

Thomas Weiss, P. E.
P. O. Box 512
Montpelier, Vermont 05601
February 9, 2024

House Committee on Environment and Energy
State House
Montpelier, Vermont

Subject: H.687 and appeals

Dear Committee:

When I spoke to you a week and a half ago, I stated that the bill needs to be implemented as a whole, all at the same time. That is also true of the decision on who shall hear appeals of Act 250 decisions.

Last week you heard Sabina Haskell request that you postpone the decision as to who shall hear appeals until after everything is up and running.

I counter with the example of the Environmental Board.

The environmental board was created on April 4, 1970. Act 250 went through a committee of conference. April 4, 1970 was the day on which the conference committee report was accepted, the bill was passed, the bill was signed into law as Act 250 (1970) by Governor Davis, and the legislature adjourned. All in that order. Act 250 took effect on passage, except the section that required permits became effective June 1, 1970.

I do not have information on when the first appointments to the district environmental commissions and the Environmental Board were made. I do know that the entire system of Board and district commissions was set up quickly.

The first permits with a known date listed in the Act 250 data base are 600001 and 800001, issued July, 8, 1970. In those three months after the signing of Act 250, offices were set up, procedures and possibly rules were created, the Board and District Environmental Commissions were appointed and staffed. The Administrative Procedures Act was created in Act 360 (1968), effective July 1, 1969. It had a rulemaking procedure. I do not know how that procedure differed from what we have now.

The Environmental Board issued its first Declaratory Ruling on September 9, 1970, according to the E-Notes.

The first appeal listed in the E-Notes was decided on September 16, 1970. That is also the date on the decision sheet (DENIED) signed by the district commission. It is not clear to me whether both dates are correct or whether one is in error. The next appeal listed in the E-Notes was decided November 5, 1970.

Appeals decided by the Environmental Board, 1970

Project number	Application status	Status date	Appeal number	Appeal decision
400002	denied	09/16/70	EB#3	09/16/70
300004	permit	09/18/70	EB#2	11/05/70
700001	denied	09/30/70	EB#4	12/22/70
600003	permit	08/28/70	EB#5	12/22/70

EB#1 is not contained in the E-Notes, January 25, 2016 edition

The above all means that the Environmental Board had the district commissions and district offices up and running within three months of Act 250 becoming effective. And the Board was hearing appeals within no more than 7 months.

Based on this past experience, I do not see any reason why the Environmental Review Board cannot be assigned hearing appeals from the beginning.

Sabina Haskell ended her testimony with

"we will need to address a sustainable revenue stream. If we want Act 250 to sustain our landscapes, we will need to address sustainable funding to make that happen."

This is a deficiency in the Natural Resources Board's report. The fourth element of the charge to the Board was to identify funding sources. You are supposed to have the Board's recommendations in your hands right now. And, as far as I know, you don't. I sent each of you an e-mail on January 30, listing the deficiencies in that report when compared to the charge for that report. I include that listing here in my written testimony to get it into the public record of the hearings on H.687.

The report omits other critical parts of the charge. I provide the excerpt on the failures to address the charge. This excerpt is from my comments to the NRB on the draft report. These comments, along with the other written comments on the draft report, are in volume 2 of the report.

"I find that the draft report is at most only 1/5 complete. It lacks discussion and recommendations on much of the charge.

First element. The report fails to address the maintenance of intact rural lands; fails to address protection of biodiversity; fails to address the threshold for jurisdiction based on the characteristics of the location; and fails to address developing the recommendations and tiers of jurisdiction as recommended by the Report of the Commission on Act 250.

Second element: Fails to address how to use the Capability and Development Plan to meet the statewide planning goals, because the report appears to confuse the Capability and Development Plan with either the Interim Land Capability Plan or various drafts of the State Land Use Plan.

Third element. Provides no assessment of current staffing against the needs and fails to make a recommendation on whether there should be a district co-ordinator in every district.

Fourth element. Fails to recommend a source of revenue to supplement the Act 250 fees.

Fifth element. Fails to address whether the permit fees are effective in providing appropriate incentives.

Sixth element. Fails to address whether the Board should be able to assess its costs on applicants.

Seventh element. Fails to address whether exempting more housing units from Act 250 would affect housing affordability; and what the potential impact of increasing the exemption to 25 units would have on natural and community resources addressed under the Act 250 criteria.

I see the proposal as an attempt to prevent returning appeals to the Environmental Review Board. First delay, then prevent. Rep. Stebbins asked me last time about whether appeals should remain with the court or be transferred to the Environmental Review Board. My answer was that that question is outside my expertise and I had a preference based on what I had heard from others to transfer appeals to the Environmental Review Board. Jon Groveman's testimony last week strengthened my preference for transferring appeals to the Environmental Review Board.

Peg Elmer Hough's written testimony states "But Gov Douglas paired that legislation with reform of A 250's structure, changing the EBd to the NRB, with appeals going to Court. That change in structure did not improve either efficiency or effectiveness."

What she did not mention, or perhaps does not know, is that Phil Scott, a second-term senator, was on the Committee of Conference that created the final version of that bill (H.175), which became Act 115 of 2004. That means that H.687 will be asking Phil Scott to undo something he had the final hand in creating 20 years ago. What you are asking is a worthy change.

On appeals themselves.

I have analyzed appeals of housing decisions under Act 250 in the years 2017 through 2021. I began this in 2021. I put it aside because of difficulties in getting all the information I needed. I recently completed that work. I have left it at those years because of the difficulty of getting the cross-references of Act 250 project numbers and Environmental Court docket numbers. I had started this in 2022 and had gotten the cross-references from the Natural Resources Board. I needed the cross-references to find information on the appealed cases from the judiciary's site.

I found 506 decisions relating to housing on the Act 250 database: permit applications and jurisdictional opinions.

Six of those decisions were appealed. Three by applicants and three by non-applicant parties.

The 506 decisions involved 6583 net new units. (Some decisions involved projects that demolished some units and created new units. Net new units is the difference. Other decisions involved housing without creating new units, one example being adding bedrooms to existing units.)

My previous testimony to you supported having the Natural Resources Board include information on appeals on its site. That proposal was from H.760. Getting the final information for my analysis involved getting information from the judiciary's decisions and opinions site. I had to request information from the environmental court directly on some dockets. If the Act 250 database noted which permits had been appealed and what the court docket number was, I would have been able to update my analysis.

I remind you that I consider that the balance sought by H.687 must be implemented at one time: planned development areas, rural and working lands, and critical resource areas, all together.

Requests:

- Have the ERB hear appeals from the beginning
- Acknowledge that appeals of Act 250 permits have little effect on the number of housing units being created.
- Direct that the Act 250 databses clearly identify which permits have been appealed and the court's docket numbers.

Thank you for taking the time to read these comments. I hope that you find them of use in your deliberations on H.687 and the other bills proposing to amend Act 250. And that you incorporating many of these suggestions and requests into H.687.

Sincerely,
Thomas Weiss, P.E.

Encl: Act 250 Appeals Involving Housing, 2017 through 2021
Act 250 Housing Permit Decisions and Appeals - 2017 through 2021

Act 250 Appeals Involving Housing, 2017 through 2021
Prepared by T. Weiss

These are summaries of the six decisions of Act 250 Land Use Permits and jurisdictional Opinions that were appealed to the Environmental Division.

Evaluation of appeals is a case-by-case basis. Each one is different and proceeds in different ways for different reasons by different individuals. Appeals are made equally by applicants on the one hand or by individuals concerned about potential adverse effects on their interests on the other hand.

Three of the appeals were by applicants. Their appeals were to avoid Act 250 altogether or to avoid compliance with certain criteria. The applicants lost all three of those appeals.

One appeal was by a party on the decision that a project was a priority housing project. The appeal was because of loss of parking and increased traffic congestion that the project would have created. Municipal permitting regarding parking and traffic congestion is not equivalent to Act 250's criteria on those issues. This points out one adverse effect of exempting priority housing projects from Act 250 jurisdiction. The applicant was required to increase parking and to provide funding to alleviate traffic congestion.

One appeal was by a party on the grounds of criteria 1 (blasting), 5 (traffic), and 8 (wildlife). The court affirmed the permit.

One appeal was by parties opposed to a project on grounds of criteria 8 (aesthetics) and 9(B) (loss of primary agricultural soils). It appears that the court affirmed the permit.

This research began in 2021 and early 2022 in an attempt to determine what happened in the appeals. The difficult task of cross-referencing Act 250 project numbers and Environmental Division docket numbers was made then. The work was put aside then because of difficulties of finding information from the courts about the cases. The work resumed for the 2024 legislative session. The difficulty of finding the cross-references and relevant documents is the reason this was not updated to include the calendar years 2022 and 2023. The cases reviewed here provide a good sample of the appeals that are made and why.

Review of Appeals

Act 250 project no. 2W1221-2

Brady Sullivan SV, LLC Act 250

This was a major application (had hearings).

Appealed by the applicant

Environmental Division case number 38-4-17 Vtec

helipad; at housing project

The applicant lost the appeal.

Result: The court ruled that a new helipad needed to be reviewed under Act 250. Subsequently the applicant obtained an Act 250 permit authorizing the helipad. **The applicant brought any time delay on itself by trying to get out of having to submit an Act 250 application.**

Situation:

The LLC had bought a partially developed residential project near the Mount Snow Resort in West Dover, known locally as the Snow Vidda development. The LLC uses a helicopter to transport individuals between its principal office in Manchester, New Hampshire to its development projects. After purchase of Snow Vidda, the company landed at an undeveloped parcel for a proposed amenities building. When some residents began to complain, The landing location was changed to the Mount Snow Airport, 4.3 miles away.

An official of the Town of Dover requested a jurisdictional opinion as to whether the helicopter landings and take-offs and designation of a helicopter landing area would require an amendment to permit 2W1221. The JO decision is that the helicopter use was a material change and an amendment would be needed.

The LLC requested reconsideration and the Natural Resources Board. The NRB upheld the JO.

The LLC appealed to the court. A mediated agreement was that the helicopter would use the airport and apply for an amendment to its Act 250 permit.

The district commission had a site visit and hearing. The commission previously found deficiencies in criteria 3, 8, and 10 and focused the hearing on those three. After the hearing, the commission concluded that criterion 8 had not been met.

The LLC appealed that determination to the court (38-4-17 Vtec). The court concluded that the State and municipalities may not regulate aircraft noise at airports or in the air, being pre-empted by the FCC. The court concluded that the State and municipalities may regulate whether to allow an airport and where an airport might go. The court then denied the LLC's request to overturn the commission's decision.

The court issued a consent order. The order authorized the helipad with conditions. The court directed the district commission to issue a remanded permit. The district commission did so with permit 2W1221-2 (Remanded).

Act 250 project no. 4C1289R

Indian Brook Properties, LLC

This was an administrative amendment under Act 250 (no hearing).

Appealed by the applicant

Environmental Division case number 50-4-17 Vtec

subdivide into nine lots with single family houses.

The applicant lost.

Result: The permit was granted after the applicant provided off-site mitigation for the loss of primary agricultural soils. **The applicant brought any time delay on itself by trying to get out of having to comply with the criterion on primary agricultural soils.**

Situation:

The district commission issued a decision that the application failed to satisfy conditions 1(B), 4, and 9(B). The LLC fled a motion to alter. The commission altered the permit, finding that it still failed to satisfy criterion 9(B). The LLC filed a request for reconsideration of the altered permit.

The LLC also appealed to the court.

The applicant then filed information on the soils and agricultural uses of the site and proposed to contribute 164 acres of the tract to the Town of Essex to add to the Town's Indian Brook Reservoir Recreation Area. The NRB then accepted the land transfer as off-site mitigation, bringing the project into compliance with criterion 9(B).

The court then ordered that the case be remanded to the district commission to issue a permit consistent with the stipulation and court order.

Act 250 project no. 4C1173-2

Spear Meadows/ Synder Group

This was a major application (had hearings).

Appealed by four neighboring property owners (M. and M. Scollins, R. and M. Skiff). The parties lost.

Environmental Division case number 107-10-18 Vtec

Increasing the proposed development 17 single family homes

Result: The Act 250 permit ultimately was upheld following appeals of the municipal and Act 250 permits to the Environmental Division. The Act 250 appeal was put on hold while the court's decision on the municipal permit

was appealed to the Supreme Court. Following the Supreme Court decision, it appears that the appeal on the Act 250 permit was resolved in the applicant's favor. **This s a case where the time to decide the appeal of the decision on the Act 250 permit was increased by the appeal of the municipal permit.**

Situation:

The four parties appealed both the Act 250 permit and the municipal permit. The Act 250 appeal was on criteria 8 and 9(B). One issue in the municipal appeal had to do with South Burlington's transfer of development rights bylaw.

The Environmental Division ruled that the bylaw did not comply with the statutory provisions and that it was unconstitutionally vague.

Snyder Group appealed that decision to the Vermont Supreme Court. The court ruled that the bylaw complies with statute and is not unconstitutionally vague.

The Act 250 appeal apparently was unstayed and heard by the Environmental Division following the Supreme Court's decision, resulting in a ruling in favor of the applicant.

Act 250 project no. JO 2-305

Comtuck LLC East Tract Rd JO
This was a jurisdictional opinion.
Appealed by the applicant

Environmental Division case number 54-5-17 Vtec

subdivision for housing

The applicant lost.

Result: The court affirmed the JO: The project requires a full review of all criteria by Act 250. **This is an Act 250 success story. The applicant wanted to sell 1-acre lots, originally envisioned as part of a ski area development. The applicant wanted to have the requirement that thee lots be served by municipal water and sewer be removed. That would have left 100 lot owners trying to deal with water and sewer on each of their lots with no assurance that the lots were even suitable for water or sewer.**

Situation:

Comtuck bought a tract of land (East Tract) that had been part of the Haystack Ski Area and Golf Club. The entire parcel was subject to Act 250 permit 700002. Comtuck proposed to merge 400 (ca. 1/4 acre) into 100 lots (ca. 1 acre). Then sell the lots in groups of 25 and the new owners would be responsible for securing State and local permits. The original permit requires that water and sewer be provided by a municipal entity. Cold Brook Fire District declines to serve the lots. Comtuck proposes individual wells and individual on-site wastewater treatment systems.

Comtuck requested the JO to determine that the permit remains in effect for certain villages within the East Tract. And that the permit may be amended without presenting evidence under criteria 1(A), 1(D), 6, 8, 9(B), 9(C), 9(D), 9(E), 9(H), 9(L), and 10, which was in a 1985 permit.

The JO concluded that there is no longer a valid permit on the East Tract and that even if there were, the proposed project is a material change to what was previously permitted. In either the case the proposal needs a new Act 250 permit.

The court affirmed the jurisdictional opinion.

The Act 250 data base shows no further activity on this property.

Act 250 project no. JO 4-255

Devonwood Investors, LLC
This was a jurisdictional opinion.
Appealed by Barbara McGrew

Environmental Division case number 63-5-17 Vtec

Burlington Town Center as Priority Housing Project
The applicant lost, because mitigation was required.

Result: A settlement was reached confirming that the project is a priority housing project and implementing a number of measures to mitigate adverse effects of the priority housing project. **This appeal highlights the negative aspects of removing priority housing projects from the jurisdiction of Act 250. Act 250 hearings would have addressed the adverse effects without having to have gone to court. The case went to court because the municipal process fails to cover most of the Act 250 criteria, including the ones that were appealed. A smaller project by different developers on this site is under way.**

Situation:

The district co-ordinator issued a JO determining that the project was a priority housing project.

There is a joint, consolidated appeal on the project. Barbara McGrew appealed the decision on the jurisdictional opinion. She and others filed appeals on municipal the municipal. A settlement agreement was signed. The agreement added 200 spaces to the underground parking garage; confirmed that the project is a priority housing project, prohibited the housing to be used by an educational institution for student housing; and required the applicant to set up a \$500,000 fund to mitigate adverse effects of the project, including alleviating vehicle and parking congestion.

Act 250 project no. 4C1315

Act 250 project no. 4C1315(Corrected)
John Evans & Black Rock Construction LLC
This was a major application (had hearings).
Appealed by Lori Marino

Environmental Division case number 32-2-19 Vtec

Environmental Division case number 47-4-19 Vtec
26 lots; 39 units
The party lost.

Result: The court affirmed the Act 250 permit.

Situation:

The district commission issued the permit.

The party appealed. The court held a trial limited to criteria 1 (blasting) , 5 (traffic), and 8 (wildlife). The court affirmed permit 4C1315.

Act 250 Housing Permit Decisions and Appeals - 2017 through 2021

Prepared February 9, 2024

Prepared by T. Weiss from Act 250 data base

	<u>No. of</u>	<u>Appealed</u>	<u>Net New</u>	<u>Removed</u>	<u>Built</u>	
	<u>decisions</u>	<u>Units</u>	<u>Units</u>	<u>Units</u>	<u>Without</u>	
					<u>Permit</u>	
The numbers of units are from information provided in the Act 250 database, in most cases.	No. of decisions	506	6	436	32	38
- Appealed Units are the number of units that were appealed.			units	units	units	units
- Net New Units. If a project demolishes 3 units and builds 10 units, then the Net New Units equal 7.	No. of majors	32	38	1558	-46	0
- Removed Units. If a project removes units and adds none, this is the number removed. For example, converting a residence to a commercial use equals -1.	No. of minors	227	0	1981	-51	31
- Built Without Permit. A unit receiving a permit after it was built.	No. of adm. amend's	210	4	284	-30	14
- Reason is why a permit or JO was requested.	No. of JO's	37	100	2760	-1	0
			units	units	units	units
<u>Description of reason code</u>	<u>Reason code</u>					
<u>These codes had a net increase or decrease in the number of housing units.</u>						
Information in data base is insufficient to determine exact number of units	INSUF	3	0	102	0	0
New units in excess of existing	NEW	274	142	4565	0	45
Other than the listed reasons	OTHER	16	0	0	0	0
Jurisdictional opinion for a priority housing project	PHPJO	20	0	1916	0	0
Net reduction in housing units (demolition, change in plans, change in use)	REMOVE	32	0	0	-128	0
	Subtotal	345	142	6583	-128	45
<u>These codes all apply to existing units with no change in the number of units.</u>						
Change in: use, type of unit, no. of bedrooms, footprint, design	CHANGE	58	0	0	0	0
Commercial permit retaining existing units	COMEXIST	12	0	0	0	0
Corrected permit [NOTE: This has not been determined yet.]	CORR	0	0	0	0	0
Application is incomplete	INCOM	4	0	0	0	0
Subdivision, lot line adjustment, survey; no change in units	SUB	28	0	0	0	0
Withdrawn, abandoned, dismissed	WD	10	0	0	0	0
Amended WW permit: more bedrooms or change from septic to sewer	WW	33	0	0	0	0
Time extension to complete construction	TIME	16	0	0	0	0
	Subtotal	161	0	0	0	0
	Totals	506	142	6583	-128	45