PUBLIC COMMENTS & FEEDBACK

December 2023

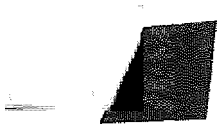
NATURAL RESOURCES BOARD NECESSARY UPDATES TO ACT 250

VERMONT
Natural Resources Board

NRB should not hear appeals

Given the very short time allowed to review the draft report (one week), I have not had time to digest it in full. But I see that it leaves open the question of what body should hear appeals – the Environmental Division or the NRB. I wish to register my strong support for appeals remaining with the Environmental Division.

I have attached a copy of a letter sent to the legislature in April 2022, which opposes a move of appeals away from the Environmental Division. It was signed by seven Vermont Mayors, along with two dozen of Vermont's preeminent land use attorneys, developers and others experienced in Act 250.



White + Burke Real Estate Advisors
Your Outsourced Real Estate Department

David G. White, MSCED, CCIM, CRRP, EDFP, CRE
President (he/him)

April 5, 2022

Dear Members of the Senate Committee on Natural Resources and Energy,

We, the undersigned organizations each with decades of experience in development in Vermont, write to you today in the midst of a housing crisis to oppose in the strongest manner the proposed legislation, H.492, sent to you by the House. This legislation proposes to re-establish an Environmental Board to hear Act 250 appeals which would no longer go to the Environmental Division of the Superior Court.

Prior to the mid-2000s, Act 250 appeals went to a prior Environmental Board. Many of us experienced first-hand the dysfunction of that process that caused two major problems. First, the Board was largely composed of lay people with little legal training in interpreting laws, as is the same for the new board proposed in H.492, resulting in inconsistent application of the law. Second, while Act 250 appeals went to the Environmental Board, appeals of local zoning decisions went to the Superior Court, resulting in two different bodies hearing appeals of the same project with sometimes conflicting outcomes. While this served project opponents well, it was highly inefficient and did not serve fair application of the law.

The move to a professional Environmental Division resolved both issues. All zoning and Act 250 appeals go to the same body and are typically consolidated into a single process making it more efficient for all parties. For example, expert witnesses are only required to attend one appeal, not two. Moreover, the judges are legal professionals trained in interpreting and applying the law. Regardless of whether one always agrees with their decisions, they at least are experts who through years of experience have developed a solid body of knowledge in environmental matters. This results in a more even-handed and consistent application of the law.

In this time when Vermont faces a severe housing crisis returning to a system similar to the previous dysfunctional and inefficient appeals process is the wrong way to go.

The goal of making appeals more efficient or expedited would be served by providing additional resources to the Environmental Division. At a time when the need to develop new, affordable housing is so clearly on display, this legislation provides an obstacle to our efforts instead of assistance.

Sincerely,

Miro Weinberger, Mayor
City of Burlington

Anne Watson, Mayor
City of Montpelier

Paul Monette, Mayor
City of Newport

Dave Allaire, Mayor
City of Rutland

Tim Smith, Mayor
City of St. Albans,
and Executive Director
Franklin County Industrial Development Corporation

Matt Chabot, Mayor
City of Vergennes

William Fraser, City Manager
City of Montpelier

Larry Slason, Esq.
Salmon & Nostrand

Liam Murphy, Esq.
Brian Sullivan, Esq.
Murphy, Sullivan & Kronk

Chris Roy, Esq.
Scott Jaunich, Esq.
Tim Sampson, Esq.
Will Dodge, Esq.
Downs, Rachlin & Martin

Evan Langfeldt, CEO
O'Brien Brothers

John Illich, Founder
ReArch Company

Doug Nedde, Principal
Nedde Real Estate

David White, President
White + Burke Real Estate Advisors

Kristine Lott, Mayor
City of Winooski

Dan Monks, Assistant City Manager
Town of Bennington

Robert DiPalma, Esq.
Mark Hall, Esq.
Ben Gould, Esq.
Paul, Frank & Collins

Jon Anderson, Esq.
Primmer, Piper Eggleston

Molly Langan, Esq.

Jim Langan, Esq.

Eric Farrell, President
Farrell Properties

Bob Stevens, President
Stevens & Associates

Larry Williams, Principal
Redstone Development

Ernest Pomerleau, President
Pomerleau Real Estate

James Pizzagalli, Founder
Pizzagalli Properties

'Zealous approach to control forest fragmentation'
It's stated that most of VT will be in Tier 2. These lands have small pockets of developable land, surrounded by rugged terrain and steep slopes. Development in these pockets should be encouraged. The trigger around the number of lots in 5 years should be sufficient for the Act 250.

Considering the wide range of topography to access developable areas, the new, broad brush road rule, does not make sense as it is a one-size-fits-all approach.

For a state that is 78% percent forested, the zealous approach to control forest fragmentation in a few good building sites is overkill.

Changing Criteria 9C from soils to forest fragmentation is a broad statement left to a wide range of interpretation. Who defines forest fragmentation? The detail needs to be spelled out now so that it is transparent and understood in this process.

John Moore

Questions about Tiers A & B

Thank you for all the work on the report and the public meeting last night. My question pertains to Tier 1 A+B. It appears in the criteria to come under one of those Tiers that you can only be a municipality type city center etc. My question is this, if you are building a development in a Town that has set zoning, has a permitted zoned area for development, has a wastewater plant with permitted growth, has a full shared municipal water system being installed, and is under 2500' in elevation, would further phases of this development now be exempt under Tier 1 A or B?

Thank you,

Jeff Temple
Director of Planning
Killington/Pico Ski Resort Partners, LLC
4763 Killington Road | Killington, VT 05751

BURLINGTON BUSINESS ASSOCIATION

The Burlington Business Association, founded in 1978, is a non-profit, non-political membership organization with over 200 business and non-profit members.

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Colin Hilliard
Deputy Director

29 Church Street, Suite 3-5
Burlington, Vermont 05401
802-863-1175

Dec 15, 2023

Address

Dear Natural Resources Board and Steering Committee Members:

On behalf of the hundreds of Burlington area businesses represented by the Burlington Business Association (BBA) including Real Estate Development Firms, Property Owners, and Construction Companies, we would like to express our strong support for the tiered system of ACT 250 review criteria proposed in your draft report dated December 7, 2023.

Allen, Brooks & Minor just released their December 2023 report on the state of real estate development in Chittenden County which includes an outlook for 2024. The report noted that in 2023, 524 units of housing were built. 872 are projected for 2024. These are important additions to housing in Chittenden County which has less than 2% vacancy. We need this trend to continue, but need to break another trend:

Most larger scale projects are built at just under 50 units to avoid triggering ACT 250 review. More units would have been contemplated if not for this reality. Chittenden County and Vermont need to reform ACT 250 to remove the ACT 250 review process for projects in cities and towns that meet the Tier 1A and 1B. That change will spur housing development in our most densely populated areas which will minimize environmental impact.

I also encourage the Steering Committee to strongly consider allowing for on-the-record review for appeals in Tier 2 regions. The "de novo" review process is lengthy and costly for real estate developers and in many cases drives up the cost of housing.

Thank you for your work and for your consideration of the BBA's position.

Sincerely,

Kelly Devine

Kelly Devine
(802) 863-1175
director@bbavt.org

Supports the road rule
Please consider the following comments and please include them in the record for the public meeting on the presentation. These comments are submitted on behalf of myself as a 20- year professional planner in the State of Vermont and are not intended to represent the views of the Planning Commission or Selectboard.

1. As somebody who has worked on countless planning projects, I can understand and respect the severely limited timeframe you had to produce this report and feel it is a relatively robust product given the timeframe. I commend the work of the paid staff and volunteers.
2. Overall, I like the approach of using tiered/location-based review.
3. I very strongly encourage you to reconsider any use of phrases including "designated", "village" and "growth center" unless you mean to use them interchangeably for the meaningful and defined terms that already exist. "Designated areas" is a term already understood to describe geographic areas as appointed by the VT Downtown Development Board. Using the same term to describe those areas mapped or assigned as part of the Tier 1 designation is misleading and confusing. Even in reading the report I was and remain confused. Does it have to be a capital G, Growth Center to qualify for 1A? It is unclear. Please find and use other terms.
4. I am disappointed in the lack of change for most of the state, most notably with relation to the new Tier 2. The 10-unit threshold consistently produces bad design. Unit count is NOT a proxy for impact. Drive the state and you will see many 9-unit developments that are extremely land intensive, lack any compact design, fragment forests, etc. I fully support the concept of a road rule and believe it will reduce these impacts, but it doesn't do enough. If you mean to limit land impact, consider a different measure other than lots or units. I assure you that a compact 20-unit multifamily development that is well planned is much less intensive than many of the 9 unit, 9.9 acre estates that exist around the state. Perhaps acreage of disturbance. Perhaps land area (less than 10 acres) only. Perhaps square footage of new impervious surfaces or building sizes (incentive smaller units). I encourage you to drop or change unit count.
5. As stated, I support a road rule as a trigger. I don't know if 2000 feet is the right number, but it is a good start.
6. The title of the report is off-putting, even for someone who supports the work done and the general ideas included within. There are other ways to stand behind the work.

Thank you for the ability to comment.

Colchester
VERMONT

Cathyann LaRose, AICP
Planning & Zoning Director

Town of Colchester
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Colchester, Vermont 05446
P: 802.264.5602
colchestervt.gov

Applying for permits is 'terribly frustrating'

Dear Natural Resources Board,
Thank you for continuing to try to improve and adapt Act 250. I understand the complexity that you're up against.

I was born and raised in District 2, grew up on farm, majored in geography in District 4, and received a master's degree in landscape architecture. I am professionally embedded in Vermont land use planning. I have been working on Act 250 permit applications for about 20 years.

Applying for Act 250 permits is terribly frustrating; it's unpredictable, costly and fraught with uncertainty. When given a chance I generally steer clients away from A250 projects, and I try to avoid working them. In my opinion, the difficulty and complexity of Vermont's land use regulations has definitely had a positive impact on our landscape. I also believe there are economic and demographic costs that weigh on our collective cost of living/quality of life balance.

My chief complaint about the law is the importance of the District Coordinator. The District Coordinator is the choke point of a broad and complicated network of stakeholders and regulations. They are typically ill-equipped to understand the entirety of land development process and as a result tend to take an obstinate and uncooperative approach. This is a reflection of the system, not the individuals.

Please understand that there are more than 40 agencies, departments, divisions, programs or offices that can review any given project. Some projects require as many as a dozen sub permits. There are also as many as 144 sub-criteria. There are countless laws, rules, regulations, codes, guidelines, standards, and practices that are constantly being updated.

It's a lot for any individual to comprehend, but what the A250 process (and your public process) seems to disregard, is that the consultant has to program, plan and design projects around this complicated web of constraints. And more than that, an owner or developer has to juggle financing and scheduling overlapped with a multitude of consultants, cost estimators, contractors, lenders, boards, committees, and users. Project planning dwarfs the complexity of Act 250.

The district coordinators typically take a 'not my problem' approach. Most likely they're overwhelmed, but it often comes across as capricious.

Hire more District Coordinators
Provide more training to Commissioners and Coordinators
Included more developers in the public process (too late)

I support the proposal for tiered districts, in Tiers 1A & 1B, but there should be an **increased threshold for commercial and industrial development** (in addition to the proposed increase in housing threshold). There are many lots greater that 10 acres in existing development zones well suited for A250 exemption

There have been multiple instances of the District Commission (or district coordinator) adding conditions or requirements that supersede local findings and conditions. This is terribly frustrating for owners, consultants and the boards that took time to review and issue findings.

Accept local findings.

If the District Commission is going to continue to assert authority over local decisions, there should be a mechanism or precedent where the District Commission could grant waivers to local decisions on issues of regional importance. (schools is rural zones, gravel pits, housing projects, dimensional requirement). In general, many project would be improved if the commission could waive conditions or requirements from other state permits or agency recommendations.

Provide a waiver mechanism

Move gravel pit review into the Public Utility Commission

Lastly, I got notice of your work last week from a contractor who has an A250 permit. I've asked in the past to be placed on your communications distribution list, to no avail.

Improve your public participation.

Sincerely,
Adam

Adam Hubbard, RLA
802-380-5875 Mobile

Tiered approach needs objective criteria

NRB Steering Committee:

My comments for finishing the report are as follows:

1) ADDRESS THE SPECIFIC CHARGE OF THE LEGISLATURE AT THE OUTSET

Add a summary sentence in the Legislative Charge section of the report that specifically addresses each charge of the Legislature, stating whether a consensus position was reached on the issue (what it was or that it was not reached) to preemptively discredit the argument that this report did not represent a true answer to what the Legislature requested. Absent a specific statement on each issue the Legislature identified at the outset of the report, much time and energy will be wasted debating whether the Steering Committee did its job instead of looking at the substance of the report.

To fully discredit this argument, I'd recommend adding a sentence in each recommendation explaining how it relates back to a specific charge of the Legislature which would also help avoid wasted time and energy debating whether the report answered the right questions.

2) MOVE MOTIONS TO RECONSIDER DISTRICT STAFF DECISIONS TO MONTPELIER

Don't stop with "there was no consensus on appeals." The lack of consensus on appeals presents a golden opportunity to give the NRB Montpelier officials a chance to handle motions for reconsideration which has the following benefits:

a) it preserves both the Environmental Court as an independent arbiter and the informality, low cost, efficient District Commission proceedings;

b) it adds an element of review that is missing that can be as informal as the District Commission proceedings by getting a second set of eyes on initial decisions to ensure that there is statewide consistency and allows the NRB to correct an erroneous decision before starting the expensive E-Court proceedings

Notably, this proposal would achieve the recommendation on page 17 of the report to "provide enhanced oversight capacity within the NRB central office to ensure procedures are applied consistently and correctly at the district level."

3) TIERED APPROACH--STATE APPROVAL OF DESIGNATIONS MUST BE BASED ON OBJECTIVE CRITERIA SO THE SAME TYPE OF LANDS ACROSS THE STATE ARE TREATED SIMILARLY

It is not enough to say that the state will approve designations to ensure consistency. There must be publicly available objective criteria that will allow the general public and applicants to understand and effectively challenge any designation that is treated differently than similar land elsewhere in the state. Consistency is another word for "rule of law." Outcomes should be the same based on similar facts. The key facts for supporting a designation must be clear and measurable to avoid arbitrary outcomes.

4) ADD CHECKS ON THE REGIONAL PLANNING COMMISSION POWER

While I understand the temptation to lean heavily on the expertise of Regional Planning Commissions for mapping and development of standards, there must be a recognition that their plans and efforts are not:

1) approved directly by voters in the towns in their regions
2) specifically warned for public meetings in the same way that zoning amendments are warned for meetings in front of planning commissions and select boards

3) are rarely even examined by voters in their regions (look at public attendance at these meetings--it is much worse than town plan meetings)

In sum, they have lots of power with little practical oversight.

Moreover, by statute, regional plans can trump conflicting municipal plans if the project is deemed to have regional impact. 24 V.S.A. § 4348(H)(2).

This is undemocratic. To make a municipality's proposal have to comply with a regional plan turns democracy on its head. A municipal application for designation will be warned in the town and voted on by a Select Board. A regional plan is never voted on by anybody but a single representative from the various towns.

These folks have the ability to do mapping and time on their hands, but that doesn't mean that they should get to design the future of Vermont development unless citizens go to the extraordinary effort of trying to oversee their work when they can only comment on it at meetings. It is hard enough for voters to keep up with town entity meetings, let alone regional planning commissions.

I would urge you to consider adding an element that makes the work of Regional Planning Commissions more democratic. Again, I understand that they have technical expertise and many issues cross municipal boundaries (p. 14 of the report), but that doesn't mean their work should not be democratically reviewed or subject to challenge by citizens, municipal boards, etc.

Things that could be considered: requiring the towns to approve the regional plan at town meeting with a warning of the land use rules provided before the meeting; requiring town Select Boards to approve regional plans; requiring Planning Commissions for the towns to issue a report on the regional plan and identify inconsistencies and concerns and share them with the town prior to any approval by the town's voters or Select Board.

5) ADD CHECKS ON TOWN PLANNING COMMISSION POWER

Similar to regional plans, a town planning commission and/or Select Board should be required to warn proposed land use rules in their town plans by actually describing the rules in the warnings for the meetings -- not simply warn a meeting to discuss/approve a town plan, which is the standard practice in these non-zoning towns. These town plans are treated like zoning but they have none of the procedural protections mandated by statute for zoning rules---specific warnings about proposed rules at every stage in the process. It is ironic that the towns which elect to impose the least restrictions on land use are the most vulnerable to having land use rules imposed on them with zero warning.

6) LEGISLATING BY MAPPING IS EVEN MORE INACCESSIBLE TO THE AVERAGE CITIZEN

Using a map to designate rules, particularly one which uses technology not generally available to the average citizen, further removes the regular voter from the process. These maps should not only be available for public comment and appeal as indicated on page 14 of the report, but that right to appeal should be available at any point with respect to a specific project. The ability to understand the role of the maps and the rules imposed by them should not impose rules that cannot be challenged when a citizen had no plans for an area and many years later comes up with a project. Or if a plan is adopted and nobody appeals, and then someone moves into that area, or is considering moving into that area, they should be allowed to challenge the designation and the rules imposed there at the time they are developing the project. It is unfair to expect people to spend time and energy figuring out the rules imposed by maps when they have no plans to develop anything.

7) MANDATING CONSISTENCY ACROSS PROJECTS AND REGIONS

The report repeatedly discusses the goal of promoting consistency and predictability. The easiest way to achieve this is to actually recommend mandating that the NRB adopt a rule that requires it to "treat like cases alike" -- something which the Vermont Supreme Court has already said. In practice, the rule

could require the agency to justify in writing differential treatment of projects that applicants present to the NRB which have been handled differently. The NRB or its district staff should have to identify key factual differences and why those differences are material in light of the statute and regulations. In addition, the NRB could be obliged to affirmatively research whether similar projects have been proposed and how they were treated. At a minimum, the agency should be forced to explain different outcomes when challenged.

8) STRONG SUPPORT FOR OTHER RECOMMENDATIONS IN THE REPORT

I want to state my strong support for these other proposals:

a) an ombudsman who has meaningful access to NRB authority to correct problems when they happen

b) making the statute funded by all Vermonters, not just applicants--so that fees do not discourage developers from investing in the highest quality materials

c) making rebuttable presumptions dispositive

d) putting concrete limitations on total timelines for decisions and limiting the power of district coordinators to issue serial incompleteness determinations to avoid action on a project

e) expand the scope of administrative amendments so that small changes do not subject the permit holder to a potential endless process of proceedings funded by wealthy abutting neighbors or other statutory parties

Thank you for your work and consideration of the above,

Todd Heyman
Fat Sheep Farm

Modernize to be able to accept financial realities of farming

I'm not able to attend the session tonight but I would like to offer my thoughts:

I moved to Vermont in 2020, started a small vegetable farm and almost immediately pivoted to value-added products. My husband and I wanted to create a home-catering business. There are few dining options in our area and we felt this was a needed service for the community. We envisioned growing as many vegetables as we could to use in foods and purchasing the rest, preferentially from other local growers.

In order to do this, we wanted to create a small farmstand where customers could drive onto our property to pick up our food order. We had an existing gravel driveway, but wanted to expand it so people could safety enter and exit.

We were told to apply for an Act 250 permit for this extremely minor project. As much as I tried to make the argument to the Act 250 coordinator that this was a minor application, she refused me. She argued that under criteria 5, our very small operation could affect traffic and under criteria 9, because we wanted to expand the width of a 50-foot driveway on prime agricultural soils, we had to go through permitting. I didn't get an approval until 6 months later. I spent perhaps 20 hours on writing the application and communicating with the Act 250 office. Not to mention the frustration at this burdensome process.

Act 250 proponents boast a 99% approval rate for applications. To me, this is nothing to boast about, and in fact hints at one of the major problems with Act 250. It is absolutely too broad, and is wasting people's time and money- both the applications and our taxpayer dollars in funding Act 250 staff.

If the law was effective in identifying the type of development the state wanted to block, its denial rate should be much much higher. Instead, one must wonder how many small, low-impact projects like mine are forced to spend time and money to go through an Act 250 review unnecessarily.

I do not support funding more Act 250 administrative positions. I support fewer and a more clearly defined law that more narrowly captures relevant permit applications.

Proponents of the law want to talk about the benefits of maintaining working farmland in the state, and I agree. But the law needs to modernize to accept the financial realities of farming. If Vermont wants to preserve working farms, they need to make it easier for them to be financially successful. Farmers are deeply connected to their land and what they do. They sell off their land, which is then vulnerable to subdivision and development, because they can't pay themselves a living wage, and their descendents have no reason to take up the family business.

Value-added products are important to keep farms viable. Farmstands should be able to sell a diversity of products from their farms and others to attract customers and get them to spend money.

Farms should be removed from burdensome Act 250 review and place them under Agency of Agriculture, Food, and Markets jurisdiction and liberalize the Accessory On-Farm Business Law. Reduce the 50% threshold to qualify as an AOFB as this is not realistic. Farmers who want to start on-farm restaurants or get into selling prepared foods can't meet the 50% rule. You would have to have an extremely diversified farm (dairy, eggs, protein, vegetables, grains, fruits) to meet the 50% threshold for a food service-related AOFB.

Instead, you should define AOFBs as that *either* farms that grow 50% of their own product or a combination of their own products and products from other Vermont farms.

I am disappointed that the feedback you received from Vermont farmers regarding AOFBs and Act 250 does not appear to be incorporated into the proposed change at all.

Liz Bleakley
Owner & Cheesemaker

Tier 1 is long overdue

Dear Natural Resources Board,

As a local employer and Vermont resident, I understand the need for Vermont to address its pressing challenges; the most concerning of which is housing and workforce population growth. The only viable solution to address rising costs, workforce shortages, and a sustainable future for Vermont residents in through smart growth in both population and housing.

The exemption for Tier I areas as described in the draft report is long overdue. Municipalities with robust zoning regulations already provide the environmental protections originally envisioned by ACT 250, making much of the existing ACT 250 requirements in these municipalities duplicative. These duplicative permit requirements add time, cost, and significant uncertainty to the entitlement of much needed housing projects. These are the areas of the State where greater density already exists and is supported by appropriate infrastructure. An exemption from these duplicative permit requirements would encourage development in these areas, simultaneously addressing our demographic challenges and discouraging sprawl in the areas of the state where less robust zoning regulations exist.

I encourage the Natural Resources Board to enact these reforms without delay.

Thank you for your time and efforts in working to address these much-needed changes.

Kindly,
Michael Biama

Housing is key to Vermont's ongoing viability

Dear members of the Natural Resources Board,

I am grateful for the efforts of the Steering Committee, consultants, and NRB staff to undertake the much-needed reform of Act 250. I could speak at much greater length on specifics, but in an effort to be concise I will limit my comments to the following:

1. Allowing for much greater numbers and density of housing units in the state is critical to Vermont's ongoing viability. The cost of housing which is driven in large part by the lengthy, convoluted, and duplicative permitting process not only limits and delays the supply of new housing stock, but it actually removes much of the potential residential development because it the Act 250 process is so daunting to would be developers and homebuilders.
2. New housing stock will not only provide better access to housing for our citizens, but it will also provide employees for our businesses, teachers for our schools, doctors and nurses for our medical system, and childcare providers to take care of our children. Without a healthy housing stock we are a broken state.
3. We need to be sure that the areas that are proposed for Act 250 exemption are sufficient to meet our growth needs to support our various functioning requirements, some of which were stated in #2 above. That doesn't just mean traditional villages and town centers, many of which were developed along rivers which are becoming more and more susceptible to flooding. We need to make sure that the changes that come out of this effort are capable of sustaining Vermont as our demographics change. That means housing stock that is appropriate for our rapidly aging population, as well as housing stock that is appropriate to attract and retain young professionals, families, and workforce participants.
4. We must be cautious to not create an Adirondack park-like situation where the residents of our rural areas feel disenfranchised and excluded from economic activity and reasonable housing. We can protect our natural resources without creating a situation of haves and have-nots.
5. In municipalities that have the capacity, resources, and expertise to manage their own permitting and land use regulations, they should be exempted from or at minimum provided a streamlined Act 250 permitting process and a proportionally minimized fee structure.
6. Zones shouldn't be limited to municipal boundaries, but instead if existing infrastructure for one community is existent on one side of a town line, but not on the other, that infrastructure should be put to its highest use, and we should encourage growth in those locations if it is appropriate.
7. Any updates to Act 250 must be clearly defined and administered. There is far too much murkiness, subjectivity, and inconsistency across the state in the current regime's implementation.
8. We need to acknowledge that the state has changed, and that land use regulations are now the standard, not the exception in our municipalities. Having a double jeopardy situation is not helping the state or our residents. It is simply stunting good growth.

Thank you again for your efforts and for your consideration of my comments.

Best regards,

Evan Langfeldt
Chief Executive Officer
O'Brien Brothers
1855 Williston Road
South Burlington, Vermont 05403
www.obrienbrothersvt.com

Focus on housing and appeals process

We work in commercial real estate, which includes development of residential housing.

It's imperative to make the process streamlined, so that more housing can be build, immediately, especially in areas where there is public water/sewer.

Another important item that should be addressed is the appeal process. Currently 10 interested parties can spend a nominal amount money, to delay projects for years! They are able to appeal, even though town zoning and town plans have been approved and the project specifications fit the desired outcome.

Our judicial system moves slowly on appeals, costing enormous legal fees, to property owners.

Appellants should have to pay a larger amount of money to appeal, especially if the project is approved by local boards. If they lose their appeal, they should have to pay for a portion (or all) of the property owner's legal fees.

The delays that appeals cause are costing us more housing. It needs to be addressed.

Meg McGovern
Senior
Associate,
Broker, Donahue
& Associates

What happens to existing permits under Tier 1?
I had a question regarding the proposed implementation in Tier 1 areas. If an existing commercial building has an Act 250 permit in a Tier 1A area and wants to build an expansion on their already commercially zoned property, would they be required to update their existing Act 250 permit or would town permitting be sufficient?

Thank you,
Julia Termine

Thomas Weiss
P. O. Box 512
Montpelier, Vermont 05601
December 15, 2023

Natural Resources Board
10 Baldwin Avenue
Montpelier, Vermont
by e-mail

Subject Comments on "Natural Resources Board Necessary Updates to Act 250", draft, prepared by Environmental Mediation Center, December 2023

Gentlepeople:

Here are my comments on this draft report.

Sincerely,
Thomas Weiss

Encl: Comments

"Natural Resources Board Necessary Updates to Act 250"
draft report prepared by Environmental Mediation Center, December 2023
Review by T. Weiss, P. E., December 15, 2023

These are my comments on the draft report. I find that the report is not responsive to the charge given for this report. I find that the report contains incorrect or misleading information and statements. A report that receives a failing grade will generate many comments. There is something wrong with a report as important as this one is supposed to be, when the 36-page report generates 9 pages of comments.

My recommended corrections are provided in this light red italicized text.

The report fails to respond to most of the charge given to the Natural Resources Board

These are the comments that I presented at the public meeting on December 14, 2023.

I find that the draft report misquotes and distorts three of the seven elements of the charge. If something as simple as copying the charge from the statute is done incorrectly, that calls into question the credibility and accuracy of the entire report. The misquote of the first element alters the nature and requirement of the element.. The misquote of the second and fourth elements do not appear to change the substance of the charges; however, they have no place in a section which purports to be providing the charge from the legislature.
Recommended correction: use the text actually written in Sec. 19 of Act 47 (2023).

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.

Recommended corrections: Use the text of the charge from Act 47. Expand the report to address fully all elements of the charge.

Third, the draft report strays outside the charge by including discussion and recommendations on the following:
- the structure and duties of the Natural Resources Board
- Improving consistency and streamlining the permitting process
- Reducing redundancy. In addition to being outside the charge, Act 250 is not redundant. Many or most of Act 250's 30-some criteria and subcriteria are not evaluated by any other permit, State or local.

Recommended correction: remove from the report text on these issues, which are extraneous to the charge.

Time spent on these issues, extraneous to the charge, would have been better spent working on the elements not represented in the report.

If submitting a report in response to the charge were an assignment in a class, and the draft report was submitted as the final report, I would give the report a failing grade.

The rest of these comments are presented in the order in which the material appears in the report, with multiple locatiosn grouped together in one comment. Many of these comments come from the failure of the report to address only a small portion of the charge.

Executive Summary

Introduction p. 3, 2nd par.
The Report Process, p. 7, 1st par.

The NRB received its charge through Act 182 on June 7, 2022, which became effective July 1, 2022. The NRB spent most of the first year (July 2022 through June 2023) figuring out with ANR, ACCD, AAFM, AOT, and other State agencies how to do this report and what issues would be covered in the report, irrespective of the charge. Substantive work was limited to four months (July 2023 through October 2023). The short time frame of the substantive work restricted the ability for the Steering Committee to do its job. Consnesus cannot be guaranteed in a few months.

Recommended correction: ***Revise both sections to include the activities before June 2023.***

Introduction, p. 3 , 4th par.
Recommendation - Tiered Approach, p. 9, 3rd par.
Conclusion, p. 21, 1st. par.
Appendix 5 NRB Suggested Timeline, p. 35

The tiered approach is not balanced. It is not balanced because the removal of Tiers 1A and 1B from Act 250 will occur before the expansion of Act 250 to tier 3. Based on history, the increased jurisdiction in Tier 3 likely will be legislated away before it is implemented. Development of Tier 3 will be a long process involving mapping and negotiations. Look at what happened to the land use plan that was supposed to follow the capability and development plan which was adopted in 1973. The requirement for a land use plan was repealed in 1973 by the same Act that adopted the capability and development plan.

Recommended correction: Adjust the timelines so that all changes proposed by this study are implemented simultaneously.

Governance Recommendation, p. 4
Natural Resonrces Board Governance, p. 15, heading

I do not find that governance is part of the charge The charge covers staffing, which strictly interpreted means the staff. The Board itself (five individuals) is not part of the staff.

Recommended correction: Remove these portions from the report.

Staffing Rccommendation, p. 4
Staffing, pp. 17 and 18, all pars. and blue box.

The report makes no recommendation on how many staff are needed and what the positions

It makes no recommendation on whether each district should have its own co-ordinator. I suggest that each district have its own coordinator.

It makes no recommendation on moving three district offices out of the Montpelier central office. My experience is that such offices lose identity and are too often pulled into central office activities to the neglect of their actual district duties. So the three district offices (the ring around Chittenden County) shonld be moved ont of the central office.
Recommended correction: provide discussion and recommendations on these issues.

Capability and Development Plan Recommendation, p. 5
P. 20, 1st par.
Recommendation, P. 20
One needs to keep the terms straight. Act 250 originally required
- an interim land capability plan, which was approved by Governor Davis, March 8, 1972. § 6041
- a capability and development plan consistent with the interim land capability plan, April 23, 1973. § 6042
- a land usc plan, which was never adopted and the requirement for which was repealed in 1984. § 6043.

The same Act 85 (1973) that created the capability and development plan also prohibited district commissions and the environmental board from using the 19 findings from section 7 of Act 85 as criteria before the district commissions.

The capability and development plan is neither a set of maps nor does it contain a set of maps. Therefore the alleged maps of the capability and development plan cannot be replaced. Maps were a part of the Interim Land Capability Plan. Maps would have been part of the land use plan.

The maps likely were those of the "Vermont Interim Land Capability Plan". This plan expired July 1, 1972 because thc land use plan of §6043 had not been created. I write "likely" because I have not seen the maps being referred to. The "Vermont Interim Land Capability Plan" was prepared June 1971 by the Vermont State Planning Office for presentation to the Environmental Board. It has 70 pagcs plns four statewide maps. The maps are Generalized Land Use; Limitations for Development; Capability for Agriculture and Forestry; Unique or Fragile Areas. The maps were prepared by the State Planning Office. These statewide maps were compiled from county-wide maps. (There were land capability plans for each county, which had a set of five maps, each.) The Interim Land Capability Plan was approved by the Environmental Board was adopted by the Environmental Board Febrnary 9, 1972. It was forwarded to Governor Davis February 28, 1972, and it was approved by Gov. Davis March 8, 1972.

There are also several documents titled State Land Use Plan or Vermont Land Capability. There might be latcr ones which I have not looked for. As far as I know, no land use plan was adopted or approved.
Recommended correction: Revise the information in these three sections to accurately state what the capability and development plan actually is; and how to use the plan to meet the statewide planning goals.

1. Introduction

Introduction, p. 6, 1st par.
Location-based Jurisdiction, p. 8, 1st par.
The report has "The longstanding vision of Act 250 has been to support compact devclopment surrounded by forests and open lands, including farms and forestry operations."

Act 250 was created and implemented in 1970. The concept of compact devclopment surrounded by forests and open lands was first added to Act 250 in 2014. So, longstanding appears to mean, in this context, 9 years out of 53.

The first uses of the word "compact" in Act 250 appeared in 2006. 17 years out of 53.

The word "compact" is found in Act 250 at the following locations:
- § 6001(16) added by sec. 1 of Act 147 (2014) in the definition of "existing settlement"
- § 6086(a)(9)(B) and (C) and §6093(a)(2) added by secs. 7 and 8 of Act 183 (2006) in using compact development patterns to preserve primary agricultural soils and productive forest soils on a parcel to the extent that the remaining soils are capable of supporting commercial agricultural or forestry operations, respectively.
- § 6086(a)(9)(L) added by sec. 2 of Act 147 (2014) when "rural growth areas" was changed to "settlement patterns", the phrase being "To promote Vermont's historic settlement pattern of compact village and urban centers separated by rural countryside".
- § 6093(a)(4) added by Sec. 8 of Act 183 (2006) and removed by sec. 39 of Act 199 (2014) applying to compact development patterns in industrial parks.

I believe that the concept of "the historic development pattern of compact village and urban centers separated by rural countryside" was first added to any statute in 1989 in §4302(c)(1) in title 24, then in 2006 in §2791(13)(A) in Title 24.

Governor Davis Executive Order creating the Gibb Commission. (E. O. #7, May 14, 1969) did not refer to historic or compact development patterns. He was actually opposed to the compact development at and around ski areas.

> The problem is two-fold. On the one hand our people must be made aware of the magnitude of the changes taking place in Vermont, and on the other hand there must be enacted into law a set of comprehensive and meaningful statutes which will preserve and protect our environment. We must also provide for continuing economic development so vital to the needs of our people, within this framework of environmental protection.

Act 250, Section 1 (Neither the "Whereases" nor the "Therefore" mention compact development.)

> Sec. 1. Findings and declaration of intent
> Now, therefore, the legislature declares that in order to protect and conserve the lands and the environment of the state and to insure that these lands and environment are devoted to uses which are not detrimental to the public welfare and interests, the state shall, in the interest of the public health, safety and welfare, exercise its power by creating a state environmental board and district environmental commissions conferring upon them the power to regulate the use of lands and to establish comprehensive state capability, development and land use plans as hereinafter provided.

Recommended correction: Revise both sections to state that the longstanding vision was to "protect and conserve the lands and the environment of the state and to insure that these lands and environment are devoted to uses which are not detrimental" irrespective of where the lands were located." And that compact development surrounded by forests and open lands did not make it into Act 250 until 2014.

2. Legislative Charge

Legislative charge, p. 6, 1st par.

The report distorts the legislative charge by misquoting the charge. See "The report fails to respond to most of the charge given to the Natural Resources Board"

Recommended corrections: Use the text of the charge from Act 47. Expand the report to address all elements of the charge.

3. The Report Process

The Report Process, p. 7, 3rd par.

The number of meetings of focus groups is overstated. Only six focus groups are acknowledged on the NRB's site (nrb.vermont.gov/legislative-study-necessary-updates-act-250-program). Originally there were supposed to be four meetings with each focus group. The third meeting was abruptly cancelled because of undisclosed absences. As far as I can tell there were only 18 meetings with focus groups. The same page provides minutes of only 9 meetings of the Steering Committee, not 10. The loss of one meeting reduced the effectiveness of the Environmental Group, of which I was a part. I cannot speak for how the loss of the one meeting affected the

other focus groups. There might have been a seventh focus group composed of select NRB staff. If so, its minutes were not made available, so there is no record of those meetings.

To date there has been only one public meeting to hear feedback.
Recommended correction: Correct the numbers of meetings to agree with what is shown on the site on the study and to claim only one public meeting.

4. Location-based Jurisdiction - Analyis and Recommendations

Location-based Jurisdiction, p. 8, 1st par.
The role of Act 250 is not to encourage development where it is desired. The legislature declared that the role of Act 250 is "to protect and conserve the lands and the environment of the state and to ensure that these lands and environment are devoted to uses which are not detrimental to the public welfare and interests". (Sec. 1 of Act 250 (1970)).
Recommended correction: Delete the entire last sentence of the paragraph and reconfigure it to agree with Sec. 1 of the original Act 250.

Location-based Jurisdiction, p. 8, 3rd par.
The summary of jurisdiction is incorrect. The summary tries to combine too many disparate elements into one sentence. This combination distorts the definition of "development". The condition of "within five years" does not apply to commercial/industrial purposes.
Recommended correction: Revise this paragraph to accurately state the jurisdictional requirements.

Recommendation - Tiered Approach, p. 9, 1st par.
There is no link to the ACCD report on the chapter 76A designations. Without knowledge of the ACCD report, it is not possible to evaluate the recommendations in this NRB report. However, a "sneak peak" set of slides on the draft program is available.
https://www.vtdesignation2050.org/post/sneak-peek-draft-recommendations-for-vermont-s-future-designations

There will be one core designation with add-ons for residential neighborhoods and for redevelopment areas. There will be 4 steps on the core ladder, depending primarily on the size of the municipality. That will make 12 combinations, compared to the present five.

The process is circular. The ACCD slides state that boundaries will align with new state/RPC land use types. The NRB report states that tiers 1A and 1B will be based on the ACCD designations.

There will be "Act 250 relief", whatever that means.

There will be no renewal. Once a designation is granted, it lasts forever (or at least until the legislature changes the rules again).

The report originally was due July 15, 2023, so the NRB would be able to use it in completing the NRB report. During the legislative session, ACCD whined that it needed more time, so the legislature extended the due date to December 31, 2023, so it is unavailable to the NRB.
Recommended corrections: Revise this paragraph to include the ACCD proposals. The original due date for the ACCD proposals was July 15, 2023 (Act 182). This was established so that the NRB would be able to consider the ACCD recommendations and incorporate them into the NRB report. ACCD requested the legislature to delay the ACCD report to December 31, 2023, which was granted (Act 47). I do not remember that NRB opposed this delay to the ACCD report.

Recommendation - Tiered Approach, p. 9, 2nd par.
Recommendation - Jurisdiction Triggers for Tier 2, p. 12, 2nd par.
The page 9 text is that a new road rule be applied only to tier 3 (ecologically important natural resource areas). The page 12 text is that the road rule be applied to tiers 2 and 3.

The road rule is being put forth as a proxy in "an effort to discourage and prevent fragmentation of intact forest blocks and wildlife corridors and to mitigate sprawl." It is not clear why a proxy is used. It would be much more effective to directly add fragmentation and forest blocks and wildlife corridors and sprawl to the criteria.

The road rule should not be adopted. Instead, more attention should be paid by the district commissions to the adverse effects of new roads.
Recommended corrections:
- recommend, that fragmentation and forest blocks criteria be added instead of the road rule.
- re-inforce that district commissions carefully consider the effects in all tiers of new roads and driveways on the criteria.

Tier 1 Overview and Definition, p. 10, 3rd dotted par.1
Ability to be in Tier 1A depends in part on a municipal plan that meets standards that are not yet developed. There is no recommendation on the content of the new standards. Municipalities are not allowed to consider many of the Act 250 criteria. The new standards should require that a municipality evaluate projects in a Tier 1A or 1B area using all the criteria of Act 250. Because resources and municipal and education infrastructure and facilities change over time, there should be no blanket exemption of any of the Act 250 criteria.
Recommended correction: Develop recommended standards to be used for municipal plans.

Tier 1 Overview and Definition, p. 10, 4th dotted par.1
There is no guidance on what qualifications professional staff need in order to be capable. And there is no recommended guidance on what it takes to have adequate staff.
Recommended correction: Develop standards for qualifications for the professional staff who would be overseeing and administering review.

Recommendation - Two kinds of Tier 1 areas, p. 10, 1st par.
A municipality that intends to be exempt from Act 250, needs to be required to review the Act 250 criteria. Consistence with §§ 4302 and 4348, as they now exist, is insufficient level of review.
Recommended correction: Expand the recommendation to include being consistent with Act 250.

Recommendation - Jurisdictional rules, p. 11, 2nd par.
Fees, p. 19, 1st full par.
Fifty units are too many.

Tier 1B is defined as lacking the capability to review projects in lieu of Act 250.

There is no hint at density. Tier 1B can require on-site septic systems. Thus, 50 units could easily occupy 30 to 60 acres: 1/2 acre to 1-acre lots (because that is what the septic systems require) plus roads and sidewalks. That is a large amount of potential impact to the Act 250 criteria that needs to be evaluated.
Recommended correction:
- change the recommendation so that Tier 1B has a density requirement and that the housing needs to be reviewed using the Act 250 criteria, or better yet, reviewed by Act 250.
- change the fee part that Tier 1B areas should not have a higher jurisdictional trigger for housing

Recommendation - Tier 1 Application process, p. 11, 2nd par.
Recommendation - Tier 3 Designation process, p. 14, 1st and 2nd par.
The municipality is applying for an exemption from regulation by Act 250. Therefore, the Act 250 Board (an effective, hands-on Board) should be the statewide review entity. The statewide review entity should not be an entity whose primary purpose is development. This excludes the Agency of Commerce and Community Development, the Downtown Development Board, and other statewide agencies involved with development.
Recommended correction: Recommend that the statewide entity be an active, effective Act 250 Board.

Rccommendation Jnrisdiction Tier 3, p. 13
The identified area also needs to include a buffer of sufficient size to actually protect the natural resource.
Recommended correction: Clarify that the mapped area includes a buffer of sufficient size to protect the natural resource.

Recommendation - Forest Fragmentation Criterion, p. 14
The relevant criterion here should be "no adverse impact". Mitigation is inappropriate for forest fragmentation. Adverse impacts to a forest cannot be mitigated elsewhere.
Recommended correction: Revise the recommendation to change the criterion to be "no adverse impact".

5. Governance - Analysis and Recommendations

Natural Resources Board Governance, p. 15, 1st par.
The Environmental Board was "routinely engaged and involved, a time commitment in the operations of Act 250 that has not been expected of the current appointed board members." The current Board members were all appointed by Phil Scott. Scott served on the conference committee that developed Act 115 (2004), even though he was on the Transportation Committee. Act 115 abolished the Environmental Board and created the Natural Resources Board.
Recommended correction: change the last clause to "that has not been expected of the current or previous board members back to the creation of the Environmental Board in 2005.

Recommendation, NRB Structnrc, p. 15, 1st par.
Conclusion, p. 21, 3rd. par.
The recommend experience of Board members has the wrong focus. Act 250 is about making sure that development does not negatively affect the resources of Act 250's criteria. Instead of the experience suggested in the recommendation, the Board members really need to have experience, expertise, or skills in the environment or land use.

Three Board members are too few. Five members are marginal. Seven members or nine members will better serve the purposes of the proposed Board. Seven or nine members will provide a broader diversity of experience and expertise than will three members or five members. That breadth is needed because of the wide range of Act 250's criteria.

The Environmental Board had nine members. That number of members provided a diversity of expertise and experience. Act 115 whittled that down to five members that dealt with Act 250 matters. (The other four members dealt with water resources matters.) When the water resources matters were taken from the Natural Resources Board, the Board was reduced to five members.
Recommended correction: Recommend that the Board have seven or nine members and that their experience or expertise include environment or land use.

Recommendation, NRB Structure, p. 15, 2nd par.
If appeals remain with the courts, the statutes need to require that Board members review each court decision (environmental court or supreme court). If the court decision did not support the goals or purposes of Act 250, the Board would then revise rules or propose changes to statutes to strengthen the weaknesses found by the court. As far as I know, the Board has neither amended rules nor proposed changes to statutes when court decisions have not supported the purposes or goals of Act 250.
Recommended correction: Recommend that the Board be required to review court decisions and amend (or recommend amending) policies, rules, and statutes where the decisions are contrary to the purposes of Act 250.

Appeals of Act 250 Decisions, p. 16, 3rd par.
The "fresh start" is not from the beginning. It is only with regard to the issues which have been appealed. And a party may appeal only those issues for which it has party status.
Recommended correction: clarify that the "fresh start" is limited to the criteria appealed.

Appeals of Act 250 Decisions, p. 16, 3rd par.
I fail to understand why the issue of on-the-record appeals keeps returning. Act 250 had an optional pilot program for on-the-record hearings at the district commissions and appeals. The pilot program was added in 2001 and was repealed in 2004. During the period of the pilot, no application was heard on the record.
Recommended correction: revise the paragraph ito nclude that the on-the-record pilot program (2001 through 2004) was never used.

Professional Board to hear major permits, p. 17, 1st par.
Hearings on applications held by district commissions are the essence of Act 250. Having those applications heard by a professional Natural Resources Board will destroy thc essence of Act 250.
Recommended correction: change the recommendation box on page 17 to include that the district commissions should be retained with their existing functions.

Staffing, p. 18, blue box.
There is no description of what a permit specialist would do and why the specialist needs to be independent from the permitting review process. I argue that such a specialist, if not staff of the NRB, would be better placed in an agency that has an active interest in protecting the environment.
Recommended correction: Provide more information on the duties of a permit specialist.

Reducing Redundancy, p. 19, 1st full par.
Recommendation - Streamline, p. 20
Act 250 is not redundant. Many or most of Act 250's 30-some criteria and subcriteria are not evaluated by any other permit, Statc or local.

There should be no dispositive permits for Act 250. ANR permits and Act 250 permits are not redundant. That is because the criteria for issuing a permit differ between Act 250 and the other permit. Also, Act 250 is the only permit that considers all aspects of a project. Other permits look at only one narrow focus. Also, I have experienced mnltiple instances where a non-Act-250 permit or certification was issued improperly. The district commission should not be forced to accept a permit that is either improperly issued or that does not meet the conditions of the criterion. ANR permits should remain presumptive. Also the independence of district commissions removes the political pressures that can exist within ANR.
Two places: redundant and outside charge
Recommended corrections:
- recommend that other permits remain presumptive for Act 250.
- revise the text to acknowledge that Act 250 permits are not redundant and that the criteria for other permits are different from conditions for Act 250 permits.

6. Mapping and the Capability Development Plan - Analysis and Recommendations

Recommendation, P. 21
Didn't COVID shortages; don't high food prices, tell us it is unwise to reduce agricultural soils mitigation?

How are we going to feed ourselves when half the agricultural soils are converted to housing, or to industrial parks, or to forest processing enterprises.

Recommended correction:recommend determining how much agricultural soil we need to retain in order to become self-sufficient in basic nutritional needs for whatever our population goals are. Then it would be possible to determine mitigation ratios on a rational basis, instead of picking mitigation ratios out of the air. I am not suggesting that there bee no imports of food. I am suggesting that we plan for the possibility that we will need to supply more of our own food needs in case of climate or supply chain.

7. Conclusion

Conclusion, p. 21, 1st. par.
The steering committee is not our anti-Act-250 governor. So this whole package is likely to unravel anyway.

Appendix 1: List of Focus Group Members

Environmental Focus Group Members, p. 24
Recommended correction:Add "Thomas, Weiss, Environmental, individual" to the table.

Environmeutal Focus Group Members, p. 24
Recommended correction: If there are any focus group members who attended none of the focus group meetings, remove them from the list.

Appendix 4: Illustrations of Designated Tier Areas in Muncipalities.

All four illustrations, p. 34
The text is illegible and needs to be larger.

The concept needs to be shown that there might be some tier 3 areas within a growth boundary. An example would be an endangered species located along the bank of a river that flows through the Tier 1A area.
Recommended corrections:
- revise the text to make it legible
- add Tier 3 areas within the Tier 1A area in the Tier 1A illustration
- add Tier 3 areas within the Tier 1B area in the Tier 1B illustration

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December 18, 2023

Vermont Natural Resources Board
NRB.General@vermont.gov

Subject: Comments on Natural Resources Board Draft Report "Necessary Updates to Act 250"

NRB and "stakeholders" and committee members:

I am a licensed Vermont attorney with a background in land use and environmental law, including a master's in environmental law and policy. In addition, I previously served as Chair of my local Planning Commission for six years; and I was a Regional Planning Commissioner for ten years, two of which I served as the Commission's Chair. I have read the NRB Draft Report on "Necessary Updates to Act 250," and offer the following comments.

First, I'd like to point out that I found it somewhat disturbing that this draft report is presented as a "stakeholder consensus package." The NRB may have what it believes to be sufficient members on the committees, but the legislature and our representatives would do well to decide for themselves which of the proposals that were considered are worth pursuing and which are not. The "stakeholder" policy-making process has always struck me as showing favoritism to the opinions of certain individuals and groups, at the expense of the full participation of the general citizenry, non-biased analyses, and a higher level of transparency (were the stakeholder meetings even open to the public?). Getting input from stakeholders may be desirable (and somewhat effective at quieting the louder and more powerful lobbyists, as may be the partial goal here), but we are all "stakeholders" in seeing that our natural resources are adequately protected. Allowing your chosen stakeholders to be the deciders on a "consensus package," to be presented as if it's this or nothing, is really a bit over the top.

More substantively, I strongly support increased protections for Vermont's natural resources and my hope is that we will ultimately make Act 250 more effective, and not less so. In my opinion, it should be strengthened in regards to all of the state's natural resources. More and more it seems as if development is not well-planned, and/or plans are not well-implemented, and this trend is negatively impacting rural areas and the important state resources we all value and that make us want to live here. I would add that, as we're finding out through climate change impacts and species extinctions, most, if not all, impacts to local natural resources result in impacts regionally, statewide, and beyond. Statewide policies and regulations are crucial to consistently and effectively protect those natural resources.

That said, I speak from personal experience when I say that relying on our state's current system of municipal/local planning and zoning to implement desired environmental protections would

be a mistake. The draft NRB report lists "adequate professional staff capable of overseeing and administering review" as one of the criteria for removal of jurisdiction of Act 250 for Tier 1 locations (and ceding jurisdiction to the municipalities). I do not see a description in the report that defines these criteria. What would be the requirements for "adequate professional staff"? This is an extremely important issue.

How many towns have even a professional planner on staff, let alone a natural resource planner? Although my own town seeks to increase development and has adequate infrastructure in some of the areas it has slated for growth, we have no planner. We have a part-time Zoning Administrator (ZA) and an Economic Development Director, neither of which are land use planners. So, who does our town's planning? Well, if we want to put together a town plan worth having (and because we are "encouraged" by the state to have one--lest we lose some types of grant money), we apply for a state grant, hope we get one, and hire a planner (if we can find one). If not, the Planning Commission muddles through and writes its own plan (and zoning bylaws), generally with little or no planning or land use regulatory experience. Not a great system.

As in many Vermont towns, our planning and permitting policies are prepared and implemented by volunteer Boards—the Planning Commission (a volunteer Board) prepares the Town Plan and Zoning Bylaws for approval by the Select Board (also a volunteer Board). And the Development Review Board (or "DRB"-- another volunteer Board) reviews and approves many of the applications for development. It is rare that the members of these Boards have a background in planning and land use, and even more rare that they understand or have the resources to implement natural resource protection standards. My experience has been that our DRB, and likely the ZA, rarely, if ever, look at environmental impacts when reviewing applications for permits.

And you get what you pay for—the Board volunteers are generally unpaid. Which means some members put an adequate amount of work into the task, and some do not. Some are well-informed and some are not. How could we expect more, considering the lack of compensation?

What I describe above is likely the norm, and not the exception, to planning and zoning programs in Vermont towns. Therefore, I don't see how your proposal to move Act 250 review to the town permitting Boards could possibly be adequate to protect our state's natural resources. If you do indeed move forward with it, you certainly would need to improve the local planning and zoning structure and establish very clear and effective standards for the local Boards and administrators to follow. But even if that were to occur, I predict the application of those standards would be uneven and inconsistent from town to town (and region to region). Which would leave holes in our state's natural resource protections and in our environment.

Frankly, even without the changes to Act 250 that you propose, the state would do well to improve the current local planning and zoning structure. The towns do not have the expertise or the resources for staffing (and at times, not the will) that would allow for effective and consistent planning and permitting decisions, especially as relates to natural resource

protection. And they do not have easy access to the experts and resources they need. The fact that the state so heavily relies on and encourages this system for land use and planning (using unpaid, non-professional volunteers to make decisions on local land use plans and regulations) is very unfortunate, somewhat surprising, and in my view, in need of serious attention and improvements.

Further, the Act 250 and state regulatory entities should more carefully look at how municipal plans and zoning bylaws are implemented. I know of several Act 250 permit applications that were approved, despite the fact that the town plan and zoning bylaws obviously did not allow the type of development being applied for in that district. In most of these cases, the development was for commercial projects in the rural residential district (which in this instance, covers most of the rural area and natural resources outside the villages and allows for primarily residential development, and not commercial); and in at least some of these cases, the development was in, or impacting, a Flood Hazard Area or river corridor. Yet both the town and the District Environmental Commission approved the projects, nonetheless. If we really want to protect our natural resources and encourage "smart growth," which is purported to be one of the goals of this exercise, the NRB and the District Environmental Commissions should improve their permitting procedures and be more consistent and comprehensive in their project reviews. Laws, rules, and regulations are only as effective as the people and procedures implementing them.

I ask that you improve the effectiveness and consistency of Act 250, and all of our state's environmental policies and regulations. I don't see this draft as moving very far in that direction. The report drafters seem more than happy to remove jurisdiction in some cases but did not really address increased protections for specific natural resources, as seemed to be the charge. Seems like that should have been one of the main points.

If you really want policies that adequately plan for development and will protect Vermont's invaluable natural resources, don't remove or decrease jurisdictions (proposing to remove jurisdiction for Commercial and Industrial? –these uses can have serious impacts!). Improve the permitting and conservation standards and include protections for more of the natural resources we now know are important for sustaining life (such as wildlife habitat, forest blocks, ridgelines, and surface waters--including all wetlands--and their floodplains and buffer zones); provide more resources and staffing for Act 250 and local/regional land use programs (the report seems to heap a lot of responsibility on the RPC's, who from my experience, do not have the resources to take on much more); make the permitting process more efficient, clear, and consistent; and get serious about making our laws and policies work well for Vermont.

Thank you for your consideration.

Sincerely,

Laura Hill-Eubanks, Esq.

Comments re Capability and Development Plan

A review of the Capability and Development Plan (under 10 VSA 6042) was included for consideration in the NRB Act 250 study at the request of VT Planners Association, given our past recommendations in this area as an advisor to the former Act 250 Commission, and support for subsequent legislation. Note too that, in association with our participation it the Act 250 Commission process, VPA also researched and first introduced the idea of location-based jurisdiction using a version of the tiered jurisdictional system developed in Maryland, as presented in follow-up testimony to House Natural Resources and Energy in 2019 (see attached).

As described in the Draft NRB Report (p.5), the Capability and Development Plan consists simply "of a set of maps that identify settlements, environmental constraints, and important natural resources." This is not correct. These maps were in fact attachments to the 1972 Interim Capability and Development Plan prepared by the former State Planning Office (attached) to identify areas and resources of state interest for use in applying Act 250 criteria in the review of development (subject to field verification) – particularly under Criterion 9 (conformance with a duly adopted capability and development plan and state land use plan). This requirement for project conformance with state plans (not limited to maps), in effect complemented similar requirements for project conformance with local and regional plans under Criterion 10. Note that VPA located and helped pay for the digitization of previous C&D plan maps through VCGI, as a reference for these discussions, and for the historical record.

In addition to maps, the interim plan also consisted of supporting state policies and guidance, for use in Act 250 review and to inform the development of a *separate* statewide land use plan. The interim C&D plan was never formally adopted by the legislature. Subsequent controversies over proposed state land use mapping ("zoning"), led in 1973 to the repeal of the requirement for a state land use plan, and limited the C&D plan to a set of policies adopted by the legislature (sans maps) for use in coordinating local, regional, and state agency planning (attached); along with instructions that these policies no longer be applied under Criterion 9. The "current" C&D plan therefore consists *only* of these 1973 policies – no maps. And state interests, intended to serve as the policy basis for state land use regulation, have never been updated or clearly identified and mapped, except through subsequent rulemaking or court rulings. As a result, there's been no coordinated state planning and little guidance underpinning Act 250 review, particularly under criterion 9 – a source of ongoing confusion, especially under 9L (settlement patterns).

The report recommends that the C&D plan be replaced by regional future land use maps, per VAPDA's study – as proposed, largely for use in establishing jurisdictional tiers. While collectively regional land use maps may substitute for a state land use map as originally called for under the Act, they would not replace the C&D plan as intended—i.e., to more specifically define underlying state policies, and to identify and map areas and resources of critical state interest, for purposes of state regulation and for consideration in coordinated local, regional, and state agency land use planning – including, potentially, the preparation of proposed regional land use maps. This need is not specifically addressed in the draft report. The mapping necessary to identify proposed "Tier 3" areas seems more in keeping with the intent of the original C&D maps – to more specifically define and map critical state interests or resource areas, at least for purposes of determining state jurisdiction. There has been a real, longstanding need for this type of mapping, along with updated public policy and technical guidance.

That said, if the focus of proposed mapping is only to establish Act 250 jurisdiction, it's not clear how proposed maps may also apply under associated Act 250 criteria; and in particular to determine project conformance under Criterion 9. The are few recommendations in the draft report for updating relevant review criteria as applied to proposed tiers. For example, beyond the proposed reinstatement of the jurisdictional road rule, there are no longer any Act 250 standards in place to address the pattern of development in "Tier 2" rural areas – particularly outside of "existing settlements" as potentially defined under proposed land use designations. For example, with the repeal of former "rural growth area" provisions under 9L (as previously determined from C&D maps), there are no longer any specific requirements for clustering to minimize resource fragmentation and avoid rural sprawl. A real concern, given that Tier 2 as proposed will cover most of the state, including many areas without strong local regs. Former language under 9L:

Rural Growth Areas. A permit will be granted for the development or subdivision of rural growth areas [as previously identified from former C&D maps] when is it demonstrated by the applicant that in addition to all applicable criteria provision will be made in accordance with subdivisions (9)(A) "impact of growth," (G) "private utility service," (H) "costs of scattered development," and (J) "public utility services" of subsection (a) of this section for reasonable population densities, reasonable rates of growth, and the use of cluster planning and new community planning designed to economize the costs of roads, utilities, and land usage.

In sum:

- Some updated version of the C&D Plan, to include updated state development policies and the identification and mapping of critical state interests and associated development limitations – especially as referenced under Act 250 – is still very much needed in support of state development regulation, and for consideration in local, regional, and state agency planning – to include the development of regional future land use plans, as proposed. In effect this may incorporate, but may not be limited to the mapping of Tier 3 resource areas as proposed.

- Proposed jurisdictional tiers are generally consistent with those in effect in Maryland, as previously suggested by VPA for consideration under Act 250. Relevant guidance from Maryland regarding how their jurisdictional tiers were defined, mapped, and phased in is attached.

- Jurisdiction-based regulation also calls for updating associated review criteria, as may be applicable to development under proposed tiers – especially under Criterion 9, as needed to address the pattern and impacts of proposed development on critical state resources within Tier 2 and Tier 3 areas.

Finally, my name is incorrect in the draft report (p.25) – it's Sharon, not Shannon… And, more importantly, while I represented VPA as their advisor to the previous Act 250 Commission, I no longer serve as VPA's legislative rep in any capacity. As such, the information provided above and attached does not necessarily represent VPA's current position regarding the C&D plan, as presented in the report – only our previous intent in requesting that reinstating a version of the C&D plan, as the policy basis for state land use planning and regulation under Act 250 criteria, be included as part of this study.

Sincerely,

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