VERMONT NATURAL RESOURCES COUNCIL (VNRC) TESTIMONY ON S.100
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I. Introduction

My name is Jon Groveman. Thank you for the opportunity to testify on S.100.

VNRC has a longstanding interest in addressing land use in Vermont. We were formed 60 years ago by foresters and farmers concerned about the impacts of development brought on by the construction of the interstate system in Vermont. We were and are major proponents of a strong Act 250 and municipal and regional planning and zoning in Vermont. We appreciate the opportunity to address the aspects of S.100 that addresses these issues.

I have an extensive background in Act 250 that I bring to my analysis of these issues in S.100. I served as the Agency of Natural Resources (ANR) Act 250 attorney from 1995-2001. I also served as ANR General Counsel and Chair of the Natural Resources Board (NRB), which administers the Act 250 program, during the Shumlin Administration.

Before addressing the specific provisions of concern for VNRC in the bill, I think it's important for the Committee to understand where this bill fits into recent intensive efforts to modernize and improve Act 250. In 2019 the Commission on the Future of Act 250 (Commission) issued a comprehensive report on reforming Act 250 after two years of intensive work. The Commission was made up of Legislators and included Senator McCormack, Senator Campion, former Senator Pearson, Representative Amy Sheldon, Representative David Deen and Representative Paul Lefebvre. Attached is a link to the Commission's report https://legislature.vermont.gov/Documents/2018/WorkGroups/Act250/Final%20Report/W~Ellen%20Czajkowski~Commission%20on%20Act%20250%20Final%20Report~1-11-2019.pdf

The Commission's report recommended major reforms to Act 250, including lifting Act 250 in certain designated areas as part of a tiered jurisdictional approach that would avoid duplication with local zoning for towns that had robust planning and zoning programs, and better protecting natural resources outside these areas through Act 250 to address the increasing fragmentation of our forests, critical resource areas, and rural and working lands.

Act 250 reform bills were introduced during the 2019 -2020 and 2021-2022 Legislative Sessions that addressed these jurisdictional issues. Several bills were passed to reform Act 250, but vetoed by the Governor. Agreement could not be reached for a number of reasons including

that the designation programs have not been reformed yet to the point where Act 250 jurisdiction could be lifted, and complaints that all stakeholders were not adequately heard from in making changes to Vermont's bedrock land use program established in 1970.

As I noted, Act 250 was initially enacted to address migration and development associated with poorly planned ski area development in southern Vermont, the opening of the IBM plant in Essex, and the construction of the Interstate Highways that opened up Vermont to significant population centers in the northeast. We are now looking at another wave of migration due to Covid, remote work, and climate change. Real estate transfers and land values are spiking, and the Legislature has been wary of making significant changes to the protections afforded by Act 250 without striking the right balance between reducing jurisdiction and addressing gaps. As Chair Bray has said the last few years with regard to Act 250, the first principle should be to do no harm to the protections provided by the Act 250 program.

These concerns led to the Legislature just last year directing the NRB and the Agency of Commerce and Community Development (ACCD) to issue reports on how to reform Act 250 and the state designation program, respectively. The NRB was charged with looking at how to better fund and administer the Act 250 program, improve the appeals process, and expand Act 250 to address impacts outside of designated centers while loosening in areas with adequate planning and zoning. The ACCD study will provide recommendations on how to reform the designation programs that could responsibly allow for Act 250 exemptions in these areas.

Our understanding is that the NRB and ACCD studies and recommendations will be a culmination of the effort that started with the Act 250 Commission. Our overall recommendation is that the Legislature should wait a matter of months to get input from ACCD and the NRB before making what appear to us to be haphazard changes to Act 250 jurisdiction in S.100.

We also wish to push back on the notion that Act 250 is not being vilified through the discussion of this bill. There is no question that this is exactly what is happening.

As detailed in the Act 250 Commission report, Act 250 has helped shape the Vermont we have today. Vermont has avoided much of the sprawl and strip development and booms and busts in the real estate cycles that have been experienced in much of the country because of Act 250. Significant changes to Act 250 should be made thoughtfully and carefully through finishing the comprehensive work of the Act 250 Commission, not through hastily made changes in a housing bill.

With that, I will now review the Act 250 provisions in S.100 and what the adverse intended and unintended consequences of these changes may be.

II. Act 250 Provisions

Housing Units

The bill proposes changing the requirement that a person who develops **10** housing units within a 5 mile radius in a 5 year period triggers Act 250 to a person who develops **25** housing units within a 5 mile radius in a 5 year period triggers Act 250. This provision would dramatically increase the number of housing units in all areas of town (not limited to designated growth areas), including in smaller towns that do not have the capacity to administer land use and planning programs and may not even have zoning and subdivision bylaws. If the Committee insists on moving forward with this provision, VNRC recommends that it be limited to raising the jurisdictional threshold in only Designated Downtowns, NDAs and Growth Centers to ensure that municipalities have adequate bylaws and the capacity to administer them.

In addition, we request clarification on whether this change lifts the jurisdictional threshold from 10 to 25 generally – not just for projects within a 5 mile radius in a 5 year period. If this is the case this change will undermine our smart growth goals and result in a sharp increase in fragmentation of rural lands and the Committee must explore how to limit the impact of the provision outside of Designated Downtowns, NDAs and Growth Centers.

There is also a provision that provides "no permit amendment is required for the construction of improvements for 24 units or fewer of housing." This provision is very problematic. It would allow a permit holder to alter an existing project and permit conditions that other property owners and the community may have relied upon to protect their interest when the initial permit was granted to build up to 24 units of housing. We do not believe that allowing projects already under Act 250 jurisdiction to add 24 units without a review to determine how the project would affect conditions in an existing permit is sound policy. VNRC strongly recommends that this provision be eliminated.

Priority Housing Project (PHP)

The bill lifts the caps on units associated with PHPs in smaller towns (50 unit cap in towns with less than 6,000 population and 75 unit cap in towns with a population between 6,000 and 10,000) and allows PHPs in Village Center's that have adopted zoning and subdivision bylaws. Under current law the PHP exemption only applies in Designated Downtowns, NDAs and Growth Centers.

The expansion of the PHP exemption is the most concerning Act 250 change as it exempts large developments from Act 250 that could include significant commercial components. A "Priority housing project" is defined as "a discrete project located on a single tract or multiple contiguous tracts of land that consists exclusively of mixed income housing or mixed use, or any combination thereof, and is located entirely within a designated downtown development district, designated new town center, designated growth center, or designated neighborhood development." "Mixed use" is defined as the "construction of both mixed income housing and construction of space for any combination of retail, office, services, artisan, and recreational and community facilities, provided at least 40 percent of the gross floor area of the buildings involved is mixed income housing" (excluding industrial uses). Thus, a 12,000 square feet,

stand-alone, commercial building could be built in a small village provided an additional eight, 1,000 square feet apartments were built on an adjacent property.

As noted above, smaller towns and villages have the least capacity to administer and adopt bylaws sufficient to address the issues covered by Act 250, and often lack professional staff to coordinate the review process. Accordingly, even if a Village Center has zoning and subdivision bylaws, no evaluation has been done to ensure that they address the issues covered by Act 250 and whether the Village Center has the resources to properly administer the bylaws.

VNRC strongly recommends that the changes to the PHP programs be eliminated so we can see what the ACCD report recommends in terms of improvements to the designation programs to provide assurance that Act 250 jurisdiction can be lifted in municipalities that are granted the designation.

Enhanced Designation

The bill proposes a new Enhanced Designation administered by the NRB that would allow Act 250 jurisdiction to be lifted in these areas. VNRC recommends that the Committee leave this provision in the bill as an alternative to significantly expanding the PHP exemptions.

We believe that the Enhanced Designation provision is consistent with the type of changes that ACCD will review in its study and report on improving the designation programs. Enacting a robust designation program that ensures a municipality can handle the increase in development review is consistent with Act 250 Commission report and the analysis of reforming Act 250 that has occurred over the last several years. However, we recommend delaying implementation of the Enhanced Designation Program until January 1, 2025 in case the ACCD study and report recommend more efficient and effective ways of replacing Act 250 review in certain designating areas through updating Vermont's designation programs.

It is important to note that not only were the existing designation programs not enacted to exempt Act 250, there is no accountability associated with these programs. Designations are issued by the Downtown Development Board, which is composed mostly of Administration officials. There is no ability to appeal a designation decision and there are several examples where designations did not follow criteria and could not be challenged. VNRC is hopeful that the ACCD report will address accountability of designation decisions. However, until this is in place there should be limited Act 250 exemptions in designated areas. The Enhanced Designation process in the S.100 does allow the decisions to be appealed. VNRC recommends that appellants under S.100 be amended to include a person with a particularized interest in the designation. This is the same standard used in Act 250 and ANR permit appeals and it is the legal standard used by courts to decide who has a right to file a legal civil action. It is the basic issue of who has legal standing to protect their interests and it should be applied for appeals of Enhanced Designations.

In addition, we recommend that the Enhanced Designation provision includes a requirement that the NRB address how existing Act 250 permits will be administered if an Enhanced Designation is granted. Other property owners and the community in an Enhanced Designation Area may have relied upon conditions in existing permits to protect their interest when the initial permit was granted. These permits should not disappear if a designation is granted and the process needs to account for this.

The Enhanced Designation provision in the bill represents the type of tiered jurisdictional approach recommended by the Act 250 Commission that ideally involves identifying areas where we want to encourage growth where we want to address our housing crisis and accommodate climate migrants while protecting our crucial natural resources that under threat, including from climate migration, the biodiversity crisis caused by climate change and resources we will need to adapt to impacts of climate change.

As an alternative to this provision, VNRC also supports the use of Act 250 Master Plan Permits to pre-approve locations for housing in certain designated areas as set forth in S.200 introduced by Senator McCormack last year. See https://legislature.vermont.gov/bill/status/2022/S.200.

PHPs More than 25 Units in Three Months

The bill also includes a provision that triggers Act 250 for PHPs in NDAs if more than 25 units are built by the same person within a three month period. This provision does nothing to mitigate the concerns about the significant expansion of the PHP program. It is not clear where the three month threshold came from. It would be quite easy for a person to stagger developments to avoid jurisdiction. In addition, it does nothing to address the concerns about PHPs being allowed in Village Centers. This is a good example of why we should improve the designation programs to lift Act 250 responsibly rather than creating more complex rules around the PHP program. This is a good example of a last minute change that does not appear to be well thought out could lead to unintended consequence s

Appeals

The bill removes the longstanding provision that allows ten voters/property owners in a municipality to petition to appeal an application because it violates the town plan or bylaws in a municipality. There may be people in a municipality that may be adversely affected by a project that do not live in the "immediate neighborhood" of a project and will not suffer a "physical or environmental" impact to their personal property – the only other provision in Vermont law that allows a citizen to appeal a zoning decision. There are numerous examples of projects that may have widespread impacts on a community where the zoning authorities in a municipality do not correctly apply the zoning bylaws or town plan. Such projects may not "physically" affect people in a community but may affect in a variety of ways that an appeal is necessary to address. For example, projects that require a significant increase in municipal services, impact natural resources in the town but people do not live in the "immediate

neighborhood" of the project or the project does not cause physical environmental damage to a person's property, or significantly increase traffic in a community. The provision that is proposed to be eliminated is the only mechanism for people who live in a municipality to address these concerns and hold local officials accountable if they do not live in the "immediate neighborhood" of a project and won't experience a "physical" impact to property.

VNRC supports changes to state zoning laws to encourage the construction of housing in smart growth locations. However, we do not support precluding members of a community from raising legitimate concerns about the impact of a project on their community. This is especially true since this change would eliminate the right to appeal not just for housing developments, but for the most noxious, large-scale development in any part of a municipality, including sensitive areas like headwaters, river corridors, and rare natural areas. If there are issues with the appeals process or the capacity of the Environmental Court to process appeals in an efficient and timely manner, the appeals process should be reformed and/or the Environmental Court should be given additional resources. It is very bad public policy to prevent Vermonters from addressing legitimate concerns with zoning decisions which can have widespread, significant impacts on a community.

If the Committee insists on eliminating this provision it should be replaced with a provision that allows anyone with a "particularized interest" to appeal a decision. This is the same standard used in Act 250 and ANR permit appeals and it is the legal standard used by courts to decide who has a right to file a legal civil action. It is the basic issue of who has legal standing to protect their interests and it should be applied here if the "any ten persons" appeal provision is eliminated.

III. Conclusion

VNRC agrees that comprehensive Act 250 reform is needed and we have advocated for meaningful, well thought out balanced reforms as Act 250 has been debated in the Legislature over the last several years. VNRC also agrees that we need to address the housing crisis and we believe that the zoning changes in S.101 is another major step toward addressing housing issues in Vermont through land use reform.

However, there are also serious gaps in resource protection under act 250, including the continuing fragmentation of Vermont's forests. The report from the Act 250 Commission outlines these issues well and supports VNRC's position that Act 250 reform be addressed comprehensively, versus continuing to merely focus on exemptions to Act 250. That is what the studies ACCD and the NRB are conducting are designed to do as the culmination of the work that the Act 250 Commission started. The Legislature should move forward with the zoning changes and do no harm to Act 250 until the studies are completed later this year, which will examine jurisdictional policy, setting up comprehensive Act 250 reform for next year.