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MEMORANDUM

TO: Members of the Senate Committee on Natural Resources and Energy

FROM: Chris Roy
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DATE: April 8, 2024

RE: Follow-Up to April 3 Testimony Relating to S.311 and Potential Ways to Make the Permit Process More Predictable, Efficient and Timely

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I want to thank the members of the Committee once again for the opportunity to testify about S.311 and how permit reform can advance the important goals of providing Vermonters with a greater supply of much-needed housing of every type in every part of the State. As I discussed, I have been evaluating and addressing housing needs and permit reform for years not only as a practicing attorney handling permitting matters around the State, but also as a former member of the Environmental Board, a former chair of the Chittenden County Regional Planning Commission, and a former member of the Williston Selectboard.

You invited me to supplement my previous testimony with a written submission. In particular, you asked me to provide three things: (1) thoughts on ways to make the permit process more efficient and timely for projects subject to Act 250 and other land use regulation, (2) examples of project chronologies where the process has had an adverse effect on the viability of the project, and (3) thoughts as to which Agency of Natural Resources ("ANR") permits should have presumptive effect in Act 250 proceedings.

Review of S.311 and Ways to Make the Process More Timely and Predictable

I have taken the opportunity to review Draft 3.1 of S.311, and offer my thoughts with respect to its various provisions relating to the permit process specifically. I do so on my own behalf and not on behalf of any client or organization. This Memorandum does not otherwise address jurisdictional thresholds and other substantive provisions in the draft bill.

Section 5: This provision allows environmental and other permits to constitute conclusive evidence regarding compliance under certain Act 250 criteria, as opposed to simply a rebuttable presumption. It also allows these other permits to be submitted after the issuance of an Act 250 permit as a condition subsequent. This provision would eliminate much of the delay occasioned when district coordinators or commissions suspend progress in a pending matter waiting for other agencies to issue their permits, and would eliminate duplication of effort on matters better handled by ANR and other specialized, technical agencies than in the Act 250 process.

Section 17: This provision would replace the 45-day deadline for an appropriate municipal panel such as a development review board to issue a decision after the hearing is closed with a 180-day deadline to issue a decision measured from the date a complete application is filed. This approach to the setting a deadline for issuing a decision would address prolonged delays prior to the hearing, and multiple continued hearings before the hearing is deemed complete. **I would recommend that the existing 45-day deadline after the hearing is closed be retained along with the 180-day deadline after the application is complete so that matters which get to a hearing rather quickly do not get lost in limbo after the hearing is completed.**

Sections 18 and 19: These provisions would eliminate the ability of 10 or more voters, residents or landowners in a community to collectively appeal a permit when they do not otherwise have individual standing to do so. The draft bill would replace the 10-person threshold with a 25-person threshold, or a number equal to 3% of the community's population. Increasing this threshold will prevent a much smaller group of persons in a community who are not directly affected by a project to thwart development that otherwise enjoys public support.

Section 20: This provision would establish an aspirational goal that the Environmental Division conduct its merits hearing within 60 days of when an appeal is filed from a municipal zoning decision, with the decision then to be rendered within 90 days after the hearing. While the 90-day deadline for rendering a decision is workable, the 60-day goal for conducting the merits hearing may be unworkable given the jurisdiction and procedures applicable before the Environmental Division.

Currently, an appellant files a statement of questions defining the scope of the appeal 21 days after the notice of appeal. V.R.E.C.P. 5(f). Other parties then have 14 days to file their own cross-appeal. V.R.E.C.P. 5(b)(2). The Court typically schedules its initial conference shortly thereafter. Given the number of judges (two) and the need to try the case in the county where the project is located absent agreement of the parties (4 V.S.A. § 1001(e)), there would be substantial challenges in trying to schedule a trial within 60 days after the filing of the appeal. The possibility of discovery and pretrial motions further makes this timeline challenging. Occasionally, parties also need to retain experts for trial.

Some ways to streamline the process in all permit appeals before the Environmental Division include the following:

- Require written disclosures setting forth the fundamentals of the parties' respective positions to be exchanged within 14 days after the initial court conference. This would be akin to the mandatory disclosures utilized in federal court. *See* Fed. R. Civ. P. 26(a)(1)(A). Then, perhaps within 30 days of the initial court conference, the parties would need to provide expert disclosures pursuant to V.R.C.P. 26(b)(5). Further discovery could be precluded absent a showing of good cause.

- Requiring all substantive pretrial motions to be filed within 60 days of the initial conference. Absent the filing of pretrial motions, the trial could be commenced

within 120 days after the initial court conference. If a pretrial motion is filed, trial would be conducted within 60 days after the Court's decision on the pretrial motion.

- As noted above, a decision on the merits would be issued within 90 days of the trial.

Section 21: This section would create a third Environmental Division judgeship. A third judge would invariably expedite the processing of appeals. If something less is considered, perhaps the Environmental Division could be assigned a magistrate, or share a magistrate with another court, to handle discovery and other procedural issues, leaving the judges to handle merits decisions and more important decisions.

While S.311 focuses predominantly on zoning appeal procedures as opposed to Act 250 appellate processes, there are similar provisions that could be applied to the Act 250 process to make it more efficient and timely while ensuring adequate time for all parties to present their issues. The following are some procedural improvements that could be made that would result in the more timely processing of Act 250 appeals:

- If the district coordinator deems an Act 250 application to be incomplete, they may issue a ***single*** request for additional information within 7 days of the filing of the initial application. The merits hearing or a prehearing conference would then be scheduled within 40 days of the filing of the initial application or the provision of additional requested information, whichever is later. *See* 10 V.S.A. § 6084(d).

- If a prehearing conference takes place, the district commission may issue a ***single*** request for additional information within 7 days of the prehearing conference. The merits hearing should then be scheduled within 30 days of the prehearing conference or the provision of additional requested information, whichever is later.

- After the merits hearing, the district commission may issue a single request for additional information within 7 days of the hearing. A decision should be issued within 45 days of the completion of the hearing.

- On appeal, the burden of proof on any issue should lie with the party appealing the criterion or approval at issue. This would result in greater deference to the original decision below since the party challenging the original decision would always have the burden of proof on appeal.

- In the interest of statewide consistency and given the availability of legal counsel, jurisdictional opinions could be issued by the Natural Resources Board instead of the various district coordinators. *See* 10 V.S.A. § 6007(c). District coordinators could still handle project review sheets. This would free up time for district coordinators to process applications more efficiently. Appeals of jurisdictional opinions would still go to the Environmental Division.

There has also been substantial discussion about whether it is advisable to have Act 250 appeals diverted to a revived Environmental Board. As I mentioned before the Committee, I served on the former Environmental Board and was proud of the work that we did under the circumstances. I am very much opposed, however, to reinstituting a separate appeal track for Act 250 appeals. Such an approach would return permit appeals to the "bad old days" when dual appeal tracks imposed greater costs and took more time. As I discussed with the Committee, this situation creates an incongruous situation where two appellate tribunals reach opposite conclusions about a project, with the Vermont Supreme Court affirming both conclusions on appeal because there is adequate evidentiary support for either exercise of judgment respecting matters such aesthetics.

Moreover, the Natural Resources Board would then be restrained in providing active support, training and assistance to district commissions and coordinators since it would have to act as a neutral, quasi-judicial board for any appeal from a district commission.

Finally, given the scope and breadth of potential changes that are being proposed for Act 250, asking the Natural Resources Board to effectuate all of those substantive changes and, at the same time, to start handling appeals is too much to ask, in my estimation. This point has also been made by current NRB chair, Sabina Haskell. Frankly, the Board's time and resources would be better spent facilitating the jurisdictional and other changes to Act 250, and engaging in substantive and procedural rulemaking to provide further predictability and timeliness to the process.

Lengthy Project Chronologies

Each of the three projects below demonstrates in its own way how the permit and appeal process – without reference to the merits of the project – undermines responsible development and drives up housing and other costs for all involved. These are each actual projects and actual chronologies.

Project 1: Grocery store proposed for an existing developed commercial park in a village center.

Nov. 2010	Complete site plan application filed with DRB
Nov. 2012	DRB issues favorable decision two years after application filed (after 12 hearings from Jan. 2011 until June 2012) – appealed to Environmental Division and stayed pending Act 250 application
Mar. 2013	Act 250 application filed with District Commission
July 2014	District Commission issues favorable decision more than a year after application filed – appealed to Environmental Division
Apr. 2016	Environmental Division issues favorable merits decision on appeal nearly two years after Act 250 appeal filed – appealed to Vermont Supreme Court
May 2017	ANR issues stormwater permit – appealed to Environmental Division

Nov. 2017	Vermont Supreme Court issues decision requiring some minor changes 1½ years after Environmental Division decision – project remanded to make changes
June 2018	ANR issues water quality certification – appealed to Environmental Division
Oct. 2018	DRB issues revised site plan decision on remand – appealed to Environmental Division
Oct. 2018	DRB issues revised subdivision decision on remand – appealed to Environmental Division
Dec. 2019	All applications withdrawn and project abandoned 9 years after initial application filed – due to the costs and delay already experienced, the need for another merits hearing before the Environmental Division, and a likely appeal to the Vermont Supreme Court

Project 2: Proposed renovation of defunct ski lodge as a distillery and event space.

Sept. 2019	Site plan and conditional use application filed with the DRB
Dec. 2019	DRB approves project – not appealed
Feb. 2020	Act 250 application filed with District Commission
Apr. 2021	After encouraging additional analysis and collaboration with ANR, the district coordinator issues a letter deeming the application incomplete 14 months after it was filed
June 2021	The district coordinator issues another letter deeming the application incomplete – applicant forced to appeal this determination to the Environmental Division due to the inordinate delay
Oct. 2021	The NRB agrees the application is complete and stipulates to a remand of the matter for a hearing
Dec. 2021	A prehearing conference takes place nearly two years after the application was initially filed
Dec. 2021	District commission issues a prehearing conference recess order improperly reasserting same issues relating to deemed complete question that were previously settled by the NRB
Mar. 2022	Merits hearing occurs
Apr. 2022	Hearing recess order requesting additional information
Sept. 2022	District commission requests additional information
Nov. 2022	District Commission issues adverse decision almost 3 years after the application was filed – applicant appeals to Environmental Division
Jan. 2023	NRB files Partial Motion to Dismiss
Mar. 2023	Environmental Division denies NRB's Motion to Dismiss
May 2023	Environmental Division trial

June 2023	Applicant settles with NRB and ANR essentially on terms that the applicant had offered two years earlier, leaving a single appellant appealing a single Act 250 criterion
July 2023	Environmental Division issues favorable decision on single remaining Act 250 criterion – appealed to the Vermont Supreme Court by single appellant
Dec. 2023	Favorable decision by the Vermont Supreme Court – nearly 4 years after the Act 250 application was first filed. Project not yet moving forward due to substantial increases in construction costs since 2020.

Project 3: Small suburban subdivision proposed for a parcel specifically zoned residential and surrounded by existing residential developments.

Dec. 2020	Site plan application filed with DRB
July 2021	DRB approves project – not appealed
Sept. 2021	Applicant files Act 250 application with the District Commission
July 2022	District Commission issues favorable decision – appealed to the Environmental Division by *pro se* appellants, including one *pro se* lawyer
May 2024	Trial scheduled nearly 3 years after the Act 250 application was filed due to burdensome discovery requests and multiple motions by the appellants that were decided in favor of the applicant

Permits To be Given Presumptive Effect in Act 250

One of the more important provisions in S.311 is set forth in Section 5, which would deem certain ANR permits to be conclusive proof of compliance with certain Act 250 criteria, not just creating a rebuttable presumption. Theses would relate to various environmental permits pertaining to Criterion 1(air), Criterion 1(water), Criteria 2 and 3 (water supplies), and Criteria 4 (erosion), along with other permits.

Eliminating unnecessary duplication when robust environmental permitting exists is one way to make the Act 250 process more timely and efficient. These permits would presumably include air pollution control permits, stormwater permits, wastewater and potable water supply permits, wetland permits, stream alteration permits, and various approvals relating to river corridor/floodplain development. Issuance of pertinent ANR permits would conclusively demonstrate compliance with the pertinent Act 50 criteria.

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These thoughts are based upon my quarter century of work and public service in this area. I hope that my comments are helpful and, if I can be of any further assistance, please do not hesitate to get in touch. Thank you again for the opportunity to present my thoughts on these important matters.