

**Natural Resources Board  
Act 250 Necessary Updates  
Steering Committee Meeting**

**July 13<sup>th</sup> 2:00 PM – 5:00 PM  
Online Teams Meeting**

**Agenda and Notes**

- 2:00 Welcome/Summary of Last Meeting
- Preference for future meetings (online vs in person)
  - Online meeting protocol
  - Role of Steering Committee members
  - Upcoming focus group meetings
  - Vision/Schedule next few months
- 2:20 Legal Issues/Public records
- 2:30 Continued Discussion on NRB Governance
- NRB Board structure for policy making.
  - Appeals
  - Fee structure
- 4:45 Questions/Next steps
- 5:00 Adjourn

Introductions for people on the team's call

**Future meetings** – in person vs. online; tbd. Want steering committee to bond as a group, kind of easier in person, will circle back at the end. Whatever works is what we'll make happen.

**Online meeting protocol** – if you are listening in and not actively involved, use the mute button. Use hand raising feature so that everyone gets a chance to talk in a timely way when focusing on issues.

**Role of steering committee** – vision is steering committee members will actively participate in these meetings and stakeholder meetings and serve as a conduit between them. Yesterday facilitators met with district coordinators; Kirsten as steering committee member bridges the gap between the group; wisdom and experience of entire group brought from stakeholders to steering committee group. Kind of a work in progress. Ideally, we get first stakeholder group in July. NRB is in process of reaching out to stakeholders who will be in each group. Process of making sure schedules work, trying to hold as many of the meetings on Thursdays all day (morning, mid-morning, afternoon, late afternoon) so scheduling

will be less complicated. Unless anyone objects, we'd like to share email address of all steering committee members amongst all steering committee members. If anyone has concerns shoot Matt an email.

**Vision for next few months** – help group reach consensus as possible, but some issues may have division and differing opinions, don't want to get stuck on any issue. Goal today is to see how much consensus we can build on governance issues and come up with concrete and detailed proposals, each steering committee member will go back to focus group and talk about those issues. We will still revisit governance, but next meeting hoping to jump into location based jurisdiction.

No questions asked.

**Public Records Primer** – counsel everyone to know public records act, defines public records quite broadly. To the extent that we are doing work that NRB is directed to do in connection with report to legislature, prudent to conservatively assume that documents may be subject to public records request - Teams' chats, notes, emails, etc. We've already had some of those. Be transparent so people have insight into what government is doing, be aware that anything you write could be public record.

*Question* – could attendees say, “I want to say something but want it to be off record.”

*Question* – whether this type of group is subject to open meeting law? *Answer* – no quorum of decision making body of state agencies, not sure this group has decision making authority, since we are an advisory committee not making final decision, probably on good footing.

To the extent that some members aren't in state government and are communicating separate of this meeting, emails between members could be breached during public records request.

*Question* – curious what meeting notes purpose are. Point by point record could stifle dialogue, if transitory record to produce salient points at end of meeting they can be disposed of. *Answer* - Not taking verbatim notes, just trying to capture overall themes, will be helpful as we start writing the report.

Launched website on EMC where regular updates will be posted, high level, want to be open; briefing materials will be posted. <https://emcenter.org/vermont-act-250/>

## **Governance 2.0**

Intended to help move forward from previous conversation, 3 areas we want to focus on, don't want to rehash, it's ok if we don't reach consensus.

- Current structure of NRB is sub-ideal for making policy through rule making.
  - o Chair who is supported by members of NRB; but other members aren't involved in day to day workings, don't hear cases, not a lot of rulemaking.
  - o *Question* – are there alternative structures that steering committee wants to recommend; challenges and fixes.
  - o *Question* - Is there something NRB can share of current set up?
    - Document of issues with structure rang true, as chair felt other board members don't have interactions with program, not in touch with issues coming up in front of district commissions, nuts and bolts or procedural aspects in apps.

- Settlement of cases created tension between the NRB and district commissions; district commission goes through long process and when appeal happens district commission isn't a party, but board is. Board can settle with court and court is set up to encourage that, which creates tension. If NRB reverses commission decision, there's no public process for that.
    - Idea of having part-time district commission chairs rotating into board, creates some experience and depth of knowledge.
    - Issue still with using rules to address policy issues; board can't rewrite statutes. In terms of responding to issues that come up in apps and before commissions there are limits to rulemaking authority. Legislature would have to give NRB rulemaking authority for rules over statutes.
    - Notion of dual appointments of chairs of DC that some would rotate on and serve on NRB.
    - If there is agreement (not sure there is) that governance would be improved by creating professional board (think PUC) – rotating commissioners didn't line up with having consistency throughout the state, dilutes the ability to have consistency (different people in different regions)
      - If it was a professional board that had limited responsibilities, does that improve the process? Are we finding people with that expertise?
        - Goes back to what's the reconstituted NRB going to do. Doesn't matter who is on because they don't do anything substantive on policy outcomes;
          - If talking about hearing JO appeals/major apps, then the constitution of that panel is important.
    - Does the NRB need to hear appeals from district commission, like JOs;
      - Example - Applicant gets permit from district commission and then ends up in front of NRB on appeal; does the NRB take that opportunity to develop policy on the back of the applicant vs. deciding case based on precedent and develop policy later.
      - Applicant shouldn't get to NRB and then have policy changed on them – issue with NRB hearing appeals.
- Coordinators perspective – this feels somewhat rushed; existing structure is valid and in place. What is currently lacking is engagement of board members, see lots of opportunity for policy guidance, rules, to help inform and guide commissions. If you have a vetted qualified board committed to the values of Act 250 and commissioners with the same mindset, things could be different, and we wouldn't be making precedent on back of applicants. Staff would benefit from additional guidance. Chairs shouldn't be at will, politics should be taken out of it; board would be vetted and serve term, don't want to see Act 250 turned into PUC; challenges with staffing and adequately funding and different positions; think structure is already there.
  - Point of disagreement – the whole idea of policy being made on back of applicants; Act 250 created 10 criteria and sub criteria; but for environmental board decisions from 1970-2004 applicants wouldn't know how to meet some criteria. (ex. queeche analysis) created test; deer wintering areas are not in Act 250, black bear habitat not in Act 250; board heard and set precedent, mitigation is not in Act 250; nothing in statute about

mitigation. Point is we need a way to flesh out what it means to meet the criteria and the Environmental Board filled that role by setting precedent. Either need to address issues through case precedent or through rule making but rule making must be nimble enough to address concerns.

- Agree that nimble rule making should occur outside of appeal on its own; therein lies the issue, how is that triggered without a specific application in front of you on appeal.
- Need mechanism to deal with procedural issues; preference is that through cases it's the more efficient and effective way to do that.
- Courts resolve disputes; not their role to flesh out precedent.
  - may seem small but having to appeal a JO to environmental court is a heavy burden as an applicant.
    - JOs used to go to NRB; but because of board members not having experience with JOs, complaints by coordinators that decisions weren't consistent with how coordinators viewed it;
  - Calculation on if you want to appeal a coordinators JO, knowing that court process takes so long; you probably say No, and go through permit vs. appealing JO.
    - Developer might amend permit or change approach; or say no I'll try again later.
- You can't pick a little piece of it; it's a systemic shift that's needed.
- Are JOs only coordinator decision that gets appealed direct to court?
  - JOs issued by coordinators and permits issued by commissions are both subject to environmental division.
  - Administrative Amendment permits are delegated by commission to coordinator for issuance.
  - Applicants can ask for reconsiderations of an opinion.
- What kind of legislative authority could expand board's authority? Politically legislature has been reluctant to do that – how much do they want to give away?
  - Using admin board was a historical way to set precedent and make policy changes.
  - Agree that legislature and executive branch will be hesitant to give up their authority to make major policy changes to another board; but there is well documented process for rulemaking that state agencies go through; has NRB gone through this?
    - No reason why an admin board couldn't hear majors or join commissions and establish policy directives through that mechanism.
- Current challenges on structure of NRB – how it works serving on board with members who are tangentially involved in day to day.
  - Don't think we've had any rulemaking since 2015/2016
  - There is a process for rulemaking – LCAR; it's not speedy.
  - We do a pretty good job getting out 400+ permits/year; only have 20ish majors, some years more appeals than others; people are working hard.
    - Differences between permits and how they get decided based on district.
    - Feeling that lack of cohesion between central office and districts; could be healthier.

- Consensus - Volunteer board delegates authority to Chair; they aren't expected to have daily role in operations.
- 2015 rules – went through and looked at rules to address procedural issues; a few cases around jurisdiction that went to supreme court – they said must follow statute.
  - Changed some but were constrained in terms on decision.
  - Forest protection criteria – if have that would need to have legislature add; would need mitigation; part of that was authority for NRB to create mitigation for forest, wildlife habitat, and legal analysis was without leg authority NRB/ANR couldn't adopt rule for mitigating.

BREAK

Governance continued...

- Everyone loves informality of district commissions.
- Suggestion that majors cases (or cases with high likelihood of appeal regardless of decisions) those cases would be heard directly by NRB.
  - Need for some centralized entity that has the right qualifications to decide matters that are new, emerging, contested, and through those decisions clarifies how Act 250 goes forward.
  - Composition of this entity is a question.
- Thoughts on if parties could request hearing direct to board or stick with district commission;
  - Parties can currently request a hearing, so it would be a different variation on that.
- Some effort made to look at inconsistencies between commissions and their outcomes; not sure if there is data of that or just more on the anecdotal side of things; if there were anything would like to see it.
- Feeling on skipping commissioner process on majors/big uglies
  - if parties are complaining about redundancy and if it was up to parties to agree that it will be appealed, they may want to skip commission and go to another body.
  - If a party is opposing project, they are happy to litigate to max in front of commission and then take it to court too.
  - More likely it's applicant who would love to skip commission and go right to appeal but you have neighbors who are not well funded and very much want to see this play out at local level.
    - Those dynamics generated debate that have led to studies.
  - Coordinators see that keeping regionalized decision making has worked and don't want to see centralized decision making, broadly.
  - Minor apps – coordinator does assemblage of work, but district commission issues the permit; coordinator screens for completeness before commission starts review.
- What if it was up to applicant to petition for speedy hearing; applicant says we just want to go right to statewide body
  - Might be advantageous to the applicant, but to be fair to public it's a lot easier to do that at the commission level versus at administrative body; not totally fair to take that away from them.
    - Would have to create a record so would have a different feel – would be more formal.

- Proposal for a major application to have commissioners and 2-3 NRB level staff got bogged down on who had the majority vote. Would the commissioners or the people from Montpelier showing up locally, be deciding things?
- Not going to agree on NRB or new appellate body having full authority or getting rid of de novo review.
- Commission is nice because it's informal. As a citizen it's a lot easier to engage with process; but couldn't do that with the board, would be a lot harder in a formal setting.
- Flip side to discussion – the limits of localism; sit in hearings where people say things that aren't appropriate; VT prides itself on localism, but there's another side to it; having an entity with a little more formality, not a bad thing to have an avenue where it's not as informal.
- 11<sup>th</sup> criteria – satisfies all criteria but it's kind of a stupid project.
  - There are majors that propose very substantial changes/impacts that might check all the boxes but there's a lot going on; these are the ones we focus attention on in study discussions. People in neighborhood are scared and that doesn't always bring out best in everyone; some of these are mammoth projects and need to keep that in mind.
- Tension – it's a regulatory program that is you satisfy criteria you get permit; others see it as a bulwark for if you don't agree with it for your community.
  - PUC has a public good criterion; but if you don't hit the public good then they don't get a permit.
- We don't want state to dictate what regions determine, but having some input at the regional level that is consistent statewide would be helpful.
  - Levelling of policy expectations
- General agreement current structure doesn't work and need to be improved; no agreement on professional appointees; no consensus on whether they should hear appeals for majors or all appeals.
  - Wonder if there is some way the state can contribute/assign an attorney to sit at all major applications? Be there as a resource.
  - Coordinators assist commission at hearings; issue with program governance (2)
  - There will always be evolving precedent.
- Broad statement that structure isn't working, includes the role of members of NRB other than chair.
  - Act 250 works reasonably well a large percentage of the time and should be cautious of making it perfect.
- Would be helpful having more guidance from a central body.
  - Some guidance created earlier on before courts really tightened up what you can do with guidance.
    - 9L was mandated that guidance be created.
  - Broad authority doesn't exist as it did before.
- VNRC sent data to Matt about appeals/consolidation; Environmental Board time was 280 days and Environmental Division is 500+ days; not really working in a way that is needed.
- Reading the room, moving the ball in some direction is progress. Looking for specific ways to strengthen NRB even if it didn't accomplish other concerns.
- Question – consolidating of appeals at Environmental court; reference number of times that happens, what was driving that number? Reason?

- Data didn't really say; theories, several consolidated appeals took a while, because different criteria, zoning, ANR, NRB, need findings/conclusions for all.

### **Permit fees and how they should be determined; staffing.**

- should fee be tied to construction cost or level of review required?
- Applicant self-reports the costs
- Coordinators thought about how one might tie fees to impact, couldn't really come up with a good metric that is reasonable to administer all around; construction cost is a valid proxy for permitting.
  - Minimum fee of \$62.50 is quite low; having increased inquires of fee waivers; commission/staff could benefit from more guidance.
  - No fee collected when developer sells the lot to build the homes.
  - Provide some services for no/low fee, master plan apps (small) state/municipal projects are exempt.
  - Some fees go to ANR.
  - Historically roughly NRB budget was 60% fee funded and 40% general fund; now more like 80% fee and 20% general fund.
  - When you look at jurisdictional changes, it impacts our fee revenue.
    - We'd like to see data around this.
- See the need to properly staff program; one question asked by legislature was should each district have a coordinator – coordinators absolutely say yes!
  - Have lost technicians too; which puts burden back on coordinator.
  - Want to backfill and expand.
    - Currently have 2 roving coordinators and would love to see those as permanent positions in addition to reinstating the technician.
  - Some persons look at the NRB org chart and see the state coordinator position as another coordinator; however, active coordinator workload is not the primary focus of this role which is mainly focused on other tasks such as training, guidance, and “deferred maintenance”.
- Thoughts on other metrics to quantify fees?
  - Square footage vs. cost; breaks down quickly.
  - In time of housing crisis; 50% reduction in affordable housing
  - Concept that fees need to cover cost of NRB and staff; if it's a policy/legislation protecting and enhancing Vermont, and only those projects that come in the door pay the fee structure; how do we get away from fees needing to support this structure
    - It's not a good match.
  - Point - Square footage is a part of calculation currently.
- Intent of program and impact on landscape; how we treat different sorts of development in different sectors; working lands business and their impact on landscape if those businesses went away then the land would be developed and changed; what are the projects looking at and overall point on this work?
- Cost of project filed, how many different parts of said project go into projection of cost?
  - Fixtures are included in the cost field in application.
- What's practical and workable?

- What would happen if applicants had to put in the amount of money based on estimated cost of project and then another calculation based on number of criterion that are involved/hours or hearing days that somehow impacted the cost?
  - Uncertainty is high with this model.
  - It would be extremely difficult to itemize cost and make an hourly rate of our staff time; not sure that would line up with predictably, consistency, efficiency.
- There is a mechanism for applicant to ask for fee reduction/waiver.
  - 1- someone got a permit but didn't do anything with it; lapsed and coming back to start over, they make the case that it's already been reviewed
  - 2- a multi-phase project is before commission and initial application is for first part of project (i.e., Master plan) that goes forward, and the applicant comes back a year or 2 later as second phase; that triggers a new application and new fee – this is where applicants get most frustrated because there hasn't been a long gap in time; currently have an appeal in from of court.
- There are no refunds; if a project cost comes in under what the estimated cost was, the applicant doesn't get a refund.
- Construction costs have increased a lot over the last few years; if developer decides to pursue higher energy efficiency, really striving to get highly energy efficient building you are spending more money and your Act 250 fee just goes up.
- Question – is there a way to phase the fee?
  - Once you drop the check you never get it back; 25% at drop off, etc.
  - Everything is getting more expensive;
- ANR participates as party and is bound by statute. ANR spends about \$1.5mil doing NRB review and get a small portion of fees for that but do a lot of work that isn't covered by fees.
- If we know what other permitting programs base fees on, seems like it's all based on construction costs; maybe square foot is a good way to go about it.
  - As costs of construction go up its counter productive to base fees on it; where having something by square footage could be easily integrated into square foot cost.
- Trying to assign fee on what criteria are in play would be administratively complex.
  - administrative permits aren't available for original jurisdiction.
- Question - Could we give Coordinators ability to issue permits where there are less impacts? Leading to a lower fee
- If in designated downtown, you can go to state agencies and get sign off and not go through district commission;
  - 6086b designated downtown findings – there is no fee associated with that process; despite that, we see applicants that use that process and some that elect not to; if paying a small fee, they would rather stick with the normal process;
- Fundamental difference between a fee and a tax; a fee is something you pay for a particular service or product based on how much it costs to deliver said service; the more that payment is paying for the cost of government or admin of a program, the less it looks like a fee and more like something that isn't a fee; for the applicants who come in a second time, it starts to feel a lot different to them
- Cost of the project is at best imperfect but when you consider alternatives it might be the best.
  - Still room for tweaking it.

- There is application cost for applicants and then also ancillary costs that applicants are subject to such as mitigation fee for prime ag soils, traffic impact fee, etc. additional fees that come with having to go through Act 250; not just the application fee.
- Discount/waiver of fees for working lands that maintain a certain amount of acreage in farm/forest use; couldn't get through legislative committee – ANR will try and find/share.
- Goal is to maintain level funding for the program – who's going to make up fees being discounted; if affordable housing is paying 50% does that make other housing unaffordable?
  - o General fund picks up the difference.
  - o Some projects are subsidizing others.
- Fee incentives in general – do they work?
  - o PHP – 20% affordable units; only affordable for 15 years and then it doesn't have to be capped as affordable housing, and they benefit from 50% reduction.
    - What data would be helpful?
  - o Ag/forestry are treated differently – how many of those projects are coming through jurisdiction, what are we talking about for fees?
- Act 250 fees and exemptions kind of go hand in hand; want to circle back after location based jurisdiction, it will be a contributing factor to this conversation.
- There needs to be a willingness to fund program from legislature.
- When look at data sometimes the absence of data points to things; projects that take a different route; opportunity cost doesn't always show up.
- Hard to talk about fees before talking about jurisdiction; need to be careful about development we want; what does that mean for the development we don't want, what is that excluding? Having complete communities; need balance, no one sector that can carry the fee load; need to grow grand list to get workforce we need.
- Hope that each of these conversations is a puzzle piece that will add up to form a picture.

We will meet in 2 weeks 7/27/23 via Teams.

Focus group meetings on the alternate Thursdays – tbd on when these get set up.

Online vs. in person – TBD