

P. O. Box 512
Montpelier, Vermont 05601
August 26, 2020

Senate Committee on Natural Resources and Energy
meeting virtually out of the State House
Montpelier (in theory) or who knows

Subject: H.926, an act relating to changes to Act 250

Dear Committee:

Here are some comments on the draft amendments to H.926 that you were working on this morning. These are items that I did not manage to work in.

My comments recommend the following:

The enhanced village center exemption should be rejected.

The provisions for terminating Act 250 permits will be an administrative nightmare. Keep all reviews with the district commissions. Please do not allow municipalities to extinguish Act 250 permits. Better yet, please put release of land from Act 250 permits on-hold until we all have a better idea of the work involved.

Allow municipalities sole authorization of connections to water and wastewater systems if the wastewater system has no overflows of any type.

Please do repeal §6086a.

Provide guidance on when mitigation will not be allowed in connecting habitat and forest blocks

Remove the specific mention of forest blocks for resource mapping

Retain the term "improvement" in the road rule rather than the new term "upgrade".

Remove the requirement for a study by NRB of the NRB structure.

Infill in flood hazard areas should be prohibited in neighborhood development areas

Explanation of recommendations

The enhanced village center exemption should be rejected.

The proposed requirements to become an enhanced village center are inadequate as a substitute for Act 250 jurisdiction. The proposed requirements are a municipal plan; water and wastewater systems; and zoning and subdivision bylaws with flood hazard and river corridor bylaws.

You heard yesterday an estimate of 48 village centers have water and wastewater systems. Data from DEC show 12 village centers had 23 sewage overflows in the year 2019. Eleven of the overflows involved untreated sewage. Other overflows involved partly treated or partly disinfected sewage. This number of overflows does not include any combined sewage overflows that might have occurred in those systems. So even with a wastewater treatment facility, some village centers already have an adverse effect on water pollution. This bill will allow those villages to increase their adverse effect on water quality.

The proposal to exempt enhanced village centers was a last-minute, floor amendment that received little or no consideration in committee in the House. And it has had little or no testimony here.

The other reasons for retaining Act 250 in enhanced village centers are those I have put forth supporting retention of Act 250 in designated downtowns and neighborhoods:

- municipal conflict of interest: development almost always defeats environmental protection
- designations require much in town plans, while requiring almost none of that in bylaws.
- municipal and other State permits are not an adequate substitute for Act 250. Zoning is not required to evaluate the Act 250 criteria of air quality; water quality; waste disposal, water conservation, water supply, soil erosion, scenic beauty, aesthetics, endangered species, and energy conservation. These criteria can be critical issues in designated neighborhoods. Many of these criteria are not covered by other State permits either. Additional criteria not required to be evaluated in designated downtowns include floodways, streams, and shorelines.
- Act 250's role in the designated areas is important for the larger projects to which it applies.

For these reasons, Act 250 should be retained in village centers. That means there is no need to create enhanced village centers, either.

The provisions for terminating Act 250 permits will be an administrative nightmare. Keep all reviews with the district commissions.

If permits are to be released, then there should be a uniform procedure for doing so. Having one set of procedures in the designations and another outside the designations will lead to unnecessary confusion. The district commissions are better suited for the review. They are far enough removed from the municipality to have an impartial view. A municipal review would be subject to an inherent, unresolvable conflict of interest. And as written, the municipal review would not require notice to all parties to the Act 250 permit.

The process for releasing land from a permit would be neither short nor fast. The conditions of a permit are not well defined and not easy to determine. Yes, the Land Use Permit itself has a list of conditions; some standard and others specific to the project. Those conditions bring in the findings of fact, the conclusions of law, the plans, the exhibits, possibly several state permits, which have to be carefully reviewed before determining which conditions in them might be removed and which would need to be retained. A district commission is better suited to do the review. It is more likely to be able to find the necessary documents. It knows the decisions and how to apply the facts to the criteria. Based on my experience with municipal zoning, a development review board is more likely to take the permittee's word that the work is in compliance with the plans than to get the plans and check them out.

You have received no testimony on, and do not know, how many permits might be eligible for review. You do not know whether the district commissions have the capacity to handle these reviews. In fact two districts now are missing both their district co-ordinator and the chair of their district commission. One other district commission is missing a member and one other district is missing its co-ordinator.

The State does not monitor Act 250 permits for compliance after they are issued. So no one knows how many permittees are out of compliance. And when a permittee is found to be out of compliance, there has been no testimony that the NRB has the capacity to initiate and complete an enforcement action. No one knows how many permits might be eligible by changed definitions of development and subdivision; how many changes of use have occurred; how many permits were issued before adoption of permanent zoning and subdivision; or how many permits were issued in designated downtowns and neighborhoods. Making this change without understanding the consequences is imprudent.

Mr. Chapman raised the point yesterday, that Act 250 conditions might not fit into the framework of a zoning permit. If that is the case, then the district commission should deny the release of conditions. His statement also points out that the municipal zoning criteria are not even close to being equivalent to the Act 250 criteria. This supports leaving Act 250 in the designated downtowns and neighborhoods.

Opportunity for meaningful public participation will be lost. Testimony by non-applicant parties often raised significant issues, resulting in conditions being placed in the permit. Leaving the permits with the district commissions means that even the non-statutory parties will be notified every time a permit is up for review.

These conditions resulting from testimony of non-applicant parties are not placed neatly in the conditions section of the Land Use Permit. They are placed in the findings and conclusions. District commissions, being more familiar with how the Permit and conclusions are organized, will be able to find the relevant conditions more easily.

If the land is released from the permit, some permit conditions would be eliminated. Others would be transferred to a zoning permit. If that transfer were to occur, the connection between parties to the initial application and the conditions would be broken. Parties would not be notified of future amendments to the zoning permit and would lose any chance subsequently to retain the conditions. And municipalities lack the resources to enforce violations of their zoning permits.

For these reasons, district commissions should review Act 250 permits for release of conditions.

Allow municipal approval only for connections to wastewater systems that do not overflow.

Some municipalities have inadequate wastewater collection and treatment systems. These are the systems that discharge untreated or partially treated sewage. These discharges endanger the health and safety of individuals. These discharges have an adverse effect on water quality and impede our efforts to clean up our rivers, streams, lakes, and ponds. A municipality whose treatment facility or collection system discharges untreated or partially treated sewage or a combined sewage overflow should be prohibited from issuing water and wastewater permits for connections or subdivisions. This is not about compliance with a State permit; it is about whether water quality is adversely affected.

Municipalities have an inherent conflict of interest: either protecting downstream water quality or allowing additional tax revenue through growth in their municipality. So they should not be the sole determiner of whether to add more connections.

The bill has no requirement that both systems have capacity for the additional connection. There is no requirement that both systems be in compliance with their existing permits. There is no requirement for a municipality to demonstrate to DEC or anyone else that it has the safeguards to authorize connections.

House Natural Resources, Fish and Wildlife received no testimony on this topic. This authority was not in H.926 as it came from the House.

A municipality already may request authority to issue these permits for service connections and for subdivisions. Thus there is no need for the alternative procedure for connections or the study on subdivisions. Let the municipalities use the alternative procedure that now exists.

The American Society of Civil Engineers Vermont Section issued a "Report Card for Vermont's Infrastructure", 2019. The report card found that:

Drinking Water earned a grade of C-.

Stormwater earned a grade of D+.

Wastewater earned a grade of D+.

These are the three lowest grades on the report card.

There were 71 reported discharges of untreated or partially treated sewage in 2019. Total discharges were about 12,000,000 gallons. These discharges occurred from 32 systems: Barre City, Bennington, Bethel, Brandon, Burlington Main, Burlington North, Burlington River, Cavendish, Essex Junction, Fair Haven, Hardwick, Ludlow, Lunenburg Fire District 2, Manchester, Middlebury, Montpelier, Newport City, Northfield, Pittsford, Proctor, Rutland, Shelburne 1 (Crown Road), Shelburne 2 (Harbor Road), South Burlington, St. Albans City, St.

Johnsbury, Stowe, Troy & Jay, Wallingford Fire District 1, West Rutland, Williston, and Windsor Main.

In addition, there were 212 reported combined sewage overflows in 2019. A combined sewage overflow is a mixture of untreated sewage and stormwater. Total overflows were about 40,000,000 gallons. Overflows occurred from 10 systems: Burlington Main, Enosburg Falls, Middlebury, Montpelier, Newport City, Northfield, Rutland, St. Albans, St. Johnsbury, and Vergennes.

I ask that you prohibit a municipality from authorizing a connection to, or an increased discharge from, a wastewater treatment or collection system that is subject to overflows of municipal sewage or combined sewage. This can be done by adding a new subsection §1983(a)(7) as follows "(7) There are no overflows from the wastewater collection or treatment system.

Provide guidance on when mitigation will not be allowed in connecting habitat and forest blocks

Additional guidance on when mitigation is not allowed should be put into the rule-making provisions. I suggest that mitigation not be allowed when there will be an adverse impact on connecting habitat. The rulemakers would also be tasked to determine under what other conditions mitigation would not be allowed. This lets the rulemakers know that the legislature intends that mitigation will not be allowed in every case.

Remove the specific mention of forest blocks for resource mapping

It seems really odd that H.926 will add one resource, forest blocks, to §127, which calls out no other resource. This really belongs in session law, rather than starting to clutter up §127 with more and more pet resources to be included.

The road rule doesn't protect forests

It doesn't matter which road rule is used, all the versions discussed will be allowed to penetrate deep into forests and connecting habitat. How a class 4 road is handled doesn't change the fact that 1900' is a long way into a forest or a pasture or a cornfield, without review under Act 250.

Changing the term to "upgrade" instead of "improve" will cause confusion until the district commissions figure out what it means and how "upgrade" is different from "improve". I don't understand why you want to burden district commissions and the NRB with this when, you can just use "improve" with its current interpretations. My background in contracts for engineering and construction is that if one writes something twice and they are not identical, then they do not have the same meaning.

The study in section 36 of ANR's draft should be rejected.

The commission on the future of Act 250 already studied the structure of the NRB and commissions. And the recommendation was to retain the existing structure. My experience with Act 250 is that the existing structure works well. Now the administration proposes to distract the Natural Resources Board from its essential Act 250 functions to prepare yet another study.

Infill in flood hazard areas should be prohibited in neighborhood development areas

Allowing infill development in areas subject to flooding will increase the danger to the health, safety, and welfare of the public in neighborhood development areas. The infill will cause flood levels to be higher than if the infill were not there. Increased flood elevations will cause increased damage to the existing buildings in the flooded area.

Summary:

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Thank you for taking the time to read this testimony.

Sincerely,
Thomas Weiss, P. E.

Sewage Overflows in Village Centers in 2019
prepared by Thomas Weiss, August 26, 2020

Sources: ADDC list of village centers; DEC list of overflows.

Summary: 12 village centers had 23 overflows.

Municipality	no. of overflows	type of overflow	estimated volume
Bethel	1	untreated sewage	> 1,000 to 10,000
Cavendish	1	partially disinfected	> 1,000 to 10,000
Fair Haven	1	untreated	> 10,000 to 100,000
Hardwick	1	partially disinfected	> 10,000 to 100,000
Ludlow	2	undisinfected	> 100,000 to 500,000
		undisinfected	> 100,000 to 500,000
Manchester	2	untreated	no estimate; 9 hours
		untreated	no estimate; 4 1/2 hrs.
Northfield	1	other	other
Pittsford	1	partially disinfected	> 10,000 to 100,000
Proctor	5	untreated	> 1,000 to 10,000
		untreated	> 1,000 to 10,000
		untreated	> 1,000 to 10,000
		other	> 100 to 1,000
		other	> 10,000 to 100,000
Shelburne	4	untreated	> 100 to 1,000
		untreated	> 100 to 1,000
		untreated	> 1,000 to 10,000
		partly treated; undisinfected	> 10,000 to 100,000
Wallingford	3	untreated	> 10,000 to 100,000
		other	> 1,000 to 10,000
		other	> 10,000 to 100,000
West Rutland	1	partly disinfected	> 10,000 to 100,000