Natural Resources Board Act 250 Stakeholder Project

Act 250 Governance

Introduction

Act 182 and Act 47 direct the Natural Resources Board to study and report back to the Legislature on "necessary updates to Act 250." The report should address:

1) Location-based jurisdiction and thresholds for jurisdiction based on the characteristics of the location – when Act 250 applies both in geographic location and size of a proposed development project which trigger Act 250 jurisdiction;

2) How to use the Capability and Development Plan to meet statewide planning goals; and

3) Governance of the Act 250 permit process, including roles and responsibilities and staffing of the NRB and commissions, as well as fee structures and operating budget.

This report is due to the relevant legislative committees on December 31, 2023.

The NRB contracted with the Environmental Mediation Center to facilitate the stakeholder process and help build consensus for recommendations on updates to Act 250. As facilitators, our role is to structure and support a process that highlights issues with Act 250 and poses clear questions to guide constructive discussion.

Background

The staffing and operations is focused on:

1) An assessment of the current roles and responsibilities and level of staffing of the Board and District Commissions, including whether there should be a district coordinator located in every district;
2) The structure of Act 250 and how an applicant applies for and receives an Act 250 permit;
3) The cost of the process on participants to the process; of applying for an Act 250 permit;
4) Appeals of Act 250 decisions from the District Commissions and District Coordinators; and
5) How appeals are handled.

The structure of Act 250 and how an applicant applies for and receives an Act 250 permit

An Act 250 permit is required for the creation of certain subdivisions and commercial development that would result in 10 or more lots or 10 or more dwelling units or 10 or more acres of commercial development within five years and a five-mile radius in a municipality with zoning and subdivision regulations. In a municipality without zoning and subdivision regulations, an Act 250 permit is required for a proposed development of six or more lots or dwelling units or more than one acre of commercial development within five years and a five-mile radius. The recently passed HOME Bill now allows for a 3-year exemption of up to 25 dwelling units within five years and within a five-mile radius to be built without an Act 250 permit in designated downtowns and village centers.

An Act 250 permit is also required for the construction of improvements for commercial, industrial or residential use above 2,500 feet in elevation, for any construction that would substantially change or expand a pre-1970 development that would require a permit if built today, and for construction for a governmental purpose if the project involves more than 10 acres or is part of a larger project that will involve more than 10 acres.

Once jurisdiction has been determined, project applicants must apply for an Act 250 permit to a District Environmental Commission where the development project is proposed. There are nine District Environmental Commissions, each with a chairperson, two members, and up to four alternates. Every District Environmental Commission has a district coordinator and administrative support assigned to that district although duties are shared across some districts.

There are two types of actions that a District Environmental Commission can take. First, the District Commission must decide whether an Act 250 application is a major or minor application. An application will be processed as a minor application if the District Commission determines the project "will not present significant adverse impact" under the Act 250 criteria. A "major" application is subject to a public hearing before the District Environmental Commission. A "minor" application will not receive a public hearing unless requested by any person with party status (including: the applicant, interested party, or a local or state agency) or the District Commission. The applicant may be required to amend an Act 250 permit that has already been issued if there have been additions, extensions, renovations or changes in use to parcels or buildings.

Second, a District Commission decides whether to approve or deny an Act 250 permit application. No application shall be denied by the District Commission unless it finds the proposed subdivision or development detrimental to the public health, safety, or general welfare. A denial of a permit shall contain the specific reasons for denial.[1] An

[1] See, 10 V.S.A. Chapter 151 § 6087. Denial of application. https://legislature.vermont.gov/statutes/fullchapter/10/151

applicant who has been denied an Act 250 permit may re-apply within six months or appeal the decision of the District Commission to the Environmental Court.

Act 250 permit applications have a high rate of approval. However, a key issue is how long it takes an applicant to receive an Act 250 permit. Two measures are important: 1) The timeframes to process Act 250 applications, and 2) performance standards. There have been between 339 and 445 Act 250 applications deemed complete each year in recent years (see Table 1).

The NRB reported that in calendar year 2022 some of the time limit standards were exceeded, especially for major applications (see Table 2). Part of the reason for the lengthy review time may be that the Act 250 process draws on input from several state agencies including the Agencies of Natural Resources (ANR); Agriculture, Food and Markets; Transportation; and Commerce and Community Development, as well as regional planning and municipal officials. In 2022, major permits took an average of about a year to fully coordinate review and issue a decision (see Table 3).

Table 1. Applications Deemed Complete Per Year.

Application type	CY 2018	CY 2019	CY 2020	CY 2021	CY 2022
Major (Hearing Required)	36	23	9	11	14
Minor (No Hearing)	192	220	191	248	218
Administrative Amendments	176	202	139	179	144
TOTALS	404	445	339	438	376

Source: Natural Resources Board, Annual Report, 2022, p. 5.

Table 2. Permit Application Performance Processing Standards.

Category	Standard	CY 2018	CY 2019	CY 2020	CY 2021	CY 2022
All applications: Days of initial application completeness review (internal standard)	**7 days**	5 days	7 days	5 days	9 days	19 days
Minor applications: Days to issue after end of comment period or last item received (internal standard)	**10 days**	8 days	7 days	4 days	3 days	2 days
Major applications: Days to issue after adjournment	**20 days**	8 days	8 days	1 day	4 days	18 days

Category (Act 250 Rule standard)	Standard	CY 2018	CY 2019	CY 2020	CY 2021	CY 2022
Major applications: Days from deemed complete to pre-hearing or hearing (statutory standard)	**40 days**	42 days	50 days	40 days[2]	59 days	78 days
Minor-to-major applications: Days from end of comment period to pre-hearing or hearing (statutory standard)	**20 days**	22 days	37 days	19 days[2]	78 days	104 days

[1] Figures do not include time periods for decisions on motions to alter, decisions remanded from the court, corrections made to permits to clarify simple errors, formal abandonment proceedings, or application withdrawal proceedings for permit applications that had been inactive for years. Specifics on the omissions are available upon request.

[2] Figures do not include one application that followed the minor-to-major review process because that decision was issued without a hearing.

Source: Natural Resources Board, 2022 Annual Report, p.5-6.

Table 3. Average Days from Deemed Complete to Decision Issued Per Year By Application Type

Application type	CY 2018	CY 2019	CY 2020	CY 2021	CY 2022
Major (hearing required)	256	245	205	296	362
Minor (no hearing)	92	83	88	100	98
Administrative amendments	16	8	8	15	7

Source: Natural Resources Board, 2022 Annual Report, p.6

Question: How can the timeline for the review of Act 250 major applications be streamlined without sacrificing completeness and thorough review?

Question: How can the Act 250 reviews be better coordinated with permit reviews by other state agencies, especially the Agency of Natural Resources?

Question: How can Act 250 permit tracking through the overall review process be improved?

What are the costs associated with applying for an Act 250 permit?

Applicants and party participants (state agencies, neighbors) devote considerable resources to participating in the Act 250 application process. Experts for all parties (applicants, state agencies and neighbors) cost significant time and money. Applicants hire legal, environmental and engineering experts to provide a complete application for review. This and the length of time waiting for the permit process to play

out are hidden costs to the permitting process. Additional costs can be introduced when there are appeals by neighbors and others.

Another key issue is the cost to the applicant of the Act 250 process. Fees charged to review Act 250 applications cover an estimated 80 percent of the cost of operating Act 250. The State of Vermont contributes the other 20 percent from the General Fund. The Fiscal Year 2024 budget is $3,479,974 of which $2,766,239 or 79.5% is from Act 250 fees and $713,735 or 20.5% is from the General Fund.

Prior to Fiscal Year 2008, the Act 250 funding was comprised of approximately 60% fees and 40% General Fund appropriation. Between Fiscal Year 2018 and Fiscal Year 2023, the NRB budget ran an annual deficit with the exception of Fiscal Year 2022. In Fiscal Year 2022, $1 million was transferred from state General Fund to the NRB per Act 74 of 2021 section D101(a)(4) to clear a multi-year funding deficit.

Residential development in a state-designated Vermont Neighborhood or Neighborhood Development Area is charged no more than 50% of the fee otherwise assessed. By statute, a permit application fee may not exceed $165,000. Following the completion of project construction, each permittee is required to file a form certifying actual construction costs (CACCs) and pay any additional Act 250 permit fees due. In fiscal year 2022, the NRB collected $2.596 million in total Act 250 permit fees (see Table 4).

Table 4. Total Permit Fees Collected

Fiscal Year	*Amount Collected (in millions of dollars)*
FY 2018	$1.773M
FY 2019	$2.135M
FY 2020	$2.091M
FY 2021	$1.726M
FY 2022	$2.596M

Source: NRB 2022 Annual Report, p. 8.

Discussion:

The fee structure of Act 250 is based on construction costs, implicating that the larger the development, the more hours of review are required by the District Commissions and NRB staff.

There appears to be an argument for keeping Act 250 fees on the low side in order not to discourage development. Alternatively, Act 250 fees cover a large portion of the cost of operating Act 250.

Question: What should be the fee structure for Act 250 permits?

Question: Should the fee structure be different for a project involving the subdivision of lots and a project proposing the construction of dwelling units or commercial space?

Roles and responsibilities of the Natural Resources Board

The Natural Resources Board (NRB) is an independent agency within the executive branch of Vermont's state government. The NRB consists of a full-time chair and four citizen volunteer members, plus up to five alternates. Board members are appointed by the Governor to 4-year staggered terms, except for the Chair, who serves at the pleasure of the Governor. The Board's main purpose is to administer Act 250, Vermont's land use and development law. The Board also promulgates rules, participates in appeals, and enforces against Act 250 violations.

From 1970 through 2005, appeals from the District Commission's permit decisions and District Coordinator's jurisdiction opinions were heard by the administrative Environmental Board (EB). The EB had a full-time paid Chairperson and 8 members appointed by the governor. The members of the EB had diverse professional backgrounds including attorneys, engineers, and others not necessarily related to land use permitting. The EB was supported by a small staff of attorneys who provided legal guidance and drafted the Board's opinions.

In most cases, the full EB participated in appeals. But the Board had the authority to assign cases to a member or sub-committee. The EB was quasi-judicial in that it applied the rules of evidence in a relaxed manner but made findings of fact and conclusions of law to support its decisions.

In 1990, the Vermont Legislature created the Environmental Court to hear appeals from local zoning permits, environmental enforcement cases, and appeals from Agency of Natural Resources permits.[2] From 1990 until 2005, the EB continued to hear appeals of Act 250 cases.

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[2] https://law.pace.edu/sites/default/files/IJIEA/jciWright_The%20Vermont%20Environmental_%20Courtfinal%202_cropped.pdf, https://law.pace.edu/sites/default/files/IJIEA/Commentary-Environmental_Court_of_Vermont_May_18_2011.pdf

In 2005, the Legislature disbanded the Environmental Board and created the Natural Resources Board. The NRB retained oversight and administration of the Act 250 District Commissions, but the Environmental Court was given jurisdiction over appeals of Act 250 cases. Rulings of the Environmental Court can be appealed to the Vermont Supreme Court.

In 2018, six members of the Vermont Legislature were tasked with preparing a report making recommendations to amend Act 250.[3] The Commission on Act 250: The Next 50 Years outlined the advantages and disadvantages of the administrative and judicial review of Act 250 cases.

Table 5 below summarizes information from that report comparing how Act 250 have been handled by a judicial body (the Environmental Court) and an administrative body (the Environmental Board).

Table 5. Comparison of Act 250 Appeals to a Judicial or Administrative Body

Metric	Judicial Body	Administrative Body
Consistency	Split functions between the NRB and Environmental Court reduces oversight and enables inconsistency between different District Commissions	Because the EB administered the program and issued decisions, this increased consistency by providing uniform direction to the District Commissions
Performance	Similar timeframe for deciding appeals	Similar timeframe for deciding appeals
Consolidated hearings	The Environmental Court can consolidate appeals from multiple permits from a proposed development such as Act 250, local zoning and ANR permits. However, the timeframe at which time these permits are ripe for review is not always contemporaneous.	EB's jurisdiction was limited to Act 250. It is possible that an administrative board could have jurisdiction over multiple permits too.

[3] https://legislature.vermont.gov/Documents/2018.1/WorkGroups/Act250/Final%20Report/W~Ellen%20Czajkowski~Commission%20on%20Act%20250%20Final%20Report~1-11-2019.pdf.

Independence	Part of the independent judiciary, separate from the executive branch	Board members typically selected by governor, but the board's independence could have some protections under the Vermont Administrative Procedures Act.

Discussion:

The advantages of the Environmental Court retaining jurisdiction over Act 250 cases include its ability to consolidate hearings from multiple permit appeals concerning the same development.

> When a project subject to Act 250 also requires permits from ANR or local land use authorities, or both, the Environmental Division has authority to, and often does, consolidate hearing the different appeals. The former Environmental Board did not hear appeals other than Act 250 and did not have this authority.
> The consolidation authority has the advantage of one trial on the various permits that may apply to a project, with all the parties and witnesses appearing in that one trial. [4]

The Commission's report also points out that it has "…the disadvantage of delaying resolution of appeals already filed while the Division awaits potential appeals of other permits. Since necessary permits from local zoning boards or state agencies may not be ripe for judicial review contemporaneously, consolidating review of all permits into one case has not happened as much as anticipated.

The Commission's report analyzed the performance of the Environmental Court between 2013 and 2018 and concluded that its "…average time frames are not significantly different from the averages set forth above for the former Environmental Board."[5]

The main advantage of an administrative body hearing Act 250 appeals is that the same body would be responsible for formulating policy and administering the program to ensure that the policy is uniformly applied. Currently, the NRB formulates policy but has limited ability to shape or correct District Commission and District Coordinators decisions. In addition, the members charged with formulating the policy are not directly involved in implementation of the policy. The Commission emphasized the importance of having one entity in charge of both policy and administration of the Act 250 program.

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[4] Id at 72-73

[5] Id at 74

> The former Environmental Board was a core component of Act 250 when it was enacted. The Board issued decisions that set forth analytical frameworks for addressing the complex issues that shaped growth in Vermont and provided certainty to applicants. These issues included water quality, wildlife habitat, aesthetics, and the growth criteria of the Act. Because it also administered the program, it was able through its appellate decisions, rules, and guidance to provide consistent and unified direction to the District Commissions, a consistency that has been lost by splitting those functions between the Environmental Division and the Natural Resources Board.
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> Routing appeals to an administrative board that is also charged with supervising the Act 250 program would mean that policy decisions inherent in any appeals are being made by the administrative body charged with those decisions. It would mean that the interpretation of the Act and the rules issued under it are informed by those policy decisions and a practical understanding of the day-to-day administration of the program. It would endow that body with the greater ability to provide direction to the District Commissions that was possessed by the former Environmental Board. The strictures of the Vermont Administrative Procedure Act, such as the prohibition on *ex parte* communications, would support the independence of such a board, and appointment and removal structures could be devised to protect that independence.[6]

Appeals from District Commissions and District Coordinators could be heard by 1) the Environmental Court, 2) Superior Court, 3) an administrative body staffed by a professional board, 4) a citizen based administrative board, or 5) a hybrid using both professional board members supplemented by citizen members paid on a per diem basis.

Question: What is the preferred body for hearing Act 250 appeals?

The most parallel example is Vermont's Public Utilities Commission (PUC) because when it reviews utility applications to determine whether to issue a "certificate of public good," it applies the Act 250 criteria. The PUC has a full-time chair, two two/thirds time members, and a professional staff of lawyers and technical experts. The PUC also utilizes hearing officers who "conduct many proceedings and make recommendations for final decisions for the Commission to consider for approval."[7]

Vermont's Superior Courts have general jurisdiction over civil matters. However, in addition to the Environmental Court, Vermont also has specialty courts to hear probate and family law cases. Only two states (Vermont and Hawaii) have courts dedicated to hear environmental cases. In Hawaii, the environmental court hears cases concerning water and air pollution, historic preservation, water and land development,

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[6] Id at 76

[7] https://puc.vermont.gov/public-participation/who-commission-and-types-cases-handled-commission

and other matters.[8] Since 1961, the role of the State Land Use Commission has been to establish zoning district boundaries—urban, rural, agricultural, and conservation—for the entire State. The Commission acts on petitions for boundary changes submitted by private landowners, developers and State and county agencies. The Commission also acts on requests for special use permits within the Agricultural and Rural Districts. Appeals from the decisions of the Land Use Commission are heard by a circuit court.[9]

Massachusetts has a Land Court of seven justices who hear local zoning appeals and a variety of issues involving land such as easements and title disputes.[10] For almost all cases, a decision by the Land Court may be appealed to the Massachusetts Appeals Court.

Act 250 and the Capability and Development Plan were partly influenced by the first Adirondack Park Master Plan of 1972. The New York legislature established the Adirondack Park Agency in 1971 to draft long-term land use plans for the six million-acre Adirondack Park. The Agency issues permits for zoning and subdivision and land development on private land. State lands are off-limits to development, under the "forever wild" clause in the state constitution. Rulings of the Adirondack Park Agency may be appealed to the Appellate Division of the Supreme Court of the State of New York. We found that the Adirondack Park Agency is not as relevant today for appeals of Act 250 as Oregon's Land Use Board of Appeals.

Only a few states have either statewide or regional land use permitting programs. The leading example is Oregon. In 1973, Oregon enacted a state land use program with 19 statewide goals that all local governments must incorporate into their comprehensive plans. Unlike Act 250, Oregon's statewide land use program does not issue permits. The Oregon program required cities and towns to create urban growth boundaries and adopt strict agricultural and forest zoning and some rural residential areas outside of the growth boundaries. In 1979, the Oregon legislature created the Land Use Board of Appeals (LUBA) to hear appeals of local land use decisions in place of circuit courts and to provide "an accessible forum for resolving land use disputes quickly and efficiently."[11] LUBA consists of a panel of three attorneys who are members of the Oregon state bar with experience in land use law. They are appointed by the governor for four-year terms. LUBA issued 143 opinions in 2022. A decision by LUBA can be appealed to the Oregon Court of Appeals.[12]

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[8] https://www.courts.state.hi.us/special_projects/environmental_court

[9] https://www.capitol.hawaii.gov/hrscurrent/vol02_ch0046-0115/hrs0046/hrs_0046-0004.htm. And, https://luc.hawaii.gov/23186/

[10] https://www.mass.gov/orgs/land-court

[11] https://www.oregon.gov/luba/Pages/About-LUBA.aspx.

[12] https://www.oregon.gov/luba/Pages/Frequently-Asked-Questions.aspx

LUBA is viewed as relatively timely and effective in resolving the appeals it hears, through more than three decades of continuous operation. As a general rule, LUBA final decisions are to be issued within 77 days of receiving the record of decision under appeal from the appellant; and the entire process takes from four to eight months. By comparison, the Vermont Environmental Court decisions take an average of 12 months. LUBA is an administrative body and cases are heard on-the-record and the decision is based on the evidence presented at the local level. LUBA can't overturn a decision because it disagrees with it or thinks it's unwise. LUBA can only overturn a decision if the local decision failed to follow correct procedures, the decision violates state law, or the land use decision is not supported by "substantial evidence in the whole record."[13]

How Act 250 appeals are handled: De Novo Versus On the Record Review

An important part of the appeals process is whether the appeal is treated as a de novo case or an on the record case. The EB and the Environmental Court both heard appeals from the District Commissions de novo. In a de novo appeal, the appellate body hears the case from a fresh start without consideration of any legal or factual conclusion from the lower tribunal. "A de novo hearing therefore involves a trial to establish a factual record on the appealed issues through the presentation of testimony and cross-examination of witnesses. The Court decides what the facts are and reaches its own conclusions of law."[14]

In an on the record review, the appellate body does not hold a new trial to establish a factual record. Instead, the appellate body reviews the record of the tribunal below and the parties file written briefs and present oral argument. "In an appeal on the record, the appellate body typically will uphold the lower tribunal's findings of fact unless they are "clearly erroneous," meaning "they are supported by no credible evidence that a reasonable person would rely upon to support the conclusions." In other words, the appellate body does not substitute its judgment of what the facts are and instead makes sure the findings are reasonably supported by evidence."[15]

<u>Discussion</u>:

An advantage of the appellate body hearing appeals de novo is that it keeps the District Commission process informal and more accessible to the public. A disadvantage of de novo hearings by an appellate body is that trials are expensive and time consuming. However, the relatively small number of Act 250 appeals in any given year should be considered in balancing whether the de novo review on appeal has value or is a waste of limited resources (see Table 6).

An advantage to on the record appeals is that it is more efficient because there would only be one trial and the appellate body reviews the factual record from the

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[13] Id.

tribunal below. The appellate body typically does its own independent review on questions of law.[16] The disadvantage of on the record review is that District Commission hearings would likely have to become more structured, and evidentiary rulings may be tightened to create a reliable record. Many parties participate *pro se* (without an attorney) and this could present obstacles for citizen participation.

Table 6. Number and Type of Act 250 Appeals, 2018-2022.

Type of appeal	CY 2018	CY 2019	CY 2020	CY 2021	CY 2022
JO appeals (district coordinators)	3	6	7	2	7
District commission decision appeals	5	8	3	4	10
TOTALS	8	14	10	6	17

Source: NRB, 2022 Annual Report, p. 8.

It may be possible to develop a hybrid approach that includes features from both de novo and on the record review. For example, there could be on the record review but with an opportunity to supplement the record on appeal. If appropriate, there could be requirements to supplement the record on appeal so that parties don't withhold evidence in front of the District Commissions and wait to appeal to bring out their strongest case. This must be balanced with the desire to allow projects to change in a positive way to address concerns raised at any step of the process. The question is whether that approach would be an effective hybrid that preserves the informality of the District Commission process but avoids the inefficient use of resources by having a hearing before the District Commission and a de novo second hearing before the appellate body.

Question: Should Act 250 appeals be a de novo case or an on the record case or a hybrid?

Consistency and Governance

The facilitation/background team would like to note that consistency of decisions is a continuing topic raised in Act 250 evaluations for change. Consistency takes several forms and are all related to governance of the program. One form is whether decisions among District Commissions are comparable as to designating whether Act 250 applies as a major or minor application. Another layer is whether Environmental Court rulings and District Commission decisions generally reach the same result. A third layer is whether state policy decisions and the local and regional planning goals sanctioned in 25 VSA §4302 are adequately connected to each other (a point noted by the Next Fifty Years Commission). Any options (or the status quo) chosen will have an influence on aspects of consistency.