

Natural Resources Board Act 250 Stakeholder Project

Governance 2.0

Based on the steering committee's discussion at the first meeting, this background reading provides additional information to explore solutions to reduce redundancy in the permitting and appeal process and improve governance. We've broken it down into three topic areas.

Overall, there appears to be a general appreciation of the informality and accessibility of the District Commissions. Under the mantra "if it ain't broke, don't fix it," this background reading will predominantly focus on other parts of the process.

Areas for focus

First, the current structure of the NRB makes it difficult to provide guidance for consistent District Commission decisions and for the NRB to create policy through rulemaking.

Second, the current process' de novo hearing before the District Commission and a possible second de novo appeal before the Environmental Court was highlighted as an area to focus on to reduce redundancy.

Third, should Act 250 permit fees be based on the cost of the project or the level of review required considering the complexity of the project and the impact to environmental resources.

1. What does restructuring the Natural Resources Board look like?

Although there are hybrids and variations on each model, the basic options are a citizen or professional board.

Citizen Board

A citizen board could be led by a full-time professional chair and appointed citizens paid on a per diem basis, much like the original Environmental Board.

Professional Board

A professional board could be modeled after the Public Utilities Commission which has three highly experienced and qualified members supported by a professional staff of lawyers and analysts. A professional board for Act 250 cases could include environmental attorneys, engineers, and other experienced professionals. This structure would introduce additional administrative costs, which would need to be explored in more detail.

Another approach to consider is a professional board that would have a full-time professional chair and part-time professional District Commission Chairs who would rotate to serve on the board hearing cases (“1/4 option”). This system would require paying professional District Commission Chairs at approximately .4 FTE. Preliminary calculations estimate that it would cost \$250,000 to \$300,000 annually.

There are numerous variations on this theme including a panel of three professional board members sitting with two District Commissioners (“3/2 option”), two professional board members and three professional District Commissioners (“2/3 option”), or a panel of five professional District Commission members with a rotating chairperson (“0/5 option”).

Goals of NRB restructuring:

Improve the Ability of the NRB to Provide Guidance to the District Commissions to Increase Consistency and Develop Policy Through Rulemaking.

Alternatively, the steering committee could recommend that we leave the current appeals process as is and focus on the structure of the NRB to improve its ability to provide guidance to the District Commissions and promulgate rules. Many people in the legal and business community prefer the professionalism and formality of the Environmental Court.

However, there appears to be consensus that the current structure of the NRB doesn't adequately allow for guidance and rulemaking. Apart from the Chair, the other NRB members are not actively involved in the operations of the NRB and have a limited ability to observe any issues or challenges first-hand. As a result, some people believe the current structure of the NRB doesn't make sense because the members of the NRB are too far removed from it to provide meaningful input and guidance.

One possible strategy to remedy the situation is to make dual appointments and have professional part-time Chairs of the District Commissions rotate to serve as members of the NRB board (see appendix). The Chairs have first-hand experience with Act 250 proceedings and their insight to the workings of the permit process would inform general policy and rulemaking. This option is similar to the 1/4 and 0/5 options discussed above and could work whether or not the NRB heard appeals or had original jurisdiction of some permit applications. There are likely other options to consider structuring the NRB in a manner that improves its ability to govern the Act 250 program.

2. Re-evaluate the appeals process to reduce redundancy in the permitting process without creating obstacles for citizen participation or reducing environmental protections.

Two potential options for consideration to reduce redundancy without compromising citizen participation or environmental safeguards include “on the record review” for appeals from the District Commissions and narrowing the role that District Commissions play on some cases.

On the record review at the District Commission

In order for an appellate body to hear appeals on the record, the District Commissions would have to formalize hearings, especially on evidentiary rulings, and record all proceedings (possibly by video). A few cities in Vermont create records for on the record appeals of zoning permits but the use is not widespread.

In our preliminary discussions during the first meeting, some steering committee members expressed concern that District Commission hearings that create a record of the proceeding suitable for review on appeal would create barriers for citizen participation because the process would become more structured and formal. Although other hybrid strategies such as a quasi-formal hearing with an ability to supplement the record on appeal were not discussed, overall, there seemed to be little interest in adopting “on the record” appeal of District Commission hearings. However, we could discuss this issue further if there is interest.

Narrowing the District Commission’s Role in Some Cases

The steering committee also began to discuss options to potentially narrow the role of the District Commissions on some cases by either having the District Commissions rule on party status and uncontested issues and have an appellate body hear the contested issues or allowing some cases to skip the District Commission and be heard by a statewide body.

There was only a preliminary discussion on which cases would be subject to this expedited process. One thought was to have the District Commission hear minor applications and a statewide appellate body hear major permit applications. On average there have been approximately 20 major applications per year although over the past five years the numbers were 14, 11, 9, 23, 36 out of 400 total permit applications. This option has the advantage of a clear line on how cases will be handled. Another suggestion was to allow parties to petition the District Commission to narrow or skip the hearing in highly contested high-profile cases where all parties recognize an appeal is extremely likely regardless of the decision.

There was also a discussion about what statewide body would hear the cases de novo. There was a question raised whether the Environmental Court could have original jurisdiction to issue permits. Subsequent discussions after the steering committee meeting indicate that a court’s role is to review permits rather than be the body that issues permits.

As a result, should the steering committee recommend expediting the process for some cases, it would require creating a statewide administrative body to hear some permit applications de novo. This proposal has the advantage of one de novo hearing with a statewide permitting body and a direct appeal to the Vermont Supreme Court.

The disadvantage of this option is that it would not allow for the consolidation of appeals of local zoning, ANR, and Act 250 permits into one hearing. Although consolidating multiple permit appeals into one hearing makes sense and was used in the early years, recently there have been few if any consolidated appeals involving Act 250 permits.

According to data compiled by VNRC, of the 198 appeals of Act 250 permits from 2012-2022, only 7 involved consolidating appeals of Act 250 and other permits.

3. Evaluate the Permit Application Fee Structure and Determine Whether It Should Be Based on the Cost of the Project, the Level of Review Required or another measure.

The NRB's approved budget for FY 24 is \$3,479,974, of which \$713,735 (20%) comes from the general fund while \$2,766,239 (80%) is derived from fees. Given the overwhelming reliance on fees, the NRB routinely misses its budget goals. In FY 23, fees were \$200,000 less than projected.

With the passage of Act 47 (S.100) and future discussions on location-based jurisdiction and smart growth, it is likely additional development – particularly housing – will become exempt from Act 250 in some designated areas. Likewise, developers increasingly are seeking fee waivers on projects.

Thus, funding for the NRB needs a re-evaluation. The Governance 1.0 background reading provided detailed information about the current fee structure and how it is based on the cost of the project. While the advantage of the current fee structure is that is clear and predictable, some steering committee members questioned whether using construction costs as a financing model is appropriate given that construction costs have risen 20-30% in the last few years.

Although applicants are supposed to verify the cost of the project, a steering committee member wondered whether some applicants may still underestimate the cost of the project in order to pay a lower application fee. In addition, assuming there is consensus that we need more affordable housing, the application fees make each unit of affordable housing more expensive. If there are additional fee waivers or exemptions, it would require a higher percentage of contribution from the State's General Fund.

Finally, while the cost of the project has some relation to the level of review required, some steering committee members suggested that the more important factor is the number of criteria that need to be closely examined. For example, a project in a designated downtown area and a project on undeveloped land may have similar costs,

but the project on undeveloped land may require more hearing time, especially if it impacts natural resources. Tying the application fee to the level of review required could also create an incentive to build in areas where we would like to see more development.

Questions for Discussion:

Should the District Commission hearings remain informal with de novo appeals?

Should the District Commissions only hear minor permit applications and a statewide body hear major permit applications?

Alternatively, when parties believe an appeal is inevitable, what mechanism should be utilized to trigger an expedited process that either skips or narrows the review by the District Commission?

If we recommend creating an administrative board to have original jurisdiction to hear some cases, should it be a citizen board, professional board, or comprised of a full-time Chair (or a Chair and two members) and part-time professional District Commissioners?

If we recommend creating an administrative board, with original jurisdiction on some cases, should that board or the Environmental Court hear appeals from District Commission decisions?

If we recommend that the Environmental Court's role in hearing appeals remain unchanged, what changes to the structure of the NRB would enable it to improve its ability to provide guidance to the District Commission and promulgate rules?

Should the Act 250 permit application fee be determined by the cost of the project or the level of review required?

Should the application fee be used to incentivize development in certain areas?

Appendix

Possible re-structuring of the Natural Resources Board

Multiple stakeholders have called for a “professional board,” to provide needed policy guidance and rule-making oversight and which could include whether the board should resume hearing appeals (a return to the Environmental Board-type structure) or possibly take over hearing majors from the commissions, a time-consuming and difficult task for both staff and the volunteer commissions.

In the past few years, the Legislature and Governor have offered restructuring proposals:

- In 2022, the Legislature passed [S.234](#) – later vetoed by Governor Scott – which called for a return to the early Environmental Review Board structure.
- In 2023, House Environment and Energy Chair Amy Sheldon and Rep. Seth Bongartz introduced [H.331](#), which resurrects the concept of an Environmental Review Board. While no action was taken during the session, it is likely be taken up in the 2024 session as part of broader conversations related to the Legislative study.
- Similarly, in 2021, [Executive Order 02-21](#) sought to establish a three-person professional board for the NRB, noting the “complex emerging issues such as climate change, the interplay between Act 250 and other state and municipal regulatory programs, demographic challenges, and the growing economic divide between the rural and urban parts of our state, and with a current governance structure that lacks a unifying policy authority across the nine districts, restructuring Act 250 presents an opportunity to maximize natural resource protections, enable well planned growth, increase predictability and reduce redundancy with other state regulatory programs”

Another potential restructuring scenario proposed by an NRB staff member would be to consider is “dual appointments” between the district commissions and NRB board:

Create a new NRB board from professional Commission Chairs as members. Professional chairs are part-time (1-1.5 day/week) paid appointees with appropriate professional background, in development, environmental services and/or law, municipal planning, etc.

The dual appointment to both the NRB Board and District Commissions would “knit the silos together” within in the NRB to build a cohesive organization focused on consistency, predictability and efficiency:

- Essentially a dual appointment, an NRB Board comprised of professional commission chairs brings together the real-world permit application process of the district commissions to inform policy, guidance and appeals decisions of the Board. In return, the commission chairs take back this new oversight and policymaking to the district commissions and staff, building a more uniform, consistent and predictable interpretation of the Act 250 law to local proceedings.
- An NRB Board of professional commission chairs enshrines the commitment to local input and participation, which is at the root of Act 250 law – all the while pulling rural and urban viewpoints into policymaking and supervision of staff to instill predictable, timely and consistent application of the law across the nine district commissions.
- An NRB Board comprised of professional commission chairs will re-establish a healthy organization and supervision structure that applies policies and the law consistently and predictably with internal benchmarks and expectations for performance.