Act 250 NRB

Attorney Interest Based Focus Group

8/17/23

- Intro regarding stakeholder and steering committee processes, including focus/ purpose of the group, expectations of participants, and meeting notes

- Informal nature of Act 250 vs evidentiary hearing necessary for on-the-record review
  - Not just informal but also timely and relatively expeditious hearings are important considerations. Latter part has been lost. No predictability.
    - Could be handled by internal NRB rules or legislation
  - Act 250 values: Predictable, timely, consistent across the state.
  - Envt'l Division needs to come in now and "fill in the divots"
  - Both systemic issue and not enough guidance to district coordinators as to how applications are to be handled. Varying commissions with varying levels of experience. Guidance from management could help staff.
  - All over the map re how long it takes – depends on whether there is opposition
  - Could impose deadlines on how long it takes a Commission to act
  - Questions about vetting process for District Commissioners and whether that could be done differently to ensure qualifications
  - But: practical issues re getting people to serve on Commissions
  - Coordinators who have been around a long time can have a lot of influence over the Commissions (dominate)
  - On-the-record review is "a disaster" in the zoning context. Lay people write decisions, they make mistakes, no one understands the evidentiary rules, there is a ping-pong up and down from Environmental Court. Becomes a highly legalistic appeal process. Underlying process with citizen process becomes more cumbersome as there is a desire to preserve the record.
  - Timeliness and consistency: governance issue
    - Make chairs a part-time professional position?
    - On-the-record review ?

- Don't need to be a part-time professional if there are deadlines
- Everyone does a good-faith effort to interpret law, but where there is gray area… reasonable minds could differ
- Clear standard for what a complete application is
    - Seems to be an effort to front-load requirements for efficiency, but there isn't clarity on what is needed. E.g. have to go back to engineer for something that wasn't asked for in another recent application
- Some agencies provide prompt feedback after an application is submitted, others don't
- Schedule: no good to have deadlines if hearings can be recessed indefinitely
    - But some wouldn't want to limit that authority, which Commissions can use to help someone get across the line rather than denying permit because burden wasn't met
- Issue of how presumptive permits are treated in Act 250 and intersection with completeness
- A lot of municipalities have checklists for completeness of application
- Application itself can also serve as a checklist.
- Along the way, it has become: you have to demonstrate to the coordinator that you should get a permit, as opposed to the Commission at a hearing
- Sometimes undisputed, unissued permits from other entities are holding up process
- District Commission is using Rule 51 minor process more often. There is value to be gained from that procedure. This is positive. And it isn't necessarily accompanied by more back-and-forth in the completeness review.

- Question: What if all the parties agreed to stipulate to skip the district commission for major applications because it's likely to be appealed regardless of the decision?

- Structural considerations—if parties agreed to go to another intermediatory, does the E CT have the authority to issue the permit?
- There is a benefit for non-applicant parties to have a more informal opportunity to look at case first.
- Folks can spend a lot of $ at the DC and then do it all over again at EC.

- Folks complain about the process, and they are really talking about 20 cases where there are actually many cases going on.
- Courts don't have the authority to issue a permit.
- Should NRB hear those "big ugly" cases?

- During second attempt at Act 250 reform folks wanted to stay with court and on the record. Would like to do it once. That model had appeal/interest. Need to figure out who hears them. Shouldn't be EC. A professional board that hears those big uglies.
- In highly contested cases, where negotiating is the key, one piece of leverage is time.
- A hybrid model makes sense. Identify the contested issues, and stip that they all go to the appellate/de novo body (whether it be the E Ct or a revised E Board). The other issues get quickly resolved on the paperwork by the DC before jurisdiction transfers.
- Opposing view: this project has limited time and need to focus on issues that will improve the process. This question of parties stipulating will have such a limited effect and FG member would rather spend time on other practical issues. It will be 1 out of 100 times that parties will agree.

- From chat—responding to point that some parties will just want delay. Many opponents to projects (believe it or not!) have the same concern -- why do we have to go through this twice? It costs them.
- Would like concrete ideas to save time and efficiencies.
- Timelines and deadlines. Further exploring a completeness checklist seems to have support. Is there interest in establishing more deadlines?
- Recess orders are important, so need to maintain flexibility for DC to draft recess orders. Don't want to diminish authority.
- Coordinators encouraged to consult with Commission chairs about contentious projects. FG member doesn't think DC's are using pre-hearing for fear of delaying the process. It could bring procedural structure in consultation with the chair. The most efficient process is to have everything you need in hand when you file for an Act 250 permit.
- Prehearing conference better use? Combined issue—deemed completeness, can happen even if certain technical permits haven't been issued. Early PHC does help. Is a problem when you must wait for everything. An early PHC is an opportunity to focus attention.
- Like a trial court—you get your PTH and shouldn't wait for trial date.

- If early PHC can flush things out and do scheduling.
- PUC does PHC
- Recess orders need to be standardized. Need timelines.
- Recess orders are used to help applicant meet its burden.
- Great reluctance to make an order based on not meeting burden of proof. Need training on BOP.
- Issue is hearing date isn't set. Deadlines force action.

  PHC won't be scheduled until application is complete. So revisit the standard for completeness.
- Should applicant be able to petition to schedule the hearing even if the application is incomplete because it is waiting for another permit to be issued?
- The rules do say when to have a PHC but are silent about hearing date.
- Question, why not be consistent with other agencies and administrative law?
- An applicant can request a PHC.
- Checklist is a great idea and will help applicants. But projects are different and there can be unusual aspects that aren't on the checklist or will require more info.
- General Governance and Oversight: Current board members don't have day to day experience. Does the NRB's structure need to be improved for better governance? If so, how?
- Mid 2000's Act 250 reform was supposed to free up NRB to advise the DC's. Doesn't seem like that has happened. Haven't provided oversight by NRB that was anticipated. Maybe have 3 DC chairs to provide front line perspective for rulemaking.
- Both procedural and substantive rulemaking needed.
- Professional board with rulemaking as opposed to rotating chairs. Vetting process is important. PUC model ok for rulemaking for and for appointing the chair.
- Hope SC considers having a prof board that can also hear cases.
- Any board that is involved in training and managing should not also hear cases—inherent conflict. Strong opposition to going back to old environmental board model.
- In past board was interpreting its own rules and always looking to expand its jurisdiction beyond the statute and rules to create a broader Act 250 rules. Board can't write the rules and interpret.

- Matt— don't agencies typically do rulemaking and enforcement?
- Would never want NRB to be final word on its rules.
- From chat: "The history of administrative law in this country does involve one agency both issuing rules and enforcing them. We have treatises and many cases explaining that this is proper and imposing limits on it, which our own Supreme Court has been good at."
- Substantive rulemaking re: criteria needed.
- The E CT has created policy through its opinions, and it wasn't meant to be that way.
- Quarry Case re: noise that Matt worked on is classic example of where a clear standard is needed.
- Need board to issue substantive rules on noise—consensus on this? No opposition stated. Consensus noted.
- What are challenges in current structure? Current board needs more engagement, properly vetted, part time professionals.
- Is the staff adequate to do this? PUC has huge staff to do rules. It is odd that no NRB rulemaking for almost 10 years.
- Right now, there are NRB staffing constraints.
- Having a chair preside like a secretary? So single chair without a board like ANR?
- PUC chair is compensated like a judge. Would have to be an appetite to fund more than per diems to do rulemaking.
- Would a more engaged professional board be step in right direction?

Matt summarized and closed meeting:

- Time—checklist seems to be agreement.
- Need for more engaged board to do rulemaking.
- Appeals and skipping DC process when parties agree: no clear consensus.
- SC will meet in a week and this group reconvenes on the 31st. SC liaison will take this info back to SC and then talk about jurisdiction.
- Will have another briefing memo dependent upon future discussions.