April 14, 2022

Dear Members of the Senate Committee on Natural Resources and Energy,

We, the undersigned individuals and organizations, each with decades of experience with Act 250 and land use and environmental laws in Vermont, write to you today to convey our strong support for H.492 and to address criticism of the bill made in the March 29th letter to your Committee.

When Act 250 was adopted in 1970, a crucial part of the system was that nine regional District Commissions would review permit applications and the program would be administered by an expert Environmental Board that would also hear appeals of District Commission decisions. The District Commission process was designed to be accessible to citizens and reflective of Vermont's regional differences. The Environmental Board was made up of nine Vermonters from various backgrounds.

The diverse membership of the Board, and deep knowledge of Act 250, allowed the Board to resolve appeals of District Commission decisions while bringing clarity to the ten Act 250 criteria that are open to and in need of interpretation. For example, the Act 250 criteria prohibit undue water and air pollution, and provide a project shall not have an undue adverse effect on aesthetics or destroy or significantly imperil necessary wildlife habitat. The Board brought these criteria to life through its decisions explaining what these concise criteria require.

In 2004, the Environmental Board was eliminated by the Vermont Legislature. After more than 30 years of making difficult decisions there was a desire among some to move Act 250 appeals to the Superior Court. Proponents promoted the change because it felt the Environmental Board process was not formal enough, did not function under court rules, and Board decisions often included policy guidance rather than simply resolving the dispute among parties to an appeal. The change became part of a larger Legislative compromise that addressed how other environmental permits in Vermont were adjudicated and who could appeal Act 250 decisions.

When the Environmental Board was eliminated, concerns were raised that this change would significantly harm Act 250. Concerns included:

- that the court appeals process would be expensive, complicated and difficult for citizens without legal representation to navigate, including applicants;
- that replacing nine Vermonters with varied perspectives with one judge to hear appeals would drastically change the nature of Act 250 decisions; and
- that because courts are set up to allow individual parties to resolve disputes, Vermont would lose a crucial component of the Act 250 program, which is to bring clarity and breadth to the Act 250 criteria.

Unfortunately, these concerns have come to fruition.

H.492 rectifies the harm caused to Act 250 by restoring a strong, independent expert Environmental Review Board (ERB) to oversee the Act 250 program. H.492 implements a key recommendation in the 2017 final report issued by the Commission on Act 250 – the next 50 years, and along with S.234, which the Senate has passed this Session, will help modernize Act 250 and prepare for Vermont to address the challenges we currently face.

We strongly disagree with reasons provided in the March 29th letter to your Committee criticizing H.492. The letter argues that the former Environmental Board was dysfunctional and was composed of lay people that did not understand the law. The letter also argues that H.492 will no longer allow Act 250 and zoning appeals to be combined in one review resulting in a loss of efficiency.

As noted, far from being dysfunctional, the former Environmental Board issued hundreds of comprehensive well-reasoned decisions for over 30 years that fleshed out every aspect of Act 250. Board decisions were very frequently upheld by the Vermont Supreme Court. Here is a link to the E-Note Index https://nrb.vermont.gov/sites/nrb/files/documents/E-NOTES.pdf, which documents the wide range of Environmental Board decisions. It is difficult to comprehend how this body of work could be characterized as dysfunctional.

Moreover, it is not true that the former Environmental Board was composed entirely of lay people. The Board included attorneys, engineers, scientists and business people with expertise and experience in Act 250. There was a full time Chair and attorneys to advise the Board.

However, to the extent there is a concern about the expertise of the former Environmental Board, the ERB under H.492 addresses the concern by including a full time Chair and four part time Board members. All Board members must have certain qualifications, are appointed through a nominating process, and can only be removed for cause. Any concerns that the ERB would not be qualified or independent are unfounded.

The March 29th letter also erroneously complains that adoption of the ERB will result in "conflicting outcomes" because the ERB may rule one way while the Court rules in another way. Actually, in many cases the zoning standards and the Act 250 standards differ; local zoning standards are adopted to meet local concerns that differ from Act 250 concerns. For example, a proposed land use may fully comply with Act 250 and yet be a prohibited land use in a particular zoning district. Or, a proposed land use may have impacts that are not covered by a municipality's zoning but are covered by Act 250. These outcomes *should be* different. Act 250 was not intended to be a statewide zoning ordinance; it was adopted to address land uses that either zoning does not address or that it does not address adequately.

The March 29th letter also complains that there will be loss of consolidation. In fact, consolidation (which means the merging of two cases into one case) very rarely occurs.

What does often occur is that a permit applicant waits to file for Act 250 review until after it has obtained a zoning permit, and then asks to delay the zoning appeal so that it can be heard in the Court at the same time as the possible Act 250 appeal. This slows down and complicates the zoning process. If the ERB were enacted, zoning cases could be resolved on appeal more quickly and economically. The ERB would preside over a much more citizen-friendly, applicant-friendly, policy-driven process than the existing Act 250 appeal process. For example, much of the routine pretrial discovery that has proven to be burdensome, intimidating and expensive on the court side is prohibited.

The letter also complains about slowing down approval of housing that is needed in Vermont. H.492, however, will expedite zoning review of housing projects and all other projects. And it will replace the current Act 250 review of housing projects and other proposed land uses with a process that has been designed to be less burdensome, less intimidating, less expensive and more reflective of state policies than the current highly adversarial process. This bill is in the interest of every housing advocate.

Thank you for taking up this important bill.

Sincerely,

Elizabeth Courtney, Former Environmental Board Chair

Darby Bradley, Former Environmental Board Chair

Steve Reynes, Former Environmental Board Chair

Marcy Harding, Former Environmental Board Chair

Jon Groveman, Former Natural Resources Board Chair

Diane Snelling, Former Natural Resources Board Chair

James Dumont, Environmental Attorney

Rob Woolmington, Environmental Attorney