H. 823
4-9-14

Senate Committee on Natural Resources and Energy
Testimony Regarding H. 823
By Stephen A. Reynes
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Mr. Chairman, and Members of the Senate Committee on Natural Resources and Energy:

Good morning. I live in Calais and am testifying today as a private citizen. I am a lawyer with the law firm of Tarrant, Gillies Merriman and Richardson, here in Montpelier, but I am not here on behalf of any client.

By way of brief foundation for my testimony today, I had the privilege of serving in both the other body and then in this body in the 1980's. I chaired the House Committee on Natural Resources and Energy for two terms, with then Representative MacDonald and then served in this Committee, this room. I resigned from this body in 1989 to accept appointment by Governor Kunin as Chair of the Environmental Board which then heard and decided all Act 250 appeals and I had responsibility for oversight of the Act 250 program. I had earlier served as a District Environmental Coordinator, from '73 to '76, before leaving to go to Vermont Law School. Since the early '90s I have been in private practice here in Montpelier, with virtually all of my legal work in the area of land use regulation –Act 250 and zoning. I have represented permit Applicants, concerned neighbors and municipalities.

I heard from Melanie Kehne late yesterday afternoon about the history of this bill, which has evolved considerably. I'm here as one of those reasonably informed citizens who didn't get the memo – I heard about the bill over a beer at Positive Pie in Plainfield last Saturday night and read it for the first time Monday morning. I expect there are a lot of other Vermonters who care who are completely unaware of this legislation. I think H.823 as it has evolved in the House is pretty radical change, a lot to think about, there could be ramifications and unintended consequences. I think it would be good to slow this down for serious summer study, shop it out. As you know, S.100 recently was amended by this chamber for summer study and that proposed to amend only a single criterion of Act 250 pertaining to forests. I think that was a good decision. H.823 is far more sweeping than S.100 in changing Act 250. Here are my specific thoughts and observations regarding H.823 to date.

References below to page numbers, sections and paragraphs are keyed to the Bill as passed by the House.

1. H.823, as passed by the House, provides an exit-ramp from Act 250 jurisdiction for major development in designated downtowns, villages and growth centers. Starting on p. 37, Section 3, a developer, in lieu of applying to the District Commission, may go to the NRB for findings under a reduced scope of Act 250 criteria; if the Board makes positive findings under the limited Act 250 criteria, the project shall not be considered "development" and no Act 250 permit or permit amendment is required. See p. 37, Sec. 3 *et seq.*; p. 42, Section 4.

2. Although a project may be quite large, and involve aesthetically sensitive areas or issues, aesthetics is not one of the issues to be considered by the Board. See p. 38 (1). Impact on schools or other municipal services is not cognizable either. Nor is impact of growth, or conformance with local or regional plans. Id.

3. The reduced scope of Act 250 criteria will result in fewer impacted persons qualifying for party status because they can't have a particularized interest in criteria that are not reviewed.

4. Under H. 823, determination by the NRB of whether the project qualifies as exempt from Act 250 jurisdiction is on a fast track. The Board shall determine whether a request is complete within five days. P. 38 (2)(B). Then there is a 30-day comment period. Several of the Agency heads who are to comment on the project (pages 39-40), several of whom will have already voted for establishment of the district under 24 V.S.A. § 2792 as members of Downtown Development Board. Consider the possibility of politicization of the Act 250 process if the Governor favors a project and it is then up to the appointed Agency heads to say whether the project may have significant or substantial impacts within their areas of review, which will play into whether the NRB even holds a hearing on the project. "The Board *shall not hold a hearing* on the request unless it determines that there is a substantial issue under one or more applicable criteria." P. 40, (5)

5. Consider the practicability of review and consideration of plans by other potential parties, deciding to consult with potential experts, engaging them and getting substantive comments filed, all within 30 days, bearing in mind that there will be no hearing at all unless the Board finds there is a substantial issue. The Board must issue a decision within 60 days of a notice of complete request, "or, if it holds a hearing within 15 days of adjoining the hearing." P. 41(6). It is not practicable to prepare post-hearing proposed findings and conclusions when the Board is required to issue its decision within 15 days.

6. Rather than **10** or more units of proposed housing constituting development, which has been the Act 250 jurisdictional trigger for the last 43 years (10 V.S.A. § 6001(3)(A)(iv)), if it is a "priority housing" within a designated downtown development district, designated new town center, designated growth center, or designated village center that is also a designated neighborhood development area," (page 35, definition # 35), Act 250 won't be triggered unless it's a vastly larger project on a sliding population scale: *e.g.*, **275 [units] or more is exempt if municipality has a population of 15,000 or more**, or **25** or more in a town with a population of less than 3,000. See p. 25. You may wish to obtain a population-sorted list of the municipalities in your Senate district that matches the population categories on page 25 of the bill.

7. While p. 25 as drafted refers to the "numbers of housing units" in a "priority housing project," the definition or "priority housing" on p. 34 includes "mixed income housing or mixed use *or any combination thereof,*" located within a designated district. In turn, the definition of "mixed use" is not limited to housing and includes "any combination of retail, office, services, artisan, and recreational and community facilities, provided at least 40% of the gross floor area of the buildings is mixed income housing." Pages 32-33.

8. The historic jurisdictional trigger for private sector commercial development has been/is whether the proposed project involves ten or more acres in a municipality that has adopted permanent zoning and subdivision bylaws. 10 V.S.A. §6001(3)(A)(iii). Under H.823, if the developer of say, a mixed use project as defined, gets positive findings by the NRB under reduced scope review, it's not a development no matter how much land is involved in the project.

9. Influential developers can be active in getting a district designated under one of the categories, and then reap the benefits of a fast-track, limited review as above, thereby bypassing the Act 250 jurisdictional triggers that have been in place for over 40 years. What may well be the biggest proposed projects in Vermont are exempted from Act 250 jurisdiction, while the mom and pop businesses can get taken through the regulatory ringer, even though the big producers of traffic and other major impacts are exempt. In sum, this bill, as passed by the House, might carve out the biggest potential exemption from Act 250 for some of the biggest projects.

10. Appeal to the Environmental Court would be on-the-record, with deferential standard of abuse of discretion or not supported by substantial evidence when reviewing the record as a whole. (See page 38, Sec. 3 and page 42, Sec. 4). That is in contrast to all other Act 250 appeals which are de novo to the Environmental Court.

11. The definition of strip development on p. 34 is broad and vague, likely to pull in a lot of small, ordinary projects into controversy and lead to more litigation in a re-written and expanded criterion 9(L). Page 37.

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S-100 involves proposed amendment to Act 250 criterion 9(C), pertaining to forest soils and forest integrity; as you know, S-100 as passed by the Senate calls for a summer study. H.823 involves much larger and sweeping changes to Act 250, including a radical reduction in Act 250 jurisdiction, bypassing of District Commissions, changes to criteria, and reduced input from persons who may be impacted. In my opinion, the proposed changes to Criterion 9(L) in H.823 are alone as potentially consequential as were the proposed changes in S-100.

I respectfully submit that H.823 should also be the subject of summer study with broad public input.