

Dear Senators Pearson and Campion,

I am sending to you a recent request from David Grayck, a Montpelier lawyer who has asked if he could testify before the Act 250 Commission. Rather than send his request to the full Commission I am sending it to you as chairs of the two sub-committees that his concerns seem to address (i.e. Appeals and Jurisdiction). I am treating David in the same manner as any other VBA lawyer who has approached me wishing to testify such as, for example, Jim Dumont and Chris Roy. While this obviously addresses the appellate route, it seems to be borne out of the deference (i.e. jurisdictional) issues ANR has been advocating and the courts have been dealing with.

I am sending a copy to Faith and Aaron for their information.

Sincerely,

Gerry Tarrant

From: David Grayck <david@graycklaw.com>
Sent: Monday, April 16, 2018 12:12 PM
To: Gerald Tarrant <gtarrant@tgrvt.com>
Subject: Request to Address Act 250 Legislative Committee

Dear Gerry:

I am writing to you as the Chair of the VBA Environmental Law Committee. I would like to address the Legislative Committee that is considering changes to Act 250 and the related appeal and review process and procedures which apply to Act 250 and ANR permits before the Environmental Division.

I want to speak to the Legislative Committee in favor of adopting a professional Environmental Review Board, comprised of 3 or 5 members, which would have full de novo review authority over all Act 250 and ANR appeals. I support this outcome because it is the only way to ensure that the Legislature's enactments are carried out as the Legislature intends, without interference by ANR or Act 250. Let me explain what I mean.

The Legislature enacted Act 250 and ANR's administration of resources by means of permitting authority to carry out policy decisions by the Legislature. Unfortunately, ANR (and on fewer occasions, Act 250) substitutes its judgment for that of the Legislature. The failure by ANR to comply with the Legislature's attempts to address phosphorous and other clean water issues is the prime example where ANR is substituting its judgment for that of the Legislature.

Another example where ANR has substituted its judgment for that of the Legislature is with respect to the construction of solar development and wind power development. The viability of these types of development is set by the law, not whom the Governor has appointed as Secretary of ANR.

Because Act 250 and ANR permits are appealed to a court, it is the mandate of standard administrative legal practice that the Judiciary--the Environmental Division and the Vermont Supreme Court--heavily defer to ANR's decision to substitute its judgment for that of the Legislature. This is standard administrative law practice.

In comparison, when Act 250 appeals were to the former Environmental Board, the Vermont Supreme Court deferred to the Board's supervisory authority over both Act 250 and ANR. This was the holding in the Vermont Supreme Court case *In re Hawk Mountain*, 149 Vt. 179 (1988). I have attached a copy of the Hawk Mountain decision so that the committee members can read how important it was that Act 250 exercised authority over both Act 250 and ANR issues.

Ultimately, I believe that there will be a more consistent and efficient application of the law if a professional board is allowed to hear *de novo* appeals from Act 250 and ANR decisions. The parties should be those who presently may bring those appeal. Thereafter, any appeal from the professional board would be to the Vermont Supreme Court. The Court can then review those decisions consistent with the review standards in Hawk Mountain.

I would appreciate the opportunity to speak to the Legislative committee for 15 minutes to explain what I have presented in this email. In support of my request, please consider the following:

1. I have been a member of the Bar since 1990. I have 28 years experience of doing land use law in Vermont.
2. I was Act 250 General Counsel under John Ewing. I also served as General Counsel to the Water Resources Board.
3. I represent all parties in all Act 250, ANR, and local zoning matters. My past clients have included municipalities, neighbors, and developers. I believe I am the only lawyer in the State of Vermont whose client list includes both The Nature Conservancy and Weyerhaeuser Timber Company.
4. I have appeared before Act 250 District Commissions; the former Environmental Board; the former Water Resources Board; all local planning commissions, zoning board of adjustment, and development review boards; the former Public Service Board; the Public Utilities Commission; the Agency of Natural Resources; and the Superior Court Environmental Division (and its previous designations as the Environmental Court and its original authorization as the Environmental Law Division).
5. I have appeared before former Judge Meredith Wright. I routinely have appeared before Judges Durkin and Walsh.

Thank you for your assistance with this request.

Regards,
David

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