

Testimony to House Committee on Natural Resources, Fish and Wildlife
By Marcy Harding
On Act 250 bill
March 14, 2019

My name is Marcy Harding. Thank you Madame Chair and Committee members for the opportunity to testify today.

My background, quickly.

I grew up in Shelburne, graduated from UVM, worked for a Vermont bank for 26 years in commercial lending and credit.

In 1993, Governor Dean appointed me to serve as a member of the Vermont Environmental Board (after a turbulent time for the Board).

In 1997, when John Ewing retired, Governor Dean appointed me to be Chair of the Environmental Board and at that point I left my position at the bank. I remained in the position of Chair until early 2003, after Governor Douglas was elected.

I then worked for the Vermont Land Trust as a paralegal working on land conservation projects until 2014 when I retired.

In Spring of 2011, Governor Shumlin appointed me to the District #4 Environmental Commission (Chittenden County).

In May 2017, I resigned from the District #4 Environmental Commission, but only because I was out of state caring for a family member.

My experience with the Act 250 program is long but with some interruptions. When not serving, I've tried to keep abreast of changes in the law and with important cases, but I admit to being somewhat rusty on certain details. I have tremendous admiration for the law and the people who administer it.

There have been many changes in Act 250 since it was enacted in 1970. The changes generally have made the law more complex and I think the bill you are working on will continue that trend.

One of the more significant changes was just after I left the Environmental Board as Chair in 2003. It was then that the appeal process was moved from the Board to the Environmental Division of the Superior Court. Changes in appeal rights were made at that time too, among other changes. My understanding is that the change in the appeals process and changes in appeal rights were sort of a package deal. One would not happen without the other. I think there was strong support for changing appeal rights and the proponents of that change acquiesced to the change in the appeals process.

Patricia Moulton-Powden was my successor as Chair of the Environmental Board. Governor Douglas had vowed to reform the permit process. A framework for a bill had been drafted but was not yet public. I recall Patricia coming in to my office to get an overview of the job she was taking and I was the one to inform her that if the permit reform bill passed, which it ultimately did, the job she had just accepted would be very different as the Board would no longer hear appeals. I hoped that she would oppose the change but she did not have enough time to experience the benefits of a citizen board before she was immersed in the legislative process, and the bill was enacted.

Having observed first hand the degree of effort put into the decision making process at the Board, by Board members and staff, I thought it was a serious mistake to move the appeal function to a court where just one person would make the decision on cases which often involve much complexity. I was part of deliberations at the Board. I saw the diligence with which Board members would read and hear testimony and evidence, consider the law and case precedent, weigh the merits of the arguments, and reach a decision, often unanimous but not always. The Board also had the benefit of staff attorneys who would brief board members on the law and case precedent. However, it was always the Board that made the decisions, not the staff attorneys.

Those serving on the board brought valuable and varied experience and expertise. Those I served with include:

Jack Drake - UVM geology professor, former Chair of District #4
Environmental Commission

George Holland - civil engineer, Navy Seabees, VT Tech professor

Sam Lloyd - former business owner, former House member, actor
John Ewing - former bank president, former Chair of District #4
Environmental Commission, attorney
Arthur Gibb - investment banker, former state Senator, farmer (and I say that because the last time I saw him, with his sight impaired, he was on his tractor mowing a field on his farm)
William Martinez - electrical engineer for utility company and former Water Resources Board member
Alice Olenick - attorney
Becky Nawrath - former District #8 Environmental Commission member
Don Sargent - IBM engineer and very long service to the Environmental Board
Jean Richardson - UVM professor, maple syrup producer, organic inspector, consultant on rural development, agriculture and environmental issues
Nancy Waples - attorney (now judge)
Lawrence Bruce - attorney (now judge)
Gregory Rainville - attorney (now judge)
Steve Wright - former Fish and Wildlife Commissioner
Robert Page - medical doctor, former District Environmental Commission member I believe
John Farmer - business background, former state Senator

In short, I believe that nine heads reach better decisions than one.

I'd like to cite one decision that you may be familiar with. A large mixed-use business park was proposed at I-89, Exit 1 in Hartford. The Regional Plan applied to this project. It contained specific language stating "Principal retail establishments must be located in town centers, designated downtowns, or designated growth centers to minimize the blighting effects of sprawl and strip-development along major highways and maintain rural character."

The question turned on whether the proposed project was considered a "principal retail establishment" and, with 35,000 s.f. of retail space, the Supreme court found that it was, reversing the decision of the Environmental Division. I believe that if nine Environmental Board members had considered that case, they would have reached the same conclusion as the Supreme Court and the District #3 Environmental Commission. I encourage you to read the case.

This is only one case. There are other decisions I could cite. But my point is, just as with this committee, when you have a group of people together, all focused on one or more questions, you will generally get better outcomes than with just one person. A citizen board will bring expertise, experience and perspectives gained from different disciplines.

I am sure you've heard from attorneys who prefer the Court process. Some might criticize the Board process as being too informal. I beg to differ. I'm sure there are citizens who appeared before the Board that found it too formal. Not all citizens were represented by an attorney. I believe the Board struck a reasonable balance between being accessible and being formal, always giving parties due process. I suspect the cost to applicants and parties before the Court is higher than before the Board. That may be an unstated reason some attorneys prefer the Court process.

One clear advantage to having appeals within the Act 250 process was the coordination between the Board and the Commissions that resulted, and the guidance the Board was able to provide. I can think of several examples where the Board developed guidance based on a case it decided, either within the decision or as a separate policy. Such guidance became instrumental in helping the Commissions decide similar cases and often was eventually enacted into law. Examples include prime agricultural soils and traffic impact fees. Lifting jurisdiction is another such issue that you are now considering in the proposed bill.

Now on some specifics of the bill you are considering:

Section 6021(a)(1) Candidates shall be sought who have experience, expertise, or skills relating to the environment or land use. I think it's beneficial to have some members who have such experience, expertise or skills but I don't think it should be a requirement for all members. It probably would have been a stretch to convince someone I had those skills. (I presume prior service on a District Commission or on a House or Senate Natural Resources Committee would suffice to meet that requirement.)

Section 6026(e) provides for former Commission members to sit on a case if current members and alternates are disqualified or unable to serve. (I

think this language is simply moved from another section.) I'd suggest expanding this to include current Commission members from other Commissions who may be more knowledgeable about the current state of the law.

Section 8403(a) consolidates Act 250 appeals with appeals from ANR permits. I think this change will make it more challenging to find good willing candidates to serve the Board. It takes time and effort to learn the Act 250 law, process and precedent (which of course is always changing). Adding on top of that, at least 23 additional permits governed by different sections of statute would be daunting.

Vermont Environmental Review Board - why include "Review"?

Additional staffing will be required or staffing will have to be reallocated.

In closing, on a very personal note, I'd like to say that it was very disappointing to me when the appeal function was removed from the Environmental Board. I was gone when the bill was enacted but I still took it very personally. It gives me great pleasure to know that the Legislature is now considering reversing that decision and I applaud you for doing so. I think if you were to make only one change to improve the permit process for the next 50 years, this is the change you should make.

Thank you.