STEPHANIE J. KAPLAN, ESQ.
1026 Jack Hill Road
East Calais, VT 05650
802-456-8765
skaplan@jackhill.org

TO: House Committee on Natural Resources, Fish, and Wildlife
DATE: March 25, 2019
RE: Changes to the Act 250 appeals process

I am currently out of the country so I have not had been able to testify to your Committee about the proposed changes to Act 250. However, I have read the testimony of many of the witnesses who have testified, and I have read the most recent version 6.1 of the proposed legislation.

I am a semi-retired attorney, but I still have my law license and am a member of the Vermont Bar Association and the Environmental Law Committee of the Vermont Bar. I am particularly interested in providing my perspective about the proposed change for appeals from the court to an administrative board, especially in light of the fact that most of the attorneys you have heard from oppose this change, while I am strongly in favor of it.

I have had a long and extensive involvement with Act 250, starting when I was attending Vermont Law School in the early 1980s. In my last semester of law school I interned at the Vermont Attorney General's office working on a special project to improve the enforcement of Act 250, which at the time carried only criminal and not civil penalties for violations.

After graduation from VLS in 1982, I was hired at the Vermont Attorney General's Office in the Environmental Division. For the next four years I advised and represented ANR and the Environmental Board in various legal proceedings. In 1986 I was hired as Executive Officer and General Counsel of the Environmental Board. In that capacity I attended Board hearings, drafted their decisions, and advised their deliberations. Over the next eight years I attended more than 100 quasi-judicial hearings and sat in on numerous Board deliberations and meetings. I also administered the program statewide, providing training for the District Commissioners and their staff.

In 1994 I left the Board and started my own solo private practice, primarily representing citizen groups in municipal zoning hearings at Environmental Court and Act 250 proceedings at District Commissions and the Environmental Board and later the Environmental Division of Superior Court (a/k/a Environmental Court) and occasionally

the Vermont Supreme Court. Some of my cases also involved challenging permits issued by ANR.

In 2004 when the legislature proposed to eliminate the appeals functions of the Environmental Board, I supported it. Over the years at the Environmental Board the proceedings had become more and more "legal," that is more lawyers were involved representing parties and the process was becoming more and more formal and more and more demanding of the other eight members' time when only the chair was paid. Having represented neighbors in a number of Act 250 appeals at the Environmental Board, and being frustrated by what I perceived to be the difficulty many of the Board members had trying to deal with the legal aspects of the cases, I supported the move from the quasi-judicial Environmental Board to the court. I also was disturbed by the interference in the Act 250 process by different governors, and I believed that a court would be less subject to political influence than the Board's appointments made by the governor.

But I was wrong. Based on my experiences and observations at the Environmental Court over the years, I think moving appeals to the court was a mistake. The fact is that the 2005 elimination of the quasi-judicial Environmental Board and the Environmental Court's assumption of jurisdiction over Act 250 appeals has been problematic in a number of respects.

For one thing, it has made it much more difficult for affected citizens to participate in Act 250 appeals. The formality of court and the ability of developers' lawyers to take advantage of unrepresented parties has become a real obstacle for Vermont's citizens to effectively participate, and the costs of hiring the necessary legal representation are often prohibitive. But even when the neighbors do have legal representation, some deep pocket developers' attorneys and sometimes even the state agencies drive up the costs with complex discovery, depositions, and motions. This reality has been and continues to be a clear disincentive for affected neighbors to even bring an appeal.

Moreover, after having read many of the Environmental Court's decisions over the years, it is obvious that land use cases are more appropriately decided by more than one legally trained person. That is, the kinds of considerations for deciding land use cases, and particularly the often technical issues that arise under the Act 250 criteria, greatly benefit from the give and take and various perspectives of more people than a single judge. During the eight years that I staffed Environmental Board cases, I sat in on numerous deliberations of the nine Board members. The decisions that result from a diverse group of people with different backgrounds and experiences and disciplines, engaged in the process of discussing and debating various issues, are far better informed than those resulting from one judge trying to grapple with the often complex technical issues of the Act 250 criteria. Furthermore, while judges usually leave it up to parties and their attorneys to cross-examine expert witnesses, there are many advantages to board

members also questioning witnesses, especially when some parties do not have legal representation.

Another problem with the Environmental Court process is that neighbor-parties often cannot afford to hire expensive expert witnesses to counter the applicant's experts. The result is that since the applicant's experts are the only ones providing information to the court, they have a huge unfair advantage in influencing the outcome of the case. The provision in the latest Draft 6.1, Section 6022 authorizing the new board to retain "legal counsel, scientists, engineers, experts, investigators [and] temporary employees" should go far in making the proceedings more fair for all the parties whether they are wealthy or not, and result in much better informed decisions.

For all of these and other reasons, the benefits of an administrative board and its many advantages over Environmental Court cannot be overstated.

I fully support the 5-member board in the latest draft 6.1, Section 6021(a). It's not clear to me, however, if all the members or just the chair are full time. Based on my experience and observations of the former Environmental Board, the work of preparing for and hearing appeals can be very demanding and time consuming and it was difficult for many of them to adequately prepare when they were working at other jobs. Having the other four members paid for at least part time would be necessary for optimal functioning.

Another very important provision in the latest draft 6.1, section 6021(a)(1), provides that the board members would be nominated, appointed, and confirmed in the same manner as a superior court judge. This is a critical step in the direction of minimizing the politicalization of the appointments, as is the provision that the members be removable only for cause at section 6021(c). However, as it is written this does not apply to the Chair, who could still be removed at the whim of the governor. I believe this is a serious mistake, if the goal is to minimize political influence on the board (as it definitely should be minimized to the extent possible). In the past, at times it was clear that certain Environmental Board chairs made their decisions and attempted to influence the other Board members in their quest to please the governor's political agenda for the Board's decisions. This will continue to be a problem unless the chair also can be removed only for cause.

I am aware that some members of the Vermont Bar are opposed to moving Act 250 appeals from the court to an administrative board, and a few have testified about various concerns they have. In my opinion, many of their concerns are exaggerated or could be easily addressed with an administrative board. For example, one attorney asserted that an administrative board would require establishing a huge expensive bureaucracy, stating in his written testimony that the former Environmental Board staff consisted of six lawyers. This is not correct: for the first several years I was employed by the Board, I was the sole

attorney, and then because of the large workload that grew substantially in the late 1980s due to a development boom in Vermont, two additional attorneys were hired. Thus the size of the staff was almost the same as the existing Natural Resources Board but the Environmental Board also heard and decided appeals in addition to the administration of Act 250.

Other concerns that were expressed have already been addressed in the Committee's bill. For example, some attorneys believe that the ability of the Environmental Court to consolidate ANR and Act 250 appeals concerning the same project is important, although it's not clear how often this actually happens and whether it is in fact more efficient. But this legislation addresses that, by providing that the new board would hear appeals from ANR decisions as well as Act 250, and there is no reason those appeals could not be consolidated.

The Act 250 Commission, and now this Committee, have obviously listened to a variety of perspectives and ideas, and resolved some of the concerns that have been raised. The new board that the legislation creates should result in a process that is fairer for all parties and less difficult for ordinary Vermonters affected by proposed development, as well as better informed decisions.

Thank you for the opportunity to provide my perspective on this one aspect of the legislation. I would be willing to testify by telephone if that would be of any help to this Committee.