Testimony to the House Committee on Natural Resources, Fish, and Wildlife

By Robert Woolmington
January 27, 2022

I am testifying in favor of removing Act 250 appeals from the judges of the Environmental Court and creating an Environmental Review Board. The current Environmental Court is not working well, and it is time for a change.

I rarely testify before legislative committees, and I am not representing any organization. I am here at the invitation of the chair. I am also about to retire as a lawyer so, frankly, I don't worry whether my comments might offend someone who will be deciding a case for my client next year.

I have practiced land-use, environmental and municipal law in Vermont for 38 years. I've been involved in more cases than I can count – cases involving Act 250, municipal zoning, regional planning, water-quality disputes, energy projects and civil nuisance claims. I've litigated many of these disputes in the Vermont Supreme Court. My Supreme Court cases included the two principal precedents – decided 30 years apart -- on regional planning in Act 250. Other Supreme Court decisions I argued include leading precedents on the validity of aesthetic concerns in municipal zoning, wildlife habitat in Act 250, regulatory authority over environmental impacts after permits expire, and the standards for amending Act 250 permits.

I practiced for many years before the former Environmental and Water Resources boards. I also have practiced in more recent years before the Public Utility Commission. I have been an active practitioner before the Environmental Court since it was established and have tried many cases to judgment before the judges of that court.

I believe the former Environmental Board did a better job, on balance, than the Environmental Court with Act 250 cases. I am not here to criticize individual judges. I believe the problem is systemic.

Briefly, here are reasons I think that the Environmental Board did a better job than the judges. First, problems I have observed with the judges.

1. **The judges have made the process ever more technical.** For example, they have created a complex body of law about the scope of notices of appeal through hyper-technical interpretations. Frankly, I find the decisions involving the scope of appeal notices to be confusing. In theory, the notices of appeal are supposed to narrow the issues. In practice the decisions encourage filing of ever more complex and multiples statements of the issue. This benefits lawyers, not the parties.

2. **The judicial tendency to embrace technical complexity tends to benefit a few lawyers and those who can afford to hire them.** The

current system encourages reliance on lawyers who specialize in representing developers or project opponents. This is not all the fault of the judges. Lawyers file motions that raise "legal" issues, and the judges need to respond. Of course, lawyers will do what lawyers are trained to do in any available forum, but I believe the court setting makes this tendency more problematic. A small-firm lawyer, with a general practice, now risks clams of malpractice if she takes on a case before the Environmental Court and loses on a technical issue -- particularly with regard to the wording of a notice of appeal.

3. **The judges at times may tend to ignore the values underlying Act 250.** I have not done a thorough study -- and so the following observation is more anecdotal than rooted in researched analysis. I was frankly shocked by the Environmental Court's performance in the case that was eventually decided by the Vermont Supreme Court in *In re B&M Realty, LLC*, 2016 VT 114. The Environmental Court dismissively disregarded very clear provisions of the regional plan. The Supreme Court reversed and gave a much-needed lecture to the Environmental Court about the purposes of Act 250, the role of planning and how Act 250 should be interpreted. I wish this were an isolated incident. I do not believe it is.

Second, some brief observations on why I believe the former Environmental Board in general made better decisions:

1. **Broader perspectives by decisionmakers.** The Board had invaluable assistance from staff lawyers, but its decisions drew on a variety of perspectives.

2. **The Board had rule-making authority and in general seemed more willing to provide interpretative guidance for parties.**

3. **The proceedings were more user friendly.** We were not usually in courtrooms. The decisionmakers did not wear robes. There was dignity and good process, but more of an atmosphere that built trust among the parties.

The core provision of H. 492 – to establish a five-person board – is just right. Providing the board with the power to initiate proceedings, as with the Public Utilities Commission, is a very important provision -- as is granting the board authority to enforce its own judgments. The use of hearing officers for appropriate cases should help to speed the work and might well remedy some of the delays associated with the current court.

These provisions of H. 492 distinguish the proposed Environmental Review Board from an adjudicatory court, and I believe the board would better serve Vermont. Thank you.