

# TARRANT GILLIES & SHEMS

44 EAST STATE STREET  
POST OFFICE BOX 1440  
MONTPELIER, VT 05601-1440  
(802) 223-1112  
FAX: (802) 223-6225

GERALD R. TARRANT  
PAUL S. GILLIES  
RONALD A. SHEMS\*  
\*Also Admitted in Maine

MICHAEL J. TARRANT II  
NICHOLAS A. E. LOW  
K. HEATHER DEVINE  

---

PARALEGAL  
DOREEN M. PALMISANO

## H. 492 Written Testimony of Ron Shems February 2, 2022

I thank Chair Sheldon and the Committee for again inviting me to testify. I am here as a former Natural Resources Board Chair (2012-2016). I am not here on behalf of a client or constituency. I am here to share my thoughts as a former Chair and as a lawyer with experience in administrative law and tribunals in Vermont, on the federal level, and in other states.

I support H.492 and cannot overstate how important addressing governance is to Act 250's vitality. I understand "Act 250 governance," to address the question of whether there is an entity with the authority to properly, fully, and fairly implement Act 250 – assuring good management, good, accessible government, and being citizen-friendly.

When Tom Little testified last week, he mentioned a process idea he and I discussed, so I offered to share that with you.

First, I want to make clear that I am not advocating for any particular process. I would be pleased to see H. 492 become law as is. I offer this alternative process only to share ideas.

I submitted short and even shorter outlines of that approach along with this written testimony. Essentially, the NRB/ERB would provide appellate review of District Commission decisions and jurisdictional opinions through a "reconsideration" process. The starting point would be the Commission decision and the informal record (the application, materials provided by parties, recording of the hearing, etc.) created by the District Commission. The Board could allow discovery, supplemental evidence, briefing, and have hearings on disputed issues. The Board would create a formal record and issue its own decision. This could be more streamlined than de novo review while still accomplishing governance goals and fundamental fairness for the parties. All of the procedural safeguards would apply – Board members would go through the Judicial Nominating Board process, ex parte rules and separation of functions would apply. The District Commissions and their process would not change.

I am happy to answer any questions about this process. After any questions, I would like to address some points made by other witnesses.

- **The ERB should be insulated from politics.** I fully agree. It is simplistic to say that the judicial branch is insulated from politics while independent executive branch tribunals are not. A sound vetting and appointment process, with appropriate terms and a reappointment process allows administrative tribunals to be as insulated from politics as judges. You can make that

clear. I do not see the PUC, for example, as taking direction from elected officials. The flip side is that judges are people – not robots. They follow the news, have views, beliefs, and human reactions. Look at the fights over federal judges down in Washington. That is also political. As such, Vermont judges are subject to retention hearings and votes in the General Assembly every six years. Judges in divisions other than the Environmental Division also have a rotation system. Here, unlike a trial court but like an appellate court, the five members of the ERB would temper any one person's perspective, further insulate the ERB from politics, and make for a better decision.

- **The ERB needs to support District Commissions.** I fully agree, but disagree that supporting the Commissions is either/or with the ERB's appellate function. Simple screening procedures or dedicated positions would allow the ERB to effectively perform both functions. Separation of functions is ubiquitous throughout administrative agencies. For example, the Federal Energy Regulatory Commission has regulatory, licensing, enforcement, and hearing functions and there are screening protocols between them. EPA provides assistance, regulates, enforces and holds hearings, also with separation of function protocols.
- **Consolidated appeals.** I agree with Chris Roy that consolidated appeals are uncommon. Other lawyers have also testified that consolidated appeals is a great concept that does not work in practice. Chris emphasized the familiarity with a matter gained by a consolidated appellate body, presumably over multiple appeals regarding a project. That is a tricky situation. Each appeal is supposed to stand on its own and a judge should not be relying on facts from one appeal to inform a separate matter. And, most projects are not subject to multiple appeals. I do not understand the value Chris places on a consolidated appellate body. Also, I am not aware of any such consolidated appellate body in other states or on the federal level.
- **Rulemaking sufficiently fills the governance need.** I strongly disagree. The noise issue with the quarry example Chris Roy provided was helpful. Sitting in that hearing, and other hearings with noise issues, informs the need for rules and how to shape the rules. Without the experience and education gained by the hearing process, without hands-on experience applying Act 250, the ERB would be making rules in a vacuum. Chris is right in stating that applicants and other parties should not be unreasonably burdened with the Board's own work. As Jim Dumont mentioned, the Board hired its own experts when it formulated the Quechee test. And, litigants also educate the ERB through their presentations. The continued experience and knowledge gained through hands-on application of Act 250 is critical to formulating solid policy and making workable rules. This is even more important to implementing any changes to Act 250 such as a forest fragmentation or downtown criterion. These important policies should not be implemented in a vacuum.
- **The ERB will need time to get up to speed.** Billy Coster wisely raised a very important point that should be addressed. I applaud Billy's intent, but I am not sure that having an ERB member sit as a District Commissioner would be practical. The District Commissions work well as is. I am concerned that the complexity of a new mix on the Commissions and screening the ERB member from appeals of Commission action the member was involved with could be counterproductive. A simpler approach would be to, at least initially, compose the ERB of a mix of District Commissioners, former Commissioners, consultants (PE, biologist, etc.) or a lawyer with the right experience. The Environmental Court faced this same problem when it started to hear appeals. The legislature thus required Environmental Board decisions to be treated as precedent. 10 V.S.A. § 8504(m). The same should apply to the ERB. Use of existing precedent also fosters predictability.

- **Predictability.** In my experience before various courts and tribunals, the need for predictability is focused on time and cost. I don't know many lawyers that predict outcomes. The clear-cut cases typically settle while those without apparent outcomes go to hearing. I find it easier to predict timing and costs at the PUC and other administrative tribunals. The timing and cost of a court proceeding is largely driven by other parties and is hard to predict. In my experience, a court proceeding is more expensive and takes longer than an administrative proceeding.
- **Hearing officers.** I do not anticipate that the ERB will have the caseload requiring hearing officers to handle the merits of appeals. However, hearing officers can play an important role in handling scheduling and procedural issues. It can be logistically difficult and time consuming to coordinate five ERB members and staff to address the minor issues that inevitably crop up in a case. Allowing the ERB to appoint a hearing officer (ERB member or counsel) to address such issues is more efficient. Hearing officers could also serve as mediators. I recommend that the ERB have the discretion to appoint a member or staff as a hearing officer. Rob Woolmington spoke to this. I agree with him.

Thank you for hearing and considering my comments.