Act 181 Testimony to Repeal Tier 3 – Todd Heyman – Fat Sheep Farm & Cabins

Testimony of Todd Heyman
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Thank you for allowing me to testify before this committee today. I want to emphasize at the outset that I believe Act 181 was supported by legislators, including those in this room who disagree with me, in good faith and with good intentions.

That said, it has become clear that Tier 3 and the road rule must go before more damage is done. Too much time and money will be wasted by too many people fighting over an undeveloped and clearly impracticable idea. Moreover, citizens across the state will race to develop property before it becomes effective setting back the goals of Act 181. Time would be better spent on coming up with something better.

You have a clear choice right now:

Impose your will on the majority with a delay and cling to the uninformed 2024 vote; or,

Ensure you express the will of the majority by starting over and voting when done.

Background

-Since 2016, developed 5 cabin farm-stay business just outside Woodstock
-Milk sheep and make cheese; Support Jersey cow dairy down the road with blended cheese
-Grow vegetables, berries, grain corn, wine grapes (wine coming soon); Mill polenta/corn meal
-Sell product in farmstand and to local restaurants; Used to sell at farmers markets/groceries
-Two cheeses won awards at American Cheese Society competition last year
-Selected as Vermont's best farm stay by Yankee Magazine
-Featured in Boston Globe, Travel & Leisure, Edible Vermont, Food & Wine, USA Today

-Revived non-operational dairy farm that paid a little over 6.5k in property taxes
-Now pay over 10 times that in property tax and meals and rooms tax, *not counting income tax*
-Our little business drives tons of revenue to rural businesses and is an ambassador to Vermont ag
-We have been recognized for our innovative model in Agriview and our cheese creamery was supported by a working lands grant.

-15 years working on farms (11 on my own) and a UVM Farmer Training Program Graduate
-10 years working as a lawyer handling complex commercial litigation throughout the country
-Masters in Food and Agricultural Law, University of Arkansas (LLM); JD, Stanford Law School
-Clerked for a United States District Judge, Nancy Gertner

-Obtained Act 250 permit and two jurisdictional opinions (at great cost)
-Successfully litigated an appeal against the NRB in Environmental Court
-Successfully defended against two enforcement actions
-Serve as a local resource to other farms regarding state permitting questions
-Was an Invited Farmer Stakeholder to the NRB/AAFM process on AOFB regulation

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Points I Will Cover Today:

1) **Repeal, Do Not Delay, Tier 3 -- Start Over And Do It Right**
2) **Next time: Study, Engage, Consider Equity, Finalize the Details, Then Vote**
3) **If Tier 1 Promotes Housing By Eliminating Act 250, Tier 3 Irrefutably Impedes It**
4) **Act 250 Hidden Costs – It's not about permit fees and approval rates!**

REPEAL TIER 3 AND START OVER

Trust has been broken. The ski resorts were at the stakeholder table and came out safe. The farmers were not and many came out facing a commercial permitting regime for livestock sheds that measure 12 by 20 and houses for their aging parents or young children. Low income Vermonters living alongside country roads often find their small parcels fully engulfed in Tier 3 and won't be able to put up a garage or shed without going through the Act 250 permitting process.

Private citizens had to look at the socio-economic burdens of the draft Tier 3 maps because nobody in government did. Neil Ryan's testimony makes clear that this is Greenlining and discriminates against the rural working class. This is beyond dispute.

Asking rural Vermonters now to trust you to get it right eventually at some point in the future is backwards, much like the way this law was implemented: voting on a law that was not yet written.

If you're so confident you can get it right in the future, scrap this law and prove it. Walk the walk. Trust yourselves to get it right by showing you are not afraid to face a vote when the details of any law are final and the populace has access to those details when those votes are cast.

You dragged us on one leap of faith already. Rural Vermont has no appetite for another trust fall.

STUDY, ENGAGE, CONSIDER EQUITY, FINALIZE THE DETAILS, THEN VOTE

How this law came about is shocking. The studies, rules, and mechanics of the law were to be done after the vote, and are still not done yet.

Your desire to delay the maps, the rules, perhaps seek changes in the criteria for Tier 3, etc. are all admissions that none of this was thought through, let alone available to the public when the Legislature enacted an unprecedented expansion of Act 250 jurisdiction.

On far more modest topics, like allowing accessory businesses to be developed on farms, you have chosen stakeholders to study the issue twice and made the most modest of changes only. Italy's agritourism industry – built on farmstays and on-farm dining – enjoys tremendous growth thanks in part to our neighbors in New York, Connecticut and Massachusetts who spend entire vacations

there doing what they cannot do in Vermont. The notion of easing Act 250 jurisdiction on the few dozen farms that might explore diversification in this area is too scary for this Legislature.

By contrast, this Legislature had no problem passing a law to expand Act 250 jurisdiction to mere residential construction, down to a modest livestock shelter, a garage, a house for a family member of a different generation, or a long driveway – even before the stakeholder meetings, the real rules were developed, and the maps were finalized.

The choice to make these bold changes to Act 250 jurisdiction to apply to rural residents while steadfastly avoiding making far more modest changes to improve farm viability is quite telling about where the Legislature's focus lies.

Many have complained about insufficient notice to rural property owners, and relying on bureaucrats to do the job of the legislature: write the rules and draw the maps that will set forth the restrictions on Tier 3 development. The process was backwards, sure enough.

But when I looked at the laws, I wanted to see what exactly did the Legislature legislate. I looked at the definitions for habitat, forest block and habitat connector to see what was delegated and what firm guard rails were set up on those definitions to ensure that any restrictions were based on real world empirical evidence, if not also peer reviewed research. No guard rails were in place. A habitat is home to a species, a forest block is undeveloped forest land at any stage of succession (saplings in a field?), and a connector is land between habitats. That's it. The LURB can do the rest. And then the maps were further delegated to regional planning commissions to develop—whose staff are also unelected and not subject to any ethical rules with teeth despite their boards' heavy involvement in the local business community.

This wasn't delegation. This was abdication. Please set the guard rails next time. Don't defer. Legislate. You voted on an unrefined idea in 2024. That's not a law. Try a current use system of incentives, longer enrollments, larger penalties for withdrawals. Compensate owners.

IF TIER 1 PROMOTES HOUSING, TIER 3 IRREFUTABLY IMPEDES IT

Please stop describing the law as promoting housing development in urban areas by lifting Act 250 jurisdiction while protecting critical natural resources in environmentally sensitive locations.

Describe what the law actually does. How is it protecting those areas in Tier 3?

It impedes housing development by expanding Act 250 jurisdiction to cover all residential development. That's it. That's what it does.

If you want to say Tier 1 facilitates housing because it lifts Act 250 jurisdiction, then you have to admit that housing in Tier 3 will be impeded by imposing Act 250 jurisdiction, end of story.

Everything but basic, small-scale residential construction was already covered by Act 250.

Now, Act 181 will cause some small town Vermonters to face a commercial permitting regime for the most basic residential construction. In our housing crisis, and with the pain rural communities are experiencing with property taxes and property prices, not to mention population decline, this is inexcusable. Admit what you are doing: impeding residential construction in rural VT.

ACT 250 HIDDEN COSTS—IT'S NOT ABOUT PERMIT FEES AND APPROVAL RATES!

The short version on the various forms of hidden costs:

1-preparing the application typically requires expensive engineers/consultants

2-submitting an application without an Act 250 specialized lawyer is unwise

3-even jurisdictional opinions should involve lawyers because jurisdiction is permanent

4-abutting neighbors can impose endless delay and cost with party status in appeals on vague criteria like aesthetics, vague statements in town plans, subjective arguments about the character of the neighborhood, etc. They might eventually lose, but they can cost you thousands, if not millions in some cases (27,000 parcels means a potential 80,000+ neighbors who can appeal a Tier 3 single family residence on aesthetics just to avoid a new neighbor)

5-unelected town and regional planning commissions can appeal and cost you years and delays

6-even after you get the permit, you still can face enforcement activity from neighbors' complaints and you'd be unwise not to involve an Act 250 specialized lawyer in responding

7-Act 181 already proposes to impose a JO requirement to fix mapping errors according to the draft LURB rules… including requiring a professional to provide documentation and data to correct for the mapping errors that will inevitably exist. The state's maps are in rough shape, so much so that you need to delay things, and yet you are asking regular Vermonters to pay for getting the maps right. It's insulting.

8-there is a deterrent effect, whether you think it's well founded or not, and people don't even attempt any enterprise that triggers Act 250… and you know this is true because you see project scale changes when exemption levels increase. Farmers call me and I know they quit if Act 250 is involved. The same will happen with Tier 3 properties. Why bother with all that? Shop elsewhere. Build elsewhere. You will be augmenting the housing crisis where Tier 3 predominates. You might think it's easy, but Act 250's reputation has more influence than your opinion. And I would never try to build in Tier 3. Act 250 is the single biggest reason I don't expand my business. You are going to augment the housing crisis, see home prices increase, and tax bases not grow to keep up with the cost of municipal services.

9-NRB, now LURB, incompetence is costly. LURB was supposed to professionalize the agency but it is being immediately handed the responsibility to oversee an unprecedented jurisdictional expansion and it hasn't even shown it can run things better than before yet:

-Inconsistent and incompetent administration leads to costly litigation
-The agency cannot even keep track of its paperwork
-The agency cannot even create a database with information by parcel

-The structure of decision making involves too few people and now you want to get rid of the Environmental Court and let LURB decide appeals of its District staff.

Get a lawyer: Act 250 Jurisdiction is Permanent and Determined by Your Submission.

In 2016, I had spent over $10,000 dollars on an architect/engineer to prepare my Act 250 application before I finally took the District Coordinator's advice that I could do my permit myself, and that I didn't need these folks or an Act 250 lawyer. She was right if all I cared about was getting the permit. I got one. But I should have got a lawyer.

My permit did not contain a jurisdictional statement about the scope of jurisdiction. On farms, jurisdiction is supposed to be limited to the land that supports the development (thanks to a Senator Starr sponsored amendment to Act 250). The NRB called me a "farmstay" and my application was replete with detailed references to farming activity and even selling product early in our first season. I assumed jurisdiction was limited to the area where I built my cabins. The NRB fought this law in Court when trying to take control of Whistle Pig Whisky's entire parcel (hundreds of acres)

Fast forward some years, and my father passed. My elderly, widowed mother is alone, losing her eyesight to macular degeneration. I convinced her to take an acre of my land and build a home. Not so fast, the agency argued that they had jurisdiction over all my land even though I was a farm, and then claimed I lost all my rights for not appealing my permit, even though nobody could point to a single sentence indicating jurisdiction applied to my entire property.

This law limiting jurisdiction on farms had been voluntarily applied to Hill Farmstead, Jasper Hill, and Boyden Winery – all well connected large players in Vermont. In Boyden Winery's case, the farmer scribbled a hand written note asking the NRB to relinquish jurisdiction (allegedly permanent) of 297 acres after the law was passed. The law was not retroactive. It was illegally granted without a hearing. That tells you everything you need to know about how Act 250 is administered by the NRB. Boyden got 297 acres illegally released from jurisdiction with a note, and I couldn't get one acre for my widowed mom to build a personal residence to enforce the law as written without appealing to the Environmental Court.

This cost me thousands to respond to but I eventually handled it myself (an option unavailable to many people). The District Coordinator who is still there issued a JO saying my widowed mother's house needed to go through Act 250 even though it had nothing to do with my cabin rental business and was nowhere near it. I filed a lengthy motion to reconsider (which unfortunately goes right back to the same person) and he denied it.

I then appealed to the Environmental Court. Within a week, after thousands spent and endless amounts of my time over the prior year with delays to construction, the NRB lawyer called me and said she had reviewed everything and agreed that I was right and offered to settle on my terms. It's a longer story than that, but the short version is that the NRB wasted my time and money needlessly, and then didn't even bother defending the jurisdictional opinion that held up the construction of my mom's house. This is not the only instance that the NRB did not defend a JO issued by this District Coordinator that had time and cost implications for an applicant.

If I had an Act 250 lawyer when I got the permit, the lack of jurisdictional scope in my permit likely would have been caught, or I would have made clear in my submission that I expected them to limit jurisdiction to the land supporting my cabins only. It might seem easy, but it isn't!

This story about my mom's house has a lot to do with Act 181!

In all my years running the cabins, I had never gotten any complaint from a neighbor to the NRB/LURB. But when I started my mom's house, my neighbors filed complaints because they didn't want another house on the road. My cabins were situated further from the road and were not easy to see but my mom's house was alongside the road.

If I had to get a permit to build that house, they undoubtedly would have become parties and appealed any permit granted to me. I know this because they became parties to oppose a very minor amendment to my permit later just to make my life difficult in retribution for my mom's house.

This has big relevance to Act 181. There will be 80,000 plus neighbors out there who could have party status to appeal a permit for a house in Tier 3. If just 5% of those neighbors don't want a new house on the road, that could be 4,000 lawsuits capable of impeding housing construction on those Tier 3 parcels. Defending those appeals costs significant money.

And again, that doesn't count the loss of housing simply from folks not wanting to build if they have to go through Act 250.

Vermont is full of wealthy second home people who can oppose residential construction just like anyone else. And they often do not want their views to change. A restaurant at Peacefield Farm in Woodstock has been held up for four years by a wealthy neighbor who cannot even see the barn that would host the meals. I would be shocked if over a million dollars was not spent by both sides on lawyers fighting about this.

Act 250 Enforcement and Inconsistent Treatment of Barns on Farms

Please note that Act 250 is not administered even handedly. Philo Ridge Farm, Fable Farm Collective, and Cloudland Farm all operate restaurants that have no Act 250 permit. The NRB gave them each a jurisdictional opinion based on representations that they would use over 50% of their own agricultural product to qualify as exempt agriculture. Peacefield Farm in Woodstock made the exact same representation – under oath, unlike those other farms – and it was required to apply for a permit and that permit was eventually denied (twice). That's the short version.

Notably, the District Coordinator who issued the JO saying that Peacefield needed a permit was the same that said I needed a permit amendment for my mom's house. And notably, the agency once again did not defend that JO in the Environmental Court and Peacefield now can operate without a permit. If that issue had been resolved correctly (and as it had been for all the other farms), the delays and costs incurred by Peacefield would not have happened, or certainly would have ended much sooner and more efficiently.

Eventually both Fable Farm and Philo Ridge Farm faced enforcement inquiries even though they had operated for years without incident. They are still both operating and those actions failed. You should not be surprised to read that the agricultural community has not heard good things about Act 250.

My Barn Faced Worse Treatment Based on Minimal "Commercial" Activity

I too have been the victim of inconsistent and unfair treatment by the NRB with respect to my barn. When my neighbors' complaints about my mothers' house failed, they turned their attention on my actual business. One of my neighbors had hosted a birthday party in my barn a couple years prior and had rented my cabins for his out-of-town guests. Another neighbor attended that party and I saw her enjoying herself. But she didn't like my mom's house and then filed a complaint against my barn over a year after the party, complaining of a birthday party without disclosing she was a guest. The allegation was that the barn was a commercial building and should have been permitted.

The barn hosts our milking equipment for the sheep, our creamery, our brining room, our cheese cave, our farm stand, and an old hay loft where I dry and cure crops like garlic, winter squash and pumpkins, and popcorn and flint corn. It is used for agriculture 365 days per year.

She made the complaint to the District Coordinator who had issued the incorrect JO about my mom's house. He was thrilled with the possibility of revenge. He did not just pass on the complaint to the enforcement team (he is not part of the enforcement team). He also commenced a bunch of research on my barn using his state computer and communicated additional complaints to the enforcement team that had never been raised by any member of the public, including: (1) we were likely using more cow's milk from another farm and our creamery should have been permitted under Act 250 as non-agricultural (going so far as to say our website concealed our use of cow's milk in one of our four cheeses we make—a false statement), (2) that we were violating septic regulations by hosting gatherings in the barn (a licensed lodging facility is permitted 12 gatherings per year, and we likely have not held 12 gatherings in 10 years), and (3) that we had made material misrepresentations about our business and concealed the gathering space from the NRB and would likely lie about it now – urging the enforcement team to take screenshots of our website. All of this was false and inaccurate.

The one thing the District Coordinator did not research was whether any jurisdictional opinion had been issued regarding gatherings in my barn. And to be fair, it's not easy to find paperwork associated with specific parcels because the NRB cannot competently manage its paperwork. To this day, you cannot easily find all my submissions and jurisdictional opinions relating to my parcel on the Act 250 database. But had he looked hard enough, he would have realized that his predecessor issued a jurisdictional opinion expressly determining that occasional gatherings in the barn would not defeat the barn's status as agricultural.

When I responded that the NRB had already ruled that the gatherings were authorized by jurisdictional opinion, the cease and desist demands stopped and silence followed for days while the agency frantically tried to locate the jurisdictional opinion. Ultimately, they admitted that they

lost it (and the paperwork I submitted in conjunction with it), and asked me to send them copies of their own documents setting forth my legal rights and the jurisdictional limits on my property.

This is not an isolated example. When I was trying to see if Philo Ridge Farm submitted something different from Peacefield Farm that would explain the difference in treatment, I did a public records request for Philo Ridge Farm's submissions and they admitted they lost many of those too.

And I am now supposed to believe this is the agency that will fairly and competently administer location based jurisdiction over every corner of Vermont??? And develop maps with accuracy down to the 100 foot level? There is no way that this agency is up to this enormous task.

If you go through with this law, tens of thousands of Vermonters will understand what Act 250 does and how it does it—and you will very well accelerate its demise, or at least the countless reforms it needs.

Thank you for your time and consideration.