comments on your response to Libby Harris

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Sen. Bray,

Libby Harris shared your response to her with me, and I thought it would be worthwhile to respond based on my extensive and unique experience with the various regulatory areas:

(1) Regarding Lawyers and the PSB

Lawyers often specialize, and PSB proceedings are a quasi-judicial process that's unique within our state. It wouldn't surprise me to learn that most lawyers don't take on this kind of work, as it's traditionally been very limited. Did you have difficulty finding a lawyer who would work with you?

> Libby and the AHHA worked with a Bennington attorney who had no experience with the PSB. He moved to intervene for the AHHA on property issues and was denied. The expense of pursuing anything via court or the PSB caused AHHA to enter into an MOU, even though all the issues on their list were not addressed.
> Last year I worked on a case where one citizen made numerous phone calls to attorneys, pretty much everyone we could think of was called. They ended up hiring Dick Saudek and last I heard the bill was in the thousands of dollars, close to $10,000. That was for one fairly simple case, and it was withdrawn before going to technical hearing. It would have been a lot more if they had to do the full schedule with technical hearing, brief, reply brief, oral argument, comment on proposal for decision.
> The woman who did the calling reported that some lawyers said there was no point in taking any cases, the PSB approves everything and treats opposing counsel badly. The cost is a bar to hiring a lawyer, even if you can find one. I can name on one hand the number of attorneys who will represent citizens before the PSB, and the expense is guaranteed to be in the thousands of dollars even for relatively small cases.

(2) Regarding attorney aid and evidence in Act 250

In Act 250, the state does not provide attorney aid to intervenors. Act 250 also has rules of evidence, and those rules allow for the admission of not just expert testimony but also opinion and even hearsay — and it is up to the commissioners to assign a suitable weight to the value of each participants testimony. We are examining in committee the possibilities for having greater informal (non-expert) discussions as part of energy projects; this might be achieved, for instance, through pre-filing public meetings.

> In promoting the change to Act 250 for land use issues surrounding energy projects, I want to make it clear that I am not talking about using the current district commission process. I am aware of Jon Groveman's testimony (as referenced in (3) below) and disagree with his assessment. I will write more about that below. Your reference to pre-filing public meetings perpetuates the developer-driven system. If I have to sit through another developer dog and pony show, I should be paid to do so. It is torture, as there is not an opportunity to correct misinformation or engage in anything constructive. They are salesmen. Spare us, please. We need to work together and not let the developers continue to drive energy siting.
> And please do not hold out mediation at the outset as a solution. Mediation is very different from a facilitated stakeholder process.

(3) Regarding Process, Expertise, Training and Workload

Act 250 now sees about 300 applications per year. In FY2015, the PSB handled 2,238 net metering applications alone. We would have to engage in a careful assessment of whether or not the District Commissions and Natural Resources Board would be overwhelmed if required to handle the cases now sent to the PSB. Preliminary testimony from NRB chair Jon Groveman suggested

that staff would have to be doubled or tripled, and that this staff would need to be hired and trained—both of which would take a significant amount of time and cost a significant amount of money.

> Title 10, §6085(e) that grants the authority to "promote expeditious, informal, and nonadversarial resolution of issues, require the timely exchange of information concerning the application, and encourage participants to settle differences," is already in statute. VCE wants to get away from contested cases as a starting point, and move towards a stakeholder process that creates an incentive for developers, planners, towns, citizens to work together in a collaborative process in the first instance. That means not using the typical District Commission process, where each side sites at different tables facing a panel of commissioners. Instead, the idea is that the district coordinator and commissioners could serve as facilitators of the discussion. I suggest you bring in some district coordinators who actually do this work and see what they think. Ask Ed Stanak who is retired after 30 years. Or Bill Burke, Warren Coleman, there are good people to hear from who can give a much better opinion of how to change the system to enable collaboration. Lawyers are not the ones we want driving this change in the first instance. There is always a role for them later if people want to fight. I do not want to fight.
> I think the comments you got from Jon Groveman, and also what you might hear from other lawyers, reflects their perspective as lawyers. VCE is most successful when we work without lawyers in a collaborative process. I was in Montpelier on Thursday for the third meeting of the Agrimark/Cabot stakeholder process, where a group of us are working with the company to come up with solutions to their wastewater disposal problem. This dynamic really works. In my experience the biggest challenge is getting the companies/developers to the table. Once they agree, it is a whole new world. We are making what I think is real progress in our discussions with Agrimark/Cabot. Please do not let the lawyers guide the discussions about using the District Commission infrastructure at Act 250. The process at the district commissions has and can be taken over by lawyers, and that is antithetical to the intention of Act 250 initially, which was to create a place for the average Vermonter to be heard. I want us to step back from the overly-legalistic approach that has become Act 250.

Further, the Act 250 District Commissioners have no training or expertise in the energy components of an application, such as assessing a project's impacts in terms of

- the electrical system's orderly development, need, reliability, and stability;
- ratepayer impacts;
- economic benefit to the state;
- consistency with least-cost integrated planning (required by law); and
- consistency with the state's 20-year energy plan.

All of the above must be considered by the PSB.

> In almost all other states, those issues are handled by PUCs or some version of a PUC. VCE's proposal for regulatory reform leaves those issues with the PSB. I was just talking to someone in NJ the other day who is an expert on a solar case and he said the siting issues are being handled by their municipal zoning board, and that is also the case in MA, NY, NH, CT. Their PUCs handle the electrical issues. All we're trying to do here is separate out the land use siting issues and put them where they belong, in our land use process. We need a different process for Act 250 to be more collaborative and provide the opportunity for people to sit down and talk in the first instance rather than fighting. Jon's presentation relies on his lawyer's view as he has seen major contested cases develop at the district commission level. Act 250 works best on the regional level when there are no lawyers and it is open to the public and developers to work together. We can do this at much less cost than Jon is claiming. And by taking siting out of the PSB, it can focus more on the job it is supposed to be doing. Make no mistake, the PSB is backlogged to the point of absurdity. Even if they won't admit it, I see it in the case backlog I am following.

In addition, the PSB must consider (and has been required to do so since Section 248 was revised in 1988) nearly all of the Act 250 criteria.

> The reality is that the PSB is not giving full consideration to the criteria of Act 250. Just the fact that the PSB has never denied a solar project on aesthetics should be enough to make the case that they have failed in their duties to apply the Act 250 criteria.

While no development project might be considered necessary for the public good, utilities do have this potential — and thus the PSB gives due consideration to well-formed town plans, but it does not require conformance with them, as is the case under Act 250. This last difference is at the heart of the distinction between Section 248 and Act 250.

In my view this is the fundamental question to grapple with in moving land use to Act 250. Which comes first, the PSB's determination of public good or the Act 250 review? Act 250 is basically a checklist and you have to have all your permits in place to get your permit. I could see it working well to be the final permitting agency where ANR and PSB permits are brought in. But I also think this is something that needs to be fully discussed to make the most sense. My own view of this whole discussion at this time, and given the testimony you have heard from Bob Ameland and Cindy Hill, and with the net metering cap being reached, I would propose the most sensible thing to do right now is stay all development and work on this change over the next few months. But no more political appointees. It may seem brash to say it but if you put me in charge of pulling together the right people I could fix this. Keeping me in the bleacher seats and sidelined is stupid. I am not the enemy, I want to see renewable energy done right and could bring the right people to the table to flesh all this out. I do not think it can be done this session through committee, and if the current PSB regime is kept in place, we are just going to see more bad projects leading to more opposition.

(4) Regarding Appeals

Act 250 appeals are made as de novo appeals to the Environmental Division of the Superior Court, whereas PSB appeals are made as on the record appeals to the Supreme Court. We would have to make a careful assessment of the ability and suitability of using the Act 250 process for projects currently processed via Section 248. Can the courts handle the work? Are the judges trained in the aspects to be examined? Given the different rules of evidence, would new judicial rules have to be written?

VCE's regulatory reform proposal which I presented to HNRE last year as part of my testimony on H.40 and have offered to present anywhere to anyone involves creating a carrot and stick approach: we use a collaborative process at the Act 250 district commission, but if people want to fight, then the state puts up a Counsel for the Public and the developers put up Intervenor Funding, and then there is a fair fight. The lawyer and experts for the public creates the incentive to come up with better projects down below and work together. Developers are the hardest parties to bring to the table to work together. There has to be an incentive for them to choose good sites in the beginning. It is the developers who are creating the conflicts, by choosing bad sites and then digging in. The public and towns are way way behind the 8 ball in understanding what they need to do, they are constantly scrambling to catch up, they have no say in changing a site after it's proposed. The legislature must come up with some incentives for developers to work with communities.

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Back on January 12, 2015, the Senate Natural Resources and Energy Committee began working to examine Section 248 and Act 250. Our reason for taking up the issue was to gain a greater understanding of the two quasi-judicial processes with an eye toward learning what aspects of Act 250 could be incorporated into Section 248 to enhance its performance for all involved — citizens, municipalities, regional planners, and developers.

The difference as I experience it is that citizens can show up at an Act 250 hearing, they can speak and what they say will be taken into consideration. At the PSB, everything is on paper. They can never speak as themselves and have it considered. They have to participate as their own attorneys, not as themselves. They have to go to Montpelier rather than a regional office. There is no access to all the files, while Act 250 has an excellent database and anyone can go to their regional office to look at paperwork. There is a person to talk to, the district coordinator, who is there for all parties. They have enforcement, while the PSB's enforcement proceedings literally take years.

We revised Section 248 last year to make improvements, and we're assessing now how effective they have been. We are looking to make further improvements this session. I am confident we will make meaningful progress, and I am also aware that the provisions we put forward will be judged as insufficient by some parties and overly burdensome by others. We are engaged in a perpetual balancing act.

There is great confusion over what was done last year. Legislators keep telling towns they have automatic party status. They do not. They must write a letter saying they want to be parties. It was only for solar. Or was it also for wind and towers? There is confusion about that. And it is really a very small improvement, because it only applies to towns who still have to file notices of appearance, certificates of service and a cover letter in order to participate, and there is nobody to tell them how to do all that. I've never worked with towns before until the last year, because they have nobody else to turn to, and many of the projects they are responding to are on a fast track where even if they had the budget to hire a lawyer, there is not enough time. I do not understand what you mean by a balancing act? All the eggs are in the developer's basket. The towns and public have meager bread crumbs in comparison.

Some of proposed enhancements for this year address your experience directly; for instance, we've proposed creating a Public Assistance Officer at the PSB who's job it will be to make it easier for the public (and others) to participate in the 248 process. This includes providing information and explanations of the process, as well as templates for the filings applicants and intervenors might make during the process. In addition, back in 2014, we directed the PSB to create an online system for filing and tracking all

cases—the current paper-based system needs to be replaced to make the entire operation more transparent and accessible. It's unacceptable in this day and age that you would have to travel from Bennington, for instance, to examine the application files.

As I testified previously, the PAO will simply add frustration, as they will not be able to do the type of work I've been doing, and it will have a very limited function. In particular you say it will make participation easier. No it won't. Participation is a legal process requiring a full grasp of the Board's rules and statutes. As I told you recently in person, when a citizen or town walks into that PSB room without a lawyer, they are automatically giving up rights. I give people templates now. That does not enable them to effectively participate in an entirely legalist process. And in every case where I have assisted pro se parties, the legal process is abused by opposing counsel. The ePSB has been in the works for nearly 2 years, VCE participated in the workshop about it. I don't know what is taking them so long but it is totally unacceptable and Act 250 already has a decent database system.

Clearly, there is more to do.

So, I send this lengthy reply to assure you that we are working diligently on the issues you've raised, and to share some of what we've learned thus far. I am interested in hearing your further thoughts and continuing my own education on these topics of deep mutual interest — and of profound importance to the state as we make the decades-long transition from the old world of fossil-fueled generation to a new paradigm of clean renewable energy for electricity, transportation and heating.

Sincerely,
—Chris

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