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

TO: Legislative Commission on Act 250
DATE: November 30, 2018

Thank you for the opportunity to provide my comments to you in person as well as in writing. I'll be as brief as possible and I will also submit my comments to you in writing after I testify.

I have had a long and extensive involvement with Act 250, starting when I was attending Vermont Law School. In the summer of 1981 I interned for Darby Bradley at the Vermont Natural Resources Council when he was their legal counsel. Then 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 AG's office in the Environmental Division, working under Denise Johnson who was later appointed to the Supreme Court. 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 went into private practice, primarily representing citizen groups at municipal hearings and Act 250 proceedings at District Commissions and the Environmental Board and later the Environmental Court and occasionally the Vermont Supreme Court. Some of my cases involved challenging permits issued by ANR. I am now mostly retired.

I have followed this Commission's work and read many of the comments provided by the advisors as well as members of the public. I would like to provide comments today on four areas of great concern to me. I know that you have already dealt with some of these issues, but I would like to provide my perspective on some aspects of the Act 250 process (which of course affects the substance).

• **The first involves citizen participation in Act 250.** This Commission has focused more on substantive issues, which of course are critical when considering the future of Act 250 and the need to address climate change. But there does not seem to have been enough emphasis on how important citizen participation is to the effective functioning of Act 250. From the beginning, the ability of Vermont citizens to be involved in Act 250 proceedings has been instrumental to its success in raising important issues and providing invaluable information to the Commissions and seeking out the truth. In many cases, the only parties at the Act 250 hearings are the developer and sometimes state agency representatives. The District Commissions do not have their own experts to review the expert testimony and reports provided by the developers and the state, or to scrutinize the bases for the permits from other agencies such as ANR that are submitted as rebuttable presumptions. Often it is only the citizens who have an interest in a particular project that provide the expert testimony and detailed review of the development as well as of other agency permits. The importance of the role that interested citizens play in Act 250 proceedings cannot be overstated.

Neighbors to proposed developments are often accused of being "NIMBYs" as though that it is a dirty word. But the truth is that it's the NIMBYs who have played a huge role in protecting Vermont's environment. Most people are too busy to get involved in a zoning or Act 250 proceeding unless the proposed development IS in their backyard. They're the ones who have the most at stake and therefore they're the ones who do the work to make sure the boards and commissions have accurate information about a proposed development. And ironically, unless you are a neighbor affected by a proposed project (i.e. a NIMBY), you do not qualify for party status in any of these proceedings since you need to prove that you are directly affected in order to have standing to participate.

As an aside, you may not know that many years ago each regional district commission office had a natural resources advisor – I think an employee of ANR - who would review the applications and advise the commissions on the substantive natural resource issues. It's been many years since they were eliminated. In a sense, the citizens of Vermont have taken their place. But over the years it has gotten more and more difficult for affected citizens to effectively participate, for several reasons.

Which leads me to my next issue:

• **I am aware that various state agencies are proposing to make some state permits dispositive in Act 250**, so that the issuance of a permit for instance from ANR would virtually eliminate any review by Act 250 of the effect of a development on the natural resources protected by Act 250. This is an issue that has been brought up many times over the years and the reasons it has been repeatedly rejected are still sound. The primary one is that there is no meaningful public process at ANR. Interested persons may be notified, and can provide comments either orally or in writing, but there is no opportunity

for affected citizens to provide expert witnesses or cross-examine the state representatives or the developer's witnesses.

This is the fatal flaw in efforts to eliminate Act 250 review of other agencies' permits and approvals. The importance of citizen parties' right to cross-examine developers' or state agencies' witnesses to test their assumptions and conclusions cannot be emphasized enough. As has often been quoted: "In a lawsuit, the first person who speaks seems right, until someone comes forward and cross-examines." In all judicial and quasi-judicial proceedings, cross-examination is critical to determining the truth. Unless and until other state agencies are willing to hold independently-run quasi-judicial hearings with sworn witnesses and full participation by interested parties, their approvals must be subject to independent review by Act 250 commissions and participating parties.

Another important reason that permits and approvals by ANR and other state agencies should be reviewed in Act 250 is the perennial problem of political influence. The state agencies all work for the governor and they carry out the governor's policies. For instance, not all permits and approvals from ANR are necessarily based on science but sometimes they are based on a predetermined political outcome. Some of the scientists and technical staff who work there will tell you privately how they are sometimes pressured to suppress their concerns about impacts on natural resources and support a proposed development.

Review of other state agency permits by an independent Act 250 commission is critical if Act 250 is going to have any meaningful role in protecting the state's natural resources. It is already very difficult now with the rebuttable presumption for ANR permits. Raising the bar for a District Commission to overturn a state permit in Act 250 will only further reduce the Commissions' traditional and highly valuable role as independent protectors of the state's natural resources.

Giving ANR decisions deference in Act 250 is a huge mistake if the goal is better protection of the state's natural resources. The legislature should even reconsider the rebuttable presumptions that are now afforded agency permits in the Act 250 process. The legislature should determine whether deference to other agency permits is truly in the best interest of furthering the state's goals for natural resource protection.

• **Another major obstacle to meaningful citizen participation in Act 250 is the Environmental Court.** The 2005 elimination of the quasi-judicial Environmental Board and the Environmental Court's assumption of jurisdiction over Act 250 appeals has made it much more difficult for affected citizens to participate in Act 250 proceedings. Over the years at the Environmental Board the proceedings were becoming 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 8 members' time when only the chair was paid. Having represented neighbors in a number of Act 250

appeals at the E Board, and being frustrated by what I perceived to be the difficulty most 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 believed that a court would be less subject to political winds than the Board's appointments made by the governor.

But based on my experiences and observations at the Environmental Court over the years, and seeing how much it has changed the process and become a real obstacle for Vermont's citizens to effectively participate without hiring lawyers, I think it was a big mistake. Courts are too formal and rigid for lay people to be able to represent themselves, and court rules do not allow them to be represented by a member of their group who is not an attorney. Moreover, having read many of the Court's decisions, it is apparent that land use cases are more appropriately decided by more than one person but rather greatly benefit by the give and take and various perspectives of five or six or nine. During the 8 years that I staffed Environmental Board cases, I sat in on numerous deliberations of the Board members. It was always a diverse group of people with diverse points of view, and the discussions and debates were always interesting and in most cases resulted in a unanimous decision.

I've read the VNRC's recommendations for eliminating the court's jurisdiction over Act 250 appeals and instead establishing a semi-professional administrative board to hear Act 250 appeals and administer the law. I agree with their proposal and urge you to seriously consider it. As the VNRC suggested, the problems that existed at the time it was eliminated could be creatively addressed. And to reduce the political nature of the appointments, a type of panel that would vet applicants to the Environmental Board and then forward its recommendations to the governor could be established, similar to the existing judicial nominating board for judicial appointments.

• **My final comment involves the issue of so-called "grandfathering."** The pre-existing developments – particularly gravel pits and quarries – have been problematic for almost as long as Act 250 has been around. Any industrial or commercial operation that operated at some level before 1970 can continue or resume operation except if there has been a so-called "substantial change" to its operation. There are numerous former Environmental Board decisions on what constitutes a substantial change to a pre-existing development. Trying to establish the level or type of operation of an industry as of 1970 has always been difficult, for the owners and other parties alike. At this point, almost 50 years after the enactment of Act 250, it is absurd. But it's still going on. Neighbors to these industries are still required to spend years and enormous resources in litigation over what existed in 1970, regardless of the impacts on them or the environment. Elimination of this notion that any industrial or commercial enterprise that operated 50 years ago has a right to re-start or expand without any environmental review, regardless of its effect on neighbors or the environment, is long overdue.