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Sent: Thursday, February 13, 2020 9:43 AM
To: Maxine Grad <Mgrad@leg.state.vt.us>
Cc: matt chapman <matt.chapman@vermont.gov>; Jon Groveman <jgroveman@vnrc.org>; gtarrant@tgrvt.com; Ellen Czajkowski <ECzajkowski@leg.state.vt.us>; Marc Grimes <MGrimes@leg.state.vt.us>
Subject: [External] Fwd: latest draft of Act 250 bill

[External]

Maxine, I gather this bill is on its way to your committee. Representative Sheldon suggested I voice my concerns to your committee. They are laid out in the email to Representative Sheldon below. I just got off the phone with Matt Chapman, and he authorized me to say he agrees with my concerns and he will propose to your committee some language to address it. He may even agree with the language I propose at the bottom of this email.

In a nutshell, the Env'l Court judges of course are barred from ex parte contacts. Unfortunately, the latest drafts of the Act 250 bill are likely to be interpreted by the Supreme Court to allow ex parte communications about pending cases by the new hybrid Board that would replace the judges.

I am aware of two drafts of the bill, both with the same date of Feb. 11. I don't know which draft will be sent over to you. They both suffer from the same problem. One explicitly says the rules against ex parte communications apply to the District Commission -- which our Supreme Court would say means they don't apply to the Board. *Expressio unius*. The other explicitly says the APA (which includes a bar on ex parte communications) applies to the hearings conducted by hearing officers, but again does not say they apply to the Board members or District Commission members who make the actual decisions, so again our Court is likely to say that the prohibition does not apply. *Expressio unius* again.

The existing statute which ANR's Matt Chapman has told me may fix this, 10 VSA 6002, does not. 6002 says that Chapter 25 of Title 3 applies. But this is so broad that it has never been interpreted as applying the prohibition against ex parte contacts to the Act 250 process. If it were interpreted as Matt says, then the present practice by which District Coordinators meet ex parte with applicants, intervenors,, etc., and communicate ex parte with staff in the central office -- and then act as the staff for the District Commissions, and help them write their decisions, would be unlawful. So would the existing practice of District Coordinators gathering information without any adversary process (often by a series of ex parte communications) and then issuing Jurisdictional Opinions.

And the existing caselaw in our Supreme Court would have been decided differently, such as the famous or infamous Crushed Rock decision. In the Crushed Rock decision one of the claims was that the Chair of the NRB met ex parte with the Attorney General's Office to discuss the case. The Supreme Court

had no problem with that. It said that since the legislature did not make explicit that the Env'l Board is bound by the canons of judicial conduct, the canons do not apply and the alleged quasijudicial misconduct was OK. The Court did not even mention the APA or 6002.

Moreover, if Matt's interpretation were correct, the proposed new language in the bill (that applies only to the District Commissions or applies only to hearing officers) would be unnecessary. And because the Supreme Court relies on the rule that specific statutes control over the general and later language controls over older language, this specific new language (in either draft) applying specifically to District Commissions or to hearing officers, but not to Board members, would control over the general language in 6002. Board members would not be subject to the prohibition.

Language that would remedy this could be: *With the exception of minor applications, each matter shall be treated as a contested case within the meaning of the Administrative Procedure Act.*

Again, I don't know if Matt agrees with this exact wording, but he has agreed we do need to fix the problem in the draft.

I would be happy to show up and discuss this whenever your committee would like.

Thanks.

Jim

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Sent: Thursday, February 13, 2020 3:28:14 AM
Subject: latest draft of Act 250 bill

Representative Sheldon, Attorney Czakowski, Matt, Jon and Gerry --

I just saw the latest draft of the Act 250 bill.

The latest draft bill does not contain any prohibition on ex parte contacts by District Commissioners or Board members who are decisionmakers. It says only that the "hearings" conducted by "the hearing officer" shall be governed by the Administrative Procedure Act. Regrettably, the creates the model we have elsewhere of hearing officers who make proposed decisions for a gubernatorial appointee who then has the final say without any prohibition against lobbying that person or those persons by the Governor's office, the Chair of House Natural Resources, or anyone else. Its sad but true but there is a tradition of the Governor meeting with, or picking up the phone and calling members of the PUC, and even judges, to discuss pending cases. Judges know they need to say they can't talk. If we are going to replace the Env'tl Court judges with the new panel, this prohibition must be explicit in the bill.

The bill makes clear that the new board has all the powers of a court. That is an awesome power. It includes the power to hold litigants in contempt. The Board can impose fines and even a jail sentence on litigants, whether they are pro se litigants, lawyers, or represented parties. It does not require the Board to go to a Superior Court judge for an order that someone be found in violation of an order and held in contempt. I suspect that it is a denial of due process and fundamental fairness to grant that kind of power to a board that is not governed by the judicial canons -- but, regardless of the constitutionality of the draft, its just going in the wrong direction for the people of Vermont.

As the bill stands now, in my personal opinion, its a step backwards.

Jim

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