LIAM L. MURPHY
MSK ATTORNEYS

COMMENTS REGARDING "ON THE RECORD" APPEALS FROM THE DISTRICT COMMISSIONS TO ENVIRONMENTAL COURT

I appreciate the Committee's willingness to explore options to make the Act 250 process open, fair and efficient. While I believe that there are issues with "on the record" appeals, most of them can be addressed in whatever legislation is passed.

1. Relaxed Rules of Evidence to allow public participation

   Since the hearing will be on the record, many attorneys will assert that it will be necessary to impose Rules of Evidence to keep out hearsay, unsupported allegations, etc. and ask that the Rules of Evidence used in a courtroom be applied by the District Commission. There have been discussions of hiring attorneys for the Commissions to rule on evidentiary issues.

   I believe that this is a serious mistake. If lawyers are involved and courtroom-type evidentiary rules are applied, the hearings will be bogged down in technicalities and the average person will be stymied in having his/her say before the commission.

   I propose that the Commission be directed to let witnesses have their say with the most informal rules of evidence—"evidence or testimony upon which an ordinary person would reasonably rely"—and allow the Commission, and the Court on appeal, to give the evidence the appropriate weight in light of the type of evidence admitted.

   It is important to let an average person testify and give evidence even it might be excluded if the hearing were a trial. The Rules of Evidence were designed to ensure that juries do not hear inappropriate or unreliable testimony which might be given undue weight by laymen. I am confident that the Commission members and an appellate court can sort out the evidence. Let whatever folks want to say be heard by the Commission and let the Commission members, and the judge if there is an appeal, weigh the evidence based upon its reliability and in the context of the other evidence.

2. A Good Transcript to allow proper review on the record.

   One of the major issues with an on the record appeal is the appellate body's ability to review the testimony. First, often the taping of a hearing is by a single recorder in the middle of the hearing table and voices from the around the room cannot be heard on the tape or cannot be transcribed from the tape.

   Establishing a good, clear transcript will be crucial. The hearing should be either recorded by a stenographer or by recording equipment that makes a clear recording which can then be transcribed after the hearing in the event of an appeal. This cost could be imposed on

the Applicant. Further, the Commission will need to run the hearing in a manner to ensure that the testimony is clear as to what the witness is referring to—such as when pointing to a plan, describing the plan and the area being discussed.

3. The Appellate Court should be given a limited opportunity to supplement the record.

One of the major limitations of on the record review is that the Commission might fail to obtain testimony or address one of the necessary findings required to make a decision. Often faced with the absence of evidence to review (because the issue was not addressed), the appellate court may have no option but to remand the matter back to the lower tribunal to take further evidence.

Second, another limitation of an on the record review is that technical or complex issues may need further explanation or supplementation in order to make a fair decision. Again, in such cases the appellate court may have no option but to remand the matter back to the lower tribunal to take further evidence.

Third, sometimes it is clear that the lower tribunal relied on some evidence not properly entered into the record. Again, in such cases the appellate court may have no option but to remand the matter back to the lower tribunal to take further evidence.

Each of these scenarios results in significant delays. Therefore, I suggest that the reviewing court be given a limited opportunity to supplement the record in limited circumstances in order to avoid the necessity of a remand. This process has been undertaken by Federal Courts in a number of situations, such as review of appeals under the National Environmental Policy Act—see attached memo written by my law partner A. J. LaRosa.

I would suggest that while the appeal would be on the record, that the appellate court be given the right to request parties to supplement the record by means of briefs, affidavits, or live testimony in the following circumstances. These grounds are based upon the holding in *Fence Creek Cattle Co. v. U.S. Forest Serv.*, 602 F.3d 1125, 1131 (9th Cir.2010).

The appellate court would be permitted to supplement the record if:

> (1) supplementation is necessary if the commission failed to consider all necessary elements of the applicable criteria and or failed to reasonably explain its decision; (2) the agency relied on documents not in the record; (3) supplementation is needed to explain technical terms or complex subjects; or (4) plaintiffs have shown bad faith on the part of any party.

Fence Creek Cattle Co., F.3d at 1131.

Allowing such supplementation in limited circumstances would allow a reviewing court to address errors or omissions in the record without the necessity of remanding the entire case and creating additional extensive delays.

Finally, such supplementation makes sense in those situations when the Environmental Court is hearing an appeal on a related municipal land use permit so that the Act 250 on the record appeal can be coordinated with the evidence and testimony provided in a de novo appeal of the related municipal permit appeal.

From A.J. LaRosa

Re: Supplementing the record in a NEPAS appeal

MEMORANDUM

In general, NEPA appeals are "on-the-record." However, courts have stated that there are multiple reasons to permit re-opening, supplementing or augmenting that record. Generally, there are fairly clear grounds when supplementation is allowed: "(1) supplementation is necessary to determine if the agency has considered all factors and explained its decision; (2) the agency relied on documents not in the record; (3) supplementation is needed to explain technical terms or complex subjects; or (4) plaintiffs have shown bad faith on the part of the agency." *Fence Creek Cattle Co. v. U.S. Forest Serv.,* 602 F.3d 1125, 1131 (9th Cir.2010).

This has been expanded to also allow hearings and discovery when there is a failure to adequately address an issue. It is the "proving the negative" problem. I.e. if the allegation is the Agency didn't consider a certain issue, the issue, and documents/facts/discussion relating to it, will not appear in the record. As explained in *Como-Falcon Coal., Inc. v. U.S. Dep't of Labor*, 465 F. Supp. 850, 856 (D. Minn. 1978), *aff'd sub nom. Como-Falcon Cmty. Coal., Inc. v. U.S. Dep't of Labor*, 609 F.2d 342 (8th Cir. 1979) the ignorance of an issue presents a problem when reviewing a record as the deficiency will not be seen on the face of the record. The answer is to allow for supplementation and a challenge to the sufficiency of the record.

> Besides contending erroneously that judicial review of their negative assessment of environmental impact is constricted, the federal defendants maintain that the scope of this Court's review is limited to consideration of the administrative record. While in a sense it is true that the question before the Court is the sufficiency of the administrative record, it by no means follows that the question may be resolved on the basis of the administrative record alone.
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> As stated in *County of Suffolk v. Secretary of the Interior*, 562 F.2d 1368, 1384 (2d Cir. 1977), Cert. denied, 434 U.S. 1064, 98 S.Ct. 1238, 55 L.Ed.2d 764 (1978):
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> Although the focus of judicial inquiry in the ordinary suit challenging nonadjudicatory, nonrulemaking agency action is whether, Given the information available to the decision-maker at the time, his decision was arbitrary or capricious, and for this purpose "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court", . . ., in NEPA cases, by contrast, a primary function of the court is to insure that the information available to the decision-maker includes an adequate discussion of environmental effects and alternatives, . . ., which can sometimes be determined only by looking outside the administrative record to see what the agency may have ignored.
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> . . . Generally, . . . allegations that an EIS has neglected to mention a serious environmental consequence, failed adequately to discuss some reasonable alternative, or otherwise swept "stubborn problems or serious criticism . . . under the rug," . . ., raise issues sufficiently important to permit the introduction of new evidence in the district court,

> including expert testimony with respect to technical matters, both in challenges to the sufficiency of an environmental impact statement and in suits attacking an agency determination that no such statement is necessary. (emphasis in original). *See also, Maryland-National Capital Park & Planning Comm'n v. United States Postal Serv*., 159 U.S.App.D.C. 170, 487 F.2d 1029, 1041 & n. 13 (1973). **If the federal agency has overlooked or inadequately assessed a possible adverse environmental impact, it is unlikely that the deficiency will be apparent from examination of the record itself. Given the scheme of NEPA and the scrutiny with which the judiciary must eye negative assessments of environmental impact, a reviewing court cannot be restricted to the administrative record**.

Como-Falcon Coal., Inc. v. U.S. Dep't of Labor, 465 F. Supp. 850, 856 (D. Minn. 1978)(emphasis added); *see also Portland Audubon Socy. v. Endangered Species Comm.,* 984 F.2d 1534, 1548 (9th Cir.1993), when a party claims that the administrative record presented by the agency is incomplete—that is, the agency failed to include documents that should have been included in the first place—the party must move to supplement the record if it wants the court to consider those documents. *See also Camp v. Pitts,* 411 U.S. 138, 142–43, 93 S.Ct. 1241, 36 L.Ed.2d 106 (1973).

Now, the standard for supplementation in NEPA is pretty high. Probably too high for Act 250 review. But the framework makes sense. Generally, the idea is that parties have the opportunity to ask the Court to allow testimony to explain the record and to allow supplementation to provide documents addressing issues that were not, but should have been, considered. The Court can also do this on its own.

There would have to be discovery at the Act 250 level for this to be fair however, and/or a provision to ask the Court to open limited discovery on appeal. I think a party would have to make a showing that discovery is relevant, narrowly tailored and necessary for them to properly present their case. Right now I'm thinking of Criterion 8 – where mitigation measures have to have been considered. Without discovery asking what mitigation measures were considered, there can't be a full and fair discussion of this Criterion.