April 2, 2019

Testimony Before the Vermont House Natural Resources, Fish and Wildlife Committee

Good Afternoon. My name is William Burke. It has been my privilege to serve as your Act 250 District Coordinator for District 1 in Rutland County for 26 years. In that time, if I have learned nothing else, I've learned that Vermont has been blessed with a series of citizen volunteers – the Act 250 District Commissioners – who have dedicated themselves to the difficult task of evaluating each case on its merits, sometimes under difficult circumstances, and that the citizens of the state of Vermont very much appreciate the opportunity to participate in the Act 250 process in front of these Commissioners. I thank you so much for your invitation to share with you my experiences and concerns as you embark on the difficult task of addressing the next 50 years of Act 250. In my invitation to testify today, Rep. Sheldon asked that I prepare to present about my experiences as the District Coordinator in Rutland County for the NRB. For the record, my remarks today are made as an active duty District Coordinator and my testimony is mine alone and is not intended to represent any official policy or position of the NRB.

I have two principal observations that I'd like to share with you today – first, the fundamental integrity of the Act 250 process, and second, the slate quarry exemption - and I do hope that you will allow me to read my statement as portions of it require precision. Then I'll be happy to answer any questions you may have.

I. Integrity of the Process

Preface: It has always been my belief that my duty as an Act 250 District Coordinator is to provide the best advice and service to both the applicants and to the citizenry – in equal measure. And over the years, I've endeavored to do this without fear or favor: including the day the then President Pro Tem of the Vermont Senate, the late John Bloomer, came into my office seeking assistance in the Act 250 process to fight a proposed 130' tall communications tower adjacent to his home on Boardman Hill in West Rutland. That tower was ultimately denied on aesthetic grounds. I did the same recently when Kim Gaschel and her husband Josh contacted me in the hope that they could obtain relief in the Act 250 process for impacts from a slate quarrier adjacent to their home in West Pawlet. From prior testimony, you are aware of the answer that I was obligated to deliver to the Gaschel family.

So, about the integrity of the Act 250 process:

The legislature has mandated within the Act 250 statute that the public trust be preserved and protected by operation of 10 V.S.A. § 6031 captioned "Ethical Standards". Among other provisions, the law states that:

- The Chair and each member shall conduct the affairs of his or her office in such a manner as to instill public trust and confidence and shall take all reasonable steps to avoid any action or circumstance that might result in any one of the following:

(A) undermining his or her independence or impartiality of action;

(B) taking official action on the basis of unfair considerations;

(C) giving preferential treatment to any private interest on the basis of unfair considerations; or

(F) adversely affecting the confidence of the public in the integrity of the District Commission.

With that law in mind, I note that the Committee's draft bill proposes to replace the Natural Resources Board (NRB) with a Vermont Environmental Review Board, which would hear appeals from the District Commissions and the Agency of Natural Resources in addition to the NRB's current duties. The Environmental Division of the Superior Court would continue to hear enforcement and local zoning appeals.

I urge you to adopt the Vermont Environmental Review Board as it strikes at the heart of the integrity of the public process that is Act 250. The process, as I feel obligated to share with you, is presently subject to undue political influence. How did this come to pass, and what are its manifestations?

In 2005, the former citizen based Environmental Board was replaced with the Natural Resources Board, and an Environmental Court was created to shift the appellate function on Act 250 appeals from that Board to a newly constituted Environmental Court. When that happened, the ethical, if not the legal, restrictions on direct communications between the Governor's office and the Act 250 program were undermined..

Let me put it another way. Act 250 is what is known as a "quasi-judicial" process, meaning that it is, effectively, a hybrid of the executive, legislative and judicial branches of our government. Once the application process is initiated and, if necessary, a public hearing process is complete a decision emerges at the District level based upon the statute, the Act 250 rules and the Administrative Procedures Act. That decision may or may not be appealed to the appellate body empowered by the legislature to hear such appeals. Currently, that is the E Court. In court, this appellate body is expressly protected from ex parte communications by operation of the Administrative Procedures Act, meaning that, with respect to the pending case, the court may have no direct discussions regarding the potential outcome of the case outside of the formal appellate hearing process. Lawyers call this the Chinese Wall.

However, as a perhaps unintended but unfortunate consequence of this shift in venue for appeals from the Environmental Board to the E Court, the Chinese Wall that previously existed between the Governor's office and the Environmental Board has been effectively removed, resulting in routine communications between the Governor's Office and the Chair of the Natural Resources Board. It is my understanding that they meet weekly. That change has had direct impacts upon the integrity of the Act 250 process.

How do I know this to be true?

I have direct experience with respect to two examples.

Example #1:

In 2015, my Commission received an application from the Mountain Top Inn seeking approval of a 34 unit stand-alone satellite hotel building at its Act 250 permitted resort facility in Chittenden, Vermont. During the course of that review, the citizenry alleged numerous violations by the Inn, all of which were subject to subsequent investigation and a settlement and payment of fines arranged between the Inn and the NRB. Between 2015 and 2016, it became apparent from interested neighbors that, in addition to the violations previously mentioned, that the Inn had created a formal home rental program, directly tied by contract to 26 participating homeowners, to effectively double the size of the resort's rental inventory. I informed the Board that I expected receipt of a request and would be issuing a Jurisdictional Opinion on whether or not the routine, contracted use of adjacent homes to expand the rental capacity of the resort constituted a material change under the Act 250 rules and therefore required the review and approval of the District Commission in a permit amendment proceeding. On the early morning of December 12, 2017, I received a phone call from the Chair of the Board, wherein she informed me that Jay Pershing Johnson, the Governor's counsel, had directed her to settle all matters associated with Mountain Top, and therefore she (and the NRB) would not be supporting my jurisdictional opinion should it be issued and appealed to the E-Court. The Chair went on to add, and I quote: "I could lose my job over this." I didn't question that statement at the time and don't question it now. I also believe that that sort of pressure fails to conform with the APA and with Act 250's ethical requirements – in any case, it's entirely unfair to whomever sits at the head of the Board. In the course of that call, I made notes, which I have preserved and will make available to the Committee if requested to do so. On February 23, 2017, I issued Jurisdictional Opinion #1-391 wherein I concluded that the regular contracted use of up to 26 private residences - more than doubling the permitted capacity of approximately 32 rooms in the Inn's Lodge – constituted a material change under the rules with the potential for significant new adverse impacts such as traffic, water supplies and sewage disposal and therefore required an Act 250 permit amendment to continue to operate in that manner. The Mountain Top Inn, you should know, is situated immediately adjacent to the largely undeveloped Chittenden Reservoir – considered a treasure by the local public who recreates in it. I should note, as well, that the primary septic disposal field for the resort, permitted to treat up to 9,000 gallons a day, went into

complete failure in August of 2015 requiring what was effectively an emergency replacement. It was reported to me by the Regional Engineer, that it was the fourth such failure of the system in the years that he had overseen the wastewater permitting for the system.

When my opinion was subsequently appealed by Mountain Top to the E-Court, the NRB who is, by statute, a party to all Act 250 appeals, did not participate. When the E-Court in its decision on appeal, overruled the Opinion, the matter was docketed for appeal to the Vermont Supreme Court, and the NRB has recently informed counsel for the citizen appellant and counsel for Mountain Top that the NRB would not be participating in front of the Supreme Court on this case. For the NRB to decline to participate in a fundamental and wide-reaching jurisdictional issue begs for further explanation and I feel obligated to bring it to the Committee's attention.

Example #2:

In November of 2016, the District #2 Commission was dealing with a complex master planning case involving an out-of-state developer's plans to repurpose the former Haystack Ski Area in Wilmington by converting it into an exclusive, members-only luxury resort. On November 18, 2016 I received a request from then Executive Director Lou Borie, to assist the coordinator and Commission on the case. I agreed to do so immediately. After the weekend, I received an email from Mr. Borie informing me that "all oral and written communication to the applicant, parties, and the commission should continue to come from the Coordinator assigned to District 2." In other words, I was barred from any contact with the Commission, applicant or parties. While I had assisted other districts in many previous cases, I had never received such a restriction on my ability to do the Coordinator's job. It was evident on its face, but left unspoken, that my assignment in this case was to act as a ghost writer - presumably to expedite the Commission decision for this applicant. I immediately explained to Mr. Borie that I found myself unable to work under these restrictions and that the Board would have to find someone else. In response, I was ordered on December 2nd to report to the Board Office to receive a formal "Written Reprimand" for conduct deemed by Mr. Borie and approved by the Board Chair as "unprofessional and inappropriate." That letter of reprimand is dated December 7, 2016 and, should the Committee desire to read it, I will make it available to you. Given my understanding from the Chair of the Natural Resources Board and others that the Chair had had direct meetings or discussions with the applicant, Jim Barnes, outside of the hearing process, I concluded that this special request was clearly intended to benefit Mr. Barnes by accelerating the issuance of a decision. On December 8th, I informed the NRB that, having considered the limited resources of the NRB, the Department of Human Resources and the State Employee's Union, I would spare everyone the expense of a grievance or appeal and would accept the letter of reprimand.

In summary, restoring an Environmental Review Board's appellate function and rebuilding the "Chinese Wall" between the Governor's office and the NRB would serve to restore and to protect the integrity of the Act 250 process, and I urge you to do so.

II. The Slate Quarry Exemption

Because nearly 100% of Vermont's slate quarries are located in Rutland County, it was my job to develop and administer the slate quarry exemption that the legislature implemented in 1995. I first developed a proposed registration application that included detailed documentation of the history and physical location of each hole on the ground. I was informed by then Executive Director Michael Zahner that the proposed registration was deemed unduly burdensome by the industry, and a pro forma registration was substituted. As mandated by law, I then issued 118 jurisdictional opinions which, in the aggregate, probably total between 300 and 400 quarry holes. The explanation for that difference is that a single registration for a single tract can involve the exemption of multiple quarry holes – in some cases up to 7. This exemption is unique to slate. All other extractive industries in Vermont are subject to the ordinary rules of Act 250 jurisdiction.

I urge you to pursue repeal of the special interest exemption. It is, in my view, bad for the environment, bad for impacted citizens and therefore bad public policy.

You've heard from a number of responsible slate quarry owners. I respect the hard and sometimes dangerous work involved in producing the product. Over the years, I've had very few complaints regarding any of those operators.

The Committee has heard testimony that the public lacks access to adequate notice of the particulars on registered quarries. I agree with that and have included a sample of some particulary weak slate quarry registration drawings as an illustration of part of that problem.

But more importantly, I think that broader public notice that there is, effectively, no remedy, no recourse in the event that adjoining or neighboring properties are unduly impacted is not a meaningful way to approach the problem.

The fundamental problem with the status quo is that it dooms the slate belt and the citizens who reside in or near it to a nearly lawless environment. The problem rests not with the responsible operators – whom you have heard from – but the potential for the next 50 years and beyond that literally anyone else – including rogue operators or "cowboys" will be free to reopen any of those 400 holes at any time in the future. With effectively no state regulation. That leaves the land and its inhabitants at undue risk. Ms. Gaschel and her family testified that that is simply not fair. And she's right. It's not the Vermont way.

With respect to the potential for rogue operators, I think you'd find agreement with the responsible operators that the potential for irresponsible operators is real. From times past, they know who I'm talking about. I experienced it personally when I asserted Act 250 jurisdiction over a quarry in West Pawlet back before the exemption was implemented, and, at the conclusion of my site visit, was told by the operator to "watch

my rear view mirror" as I drove back to Rutland. The operators and I could tell you other stories but we don't have the time today.

So what is the remedy? How can we as a state correct this error? Do we simply repeal the exemption and require all quarries and their operators to go through the Act 250 process? I think that it is entirely possible to fashion legislation that would restore Act 250 jurisdiction to this industry without undue financial burden to those currently working active quarries. The process would go something like this: a committee made up of operators and interested citizens, working with a facilitator, could develop a set of stipulated permit conditions related to operations, and what to do when or if a problem develops. All operating quarries would be required to file an application, and, if proposing to abide by the conditions, the legislature could mandate that those applications be noticed publicly as "minors" – meaning that there would be no public hearing unless one was requested by an impacted member of the public. If we had to have a hearing, we'd have one, and the perceived problems would be addressed. If no hearing was requested within 15 days, the permit would issue and be legally final provided that the operator abided by the conditions. For those who come later, in the future, and propose to re-open an old quarry, they would be subject to the same requirements that all other extraction industries are subject to: the regular Act 250 process.

I would be happy to participate, if asked to do so by the Chair of the NRB, in a project to work with the operators and citizenry to fashion this sort of remedial process. It's not a perfect solution – we still have the very difficult issue of site reclamation to deal with – but it would go a long way to restore a sense of fair play to the citizens of Western Rutland County.

III. Closing

I'd like to close my testimony on a positive note. The Chair of the Natural Resources Board and her leadership team in Montpelier have made great advances in making the application process more efficient electronically, and making each application more readily accessible to the public. These successes deserve recognition and could go a long way toward advancing the Governor's interest in transparency. I think that the creation of a professional or semi-professional Environmental Review Board to hear appeals, and the repeal of the slate exemption would further the goals of open government and a fair playing field for the citizenry. Thank you so much for giving me the opportunity to share this with you today and I wish you all well in the difficult task ahead.