

Local Act 250 Review -- Newport

(1) In accordance with Title 24 V.S.A. 4420, the Development Review Board is hereby authorized to undertake local Act 250 review of municipal impacts caused by a “development” and/or “subdivision,” as such terms are defined in Title 10 V.S.A. Chapter 151.

(2) With respect to such “developments” and/or “subdivisions”, the Development Review Board, pursuant to the procedures established under Title 24 V.S.A. Chapter 36 (the Municipal Administrative Procedures Act), shall hear applications for local Act 250 review of municipal impacts at a duly warned public hearing.

(3) All applicants for Act 250 permits for such “developments” and/or “subdivisions” located within the City of Newport shall go through this review process, unless ALL of the following apply:

(A) The applicant can establish to the satisfaction of the Development Review Board that the applicant relied on a determination by the Natural Resource Board’s local district coordinator that Act 250 jurisdiction did not apply to the development and/or subdivision in question and, based upon that reliance, the applicant obtained local permits without complying with the requirement for local Act 250 review.

(B) The Natural Resource Board’s local district coordinator’s jurisdictional ruling was later reconsidered or overturned on appeal, with the result that Act 250 jurisdiction does apply to the “development” and/or “subdivision” in question.

(C) The Development Review Board waives its local Act 250 review jurisdiction in the interest of fairness to the applicant.

(4) Determinations by the Development Review Board regarding whether or not to waive its local Act 250 review jurisdiction shall not be subject to review.

(5) At the Development Review Board’s local Act 250 review proceedings, the applicant shall provide, at the minimum, all of the information relating to Act 250 Criteria 6, 7, and 10 requested in the Act 250 Application Forms and demonstrate to the satisfaction of the Development Review Board that the proposed “development” and/or “subdivision”:

(A) Will not cause an unreasonable burden on the ability of the City to provide educational services (Act 250 Criterion 6).

(B) Will not cause an unreasonable burden on the ability of the City to provide municipal or governmental services (Act 250 Criterion 7).

(C) Is in conformance with the duly adopted City Plan (Act 250 Criterion 10).

VERMONT **GENERAL ASSEMBLY**

The Vermont Statutes Online

Title 24 : Municipal And County Government

Chapter 117 : Municipal And Regional Planning And Development

Subchapter 007 : Bylaws

§ 4420. Local act 250 review of municipal impacts

(a) This section shall apply to any municipality in which all of the following have taken place, either at the direction of the legislative body or pursuant to a vote of the municipality's voters at a duly warned municipal meeting considering the question:

(1) The criteria specified in this section have been adopted in the appropriate bylaws authorized under this chapter.

(2) The municipality's plan has been duly adopted under the provisions of this chapter.

(3) The municipality has adopted zoning bylaws and subdivision bylaws, either separately or incorporated into one unified development bylaw.

(4) The municipality has adopted, for purposes of this section, the municipal administrative procedure act established in chapter 36 of this title.

(5) A development review board has been created and has been authorized to undertake local Act 250 review of municipal impacts caused by a development or subdivision, or both, as the terms "development" and "subdivision" are defined in 10 V.S.A. chapter 151.

(b)(1) With respect to developments or subdivisions to which this section applies, the development review board, pursuant to the procedures established in chapter 36 of this title, shall hear such applications as meet the criteria set forth in the bylaws with respect to size or impact, or both, for local Act 250 review of municipal impacts. Once a municipality has determined to conduct reviews under this section, all applicants meeting such criteria for Act 250 permits for developments or subdivisions located within the municipality shall go through this process, unless all the following apply:

(A) The applicant can establish to the satisfaction of the development review board that the applicant relied on a determination by the natural resource board's local district coordinator that Act 250 jurisdiction did not apply to the development or subdivision in question, and based upon that reliance, the applicant obtained local permits without complying with this section.

(B) The natural resource board's local district coordinator's jurisdictional ruling was later reconsidered or overturned on appeal, with the result that Act 250 jurisdiction does apply to the development or subdivision in question.

(C) The development review board waives its jurisdiction under this section in the

interest of fairness to the applicant.

(2) Determinations by the development review board regarding whether to waive jurisdiction under this subsection shall not be subject to review.

(c) In proceedings under this section, the applicant shall demonstrate that the proposed development or subdivision:

(1) Will not cause an unreasonable burden on the ability of the municipality to provide educational services.

(2) Will not cause an unreasonable burden on the ability of the municipality to provide municipal or governmental services.

(3) Is in conformance with the plan of the municipality adopted in accordance with this chapter.

(d) A violation of the provisions of this section shall be subject to enforcement as a violation of this chapter. (Added 2003, No. 115 (Adj. Sess.), § 95.)

VERMONT **GENERAL ASSEMBLY**

The Vermont Statutes Online

Title 24: Municipal And County Government

Chapter 36: Municipal Administrative Procedure Act

§ 1201. Definitions

As used in this chapter:

(1) "Contested hearing" means one of the following:

(A) A case in which an applicant for a land use permit under 10 V.S.A. chapter 151 is required to obtain local Act 250 review of municipal impacts by a municipality that has taken steps required under section 4420 of this title to allow it to conduct that local review.

(B) A hearing, under chapter 117 of this title, which will be subject to review on the record, as determined under procedures established in that chapter.

(C) A hearing which a provision of law requires to be heard according to procedures established in this chapter.

(D) A hearing by a municipal body which is not required by law to be conducted according to procedures established in this chapter, but which the municipality elects to conduct in accordance with this chapter.

(2) "Directly or indirectly interested" means a financial or personal involvement in the contested hearing or with any party.

(3) "Local board" means the entity authorized to conduct a contested hearing.

(4) "Party," for purposes of proceedings under chapter 117 of this title, other than those related to local Act 250 review of municipal impacts, means "interested person," as defined by subsection 4465(b) of this title. "Party," for purposes of local Act 250 review of municipal impacts, means a person whose interests, under relevant provisions of 10 V.S.A. § 6086(a) being reviewed at the municipal level, may be affected by a proposed development or subdivision, as those terms are defined in 10 V.S.A. chapter 151. "Party" for purposes of other proceedings under this chapter, shall have the meaning established under statutes controlling those proceedings. (Added 1993, No. 232 (Adj. Sess.), § 44, eff. March 15, 1995; amended 2003, No. 115 (Adj. Sess.), § 76, eff. Jan. 31, 2005.)

§ 1202. Application

(a) This chapter shall be used by local boards conducting contested hearings, where required by law, and may be used by local boards conducting contested hearings, even where not required by law. Local determinations to use this chapter, unless otherwise provided by law, shall be made by majority vote of those voting at a duly warned special or

annual municipal meeting, or may be made on behalf of the municipality by the legislative body.

(b) This chapter creates only procedural rights and imposes only procedural duties. They are in addition to those created and imposed by other statutes.

(c) This chapter provides the minimum due process rights of parties in contested hearings. A local board may grant additional rights to parties so long as the rights of other parties are not substantially prejudiced.

(d) A local board may adopt additional procedural rules not inconsistent with this chapter governing its hearings. The ordinance adoption process established by chapter 59 of this title shall be used for this purpose. (Added 1993, No. 232 (Adj. Sess.), § 44, eff. March 15, 1995.)

§ 1203. Conflicts of interest

Local boards shall comply with the provisions of 12 V.S.A. § 61(a) when they conduct contested hearings and make findings under this chapter. For purposes of this section, prohibitions referring to those within the fourth degree of consanguinity or affinity shall refer to the person's spouse, as well as to the person's and the spouse's: parent, child, brother, sister, grandparent, or grandchild. (Added 1993, No. 232 (Adj. Sess.), § 44, eff. March 15, 1995.)

§ 1204. Notice

(a) Initial public notice of any hearing under this chapter shall be provided in accordance with applicable statutes. All parties and interested persons shall be given an opportunity for hearing after reasonable notice.

(b) At any hearing held under this chapter, opportunity shall be given to all parties to respond and present evidence and argument on all issues involved.

(c) If a hearing is to reconvene at a later date, it shall be deemed sufficient to constitute proper notice of that later session, if an announcement made before adjournment of the previous session of the hearing specifies the time, date and place of that later session. (Added 1993, No. 232 (Adj. Sess.), § 44, eff. March 15, 1995.)

§ 1205. Procedure at hearing

(a) The chair or vice-chair of the local board shall preside at the hearing. If neither is available, the board shall elect a temporary chair.

(b) The presiding officer may conduct all or part of the hearing by telephone, television, or other electronic means, if each participant in the hearing has an opportunity to participate in, hear, and, if technically feasible, to see the entire proceeding as it is taking place.

(c) The presiding officer shall cause the proceeding to be recorded. (Added 1993, No. 232 (Adj. Sess.), § 44, eff. March 15, 1995.)

§ 1206. Evidence

(a) All testimony of parties and witnesses must be made under oath or affirmation.

(b) Irrelevant, immaterial or unduly repetitious evidence shall be excluded. The rules of evidence as applied in civil cases in the superior courts of this state shall be followed. When necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible under those rules may be admitted if it is of a type commonly relied upon by reasonably prudent people in the conduct of their affairs.

(c) When a hearing will be expedited and the interests of the parties will not be prejudiced substantially, any part of the evidence may be received in written form, to expedite the presentation of direct testimony of a witness, provided the witness is available for direct testimony and cross-examination at the hearing on this evidence.

(d) Documentary evidence may be received in the form of copies or excerpts, if the original is not readily available. Upon request, parties shall be given an opportunity to compare the copy with the original. (Added 1993, No. 232 (Adj. Sess.), § 44, eff. March 15, 1995.)

§ 1207. Ex parte communications

(a) A presiding officer shall not communicate, directly or indirectly, with any party, party's representative, party's counsel, or any person interested in the outcome of the proceeding, on any issue in the proceeding, while the proceeding is pending, without notice and opportunity for all parties to participate.

(b) No other members of a local board sitting in a contested hearing shall communicate on any issue in the proceeding, directly or indirectly, with any party, party's representative, party's counsel, or any person interested in the outcome of the proceeding, while the proceeding is pending.

(c) A presiding officer who receives an ex parte communication on any issue relating to the proceeding and a member who receives any ex parte communication shall place on the record all written communications received, all written responses to those communications, and a memorandum stating the substance of all oral communications received, all responses made, and the identity of each person making the ex parte communication. (Added 1993, No. 232 (Adj. Sess.), § 44, eff. March 15, 1995.)

§ 1208. Qualification of members

(a) Members of a local board in a contested hearing shall not participate in the decision unless they have heard all testimony and reviewed all other evidence submitted for the

board's decision.

(b) Members who have not attended every session of the board in a contested hearing may participate in the decision if they have listened to the recording of the testimony they have missed (or read transcripts of this testimony) and reviewed all exhibits and other evidence, prior to deliberation. (Added 1993, No. 232 (Adj. Sess.), § 44, eff. March 15, 1995.)

§ 1209. Decisions

(a) A final decision in a contested hearing shall be in writing and shall separately state findings of fact and conclusions of law.

(b) Findings of fact shall explicitly and concisely restate the underlying facts that support the decision. They shall be based exclusively on evidence of the record in the contested hearing.

(c) Conclusions of law shall be based on the findings of fact.

(d) The final decision in any case involving local Act 250 review of municipal impacts shall include notice that it constitutes a rebuttable presumption under the provisions of 10 V.S.A. chapter 151, and notice that presumption may be overcome in proceedings under 10 V.S.A. chapter 151.

(e) The presiding officer shall cause copies of the decision to be delivered to each party.

(f) Transcriptions of the proceedings of contested hearings shall be made upon the request and upon payment of the reasonable costs of transcription by any party. (Added 1993, No. 232 (Adj. Sess.), § 44, eff. March 15, 1995.)

§ 1210. Appeals

Appeals under this chapter shall be taken in the manner established for the underlying proceedings to which this chapter is applied. (Added 1993, No. 232 (Adj. Sess.), § 44, eff. March 15, 1995.)

Municipalities may choose to participate in Environmental Court proceedings to defend the AMP's decision, or may choose not to participate and instead allow the Environmental Court to address the issues raised in the appeal. As discussed below, there are limited circumstances when the legislative body has standing to appeal a decision of an AMP.

Finally, local officials should be aware that the Environmental Court is increasingly turning to mediation to resolve cases before them. Parties to a local proceeding (including the municipality) may wish to consider involving a mediator in order to resolve local land use disputes. For more information on mediation, contact the Environmental Court at (802)828-1660 or go to www.VermontJudiciary.org

Appeals in Environmental Court are heard by the judges as if there were no proceeding at the municipal level; this is called a de novo appeal.

3. The Role of the Legislative Body in the Appeal Process

When an administrative officer's decision is appealed, the appeal is heard by the AMP. The legislative body's role is minimal at this point, and primarily focuses on clarifying expectations for all involved, including the municipal attorney. The legislative body may have to coordinate with the municipal attorney to clarify who the client is and define the scope of the attorney's services.

When a case is appealed from the appropriate municipal panel to the Environmental Court, the AMP's role ends. It has no authority to appeal, to participate in an appeal, or to represent the municipality.⁷⁵ However, the legislative body may appeal a decision of the appropriate municipal panel if "the plan or bylaw is at issue."⁷⁶ While this statute may seem to grant broad authority to participate, case law has limited that right to those cases where the legislative body believes there has been an illegal or unconstitutional interpretation of a bylaw.⁷⁷ Nevertheless, a legislative body may participate in an appeal that has been initiated by another appellant.

E. On the Record Review

As an alternative to *de novo* review, municipalities may choose to have their decisions heard *on the record*. When a decision from a municipality that has adopted on the record review is appealed to the Environmental Court, the court only examines whether the AMP misinterpreted the bylaw or state law. The court does not hold any new factual hearings and any questions as to the facts will be resolved by looking at the record developed by the appropriate municipal panel. A basic requirement, therefore, is an audio recording of the proceedings.⁷⁸

The first step prior to adopting on the record review is to adopt the Municipal Administrative Procedure Act (MAPA). MAPA may be adopted either by the voters or by the legislative body. The benefit of

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⁷⁵ The legislative body appoints a designee to act on its behalf at Environmental Court proceedings. This could be the municipal attorney, a member of the legislative body, or perhaps the zoning administrator. The appropriateness of all of these potential designees should be considered. It would not be appropriate for a member of the AMP to serve as the selectboard's designee.

⁷⁶ 24 V.S.A. § 4465(b)(2).

⁷⁷ *In re 232511 Investments Ltd*, 2006 VT 27.

⁷⁸ 24 V.S.A. § 1205(c).

Municipal Administrative Procedure Act (MAPA)

24 V.S.A. Chapter 36, § 1205

Any municipality that chooses to have local decisions appealed to Environmental Court to be heard “on the record” (rather than anew), or to conduct local Act 250 reviews, must adopt the Municipal Administrative Procedure Act to apply to specified development review proceedings. MAPA provisions include the following:

- Conflicts of Interest
- Notice Requirements
- Hearing Procedures
- Evidence
- Ex Parte Communications
- Qualification of Members (in rendering decisions)
- Decisions
- Appeals (per Chapter 117)

adopting on the record review is that the municipality retains stronger local control in the outcome of the case. Why go through the effort of holding a hearing if an appeal is going to be heard anew, without any consideration of the proceedings below? On the record review allows local decisions to stay local. The parties have the right to participate at the Environmental Court, but they will only have the right to question whether the AMP made a mistake in interpreting the law. The facts found by the AMP will stand as the facts on which the case is built.

However, there are downsides to adopting on the record review as well. The biggest problem is that, in all matters, the expectations are greater. From managing evidence to finding facts, writing adequate decisions, and managing conflicts of interest, the Environmental Court has higher expectations. As such, the chairperson must run a very orderly proceeding and continually reinforce such matters as requiring speakers to repeat his or her name prior to speaking so that those reviewing the audio can discern the speaker. Municipalities considering adopting on the record review may wish to schedule a workshop with a knowledgeable expert to help determine if on the record review is a good fit with their municipality.

