

# **Who's Got the Power? Roles and Responsibilities in Planning and Zoning**

## **Vermont League of Cities and Towns**

### **I. Role of the Selectboard**

The selectboard has general supervision of the affairs of the town and responsibility for all duties of towns and town school districts not committed to the care of any particular officer. 24 V.S.A. §872.

#### **Election and Removal**

Selectboard members are elected to three-year terms. 17 V.S.A. §2646(4). 24 V.S.A §963. While the selectboard serves an executive function in the town, with limited exception, no single board member has the authority to act independently. 1 V.S.A. §172. Vermont law provides no provision for removal of wayward selectboard members. While this insulation from the political process can provide elected officers with significant, albeit temporary, political power, the insulation is often the source of gridlock and impasse.

#### **Adoption of Town Plans and Zoning Bylaws**

With regard to zoning and planning, the selectboard plays an important but indirect role. Perhaps the most direct role is in the adoption of municipal plans and zoning bylaws. In some communities, the selectboard may adopt a municipal plan or bylaw by majority vote. In other communities, the plan or bylaw is adopted by the voters. In either case, the selectboard is given some limited authority to make changes to the plan or bylaw prior to final adoption, which gives the selectboard a direct hand in the creation of these tools. 24 V.S.A. §§4385, 4442. The selectboard may also adopt interim zoning bylaws. Interim bylaws are intended as an emergency measure, may only be adopted after a public hearing, and have limited duration.

#### **Appointment and Removal of Zoning Officials**

The selectboard's primary power in the zoning process comes from its authority to appoint and remove members of the planning commission and the zoning board of adjustment or development review board. 24 V.S.A. §§ 4323, 4460. The selectboard, upon nomination from the planning commission, also appoints the zoning administrator. While seldom used, the selectboard's removal authority serves as a significant check on the autonomy of the planning commission, ZBA/DRB, and the ZA.

The selectboard's authority to remove zoning officials has some subtle nuances that are worth noting. Planning commission members can be removed without cause, but removal requires unanimous vote. 24 V.S.A §4323. DRB and ZBA members may only be removed for cause, upon written charges and after a public hearing. 24 V.S.A §4460. A ZA may only be removed for cause after consultation with the planning commission. 24 V.S.A. §4448.

In some towns, voters have chosen to elect planning commissioners. If a municipality chooses to elect its planning commissioners, the voters set the commissioners' terms. Elected planning commissioners cannot be removed by the selectboard. The selectboard can only fill vacancies until the next meeting of the municipality, at which time the voters elect a commissioner to fill the unexpired term. 24 V.S.A. 4323(c).

### **Role in Enforcement and Administration**

In most cases, the selectboard plays no direct role in administration or enforcement of a town's zoning bylaw. However, the indirect role that the selectboard plays in zoning enforcement is a powerful one: Enforcement actions, especially those requiring a court order, can be expensive. While the ZA can unilaterally initiate an enforcement action, the selectboard controls the town's purse strings. Accordingly, a ZA must work closely with the selectboard, or face being undermined by the selectboard in enforcement efforts.

### **Role in the Hearing Process**

Selectboard members play no official role in the typical conditional use or variance hearing. However, board members occasionally seek to participate individually as members of the public or as statutorily defined interested persons. 24 V.S.A. §4465. In such case, selectboard members may, intentionally or otherwise, seek to add weight to their testimony by reference to their office.

### **Role in Appeals to ZBA/DRB and Environmental Court**

Only statutorily defined interested persons may appeal a zoning decision. In some limited instances, the municipality may initiate such an appeal as an interested person, but only if it alleges that the ZBA/DRB has exceeded its statutory authority. Generally, so long as the ZBA/DRB acts within its authority, the wisdom of its decision cannot be challenged by the selectboard through an appeal. See, *Rossetti v. Chittenden County Transportation Authority*, 165 Vt. 61 (1996). As a practical matter, some selectboards will participate in appeals to the environmental court when the appeal is first taken by an applicant or other party dissatisfied with an adverse decision. In such cases, the selectboard's intervention is usually in support of the DRB/ZBA decision.

### **Act 250**

The municipality in which a project is located, and any adjacent Vermont municipality (if the project is located on a boundary) are statutory parties in Act 250 proceedings. 10 V.S.A §6085(c)(1)(C). Generally, the selectboard represents the interests of the municipality in Act 250 proceedings and can offer testimony under any of the Act 250 criteria.

## **II. Role of the Planning Commission**

The planning commission is principally responsible for drafting the town plan and zoning bylaws and, in towns that do not have a development review board, the planning commission also

performs site plan review, subdivision review, and approval of planned unit developments. Planning commissions may prepare building, housing and safety codes, undertake capacity studies, and prepare and present a capital budget.

### **Statutory Authority**

The planning commission's planning authority is primarily found at 24 V.S.A. §4325. Its authority to conduct development review (subdivision and site plan) is derived from 24 V.S.A. §4460.

### **Appointment or Election**

In most towns, planning commission members are appointed by the selectboard for such terms as the selectboard determines. 24 V.S.A §4323. A planning commission may have as few as three, but not more than nine members. 24 V.S.A. 4322. A majority of the members must be town residents. 24 V.S.A. § 4322. The selectmen of a rural town are ex officio, nonvoting members of the town's planning commission. Id. In some towns, planning commission members are elected. 24 V.S.A. § 4323(c).

### **Removal**

Appointed planning commission members may be removed, without cause, upon unanimous vote of the selectboard. 24 V.S.A 4323(a). While the lack of a cause requirement for termination may effectively eliminate the opportunity to challenge the removal, the likelihood of a unanimous removal vote, in some towns, may be so remote as to make removal impossible. Elected planning commission members cannot be removed by the selectboard. 24 V.S.A. § 4323(c).

### **Role in Enforcement and Administration**

The planning commission plays no direct role in zoning enforcement or administration of zoning bylaws. As its name implies, the planning commission is largely responsible for the proactive, planning phase of the land use process. In that regard, it is responsible for drafting the town plan and the town's zoning bylaws. In those towns without development review boards, the planning commission also performs a quasi-judicial function in subdivision review, site plan approval, and approval of planned unit development. 24 V.S.A. §§ 4416, 4417, 4463.

## **Role in the Hearing Process**

Planning commissions hold a wide variety of hearings, including hearings on town plans and proposed zoning bylaws. 24 V.S.A §§4384, 4441. A planning commission conducting development review functions will also hold hearings in conjunction with site plan review, subdivision, and planned unit development review. 24 V.S.A. §§ 4416, 4418, 4417. Like selectboard members, planning commission members may occasionally seek to participate in zoning hearings conducted by the DRB or ZBA as members of the public or as statutorily defined interested persons. 24 V.S.A. § 4465. In such cases, the planning commission members are acting as individuals, but may, intentionally or otherwise, seek to add weight to their testimony by reference to their office.

## **Role in Appeals to ZBA/DRB and Environmental Court**

Like the ZBA or DRB, once a matter has been appealed to the Environmental Court, the planning commission's role in the process ceases. The planning commission has no authority to participate at the Environmental Court in any way.

## **Act 250**

The planning commission for a municipality in which a project is located, and the planning any adjacent Vermont municipality (if the project is located on a boundary), are statutory parties in an Act 250 proceeding. 10 V.S.A § 6085(c)(1)(C). The planning commission is primarily afforded party status to give testimony under Act 250's criterion 10, though it can offer testimony under any of the Act 250 criteria. This may put the planning commission in conflict with the selectboard.

## **III. The Role of the Zoning Administrator: 24 V.S.A. §§ 4448, 4449**

The zoning administrator is the face of zoning in any municipality that has zoning regulations. State law requires that the ZA "shall administer the bylaws literally and shall not have the power to permit any land development that is not in conformance with those bylaws."

### **Statutory Authority**

The ZA's statutory authority is found in 24 V.S.A. §§ 4448 and 4449. Some zoning bylaws may also confer additional powers on the zoning administrator to perform administrative review of certain types of development, and to grant waivers in certain instances.

### **Powers**

While the role of the ZA may vary from town to town, the general powers of the zoning administrator are the same: To grant or deny zoning permits (or building permits, as they are sometimes called), to enforce the zoning bylaw and other land use regulations, and to assist applicants in the zoning application process.

## **Appointment**

Act 115 of the 2003 adjourned session changed the appointment process for the zoning administrator: “An administrative officer . . . shall be nominated by the planning commission and appointed by the legislative body for a term of three years . . .” The planning commission’s role has become more limited than it was under the prior law, which enabled the PC to appoint the ZA with the approval of the selectboard. Now, the law envisions the PC playing a more minor role in the appointment process, while the role of the ZA is more closely regarded as an employee who is appointed and evaluated by the selectboard.

For the appointment of an acting or interim ZA, “The planning commission may nominate and the legislative body may appoint an acting administrative officer who shall have the same duties and responsibilities as the administrative officer in the administrative officer’s absence.”

## **Removal**

Removal of the ZA can occur “for cause at any time by the legislative body after consultation with the planning commission.” The term “for cause” requires that a reason be given for the removal of the ZA, coupled with notice and an opportunity to be heard. This means that to remove the ZA, the legislative body would have to hold a hearing to consider the ZA’s employment. At that hearing, the ZA would be able to state why he believes he should not be removed from office.

## **Role in Administration**

In most towns, ZA is the first contact point for anyone seeking a zoning permit or simply inquiring about zoning. By statute, the ZA is charged with “providing an applicant with forms required to obtain any municipal permit or other municipal authorization required under this chapter, or under other laws or ordinances that relate to the regulation by municipalities of land development. If other municipal permits or authorizations are required, the administrative officer should coordinate a unified effort on behalf of the municipality in administering its development review programs.”

The ZA needs to be a Jack/Jill-of-all-trades in the town zoning office. The ZA’s function is not only to issue permits, but also to provide assistance to those who need it, whether it is an applicant, an adjoiner, or another municipal official.

## **Role in Hearing Process**

The ZA’s role in the hearing process is ill-defined at best. Each board that works with the ZA should consider what they want the ZA’s role to be when he/she appears before them, and apply those principles consistently in all hearings. In most towns, the ZA spends more time reading and administering the bylaw than anyone else. Because of this, the ZA tends to have specialized knowledge of how the regulations have been interpreted over time. Those experienced ZAs therefore tend to provide a fair amount of assistance to PCs, ZBAs, and DRBs in their hearings. Keep in mind that the ZA is not a party or an interested person in a typical zoning application

hearing. The ZA is a municipal official who may have specialized expertise in zoning matters that could be helpful to the board in issuing a decision.

### **Role in Appeals to ZBA/DRB**

The ZA's role in appeals to the ZBA/DRB is somewhat different than it would be in a direct application to one of those boards. In the appeal context, the ZA is more like a party. As such, the ZA should be allowed by the board to present evidence concerning the appeal. For example, if the appeal is of a notice of violation that was issued by the ZA, the ZA should have the opportunity to present evidence of the violation to the board, in much the same way that the landowner should be allowed to present evidence concerning the appeal.

The ZA does not have the authority to appeal a decision made by the ZBA/DRB.

### **Role in Appeals to Environmental Court**

The ZA has very little, if any, role to play in appeals to the Environmental Court. If the case gets as far as an evidentiary hearing, the ZA may be called as a witness in the case. Otherwise, the ZA may be the point of contact for the mailing of Environmental Court decisions.

### **Appropriate Municipal Panels**

Act 115 of the 2003 adjourned session created the term, "appropriate municipal panel," a catch-all term used by the Legislature to apply to any local zoning-type board that conducts development review. Part of that act, 24 V.S.A. § 4460(e) permits zoning bylaws to designate which boards will conduct which reviews.

## **IV. The Role of the Zoning Board of Adjustment and the Development Review Board: 24 V.S.A. §§ 4460, 4461, 4464**

The zoning board of adjustment (ZBA), or the development review board (DRB) is the quasi-judicial board that has authority over applications for land development in the municipality. Typically, the ZBA has jurisdiction over conditional use applications, variance requests, and appeals of ZA decisions. There may be other jurisdiction vested in the ZBA by the zoning bylaw.

The development review board (DRB) has jurisdiction over all quasi-judicial review of requests for land development. Essentially, the DRB handles every review that the ZBA performed, plus the reviews performed by the Planning Commission (PC). This statutory authority would include conducting every single development review authorized by the zoning bylaw. Once a DRB is established, the ZBA shall cease to exist.

## **Statutory Authority**

The primary statutory authority for the ZBA/DRB comes from 24 V.S.A. § 4460. This law is enabling only, in that it simply requires that there be a ZBA or a DRB in a town with zoning regulations.

State law now requires the municipal zoning bylaw to specify those functions to be performed by the ZBA/DRB. Under the prior version of 24 V.S.A. Chapter 117, the ZBA would hear conditional use requests, variance requests, and appeals of ZA decisions. Most towns will likely continue with this structure for the immediate future. Some towns will likely consolidate all quasi-judicial review authority in a DRB.

## **Powers**

The ZBA/DRB's authority is to grant, grant with conditions, or deny a permit. The requirements that must be followed by the ZBA are spelled out in 24 V.S.A. § 4461, which requires the board to adopt rules of procedure and rules of ethics with respect to conflict of interest. The statute also provides that the board may administer oaths and compel the attendance of witnesses and the production of material germane to any issue under review. Meetings and hearings of the board must be open to the public, except for deliberative and executive sessions (it is unlikely that ZBAs/DRBs will have occasion to hold an executive session). The ZBA/DRB must keep minutes of its proceedings, and must keep a record of the votes of its members. Any minutes or written decisions of the board shall become public records.

## **Appointment**

The ZBA in a rural or an urban town where the members of the ZBA also serve as members of the planning commission may be constituted of as few as three or as many as nine members, as determined by the legislative body. 24 V.S.A. § 4460(b). Where the ZBA/DRB and PC are separately appointed, the legislative body shall set the number of members of the board (If there is a DRB, the membership shall be not less than five nor more than nine). ZBA/DRB members are appointed by the legislative body of the municipality to terms established by the legislative body.

## **Removal**

ZBA/DRB members may be removed by the legislative body for cause, upon written charges and after public hearing.

## **Role in Administration**

The municipal zoning process can be looked at as occurring in two phases: An administrative phase, and a quasi-judicial phase. The administrative phase is handled almost exclusively by the administrative officer, while the quasi-judicial phase is conducted by the PC, ZBA, or DRB.

The ZBA/DRB's role as a quasi-judicial body is purely reactive: To respond to applications presented to it. The ZBA/DRB has no role in the administrative phase of the zoning process.

### **Role in Hearing Process**

Hearings are where the ZBA/DRB conducts its business. By law, a hearing is required to be held on conditional use reviews, variances, ZA appeals, and final plat reviews. Hearings are usually required by zoning bylaws in most other types of reviews, including site plan and preliminary plat reviews. These hearings must be warned in accordance with 24 V.S.A. § 4464, and they must follow the procedural requirements of 24 V.S.A. § 4461 (see Powers, above).

### **Role in Appeals to ZBA/DRB**

The ZBA/DRB is the arbiter of the appeals process at this level. An interested person who is aggrieved by an act (or non-act) of the ZA may appeal that action to the ZBA/DRB. The ZBA/DRB's job is to take evidence from the appellant, any other parties, and from the ZA, to determine whether the appeal should be granted or denied. The ZBA/DRB has the power to run the hearing pursuant to its rules of procedure and pursuant to state law.

### **Role in Appeals to Environmental Court**

Once a matter has been appealed to the Environmental Court, the ZBA/DRB's role in the process ceases. At this point, the ZBA/DRB becomes just another train station on the track, which started at the ZA level, progressed to the ZBA/DRB, and now has gone on to the Environmental Court. The ZBA/DRB has no authority to participate at the Environmental Court level in any way.