

How to Write Effective Land Use Decisions

A Workshop for all Municipal Board Members and Staff

October 22, 2009

7 – 9 PM

Vermont Room, Hotel Coolidge

White River Junction, VT

Agenda

- 1. Welcome – Chris Sargent (5 Minutes)**
- 2. Land use decision making process (10 Minutes)**
 - A. Workshop purpose and importance of decision making process – Chris Sargent
 - B. Overview of the basic planning and decision making process – Jason Rasmussen
- 3. Written decision basics – Judge Merideth Wright (30 Minutes)**
 - A. Decisions must be issued in writing
 - B. Findings of Fact
 - (1) Factual basis for AMP conclusions
 - (2) The difference between reciting the evidence and making factual findings
 - C. Conclusions of Law
 - (1) Making conclusions relate to the facts
 - (2) Conformance with Town Plan and regulatory standards
 - D. Decisions & Conditions
 - E. Considerations for *on the record* review
 - (1) Rules of procedure / MAPA
 - (2) Interested parties
- 4. How to Write a Good Decision (30 Minutes)**
 - A. How to Hold an Effective Public Hearing – *Lawrence Slason, Esq.*
 - (1) Procedure
 - (2) Party Status
 - (3) Presentation of evidence
 - (4) Using a rubric to determine if the project meets town standards
 - (5) Deliberations
 - (6) Preparing the written decision to meet legal standards
 - (7) Continuation/reopening of hearings to receive additional evidence
- 5. If an Appeal is Filed – Jacalyn Fletcher, Environmental Court Manager (10 Minutes)**
 - A. What to expect if your local decision is appealed
- 6. Questions and Answers (35 Minutes)**
- 7. Adjourn (9 PM)**

General References

- *Making it Stick: The Art of Writing Effective Zoning Decisions*, Municipal Assistance Center Technical Paper #1 (VLCT, March 2007)
- *Decisions Paper* (TRORC)
- *Local Administration Helper* (TRORC, 2006)
- *Written Decision Templates* (Vermont Land Use Education & Training Collaborative, May 2005):
 - Appeal of Administrative Officer Decision
 - Conditional Use Review
 - Variance
 - Subdivision Review
- *Example Written Decisions*:
 - Good
 - Not So Good
 - Bad

Judge Wright's Handouts

- *Leikert V. Morristown DRB Decision* (Supreme Court 2004)
- State Statutory Excerpt of 24 V.S.A. §4464(b)(1) & (b)(2)

Attorney Lawrence Slason's Handouts

- *Municipal Land Use Decisions & Hearing Procedures*, Lawrence G. Slason, Esq. (Salmon & Nostrand, Oct 2009)
- *Conditional Use Review*, Lawrence G. Slason, Esq. (Salmon & Nostrand, Oct 2009)

Jacalyn Fletcher's Handouts

- Environmental Court Flow Chart
- *Municipal Land Use Panel Procedures & Appeals to Environmental Court*, Lawrence G. Slason, Esq. (Salmon & Nostrand, Dec 2008)

Title 24: Municipal and County Government

Chapter 117: Municipal and Regional Planning and Development

4464. Hearing and notice requirements; decisions and conditions; administrative review; role of advisory commissions in development review

Last two sentences of (b)(1) and all of (b)(2)

Decisions shall be issued in writing and shall include a statement of the factual bases on which the appropriate municipal panel has made its conclusions and a statement of the conclusions. The minutes of the meeting may suffice, provided the factual bases and conclusions relating to the review standards are provided in conformance with this subsection.

(b)(2) In rendering a decision in favor of the applicant, the panel may attach additional reasonable conditions and safeguards as it deems necessary to implement the purposes of this chapter and the pertinent bylaws and the municipal plan then in effect. A bylaw may provide for the conditioning of permit issuance on the submission of a bond, escrow account, or other surety in a form acceptable to the legislative body of the municipality to assure one or more of the following: the completion of the project, adequate stabilization, or protection of public facilities that may be affected by a project.

MUNICIPAL LAND USE DECISIONS AND HEARING PROCEDURES

- **Appropriate Municipal Panel:** Under Vermont law, land use decision making bodies (planning commissions, zoning boards of adjustment, development review boards) are grouped into the term “*Appropriate Municipal Panel*”. 24 V.S.A. §4303(3). An AMP acts in a quasi judicial capacity when it holds hearings to review and determine applications for development.
- **Quasi-Judicial Proceeding:** Quasi-judicial proceeding means a proceeding which is

“(a) a contested case under the Vermont Administrative Procedure Act; [3 V.S.A. §801 et seq.]; or

(b) a case in which the legal rights of one or more persons who are granted party status are adjudicated, which is conducted in such a way that all parties have **opportunity to present evidence and to cross examine witnesses** presented by other parties, which results in a **written decision**, and the result of which is **appealable** by a party to a higher authority.” 1 V.S.A. §310(5); 24 V.S.A. §4461(a) (emphasis added)

- **Public Notice Requirements:** 24 V.S.A. §4464(a)—Prior to public hearing, the municipal panel must provide the following notice:
 - (a) Publish the date, place and purpose of the hearing in a newspaper of general circulation in the municipality affected;
 - (b) Post the date, place and purpose of the hearing in the municipal clerk’s office and in at least two (2) other public places in the municipality and place a posting within view from the public right-of-way most nearly adjacent to the property for which the application is made.
 - (c) Mail written notification to the applicant and to owners of all properties adjoining the property subject to development, without regard to any public right of way. The notification shall include a description of the proposed project and shall be accompanied by information that clearly informs the recipient where additional information may be obtained and that participation in the local proceeding is a prerequisite to the right to take any subsequent appeal.

NOTE: Public notice shall be given not less than 15 days prior to the date of a public hearing for conditional use review, variances, administrative officer appeals, and final plat review for a subdivision. Public notice shall be given not less than 7 days prior to the date of the public hearing for site plan review and any other type of development review.

NOTE: The municipality may require the applicant to bear the cost of the public warning and the cost and responsibility of notification of adjoining landowners. The applicant may also be required to demonstrate proof of delivery to adjoining landowners either by certified mail, or by written notice hand delivered, or mailed to the last known address supported by a sworn certificate of Service. 24 V.S.A. §4464(a)(3)

- **Public Hearing Procedure:** 24 V.S.A. §4461—Development Review Procedures; 24 V.S.A. §1201, et seq.—Municipal Administrative Procedures Act

- Open Meeting Law—1 V.S.A. §310, et seq. All meetings of an appropriate municipal panel are declared to be open to the public at all times with the exception of deliberative and executive sessions. 1 V.S.A. §§312, 313. The receipt of evidence must occur in open session. If evidence is submitted in writing, a copy must be provided to all parties of record.

NOTE: Vermont's Open Meeting Law requires that members of the public be given a reasonable opportunity to express opinions on matters considered during the meeting. The opportunity for public participation **does not apply to quasi judicial proceedings**. 1 V.S.A. §312(h). Only those parties who are granted party status, or their witnesses, are entitled to participate.

- Quorum—A quorum shall not be less than a majority of the members of the panel. 24 V.S.A. §4461
- Binding Action—The AMP may not take any lawful binding action unless there is a concurrence of the majority of the entire membership of the panel. 24 V.S.A. §4461(a); 1 V.S.A. §172.

NOTE: Under Vermont law, abstentions are not counted with the majority to determine whether a vote has been taken by a concurrence of the majority. See: In Re Reynolds, 170 Vt. 352 (2000)

- Physical Presence Not Required—All or a part of a hearing may be conducted by telephone, television or other electronic means if each participant in the hearing has an opportunity to participate in, hear, and if technically feasible, see the entire proceeding as it is taking place. 24 V.S.A. §1205(b).
- Review of Evidence by Absent Member of Panel—An absent member is allowed to participate in the vote if that person listens to a audio or video recording of any missed testimony or reads transcripts of the testimony and reviews all the exhibits and other evidence prior to deliberations. See: 24 V.S.A. §1208(b); In re Clyde's Place, LLC, Vt. Env'tl. Ct. Docket No. 9-1-08Vtec (November 14, 2008)
- Record of Proceedings—The AMP shall keep minutes of its proceedings, showing the vote of each member upon each question, or if absent or failing to

vote, the record shall indicate such. The AMP records of its proceedings and any official actions taken by the AMP shall be filed immediately in the office of the town clerk as a public record. 24 V.S.A. §4461(a).

- **Evidentiary Standard**—The evidentiary standard for AMP hearings is the same used for contested hearings under the Municipal Administrative Procedures Act. The Rules of Evidence are somewhat more relaxed than in a court of law. Evidence may be admissible if it is of a type commonly relied upon by reasonably prudent people in the conduct of their affairs.

The AMP may take “*administrative notice*” of facts which are not subject to reasonable dispute and are either: (1) generally known or (2) facts that can be readily and accurately determined from sources of unquestionable accuracy. See: Vermont Rules of Evidence 201.

Title 24, Section 1206 of the Municipal Administrative Procedures Act provides as follows:

- “(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 or 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.”*

- **The Hearing:**

- **Open the Meeting.** Meeting shall be held at the call of the chairperson. 24 V.S.A. §4461(a). The chair or vice chair shall preside at the hearing. If neither is available, the panel shall elect a temporary chair. 24 V.S.A. §1205(a).
- **Introduce each member of the panel** who is present and any member of the panel participating by telephone or other means.

- Describe the purpose of the hearing (i.e., “*This is a hearing of the Development Review Board. The purpose of this hearing is to receive evidence and act upon an application for conditional use permit submitted by _____, received by the Zoning Administrative Officer on _____ and designated as Application No. _____.* The project is described in the application as _____.”)

NOTE: Combined review—If more than one type of review is required for a project, the reviews, to the extent feasible, shall be conducted concurrently. 24 V.S.A. §4462.

- Appearances.

(a) Applicant and counsel.

(b) Persons seeking party status

Persons who wish to obtain party status to participate in the hearing as an “*interested person*” must be identified and given an opportunity to demonstrate that they satisfy the criteria of 24 V.S.A. §4465(b). The AMP must keep a written record of the name, address and participation of each person who seeks party status. 24 V.S.A. §4461(b).

(c) Interested persons—24 V.S.A. §4465(b)—the following are interested persons:

- (1) A person owning title to property...affected by a bylaw who alleges that the bylaw imposes on the property unreasonable or inappropriate restrictions...
- (2) The municipality that has a plan or bylaw at issue or any municipality that adjoins that municipality;
- (3) A person owning or occupying property in the immediate neighborhood of a property that is the subject of any decision or act taken under this chapter who can demonstrate a physical or environmental impact on the persons interest under the criteria reviewed and who alleges that the decision or act, if confirmed, will not be in accord with the policies, purposes, or terms of the plan or bylaw of that municipality;
- (4) Any 10 persons who may be a combination of voters or real property owners within a municipality who, by signed petition to the appropriate municipal panel, allege that any relief requested by a person under this title, if granted, will not be in accord with the policies, purposes or terms of the plan or bylaw of that municipality;
- (5) Any department and administrative subdivision of the State owning property or any interest in property within a municipality and the Agency of Commerce and Community Development

(d) "Participation"—24 V.S.A. §4471(a)—"*Participation in a local regulatory proceeding shall consist of offering, through oral or written testimony, evidence or a statement of concern related to the subject of the proceeding.*"

NOTE: Personal appearance is not required at the local municipal proceeding. A letter of concern is adequate. Smith NOV Appeal, Vt. Env'tl. Ct., Docket No. 117-5-06Vtec (December 21, 2006)

However, mere attendance at a municipal hearing is not enough to secure a right to appeal. The interested person must actively participate in the proceeding through offering evidence or providing a written or oral statement of concern. In re Verizon Wireless Barton Permit, Vt. Env'tl. Ct. Docket No. 133-6-08Vtec (May 20, 2009)

- **Presentation by Applicant**

- Administer oath to applicant and each of applicant's witnesses

NOTE: Some chair prefer to administer an oath at the outset of the meeting to all persons who seek party status and all persons who intend to testify. The oath can be phrased as follows:

"Do you solemnly swear that the evidence you shall give relative to the cause now under consideration shall be the whole truth and nothing but the truth, under the pains and penalties of perjury?"

- Mark and label exhibits
- Use of a template—It is becoming customary practice for AMPs to utilize templates to insure that all permit criteria are addressed by the applicant. The template is helpful to make findings of fact.
- Questions by Panel—At the conclusion of the testimony of each witness, the chairman of the panel shall provide an opportunity for each member of the panel to ask questions of the witness.
- Cross examination—Questions by Parties—The chair should provide an opportunity for any party to ask questions of the witness. The nature of the cross examination should be carefully controlled by the chair to avoid questions which are argumentative or improper. Some chair prefer that all questions be directed to the chair to be answered by the applicant or applicant's witness.
- Presentation by Parties in Opposition—After the applicant has presented its case, each person who has been granted party status should have the opportunity to testify in their own behalf and present evidence in opposition to

the proposed application. The applicant should be allowed to ask questions/cross examine the party opponent.

- Rebuttal—After the party opponents have presented their evidence, the applicant should be asked if it has any rebuttal evidence or additional evidence for consideration by the panel. If no further evidence is proffered, the chair may entertain a motion to close the hearing, or recess the evidentiary hearing pending receipt of additional evidence.

NOTE: Recommend deliberative session before hearing is closed so panel can decide whether it requires additional information to render a final decision.

- Additional information—The municipal panel may recess the proceedings and require submission of additional information. An AMP may examine or cause to be examined any property, maps, books or records bearing upon the matters concerned in the proceedings and may require the attendance of any person having knowledge about the matters. 24 V.S.A. §4464(b)(1); 24 V.S.A. §4461(b)
- Adjourned Meeting Notice—An adjourned meeting shall be considered a new meeting unless the date, time and place for the new meeting is announced before the meeting adjourns. 1 V.S.A. §312(4); 24 V.S.A. §1204
- Site visit—It is usual and customary for members of a municipal panel to make a site visit as a panel. A site visit in and of itself is not evidence. If the panel to intend to rely upon anything observed during the site visit then the panel must make a statement, in open hearing, describing the nature of any observations from the site visit.
- Close of evidence—Once all evidence is received and the panel has sufficient evidence to make a decision, the panel should declare the hearing closed. The date on which the hearing is closed triggers the 45-day period to issue a written decision. Failure to issue a written decision within the 45-day period shall be deemed approval and shall be effective on the 46th day. 24 V.S.A. §4464(b)(1).
- Deliberations—Deliberations mean “*weighing, examining and discussing the reasons for and against an act or decision, but expressly excludes the taking of evidence and the argument of parties.*” 1 V.S.A. §310(1).
- Deliberative sessions—Are exempt from the Open Meeting Law. A municipal panel does not have to warn a deliberative session. A motion to go into deliberative session need only be supported by a majority of the panel.

- While in deliberative session, a municipal panel acting within a quasi judicial proceeding may discuss and draft a written decision. The written decision need not be adopted in open session if the decision will be released as a public record. 1 V.S.A. §312(f)

- **Decisions**

- Decisions shall be issued in writing and shall include a statement of the factual bases on which the municipal panel has made its conclusions and a statement of the conclusions. 24 V.S.A. §4464(b)(1); 24 V.S.A. §1209(a)
- The Vermont Supreme Court has made it clear that decisions must “*convey not only a result, but also an indication of how the result was arrived at.*” Potter v Hartford Zoning Board of Adjustment, 147 Vt. 445, 447 (1979); City of Rutland v McDonald’s Corporation, 146 Vt. 324 (1985)
- 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. 24 V.S.A. §1209(b)
- Conclusions of Law shall be based on the Findings of Fact. 24 V.S.A. §1209(c)
- Filing and Service of Municipal Panel Decision—24 V.S.A. §4464(b)(1)(3)—the municipal land use decisions shall be sent by certified mail to the applicant and shall be mailed by First Class Mail to every other person or body appearing or having been heard at the heard. A copy of the decision shall be filed with the Zoning Administrative Officer and the Town Clerk as part of the public records of the municipality.

- **Contents of Written Decision**

- There is no statutory requirement which specifies the form or style of a written decision. It is becoming customary practice for municipalities to use a decision template. VLCT has decision templates available online.
- It is recommended that written decisions contain the following sections:
 - I. Introduction and Procedural History
 - i. Nature of application
 - ii. Date application was submitted
 - iii. Date application deemed complete
 - iv. Action taken by zoning administrative officer
 - v. Recitation of dates, places and posting and publication of notice of public hearing
 - vi. Name of adjoining property owners to whom notice was provided

- II. Hearing
 - i. Record of attendance of board members
 - ii. Name and address of each person who requested party status as an “*interested person*” pursuant to the requirements of 24 V.S.A. §4465(b)
 - iii. A record of the level of participation of each person who requested party status as an “*interested person*”
 - iv. Determination of persons granted party status as an “*interested person*”
 - III. Master Exhibit List
 - i. Maintain an exhibit list which identifies the name of the party presenting the exhibit, the nature of the exhibit and determination of whether the exhibit was admitted into evidence
 - IV. Findings
 - i. List the permit criteria and findings of fact relating to each of the criteria referencing exhibits where appropriate
 - V. Decision and Conditions
 - i. Prepare conclusions of law based on the factual findings for each of the permit criteria
 - ii. The conclusions should explain how and why the panel has concluded that the proposed project satisfies the applicable criteria
 - iii. The panel may attach reasonable conditions and safeguards as it deems necessary to implement the purposes of the zoning bylaws and the municipal plan. 24 V.S.A. §4464(b)(2), (4), (5), (6)
- **Standard of Review**—In an “*on the record*” appeal, the findings of the municipal panel are to be affirmed if supported by substantial evidence in the record as a whole. Evidence is substantial if it is relevant and a reasonable person, looking at the record as a whole, would accept it as adequate. Legal issues, on the other hand, are reviewed without affording deference to the panel’s legal conclusions. In re Byrne Trusts NOV, Vt. Env’tl. Ct. Docket No. 150-7-08Vtec (June 15, 2009); In re Smith, 2 Lot Subdivision, Vt. Env’tl. Ct. Docket No. 247-11-05Vtec (February 9, 2007); In re Freedom Foods, Vt. Env’tl. Ct. Docket No. 243-10-08Vtec (March 19, 2009)
 - **Reconsideration**: A municipal panel may vote to reconsider its decision if the reconsideration occurs within the 30 day appeal period. See: In re Appeal of Dunn, Vt. Env’tl. Ct., Docket No. 2-1-98Vtec (March 8, 1999); In re Appeal of Comi, Vt. Env’tl. Ct., Docket No. 95-6-04Vtec (March 14, 2005); In re Clyde’s Place, LLC, Vt. Env’tl. Ct., Docket No. 9-1-08Vtec (November 14, 2008)

As the court recognized in Dunn, “it is far more efficient for a [AMP] to have the opportunity to correct its own decision than to have the reviewing court necessarily make the correction.”

“Reconsideration allows a DRB to correct errors by providing its members an opportunity to consider the evidence anew and to vote accordingly.” In re Clyde’s Place, LLC, at 8

V.R.E.C.P. 5(i)(j)—At the request of the tribunal appealed from, the Environmental Court, at any time prior to judgment, may remand a case to the municipal panel for reconsideration.

- **Statutory Construction:** Land use regulations are in derogation of property rights and any uncertainty in their meaning must be resolved in favor of the property owner. See: Agency of Natural Resources v Weston, 2003 Vt. 58; In re Eustance Act 250 Jurisdictional Opinion, 2009 Vt. 16; Secretary of Agency of Natural Resources v Handy Family Enterprises, 163 Vt. 476 (1995); In re Weeks, 167 Vt. 551, 555 (1998); Glabach v Sardelli, 132 Vt. 490 (1974)

CONDITIONAL USE REVIEW

I. Introduction

Conditional use review has historically required a factual determination whether the proposed project would have an undue adverse affect on the “*character of the area*”. The legislative rewrite of Title 24, Chapter 117, effective July 1, 2004 (Act 115), now requires a municipal panel to consider the character of the area affected “***as defined by the purpose or purposes of the zoning district within which the project is located, and specifically stated policies and standards of the municipal plan.***” 24 V.S.A. §4414(3)(A)(ii) (emphasis added). Thus, although consideration of existing conditions remains relevant, there is greater emphasis on what the town zoning bylaws expressly state about the purpose of the zoning district where the project is located and whether there are any specific policies or standards in the town plan applicable to the project area.

Municipal plans do not have the force and effect of a legislative enactment unless specifically incorporated into the zoning bylaws. See: In re Appeal of Shaw, et al., (Rinker’s Communication Application), Vt. Env’tl. Ct. Docket No. 4-1-05Vtec, *Decision and Judgment Order* (October 2, 2006); In re Appeal of Wesco, Inc., 2006 Vt. 52

II. Incorporation of Conditional Use General Standards in Municipal Bylaws

The Vermont Supreme Court has held that conditional use General Standards are incorporated within every zoning ordinance which purports to provide conditional use review. The statutory criteria are deemed to be contained in the ordinance even if omitted. “*In order to do conditional use zoning, the town must use the enumerated general standards: they are the floor below which no town can go if it wants to do conditional zoning... On the other hand, specific standards are left to the town’s discretion. Specific standards are the town’s individualized zoning ceiling, giving the town’s inhabitants notice of the limits of their town’s particular zoning scheme.*” Murray v White, 156 Vt. 619, 620; In re Miller, 170 Vt. 64 (1999); In re Geddes, 9 Lot Subdivision, Vt. Env’tl. Ct. Docket No. 101-5-07Vtec (August 22, 2008)

III. Undue Adverse Affect

The determination of what is “*undue*” is factually dependent. The Vermont Supreme Court has held “...***the adverse effect test must be applied reasonably to prohibit only substantial and material adverse effects.***” In re Miller, 170 Vt. 64, 69 (1999); In re Walker, 156 Vt. 639 (1991) (mem.) (emphasis added)

IV. Area Affected

The municipal panel must determine the area likely to be affected by the proposed conditional use. The Supreme Court, in In re Gaboriault, upheld a determination that the “*area affected*” by a proposed school parking lot consisted of the

residential neighborhood adjacent to the parking lot. See: Gaboriault, 167 Vt. 583, 585 (1997). In the case of In re Miller, 170 Vt. 64 (1999), the Supreme Court upheld a town's determination that the area affected by a development proposal was "*the surrounding residential neighborhood*" and upheld the town's refusal to find that the affected area consisted only of three adjacent residential properties. In re Miller, 170 Vt. 64, 70 (1999)

V. **Specifically Stated Policies and Standards of the Municipal Plan**

Only town plan policies and standards that are clear and unambiguous will be incorporated into the zoning bylaws.

*"While cities may require subdivisions to conform to their city plan, as here, city authorities may not deny permission for a project when there is not a specific policy set forth in the plan **stated in language that is clear and unqualified and creates no ambiguity. A city plan must contain specific standards to guide enforcement to be given regulatory force...** While the city does specifically identify some generic natural resources to be protected—such as scenic views, the plan fails to define what in particular is to be protected and provides no standards as to how or when development should be restricted to accomplish protection... The ordinance cannot leave such designations to the unfettered discretion of the environmental court [or appropriate municipal panel]." In re Appeal of JAM Golf, LLC, 2008 Vt. 110, ¶¶17, 18*

NOTE: JAM Golf is only one of several recent decisions issued by the Vermont Supreme Court and the Environmental Court which have emphasized that **standardless discretion violates property owners' due process rights.**

Conditional Use Review—24 V.S.A. §4414(3)—The Statute

“(3) Conditional uses.

- (A) *In any district, certain uses may be allowed only by approval of the appropriate municipal panel, if general and specific standards to which each allowed use must conform are prescribed in the appropriate bylaws and if the appropriate municipal panel, under the procedures in subchapter 10 of this chapter, determines that the proposed use will conform to those standards. **These general standards shall require that the proposed conditional use shall not result in an undue adverse effect on any of the following:***
- (i) *The capacity of existing or planned community facilities.*
 - (ii) *The character of the area affected, as defined by the purpose or purposes of the zoning district within which the project is located, and specifically stated policies and standards of the municipal plan.*
 - (iii) *Traffic on roads and highways in the vicinity.*
 - (iv) *Bylaws and ordinances then in effect.*
 - (v) *Utilization of renewable energy resources.*
- (B) *The general standards set forth in subdivision (3)(A) of this section may be supplemented by more specific criteria, including requirements with respect to any of the following:*
- (i) *Minimum lot size.*
 - (ii) *Distance from adjacent or nearby uses.*
 - (iii) *Performance standards, as under subdivision (6) of this section.*
 - (iv) *Criteria adopted relating to site plan review pursuant to section 4416 of this title.*
 - (v) *Any other standards and factors that the bylaws may include.*
- (C) *One or more of the review criteria found in 10 V.S.A. §6086 may be adopted as standards for use in conditional use review.”*

NOTE: The 10 criteria of Act 250 found at 10 V.S.A. §6086 include the following:

- 1 Water and air pollution
 - 1(A) Headwaters
 - 1(B) Waste disposal
 - 1(C) Water conservation
 - 1(D) Floodways
 - 1(E) Streams
 - 1(F) Shorelines
 - 1(G) Wetlands
- 2 Water supply
- 3 Impact on existing water supply
- 4 Soil erosion
- 5 Traffic
- 6 Educational services
- 7 Municipal or government services
- 8 Scenic and natural beauty, aesthetics, historic sites, rare and irreplaceable natural areas
 - 8(A) Necessary wildlife habitat and endangered species
- 9 Conformance with capability and development plan
 - 9(A) Impact of growth
 - 9(B)(C) Primary and secondary agricultural soils and forest soils
 - 9(D)(E) Earth resources
 - 9(F) Energy conservation
 - 9(G) Private utility services
 - 9(H) Costs of scattered development
 - 9(J) Public utility services
 - 9(K) Development affecting public investments
 - 9(L) Rural growth areas
- 10 Conformance with local and regional plans

Template for Conditional Use Review

A. Project Description

Considerations:

What is the nature of the conditional use?
New construction?
Number of buildings/units?
Renovation or addition to existing facility?
New business—retail, commercial, industrial?
Hours of operation?
Number of Employees?
Number of persons on the premises?
Number and type of vehicles traveling to and from the premises?
What roads will be used to travel to and from the premises?
Frequency and duration of activity on proposed site?
Other considerations:

B. General Standards—Will the proposed use result in an undue adverse effect [substantial and material adverse effect] on the following?

i. Capacity of existing or planned community facilities.

Considerations:

Police Department
Fire Department
Waste Disposal System
Rescue Squad
School System
Does the town have a duly adopted capital improvement plan?
Will the proposed use adversely affect any proposed capital project?
Has the applicant provided ability to serve letters from the municipal departments?
Will proposed project materially jeopardize or interfere with the public's use or enjoyment of any public facility?

- ii. **The character of the area affected as defined by the purpose or purposes of the zoning district within which the project is located, and specifically stated policies and standards of the municipal plan.**

Considerations:

What is the zoning district within which the proposed use will be located?
What is the stated purpose of the zoning district within which the project area is located?
Are there any specific policies or standards in the town plan applicable to the project area?
Does the town plan describe the existing land use of the project area?
Does the town plan describe the future land use of the project area?
Is the proposed project unique or different from other uses or structures within the immediate neighborhood?
What is the nature of the immediate neighborhood? Residential, commercial, industrial, retail, multi-unit, mixed use, other?

What are the types and uses of adjacent properties?
What area will be affected by the proposed project?
What are the potential environmental impacts from the proposed use?
Air pollution—Will the proposed use generate potential source air contaminants?
Noise—duration, frequency, and level of noise as measured from property boundary
Water pollution—Will the proposed use cause potential water pollution?
Proximity of proposed project to nearest stream or water body
Area of disturbed soils
Area of impervious surface
Management of stormwater discharge
Does applicant have an operational stormwater discharge permit (No. 3-9015)?

Does applicant have a construction general permit or individual construction permit (No. 3-9020) for stormwater runoff from construction site?
Waste disposal system
Will proposed use connect to the municipal system or will it require development of a state approved waste disposal system?
Does applicant have a potable water supply and wastewater system permit?
Does municipal waste treatment plant have sufficient capacity?
Will any hazardous materials be used or stored on site?
How will construction debris be disposed of?
Streams—Will project maintain the natural condition of any nearby stream or water body?
Shorelines—Will project maintain the natural condition of any adjacent shoreline?
Wetlands—Will project maintain the natural condition of wetlands in the area?
Is a conditional use determination (CUD) required for impact to wetland areas?
What is the proposed water supply source?
What amount of water will be required to serve the needs of the project?
Does applicant have a state approved public water source?

Will the proposed use adversely affect existing water sources?
Will the project cause soil erosion?
What is the area of land disturbance?
Does the applicant have a soil erosion control plan prepared in conformance with Vermont Soil Erosion Manual?
Will proposed project increase the number of students attending local schools?
Will the project impact local schools?
What are the visual impacts of the proposed project?
Size, dimension and height of proposed structure
Areas from which proposed structure will be visible
Will project be visible from any designated scenic areas?
Will project impact any natural area?
Will project adversely affect the aesthetics of the area (Quechee test)?
Will project adversely affect the natural beauty of the area?

Lighting
Has applicant submitted a lighting plan with lighting details?
Landscaping and screening
Has applicant submitted a landscaping plan?
Will project affect any wildlife habitat areas?
Has any field investigation been performed by Department of Environmental Conservation or applicant's consultant?
Will project affect any rare, threatened or endangered species of animals or plants?
Will project require cutting and removal of trees?
Will project require extraction of earth resources?

iii. Traffic on roads and highways in the vicinity

What traffic will be generated by the proposed project?
What roads will be affected by the proposed project?
What is the classification of area roads affected by the proposed project?
Will new roads be required for access to the proposed project?
What are the design standards of the access roads?
Will the proposed project cause unreasonable congestion or unsafe conditions?
Intersection sight distances
Existing average daily traffic of receiving roads
Number of daily trips generated by proposed project
Project peak hour trips
Number of truck trips generated by proposed project
Parking areas

Adequacy of parking
Will proposed project generate pedestrian use?
What provisions have been made for pedestrian safety?

iv. Bylaws and Ordinances in Effect

Zoning district permitted uses
Zoning district conditional uses
Zoning district accessory uses
Lot area minimum
Lot coverage
Density limitations
Lot frontage and setbacks
Building heights

Non conforming use
Conservation overlay districts
Town road specifications
Performance standards
Parking
Flood plain overlay districts
Landscaping and screening
Riparian buffers

v. Utilization of Renewable Energy Resources

- **Renewable energy resources** means “energy available for collection or conversion from direct sunlight, wind, running water, organically derived fuels, including wood and agricultural sources, waste heat, and geothermal sources.” 24 V.S.A. §4303(24)

MUNICIPAL LAND USE PANEL PROCEDURE AND APPEALS TO ENVIRONMENTAL COURT

- **Hearing and Notice Requirements for Municipal Land Use Panels:** 24 V.S.A. §4464(a)—Following receipt of a complete land use application, the municipal panel must provide the following notice:
 - (a) Publish the date, place and purpose of the hearing in a newspaper of general circulation in the municipality affected;
 - (b) Post the date, place and purpose of the hearing in the municipal clerk's office and in at least two (2) other public places in the municipality and place a posting within view from the public right-of-way most nearly adjacent to the property for which the application is made.
 - (c) Mail written notification to the applicant and to owners of all properties adjoining the property subject to development, without regard to any public right of way. The notification shall include a description of the proposed project and shall be accompanied by information that clearly informs the recipient where additional information may be obtained and that participation in the local proceeding is a prerequisite to the right to take any subsequent appeal.

NOTE: Public notice shall be given not less than 15 days prior to the date of a public hearing for conditional use review, variances, administrative officer appeals, and final plat review for a subdivision. Public notice shall be given not less than 7 days prior to the date of the public hearing for site plan review and any other type of development review.

NOTE: The municipality may require the applicant to bear the cost of the public warning and the cost and responsibility of notification of adjoining landowners. The applicant may also be required to demonstrate proof of delivery to adjoining landowners either by certified mail, or by written notice hand delivered, or mailed to the last known address supported by a sworn certificate of Service. 24 V.S.A. §4464(a)(3)

- **Defect in Municipal Notice:** 24 V.S.A. §4464(a)(5)—No defect in the form or substance of notice shall invalidate the action of the municipal panel where reasonable efforts were made to provide adequate posting and notice unless the posting or notice was materially misleading in content.
- **Municipal Land Use Panel Hearing Procedure:** 24 V.S.A. §4461—All meetings, except for deliberative and executive sessions, shall be open to the public. A quorum shall not be less than a majority of the members of the panel. Any binding action of the panel shall be taken by the concurrence of the majority of the panel. The panel may examine or cause to be examined a property, maps, books, or records bearing upon the matters concerned in the proceeding and may require the attendance of any person having knowledge about the project. In contested proceedings, the panel shall require that witnesses be sworn and that opportunity be

given to all parties to respond and to present evidence and argument on all issues involved. 24 V.S.A. §4461(b); 3 V.S.A. §809; 24 V.S.A. §1201, et seq. (Municipal Administrative Procedures Act)

- **Identification of Interested Persons:** 24 V.S.A. §4461(b)—In each municipal land use panel hearing there shall be an opportunity for each person wishing to achieve status as an *Interested Person* under §4465(b) to demonstrate that they meet the criteria. The panel shall keep a written record of the name, mailing address and participation of each of these persons.

NOTE: Many municipalities provide a sign up sheet for each public hearing whereby each person in attendance is required to write down their full name, full mailing address and indicate which item or items on the agenda for which they are present. A decision issued by the municipal land use panel should identify within the decision each person who qualified as an interested person and who provided oral or written testimony, evidence or a statement of concern related to the project.

- **Municipal Land Use Panel Decision:** 24 V.S.A. §4464(b)(1); 1 V.S.A. §312(f)—The municipal panel may recess the proceedings on any application pending submission of additional information. The panel shall adjourn the hearing and issue a decision within 45 days after the adjournment of the hearing. Failure of the panel to issue a decision within the 45-day period shall be deemed approval and shall be effective on the 46th day.

The municipal panel may schedule one or more deliberative sessions to finalize its written decision. The panel may adopt the written decision in deliberative session and then release the decision to the public at which time it becomes a public records. 1 V.S.A. §312(f)

Decisions shall be issued in writing and shall include a statement of the factual bases on which the municipal panel has made its conclusions and a statement of the conclusions. The minutes of the meeting may suffice provided the factual bases and conclusions relating to the review standards are provided. 24 V.S.A. §4464(b)(1)

- **Filing and Service of Municipal Panel Decision:** 24 V.S.A. §4464(b)(1)(3)—The municipal land use decision shall be sent by certified mail to the applicant and shall be mailed by First Class Mail to every other person or body appearing or having been heard at the hearing. A copy of the decision shall be filed with the Zoning Administrative Officer and the Town Clerk as part of the public records of the municipality.
- **Time to File Appeal:** 10 V.S.A. §8504(b)—Appeal shall be filed within 30 days of the date of the decision appealed from.
- **Contents of Notice of Appeal:** V.R.E.C.P. 5(b)(3)

- **Filing and Service of Notice of Appeal:** V.R.E.C.P. 5(b)(1) and 5(b)(4)(A)—
 - File Notice of Appeal by certified mail with filing fee of \$250 to the Clerk of the Vermont Environmental Court addressed as follows:

Jacalyn M. Fletcher, Court Manager
 Vermont Environmental Court
 2418 Airport Road
 Barre, VT 05641-8701

- Mail a copy to the Town Clerk or Zoning Administrative Officer (if designated). Include a cover letter requesting the municipality to provide a list of “Interested Persons” within five (5) days as provided for my V.R.E.C.P. 5(b)(4) and 24 V.S.A. §4471(c)
- Upon receipt of the list of interested persons from the town, appellant must provide each interested person with a copy of the notice of appeal by certified mail. The Environmental Court has Form 900 (Notice to Interested Parties) available on the Court’s website at www.vermontjudiciary.org

NOTE: Sometimes the address provided by the town is not adequate for certified mailing. Additionally, it is not unusual for the town to provide the list of interested persons several days after the five (5) day statutory deadline. Appellant should request the Town Clerk or Zoning Administrative Officer to confirm that the municipality provided public notice and written notification to all adjoining property owners as required by 24 V.S.A. §4464(a). If the appellant is not satisfied that the municipal panel made reasonable efforts to provide adequate notice then appellant may elect to send notice of the appeal to all adjoining landowners.

- **Cross Appeal:** V.R.E.C.P. 5(b)(2)—Any other person entitled to appeal may file a cross appeal within fourteen (14) days of the date on which the statement of questions is required to be filed or within the timeframe extended by the Court as provided in Rule 4 of the Vermont Rules of Appellate Procedure.
- **Statement of Questions:** V.R.E.C.P. 5(f)—Appellant shall file a statement of questions within twenty (20) days after filing the notice of appeal. The statement shall be served upon all parties by First Class Mail. Review is limited to issues that have been preserved by the appellant in the statement of questions. In re Eastview at Middlebury, Inc., Vt. Env’tl. Ct., Docket No. 256-11-06Vtec (February 15, 2008)

NOTE: The 20-day timeframe for filing the statement of questions is not jurisdictional and late filing does not affect the validity of the appeal but is ground for such action as the Court deems appropriate, which may include dismissal of the appeal. V.R.E.C.P. 5(b)(1)

NOTE: Only an appellant or cross appellant may file a statement of questions with the Court. In re Garen, 174 VT 151 (2002)

An intervener is limited to review of only the issues raised in the statement of questions and may not expand the issues or submit additional questions. Garen at 156

- **Standing to Appeal:** 10 V.S.A. §8504(b)(1); 24 V.S.A. §4471(a)—An “*interested person*” as defined by 24 V.S.A. §4465(b) who has “*participated*” in a municipal regulatory proceeding may appeal to the Environmental Court
- **Interested Person**—24 V.S.A. §4465(b)—the following are interested persons:
 - (1) A person owning title to property...affected by a bylaw who alleges that the bylaw imposes on the property unreasonable or inappropriate restrictions...
 - (2) The municipality that has a plan or bylaw at issue or any municipality that adjoins that municipality;
 - (3) A person owning or occupying property in the immediate neighborhood of a property that is the subject of any decision or act taken under this chapter who can demonstrate a physical or environmental impact on the persons interest under the criteria reviewed and who alleges that the decision or act, if confirmed, will not be in accord with the policies, purposes, or terms of the plan or bylaw of that municipality;
 - (4) Any 10 persons who may be a combination of voters or real property owners within a municipality who, by signed petition to the appropriate municipal panel, allege that any relief requested by a person under this title, if granted, will not be in accord with the policies, purposes or terms of the plan or bylaw of that municipality;
 - (5) Any department and administrative subdivision of the State owning property or any interest in property within a municipality and the Agency of Commerce and Community Development
- “**Participation**”—24 V.S.A. §4471(a)—“*Participation in a local regulatory proceeding shall consist of offering, through oral or written testimony, evidence or a statement of concern related to the subject of the proceeding.*”

NOTE: Personal appearance is not required at the local municipal proceeding. A letter of concern is adequate. Smith NOV Appeal, Vt. Env'tl. Ct., Docket No. 117-5-06Vtec (December 21, 2006)

- **Entry of Appearance:** V.R.E.C.P. 5(c)—Any other interested person or “*party by right*” may enter an appearance within twenty (20) days after the date on which notice of filing of the last Notice of Appeal was served or may file a motion to intervene. Also note—24 V.S.A. §4471(c)—Any of the persons identified as “*Interested Persons*” by the town and required to receive notice of the appeal from the appellant may enter an appearance within twenty (20) days and shall

automatically be accorded party status and upon motion shall be granted leave by the Court to intervene.

- **Party by Right:** 10 V.S.A. §8502(5)—A *Party by Right* means the following:
 - (A) The applicant,
 - (B) The landowner,
 - (C) The municipality in which the project site is located, and the municipal and regional planning commissions for that municipality,
 - (D) If the project site is located on a boundary, any Vermont municipality adjacent to that border and the municipal and regional planning commissions of the bordering towns,
 - (E) The solid waste district, if the project is a solid waste facility,
 - (F) Any state agency affected by the proposed project.
- **Intervention:** 10 V.S.A. §8504(n)—The following persons may intervene in a pending appeal:
 - (1) Appeared as a party in the action appealed from and retained party status;
 - (2) Is a party by right;
 - (3) The Natural Resources Board or either panel of the Board;
 - (4) Is a “*Person Aggrieved*”;
 - (5) Qualifies as an “*Interested Person*” pursuant to 24 V.S.A. §4465;
 - (6) Meets the standard for intervention pursuant to V.R.C.P. 24

NOTE: An intervener who otherwise has standing to appeal, may continue the appeal before the Environmental Court even if the original appellant withdraws. In re Garen, 174 VT 151 (2002). Although a party may have a statutory right to intervene, the Court may deny a motion to intervene if not made within a reasonable time. Garen at 154.

- **Person Aggrieved:** 10 V.S.A. §8502(7)—A person who alleges an “*injury to a particularized interest*” protected by the provisions of law.
- **Injury to a Particularized Interest:** Not statutorily defined—Vermont case law and previous environmental decisions have required the party to demonstrate an “*actual, particularized injury*”. An abstract interest in the outcome of an adjudication is insufficient. Parties are required to show that they have suffered some special and substantial injury distinct and apart from the general injury to the public. It is not adequate to assert a generalized policy concern or a generalized harm to the public or the public interest. Parker v Town of Milton, 169 VT 74 (1999); In re Stone Cutters Way/Winooski East Waterfront Redevelopment Project, Declaratory Ruling Request #391 (Vermont Environmental Board, June 1, 2001); In re Marcelino Waste Facility, Vt. Env'tl. Ct., Docket No. 44-2-07Vtec (January 28, 2008) (March 21, 2008); In re East View at Middlebury, Inc., Vt. Env'tl. Ct., Docket No. 256-11-06Vtec (February 15, 2008); In re Entergy Nuclear/Vermont Yankee Thermodischarge

Permit Amendment, Vt. Env'tl. Ct., Docket No. 89-4-06Vtec (January 9, 2007); In re Unified Buddhist Church, Inc., Indirect Discharge Permit, Vt. Env'tl. Ct., Docket No. 253-10-06Vtec (August 15, 2007); In re Morgan Meadows/Black Dog Realty, Vt. Env'tl. Ct., Docket No. 267-12-07Vtec (May 1, 2008)

- **Intervention Under V.R.C.P. 24:** There are two types of intervention—intervention by right (V.R.C.P. 24 (a)) and permissive intervention (V.R.C.P. 24(b))

To qualify for **intervention by right**, the applicant must satisfy the following standards:

- (1) Show that a statute confers an unconditional right to intervene, or
- (2) *The applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.* (V.R.C.P. 24(a))

Permissive intervention is discretionary with the Court. The party must demonstrate that a statute confers a conditional right to intervene or that they assert a "*claim or defense*" that has a question of law or fact in common with the appeal itself. V.R.C.P. 24(b)

- **Amicus Curiae Participation:** The Court may grant leave to participate in the de novo proceeding as *amicus curiae*. *Amicus curiae* status may provide the proper avenue for participation of an environmental advocacy organization without full party status. In re Morgan Meadows/Black Dog Realty, Vt. Env'tl. Ct., Docket No. 267-12-07Vtec (May 1, 2008).
- **Challenge of Party Status/Intervener Status:** V.R.E.C.P. 5(d)(2)—An appellant who claims party status as an interested person who participated in the municipal proceeding and any other persons who appeared in the municipal proceedings will be accorded party status unless the Court otherwise determines on its own motion, on motion to dismiss a party, or on a motion to intervene. A person who wishes to challenge party status has the burden of establishing lack of status on a motion to dismiss.

If party status is denied, the denial of party status may be appealed on an interlocutory basis to the Supreme Court (V.R.E.C.P. 5(k)(5)) or after final judgment on the merits. 10 V.S.A. §8505(2).

- **Stay:** V.R.E.C.P. 5(e)—The Environmental Court may, on its own motion, or on motion of a party, stay the act or decision and make such other orders as are necessary to preserve the rights of the parties "*upon such terms and conditions as are just.*" The filing of an appeal shall automatically stay a decision involving a stream alteration permit or shoreline encroachment permit issued by the Secretary

of the Agency of Natural Resources and the denial of “*Interested Person*” status by a Board of Adjustment, Planning Commission or Development Review Board. See: 10 V.S.A. §8504(f).

- **Remand for Reconsideration:** V.R.E.C.P. 5(i)(j)—At the request of the tribunal appealed from, the Environmental Court, at any time prior to judgment, may remand the case to the tribunal for reconsideration. The Court may also, in its final judgment, remand the case for further proceedings consistent with the order of the Court.
- **Consolidation:** 10 V.S.A. §8504(g)—The Environmental Court may consolidate different appeals where they relate to the same project.
- **Place of Hearing:** 4 V.S.A. §1001(e)—Hearings shall be held in the county in which all or a portion of the project land is located.
- **Legal Precedent:** 10 V.S.A. §8505(m)—Prior decisions of the Environmental Board, Water Resources Board, and Waste Facilities Panel shall be given the same weight and consideration as prior decision of the Environmental Court.
- **Appeals to the Supreme Court:** 10 V.S.A. §8505; V.R.E.C.P. 5(k)—An appeal shall be filed within thirty (30) days of the date of the entry of the order or judgment appealed from. A person has standing to appeal if they are a “*person aggrieved by a decision of the Environmental Court*” or a “*party by right*” or the Natural Resources Board or a panel of the Board and

(1) the person was a party to the proceeding before the Environmental Court; or
(2) the decision being appealed is the denial of party status, or
(3) the Supreme Court determines that there was a procedural defect which prevented the person from participating in the proceeding or some other condition exists which would result in manifest injustice if the person’s right to appeal were disallowed.

Prepared by Lawrence G. Slason, Esq.¹
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