

DO IT YOURSELF: ZONING

A GUIDE TO ZONING HEARINGS AND APPEALS • *Compiled by Paul Gillies*

This pamphlet comes with a big proviso.

Check the date on the pamphlet.

The law may have changed since this paper was released, and there is no way to get it back to fix it. This pamphlet was written in the fall of 2007. It reflects the changes made in the law during the last several years.

The purpose of this pamphlet is to prepare you for the upcoming hearing before the local zoning board, development review board, or planning commission considering a permit that is important to you, either because you want the permit granted or rejected. Like all unstaged events of powerful import in your life, this hearing is going to require your greatest resources of courage and intelligence to get you through it. Preparation, as always, is essential. Restraint is key.

At the table sits the parties. One side wants to develop property. The other side opposes the development. Now what? Many people in this situation have no idea what to expect. It makes sense to do some homework before you arrive at the meeting. Your first duty is obtain a copy of the bylaws and the subdivision regulations, if a subdivision is involved.

Read all of the materials from cover to cover several times. The first sweep should be light reading, breezing over the topics and seeing how the regulations are laid out. Locating the definitions, and pages devoted to the appropriate zoning district, are essential steps. Existing small lots, conditional use review, or variances may be applicable to the application before the board. In the second pass, start taking notes. Squeeze out the details you need to support your position—setbacks, minimum lot size, traffic impact, whatever particular regulations are at issue.

Try to look at the state law on this subject. Chapter 117 of Title 24 is the most important. Search for the Vermont Legislature home page, and then click “Vermont Statutes

Annotated,” then “Title 24,” then “Chapter 117.” Scroll down to “Title 24 Municipal and County Government.” From there scroll down to “Chapter 117, Municipal And Regional Planning And Development.” If you prefer to type in the web address directly, the link is <http://www.leg.state.vt.us/statutes/sections.cfm?Title=24&Chapter=117>. For those that prefer books to computers you can find the same information in hard copy. In the library or town clerk’s office, Chapter 117 is found in the second volume of Title 24 of the Vermont State Statutes. Most of it is in the main volume, but always check the pocket parts for the most recent changes in the law (at the back of the book in a separate pamphlet for Title 24, and make sure it’s the latest version).

Familiarity with the application is also essential. Don’t be surprised if the board or commission asks detailed questions, requiring a working knowledge of a plat or construction plan. Think ahead about what will be asked, and prepare yourself to give short, clear answers. Bring a ruler, know the scale of the drawing (and the ruler), and practice measuring points on the plat to become familiar with the process.

Talking to the other side in advance of a hearing or before it begins is not forbidden. This should be a civil encounter, as early in the process as possible, perhaps before the project’s plans are fully developed. Misunderstandings easily flourish in a vacuum of information. Most people will gladly explain what they intend to do. Candid conversations can resolve problems before they emerge in a hearing, and everyone will be better prepared to discuss the issues in a calm, clear manner. Talk to the zoning administrator, to find out what the town knows of the project and what sections of the zoning bylaws are involved.

The chair is about to call the hearing to order. Wait, who are these people?

The Players

Meet the principal actors in the land use drama. For zoning, you start with the zoning administrator (who we’ll

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refer to as the ZA) who issues permits for single family homes, and other small developments, such as garages and the like. The ZA must administer and enforce the bylaws literally. The ZA decides what kind of a permit is needed. If the ZA denies the application, the decision can be appealed to the zoning board or development review board (here

we'll call them ZBA and DRB). But any appeals must be filed within 15 days of the decision.

Towns have either a ZBA or a DRB. If there is a ZBA, that's the board for conditional use permits, variances, and appeals of decisions of the ZA. In those towns the planning commission (PC) reviews site plans and grants subdivision permits.

In towns with DRBs, the regulatory functions of the PC and ZBA are merged in the DRB. In every town, the PC is responsible for planning, including the drafting of town plans, bylaws, regulations and amendments. The state statute refers to all of these as appropriate municipal panels, but try to keep them separate. Here we'll use PC, ZBA, and DRB as appropriate.

Then there are the "parties." Some might be requesting a permit. Some might be opposing a permit. Some may be drawn by the promise of action at tonight's meeting. Most times there is no opposition to proposals. Sometimes things get out of control. It's the board or commission chair's duty to maintain order, and nothing is more important. Your case can only be made if there is respect and attention, both of which are lost with rude behavior or choice words. Even a slightly sarcastic attitude can constitute a virtual forfeiting of your position in many towns.

Interested Persons

You have to be an "interested person" to participate in the hearing. You must participate in the hearing in order to appeal a decision later to the Vermont Environmental Court. It's important to know what this term "interested person" means. It isn't what you might think. Interest, in the sense of caring about the project, is not what the law means. You have to be on the list. The list is found in 24 V.S.A. § 4465 Appeals of decisions of the administrative officer (b).

The applicant for a permit is an interested person, of course. So is the town. People in the "immediate neighborhood" (a term of art) of the proposed development who support or oppose it are also parties.

Suppose you are a neighbor of a

24 V.S.A. § 4465. Appeals of decisions of the administrative officer (b)

For the purposes of this chapter, an interested person means any one of the following:

(1) A person owning title to property, or a municipality or solid waste management district empowered to condemn it or an interest in it, affected by a bylaw, who alleges that the bylaw imposes on the property unreasonable or inappropriate restrictions of present or potential use under the particular circumstances of the case.

(2) The municipality that has a plan or a bylaw at issue in an appeal brought under this chapter 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 person's interest under the criteria reviewed, and who alleges that the decision or act, if con-

firmed, will not be in accord with the policies, purposes, or terms of the plan or bylaw of that municipality.

(4) Any ten persons who may be any combination of voters or real property owners within a municipality listed in subdivision (2) of this subsection who, by signed petition to the appropriate municipal panel of a municipality, the plan or a bylaw of which is at issue in any appeal brought under this title, 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. This petition to the appropriate municipal panel must designate one person to serve as the representative of the petitioners regarding all matters related to the appeal.

(5) Any department and administrative subdivision of this state owning property or any interest in property within a municipality listed in subdivision (2) of this subsection, and the agency of commerce and community development of this state.

proposed shopping mall or gas station, and you want to be sure your voice is heard in the coming hearings. It's your duty to provide evidence to the board to show that the project will have an impact on your property or interests. By "neighbor," the statute means one who is in the immediate neighborhood, which means having a physical or environmental impact on you as a landowner. Someone who uses the road on which a subdivision is being proposed, for instance, might complain about traffic.

There is another way of achieving interested person status. Ten voters or owners of real property can petition to become an interested person, able to participate in the hearing and file an appeal. Here the statute provides words to use in your petition. You must allege (and be able to prove) that the project "will not be in accord with the policies, purposes, or terms of the plan or bylaw" of the town or city. The petition needs to be filed with the board before testifying at the hearing. In these cases, petitioners must designate one person to serve as their representative, to speak for the group.

One more situation is worthy of mention, just to round out the subject. Occasionally, the ZA denies an application. Stunned as the applicant may be, this is no time to sit on the back porch and complain about the government. Within 15 days of the date of the decision (no matter when you receive it, and not counting the day of the notice), you must appeal that "decision" of the ZA to the ZBA or DRB, or you may never be able to raise that issue again in any forum. You can also appeal a notice of violation, issued by the ZA, if you are the subject of such a notice.

Your appeal to the ZBA or DRB is a form of a petition. In writing, you should say why you disagree. Hand deliver it to the ZBA, PC, or DRB.

Getting a receipt is extra protection. Fifteen days: count them out.

Participation in the process of a hearing or appeal at the local level is essential. You cannot sit back and watch it unfold. You have to offer some evidence, some testimony, in person or in writing, or you may be foreclosed from appealing that decision, if the board grants or denies the permit, subdivision, or appeal.

Notice

The town has an obligation to warn hearings in the newspaper and in the usual places of public posting. Fifteen days is the minimum notice period, not counting the day of the hearing itself. Less than 15 days' notice makes the board or commission's consideration of the matter invalid, until proper warning is done.

Notice is also required to all abutting landowners at least fifteen days before a hearing. Sending that notice is the obligation of the applicant. By the way, you are abutting if you live across the road from the development, as the public right-of-way is irrelevant in this case. The notice is required to describe the proposed project and give the recipient notice of how more information can be seen, reviewed and copied. The notice also must tell you about your right to participate in the hearing and in particular the consequences of not participating on subsequent appeals.

The notice must be precise. A warning for a variance, when what is really at stake is a conditional use permit review, is not adequate. The hearing would have to be rewarned for a conditional use.

On a more practical note, do not be surprised if some of what is explained here is not well understood by the board or commission. Many are not used to formality such as petitions for interested person status, but do not

neglect any of these requirements because of what a board says. These are legal systems, and they have their rewards and punishments. You may end up in Environmental Court, where all of these details become critically important.

The Hearing

The time of the hearing has arrived, and the board is right on schedule. What happens next has many local variations, but the basic hearing usually starts with the applicant, who presents what is proposed and takes questions from the board. By the way, when "board" is used here, assume it could apply to any of the appropriate municipal panels—PC, DRB or ZBA—that hold hearings on permits and appeals.

The rule in most hearings is, you don't speak unless the chair recognizes you (and you have something to say). You can wave your hand or lift one finger, but don't interrupt and don't mutter asides during the hearing. It's not polite or likely to influence your position, and it's likely not to be considered by the board. Get over the idea that you are right and anybody ought to agree with your point plainly, without proof. Remember, property rights are defined by the bylaws and state law, and standards mean everything.

The standards apply to a particular hearing are listed in the bylaws. Look them up under the appropriate heading—"conditional use," "non-conforming use," "existing small lots," or "site plan review," for example.

The hearing is to decide whether the proposal meets the standards. That's why the best practice is to keep outbreaks of personality to a minimum. Just the facts. What is proposed? What will it do to you?

The hearing ought to start with a swearing ceremony. You will be asked if you solemnly swear to tell the whole

truth and nothing but the truth. If you prefer not to say, "So help me God," you may affirm, ending the oath with the words, "Under the pains and penalties of perjury." If you don't take the oath, you can't testify.

The applicant presents the development. Interested persons get an opportunity to present their point of view. Everybody may ask anybody questions. Sometimes another session is required. Sometimes parties ask for more time to present a different variation of the plan. At some point, the chair declares the evidence closed, and after that there is nothing to do but wait.

If you are presenting anything on paper, it makes good sense to bring enough copies for the board and all others who will attend. If what you're offering is long, use stickies or other methods to point out the particular page that's important. A short written description of your position accompanying the oral presentation also helps. Use numbered paragraphs, so everybody can locate what you're talking about quickly. Be articulate. Restrain emotion – it doesn't help.

The Decision

The board has 45 days from the close of evidence to make its decision. Writing it and issuing it may take longer. The decision may be in the minutes, or in a separate document. It needs to have findings and conclusions. If the board takes longer than 45 days to make the decision, the permit may be granted by operation of law. That takes an appeal to make it stick, and is rarely granted, but it's an argument. The board makes its decision out of your sight, without formal notice of its deliberations. *It doesn't need to meet to vote on the decision.* The written

decision is all that's needed. If the time passes, make a call. Perhaps they forgot to send you a copy.

The board is expected to write findings and then apply those findings to the law and reach a decision. It may grant the permit or deny it. It may include conditions that are acceptable or not to the applicant or others. Somebody is bound to be unhappy.

The Appeal

For those who have the energy to proceed further, there is the appeal. This is on a 30-day timer, measured from the date of the decision, no matter when you receive it, not counting the day it was issued. An appeal must be filed in writing with the Vermont Environmental Court in Berlin before the close of business on the 30th day after the decision (unless you are granted an extension by the Court in advance of the deadline).

There are two Environmental Judges in Vermont. The court is located on Airport Road in Berlin. The phone number is 828-1660, and the staff is always helpful in explaining any details of the appeal process.

The fee is \$225.00 and ought to be included with the notice. The notice simply states you appeal the decision. It should state the name, address and phone numbers of the interested persons (and applicant), including yourself; name the decision you are appealing (and give its date); and describe the location of the property under appeal. Describe what makes you an interested person in the notice. Enclosing a copy of the decision of the local board is smart practice. You must send a copy of the notice to the town board from which the appeal is taken, and any interested persons identified at the hearing, by certified mail.

Other interested persons have 20

If you failed to participate at the hearings at the local level, you may not be entirely foreclosed from proceeding. Within the 30 day appeal period, after a local decision has been issued, you may try to appeal. You'll need to state in writing one of three possible positions: (a) there was a procedural defect which prevented you from obtaining interested person status or participating in the proceeding; (b) the decision being appealed is the grant or denial of interested person status; or (c) some other condition exists which would result in manifest injustice if your right to appeal was disallowed. 10 V.S.A. § 8504(b)(2). The Court then decides whether to accept your appeal.

days from the date the notice of appeal was served on the last interested person to enter an appearance. After that time, people who want to participate must request permission of the Court.

The law makes the appellant (the one bringing the appeal) file a statement of questions with the Environmental Court within 20 days of filing the notice of appeal. These are statements, usually posed as questions, delineating what you find objectionable. For instance, "Whether the proposed project adversely impacts the character of the neighborhood," in a conditional use context, is a question that might appear on the statement. Usually statements list multiple questions. Don't be conservative in this listing.

Unless your town has adopted

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“on-the-record” proceedings, an appeal before the Vermont Environmental Court is *de novo*, meaning anew. Forget what happened at the town. The hearing (or at least those parts that are the subject of the appeal) must be presented all over again to the court, unless the matters are resolved on motion. You are starting over. That means you need to marshal your evidence and organize your presentation again.

You may proceed to Environmental Court without an attorney. The rules allow it. You can gauge your own level of confidence, and decide that for yourself. It is a court, however, and there are rules.

You can request a copy from the Court or locate them on-line at the Vermont Judiciary web page.

Final advice

Some people say, it’s not neighborly to oppose the plans of others. You are a member of a community, and there are sacrifices everyone must bear. That you may have to bear more that your share is a bitter pill you must swallow, for the public good. Why don’t you just mind your own business?

Others say, it’s not nice to use your property in a way that makes mine less enjoyable or detracts from its value. Expect me to oppose your

plans if that happens. I’m not being mean. I’m just trying to show you that my rights begin where yours end. I don’t oppose development for its own sake. It’s just that private property can’t always do everything it wants.

These two polar opposite positions collide in hearings before local boards. Ideally, the hard decisions that are made at this level are fair, unbiased, and based on facts not personalities. Effective participation helps guarantee that. The one choice you have is to become involved. You have to fight your battles at the local level, or accept change and move on.

Seven truths of zoning

1. The town will not necessarily protect your interests. The town has a duty to enforce its bylaws and subdivision regulations. Your interests may be qualitatively different. The town board or commission may deny or condition a permit to satisfy your concerns, but may choose to ignore your concerns and issue the permit anyway.

2. You cannot simply wait and see. The law now provides that you must participate, in person or in writing, in the hearing to qualify to appeal the decision to the Vermont Environmental Court. If you do nothing, you will be turned away if you try to appeal.

3. Residents’ needs do not necessarily trump non-residents’ plans. The personality of the applicant or the interested person opposing the development is irrelevant. The standards that count are found in the bylaws, particularly the list of permitted and conditional uses in the pages describing the uses in the zoning districts.

4. The big guy does not always get his way. Recent history demonstrates this. What counts is who has the most articulate, reasonable, competent evidence, and whose presentation is more persuasive than those of others. You can be outgunned, but your voice is going to be heard and if your point is a good one it may change the direction of the review pro-

cess. Don’t be intimidated by a phalanx of blue-suited lawyers and flannel-shirted engineers. They are just citizens like you, with equal standing before the board or commission.

5. You do not have to have a lawyer at the board or commission. Many applicants and many landowners who participate at the local level do so without lawyers present representing them. The law does not require it. The Environmental Court is also very cordial to pro se parties. There may come a time, however, where you begin to feel uncomfortable with what is happening, and a lawyer familiar with the process may be of great value to you, either through a simple consultation or actual representation.

6. You cannot get your legal and expert fees when you win. You bear your own costs and expenses in these affairs. It’s not about damages. It’s about regulated uses of land.

7. What happens at the town board or commission does not carry forward to affect the appeal process. Unless the town has decided that its hearing is “on the record,” the Environmental Court is not bound to make the same findings or the same conclusions of law when it takes up the case. That’s because it’s *de novo*, meaning anew. What the board members said, how the commission decided, is irrelevant on appeal.

The Districts

Districts 1 & 8:

440 Asa Bloomer Building,
4th Floor
Rutland, VT 05701-5903
802-786-5920

Districts 2 & 3:

100 Mineral Spring Street,
Suite 305
Springfield, VT 05156
802-885-8855

Districts 4, 6, & 9:

111 West Street
Essex Junction, VT 05452
802-879-5614

District 5:

5 Perry Street, Suite 60
Barre, VT 05641-4252
802-476-0185

District 7:

1229 Portland Street,
Suite 201
St. Johnsbury, VT 05819
802-751-0120

Vermont Environmental Court:

2418 Airport Road, Suite 1
Barre, VT 05641-8701
802-828-1660

A Word About The Vermont Institute for Government

The Vermont Institute for Government (VIG) is a nonprofit corporation dedicated to improving educational opportunities for local officials and the public on how government works. It consists of representatives from each of the major groups in Vermont that offer such training.

VIG has published other pamphlets that may be of use or interest to you. These include:

- *The Meeting Will Come to Order*, covering town meeting procedures.
- *Changing the World*, about how to increase your effectiveness in meetings of local and state boards and commissions.
- *Are you Appealing?*, which covers the tax grievance and appeal processes at the local level.
- *Isn't This My Land?*, relating to local planning and zoning.
- *The Public Right of Way and You*, covering town highways.
- *How and Why to Read a Town Report*, it can tell you a great deal about your town.
- *It's Your Turn: A Call to Local Office*, how to get involved in your local government.
- *Reforming Local Government by Charter*, how to change your local government.
- *The Development Review Board*, what's involved in creating a development review board.
- *The Law of Trees*, how the law treats trees and describes your rights.
- *The Law of Water*, how the law treats water and describes your rights.

These publications are available from the VIG office or online at <http://crs.uvm.edu/citizens/index.htm>

For more information on any of the material contained in this pamphlet contact:

Vermont Institute for Government

617 Comstock Rd., Suite 5
Berlin, VT 05602-9194

802-223-2389 x13 or email: Mary.Peabody@uvm.edu

A companion to this pamphlet entitled "Do it Yourself: Zoning" is also available upon request. It has many complementary sections to this one. Be sure you keep the two processes separate. There are some overlaps, but these are different laws.