

DO IT YOURSELF: ACT 250

A CITIZEN'S GUIDE • *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.

Act 250 is a unique Vermont institution designed and operated by the State of Vermont, and dedicated to ensuring that development of larger projects occurs correctly, with due respect for the environment. Don't be frightened by it. Its reputation as a ham-handed destroyer of the dreams of entrepreneurs is undeserved. Act 250 is a grand stage where developers and neighbors meet to resolve their differences, before a district commission charged with the duty of reviewing the application to see if it satisfies ten criteria of public concern. The majority of applications are granted, but if the commission's decision is unacceptable to any party, then there may be an appeal to the Vermont Environmental Court.

Act 250 is not beyond your reach if you proceed deliberately to understand it, before you get involved in making an application to the district commission or thinking about participating in a hearing. This pamphlet intends to introduce you to the basics of the law, the rules, and the process, so that you can participate productively in the hearing, if one is held. Eighty percent of all applications are processed as "minor applications" with no hearing unless one is requested.

If you are reading this because you have just received notice of a pending application affecting your interests, you need to act immediately to ensure you have party status to participate in the review. Call the district coordinator and learn the critical dates, or you may be foreclosed from party status. Get on the service list, and

attend all hearings. Participation is essential. Waiting to see is not an option, unless you are prepared to accept what is being proposed. If you are an applicant, you must participate or risk denial of the application.

Before you file any paper, you ought to consider what you are willing to risk, whether as an applicant or a party to an Act 250 review. Valuing your investment in the process must include both a consideration of what participation will cost in time and energy, and perhaps dollars, if you hire an attorney or an expert, but also what the development will do to your property if it is approved.

Getting to know Act 250.

The first thing you should do is to understand the basics of the law, including, in particular, the ten criteria. On the internet, go to the home page of the Natural Resources Board at <http://www.nrb.state.vt.us/lup/statute.htm>.

From that site, you can read Act 250. The rules governing Act 250 are available at <http://www.nrb.state.vt.us/lup/publications/rules/2007rules.pdf>. A far more thorough discussion of the Act 250 process is also available. Cindy Corlett Argentine's Vermont Act 250 Handbook is available from the Putney Press. More information on the content, pricing and ordering are available at <http://putneypress.org/Books.htm> (a new edition is scheduled for release in the late spring of 2008).

You might also choose to look at the publication (the E-Note index) that summarizes all of the decisions of the former Vermont Environmental Board, which constitute the precedents that Act 250 continues to follow, even after the 2004 reform law took effect. These are organized by topic, and available by going to the Natural Resources Board Act 250 website, <http://www.nrb.state.vt.us/lup/index.htm>, and clicking on the link titled E-Note index. Focus on the issues relevant to the application itself, as identified by the application and the district commission staff.

Ideally, if you have time, you might also attend a dis-

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district commission hearing on some other project, just to see what is involved—how the process works, who the players are, and what you need to do to prepare.

Perhaps most importantly, you should consult with the district coordinator for your area. Coordinators and their staff are always willing to help you understand Act 250. A listing of the districts and contact information appears at the end of this pamphlet.

Introduction to the players.

You've just met the coordinator. His or her job is to assist the parties and the district commissions in meeting their responsibilities under the law. Coordinators are also authorized to issue jurisdictional opinions on Act 250 jurisdiction, which are appealable to the Vermont Environmental Court by those who may be affected by them. These opinions provide a shortcut to applicants and other parties on whether a permit is required, although usually jurisdiction is obvious.

If a hearing is held, you will meet the district commission, which consists of three citizens appointed by the Governor to rule on applications. Not all applications warrant a hearing; some minor applications, or minor amendments, are handled administratively, unless a party (or person who qualifies as a party) submits a written request for a hearing.

At some point, you may be introduced to one or more state officials, from one of the various departments or agencies. The state is a statutory party in Act 250. Getting to know who will appear and what they will say, in advance of a hear-

ing, is a smart move. Successful applicants have already visited state offices, and discussed their application with the people who regulate highways, wetlands, agricultural lands, deer habitats, and other programs in state government. They have found out the state's concerns, and worked with them to ensure a smoother review at the District level. The town in which the project is located is also a statutory party.

Applicants also ought to get to know those who oppose their plans. There are times when neighbors are opposed to change and may seek party status to raise objections to the project. This is their right. There is no right to a permit, and the review process starts as an even playing field, where facts, not feelings, make the difference. Talking to opponents, and seeing how a project can be altered to eliminate their concerns, is always a good idea. Even if you are unsuccessful, remaining civil always helps. Hard feelings cloud judgment, and detract from the important work of deciding the complex questions of Act 250.

Appeals of District Commission decisions go to the Vermont Environmental Court. Requests for appeal must be in writing, accompanied by a fee of \$225, and must state the reasons for the appeal. They must be filed at the Court within 30 days of the date of the decision being appealed (unless you are granted an extension in advance of the deadline). Delays in filing lead to dismissals of appeals.

There are two Environmental Judges in Vermont. The court is located in Berlin, VT. The Environmental Court phone number is 828-1660. Contact names and

other useful information can be found at the Environmental Court website, <http://www.vermontjudiciary.org/courts/environmental/index.htm> and the staff is always helpful in explaining any details of the appeal process.

Beyond the Environmental Court, the appeal is to the Vermont Supreme Court, which also must be filed in writing with the payment of the same fee within 30 days of the date of the Environmental Court decision. These appeals are filed with the Environmental Court.

Party status

The first question at the first hearing of the District Commission is party status—the determination of who gets a seat at the table, and if seated which issues each party may discuss during the process. The applicant and the landowner (if different), the town and the state are always parties. Others may also be granted party status. Frequently these include adjoining property-owners or others that can show they have a “particularized interest” in one of the specific Act 250 criteria. A particularized interest is more than a general interest such as wishing to preserve prime agricultural soils or deeryards. If there is a possible contamination of your water supply (Criterion 1(B)) or traffic congestion (Criterion 5), the Commission may decide you have a particularized interest. Commissions will help you frame your request for party status.

Usually the commission will direct adjoining property-owners who have the same interests to join together, directing them to choose one person to speak for all of them,

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in the presentation of evidence and pleadings.

Although not technically parties, groups or individuals can qualify as friends of the commission, upon petition, if they can demonstrate they can assist the commission in the review. The commission may limit their participation to motions and responses, or it may allow the presentation of evidence at a hearing by the friends.

At the hearing, parties present evidence on the designated criteria identified by the commission. *Any person denied party status or the opportunity to present evidence on a particular criterion* may appeal either of those decisions to the Vermont Environmental Court, within 10 days of the date of the party status decision. In any notice of appeal, the appellant must state the reasons for the appeal. As with all pleadings, this notice must be served on all of the other parties.

These details and many more are found in the rules of the Vermont Environmental Court, principally Rule 5 on Appeals. You can access these rules through the Court's web page listed above, and you should know and understand them fully before proceeding into the Act 250 process.

The Ten Criteria

These criteria can be found in Section 6086 of Title 10, the enabling law for Act 250. Familiarity with these criteria is essential to understand how projects are reviewed. These are the standards, and they include water quality and sufficiency, impact on other water systems, erosion, congestion and safety of highways, impact on schools and municipal services, and the undue, adverse impact on the scenic and natural

beauty of the area, aesthetics, historic sites, and rare and irreplaceable natural areas. That just gets us to the first eight.

Learning the various criteria by number helps you follow the hearing process, which can sometimes seem to be conducted in another language. "What have you on 5?" the chair may ask. You should know that is highways, and that no Act 250 permit can be denied simply because of the impact on traffic. Instead, that criterion is used to condition a project to ensure safety and control congestion.

Criterion 9 may be the most challenging standard in Act 250. This criterion is more likely than others to challenge the commission in its decision to issue a permit. Its subjects include the impact of growth on the town and region, primary agricultural or forest soils, energy, cost of scattered development, and utilities, among others. Whole pamphlets could be devoted to any one of these issues.

Criterion 10 is conformance with the town and regional plan. You need copies of those plans to understand this standard. Some plans are available online or they can be obtained from the town office or regional commission office.

Understanding the ten criteria requires further study. Read the leading cases from the former Environmental Board, and learn the vocabulary and the principles, if you intend to have a measurable impact on the process. Learning the Quechee analysis—on how to measure what is *adverse* and what is *undue*—is a prerequisite for parties participating in a Criterion 8 review of aesthetics.

The web address for the E-Note Index which summarizes cases on this criterion and others is provided in

the first section of this pamphlet.

Before going on, take a deep breath. That's better. At various points in the Act 250 process, you will want to repeat this simple exercise, in order to clear your mind for what lies ahead. Act 250 is not a piece of cake. It requires close attention to detail, procedure, and precedent. A clear mind is your greatest asset. A reserve of patience will also help.

Notice

The district commission warns the public about applications for Act 250 permits by publishing them in the newspaper. If the project has been deemed to be a minor application, no hearing will be held unless a party requests it. If it is a major application, then notices will inform interested persons of when and where the hearing is to be held.

Notice is also required to all abutting landowners. 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 Hearing

The day of the hearing has arrived, and the district commission is right on schedule. The chair begins by identifying the parties. A party may be given initial permission to participate, but that permission may later be revoked if what the party has to offer is not substantive. Parties are acknowledged according to their issues. Some, usually those opposing an application, may be limited in the subjects they can cover by their testimony. Statutory parties may testify on

any criteria; the applicant needs to offer evidence on all ten.

The rule of hearings is, 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. Let go of the idea that you are right and that any sensible person should see that plainly, without proof. Remember, property rights are defined by the rules and state law, and standards mean everything. This is not a political process.

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. Other parties have their chance to say their piece. You may ask questions of witnesses on your issues. 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, unless the chair agrees to accept something in writing from the parties after the hearing.

If you are presenting anything on paper, bring enough copies for the board and all others who will attend. A short written description of your position accompanying the oral presentation also helps. Use

numbered paragraphs, so everybody can find what you're talking about quickly. Don't waste time. Be articulate. Restrain emotion – it doesn't help.

The Decision

The commission writes and issues its decision. This is done out of your sight, without formal notice of its deliberations. There isn't a time when it votes openly on the decision. The written decision is all that's needed.

The commission is expected to make findings and apply the law to those findings to 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 (at the Barre mailing address) before the close of business on the 30th day after the decision. The fee is \$225.00 and ought to be included with the notice. The notice 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.

The law makes the appellant (the one bringing the appeal) file a

If you failed to participate at the hearings at the district commission level, you may not be entirely foreclosed from proceeding. Within the 30 day appeal period, after a decision has been issued, you may 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.

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 traffic in the neighborhood," is a question that might appear on the statement by a neighbor who feels the commission did not properly address that issue. An applicant with a condition that seems unacceptable might state why in a question. Usually statements list multiple questions. Don't be conservative in this listing.

Enclosing a copy of the decision of the local board is smart practice. You must send a copy of the notice to all parties (use the service list).

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An appeal before the Vermont Environmental Court is *de novo*, meaning anew. Forget what happened below. What happened at the local level (or at least those parts that are the subject of the appeal) must be presented again before 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 online at <http://www.vermontjudiciary.org/courts/environmental/index.htm>. That web page includes links to the decisions of the Court, which are always helpful.

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 than your share is a bitter pill you must swallow, for the public good. Why don't you just mind your own business?

Other's 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 the

district commissions. Ideally, the hard decisions that are made at this level are fair, unbiased, and based on facts not personalities. Effective participation helps guarantee that outcome. The one choice you have is to become involved. You have to fight your battles at the district level, or accept change and move on.

Seven truths of Act 250

You should know that:

1. The state or town will not necessarily protect your interests. Of course, the various agencies of the state and the town in which the development is located have a duty to enforce laws and regulations, but your interests may be and probably are qualitatively different. The state represents the public interest, not any particular landowner's interest. If anyone is going to share your concerns, it is you, or those whom you hire or persuade to help you.

2. You cannot simply wait and see. The law now provides that you must participate, in person or in writing, in the hearing at the District Commission in order 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 prevail over nonresidents' plans. The personality of the applicant or the party opposing the development is irrelevant. The standards that count are found in the law and rules. Where you were born, how long your family has lived in town, has nothing to do with the decision.

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 process. 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 commission.

5. You do not have to have a lawyer at the district commission. Many applicants and many landowners who participate at the district commission 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 if you win. It's sometimes bad news to parties. Everyone bears his and her own costs and expenses in these affairs. It's not about damages. It's about regulating uses of land.

7. The decisions of the district commission are not binding on appeal. Only those issues you don't appeal are binding; with an appeal, you have a right to a whole new hearing before the Court. The Environmental Court is not bound to make the same findings or the same conclusions of law as the commission 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.