



VERMONT LAND USE

Education & Training Collaborative

Zoning Administrators Handbook

October 2005

Table of Contents

| | |
|--|------------|
| Preface to Third Edition..... | iii |
| Introduction..... | v |
| 1. The Zoning Administrator | 1 |
| <i>Statutory Authority</i> | <i>1</i> |
| <i>Appointment and Removal.....</i> | <i>1</i> |
| <i>Acting Zoning Administrator.....</i> | <i>1</i> |
| <i>Salary</i> | <i>2</i> |
| <i>Other Offices</i> | <i>2</i> |
| <i>Qualifications</i> | <i>2</i> |
| 2. Duties of the Zoning Administrator | 5 |
| <i>Issuing Permits.....</i> | <i>5</i> |
| <i>Assistance to Applicants.....</i> | <i>5</i> |
| <i>Administrative Functions</i> | <i>5</i> |
| <i>Administrative Review.....</i> | <i>7</i> |
| <i>Enforcement</i> | <i>7</i> |
| <i>Appeals.....</i> | <i>7</i> |
| 3. Limits of Authority | 9 |
| <i>Literal Interpretation.....</i> | <i>9</i> |
| <i>Administrative Guidelines</i> | <i>9</i> |
| 4. Permits and Approvals..... | 11 |
| <i>Statutory Requirements</i> | <i>11</i> |
| <i>Applicant Assistance</i> | <i>11</i> |
| <i>Application Submitted</i> | <i>11</i> |
| <i>Zoning Administrator Action.....</i> | <i>12</i> |
| <i>Appeal of Zoning Administrator Action</i> | <i>13</i> |
| <i>Board Action</i> | <i>13</i> |
| <i>After Board Review</i> | <i>14</i> |
| <i>Posting Permits</i> | <i>14</i> |
| <i>Permits Pending Appeal.....</i> | <i>14</i> |
| <i>Appeal to Vermont Environmental Court.....</i> | <i>14</i> |
| <i>Notifying Listers</i> | <i>15</i> |

| | |
|---|-----------|
| <i>Recording Permits</i> | 16 |
| <i>Pending Zoning Changes</i> | 16 |
| <i>Interim Zoning</i> | 16 |
| <i>Certificates of Occupancy</i> | 17 |
| 5. Enforcement | 19 |
| <i>Discovering the Violation</i> | 19 |
| <i>Investigating a Violation</i> | 20 |
| <i>Search and Seizure Law</i> | 21 |
| <i>Informal Warnings</i> | 22 |
| <i>Notice of Violation</i> | 23 |
| <i>Judicial Bureau Alternative</i> | 24 |
| <i>Enforcement Authorizations</i> | 25 |
| <i>Court Action</i> | 25 |
| <i>Settlements</i> | 26 |
| <i>Statute of Limitations</i> | 26 |
| <i>Penalties</i> | 27 |
| <i>Selective Enforcement</i> | 28 |
| 6. Special Issues | 29 |
| <i>Existing Small Lots</i> | 29 |
| <i>Lots with Multiple Principal Structures</i> | 31 |
| <i>Required Frontage</i> | 32 |
| <i>Home Occupations</i> | 33 |
| <i>Mobile Homes</i> | 33 |
| <i>Mobile Home Parks</i> | 34 |
| <i>Accessory Dwellings</i> | 35 |
| <i>Antennae, Wind Turbines and Rooftop Solar Collectors</i> | 36 |
| <i>Energy-related Structures</i> | 36 |
| <i>Satellite Dishes</i> | 36 |
| <i>Agricultural Structures and Uses</i> | 38 |
| Appendices | 1 |
| <i>The Players - Roles in Local Planning and Regulation</i> | 1 |
| <i>Sample Notice of Violation</i> | 4 |
| <i>Referrals for Permit Applications, Reviews, Approval and Appeals</i> | 5 |
| <i>Other Resources for Zoning Administrators</i> | 6 |

Preface to Third Edition

Zoning is the most common land use tool in Vermont. Based on a town plan, zoning encourages the appropriate development of land in ways that the voters and local officials have approved. It is done purely to protect the public health, safety and general welfare of the residents. In order to preserve the rights of the individual property owner, competent administration and even-handed enforcement of adopted zoning bylaws is essential. These objectives can be realized only if administrative officials have a clear understanding of the relevant legal requirements and limitations of the zoning process and a willingness to adapt the regulatory framework to fit local needs.

Rarely is there a simple answer to a land use question, nor can a simple discussion anticipate and adequately respond to the full range of problems to be encountered by the zoning administrator. Because of the complexity and endless variation of site conditions and ownership patterns associated with land development, each permit application must be considered and judged solely on the basis of the specific factual circumstances associated with the proposed use or development. Nevertheless, an attempt has been made in this handbook to identify and discuss a number of common administrative problems and potential solutions as they relate to basic zoning principles and procedures. Once these principles and procedures are understood in context with current law, the zoning administrator should have a sound basis for properly evaluating a zoning application, complaint, or violation and taking the appropriate action.

In addition to its use as a procedural guide for the zoning administrator, the content of this handbook is also important to the planning commission, zoning board of adjustment/development review board and the municipal legislative body, who are responsible for adopting and amending the bylaws, hearing appeals of an administrator's decisions and appointing and/or removing the zoning administrator.

This edition of the Zoning Administrators Handbook was updated with the assistance of Burnt Rock, Inc., Associates in Community Planning of Waitsfield Vermont. Review, editing and formatting was provided by the Vermont Dept. of Housing and Community Affairs. Special thanks are due to Deb Markowitz, the Vermont League of Cities and Towns, Paul Gillies, and Northwest Regional Planning Commission for their time in reviewing this document.

October, 2005

Introduction

Zoning is a legal process that restricts the use of private property. Because the stakes are high for both the landowner and community, these restrictions must conform to state law as written by the legislature and interpreted by the courts. Once adopted, zoning bylaws and subdivision regulations are the law of the town. Local officials must administer them in a uniform, consistent manner for their actions to be respected both by the townspeople and in the courts.

The aim of this handbook is to provide the administrative officer (commonly referred to as the zoning administrator) with an understanding of some basic principles of zoning administration and enforcement and their application to a wide range of problems likely to be encountered. It is also a plea for consistency in conforming to established criteria and a caution against uninformed, arbitrary, and unfair actions that violate the law as well as people's rights.

The zoning administrator is, in large measure, responsible for ensuring the integrity and effectiveness of this process and for the public support it receives. Since he or she is the initial and often sole zoning contact with affected property owners, intelligent, firm, and impartial administration and enforcement conducted with sensitivity to public relations are essential.

Willing compliance with ordinance requirements is a measure of the promptness and tact with which an applicant or violator is handled and the trust engendered by the administrator's expertise. This expertise is fostered by acquiring a clear understanding of the purpose, theory, and practice of zoning and by developing an ability to communicate this knowledge clearly and precisely to an applicant, violator or other interested party.

The content of this handbook is primarily technical. It is based on a collective knowledge of the planning and zoning process and daily experience in responding to individual problems. Hopefully, it will provide the municipal zoning administrator with a better understanding of the responsibilities and legal limits of his or her authority and assure that proper procedures are followed in handling zoning applications and enforcing violations.

This edition of the handbook was prepared to incorporate statutory changes to the Vermont Planning and Development Act, 24 V.S.A. Chapter 117 that went into effect in July, 2004 as a result of Act 115. Unless otherwise indicated, all statutory references are to 24 V.S.A. Chapter 117.

1. The Zoning Administrator

Statutory Authority

The Administrative Officer, commonly referred to as the Zoning Administrator (ZA), is responsible for the administration and enforcement of zoning and other bylaws adopted under the Vermont Municipal and Regional Planning and Development Act (24 V.S.A. Chapter 117).¹ Terms of appointment, duties and responsibilities of the ZA are prescribed by statute [§4448].

Appointment and Removal

A ZA must be appointed promptly after the adoption of a municipality's first bylaw or whenever the position becomes vacant. The planning commission has the responsibility of nominating candidates for ZA to the legislative body (e.g., selectboard, city council, village trustees). The legislative body has the authority to appoint a ZA to a three-year term [§4448(a)].

The legislative body, after consultation with the planning commission, may remove the ZA from office for good cause [§4448(a)]. The legislative body must give the ZA notice of the pending dismissal and the facts that form the basis of the decision to dismiss.

Note

The ZA is subject to all municipal personnel policies unless specifically exempted. The ZA has a right to remain employed for the three-year term; that cannot be altered without first providing due process. There is no right to reappointment when a three-year term is completed, however, and the legislative body may choose to appoint a new ZA without going through the process of dismissal.

The legislative body must also provide the ZA with a hearing, if requested.² At the hearing, the ZA must have an opportunity to bring witnesses and provide other evidence to show that there is no good cause for dismissal.

Acting Zoning Administrator

The planning commission may also nominate one or more persons to serve as acting ZA, for appointment by the legislative body. An acting ZA has the same duties and responsibilities as the regular ZA and serves in the absence of the regular ZA. If an

¹ Specific statutory citations have been included adjacent to related provisions and requirements. All citations refer to 24 V.S.A. Chapter 117 unless otherwise noted.

² Case law has established that it is a constitutional due process requirement that a person who can only be dismissed for cause has a right to notice and an opportunity to be heard prior to dismissal.

acting ZA is appointed, or if the municipality appoints an assistant ZA, clear policies regarding the authority of the ZA in relation to the acting or assistant ZA must be established [§4448(b)].

Salary

The ZA's salary is set either by a vote at town meeting or by the legislative body. (24 V.S.A. Chapter 33 §932). If the legislative body sets the salary, it may alter the ZA's salary and benefits, so long as such alteration is permitted by the municipal personnel policy or collective bargaining agreement.

Some smaller municipalities allow their ZA to retain a percentage of the permit fees instead of receiving a salary. This is acceptable, although those fees must be treated as wages for state and federal payroll tax withholding purposes. All fees must be paid to the municipal treasurer who then issues a check to the ZA. Using application fees as the sole source of a ZA's wages, however, may not provide a strong incentive for enforcement or other duties not directly related to the issuance of permits.

Role of the Acting Zoning Administrator

If your community has not already done so, it should consider appointing an acting ZA. An acting ZA has the same duties and responsibilities as the ZA and serves in the ZA's absence. Thus, the acting ZA is available to step in and carry out the ZA's duties while on vacation or on sick leave.

Some municipalities allow the appointed ZA to call upon the acting ZA when the ZA has a conflict of interest regarding a particular application. To avoid confusion over the circumstances in which the acting ZA is authorized to carry out the duties of the ZA, municipalities are required to establish a clear policy outlining their respective authority.

Other Offices

The ZA can hold other offices in the municipality, with the exception of membership on the Board of Adjustment or Development Review Board [§4448(a)]. The ZA may, for example, serve as a member of the planning commission or legislative body, and it is common for the ZA to also function as the local health or sewage officer.

Qualifications

There are no specific educational or background requirements for a ZA, although the job requires a thorough knowledge of:

1. The community, including general geography and settlement patterns;
2. The objectives of the municipal plan;
3. The purpose, theory and practice of zoning;
4. The Vermont Planning and Development Act, 24 V.S.A. Chapter 117;
5. The municipal bylaw(s) to be administered;
6. Other relevant municipal ordinances and polices; and
7. Basic understanding of state statutes and regulations related to land use and land development.

Equally important are the personal qualities of courtesy, tactfulness, objectivity, common sense and fairness. The ZA will need the ability to communicate clearly, both verbally and in writing, with a wide variety of people. A person treated fairly and impartially by a knowledgeable ZA stands a good chance of feeling well served by the process.

The ZA must understand the role and authority of the legislative body, the Board of Adjustment or Development Review Board and the planning commission. The ZA is in a good position to help ensure that there is a harmonious working relationship between these bodies. The ZA should also be prepared to provide staff reports and testimony before the board during appeals.

2. Duties of the Zoning Administrator

Issuing Permits

The ZA issues zoning permits for all land development not specifically exempted under the municipal zoning bylaw [§4449]. In some instances, approval of one or more “appropriate municipal panels” (i.e., the planning commission, board of adjustment or development review board), or the legislative body, is required before the ZA may issue a zoning permit.

The ZA must administer the bylaws literally and only has authority to permit land development that strictly conforms to the municipal bylaws [§4448(a)], (see Chapter 4).

Municipal land use permit

is a statutory term that includes a zoning, subdivision, site plan or building permit or approval, any of which relate to land development as defined in statute [§4303(11)], which has received final approval from the applicable board, commission or officer of the municipality. It also includes wastewater system permits, certificates of occupancy and compliance, and any amendments to a prior permit or approval.

Assistance to Applicants

An important function of the ZA is to provide property owners and other members of the public with the necessary forms to obtain any municipal permit or authorization required under local bylaws or ordinances regulating land development. In this way the ZA can help coordinate a unified effort on behalf of the municipality with regard to the administration of its land use and development regulations [§4448(c)]. To best serve the public, the ZA should be available during specified hours, and be knowledgeable of all local permits and approvals that are required of applicants.

The ZA should also inform people applying for municipal permits and approvals to contact the Vermont Agency of Natural Resources’ regional permit specialist in order to assure timely action on any required state permits [§4448(c)]. To find the Specialist assigned to your town please see: <http://www.anr.state.vt.us/dec/ead/pa/index.htm>. Your Specialist will provide you with brochures you can give to municipal permit applicants which explain state permits and give contact information.

Note

Failure of the ZA to notify an applicant of all state permit requirements does not excuse an applicant from their obligation to identify, apply for and obtain all relevant state permits.

Administrative Functions

It is common for the ZA to perform a variety of administrative functions for the municipality. These functions may vary depending upon the complexity of local bylaws and whether other paid staff is working with the zoning and planning boards.

The range of administrative functions and type of staff support provided by the ZA beyond what is required in statute is up to each municipality.

The ZA often acts as clerk of the planning commission and/or development review board/board of adjustment. In that role, the ZA may be required to help set meeting agendas, schedule and warn public hearings, and ensure that the boards have the assistance and information required to perform their duties. These functions, however, are not required by statute. At a minimum, however, the ZA *should* inform the planning commission about errors or inconsistencies in the bylaw(s) and recurring problems of interpretation, administration and enforcement. The planning commission can then propose needed amendments to the bylaw.

A Zoning Administrator ought not, however, confuse the clerk's duties with those of the zoning board, development review board, or planning commission in making decisions. The ZA is a party or a witness to most permit reviews. The board or commission should make its own decision in a deliberative session without the ZA present, and to avoid an unhealthy mixing of roles, the ZA should not write the board or commission's decision.

Certain administrative functions are required by statute to be performed by the ZA. These include:

1. Assisting landowners and interested parties with required forms and providing information about local permit requirements [§4448];
2. Referring applications to the appropriate municipal panel having jurisdiction over a proposed land use or development (e.g., for site plan or conditional use approval), and to other municipal staff, departments or advisory commissions as specified in the bylaws [§§4448, 4460, 4464];
3. Referring applications within special flood hazard areas to the state's national floodplain insurance program coordinator within the Agency of Natural Resources' River Management Section, and to the Agency's stream alteration engineer and adjoining municipalities if a watercourse alteration or relocation is proposed (under locally adopted flood hazard area regulations) [§4424];
4. Issuing zoning permits and certificates of occupancy or compliance [§4449];
5. Providing a "notice of permit" with each permit issued, to be posted within view of the public right-of-way most nearly adjacent to the subject property until the period in which an appeal may be filed has expired [§4449];
6. Posting a copy of every zoning permit in at least one public place in the municipality within three days after issuing the permit. Each permit must remain posted for 15 days following the permit's date of issuance [§4449];
7. Delivering a copy of every zoning permit to the listers of the municipality, also within three days of issuing the permit [§4449]; and
8. Recording permits or notice of permits, permit denials, certificates of occupancy and violations with the municipal clerk within 30 days of taking action [§4449].

9. Answering public information requests – the ZA is the custodian of permit records and must assist individuals who are researching the permit history of a property [§4448].
10. Receiving notices of appeal of local decisions to the Vermont Environmental Court, if the municipality has designated the ZA as being responsible for this, in which case the ZA shall supply a list of interested persons to the appellant within five working days of receiving the notice [§4471].
11. Enforcing all violations of the bylaw(s), including the issuance of notices of violation [§§4451, 4452].

Administrative Review

Under certain circumstances, the ZA may be authorized under the bylaws to review and approve new development, and amendments to previously approved development, that would otherwise require review and approval of one or more appropriate municipal panels. This is commonly referred to as “administrative review.” If a community opts to extend this authority to the ZA, the bylaws must clearly specify the thresholds and conditions under which an application may be classified as being eligible for administrative review. Under no circumstances may a ZA approve a development that results in a substantial impact under any of the standards set forth in the bylaws, or approve an amendment that has the effect of substantially altering the findings of fact of the most recent approval [§4464(c)].

Enforcement

The ZA must act to stop or prevent violations of duly adopted bylaws. To do this, the ZA must institute, in the name of the municipality, an action, injunction or other proceeding to prevent or abate violations [§4452]. The ZA has no discretion on whether to enforce known violations and must enforce all such violations in the municipality [see in re Fairchild, 159 Vt. 125 (1992)], (also see Chapter 5).

Appeals

Actions of the ZA may be appealed to the zoning board of adjustment or development review board within 15 days of the date that the action was taken [§4465]. The ZA must participate in the appeal by explaining the action that is under appeal and by presenting evidence to support the action. In addition, the ZA may question any witness or evidence presented during the hearing.

Due Process

The 14th amendment of the U.S. Constitution dictates that the government cannot take away a person's basic rights to 'life, liberty or property, without due process of law.' Due process guarantees that citizens have a right to a fair hearing before an impartial decision-maker. Federal and state courts have issued numerous rulings about what this means in particular cases [e.g., *Town of Randolph v. Estate of White*, 166 Vt, 280 (1997)].

The Zoning Administrator is an officer of the law and must interpret the law (bylaw) literally. The ZA's discretion is limited and defined by state statutes as well as adopted municipal bylaws, ordinances and administrative policies. As a matter of due process, all actions of the ZA (and of appropriate municipal panels) may be appealed; and all determinations, permits, approvals, and notices of violation issued locally must include information on how and when an appeal may be filed.

3. Limits of Authority

Literal Interpretation

The ZA must literally interpret the zoning bylaws [§4448(a)] and has no discretion to:

1. Vary any requirement of duly adopted bylaws;
2. Make any changes in the terms of the bylaws; or
3. Grant or refuse a permit for reasons unrelated to the bylaws and not within the scope of authority delegated by state statute.

Literally Speaking

The zoning administrator (ZA) must interpret the bylaws literally. However “literal interpretation” often requires the ZA to use good judgment in addressing the specifics of the regulations. No law repeals common sense or invites the ZA to make decisions that lead to absurd results.

No sentence ever written in any language is perfectly plain and obvious. The ZA needs an appreciation of context and precedent to understand how a particular provision should be applied.

In certain instances, the ZA may find it useful to consult with the planning commission or a state or federal official (e.g., the State National Floodplain Insurance Program Coordinator) prior to making an interpretation, although only the ZA is responsible for making determinations. All ZA determinations may be appealed to the zoning board of adjustment or development review board.

Each permit application is considered on its own merits. The ZA may not withhold a valid permit because of other current or prior violations by the applicant. Nor may the ZA revoke a valid permit where changes have been made in the use or structure in violation. The only proper remedy in either case is enforcement action by the municipality [§4452].

It is important for applicants and appellants to know that the process is not arbitrary. The ZA must apply the bylaws objectively.

Administrative Guidelines

It is the ZA’s job to administer bylaws fairly and equitably. The zoning bylaw should include language that clarifies the roles and responsibilities of the ZA, as well as the board and commission (see Appendix A for a list of the roles and responsibilities of all of the players in local land use regulation).

Often, however, many of the details of bylaw administration aren’t spelled out in the regulations. It is therefore important to establish clear guidelines, or administrative procedures, that are consistent with the bylaws and Chapter 117, to ensure that everyone is treated the same. This is often done in consultation with the planning commission. The procedures should be written plainly enough so that applicants can know what to expect from the process (for example bylaw language and commentary, see *Manual of Procedures for Administration & Enforcement* at www.vpic.info).

Used in association with the bylaws, administrative procedures can more specifically outline the ZA's role and enable applicants or appellants to better understand their rights and responsibilities.

At a minimum, administrative procedures should outline:

1. The permit application process – including necessary application forms;
2. The enforcement process – including notice requirements; and
3. The appeals process – including filing, notice and participation requirements.

It's also important to maintain a record of local precedents – i.e., past determinations concerning specific bylaw provisions (e.g., district boundaries or definitions) – to ensure that these are consistently applied. Such records are also useful in bylaw updates, to refer to as needed in reconsidering or clarifying existing procedures, standards and definitions.

Note

Changing even longstanding policies will not make the ZA vulnerable to charges of inconsistent treatment of the public, so long as the new procedures are in writing and are applied consistently to all members of the public.

Administrative procedures can be changed as necessary, as long as they are consistent with the regulations and state requirements. The procedures or practices of past ZAs do not necessarily bind a new ZA. It is not good practice, however, for a ZA to arbitrarily change established procedures. The ZA should make changes when there's a good reason for doing so (e.g., to improve application forms), to make the process work better for both the ZA and applicant.

Where to Sit?

In some municipalities, the zoning administrator (ZA) confuses the role as administrator for the zoning process with the role in a public hearing as a party with equal status to that of the applicant and other interested persons. Parties do not meet with the judges and discuss a case outside of a hearing nor should a ZA.

Where the ZA sits signals something to the parties and public attending the hearing. If the ZA sits with the board, many will assume the ZA is part of the body that makes the decision. It is better for the ZA to sit apart from the board and treat the members as the judges they are.

4. Permits and Approvals

Statutory Requirements

No development may begin in a municipality that has zoning bylaws until the ZA issues a zoning permit [§4449(a)], unless the particular development activity is explicitly exempted under state statutes or the bylaws. This means that a permit is usually required before a landowner can develop or change the use of a property.

Land Development

means the division of a parcel into two or more parcels, the construction, reconstruction, conversion, structural alteration, relocation, or enlargement of any building or other structure, or of any mining, excavation or landfill, and any change in the use of any building or other structure, or land, or extension of use of land [§4303(10)].

Note

Bylaws may specify that certain types of land development be exempted from all review and permitting requirements provided that the exempted activity imposes no impact, or only a “de minimus” impact on the surrounding area and overall pattern of land development. Examples of the types of land uses and development commonly exempted include small accessory structures (e.g., doghouses, sheds), occasional yard or garage sales, entry steps and ramps, fences of a certain size, etc.) [§4446].

Applicant Assistance

The ZA provides applicants with the proper forms and explains what is required to file a complete application. The ZA also may need to help applicants determine the location of zoning district boundaries when the locations are uncertain, and point out all applicable bylaw provisions that might apply to a proposed development.

In addition to local bylaw requirements, the ZA should also inform people applying for municipal permits and approvals to contact the Vermont Agency of Natural Resources’ regional permit specialist in order to assure timely action on any required state permits [§4448(c)]. A basic understanding of state permit requirements will help the ZA to provide clear direction to applicants, helping them to avoid problems that could result from not knowing that state permits may be required for their project. The ZA should have a copy of the agency’s permit handbook on hand (available on-line at http://www.anr.state.vt.us/dec/permit_bb/index.htm), which includes information sheets on all permits issued by state agencies.

Application Submitted

The applicant completes a permit application and submits it to the ZA, along with any required fee. The ZA reviews the application to ensure that all necessary information and attachments are included [§§4448(d), 4449].

Do Subdivisions Require Zoning Permits?

Many communities have traditionally not required that subdivisions be issued a zoning permit. One reason for this is that, until recently, subdivisions were regulated under separate, stand-alone regulations that did not stipulate a role for the ZA (in fact, some communities adopted subdivision regulations but did not adopt zoning bylaws, and therefore did not appoint a ZA). Under current statute, “unified development bylaws” are explicitly authorized [§4419], although the Planning Commission or Development Review Board remains responsible for approving subdivision plats. Complicating this matter, communities often include an expiration date for zoning permits, although subdivision plats, if approved and properly recorded, may not be subject to an expiration requirement [§4463(b)].

To avoid confusion, several communities define “subdivision” separately from “land development,” and require commission or board approval of proposed subdivisions without requiring the issuance of a zoning permit. Despite common practice, however, the statutory definition of land development can not be changed by a local bylaw. If a community’s bylaws are not clear regarding the coordination of subdivision approval with zoning permit requirements, the ZA should consult with the municipal attorney.

Zoning Administrator Action

The ZA must “act” within 30 days of receiving a complete application, or a permit is “deemed issued” on the 31st day [§4448(d)]. The “act” of the ZA may include any of the following:

1. The issuance of a zoning permit, if the application conforms to the bylaws;
2. The issuance of a denial, if the application does not conform to the bylaws;
3. The referral of the application to the appropriate municipal panel (planning commission, board of adjustment or development review board) if the proposed development requires one or more approvals (e.g., site plan, conditional use, design review) prior to the issuance of a permit.

The issuance of a decision or a referral within the 30-day period constitutes an action that avoids the issuance of a permit by default.

Note

The ZA should issue a written determination that an application is incomplete in order to avoid triggering the 30-day period.

The bylaws typically include, or reference, the information and approvals required prior to the issuance of a zoning permit. For applications for development within locally regulated flood hazard areas, the ZA is also required to refer the application to the state for review, and cannot issue a zoning permit until 30 days have elapsed from the date of mailing, or comments are received from the state [§4424(2)].

All decisions or determinations of the Zoning Administrator must be in writing, and include a statement of the period of time within which an appeal may be taken. If a zoning permit is issued, the ZA shall provide a notice of permit to be posted within view from the public right-of-way most nearly adjacent to the subject property (see “Posting Permits” below).

Appeal of Zoning Administrator Action

The applicant or other “interested person” may appeal the ZA’s decision to the board of adjustment or development review board within 15 days of a permit being granted or denied. The notice of appeal must be filed with the secretary of the board or the municipal clerk if no secretary has been elected, and copied to the ZA [§§4465(a)]. The notice must include the following information:

1. The name and address of the appellant;
2. A brief description of the property in question;
3. A reference to applicable regulatory provisions;
4. The relief requested by the appellant; and
5. The alleged grounds why the requested relief is proper under the circumstances [§4466].

The appeal may be accompanied by a request for a variance or waiver from applicable dimensional requirements under the bylaws.

The board then schedules a hearing in accordance with state statute, which must be warned and held within 60 days of the date on which the notice of appeal was filed [§4468].

Note

The ZA is a party to the appeal, and as such should be prepared to document for the record the basis for the issuance or denial of the permit. The ZA also has the right to question any witness or evidence presented at the hearing.

Board Action

In the event of an appeal, or if the ZA refers an application to one or more appropriate municipal panels having jurisdiction over the proposed development, the panel must hold a hearing in accordance with applicable statutes [§§4461- 4464]. After the public hearing, the board issues its decision in writing.

The decision must be filed with both the municipal clerk and the ZA as part of the public records of the municipality. The decision also must be promptly mailed to the applicant or appellant and copies sent to all interested persons within 45 days of the date that the hearing on the matter is adjourned [§4464(b)]. In some communities, the ZA is responsible for mailing decisions – this should be set forth in the bylaws or rules of procedure.

Site Visits

If the board wants to visit a site, it should set aside a time and place to meet to tour the property. The ZA and interested persons are entitled to attend the site visit. The public must be duly warned. No formal testimony is allowed at a site visit.

If the board intends to use its observations from the site visit in its decision, the chair should make a written record of the inspection and read it aloud to the members to see if they agree with the report. The report should be available to parties, including the ZA.

The applicant or an interested person who has participated in a municipal proceeding may appeal the decision to the Environmental Court within 30 days of the board issuing its written decision [§4471].

After Board Review

Once all required approvals by appropriate municipal panels have been granted, the ZA issues the required zoning permit [§4449]. This is true for developments requiring one or more approval (e.g., conditional uses, site plan review) as well as variance requests and appeals of ZA decisions.

Note

ZA must issue a permit even for projects that require the approval of the board of adjustment, development review board or planning commission. In the past, the practice in some communities was for the board to “issue a zoning permit” for conditional uses. Bylaws should clearly specify that the procedure should be the ZA refers an application to the board, the board grants approval and the ZA issues the permit.

Posting Permits

Zoning permits do not take effect until after the 15-day appeal period has passed [4449]. The ZA is required to post a copy of the permit in one or more public place in the municipality until the expiration of the 15-day appeal period. In addition, the ZA must provide a “notice of permit” with each permit issued which must be posted within view from the public right-of-way most nearly adjacent to the subject property until the expiration of the 15-day period.

Permits Pending Appeal

If there is an appeal, the permit does not take effect until final adjudication of the appeal before the board *and* the period in which an appeal of the board’s decision may be filed with the Environmental Court has passed without such an appeal being taken [§4449(a)(3)].

If an appeal of a board decision is filed with the Environmental Court, the permit does not take effect until the Court rules [in accordance with 10V.S.A. §8504] on whether to issue a stay, or until the expiration of fifteen days, whichever occurs first. If no stay is granted, landowners who proceed with a project under appeal do so at their own risk. Ultimately, any development must conform to the decision of the Court.

Appeal to Vermont Environmental Court

All board decisions may be appealed to the Vermont Environmental Court. In many communities, the ZA is designated to receive copies of notices of appeal filed with the Court (the municipal clerk may also serve this function). If this is the case, the ZA must supply a list of interested persons to the appellant within five days of receiving the notice [§4471(c)].

Participation in the Appeals Process

The definition of an *interested person* includes the following:

- A person owning title to property, or a municipality or solid waste 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.
- The municipality that has a plan or bylaw at issue in an appeal or an adjoining municipality.
- A person owning or occupying property in the immediate neighborhood of a property which is the subject of a decision or act taken under these regulations, 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 confirmed, will not be in accord with the policies, purposes or terms of the plan or bylaws of the municipality.
- Any ten (10) registered voters and/or property owners within the town who, by signed petition to the Development Review Board, allege that any relief requested by a person under this section, if granted, will not be in compliance with the plan or regulations of the town; and
- Any department or administrative subdivision of the state owning property or any interest therein within the town or an adjoining municipality, and the Vermont Agency of Commerce and Community Development [§ 4465(b)].

Interested persons have the right to:

- Participate in the hearing by offering testimony and witnesses;
- Cross-examine other parties and their witnesses; and
- Appeal the decision of the board to the Environmental Court, provided the interested person participated in the municipal regulatory proceeding [§ 4471].

The ZA fits into this scheme best as a party, separate from the board, with a right to participate in the process in an independent role. The ZA does not have the right to appeal a decision to the court, but otherwise should have full authority to participate in the hearing. This party status prevents the ZA from meeting with the board in deliberative session or writing the decision for them.

When the public feels strongly about an application, people will want to speak at the hearing, but in law they have no place at the table. Many boards allow anyone to speak at a hearing as a way of allowing the strong passions of the evening to dissipate. Only interested persons as defined in statute, however, are guaranteed that right.

The list of interested persons should include those who participated in the local deliberations, and whose names, addresses and record of participation were recorded by the appropriate municipal panel in accordance with §4461(b).

Notifying Listers

The ZA must provide the listers with a copy of all permits within three days from when they were issued [§4449(b)].

Recording Permits

Within 30 days of the issuance of a zoning permit, notice of violation or denial of a zoning permit, the ZA must deliver either the original, a legible copy, or a notice of the municipal land use permit or notice of violation to the municipal clerk for recording in the municipal land records in accordance with 24 V.S.A. §1154. A copy must also be filed in the municipal office in a location where all municipal land use permits shall be kept [§4449(c)].

In many communities, the ZA is required to file all municipal land use permits with the municipal clerk, including approvals of various appropriate municipal panels. The bylaws or rules of procedure should clarify who is responsible for filing each type of permit and approval. It is also common for the ZA to be responsible for maintaining copies of all municipal land use permits in a single location other than the land records.

If the municipality has adopted flood hazard regulations, the ZA must also maintain a record of all permits, elevation certificates, elevations, floodproofing certifications and variance actions issued for development within designated flood hazard areas.

Pending Zoning Changes

The process for reviewing applications and issuing permits changes whenever a proposed amendment to the applicable bylaw is going through the adoption process. This change in the process takes effect once public notice has been issued for the first public hearing of the legislative body to consider the bylaw amendment.

For 150 days following this public hearing notice, the ZA reviews any new application filed under both the proposed and the existing bylaw provisions. The ZA's decision is then based on the more restrictive bylaw provision.

If the amendment has not been voted on by the end of the 150-day period, the ZA must return to reviewing permits under the existing bylaw. Obviously, if there is a vote in which the amendment is rejected, the ZA immediately returns to the existing bylaws.

If an amendment is rejected, or not adopted within the 150 day period, any applicant whose application was denied under the rejected amendment may request the ZA to reconsider the application under the existing bylaws. In this situation, the applicant is exempted from paying additional application fees for this second review [§4449(d)].

Interim Zoning

If a municipality has adopted interim bylaws, the provisions of those bylaws shall be administered in accordance with the same procedures and administrative requirements as permanent bylaws. The legislative body, however, may authorize the ZA to issue permits for land development that is not otherwise permitted by the bylaw as a conditional use [§4415].

The legislative body may only authorize a permit for a use not otherwise allowed by the interim bylaw if it finds that the proposed use is consistent with the health, safety and welfare of the municipality, as well as the standards listed below. In addition, the

legislative body may only authorize such a permit after a duly noticed public hearing. The applicant and all abutting property owners must be notified in writing of the date of the hearing and of the legislative body's final determination.

In making a determination the legislative body shall consider the proposed use with respect to:

1. The capacity of existing or planned community facilities, services or lands;
2. The existing patterns and uses of development in the area;
3. Environmental limitations of the site or area and significant natural resource areas and sites; and
4. Municipal plans and other municipal bylaws, ordinances or regulations in effect.

Certificates of Occupancy

Many communities have found that requiring a "certificate of occupancy" is an effective means of ensuring that all permitted development is constructed in accordance with applicable permit conditions and bylaw standards. In these instances, the use or occupancy of any land or structure subject to a zoning permit is prohibited until a certificate of occupancy is issued [§4449(2)].

Unlike other administrative provisions, the process for applying for and issuing certificates of occupancy is not set forth in statute. Most communities that require certificates of occupancy specify when an application must be filed (typically upon completion of project, although some communities distribute application forms with zoning permits).

It is also common to limit the time in which a ZA must issue a certificate after receiving an application (often 15 days). Within that time period, the ZA should inspect the property to ensure that it complies with all applicable permit conditions and bylaw standards. These procedures should be clearly explained in the bylaw or, at a minimum, within the administrative procedures adopted by the municipality.

Some communities allow the issuance of a temporary certificate of occupancy, or allow the issuance of a certificate of occupancy if the project is only "substantially" complete. This allows the zoning administrator to determine that all applicable conditions of the permit have been met (e.g., setback standards, building height), while allowing the landowner to continue construction after occupying the building.

5. Enforcement

The ZA is required by law to enforce violations of zoning and subdivision bylaws [§4452]. A municipality that fails to regularly enforce violations of its permits and bylaws undermines the planning and zoning process and its goals. Lack of enforcement also fosters disrespect for the bylaws and sends a message that local regulations have no force or effect

Once municipalities get in the habit of regular enforcement of violations, most find that enforcement actions will generally get quick results without resorting to court action. Moreover, municipalities are increasingly discovering that courts are sensitive to their concerns – recent court cases have generally supported municipal actions to enforce local regulations.

Note

No action, injunction or enforcement proceeding may be instituted to enforce an alleged violation of a permit issued after July 1, 1998 unless the permit, or a copy of the permit, has been recorded in the land records of the municipality [§4454(b)].

Discovering the Violation

The first step in enforcement is identifying and confirming that a violation exists. Discovering a violation can be difficult. For example, it may be hard to detect a violation that is not visible from the street such as:

Enforcement is not Discretionary

The zoning administrator (ZA) must take action to, “prevent, restrain, correct or abate” violations.

If the ZA fails to enforce a violation, the Environmental Court can compel the ZA and the municipality to bring an action to prevent the landowner from continuing to violate the municipal regulations [see in re Fairchild, 159 Vt. 125 (1992)].

- A “camp” that was built without a permit in a remote part of a lot;
- A home business that is operating without a required permit; or
- A gravel pit that increases the number of tons per day that it removes in violation of its permit.

It is not reasonable to expect the ZA to go snooping around people’s land in an effort to discover potential violations. Many violations, however, can be easily prevented or addressed by informing landowners of their obligations to obtain zoning permits prior to building or renovating an existing structure, or changing the use of a property.

In addition, when traveling around the community, the ZA should keep alert to the obvious signs of new construction, changes of use or home occupations.

There are four ways that a ZA generally becomes aware of a violation:

1. **Direct observation.** The ZA notices some building or development that was not permitted. For example, the ZA may drive by a house and see a new porch that was built without a permit, or a garage that was built in violation of its permit conditions.
2. **Complaint.** Many violations are brought to the attention of the ZA by a neighbor who calls to complain. It is not unusual to get reports that the property owner next door has just started constructing an addition, or has converted a garage into a rental apartment. The ZA must promptly investigate all reasonable complaints. It is a good idea to require that such complaints be made in writing – this should be part of the municipality’s administrative policy.
3. **Site visit.** A ZA might also discover a violation during a site visit after a permit has been issued or prior to the issuance of a certificate of occupancy. The ZA should conduct on-site inspections of buildings, structures, and land uses at an early stage in construction or development to make sure that they meet the terms of the zoning regulations and conform to permit requirements. This is a great way to catch inadvertent errors or potential violations early on, before expensive corrective measures are needed.
4. **Landowner.** It’s in a landowner’s interest to ensure that no violation exists prior to the sale of a property. In 1997 the Vermont Supreme Court (*Bianchi v. Lorentz*) held that a zoning violation could affect title to property. In response to this decision, the legislature clarified that violations of land use regulations or permits do not constitute an encumbrance on record title to real estate [27 V.S.A. §612]. The statute, however, does allow buyers to terminate their purchase agreements if the property is not in compliance with all municipal regulations. As a result, before real estate is sold, the attorneys involved in the transaction will usually try to determine whether the property is in compliance with all permit requirements. If problems are discovered, the landowner will be highly motivated to cure the violation so that the transaction can be completed.

Investigating a Violation

The ZA must investigate whenever there is reason to believe that a violation may exist. The investigation often begins with a phone call or letter to the landowner, explaining the reason for the suspicion and asking the landowner to respond. If the landowner fails to respond satisfactorily, the ZA should contact the landowner again and ask for permission to visit the site. If a landowner refuses to allow the ZA to inspect the property, the ZA has other options.

Once the ZA has sent the landowner a notice of violation, the burden to establish that there is no violation shifts to the landowner.

Investigating a Complaint

The ZA receives a call from a neighbor to complain that the landowner next door has put an addition onto his home in violation of the zoning ordinance. The ZA calls the landowner to investigate the complaint and the owner refuses to discuss the situation. When the ZA shows up to investigate, the landowner brandishes a shotgun and insists that the ZA leave his “private property.”

In this situation, so long as there is some reason to believe that a violation exists – in combination with the failure to allow an inspection – the ZA can proceed as though a violation exists. Reasons to believe a violation exists: the ZA can see the violation from the street or from the neighbor’s property; a neighbor has complained about it; or the ZA has seen trucks bearing construction company logos and truckloads of lumber regularly visiting this house.

Search and Seizure Law

A ZA who wants to gain access to a property to be sure of the nature and extent of a violation may ask the landowner for permission to inspect the property. Federal and state constitutional protections, however, prohibit a government official from conducting a search of private property without a search warrant issued by a judicial officer.

A ZA must obtain a search warrant before going onto private property to search for evidence of a violation. The court may only issue a search warrant if the ZA can demonstrate “probable cause” – reasonable grounds in fact and circumstance – to believe there is a violation of the bylaw.

Although the ZA may not go on the private portions of a person’s property without permission, state and federal court rulings allow a “government officer,” such as the ZA, to travel the “public” portions of a private property without a warrant. This includes driving up the driveway and walking to the front door to knock – or the back door if it’s obvious that it is the primary access.

Anything the ZA notices while in the public areas of the property may be used as evidence and can provide grounds for issuing a notice of violation. In addition, if anyone who is rightfully on the property (such as a baby-sitter, tenant, guest or occupant) invites the ZA onto the premises, the ZA may observe whether a violation exists. This evidence may be used to support a notice of violation even though the ZA may not have initially had probable cause to believe that a violation existed and may not have received permission from the landowner to search the property.

The ZA does not need to get a warrant to search property before issuing a notice of a violation. If the ZA believes that a warrant is necessary in a particular case, however, he or she is likely authorized to obtain one. State statute is silent on the issue of obtaining a search warrant, but this authority can be inferred as part of the officer’s responsibility to investigate and enforce violations of the bylaw.

A District Court judge may issue a warrant to “any law enforcement officer or official inspector for searching in the daytime a dwelling house or other premises for violation of local codes or ordinances” [13 V.S.A. §4701].

In addition, the state statute regarding health inspections [18 V.S.A. §121] discusses the probable cause required for a search warrant. It states that probable cause exists when "... a law enforcement officer has reason to believe that a ... rule, ordinance or permit has been violated..."

Thus, by analogy, in order for a ZA to get a warrant to search a particular property, the ZA must have reason to believe that a violation exists. The ZA must apply to District Court for permission to search the premises either alone as an "official inspector" or with the municipal constable.

Proper Enforcement

Enforcement should start with a gentle, informal notice of a problem. The zoning administrator (ZA) says, "I see you've built a bigger porch. Did you know you needed a permit for that work? No need to apologize – just fill out an application and let's see what you need. I'll put one in the mail. Then we should talk."

The notice of violation follows when the first contact is ignored. It is a seven-day notice, explaining what actions the landowner must take to come into compliance with the bylaws. Ordering the removal of the porch in that notice will usually expedite the process of compliance with startling results.

Now the application process can begin. If the application is filed within a reasonable time, the notice of violation is no longer an issue, provided the ZA can issue a permit that will cure the violation.

Informal Warnings

Many ZAs provide an informal warning to a violator before sending out a formal notice of violation. The ZA will call the violator to explain the problem and seek informal resolution of the problem. Sometimes this conversation is followed up with a warning letter, again explaining the problem and describing what is required to achieve compliance. The informal warning is not required by statute, but many ZAs find that it is an effective and less threatening way to obtain voluntary compliance.

Any agreement reached at this point between the violator and the ZA should be written down and signed by parties to avoid problems in the event that the violator fails to abide by the agreement. The ZA can informally resolve the problem, but should not act too informally – a simple oral agreement will likely be impossible to prove and enforce.

The ZA has some limited authority to informally settle violations prior to initiating a formal enforcement action. State law, however, prevents the ZA from agreeing to allow a violation to continue, even if the violation is minimal, inadvertent, and the violator agrees to pay a fine. This is because the ZA is charged with strictly applying local bylaws "and shall not have the power to permit any land development that is not in conformance with those bylaws" [§4448].

The Vermont Supreme Court recognizes that, although the ZA must enforce the zoning bylaw, the nature of the remedy sought is discretionary [see *In re Letourneau*, 168 Vt. 539 (1998); *Richardson v. Rutland*, 164 Vt. 422 (1995)].

Indeed, the ZA generally has the discretion to expand the time period for curing the violation. This is a practical necessity in Vermont when, for several months of the

year, it may not be reasonably possible to do the work necessary to remedy a violation.

In such cases, the ZA should obtain a written agreement with the landowner including a specific timeline for coming into compliance. There should also be an agreement that the landowner will allow the ZA to inspect the premises to ensure compliance by the agreed-upon date.

Notice of Violation

Once a violation is identified, the ZA may try to informally resolve the problem as described above, or the ZA may immediately issue a notice of violation.

Before going to court to enforce a violation of the bylaws or a permit, the ZA must issue a formal notice of violation. The notice must give the landowner an opportunity to come into compliance with the bylaw or permit conditions [§4451(a)].

The statutory requirements for notices of violation are as follows (see Appendix B for a sample Notice of Violation):

1. The ZA must notify the landowner by certified mail (return receipt requested) that he or she is in violation of the bylaw.
2. The notice must state that a violation exists and reference the portions of the bylaws that are being violated.
3. The notice must state that the alleged violator has seven days to cure the violation before an action will be brought to enforce the violation.
4. The notice must state that each day the violation continues constitutes a separate offense.
5. The notice should state the per day fine amount for the violation.
6. The notice must state that the ZA may bring an enforcement action without the seven-day notice period if the alleged offender repeats the violation after the seven-day period and within the succeeding 12 months.
7. The notice of violation must state that the alleged violator has 15 days to appeal the notice of violation to the board of adjustment or development review board.
8. The notice must indicate that, to appeal, a written notice of appeal must be filed with the secretary of the board, or with the municipal clerk if no secretary has been elected [§4465].

The required notice of violation should be mailed and delivered to “addressee only,” return receipt requested. If acceptance is refused, the ZA should file a sworn statement – an affidavit – with the municipal clerk describing the attempts made to obtain personal delivery. The affidavit should also certify that upon refusal a copy of the notice was sent to the violator by first class mail.

Note

Some people who know that they are in trouble with the municipality will refuse to accept certified mail under the mistaken belief that failure to accept the mail will prevent further proceedings against them. Some municipalities have an administrative practice of sending out a duplicate copy of this notice by first class mail in an envelope with no return address. This assures that the alleged violator receives actual notice of the violation and his or her rights to cure or appeal. The municipality will then be protected from later complaints that the alleged violator's due process rights were disregarded because he or she failed to receive actual notice of the violation.

A notice of violation gives the landowner a minimum of seven days, from the date that the notice is issued, to come into compliance with the bylaw or permit conditions. If the activity is temporary or the landowner needs a more appropriate period of time to comply, the ZA may agree. Although the ZA has this discretion, it is advisable for the zoning bylaw or administrative policy to contain specific authorization and directives for exercising discretion in these cases.

Notices of violation, like municipal land use permits, must be recorded in the land records of the municipality [§4449(c)]. Within 30 days of the date of issuance, the ZA is required to:

1. Deliver a legible copy of the notice to the municipal clerk for recording; and
2. File a copy of the notice in the municipality's permit files.

As a matter of practice, the ZA should also forward a copy of all violations and relevant information to the municipal attorney, in the event that further enforcement action is needed.

Judicial Bureau Alternative

Municipalities may choose to enforce some zoning violations through the Vermont Judicial Bureau [24 V.S.A. §1977] as an alternative to the procedures set out in Chapter 117. A ZA however, cannot pursue enforcement using both procedures simultaneously.

The Judicial Bureau process requires that the ZA issue a ticket – a “municipal complaint” – for a zoning violation on forms provided by the Judicial Bureau, a copy of which is then sent to the bureau. The violation is considered a civil infraction with a maximum penalty of \$500.

When using this process it is unnecessary to provide the landowner with a seven-day opportunity to cure the violation before the ticket is issued. The Judicial Bureau process, however, is not appropriate for many common zoning violations because it cannot be used for continuing violations that result in fines of more than \$500 and it does not afford injunctive relief.

Enforcement Authorizations

Although the ZA may be legally obligated to enforce violations of the bylaws, the ZA may not have the practical authority to do so. The ZA may not spend municipal money to hire an attorney or to pay the costs of bringing such an action. Thus, as a practical matter, when it is necessary to take a case to court for enforcement, the ZA must seek authorization from the legislative body (e.g., the selectboard) to spend the necessary funds.

Procedures for handling the enforcement of zoning violations should be clearly addressed in adopted municipal administrative procedures. No authorizations are needed to issue an initial notice of violation or a ticket. Authorization will likely be required if the ZA needs to bring action in Environmental Court.

If a selectboard refuses to authorize an enforcement action, the ZA is placed in the very difficult situation of being unable to perform a required function of the position. In such a situation the ZA has the following options:

1. The ZA can defer to the decision of the selectboard and not act.
2. The ZA can attempt to convince the selectboard to change its mind by asking them to get their attorney's advice about the legality of non-action.
3. The ZA can bring a suit in court to force the selectboard to spend the money; however the ZA would have to pay for the suit personally.
4. The ZA can attempt to enforce the violation without expending funds. A civil violation can be issued and defended in the Judicial Bureau without an attorney if the town has chosen this option.
5. The ZA can resign.

Court Action

Zoning enforcement actions may be brought in Vermont Environmental Court [§4452] or, as specified by the municipality, in the Judicial Bureau [24 V.S.A. §1974a]. An action in Environmental Court is instituted by filing a summons and complaint. Motions may be filed and an evidentiary hearing held before the court decides the matter.

The ZA should work closely with the municipal attorney to prepare the case. The attorney should be authorized to determine and take the appropriate legal action in the name of the municipality.

No further action from the municipality is required following the issuance of ticket unless the violator files an appeal – a plea to deny the violation – with the Judicial Bureau. This must be entered within 20 days of the date that the ticket is issued. In the event that a plea is entered, the ZA will receive a hearing notice and be expected to offer testimony before the Judicial Bureau. This process is intended to avoid the need for representation by attorneys, but in some cases the municipality may wish to have legal representation.

Settlements

When a lawsuit has been filed, it is not uncommon for the violator to seek settlement of the matter. An informal resolution will allow the municipality and the landowner to avoid the costs of litigation.

Although the ZA is generally the primary official involved in pursuing the enforcement action, only the legislative body may settle cases on behalf of the municipality [see 24 V.S.A. §872; *Town of Cabot v. Britt*, 36 Vt. 349 (1863)].

In order for a settlement or judgment order to be readily enforceable, at minimum it should include the following:

1. **Inspections.** A provision for an inspection of the premises by the ZA within a specific time period. Certain cases may also require inspections at regular intervals thereafter.
2. **Payments.** The dates on which fines are due, and to whom they must be paid (typically to the municipal treasurer, or to the municipality).
3. **Deadlines.** The time period specified for bringing the property into compliance.

An effective way to ensure compliance with the stipulation or order is to record it in the municipal land records. Once the landowner has complied with all requirements of the order, the ZA will record in the land records a certificate of compliance, which will remove any cloud on the title caused by the recorded stipulation.

To be sure third parties know that a settlement has been made in the suit, the settlement agreement should be posted in the clerk's office.

Note

A memorandum of settlement should also be recorded in the land records since the notice of violation will be recorded there.

Statute of Limitations

A statute of limitations is a law that prevents a party from bringing an action after a certain amount of time has passed. In 1999, the state legislature created a 15-year statute of limitations for zoning violations [§4454].

Any action, injunction or other enforcement proceeding must be instituted by the municipality within 15 years of the date that a violation allegedly occurred. Also, as noted earlier, in order to enforce a violation of a permit issued after July 1, 1998, the permit (or a notice of the permit) must have been recorded in the municipal land records.

After 15 years, zoning violations may become grandfathered and the municipality may no longer bring an action to correct the violation. This statute of limitations, however, does not prevent the municipality from bringing an action to abate or remove public health risks or hazards.

Note

The statute of limitation applies to everyone, even landowners who themselves created the violation.

The burden of proving the date the alleged violation first occurred is on the “person” (e.g., the current owner or occupant of the property) against whom the enforcement action has been instituted. The statute provides some exceptions under the definitions of “person” used in this context.

Penalties

Any person who violates a bylaw may be fined up to \$100 per offense, and each day a violation continues is a new offense [§4451]. Fines are calculated and assessed by the court, and are paid over to the municipality. Unfortunately they rarely cover all expenses and attorney’s fees.

If the Environmental Court determines that a violation of the zoning bylaw exists – and that the ZA followed all proper procedures – the court will order a remedy [see *Town of Sherburne v. Carpenter*, 155 Vt. 126 (1990)].

Note

The Supreme Court has held that penalties for bylaw violations are all civil. This means that a landowner who is charged with a violation is not entitled to the constitutionally protected rights afforded a criminal defendant, such as the right to trial by jury [see *Town of Hinesburg v. Dunkling*, 167 Vt. 514 (1998)].

When a fine is requested in the complaint and is provided for in the bylaw, the court must set the fine amount for each day that the violation has continued. If a municipality requests an injunction to prevent a zoning violation from continuing, the court in most cases will be required to issue the injunction if the municipality shows it will suffer irreparable harm if the violation is not enjoined.

Failure to properly prepare or record a subdivision plat can also result in a fine of up to \$100 for each lot or parcel involved [§4451(b)]. Once in court, the only real difference between the failure to create or record a proper plat and the failure to abide by any other bylaw, is that penalties of \$100 per day are imposed for each lot or parcel involved.

Note

Approval of a plat expires if the plat is not filed or recorded in the clerk’s office within 180 days of its approval by the planning commission or development review board. The local bylaw may also allow the ZA to extend the date for filing the plat by an additional 90 days, if final local or state permits or approvals are still pending [§4463(b)]. A subdivider who fails to file a plat within the required time period will have to submit a new subdivision application and receive new approval from the board. Once a plat is recorded, it does not expire.

Selective Enforcement

Almost every ZA in Vermont has at one time or another been accused of selective enforcement. However, anyone who alleges discriminatory enforcement must meet a heavy burden of showing conscious, intentional discrimination or a consciously practiced pattern of discrimination [see in re Letourneau, 168 Vt. 539 (1998)].

In the Letourneau case, the Vermont Supreme Court recognized that “mistakes and inadequacies will inevitably occur in the process of zoning administration. When they do, these irregularities do not have the effect of leaving the municipality without an ability to enforce its zoning ordinance against anyone.”

Accordingly, the Vermont Supreme Court set out a two-part test that a landowner must meet in order to prove selective enforcement:

1. The landowner, compared with others similarly situated, was selectively treated; and
2. The selective treatment was based on impermissible considerations, such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person.

The mere fact that the ZA enforced in one case and not in another similar case, or in one instance asked for a stiff penalty and in another was lenient will not be enough to establish impermissible selective enforcement.

Impartiality

Impartiality is the ability to take action indifferently. The ZA should not care personally whether a permit is issued or not. The ZA's only motive is to issue a proper decision under the bylaws of the municipality.

The ZA is not the municipality's ambassador for economic development or environmental conservation. The ZA's job is not to satisfy angry neighbors or protect weaker parties from a corporate machine with more resources than sense. Administrators administrate. They take no position for or against a project. Impartiality extends to behavior during hearings. The indifferent ZA simply explains the basis, under the bylaws, for a permit approval or denial or other action, without further characterization.

The heart of democracy is equality. Everyone has a right to be treated fairly. Bias comes in subtle ways. “I've always liked him.” “She's got lots of money.” “He's done more harm to this town than anyone else.” Statements such as these could mean nothing in the context of a zoning application; but they could also be signs of a predisposition that affects impartiality in the treatment that an applicant receives.

6. Special Issues

The ZA occasionally will encounter difficult issues while administering zoning bylaws. Some of these difficulties may be unique to a particular municipality and set of bylaws – for example resulting from poor wording or the lack of clear definitions – while others will stem from mandatory statutory provisions that apply in all communities with zoning. Often these provisions are adopted verbatim, or by reference, in local bylaws.

When the statutes are unclear, court decisions that interpret or further clarify statutory provisions may provide guidance, but should still be considered and applied within the local context. Effective administration therefore requires some understanding of statutory limitations and prohibitions, related case law, and how these more specifically relate to bylaw administration and enforcement. Some common problem areas are addressed below. Sources of technical assistance for difficult issues include your municipal attorney, your regional planning commission, the Vermont League of Cities & Towns, the Vermont Department of Housing and Community Affairs, and the Vermont Secretary of State's office.

Existing Small Lots

It's common for a zoning bylaw to establish a minimum lot size that is larger than lots already in existence, resulting in the creation of nonconforming or "existing small" lots. Like other nonconformities, these lots are "grandfathered" under zoning. Any lot "in individual, separate and nonaffiliated ownership from surrounding properties," that legally exists on the date a bylaw is enacted, may be developed for the purposes allowed in the district even though it does not meet the minimum lot size requirement [§4412(2)]. The municipality, however, does have the authority in its bylaws to prohibit the development of an existing small lot if either:

1. The lot is less than one-eighth ($\frac{1}{8}$) acre in area; or
2. The lot has a width or depth dimension of less than 40 feet.

The statutory right to develop an existing small lot is not unlimited – the lot must still meet other zoning requirements, and variance criteria are not applicable if the lot – individually or in association with other contiguous property owned by the applicant – could be developed under the regulations without a variance (see *Kashner v. Greensboro Board of Adjustment* 172 Vt. 544 (2000); *Blow v. Town of Berlin Zoning Administrator*, 151 Vt. 133 (1989); *Lubinsky v. Fair Haven Zoning Board* 148, Vt. 47 (1987).

It's also important to remember that the statutory grandfather status of existing small lots extends only to those lots that were in "individual, separate and nonaffiliated ownership from surrounding properties" at the time that the bylaw was enacted. Chapter 117 provisions in effect from 1997 through June of 2005 required that an undeveloped existing small lot that subsequently came under common ownership with one or more contiguous lots be "deemed merged" – to conform or more nearly

conform to minimum lot size requirements. Exceptions were allowed for lots that were each served by separate water supply and wastewater systems at the time the bylaw went into effect.

The merger requirement is no longer mandated in Chapter 117. Municipalities now have discretion to require the subsequent merger of existing small lots under local zoning [§4412(2)(B)]. If the zoning bylaw requires merger however, it must continue to exempt from the merger requirement and allow separate development or conveyance of existing small lots where all of the following apply:

- The lots must be conveyed in their pre-existing, nonconforming configuration.
- On the effective date of the bylaw, each lot must have been developed with a water supply and wastewater disposal system.
- At the time of transfer, each water supply and wastewater disposal system must be functioning in an acceptable manner.
- The deeds of conveyance must create appropriate easements on both lots for replacement of one or more wastewater systems, potable water systems, or both, in case there is a failed system or failed supply as defined in state statutes [10 V.S.A. Chapter 64].

Merger provisions have been the focus of several court challenges under the previous statutory language [formerly §4406(1)]. A key issue has generally been what constitutes “individual, separate and non-affiliated ownership.” Are two lots owned by the same individual directly across from each other on either side of a highway contiguous? What if a creek or a private road was running between the two lots in question?

Many bylaws specifically define, for this purpose, what constitutes “contiguous” or “adjoining” lots. In the absence of a local definition, court opinions and state definitions offer some guidance:

- The merger requirement has been upheld by the courts even if the contiguous lot – in common ownership when minimum lot size requirements were enacted – was already developed. The undeveloped nonconforming lot cannot be separately developed [in re Appeal of Richards 174 Vt. 416 (2002); Drumheller v. Shelburne Zoning Board of Adjustment, 155 Vt. 524 (1990)].
- A parcel’s exempt status as an existing small lot is not diminished, nor is merger automatically triggered, when and if the parcel is subsequently brought into common ownership with an adjoining parcel, unless merger is specifically required under the bylaw [in re Weeks 167 Vt. 151 (1998)]. Note that, though this decision was superceded by later mandatory merger requirements, it is once again relevant.
- Irregularly shaped lots may still be considered contiguous as a matter of law [Wilcox v. Manchester Zoning Board of Adjustment, 159 Vt. 193 (1992)].

- The existence of a right-of-way contiguous to and separating two parcels in common ownership does not automatically render those parcels separate lots for purposes of this section; however rights-of-way which, because of their location and function, effectively separate parcels so they cannot be used in an ordinary manner as a single lot, may render those parcels separate [Wilcox v. Village of Manchester Zoning Board of Adjustment 159 Vt. 193 (1992)]. This case did not provide clear guidance but, as generally interpreted by the courts, lots divided by a regularly traveled public highway (e.g., a state highway, or a Class 1, 2 or 3 town highway) would not be considered contiguous, but lots divided by a driveway or other type or right-of way or easement could be considered contiguous.
- For purposes of regulating water supply and wastewater systems under the state’s Environmental Protection Rules [(10 V.S.A. §1972(9)], a subdivision of land is deemed to have taken place “when a lot is divided by a state or municipal highway, road or right-of-way, or when a lot is divided by surface waters with a drainage area of greater than 10 square miles.”

Lots with Multiple Principal Structures

A related question that frequently arises is whether a lot with two or more principal structures that predate zoning may be subdivided if the result would be the creation of one or more nonconforming lots or structures.

The purpose of zoning is to control the use, not the ownership, of land. The use or uses in the previous example were established legitimately before the enactment of zoning. Zoning does not justify allowing multiple principal structures on a parcel under single ownership, but not under separate ownership. The only effect would be to deprive the owner of the ability to sell the structures separately.

However, the subdivision should result in no change in the type or intensity of use of any parcel or structure that was not in conformance with the zoning bylaw. The density and intensity of use under separate ownership would have to remain the same as under single ownership.

Additionally, both structures would have to satisfy the specific criteria for water and wastewater infrastructure contained in §4412(2)(B). Each parcel may be conveyed separately, subject only to zoning conditions applicable to changes in, or the enlargement or extension of, nonconforming uses or structures.

If faced with such a situation, the ZA should pass on the application, as a subdivision, to the planning commission or development review board. In order to approve the subdivision, the commission or board must find all the following to be true:

1. The lot and its principal structures and uses were established before the enactment of the zoning ordinance.

2. The owner does not hold title to contiguous land that could be merged to make the parcels proposed to be subdivided conform or more nearly conform with the prescribed area and dimensional requirements.
3. Applicable water and wastewater system requirements [e.g., under subsections (ii)-(iv) of §4412(2)(B)] can be met.
4. The division and allocation of land and frontage to the respective principal structures and uses is appropriate for their level of activity and intensity of use and, to the extent feasible, most nearly conforms to zoning district requirements.

Required Frontage

Chapter 117, as a statutory protection, allows for the development of a lot that does not have frontage on public roads or public waters, provided that access to the lot has been approved by the municipality under standards and review procedures specified in the bylaw. The access must be a permanent easement or right-of-way that is at least 20 feet wide [§4412(3)].

This statutory provision serves to protect the interests of owners of nonconforming lots that were legally in existence when a bylaw was enacted, but which may not meet district frontage requirements under zoning. To avoid any confusion, many municipalities clarify in their regulations that lots created after the enactment of the zoning bylaw must meet applicable frontage requirements, unless waived or modified under a separate bylaw waiver provision, or as part of a planned unit (or planned residential) development.

Note

Lot frontage requirements become especially problematic when a parcel with no frontage on a public road is subdivided. Access can be provided through a right-of-way or easement (e.g., a private drive) that meets the requirements of the zoning or subdivision regulations. Meeting frontage requirements, however, may not be as straightforward. The frontage requirement would have to be applied along the proposed road right-of-way that would connect newly created lots to the public road. If the minimum frontage requirement was 400 feet, the right-of-way would have to extend far enough for all newly created lots to each have at least 400 feet of road frontage.

The bylaw should specify if, and under what circumstances, ZA approval of access to a non-frontage lot may be allowed. For example, administrative approval could be allowed for a pre-existing nonconforming lot that lacks the necessary road frontage, but meets access and all other applicable requirements of the bylaw. Otherwise the ZA should refer the application to the planning commission or development review board for approval (e.g., under site plan or subdivision review) as specified in the regulations.

Home Occupations

The authority of municipalities to regulate home occupations also is limited under state statute [4412(4)]. Specifically, no bylaw “may infringe upon the right of any resident to use a minor portion of a dwelling unit for an occupation which is customary in residential areas and that does not have an undue adverse effect upon the character of the residential area in which the dwelling is located.” The statute does not provide clear criteria or standards on which to base a decision, so interpreting and enforcing this provision can create difficulties for the ZA.

Remember, the ZA must administer local bylaws literally and only has the authority to permit applications that strictly conform to the bylaws. If there are no standards, the ZA cannot base the decision on personal opinions of what is “customary” in residential areas and will not have “an undue adverse effect upon the character of the ... area.”

If local bylaws provide no further guidance, the ZA can only base a decision on whether the proposed use constitutes a “resident using a minor portion of a dwelling unit.” In this situation, the ZA can issue a permit based on a determination that:

- Only residents of the dwelling will be working in the home occupation.
- The proposed use will occur in a minor portion of the dwelling – generally interpreted as less than 50% of the gross livable floor area of the dwelling (excluding accessory structures).
- The proposed use will take place largely within the interior of the dwelling unit.

This last criterion may seem straightforward, but can a home occupation use a porch, deck or garage? The Vermont Supreme Court has addressed this issue [see in re Herrick, 170 Vt. 549 (1999)]. The court found that a daycare, run as a home occupation, could use an outdoor porch as part of the facility. So, not all uses associated with a home occupation must be located in an enclosed building.

In its decision the court determined that nothing in statute prohibits the “incidental use” of the exterior portion of a residence in connection with a home occupation. Any bylaw provision that provides otherwise could be ruled to represent an unauthorized burden on a home occupation that is inconsistent with statute. The court did not, however, provide much additional guidance on what constitutes an incidental, or accepted use, nor on how far into the dwelling’s exterior space the home occupation could extend. Therefore, bylaws should specify criteria for making these determinations.

Mobile Homes

Local bylaws are required by statute to regulate mobile homes in the same manner as any other type of single-family home. The ZA must issue a permit for any single-family mobile, modular or prefabricated home that meets all applicable district lot size, frontage, setback and yard requirements for single-family dwellings [§4412(1)(B)].

In the event that a single-family dwelling is only allowed as a conditional use in a specific district, or is subject to design review, the ZA must refer applications for mobile homes to the appropriate review body to administer the conditional use or design review standards. In the event a single-family dwelling is not allowed in a specific district, the ZA must deny an application for a mobile home, as any application for a single-family dwelling would be denied.

Mobile, modular or prefabricated homes may not, however, be singled out for conditional use or design review procedures, or treated in any manner differently than other types of single family homes. Any bylaw that imposes additional, potentially exclusionary standards, or further restricts the location of this type of housing, is not enforceable and would be subject to challenge.

Note

Flood hazard area regulations, as required for municipal participation in the National Flood Insurance Program, legally do include some standards that are specific to mobile homes (e.g., elevation and anchoring requirements) which are intended only to address potential safety hazards associated with this particular type of construction.

Mobile Home Parks

Chapter 117, §4412 (1)(C) also prohibits municipal bylaws from preventing the development or expansion of mobile home parks that meet state mobile home park standards [10 V.S.A. Chapter 153]. Mobile home parks are defined by the state “as any parcel of land under single or common ownership or control which contains, or is designed, laid out or adapted to accommodate, more than two mobile homes.”

Municipal bylaws can designate districts in which mobile home parks are allowed, and include associated layout and site improvement standards, to the extent that such standards do not have the effect of being exclusionary.

ZAs, however, need to be especially aware of state requirements regarding the replacement of mobile homes within existing mobile home parks [§4412 (1)(B)]. The municipality can, under its regulations, establish standards to regulate individual sites within existing mobile home parks, for example, with regard to required distances between structures, provided such standards don't have the effect of prohibiting replacement homes on existing lots. This is an important administrative consideration given that new mobile homes can be much larger than older models.

Moreover, if an existing mobile home park is determined to be nonconforming under local regulations, this determination may apply only to the park as a whole, and not to individual mobile home sites. An individual site that is vacated cannot be treated as a discontinuance or an abandonment of a nonconforming use or structure under local regulations [§4412(7)(B)].

Note

2002 legislation amending the state's on-site wastewater system statutes also eliminated sections of Chapter 153 that dealt with mobile home park site plan standards. This change reduced the involvement of the Agency of

Natural Resources in regulating mobile home parks to approving and administering water supply and wastewater permits. Under the new state rules, mobile homes and mobile home parks are treated the same as any other dwellings or residential subdivisions.

Accessory Dwellings

All zoning bylaws in Vermont must allow for “accessory dwellings” as permitted uses in all districts in which single-family dwellings are allowed [§4412(1)(E)]. An accessory dwelling is defined as an efficiency or one bedroom apartment that is clearly subordinate to an owner-occupied single family dwelling, and has facilities and provisions for independent living, including sleeping, food preparation, and sanitation, provided it also complies with *all* of the following:

- The accessory dwelling must be located within or appurtenant to the single family dwelling.
- The property must have sufficient wastewater capacity.
- The accessory dwelling unit does not exceed 30 percent of the total habitable floor area of the single family dwelling.
- Applicable setback, coverage, and parking requirements as specified in the bylaws must be met.

Before granting a permit for an accessory dwelling, the ZA must determine that it meets these criteria unless the municipal bylaw prescribes criteria that are less restrictive – e.g., local zoning might allow for an accessory dwelling of up to 50% of the habitable floor area of the single family dwelling, or eliminate the requirement that the owner occupy the principal dwelling. If it meets these minimum criteria, the ZA must treat an application for an accessory dwelling as any other permitted use and approve the application.

An issue that municipalities struggle with is whether an accessory dwelling that is “appurtenant” to a single-family dwelling may be detached – for example, located within a detached garage or other accessory structure. The ZA should be guided by specific definitions contained within the zoning bylaw but, lacking direction from those bylaws, should follow the commonly accepted interpretation that “appurtenant” means the accessory dwelling may be attached or detached from the single family dwelling.

Note

For this, and other purposes, it is also helpful to specifically define in the bylaw what constitutes an “attached” or “detached” structure – e.g., with regard to breezeways, shared walls, roofs, etc.

There are some circumstances under which a municipal bylaw may require conditional use approval prior to the issuance of a zoning permit for an accessory dwelling. These include situations in which one or more of the following is involved in the creation of an accessory dwelling:

- The accessory dwelling is to be located within a new accessory structure.

- The accessory dwelling will result in an increase in the height or floor area of the existing dwelling.
- The accessory dwelling will require an increase in the dimensions of the parking areas.

A municipal bylaw, however, must specify whether conditional use approval is required under one or more of these situations. If the bylaw is silent on the matter, the ZA should presume that no conditional use review is required.

It should also be remembered that, despite the protection extended to accessory dwellings under statute, other regulatory provisions from various state agencies may still be applicable. Even if a zoning bylaw allows an accessory dwelling or apartment, the ZA should advise the applicant that state permits may also be required from the Department of Labor and Industry and the Department of Environmental Conservation.

Antennae, Wind Turbines and Rooftop Solar Collectors

There are also provisions in statute [§4412(6)] regarding the height of certain structures, including:

1. Antenna structures;
2. Wind turbines with blades less than 20 feet in diameter; and
3. Rooftop solar collectors that are less than 10 feet high.

The ZA cannot deny a zoning permit for any of these types of structures, if mounted on a complying structure, simply because they exceed maximum district height requirements. The zoning bylaw must include standards specific to these types of structures in order to regulate their height.

Energy-related Structures

Other statutory limitations also apply to the regulation of energy-related structures. For example, wind turbines and solar collectors that are “net metered”—connected into the power grid—are regulated by the Vermont Public Service Board (VPSB), and as such are specifically exempted from municipal zoning regulations [§4413(b)]. They are instead subject to review under 30 V.S.A. §248, a process that is somewhat similar to Act 250. This exemption also applies to other power generating facilities, transmission lines and towers that are regulated by the VPSB.

When presented with an application for an energy related structure, the ZA must review the facts carefully to determine whether the municipality has any jurisdiction. If there is no local jurisdiction, the ZA should still advise the applicant about the requirements of an Act 248 review by the Public Service Board.

Satellite Dishes

A satellite dish is considered a structure, despite the fact that new dishes are much smaller than their predecessors. Since the location or construction of a structure on a parcel of land constitutes “land development” in a municipality with zoning in effect,

a satellite dish still requires a permit unless specifically exempted under the bylaw. Dishes are subject to reasonable height and setback regulations that govern other structures within the municipality.

However, the ZA should also be aware that Federal Communications Commission (FCC) rules preempt all state and local regulations that would have the effect of prohibiting satellite dishes or antennae for other than valid and demonstrable health and safety reasons. Should the dish be unable to function properly in a permissible location, the applicant would likely be eligible for a variance to allow the dish to function.

Note

Given the small size of newer satellite dishes and federal requirements, some may argue that the new dishes are insignificant and should be exempted from a municipality's zoning regulations altogether. This type of exemption is allowed for any development, as specified in the bylaws, that is "determined to impose no impact or merely a de minimus impact on the surrounding area and the overall pattern of development" [§4446].

Wireless Telecommunications Facilities

In recent years, the number of wireless telecommunications facilities – including telecommunications towers and ancillary facilities – has grown rapidly throughout the state. Local communities may reasonably regulate the siting and decommissioning of such facilities under local zoning [§4414(12)], or under separately adopted telecommunications facility ordinances. Local authority in this area, however, is limited – local regulations must be consistent with federal law. The Federal Telecommunications Act of 1996 specifically prohibits municipal bylaws or ordinances that:

For municipal planning and regulatory purposes **"telecommunications facility"** is generally defined in statute as "a tower or other support structure, including antennae, that will extend 20 feet or more vertically, and related equipment, and base structures to be used primarily for communication or broadcast purposes to transmit or receive communication or broadcast signals [§4303(29)].

1. Prohibit or have the effect of prohibiting the provision of personal wireless services;
2. Unreasonably discriminate among providers of functionally equivalent services; or
3. Regulate personal wireless services on the basis of the environmental effects of radio frequency emissions to the extent that the regulated services and facilities comply with the Federal Communications Commission (FCC) regulations concerning such emissions.

Under the 1996 Telecommunications Act, bylaw provisions that completely prohibit wireless facilities, including towers, are not allowed, and generic, district-wide height restrictions are generally not applicable. Height standards specific to telecommunications facilities must be included in local regulations (see related statutory requirements regarding antennae above).

Typically, board or commission approval is required prior to the issuance of a permit for a wireless telecommunications facility. However, any bylaws and ordinances may require ZA review and approval of certain types of ancillary facilities (e.g., antennas or panels to be mounted on existing structures), and may also assign the ZA other inspection and recording duties to ensure that wireless facilities remain in compliance with permit conditions. Any duties specific to the ZA should be clearly defined in the bylaw or ordinance.

Note

Because of the technical nature of wireless facility regulations, many municipalities adopt local versions of model regulations available from regional planning commissions or through the Vermont League of Cities & Towns. Municipalities also may require an independent technical review of an application, to be paid for by the applicant, as specified in the regulations [§4440].

In the absence of wireless telecommunications facility bylaw provisions, the ZA should proceed very cautiously; the facility may still be considered a type of land development subject to review under local regulations, however, federal and state limitations would still apply. It's important to remember that the local regulations cannot completely exclude, or have the effect of excluding, such facilities from the municipality.

Agricultural Structures and Uses

A very common issue involves the level of jurisdiction that municipal zoning, and subsequently that the ZA has regarding the regulation of agricultural uses and activities. Does the ZA have the authority to even ask for a permit application describing proposed agricultural activities, such as the construction of a new barn?

For purposes of local regulation, a **farm structure** is defined in statute as “a building, enclosure, or fence for housing livestock, raising horticultural or agronomic plants, or carrying out other practices associated with accepted agricultural or farming practices, including a silo...but excludes a dwelling for human habitation” [§4413(d)(1)].

Accepted agricultural (and silvicultural or forestry) practices are generally protected from regulation under zoning, however, the municipality clearly retains limited interests – especially where farm structures are concerned [§4413(d)]. A farmer or landowner must notify the municipality of the intent to build a farm structure, and must abide by municipal setback requirements under local zoning, unless these are waived by the Secretary of Agriculture, Food and Markets.

Though no municipal permit may be required, a ZA can request that a farmer complete an application for an agricultural structure. Ultimately, the municipality might not be able to regulate the building itself, but the application allows the ZA to review the information necessary to make a jurisdictional determination.

One of the most interesting provisions in statute is the discretion given to the Secretary of Agriculture, Food and Markets. The secretary has the sole authority to determine what activities constitute legitimate agricultural uses. If a farm structure

violates zoning district setback requirements, the secretary has the ability to waive or modify the setback requirement and approve the use.

“Accepted Agricultural Practices” (AAPs), including related state definitions, are available from the Agency of Agriculture, Food and Markets (www.vermontagriculture.com/AAP.htm). If a ZA reviews an application and questions whether a proposed use truly constitutes an agricultural use, or determines that a proposed agricultural structure violates district setbacks, the ZA should ask the applicant to secure a written determination from the secretary. Once the ZA receives the secretary’s determination, the ZA can make a decision regarding whether the structure or use constitutes an exempted agricultural activity.

The ZA should, for the record, document the decision with written findings of fact and conclusions of law.

Appendices

The Players - Roles in Local Planning and Regulation

A number of individuals and boards play an important role in the creation, implementation and enforcement of local land use planning and regulation. The roles and responsibilities of each of these players can vary from town to town according to local custom within the limits expressed in statutes and case law.

1. **The Zoning Administrator**, also referred to as the “administrative officer,” provides assistance to individuals who intend to develop their property by providing forms needed to obtain municipal permits, and by directing applicants to contact the state’s regional permit specialist for necessary state permits. The zoning administrator is also responsible for referring complete applications to the “appropriate municipal panel” – the planning commission, zoning board of adjustment, or development review board – in the event that additional approvals are required under local bylaws. The zoning administrator issues zoning permits, and must literally administer local regulations. The zoning administrator is not authorized to permit any development that does not conform to the bylaws. The zoning administrator also enforces bylaw violations and is responsible for providing the municipal clerk with notices of permits, denials and zoning violations for recording. In many communities the zoning administrator also provides staff support services to the planning commission and zoning board [see 24 V.S.A. §§4448, 4449].
2. **The Planning Commission** is principally responsible for preparing municipal plans, bylaws and related reports, and conducting public outreach, including public hearings. In municipalities that do not have a development review board, the planning commission may also serve as the “appropriate municipal panel” that is responsible for site plan, subdivision, and planned unit development review. The planning commission may also undertake other planning and capacity studies and prepare, for consideration by the legislative body, proposed building, housing and other safety codes, and capital budgets and improvement plans [see 24 V.S.A. §§4322, 4323]. A planning commissioner may be appointed by the legislative body to represent the municipality on the board of the regional planning commission. The planning commission also has party status in state Act 250 reviews.
3. **The Zoning Board of Adjustment** is the “appropriate municipal panel” that, in the absence of a development review board, is responsible for the review of applications for conditional use approval, appeals from actions or decisions of the zoning administrator, and associated variance requests [see 24 V.S.A. §4461].
4. **Development Review Board.** If a municipality opts to have a development review board, this board replaces the board of adjustment and takes on the development review functions of both the board of adjustment and the planning commission [see 24 V.S.A. §4460]. The development review board, if authorized under local bylaws, may also conduct a “local Act 250 review” of the municipal impacts of a proposed project. Development review board determinations under local Act 250 review are then considered by the state in Act 250 proceedings.

5. **Alternates** to the development review board or board of adjustment may be appointed by the legislative body to provide temporary replacements to fill in for regular members who cannot participate in a matter because of conflict of interest or other reason [see 24 V.S.A. §4460]. The legislative body may also appoint an acting, or assistant, zoning administrator from nominations submitted by the planning commission [see 24 V.S.A. §4448].
6. **The Legislative Body** includes village trustees, town selectboards, and city councils or alderpersons. These legislative boards are responsible for reviewing and (generally) for adopting, amending or repealing local bylaws, following warned public hearings. Bylaws may also be adopted, amended or repealed by a vote of the municipality in the event that a petition is filed by voters, or a rural town decides to adopt all their bylaws by town vote [see 24 V.S.A. 4442]. Interim regulations may be adopted by the legislative body, under which they have a limited development review function. The legislative body appoints the zoning administrator from nominations submitted by the planning commission, and the members of the planning commission (unless elected), and board of adjustment or development review board. The legislative body also has the power to remove all appointed officials – some “at will,” and some only for “good cause.” The legislative body enables the zoning administrator to administer and enforce local bylaws by setting fee schedules, and by authorizing expenditures for independent technical reviews, legal assistance and court actions. The legislative body also may participate in appeals of planning commission, zoning or development review board decisions when the municipality is an interested party, and settle cases in litigation. The legislative body has party status in state Act 250 proceedings.
7. **Planning Director.** In urban municipalities the legislative body may create a planning department that is headed by a planning director, as a substitute for the planning commission. The planning director may be assisted by an advisory planning council who shall advise the planning director and perform other duties as assigned by the legislative body [see 24 V.S.A. §4321].
8. **Advisory Planning Council.** In an urban municipality that has a planning department, the legislative body may appoint a planning council that provides advice to the planning director. The council may have other duties assigned to it by the legislative body [see 24 V.S.A. §4321].
9. **Advisory Commissions.** A community may create one or more advisory commissions or committees to assist with the preparation of municipal plans and bylaws, and to act in an advisory capacity to local review boards and applicants in local regulatory proceedings. Advisory commissions include conservation commissions, historic preservation commissions and design review committees, and housing commissions. Advisory commissions or committees may be assigned a role in development review proceedings, as specified in the bylaw or by a resolution of the legislative body. Their function, however, is strictly advisory – they do not serve in a quasi-judicial capacity, nor may their recommendations be directly appealed to court [see 24 V.S.A. §§4433 and 4464(d)].
10. **The Municipal Clerk** records notices of municipal land use permits, permit denials, and violations, as well as subdivision plats. If a subdivision plat shows a new street or highway, the clerk may only record it if the planning commission or development review board has endorsed it, or if the clerk certifies that the commission or board failed to take action within the required forty-five day period. If the adoption of a plan, bylaw capital budget or

amendment is challenged, a certificate from the clerk regarding its publication, posting, consideration and adoption will be presumptive proof that the bylaw was properly adopted [see 24 V.S.A. §§4449(c), 4471(c), 4474].

11. **Regional Planning Commissions** are created by vote of the legislative body or voters of each of a number of contiguous municipalities, upon the written approval of the Agency of Commerce and Community Development. There are eleven regional planning commissions in Vermont, and each commission is made up of at least one representative appointed from each member municipality (often a planning commissioner or member of the legislative body). The regional planning commission assists and advises its members in all aspects of planning for future growth. It provides municipalities with information, training, technical planning, grant writing and administrative assistance, and can help with the preparation of local plans, maps and bylaws. Upon request, the regional planning commission also reviews and approves municipal plans – allowing the municipality to apply for municipal planning grants and levy impact fees. The regional commission also prepares regional plans, including regional transportation plans and improvement programs, and serves as a designated center for Vermont Geographic Information System (VGIS) information, and U.S. Census data [see 24 V.S.A. §4341, et seq]. Regional planning commissions also have party status in Act 250 proceedings.
12. **The Council of Regional Commissions** is made up of a representative from each regional commission, three members appointed by the governor who are state agency or department heads, and two members appointed by the governor who represent the public. The council mediates disputes between municipalities, regional planning commissions, and state agencies; and reviews proposed regional and state agency plans or amendments for compatibility with other plans, and consistency with state planning goals [see 24 V.S.A. §4305] .
13. **The Environmental Court** is a trial level court that was created in 1989 to review environmental appeals and enforcement actions, including local zoning and land use matters (see 4 V.S.A. §1001 and 10 V.S.A. §8001 et seq.). With a few exceptions, appeals from decisions of local boards go to the Environmental Court [see 24 V.S.A. §4471].
14. **Vermont Judicial Bureau.** In some municipalities, local zoning violations may be enforced through the Vermont Judicial Bureau. In these communities, the zoning administrator issues a ticket (similar to a traffic ticket) for a zoning violation, and sends a copy to the Judicial Bureau. The property owner receiving the ticket must either pay a fine, or contest the ticket before the Judicial Bureau.

Sample Notice of Violation

Prepared by the Vermont League of Cities and Towns

Re: _____

Dear [insert name],

As the owner of the above referenced property, you are hereby notified that you are in alleged violation of [cite ordinance section, permit and/or approval number].

The violation exists as follows: [*Description of violation(s) and reference to applicable ordinance or specific violation as laid out in 24 V.S.A. §4451 (b)*]

In conformance with 24 V.S.A. §4451, you have seven days from the date of this notice to correct this violation [*insert appropriate language here. ZA may order that construction cease or that violation be corrected to conform with permit or bylaws*]. Please understand that if you fail to correct this violation within seven days, a fine of [*up to \$100*] may be assessed each day the violation continues. Each day the violation continues constitutes a separate offense. In default of payment of the fine, you shall be required to pay double the amount of the fine until the violation ceases. It may also be necessary to turn the matter over to the Town Attorney to institute in the name of the municipality any action deemed appropriate by the municipality, such as an injunction or other proceeding to prevent, restrain, correct, or abate that construction or use, or to prevent, in or about those premises, any act, conduct, business, or use constituting a violation. Such court action may be initiated in [*the environmental court, or as appropriate, before the judicial bureau, as provided in 24 V.S.A. §1974a.*].

You should be aware that further action may be taken *without* the seven-day notice and opportunity to correct the violation if the violation of the bylaw or ordinance is repeated after the seven-day notice period and within the next succeeding 12 months.

In accordance with 24 V.S.A. §4465, should you disagree with this Notice of Violation, you may appeal to the [*Development Review Board/Zoning Board of Adjustment*] within 15 days of the date of this letter. A copy of the appeal must also be provided to the Zoning Administrator. The appeal must include the appellant's name and address, a brief description of the property with respect to which the appeal is taken, a reference to the regulatory provisions applicable to that appeal, the relief requested, and the alleged grounds for the requested relief. The appeal must also be accompanied by an appeal fee of [\$_____].

Please feel free to contact me should you have any questions.

Sincerely,

Zoning Administrator

cc: Town Attorney
Selectboard

Referrals for Permit Applications, Reviews, Approval and Appeals

| Requested Action | Submit Application To: | Review Requirements | Appeal I | Appeal II |
|---|--|---|---------------------|------------------|
| Permitted use decision | Zoning Administrator | See §§ 4448, 4449 | ZBA/DRB §4465 | Env. Court |
| Permitted use other than 1 or 2 family dwelling | Zoning Administrator | Site Plan Review by Planning Commission or DRB may be required § 4416 | Env. Court §4471 | Supreme Ct. |
| Agricultural Exemption | Zoning Administrator | See § 4413(d) | ZBA/DRB | Env. Court |
| Permitted use – no frontage on public road | Zoning Administrator | Access approval by Planning Commission §4412(3) | Env. Court §4471 | Supreme Ct. |
| Certificate of Occupancy | Zoning Administrator | See § 4449((a)(2) | ZBA/DRB | Env. Court |
| Conditional Use | ZBA/DRB | See § 4414(3) | Env. Court | Supreme Ct. |
| Change in non-conforming use or non-complying structure | ZBA/DRB | See § 4412(7) | Env. Court | Supreme Ct. |
| Variance | ZBA/DRB | See § 4469 | Env. Court | Supreme Ct. |
| Planned Unit Development | Planning Commission or ZBA/DRB | See §§ 4417 | Env. Court | Supreme Ct. |
| Design Review District approval | Design Review Advisory Committee, Planning Commission or DRB | See § 4414(1)(E) | Env. Court | Supreme Ct. |
| Subdivision approval | Planning Commission or DRB | See § 4418 | Env. Court | Supreme Ct. |
| Proposed zoning amendment | Planning Commission | See §§ 4441 4442 | Env. Court | Supreme Ct. |

ZBA = Zoning Board of Adjustment; DRB = Development Review Board; Env. Court = Environmental Court. All Citations are to 24 V.S.A. Chapter 117.

Other Resources for Zoning Administrators

Zoning administrators are encouraged to access the following training materials and tools, as well as new ones as they come on-line. These and other resources are available at the Vermont Planning Information Center website at www.vpic.info. For hard copies, contact your regional planning commission.

Planning

- ***Vermont Planning Manual***, Vermont Department of Housing and Community Affairs, 2000 – provides instructions on preparing a town plan

Bylaws

- ***Manual of Procedures for Administration and Enforcement***, Vermont Education and Training Collaborative, 2005 – model language and commentary for the administration and enforcement sections of zoning bylaws.
- ***Plan and Bylaw Adoption Tools***, Vermont Education and Training Collaborative, 2005 – checklists and reporting form for plan and bylaw adoption.

Development Review

- ***Rules of Procedure and Ethics Manual***, Vermont Education and Training Collaborative, 2005 – instructions, commentary, model language and sample forms for rules of procedure and ethics that all boards conducting development review must adopt.
- ***Development Review Templates***, Vermont Education and Training Collaborative, 2005 – templates for hearing notices, findings of fact and decisions.

On-going training is important. Encourage your town to budget funds for you to attend annual trainings. Most training opportunities are announced at www.vpic.info. Sign up for the VPIC list serve and receive email announcements of new training opportunities, new materials and relevant statutory changes.

Many of Vermont's regional planning commissions host regular zoning administrators' roundtables that provide opportunities to share information, ask questions and explore solutions with others in the trenches. Contact your regional planning commission about the availability of these services.

The Vermont League of Cities and Towns, Municipal Assistance Center, provides a variety of support services to member municipalities including a call/email center and customized training. See <http://www.vlct.org/law.cfm> or call (802)229-9111 for more information.