

## A COMMENTARY ON THE PERMIT REFORM BILL

By Jon T. Anderson, Esq.

Published in The Vermont Bar Journal, Summer 2004

On Thursday, May 13, 2004, Governor Douglas signed a permit reform bill implementing broad procedural changes for all permit programs and many substantive changes to municipal zoning. The text of the statute (the “Statute”), H.175, is available on the Legislature’s website. This article summarizes its main provisions.

### Consolidation of Permit Appeals.

All permit appeals, including appeals from District Environmental Commissions administering Act 250, local boards administering zoning bylaws, and state agencies administering other permit programs, are consolidated into an Environmental Court effective January 31, 2005. Statute, § 121. In addition, Environmental Court judges will have original jurisdiction to revoke Act 250 permits (Statute, § 9), which jurisdiction previously resided in the Environmental Board. The Environmental Court will remain a separate court within the judiciary and its staff will be expanded. Where the Environmental Court now has one judge, one court manager, one docket clerk and partial use of a law clerk, it will be provided two judges, one court manager, two law clerks, one case manager and two docket clerk – courtroom operators. None of these positions is subject to rotation. Statute, § 9.

Effective January 31, 2005, the Solid Waste and Air Quality Board is eliminated; its duties are assigned to the Secretary of the Agency of Natural Resources. Statute, §§ 12 – 14.

Effective January 31, 2005, the former Water Resources and Environmental Boards are combined into the Natural Resources Board, whose duties will no longer include adjudication of appeals. e.g. Statute, §§ 19, 23, 29, 43, 44, 74. The following responsibilities are reassigned from the Water Resources Board to the ANR’s Department of Environmental Conservation: cooperation with the federal government and the Province of Quebec on interstate stream flow issues; cooperation with the Department of Health concerning stream pollution affecting public health and cooperation with the federal government on flood control. Statute, § 17. The Natural Resources Board will have two panels – water resources and land use. The Natural Resources Board Chair will be a full-time position serving at the pleasure of the Governor. Each panel will consist of the Natural Resources Board Chair and four other members. After the initial appointments are made, other panel members will each serve for four-year terms with two members of each panel being appointed in each odd numbered year. Statute, § 48.

Each panel may participate as a “party in all matters before the environmental court that relate to their subject areas.” Statute, § 50. Responsibilities remaining for the Water Resources Panel include rulemaking to designate outstanding resource waters. Statute, § 26. A new section provides for the Water Resources Panel to adopt rules “regulating the ability to classify wetlands.” Statute, § 49. Whether this is intended to confer any new responsibilities is unclear.

A new section calls for the Land Use Panel to “interpret and carry out” Act 250. Statute, § 49. This appears to mean that the Environmental Panel will be able to adopt rules similar to the Quechee Lakes Decision, specifying how Act 250 criteria will be interpreted and applied. The Land Use Panel will also participate in the enforcement of Act 250 in conjunction with the Agency of Natural Resources. Statute, §§ 69 – 71. The Land Use Panel can also bring in Superior Court an action to enforce Act 250. Statute, § 73.

### Notice

The Bill increases the amount of notice given for various permit proceedings as follows:

1. Effective July 1, 2004, ANR’s website must contain the following:
  - A. Notice of administratively complete permit applications submitted to the department of environmental conservation.
  - B. Notice of the comment period on the application and draft permit, if any, for those applications which were noticed.
  - C. Notice of the issuance of a draft permit, if required by law, for those applications that were noticed.
  - D. Information on how to request a public hearing or meeting.
  - E. Notice of the name of the staff person to contact for information regarding public hearings or meetings with respect to a particular application.
  - F. Notice of the issuance or denial of a permit for those applications that were noticed.

Statute, § 5.
2. Opinions concerning Act 250 jurisdiction over any project must be published in a local newspaper generally circulating in the area where the project is located and must be served on the municipality in which the project is located and any state agency affected by the project and any adjoining property owner who would be likely to be able to demonstrate a particularized interest protected by Act 250 in the project. Statute, § 47.
3. A party appealing any permit issued by a district environmental commission or any state agency must notify other parties by mail and must publish notice of its appeal. Statute, § 74 enacting 10 V.S.A. § 8504(c).
4. Notice of municipal permit reviews must include newspaper notice, a sign posted on the property within view for the public right-of-way most nearly adjacent to the

property (not required for site plan review) and written notice to adjoining property owners. For site plan review, the notice period is reduced to seven days. Municipal action following defective notice is valid as long as “reasonable efforts are made to provide adequate posting and notice”. Municipal action is invalid if such “posting or notice was materially misleading in content.” Statute, Section 104 enacting 24 V.S.A. § 4464.

## Parties

### Act 250

Adjoining property owners may obtain full party status, including full appeal rights, to address any Act 250 criteria in which they demonstrate a “particularized interest . . . that may be affected” by a project’s approval. Friends of the commission may still participate without appeal rights. *See* Statute, § 55.

Any person can intervene in an Act 250 appeal following the Vermont Rules of Civil Procedure. Statute, § 74 enacting 10 V.S.A. § 8504(a)(6).

Except in limited circumstances, “aggrieved persons” may appeal District Environmental Commission decisions only if they “participated in the proceedings before the district commission”. Statute, § 74 enacting 10 V.S.A. § 8504(d).

Except in limited circumstances, only parties to proceedings before the Environmental Court may appeal the resulting decision to the Supreme Court. Only the Attorney General represents the State in such appeals. Statute, § 74 enacting 10 V.S.A. § 8505.

### Zoning

An immediate neighbor seeking to file a zoning appeal must also be able to “demonstrate a physical or environmental impact on the person’s interest under the criteria reviewed”, Statute, § 106, where now such neighbor need only allege an illegal approval. *Compare* 24 V.S.A. § 4464.

Only interested persons who have participated in the municipal regulatory proceeding may appeal decisions from such proceedings. Statute, § 74 enacting 10 V.S.A. § 8504(b). Participation consists of “offering through oral or written testimony, evidence or a statement of concern related to the subject proceeding.” Statute, § 107 enacting 24 V.S.A. § 4471. Interested persons may continue to include ten real property owners in a municipality alleging a project is illegal, but apparently such owners must form and participate through their designated representative in local zoning hearings. Explicit provision is not made for intervention in zoning matters or appeal to the Supreme Court by parties only, but this has been the practice.

## Appeals

In most cases, appeals of local zoning decisions will no longer stay the issuance of permits. *Compare* current 24 V.S.A. § 4443, which is deleted. Rather, stays will be granted or not by action of the Environmental Court. *See* Statute, § 74 enacting 10 V.S.A. § 8504(f).

Partial decisions, e.g. those considering only some Act 250 criteria, must be appealed within thirty days or such partial decisions become final. Statute, § 74 enacting 10 V.S.A. § 8504(k)(3).

The possibility for on-the-record review of Act 250 decisions, which was never used, is eliminated. *See* Statute, § 74 enacting 10 V.S.A. § 8504(h).

Notices of appeal to the Environmental Court of zoning issues must be given in the same way as for appeals to the Vermont Supreme Court from state administrative agencies. Statute, § 107 enacting 24 V.S.A. § 4471. Notice must also be given by certified mailing to the Environmental Court and by mailing a copy to the municipal clerk or the administrative officer. In general, the permit reform bill does not otherwise specify the method for filing appeals. *See* Statute, § 74.

## Scoping

The Statute creates a new so-called “scoping process”, which is voluntary. After at least thirty days’ notice, including newspaper notice and mail notice consistent with that given for Act 250 permit applications, a project applicant can meet with the Secretary of the Agency of Natural Resources, the applicable district coordinator if the project requires an Act 250 permit and a representative of the local permitting authority. “The purpose of the meeting shall be to provide public information and increase notice about the project, allow discussion of the proposed project, and identify potential issues at the beginning of the project review process.” Statute, § 6. Presumably, any meeting requested by an applicant would be used to develop a schedule and to discuss the coordination of various permit reviews.

## Substantive Changes in Zoning Enabling Statute

*In re Jackson*, 2003 Vt. 45, 830 A.2d 685 (2003) suggests the illegality of municipal regulation not specifically authorized by the statute enabling municipal zoning. In apparent response, the permit reform bill clarifies a municipality’s ability to adopt various types of zoning regulations and appears to broaden a town’s ability to adopt the following: planned unit developments, phasing “special or freestanding bylaws”, inclusionary zoning, parking requirements that consider the availability of public transportation, subdivision and transfer of development rights. Statute, § 92. The permit reform bill specifically overrules *In re Jackson* by allowing dimensional waivers without application of conditional use standards. Statute, § 95 enacting 24 V.S.A. § 4414(8).

Home occupations are protected from zoning regulations to the extent they do not have an undue adverse impact on the character of their area where before they could not change the

character thereof. Statute, § 95 enacting 24 V.S.A. § 4412(4); *compare* 24 V.S.A. § 4406(3). The reform bill authorizes the adoption of new provisions subjecting so-called in-law apartments that include accessory structures, structures that increase the height or floor area of existing dwellings and parking areas to conditional use review. Statute, § 95 enacting 24 V.S.A. § 4412(1)(E).

Residential care homes may have eight (previously six) residents and still be entitled to zoning treatment as single family housing. Statute, § 95 enacting 24 V.S.A. § 4412(1)(G).

The permit reform bill at least partially reverses the Supreme Court's holding in *In re Richards*, \_\_\_ Vt. \_\_\_, 819 A.2d 676 (2002). That case rules that a pre-existing, undersized lot loses its grandfathered status through merger with an adjoining adequately sized lot that was empty no matter what the local zoning bylaws provide. The permit reform bill allows municipalities to so provide or presumably not to so provide. Statute, § 95 enacting 4412(2)(B). Merger cannot prevent the separate conveyance of undersized lots in their pre-existing, non-conforming configuration if they were developed with a water supply and wastewater system on the date they became non-conforming.

Municipalities may regulate state or community owned facilities, public and private schools and hospitals, churches and waste management facilities only to the extent the regulations "do not have the effect of interfering with the intended functional use." Statute, § 95 enacting 24 V.S.A. § 4413. Previously existing municipalities could regulate such activities only if they made reasonable provision for their location. 24 V.S.A. § 4409.

The permit reform bill makes it much more difficult for a town to allow substantial alterations, restorations, changes and demolitions to historic structures within historic districts designated by municipalities. Statute, § 95 enacting 24 V.S.A. § 4414.

### Transition

The permit reform bill directs the Environmental Court to follow the precedent of the former Water Resources and Environmental Boards. The rules of such Boards remain in effect except as superceded by the permit reform bill. Statute, § 121(b)(1). All appeals for which proceedings have not been commenced will be transferred to the Environmental Court on January 31, 2005. Statute, § 121(b)(2). Appellate jurisdictions commencing review proceedings before that date retain jurisdiction to complete their reviews.

By January 15, 2007, the Court Administrator must report on the performance of the Environmental Court, as reconstituted. Statute, § 121(e).

Jon Anderson, Esq. practices land use with Burak Anderson & Melloni, PLC. On behalf of the Coalition for Permit Reform, Jon authored a bill that became part of the Statute.