

LAW AND LAND
DEVELOPMENT
IN
VERMONT

A Practical Guide

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Burak Anderson & Melloni, PLC regularly publishes and distributes a free newsletter tracking land use and environmental law issues in Vermont. Recent newsletters are available at our website, www.vtlaw1.com. Contact Burak Anderson & Melloni, PLC to add your name to the mailing list. Burak Anderson & Melloni, PLC has also been selected by the Government Institutes Division of ABS Group, Inc. to prepare the Vermont Environmental Law Handbook, the next in a series of such handbooks for each of the fifty states.

Burak Anderson & Melloni, PLC prepared the chapter on planning and zoning law in Vermont for the Vermont Bar Association's Environmental Law Practice manual. An updated text of that chapter is available at our website. Printed copies are available (for \$5.00) on request. We also maintain a searchable index of Vermont Environmental Court decisions on our website.

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FOREWORD

This pamphlet offers basic information on the land development process in Vermont. It blends knowledge and experience gained from working in development review processes for more than twenty years as planning commission members, municipal and state officials and as advisors and counsel, most often to people attempting to build, with insights gained through our continuing efforts to improve the process, including the major role we played in formulating the permit reform bill enacted in 2004.

This pamphlet outlines an approach to land development followed by the authors that seeks to provide investors with the greatest net return on their investment. This approach features the following:

1. Various steps in the permitting process are staged to optimize the rewards for risks incurred. This approach recognizes that there are some projects for which permitting is not possible and there are other projects that may require so much investment as to not be worth pursuing. Still other projects proceed easily once a key issue is resolved. This pamphlet describes an approach for minimizing project investment until major challenges are addressed. If these challenges can be resolved fully, great—the project proceeds, providing what we hope is more than a fair return, especially given the reduced project risk. If the challenges cannot be resolved economically, however, at least this is known early so that further investments can be directed to projects offering higher returns.
2. Money is spent to develop only the level of detail that is necessary. For example, suppose it costs as much or more to characterize soil conditions at a site as it would cost to deal with the worst-case scenario encountered during construction. Rather than wasting money to characterize such soil conditions so that the final result is determined in permitting, we would propose permit conditions dealing with alternative situations encountered in construction. Similarly, legal issues are not resolved unless and until it is necessary to do so.
3. Controversy is avoided in an economic manner. For example, if an abutter to a project requests a specimen planting, we would encourage a client to consider providing it especially if it is apparent that to do so will be cheaper than arguing over the issue. Similarly, we may look for design solutions that, at little or no project cost, create value for neighbors who will then support the project.
4. The number of issues to be resolved at hearings is minimized. For example, the opinions of staff administering any permit system are actively sought. Site plans may be reworked between their initial filing and a hearing on them to resolve as many issues as possible.

Clients may use this pamphlet in two ways. First, when you or someone else leads an aspect of any project, you understand the process and you can do more things yourself if you so desire and it is cost-effective to do so. Second, greater understanding of the process will allow you to function more effectively as a team member and leader. You will better understand what is being done for you, why it is being done and why it is being done now. You will be able to make necessary decisions more quickly and efficiently, and you will be better able to explain the issues to others within your organization.

SECTION I

Background Information

To succeed at land development and remain within budget, you must articulate a program for land development and track its progress. This section describes the need for such a program and describes the legal background for its development.

CHAPTER 1:

DEVELOPING A STRATEGY FOR DEVELOPMENT
AND TRACKING ITS PROGRESS

The development process can be complex, expensive and risky. A number of questions must be answered affirmatively before a project can succeed. A project will fail if there is no way to achieve a favorable result in any area necessary for success.

Issues that can threaten a project are project specific. Accordingly, you should carefully consider each project's specific challenges. A set of questions that you must always ask yourself includes the following:

1. *Is the project worth doing?*
2. *Can the project be financed?*
3. *Can suitable land be acquired for the project?*
 - a. *At what price? On what conditions?*
 - b. *Can clear title be obtained?*
 - c. *Is there sufficient access for people, cars and utilities?*
 - d. *Are there environmental risks associated with the property?*
 - e. *What existing permit conditions affect usage of the site?*
4. *Can the project be permitted?*

To avoid wasting time and money, we suggest several phases of project review. The amount of money and time you must devote to your project increases with each phase. For this reason, you may choose not to proceed to a new phase of development until you have reason to believe that all your questions can be answered favorably in the current phase. You may also advance or delay the consideration of any particular question depending on overall project timing and the risk associated with having insufficient information to answer that question.

The first pass through these and other questions may only take a day or two; a final analysis may take months. Along the way, you must continuously redesign the process in light of the emergence of new facts and data. **Table 1** is a summary project flow chart for a complex project. Of course, each project is different. Often, such flow charts can be simplified, or you can use other techniques for tracking progress, such as a tickler system. The important thing is that you design and redesign the process throughout. Insist that your permitting team consider a design for the process before advancing far, and ask that they reconsider that design at frequent intervals thereafter. A flow chart or other tracking device should be used to review, analyze and track progress throughout the existence of your project.

TABLE 1		1 st Quarter			2 nd Quarter		3 rd Quarter			4 th Quarter		1 st Quarter			2 nd Quarter		
ID	Task Name	Jan Mar	Feb	Apr Jun	May	Jul	Aug	Sep	Oct Dec	Nov	Jan Mar	Feb	Apr Jun	May			
1	Negotiation Finalized	◆	1/15														
2	Title Work	→	◆	◆													
9	Environmental Work	→	◆	◆													
17	Appraisal Work	→	◆	◆													
20	Permit Requirement Work	→	◆	◆													
26	Deal Signature			◆													
27	Calendar Options			◆	Paralegal											◆	
28	Permit Filing & Hearings			◆			◆										
29	Abutters Search				Paralegal												
30	Conditional Use			→	◆			◆									
38	Site Plan Approval			→	◆			◆									
46	Local Subdivision			→	◆	◆										◆	
54	State Water and Waste																

	Water						
61	Act 250						
69	Closing					◆	 3/11 ◆
70	Title Insurance						
73	File Clean Up Issues						◆

CHAPTER 2:

A LAND USE AND
ENVIRONMENTAL LAW PRIMER

Often in Vermont, as elsewhere, there is a disconnect between the law and its practice. In theory, land use law is simple and conservative. Under common law, you could do almost anything with your land. Land use law limits this concept, but only to the extent that certain activities are clearly proscribed. Thus, courts often declare that land use law is in “derogation of common law,” meaning that activities are permitted unless they are clearly proscribed.¹ Although, in general, application of this standard favors development, you should remember that its inverse is also true. Clearly prohibited projects are prohibited. You should be especially concerned if you are ever told that a(n overly) literal interpretation of an ordinance favors your opponent. If you ever participate in drafting ordinances to which your project will be subject, you should carefully consider language imposing broad and absolute standards, such as requirements that a project “maximize” positive impacts or “minimize” negative ones.

In practice, officials charged with applying this simple legal standard—particularly lay or less experienced people or boards—are more likely to support or reject a project based on its perceived popularity within the community. You are wise, therefore, to look for ways to gain popular acceptance for your project from the outset. This does not mean that your project will be approved over opposition simply because it is popular. For example, even if a local development review board approves an otherwise prohibited project, a single opponent can appeal any approval to the Environmental Court, which will apply the applicable standards as written.

There are three major categories of permitting processes of which all developers should be aware—local zoning (including local subdivision), Act 250, and the other approvals administered by state agencies. All permitting processes involve at least three levels of review—initial, first appellate and second appellate.

¹ *In re Weeks*, 167 Vt. 551, 555 712 A.2d 907, 910 (1998). In general, zoning officials cannot interpret legal standards to say what they would like them to say versus what they actually say.

Table 2 compares these processes.

TABLE 2

Process Type	Initial Reviewer	First Appellate Reviewer	Period for Filing Appeal	Second Appellate Reviewer	Period for Filing Appeal
ZONING:					
Ministerial Decisions	Zoning Administrator or Development Review Board	Zoning Board of Adjustment	15 Days	See Below	
Appeals from Zoning Administrator; Conditional Use Approval; Variances	Zoning Board of Adjustment or Development Review Board	Environmental Court	30 Days	Supreme Court	30 Days
Site Plan; Subdivision	Planning Commission or Development Review Board	Environmental Court	30 Days	Supreme Court	30 Days
ACT 250:					
Declaratory Rulings (Jurisdictional Issues Only)	Act 250 Coordinator	Environmental Court	30 Days	Supreme Court	30 Days
Permit Issues	District Environmental Commission	Environmental Court	30 Days	Supreme Court	30 Days
MOST OTHER STATE	Agency of Natural Resources (ANR)	Environmental Court	30 Days	Supreme Court	30 Days

AGENCIES					
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Our list is intended to be illustrative rather than comprehensive. A more comprehensive list of possible permits you may need is available at http://www.anr.state.vt.us/dec/permit_hb/index.htm. This list is useful for designing your permitting plan. (*See* Chapter 1.) Here we are more interested in discussing the relative priority and timing for such permitting processes and the strategy for approaching them.

ZONING ISSUES

Most municipalities with zoning regulations employ a zoning administrator to oversee the planning process, handle administrative or ministerial matters and make recommendations regarding particular projects. Municipalities are also served by one or more boards of elected or appointed individuals that review zoning permit applications requiring more in-depth review, such as conditional use applications, site plan applications, subdivision applications and variance applications. In some municipalities, a Zoning Board of Adjustment is responsible for reviewing conditional use and variance applications, and a Planning Commission is responsible for reviewing site plan and subdivision applications. In an increasing number of municipalities, both functions have been collapsed into a single Development Review Board. Other municipal regulatory bodies may convene to advise about such functions as design review or historical impact review.

1. ADMINISTRATIVE DECISIONS. Administrative decisions are those cases in which a zoning administrator may issue a permit after review but without a hearing. For example, in most towns a zoning administrator, acting alone, can approve the construction of a one- or two-family home in an area zoned for residential use on a pre-existing lot. Issuance of a Certificate of Occupancy is usually administrative. Minor changes to a previously approved site plan may be administratively approved.

You are wise to ask a zoning administrator at the outset if he or she will issue an administrative permit. Consider applying immediately if he or she has any room to hedge on that decision or the decision is likely to be appealed. The downside to applying early for a permit from a zoning administrator is that the filing fee to obtain a permit can be expensive and the permit is usually only valid for one or two years. Such concerns may be minor, however, when compared to the costs of an unexpected delay arising from lengthy participation in a hearing process when you had expected your project to be non-controversial and the regulatory process to be brief.

2. SITE PLAN REVIEW. Site plan review is usually required for all projects except one- or two-family homes. The reviewing board may impose conditions concerning adequacy of traffic access, circulation and parking; adequacy of landscaping and screening; the extent to which a project protects the use of renewable energy resources; and any other matters set forth in the municipal bylaws. The zoning regulations for every municipality specify which schematics, data and other information must be submitted together with a site plan application.

3. SUBDIVISION REVIEW. Subdivision approval, governed by 24 V.S.A. § 4463, is normally required any time you create a new lot. In subdivision review, a municipal planning commission or development review board reviews the design and layout of streets, curbs, gutters, streetlights, fire hydrants, street trees, water, sewage and drainage facilities, public utilities and any other necessary public improvements.

The reviewing board may waive or vary its requirements (subject to appropriate conditions) if enforcement of such requirements is not required to ensure or promote the public health, safety or general welfare. It may also require specific development standards to promote energy conservation and/or the use of renewable energy resources.

As with site plan review, subdivision approval is usually granted, although approval may take a long time and approval conditions may be onerous. Subdivision and site plan review may be conducted simultaneously.

4. CONDITIONAL USE APPROVAL. Conditional use approval allows a town to grant a zoning permit for a particular type of project in a particular zoning district if certain standards are satisfied. By state law, 24 V.S.A. § 4414(3), the general standard is as follows:

The proposed conditional use shall not result in an undue adverse effect² on any of the following:

- (a) *The capacity of existing or planned community facilities;*
- (b) *The character of the area affected, as defined by the purpose or purposes of the zoning district within which the project is located, and specifically stated policies and standards of the municipal plan;*³
- (c) *Traffic on roads and highways in the vicinity;*
- (d) *Bylaws and ordinances then in effect; or*
- (e) *Utilization of renewable energy resources.*

Towns are free to adopt all manner of additional standards. The state, however, has suggested the following possibilities for regulation by specific standards:

- (a) *Minimum lot size;*
- (b) *Distance from adjacent or nearby uses;*
- (c) *Performance standards; and*
- (d) *Site plan review standards.*

The probability of success depends on the rigor with which the conditional use standards are applied. As with variances, discussed below, most towns will grant a request in the absence of opposition. The probability of receiving or retaining conditional use approval over opposition is generally in the 40 – 60% range, depending on

² Prior to permit reform bill enacted in 2004, conditional uses could not adversely affect the listed criteria. The Supreme Court eased this standard by prohibiting conditional uses only when they resulted in an adverse impact that was material. *In re Walker*, 156 Vt. 639, 588 A.2d 1058 (1991). Exactly what was intended or achieved by changing the standard to one of undue adverse effect is unclear. In the absence of regulations defining it, undue adversity is, at best, an ambiguous standard. The Vermont Supreme Court continues to strike down or at least restrict the meaning of ambiguous zoning ordinances.

³ The permit reform bill enacted in 2004 added the underlined language to the standard. This change allows towns to use conditional use standards to become what they want to be, rather than reinforcing what they are.

circumstances. Given these odds, it is wise to minimize project investment pending conditional use approval, or to design your project to avoid such review altogether.

5. VARIANCES. Variances⁴ are only supposed to issue (24 V.S.A. § 4469) in the rare circumstances in which all of the following conditions exist:

- a. The zoning regulations as applied to the property cause unnecessary hardship due to unique physical circumstances or conditions, including irregularity, narrowness or shallowness of lot size or shape, or exceptional topography or other physical conditions peculiar to a particular property, and that hardship is not caused by general circumstances or conditions created by the zoning regulation applicable to the area where the property is located (i.e., you cannot meet the side yard setback requirement because the lot is too narrow, as opposed to you are prohibited from using your property as a store because the property is located in a residential zone);
- b. Because of the property's peculiarities, there is no possibility that the property can be developed to conform with the zoning regulations. Therefore, a variance is necessary to enable reasonable use of the property;
- c. The applicant has not created the unnecessary hardship (as, for example, by conveying part of the lot so that the remaining portion can be developed only with a variance);
- d. A permitted variance will not alter the essential character of the area in which the property is located, substantially or permanently impair appropriate use of adjacent property, reduce access to renewable resources, nor be detrimental to the public welfare; and
- e. A permitted variance will be the minimum variance needed to afford relief and will be the least deviation possible from the zoning regulation and municipal plan.

Because this test is so rigorous, you will rarely receive or retain a variance over opposition. A zoning board of adjustment or development review board, however, will often apply these tests more leniently and grant a variance if there is no opposition. As long as you have a good faith argument supporting your application (you can be creative) and no one appeals the decision within 30 days, you can rely on the variance.

⁴ A quaint, but sometimes confusing, aspect of variance applications is that you apply for them only indirectly, as an appeal of a zoning administrator's decision that your zoning application must be rejected for non-conformance with applicable standards.

If a variance is necessary for your project, early application is recommended. If you obtain the variance from the zoning board of adjustment and no one appeals, great. Otherwise, you will need to redesign your project. Minimize your investment until variance issues are resolved.

6. WAIVERS. To allow boards increased flexibility to approve projects otherwise requiring a variance, a zoning ordinance may allow municipal boards to “waive” specified zoning requirements.⁵

7. OTHER ZONING LAW CONCEPTS. There are many other zoning concepts with which you may want to become familiar, such as design control districts, often used to regulate aesthetics; planned unit and planned residential developments, used to introduce flexibility into traditional zoning; historic preservation, used to protect and preserve historic resources and limit their development or alteration; and the transfer of development rights, used to give up development rights in one area in exchange for greater rights in others. Usually, you will apply these concepts only with competent assistance. You can learn what you need to know about these concepts if and when you need to use them.

ACT 250

Act 250 is Vermont’s unique, important, expensive and time consuming statewide zoning law. Many developers seek to avoid Act 250 review altogether. (See Chapter 3.)

If you determine that you need an Act 250 permit, your project will be judged according to the following ten criteria (which, when considered in their totality, actually number about thirty-five criteria):

CRITERIA 1: The Project will not result in undue air or water pollution.

(a) **Headwaters**. *The development will not reduce the quality of ground or surface waters on not intensively developed lands that are headwaters of watersheds; drainage areas of 20 square miles or less; above 1,500 feet elevation; watersheds of Vermont designated public water supplies; or recharge waters of aquifers.*

(b) **Waste disposal**. *The development will not involve the injection of waste materials or any harmful toxic substances into groundwater or wells.*

(c) **Water conservation**. *The design incorporates water conservation measures and uses the best available technology for, and efficient operation of, multiple water uses and recycling.*

⁵ The Supreme Court restricted the use of waivers in *In re Jackson*, 175 Vt. 304, 830 A.2d 685 (2003). However, waivers were formally authorized by the Legislature in the 2004 permit reform statute. See 24 V.S.A. § 4414(8).

(d) **Floodways.** *Development within a floodway or its fringe will not restrict, divert or increase the flow of floodwaters so as to endanger the public during flooding.*

(e) **Streams.** *The development will maintain the natural condition of adjacent streams and will not endanger the public or adjoining landowners.*

(f) **Shorelines.** *Development must, of necessity, be located on a shoreline to fulfill its purpose and will retain the shoreline and waters in their natural condition; allow continued access to the waters; maintain vegetation to screen the development from the waters; and stabilize the bank from erosion.*

(g) **Wetlands.** *The project will comply with applicable regulations relating to significant wetlands.*

CRITERIA 2: The Project has sufficient water available for its reasonably foreseeable needs.

CRITERIA 3: The Project will not cause an unreasonable burden on an existing water supply.

CRITERIA 4: The Project will not cause unreasonable soil erosion or reduce the capacity of the land to hold water such that a dangerous or unhealthy condition may result.

CRITERIA 5: The Project will not cause unreasonable congestion or unsafe conditions for any mode of existing or proposed transportation.

CRITERIA 6: The Project will not unreasonably burden the subject municipality's educational services.

CRITERIA 7: The Project will not unreasonably burden municipal or governmental services.

CRITERIA 8: The Project will not have an undue adverse effect on aesthetics, historic sites or rare and irreplaceable natural areas.

(a) **Necessary wildlife habitat and endangered species.** No permit will be granted for a development that will significantly imperil necessary wildlife habitat or any endangered species, and

(i) *the benefit to the public from the development will not outweigh the economic, environmental or recreational loss to the public from the imperilment of the habitat or species;*

(ii) *all feasible and reasonable means of lessening the imperilment of the habitat or species have not been or will not continue to be applied; or*

(iii) the applicant owns or controls a reasonably acceptable alternative site that would allow the development to fulfill its intended purpose.

CRITERIA 9: The Project is in conformance with a duly adopted capability and development plan and land use plan.

(a) **Impact of growth.** Consider whether the development would significantly affect the town's and region's existing and potential financial capacity to reasonably accommodate both the total growth and the rate of growth anticipated from the development if approved.

(b) **Primary agricultural soils.** The development will not reduce the agricultural potential of onsite primary agricultural soils; or

(i) the development or subdivision will not significantly interfere with or jeopardize the continuation of agriculture or forestry on adjoining lands or reduce their agricultural or forestry potential;

(ii) except in the case of an application for a project located in a designated growth center, there are no lands other than primary agricultural soils owned or controlled by the applicant which are reasonably suited to the purpose of the development or subdivision;

(iii) except in the case of an application for a project located in a designated growth center, the subdivision or development has been planned to minimize the reduction of agricultural potential of the primary agricultural soils through innovative land use design resulting in compact development patterns, so that the remaining primary agricultural soils on the project tract are capable of supporting or contributing to an economic or commercial agricultural operation; and

(iv) suitable mitigation will be provided for any reduction in the agricultural potential of the primary agricultural soils caused by the development or subdivision, in accordance with section 6093 of this title and rules adopted by the land use panel.

(c) **Forest and secondary agricultural soils.** The development will not significantly reduce the potential of secondary agricultural soils for commercial forestry or of adjacent primary agricultural soils for commercial agriculture; or

(i) the applicant can realize a reasonable return on the fair market value of the site only by devoting such forest or secondary agricultural soils to uses that significantly reduce their forestry or agricultural potential;

(ii) the applicant does not own or control any reasonably suited sites containing non-forestry or secondary agricultural soils; and

- (iii) *the development has been planned to minimize the reduction of forestry and agricultural potential.*
- (d) **Earth resources.** The development of lands with high potential for mineral or earth resource extraction will not significantly interfere with the subsequent extraction or processing of mineral or earth resources.
- (e) **Extraction of earth resources.** A permit will be granted for extraction or processing of mineral and earth resources:
- (i) *when the extraction or processing operation and the disposal of waste will not have an unduly harmful impact on the environment or the surrounding land uses and development; and*
- (ii) *the site will be suitably reclaimed for an approved alternative use or development.*
- (f) **Energy conservation.** The planning and design of the development reflect the principles of energy conservation and incorporate the best available technology for efficient use or recovery of energy.
- (g) **Private utility services.** The privately owned utility services must be in conformity with a capital program of the involved municipality.
- (h) **Costs of scattered development.** The additional costs of public services caused directly or indirectly by the proposed development do not outweigh the tax revenue and the public benefits of the development.
- (i) **Public utility services.** Necessary supportive governmental and public utility facilities will be available when the development is completed under a duly adopted capital program, and an excessive demand will not be placed on those facilities and services which have been planned based on reasonable population increase and economic growth projections.
- (j) **Development affecting public investments.** The development will not unreasonably endanger a public or quasi-public investment or materially interfere with the function, efficiency, safety of, or the public's use or enjoyment of the investment.
- (k) **Rural growth areas.** The development must incorporate reasonable population densities, reasonable rates of growth and the use of cluster planning to economize on the cost of roads, utilities and land usage.

CRITERIA 10: The Parcel is in conformance with any duly adopted local plan or regional plan and capital program adopted under Chapter 117 of Title 24 of the Vermont Statutes.

OTHER PERMITS

A project may also require a variety of other permits and approvals, some of which are discussed below in a manner intended to provide you with a general sense of the breadth and complexity of the issues that you may need to consider and resolve.

AIR POLLUTION

Vermont law requires individuals and businesses to obtain a permit from the Agency of Natural Resources (“ANR”) prior to constructing or modifying an air contaminant source (such as a factory, refinery or mining operation). A permit is required as well for the operation of such a facility. In addition, Vermont law requires that some air contaminant sources register with the ANR and that some indirect sources (such as highways and parking facilities) obtain permits prior to their construction or modification. If you are engaging or intend to engage in an activity that may require such permits, you should contact a qualified professional to assist you with that determination and with obtaining an actual permit, as the failure to obtain a permit carries with it significant penalties.

WATER POLLUTION

Vermont law requires individuals and businesses to obtain a permit from the ANR prior to discharging waste into any state waters or wells and prior to constructing and operating a publicly owned treatment facility. Additionally, a permit is required to operate or maintain an underground storage tank (excluding fuel oil tanks for on-premises heating purposes and farm or residential tanks for storing motor fuel). A permit is also necessary to (a) construct or modify an existing potable water supply or wastewater system, (b) construct a structure that requires the construction or modification of a water supply or wastewater system, and (c) connect a new or modified structure to an existing potable water supply or wastewater system.

Developers should also be aware of wetlands regulations that may affect a property they wish to develop. There are three classes of wetlands in Vermont. Class One wetlands are exceptional and irreplaceable and have the highest level of protection with a 100-foot protected buffer zone. Class Two wetlands are the category into which most wetlands shown on the National Wetland Inventory (“NWI”) maps fall, and they are protected by a 50-foot buffer zone. Class Three wetlands are either considered insignificant in serving any wetland function or have not been mapped on the NWI maps. They are not protected under Vermont Wetland Rules, but may be protected under other federal or local regulations. If you are seeking to develop near an area that could be a wetland, you need to hire a wetlands expert to develop and categorize the land in question. That person can assist you in complying with federal, state and local regulations.

SECTION TWO

Feasibility Investigation

Many issues must be investigated to determine a project's ultimate feasibility. These include such non-legal issues as project economics and financing, which are beyond the scope of this pamphlet. This section focuses on issues associated with ascertaining the legal feasibility of a project.

CHAPTER 3:

PERMIT FEASIBILITY INVESTIGATION

Except as discussed below, permit feasibility is usually investigated at two levels: conceptual and planning. The conceptual investigation may take a few hours or longer. The planning investigation may take several days or more.

CONCEPTUAL INVESTIGATION

To perform a conceptual investigation, you must spend a few hours or longer to determine whether a project is worth considering in more detail. Obviously, you should visit the site to determine if there are any obvious permitting concerns, such as the presence of swamps (wetlands). In addition, you should discuss your plans with the zoning administrator and possibly with the Act 250 coordinator having jurisdiction over the proposed project location. With the zoning administrator, you should discuss whether the project is at all permissible, as well as the types of permits required. You should also ask the zoning administrator and the Act 250 coordinator if they see any fatal flaws in your proposed project. Your goal is not to bind permitting officials, because they cannot be bound. Rather, your goal is to avoid spending resources on a project that is impossible to economically complete.

Caution: Nothing a zoning administrator or an Act 250 coordinator does or says is binding unless proper procedures are followed.

In a similar vein, the language of a zoning ordinance trumps “past practice.” A zoning administrator has no power to act beyond his or her authority, which is defined by the zoning bylaws and by state law. Depending on the situation, you may or may not be able to rely on a zoning administrator’s actions if, after public notice, no one takes an appeal.

Finally, a visit with an Act 250 coordinator or with local zoning officials, although useful, is not a substitute for a formal review of the applicable laws as they relate to the property you wish to develop. The law simply does not contemplate reliance on such undocumented conversations. Inform counsel, however, if the zoning analysis, or “scrub,” results in information substantially different from what such officials have told you.

PLANNING INVESTIGATION

The planning investigation begins with a permit “scrub” which, like its zoning counterpart, involves formally ascertaining which permits you will need to obtain to proceed with your project.

PERMIT SCRUB

A permit “scrub” is done for three reasons: (1) to assess the probability that permits will issue for the project; (2) to estimate the time required to obtain necessary permits; and (3) to determine what permit conditions already apply to the property. To the extent that such permitting conditions unacceptably restrict your proposed use of the property, such conditions must be modified or removed during the permitting process.

The timing of the permit scrub varies. If you are seeking a site for a project, and that project is likely to be controversial in some possible jurisdictions but not in all, a permit scrub should be done as part of the process for identifying acceptable sites. Indeed, in such cases, permit scrubs should be done for several competing sites, with the results factored into the calculus of choosing which project site to pursue. For example, you may seek to avoid a location where your proposed project will be a conditional use, or you may seek to avoid Act 250 regulation. Conversely, you may be locked into a site as, for example, when you seek to expand at an existing location.

If you seek to acquire additional land adjacent to your current location, you can postpone conducting the permit scrub until you have arrived at the final stages of preparing a purchase and sale agreement. If you are expanding or redeveloping land that you already own, you may even postpone conducting the permit scrub until you are ready to initiate the permitting process.

A permit scrub should examine the following issues:

1. *Have all necessary state subdivision (water and wastewater) permits been obtained for the project site?*

In general, a state subdivision permit has been required since 1969 to create a lot measuring less than ten acres. The state subdivision regime focuses on the adequacy of water and sewer facilities serving the new lot(s). First, title is searched to determine whether any parcels measuring less than ten acres have been conveyed from the site since 1969. If so, a subdivision permit or deferral of permit should have been obtained. Usually, such documents are recorded in the municipal land records. If not, you must search the records maintained by the regional Agency of Natural Resources office.

Beginning in the early 2000’s, we began calling these permits water and wastewater permits. If a subdivision permit should have been obtained but was not, the remedy is to obtain necessary water and wastewater permits.

2. *Are any state water and wastewater permits necessary for the project to proceed?*

Lots may now be subdivided simply by including in deeds notice that water and wastewater permits must be obtained. Water and wastewater permits are required to locate on any lot water or wastewater facilities. Water and wastewater permits are required even if you are connecting to municipal water and sewer facilities with the permission of the municipal provider. In general, if you are connecting to an existing sewer system, water and wastewater permits will issue without much controversy. If you

are constructing a septic system, the Agency of Natural Resources will not issue a permit until after it has first reviewed your septic system design. In either event, you can usually design your permitting plan so that this permit is never on your project's critical path.

3. *Have all necessary local subdivision permits been obtained?*

This determination begins with a title search to determine if the project land has been subdivided since the municipality adopted its first subdivision ordinance. If so, a plat signed by an official representing the planning commission or development review board should be on file in the municipal land records. In addition, a copy of the local subdivision permit is usually on file in the zoning office for that municipality.

4. *Does the project require a local subdivision permit?*

If a town has a subdivision ordinance, a subdivision permit may be required to create a new lot of any size. Such permits are usually applied for and reviewed simultaneously with site plan review. Local subdivision permit applications can become controversial and the process may be on the critical path for any development to proceed.

5. *Has an Act 250 permit been required for any project land?*

If an Act 250 permit was obtained for any portion of the project site, you must obtain copies of that permit, including all amendments, for review. If an Act 250 permit should have been obtained but was not, you must obtain one to continue the existing use and to make significant changes in that use for your project. Act 250 permits and amendments are now recorded in every municipality's land records. However, for developments that occurred prior to the mid-1980s, you must search the regional Act 250 office records to obtain copies of relevant permits as not all Act 250 permits issued before then were recorded. Act 250 permits contain many conditions, including a common condition requiring all construction to be in accordance with the plans and specifications approved in the permitting process. Such conditions must be carefully followed or altered to allow your project.

6. *Is an Act 250 permit required for your project?*

If the project site has ever been subject to Act 250 jurisdiction, an Act 250 permit must usually be obtained to substantially or materially alter the project site. In addition, Act 250 jurisdiction attaches for the first time to the following types of development:

- (a) Any construction above the elevation of 2,500 feet;
- (b) Any commercial or industrial construction on more than one acre (ten acres in towns that have adopted both zoning and subdivision bylaws);

- (c) Construction of ten or more units of housing (a hotel or dormitory room is a unit of housing just like a single-family house) within a five-mile radius within the previous five years;
- (d) Construction for state, county or municipal purposes on more than ten acres;
- (e) The subdivision of land into ten or more lots within a five-mile area, or within the same Act 250 district, in a period of five years;
- (f) Any construction that is a substantial change to a development built before 1970, and which if built today would be subject to Act 250 jurisdiction;
- (g) Any construction of a road providing access to more than five parcels;
- (h) Exploration beyond the reconnaissance phase or extraction or processing of fissionable source material;
- (i) Drilling a well to test for, or extracting, oil or natural gas;
- (j) Proposed construction for any low-level radioactive waste disposal facility;
- (k) Any construction likely to generate low-level radioactive waste; and
- (l) Structures more than 20 feet tall to support communications antennae.

Because Act 250 applications can be expensive to prepare and pursue and the results are often uncertain, consider structuring your development plan to avoid Act 250 jurisdiction altogether. Either do not buy the land you do not need or buy it and make a bona fide conveyance to someone else with whom you are not affiliated. For example, suppose your eleven-acre site in a “ten-acre town” contains two acres of wetlands that are undevelopable. Consider giving the wetlands away to someone—a conservation group, for example—to reduce the size of your parcel so that you no longer surpass the ten-acre threshold. Similarly, suppose neither you nor the seller are active subdividers so that either of you can create a few lots without triggering Act 250 jurisdiction. Suppose further that the seller has a fifty-acre parcel of land he or she wants to sell. You only need nine acres, but are willing to pay the price of the entire fifty acres to get the nine acres you want. Offer to buy the nine acres only, obtain local and state subdivision approval as well as site plan approval, and then subdivide the land before beginning construction. Within certain limits, you can avoid Act 250 jurisdiction.

In many instances, whether or not Act 250 has jurisdiction over your project will be unclear. What you do in these situations depends on the level of investment you are making and, frankly, on the risks you are willing to take. Such risks are of two kinds – investment and punishment. You may be forced to remove or modify an unpermitted

project, risking your investment. You may also be fined, either for not obtaining an Act 250 permit or for violating the terms and conditions of a permit that already affects your property.

With competent assistance you can pursue the following options to determine your level of risk. You can often reduce risk by discussing the nature of your project with the Act 250 coordinator assigned to the district in which the project will be located. As with zoning administrators, you cannot rely on any informal conversations that you have with an Act 250 coordinator. You can seek a higher level of protection by writing a letter to the Act 250 coordinator describing your proposed project. That letter can either indicate your intention to proceed with the project absent objection, request that the Act 250 coordinator provide you with a project review sheet or request a jurisdictional opinion regarding your project.

When indicating that you will proceed with a project absent any objection, remember that inaction on the part of a state employee will not destroy the state's ability to later claim that a permit was needed. The level of fines to which you may be subject, however, depends on your degree of culpability. Disclosure reduces such culpability. Moreover, regulatory officials are less likely to seek punishment when they perceive that you have been open and honest with them. If they discover that you have made unauthorized improvements without first consulting with them, however, they may react harshly.

The project review sheet is a form completed by an Act 250 coordinator that states whether they believe an Act 250 permit is required for your project. If they find that you need a permit, then you must apply for that permit. If they find that you do not need a permit, you can choose to rely on their determination, but remember that the project review sheet is a non-binding determination made by a regulatory official only. You can substantially reduce your risk by seeking a jurisdictional opinion instead, which is identical to the project review sheet except that copies of the Act 250 coordinator's determination are served on the statutory parties to an Act 250 application, including the town, the adjoining and the public. If no appeal is taken within 30 days of the decision, those parties are bound by it. If the coordinator's jurisdictional opinion concludes that a permit is required, you may appeal that decision to the Environmental Court, joining the parties that you wish to bind by the Court's ruling on the appeal.

Remember that for both a project review sheet and a jurisdictional opinion, the coordinator's determinations are only as good as the accuracy of the facts on which they are based. Suppose, for example, that you shade the facts so much that you actually describe another proposal. The coordinator's determination will then apply to the described proposal, but will be inapplicable to your project.

7. *What, if any, other state permits are required for the project to proceed?*

Depending on the nature of your project, you may be required to obtain permits from the Labor & Industry Department addressing construction (fire separation and

suppression, access for plumbing and electrical installations, etc.). Those permits are fairly ministerial and should rarely be on your project's critical path. Other environmental permits that you may need include a Water and Wastewater Disposal Permit and/or an Indirect Discharge Permit, both of which would be issued as part of the overall Act 250 and/or state subdivision process, and which would be cross-referenced and cross-conditioned with those more well-known state permits.

8. *What, if any, local permits have been obtained for the project?*

In general, it is unnecessary to determine whether all necessary municipal permits have historically been obtained for a property. It is expensive to research this issue, and the past failure to obtain such permits is seldom penalized. Indeed, once fifteen years have elapsed since the time a permit was necessary, the failure to have obtained that permit can only be penalized if such failure constitutes a violation of a non-zoning regulation, such as an applicable health regulation. It is a better use of your resources to obtain copies of all permits that have been issued for a property. Such permits must be reviewed for current compliance and for restrictions prohibiting your proposed project. A municipality may also issue a Certificate of Occupancy, which is usually dispositive of zoning permit compliance. If a municipality does not issue a Certificate of Occupancy, it will usually (for a small fee) issue a letter indicating that it has no knowledge of any permit violations and/or that the zoning administrator knows of no pending zoning enforcement actions against the property.

9. *What, if any, local permits are necessary for your project?*

This determination is made after reviewing the current zoning bylaws. Because most municipalities do not keep records adequate for reconstructing the content of zoning bylaws effective as of a particular date, you should maintain copies of the zoning and subdivision bylaws on which your review is based in your project files. You can use the bylaws in your files to demonstrate compliance if anyone raises a question in the future.

10. *What special information is necessary for local and other permit applications?*

In general, Act 250 permit applications require a standard submission, the form of which is available on our web site, www.vtlaw1.com. Local permit submission requirements vary as specified by ordinance. The permit scrub should summarize application requirements as well as special submissions requested by permitting officials interviewed in preparing the permit scrub.

It is common practice for an attorney to document his or her permit scrub in a letter to the client. This letter should be maintained in the project notebook to help resolve questions concerning your permitting plan.

A developer can perform some aspects of the permit scrub. For example, you may be able to retrieve existing permits relating to a project site. You or a competent engineer are usually the only ones who can realistically determine how oppressive

existing permit conditions may be. You will certainly learn a lot reviewing applicable zoning ordinances and your analysis may often be correct. In general, however, the permit scrub should be left to professionals. Because permit scrubs often involve the interpretation of laws, especially zoning ordinances, that professional is usually a lawyer.

SITE INVESTIGATION

Depending on the complexity of your project and the nature of the permitting process you face (i.e., the level of current development, the level of proposed development, the intensity of the proposed development, its size, etc.), you may also want to secure a qualified expert to investigate whether obtaining permits for your project will be hamstrung by any obviously fatal flaws. Some potential issues are unmistakable. For example, you may be unable to develop wetlands and prime agricultural lands. Others involve engineering judgment. Will people see traffic far enough on both sides from the proposed access? Can a road be built to the site? Can a septic system be built at the site? Some are subtler. For example, is the site part of an intact historical area?

No expert is qualified to advise you on every issue. Nevertheless, you normally begin with a civil engineer or another expert skilled in conducting site assessments (*see* Chapter 5) on whom you expect to rely in permitting your project. From your permit scrub, you should develop a complete list of issues that you must address in the permitting process. Ask your site investigator to identify the issues he or she feels competent to address. An expert may also alert you to other issues that may arise, so you will want to hire other people to investigate those issues as well.

The results of a permit scrub and site investigation are used to assemble a permit plan. A permit plan lists all permits that will be needed for a project to succeed, names all people responsible for obtaining such permits and lists the deadline for applying for and obtaining such permits. Permit processes are prioritized based on the level of risk associated with each issue and the cost of each permitting process. For example, the riskier and less expensive processes should be done first if possible. The permit plan may also include a budget for each aspect of the process, although such costs are hard to predict, especially in the face of heavy opposition to a project. A permit plan permits the lowest cost people to work at defined tasks according to the overall timeline for project completion. A permit plan can take many forms depending on a project's complexity. Permitting plans can be embedded in the project flow chart, such as that in Table 1.

A permitting plan should consider at least four opportunities⁶ to finalize solutions to certain issues as follows:

⁶ The only possible procedure for binding a local administrative official is to have that official reduce to writing an opinion as to whether a permit is required, and to then post or publish that decision, as required by state law and municipal ordinance, as if it were an administrative decision, giving notice to the world of its issuance. Probably, you can rely on that decision if no one appeals it within the 15-day statutory appeal period applicable to all administrative decisions. In the absence of clear case law or statutory authority supporting this position, however, we are reluctant to list it as a strategy for finalizing any issues.

1. An Act 250 District Coordinator can issue a jurisdictional opinion, for example, that a project is not subject to Act 250 jurisdiction. If a developer serves this opinion on the appropriate parties, as defined by statute, and none of them appeal it, the ruling is final.

A jurisdictional opinion is issued in response to a request. The request should be carefully drafted to accurately describe the project because the jurisdictional opinion will apply only to the project as described. A jurisdictional opinion request may be submitted at any time. Usually, such requests require roughly three to five months to process before becoming final. In order not to delay your project, therefore, the request should be made about five months before you would otherwise begin preparing your Act 250 application. Traditionally, an Act 250 permit application is filed after necessary zoning permits are obtained. Following this approach, the request should be filed as you initiate local permitting activity.

2. Act 250 applications may be filed, considered and finalized in portions. This is accomplished by having the District Environmental Commission rule on a specified/requested criterion or criteria. If no one appeals that ruling, it is final. If an appeal is taken, the appeal must be processed until it becomes final. An example demonstrates the utility of this approach. Suppose the most controversial issue in your project is likely to be its impact on aesthetics. You can file a partial Act 250 application addressing this issue only and proceed with the project only when this issue is resolved. This strategy allows you to delay incurring the heavy investment in water and sewer design that may be necessary to address other Act 250 criteria until after you have determined that your project can satisfy aesthetics standards.
3. You may apply for various municipal approvals one at a time. For example, suppose you need a variance to implement your project for which a great deal of traffic impact analysis will be required for site plan review. You can apply for the variance and delay conducting the expensive traffic studies until your variance is approved and no longer subject to appeal.
4. The Environmental Court can schedule its work to conserve the parties' resources. For example, suppose traffic circulation is the most controversial issue. Traffic issues are implicated by site plan review and Act 250 Criterion 5. You can get these issues either finalized (if they are not appealed) or before the Environmental Court (if they are appealed). The Environmental Court can hold a consolidated hearing on traffic issues.

CHAPTER 4:

LAND ACQUISITION INVESTIGATION:
THE PURCHASE AND SALES CONTRACT

Once you have located a suitable parcel for development, you will need to negotiate the terms upon which you will buy the land and then memorialize those terms in a purchase and sale contract (a “P&S”). In general, courts will enforce contracts to buy and sell real estate only if they are written. Without a written P&S, you are at risk that the seller will increase the selling price of the land or change other deal terms or, worse yet, back out of the deal altogether.

Contract discussions should precede, though they may be conducted contemporaneously with, permit feasibility investigations. This is because it is difficult to know whether a project is feasible without having a good idea of how much you will need to pay for the land; the P&S will then incorporate enough flexibility to allow for a variety of unforeseen circumstances. Another reason to negotiate a P&S prior to conducting feasibility investigations is that such investigations add value to a property, which value should flow to the buyer when the buyer performs such investigations. The buyer, therefore, will want to establish the price for the land prior to adding value to that land by investigating the feasibility of permitting a project. Nevertheless, a P&S is sometimes drafted and signed after such investigations are completed because such investigations generate data that is useful to the preparation of a P&S. For example, because it is difficult to judge the length of time reasonably necessary to obtain project permits without knowing which permits will be required, a permit scrub may be conducted before the P&S is drafted so that the P&S can provide a truly reasonable time period in which to obtain the necessary permits. Whether to negotiate and execute a P&S before or after conducting permit feasibility investigations depends, in part, on the parties’ tolerance for uncertainty.

Vermonters too often use the standard Realtors’ form P&S in connection with a commercial transaction. Although the standard form P&S contains all that the law and good practice requires for a typical residential real estate transaction, commercial transactions often involve issues that are best dealt with in a contract tailored to a deal.

A major distinction between a standard residential P&S and a commercial P&S is that the commercial document builds in more protections for the parties, and is more closely tailored to the deal. For example, a buyer will seek (a) the opportunity to conduct more thorough due diligence; (b) a document containing closing conditions that require the seller to do more than simply arrive at the closing with a deed in hand; and (c) a document containing representations and warranties on the seller’s part regarding the status and condition of the property being sold. On the other hand, a seller may want to disclaim any special knowledge about the property and force a buyer to rely solely on his or her own due diligence investigation.

Though many of its terms appear to be boilerplate, a P&S is a complex document, importance of which should not be underestimated. As with most contractual situations, the parties to a P&S will reach an agreement that incorporates the essential terms of a deal and accounts for the parties' relative bargaining power and risk tolerance. The important thing, however, is that the document clearly and unambiguously spell out the parties' rights and obligations so that they know where they stand in the event of a dispute or any other unforeseen circumstances.

Table 3 on Pages [32] and [33] is a form term sheet, which, when completed, will provide an attorney with sufficient information to draft a preliminary P&S for the parties to review. The term sheet provides a good checklist of issues that should be addressed as completely as possible during negotiations leading up to the preparation of the P&S.

Table 3
Form Term Sheet

- Buyer (Name & Address):

- Will a nominee corporation be the actual buyer?

- Seller (Name & Address):

- Property Address/Description

- Is a survey being done?

- Does the seller have a copy of a prior title insurance policy?

- Purchase Price: \$

- Deposit: \$

- Paid by Personal Check or Bank Check

- Is there a financing contingency?

- Institutional financing or seller financing?

- Is there an inspection contingency?

- What are the criteria being investigated? (structural, environmental, both?)

- Are there any other contingencies?

- Broker:

-
- Target Closing Date:

 - How long has Seller owned the Property?

 - Is the Seller a foreign individual?

 - Is the Seller a corporation?

 - Do you suspect any environmental issues?

 - Does the property require a state subdivision permit?

 - Does the property require a local subdivision permit?

 - Does the property require an Act 250 permit?

 - Does the property require a zoning permit?

 - Does the property require any other permits?

 - Is the property enrolled in the Vermont Agricultural Land Use Program?

 - Will the property be leased back to the seller?

 - Are there any options to purchase?

 - Are there any rights of first refusal?

CHAPTER 5:

OTHER FEASIBILITY INVESTIGATIONS:
THE TITLE SEARCH

At some time before closing and construction, you will normally perform at least two other investigations: a title search to confirm that the supposed seller can and is conveying to you all the property rights you expect and need for the project and an environmental site assessment. You should perform these investigations sooner rather than later, depending on their relative costs, if you believe the results are likely to threaten the project. For example, one of our clients insists on impeccable project documentation for sites located in remote areas in which title problems are more likely to encumber real property. In addition, because its projects are often controversial, that client normally spends much more on permitting a site than the costs of a typical title search. For that client, we normally perform a title search before beginning the permit process. In most cases, however, the title search is left until just before closing. This chapter discusses the title search, and the next chapter discusses the site assessment.

TITLE INVESTIGATION

Everyone with experience buying and selling real property knows that before making a purchase buyers need assurance of receiving good and clear marketable record title to the property. To be marketable, title to real property must be free of liens and other encumbrances that cloud a purchaser's title to the property and his/her right to assert the prerogatives of ownership over the property. These would include an undischarged mortgage on the property, a break in the chain of title or conflicting claims of ownership to the property.

To be assured of obtaining marketable record title in Vermont, a prospective purchaser normally engages a law firm to search the land records of the municipality in which the property is located. An alternative practice, more common elsewhere and increasingly common in Vermont, is to hire a title insurance company to arrange a title search and provide a title insurance commitment, and, eventually, a title insurance policy, for a property.

The title examiner begins by following the chain of title back forty years (the minimum period required by state law). In this way, the examiner determines who owned the subject property when. The title examiner searches the index of all records for conveyances out by each such owner during the period of his or her ownership. Each such conveyance out must be studied to determine whether or not it conveys or affects the property that is the subject of the title search. In many cases, this search takes hours, or in some cases, even days. However, this technique allows the examiner to discover every deed, lien, mortgage, easement or agreement affecting the property throughout its relevant history.

Once this task is complete, the title examiner provides the purchaser, its bank and its title insurance company with a title opinion, setting forth a list of encumbrances. Your lawyer, who may also be the title examiner, should develop a plan with you for analyzing the impact of such encumbrances and, if necessary, clearing them. For example, if the title examiner identifies water rights that may encumber the property you are buying, the site engineer or surveyor should be asked to determine whether such rights affect your intended use of the property.

The information yielded by a title examination is most useful when viewed in conjunction with a survey that plots the location of the easements and encumbrances affecting a property. As title examiners tend to stress in their opinions, they have not examined the land itself. Indeed, title examiners seldom visit a property. Often title examiners may not know exactly where on the property an easement lies. In fact, because different parcels of property may share common ancestry, having all been part of a single farm forty years ago, for example, it is often difficult to determine from the land records alone whether an encumbrance affects a given parcel. A survey that plots the location of easements, by using the descriptions contained in the deeds together with a physical examination of the land, allows a purchaser to more definitively determine how the encumbrances physically affect the property. For instance, only a survey can authoritatively reveal whether a utility easement runs beneath a building, which might provide the utility with the right to remove the building to service the easement.

Often, you will purchase title insurance when acquiring real property; you will almost always purchase title insurance for your lender when your purchase is institutionally financed. Although an attorney's opinion provides you with a certain degree of assurance that you are being conveyed marketable title to a parcel of land, title insurance provides you with an insurance policy against which to make a claim in the event that someone later contests your ownership of that land.

In addition, title insurance covers some matters that an attorney's opinion does not, such as defects in title that the title examiner could not or did not discover because of improper indexing or filing. Title insurance can be used creatively to address certain, usually minor, title encumbrances. For example, suppose the title search identifies a twelve-year-old P&S to which your property remains technically subject because the would-be buyer improperly discharged the contract. A title company may insure over such defect, or allow it to be deleted from the list of encumbrances to which title insurance coverage is subject, if the current landowner provides an affidavit that the putative buyer has never sought to enforce the contract. Whether or not to insure an owner's title to property is a decision made after balancing the amount of the title insurance premium against the risk of failing to obtain insurance; it is not required by law.

CHAPTER 6:

OTHER FEASIBILITY INVESTIGATIONS:
ENVIRONMENTAL SITE ASSESSMENTSTHE PURPOSE OF ENVIRONMENTAL SITE ASSESSMENTS

An Environmental Site Assessment (“ESA”) is chiefly conducted by purchasers of commercial real estate for two reasons. First, an ESA is conducted to determine whether a property has been contaminated or is likely to be contaminated by a release of hazardous substances or petroleum products into the ground, ground water or surface water. Second, performing an ESA tends to demonstrate that a party has engaged in appropriate inquiry as to whether a site has been contaminated. If that site is later found to contain contaminants that were not discovered by the ESA, but which subject the property to an enforcement action by state or federal authorities, the landowner may be able to rely upon the performance of a site assessment to establish the innocent landowner defense to diminish or avoid liability in an action allocating the costs of site clean-up.

Generally, ESAs are conducted in three distinct phases: **(1) Phase I** assessments are broad, yet superficial, assessments that are less expensive than conducting a full-blown assessment and are designed to determine whether there has been or is likely to be any contamination of a property; **(2) Phase II** assessments are conducted if the Phase I reveals contamination or potential contamination of the property, and involve a more extensive physical examination of the property; and **(3) Phase III** assessments are necessary when a property clearly exhibits an environmental problem, and this phase involves a determination of how best to address its clean-up.

ESAs have certain limitations and qualifications. They may not produce a definite result, or the result produced may require expensive testing to achieve a greater degree of certainty. The cost/benefit analysis for conducting an ESA involves weighing the amount of money a buyer is proposing to pay for a property, together with the degree of his/her knowledge and concern about the historical uses of the property and its surrounding parcels, against the buyer’s tolerance for risk.

Buyers should always include a provision in the P&S that permits them to reject or renegotiate a deal to account for any unanticipated costs of environmental investigation or if problems are identified through an investigation. Another option is to draft an indemnity agreement or to include indemnity provisions in the purchase and sale agreement. Indemnity agreements, however, involve the risk that the party offering indemnification will become insolvent, or that the cost of enforcing the indemnity will outweigh its benefits.

PHASE I

A Phase I assessment includes a walkover of the site and may involve drilling a few monitoring wells, but it does not incorporate much scientific testing. It considers the past and present use of a property, asks questions of past and current owners and operators, and seeks knowledge about activities that may have contaminated the property. It looks at the number, size, use and history of buildings on site, the condition of access roads, and the existence of parking lots, manholes, storm drains, fill pipes, electric transformers (which may contain PCBs) and underground storage tanks. A Phase I assessment also examines a property's record title history, town maps, local libraries and aerial photographs for information about a site. A Phase I investigator may speak with local residents and abutters, and will study the zoning history of an area, and whether any abutting landowners used hazardous materials or discharged contaminants into the ground, ground water or surface water. A Phase I investigates the history of regional releases, hazardous waste sites, landfills and underground storage tanks.

The Phase I looks at a property's topography, its geographic and regional setting and studies its drainage, surface water, and flooding patterns. The type and condition of vegetation are important indicators of environmental health. Investigators study a property's water supply, its wells, springs, sewers and septic systems. They test the water table, look at patterns of waste disposal, and for telltale odors, stains, pits, ponds, lagoons and landfills. They search the property for debris, discolored solids, leachate, heating fuel, overburden materials and outcrops. A Phase I checks whether buildings on the property ever contained asbestos, used formaldehyde or lead paint and piping; it tests radon levels, indoor air quality and pollution control. A Phase I may examine employee training, material safety data sheets, storage policies, labeling and inventory tracking, transfer areas, waste generation, disposal methods and records and spill prevention and clean up of past spills or leaks. A Phase I will also look for the existence of and compliance with environmental permits, present and/or past testing and monitoring, and hazardous waste handling, or similar actions that may have occurred on site.

Phase I site assessments usually cost a few thousand dollars depending upon the goals of the examination, what the examiner finds and the nature of the property. The cost of subsequent investigations depends upon the results of the Phase I investigation. As many as half of all Phase I assessments lead to further investigations.

PHASE II

Phase II assessments usually involve scientifically testing the soil, air and water, and often cost buyers in excess of \$10,000 depending upon the scope of the testing performed. Phase II testing does not always identify environmental problems. If it does, however, Phase II does not consider the magnitude of the problems that are uncovered, nor does it consider how to deal with them.

PHASE III

Phase III assessments can be expensive and time consuming. You should proceed to purchase such a property only after careful review and often only with major concessions from the seller on price and clean-up responsibility concerning the site.

SECTION THREE

The Permitting Process

This section discusses the actual process of applying for a permit, including the appeal process and the process of auditing the conditions under which you have obtained project approval.

CHAPTER 7:

PERMITTING THE PROJECTA Lawyer's Role in Permitting

In many states, permit appeals are reviewed “on the record.” Following this approach, a record for review is created in the initial round of permit hearings, such as hearings before a planning commission or a zoning board of adjustment. No further hearings are held to receive support for the decision made by the initial decision-maker. Because a record should contain only legally admissible evidence, lawyers take the lead in hearings where such records are created.

Vermont is different. Here we focus first on less formal initial proceedings that some liken to “town meetings.” Almost anybody is recognized to say almost anything they want about a project. Boards rely on almost anything they want or nothing at all in reaching their decisions. A formal record is created only if an appeal is taken or if a municipality has adopted specific procedures. On appeal, all evidence is almost always submitted to the reviewing body in a *de novo* evidentiary hearing. In Vermont, therefore, lawyers need not participate actively in permit proceedings until the appellate stage.

Nevertheless, lawyers can cost-effectively contribute in at least the following areas:

1. *Reviewing permit applications for completeness, accuracy and potential pitfalls. (See Chapter 8 on permit condition audits.)*
2. *Preparation of adjoiner lists. Act 250 permit applications and some local zoning processes require the applicant to list all adjoining property owners. The definition of adjoiner is technical and it is easy for non-lawyers to make mistakes. An Act 250 permit is at least voidable when any adjoiner is not notified of the application.*
3. *Reviewing permit hearing notices and notification procedures. Again, failure of such notice may allow opponents to attack and void your permit or obtain additional permit conditions after your project is built.*

Lawyers can also be especially useful during the initial hearings in at least the following situations:

1. *Your opponents bring their lawyer.*
2. *Permitting officials or others raise legal questions.*
3. *The process is becoming nasty and adversarial.*

4. *You want to exclude people from your permit proceedings or limit the issues they will address.*

For example, only certain people are supposed to participate in Act 250 review, and their participation is limited to the issues on which they are admitted as parties. Because participation rules are complex, you should engage a lawyer to argue for or against participation. Normally, decisions of this kind are made at a pre-hearing conference, if there is one, or at the first Act 250 hearing.

In addition, lawyers are absolutely essential to assist you in building a record on which a final decision will be based. Only the legal professional knows how to build a record, including testimony and exhibits, on which decision-makers rely. Without an attorney representing your interests at such proceedings, your chances of success are greatly diminished.

THE TASKMASTER

Whether or not you use a lawyer for the purpose, a demanding taskmaster is often useful to a project. Among other things, the taskmaster works to identify, indeed smoke out, project opposition and then respond to it. For example, when performing the role of taskmaster, we sometimes walk around residential neighborhoods abutting commercial sites. We may view a project from a neighbors' perspective and ask what a commercial developer should be asked to do to ameliorate the impact of a project. We try to identify both neighbors who are likely to be impacted by a project as well as neighborhood leaders. Often, we contact these people before filing permit applications. We may provide them with draft site plans for their review and comment prior to filing our permit applications. We may ask clients and their consultants to revise their plans, if they reasonably can, in response to those comments. Similarly, once a zoning application is pending, we may periodically check in with the city engineer or zoning administrator. If they ever request information, we work first to define their request to something that is possible, and then we push our consultants to respond as quickly as they can to such requests.

PREPARING THE APPLICATION

GETTING ORGANIZED

To make sure you are assembling all necessary information without unnecessary duplication, the taskmaster should prepare a draft table of contents for your permit applications listing the information to be assembled. The taskmaster should identify the person responsible for its assembly and circulate this list among the people preparing the application. Application forms should be collected, listed in the table of contents, and assigned to those responsible for their preparation.

PRELIMINARY MEETING WITH PERMIT PROCESS ADMINISTRATORS

Permit process administrators (i.e., zoning administrators and Act 250 coordinators) often have good ideas and/or personal standards regarding how a process should proceed and what information an application should contain. The taskmaster should visit with the permit process administrators before finalizing your application. Such meetings also provide a good opportunity for the taskmaster to address any questions that may have been raised when assembling your permit application.

A technique for focusing meetings and making sure all of your issues are resolved is to prepare a pre-filing meeting agenda that describes the project, outlines your analysis of which permits are required, and lists the information you intend to submit. This can usually be done quickly by using the permit scrub letter as a first draft for the agenda. Include the table of contents under a section labeled “Contents of Permit Application.” Add to the agenda questions raised in preparing the application, as well as a listing of filing fees and the number and, for plans, the size of each document required or desired by the permit process administrator. Finally, add a section on the likely timing for the consideration of your application and the deadlines you must meet to achieve the schedule you desire.

Following the meeting, the taskmaster can reorganize the agenda into a memorandum of the meeting, summarizing what was learned. This memo can then be circulated to everyone comprising the permit application preparation team.

EX-PARTE COMMUNICATIONS

An ex-parte communication is one in which a party to a proceeding communicates with the relevant judicial or quasi-judicial decision-maker about the subject matter of the project absent the other parties. It is troubling for such decision-makers to engage in ex-parte communications because they are supposed to base their decisions on facts, not gossip. The best way to determine the facts about any given project is to give everyone an equal chance to argue about the reliability of submitted information.

For most purposes, quasi-judicial and judicial decision-makers include district environmental commissions, the Environmental Board, municipal boards (development review, planning commission and/or the zoning board of adjustment) and the Environmental Court. Although we believe that no ex-parte contact occurs with the Environmental Court, we believe such contact may occur in the local Act 250 processes, and we know it occurs in proceedings before many municipal boards. Although this seems unfair, to date we recommend the following:

1. *Stick to the high road. It is impossible to complain about ex-parte contact if you yourself are engaging in it.*
2. *Early in the process, make a point of communicating your understanding of the rules. You can do this in a nice way simply by saying that because*

the practice may vary from board to board, you simply want to confirm the practice of the board before which you are appearing.

3. *Finally, as lawyers, we have begun to politely inquire about the contacts that are occurring. We hope this risk of possible disclosure at least limits such improper contacts.*

APPEALS

If your project is appealed, in almost all cases you will need a lawyer to assist you. Our purpose here is simply to outline these processes so that you know what to expect.

MUNICIPAL BOARD APPEALS

Decisions involving almost all permit issues are now appealed to the Environmental Court. Decisions of the Environmental Court may be appealed to the Vermont Supreme Court. Appeals from municipal boards can be filed by a disappointed applicant, a disappointed neighbor or by any combination of ten voters or real property owners anywhere in the town, the municipality or an adjacent municipality and the Agency of Commerce and Community Development. *See* 24 V.S.A. § 4465. An interested person can file an appeal only if he or she participates in the municipal regulatory proceeding from which the appeal is taken. Such appeals must be filed within 30 days following the decision from which the appeal is taken. A municipality must give written notice of any decision to all parties participating in that proceeding. The failure to do so may extend the period parties not receiving notice of a decision have to file an appeal. *See, e.g., Leo's Motors v. Town of Manchester*, 158 Vt. 561, 613 A.2d 196 (1992). This extension is not unlimited. The initiation of construction may be sufficient notice requiring an appeal to be taken.

If you discover that a decision issued without proper notice to you, you may need to file your appeal within 7 days after you receive notice. You may not legally start a project until expiration of appeal periods and, if an appeal is filed, until 15 days thereafter. *See* V.R.E.C.P. 5(e). Thereafter, you may proceed with construction in the absence of an Environmental Court order prohibiting construction. Carefully consider whether it is worthwhile to proceed with construction until all appeals are resolved. If an appeal is resolved against you, you may be required to remove any improvements you constructed and to restore the site.

There is often a question as to when a decision was made. Suppose, for example, that a planning commission votes orally on your proposal, but does not get around to sending you a letter confirming its decision until 10 days thereafter or, worse yet, until after approving the minutes of the meeting at which the vote was taken. Ideally, you should assume the worst, which varies depending on your interest. If you are appealing a decision, you should file your appeal within 30 days after the earliest possible decision

date. If you are not appealing a decision, you should not start construction until 30 days after the last possible decision date. The relevant statute reads:

Notice of the appeal shall be filed by certified mailing, with fees, to the environmental court and by mailing a copy to the municipal clerk or the administrative officer, if so designated, who shall supply a list of interested persons to the appellant within five working days. Upon receipt of the list of interested persons, the appellant shall, by certified mail, provide a copy of the notice of appeal to every interested person, and, if any one or more of those persons are not then parties to the appeal, upon motion they shall be granted leave by the court to intervene.

24 V.S.A. § 4471(c).

If an appeal is filed, the procedure to follow is prescribed by the Vermont Rules of Environmental Court Proceedings (V.R.E.C.P.) established by the Vermont Supreme Court. In summary, the procedure is as follows: The town will generate a list of persons interested in the appeal, and the appealing party must then serve those persons with written notice of the appeal. Interested parties wishing to participate in the appeal must file a Notice of Appearance with the Environmental Court, sending a copy to all other parties. If no other party files a cross appeal by the later of 30 days after the decision or 14 days after the appeal is filed, issues to be considered on appeal are limited to those enumerated in a Statement of Questions filed by the appellant. *See Village of Woodstock v. Bahramian*, 160 Vt. 417, 631 A.2d 1129 (1993). If another party files a cross appeal, that party, too, prepares a Statement of Questions for consideration on appeal.

The Environmental Court will then hold a conference to establish the schedule for resolving the issues on appeal. If only legal questions are at issue, the matter may be resolved on a Motion for Partial or Complete Summary Judgment. If there are factual issues in dispute, all parties will have an opportunity to conduct discovery, including filing interrogatories and other demands for information. The parties in the case will file briefs with the court, and the court will eventually conduct hearings and render a decision. Appeals to the Environmental Court may take as long as a year and sometimes even longer to resolve. A further appeal to the Vermont Supreme Court may take between an additional six months to two years to resolve.

Assuming proper notice is given of a decision at the municipal or district commission level, and you have obtained all necessary permits, you may proceed with construction after the expiration of all appeal periods without much risk that you will be forced to remove betterments constructed in accordance with the permit approval. *See Levy v. Town of St. Albans*, 152 Vt. 139, 564 A.2d 1361 (1989). If you have not obtained all necessary approvals, you proceed at your own risk. For example, suppose you obtain site plan approval and that you should have received a variance or conditional use approval, but did not. You proceed at your own risk. Some towns, however, issue a permit, sometimes called a zoning or building permit, to confirm that all necessary approvals have been obtained. If the appeal period for this permit expires without appeal,

you may proceed without substantial risk even if you should have obtained an additional approval before such permit issued.

PARTICIPATION

ACT 250 APPEALS

Appeals of Act 250 decisions are processed similarly to appeals of decisions by municipal boards except that the appealing party must send a copy of its notice of appeal to all who had party status at the end of the proceeding from which the appeal is taken, and the Natural Resources Board. Within ten days thereafter, the appealing party must publish notice of its appeal in a newspaper of general circulation in the area of the project that is subject to appeal. *See* 10 V.S.A. § 8504(c)(1).

APPEALS OF OTHER ENVIRONMENTAL MATTERS

The Secretary of the Vermont Agency of Natural Resources issues permits affecting most other environmental issues including air pollution control, regulation of stream flow, dams other than hydroelectric projects,⁷ water pollution control, groundwater protection, public water supply, underground and aboveground liquid storage tanks, potable water supply and wastewater systems, heavy tree cutting, protection of endangered species, waste management and management of lakes and ponds. Decisions by the Secretary concerning these issues may be appealed to the Environmental Court. *See* 10 V.S.A. § 8504(a). Appeals must be filed with the Environmental Court within 30 days. Copies of the Notice of Appeal must be provided to: “the applicant before the agency of natural resources, if other than the appellant; the owner of the land where the project is located if the applicant is not the owner; the municipality in which the project is located; the municipal and regional planning commissions for the municipality in which the project is located; if the project site is located on a boundary, any adjacent Vermont municipality and the municipal and regional planning commissions for that municipality; any state agency affected; the solid waste management district in which the project is located, if the project constitutes a facility pursuant to subdivision 6602(10) of this title; all persons required to receive notice of receipt of an application or notice of the issuance of a draft permit; and all persons on any mailing list for the decision involved. In addition, the appellant shall publish notice not more than 10 days after providing notice as required under this subsection, at the appellant’s expense, in a newspaper of general circulation in the area of the project which is the subject of the decision.” 10 V.S.A. § 8504(c)(2). In most cases, such appeals are tried anew (*see* 10 V.S.A. § 8504(h)) following procedures similar to those for zoning and Act 250 appeals. Environmental Court decisions may be appealed within 30 days to the Vermont Supreme Court. With limited exceptions, only parties

⁷ The Vermont Public Service Board regulates most issues associated with projects owned by public utilities except the construction of distribution facilities. If the Public Service Board has jurisdiction to review a project, other regulatory authorities are excluded from jurisdiction. *See* 10 V.S.A. § 6001(3)(D)(ii); *City of South Burlington v. Vermont Electric Power Co.*, 133 Vt. 438, 344 A.2d 19 (1975).

before the Environmental Court may appeal. *See* 1 V.S.A. § 8805(a). Although Vermont Supreme Court decisions can be appealed to the United States Supreme Court, that Court accepts so few appeals that as a practical matter, decisions by the Vermont Supreme Court are usually final.

CHAPTER 8:

AVOIDING PERMIT REVOCATION

A number of permits have been revoked for violation of their conditions. We suggest the following procedures to avoid such revocations:

1. Carefully review all permit application materials for accuracy. Delete language that could form the basis for unacceptable permit conditions. Hedge other language. We sometimes insert the following reservation on permit applications and application submittals:

DISCLAIMER

This application, as well as supplementary information submitted with this application, is based on data available to the applicant(s). Such information in turn relies on the quality and accuracy of the data or research on which it is based. The project described by this application is subject to modification based upon additional information or as necessary in the field during construction. Such modification may be made without further notice or permit amendment depending upon the scope of the modification.

2. Don't over-promise during hearings. Resist the natural temptation to oversell your project to permitting officials. Your puffery may be included as permit conditions by which you will be bound.
3. Carefully review all permit conditions immediately following the issuance of each permit. Normally, you can make certain filings, usually within thirty days, allowing you to negotiate unacceptable permit restrictions directly with the administrative officer. If you fail to negotiate such conditions or appeal them within thirty days, you will be bound by them if you proceed with your project.

CONCLUSION

We all should be lifetime learners, improving ourselves and our tools each day. In this spirit, please call or write us with your thoughts and criticisms. In particular, please let us know if an issue can be discussed more clearly or fully, or if we should discuss other issues in addition to those covered in this pamphlet.

Good Luck.

Author Biographies

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