

MUNICIPAL ASSISTANCE CENTER TECHNICAL PAPER #4

On the Record Review
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INTRODUCTION

On the record review, enabled under 24 V.S.A. § 4471 (b), is an alternative to the default land use decision appeals process known as a *de novo* review. In an on the record appeal, the Environmental Court investigates procedural defects and whether the record and applicable bylaws support the appropriate municipal panel's (AMP's) decision.

This Technical Paper addresses the benefits and consequences of adopting on the record review, the process of adoption including the implications of the Municipal Administrative Procedure Act, and the changes to the appeals process.

De novo review means the appeal is heard at the Environmental Court as if no case were previously heard. Parties are entitled to present new evidence, and decisions are issued on facts presented in the evidence of that case. The trial court on appeal will make a judgment on the merits of the case.

WHY ADOPT ON THE RECORD REVIEW?

On the record review can empower local communities and simplify the development review process. Development review, planning and zoning board decisions are local decisions that should include input from elected and appointed officials, staff and the public. (Remember, all of these individuals are potential participants in an appeal and it is important that they understand the impacts of on the record review on the development review and appeals process.)

Potential benefits of adopting on the record review include more meaningful public participation at the local level, fewer frivolous appeals of local decisions, and potential savings of municipal attorney fees. However, when the appropriate municipal panel's record of the proceeding is incomplete, the Environmental Court may vacate decisions. An incomplete record may result in additional local hearings and delay, which in turn costs towns, applicants, and other interested persons time and money. It also reduces confidence in the local land use review process.

PROCESS FOR ADOPTING ON THE RECORD REVIEW

The process for adopting on the record review is simple. The legislative body, by resolution or adoption of a bylaw (or as instructed by the voters), may establish that appeals will be heard on the record. The legislative body or the voters may reverse the decision by either repealing the bylaw, or by passing a resolution rescinding its initial decision.

Regardless of the method, the resolution or bylaw must specifically define the "magnitude or nature" of development proposals subject to on the record review appeals. This provides a municipality with flexibility to decide which appeals will be heard on the record. For instance, it may decide that only appeals of subdivision or planned unit development applications will be heard on the record, because it is important to the municipality to keep these types of decisions local.

If a municipality adopts on the record review, it must also adopt the Municipal Administrative Procedure Act (MAPA). Any local board, including an appropriate municipal panel, that conducts contested hearings may adopt MAPA to govern its hearings. However, a municipality *must* adopt MAPA if it adopts on the record review for appeals. A municipality adopts MAPA by a majority vote of the legally registered voters at a duly warned special or annual meeting or the legislative body does so on behalf of the municipality. 24 V.S.A. § 1202.

MUNICIPAL ADMINISTRATIVE PROCEDURE ACT

Critics of MAPA often highlight concerns about increased costs, a reduction in citizen participation, a complicated development review process, and a decrease in citizens willing to serve on boards. However, a municipality should not view MAPA as a roadblock to adopting on the record review. MAPA establishes procedural rights and imposes duties on boards that conduct contested hearings. These duties and rights are in addition to those created and imposed by other statutes governing an appropriate municipal panel (Chapter 117 of Title 24). An AMP may adopt additional procedures, so long as they are not in conflict with MAPA or other statutes, and are not prejudicial towards particular parties.

DUE PROCESS

In contested land use hearings, all parties have a right to due process. Due process requires that boards afford parties adequate notice and an opportunity to be heard. MAPA protects due process rights by addressing conflicts of interest and *ex parte* communications and requires submission of all written communications, responses, and names of those making the *ex parte* communication for the record. 24 V.S.A. § 1207. Appropriate municipal panels probably already meet or exceed the requirements of MAPA because state law requires them to adopt rules of procedures and rules of ethics with respect to conflicts of interest. 24 V.S.A. § 4461 (a).

A member of an AMP who was absent from a hearing but still wishes to participate in the decision must listen to the recorded proceedings or read transcripts of any testimony missed. That member must also review all evidence submitted prior to participating in the decision. 24 V.S.A. § 1208.

AUDIO RECORDING

MAPA requires that AMPs create audio recordings of their hearings and that parties submit testimony under oath. The oath emphasizes the seriousness of participating in a hearing and affirms that it is a court-like proceeding. Recording the hearings ensures creation of a clear record and the ability to produce transcripts if requested. Panels that do not currently record their hearings will need to invest in quality audio recording equipment.

MAPA REQUIRES THAT:

- AMPs adhere to 12 V.S.A. § 61(a) governing conflicts of interest;
- A board member must disclose all *ex parte* communication;
- All testimony must be submitted under oath;
- Members must not participate in the decision unless they have heard all testimony and reviewed all evidence;
- An audio recording and transcript of the proceeding be made;
- The board follows the Vermont Rules of Evidence; and
- Decisions are clear, concise, and supported by the record.

Ex parte communication is direct or indirect communication between an appropriate municipal panel member and a party, party's representative, party's counsel, or any person interested in the outcome of the proceeding, on any issue, while the proceeding is pending, without notice and opportunity for all parties to participate.

A municipality has many options due to advances in audio recording technology. Digital audio recorders can produce MP3 files for posting on a Web site and distributing electronically. Audio recordings are a public record under 1 V.S.A. § 317, and must be available for public inspection and copying. According to the most recent Vermont Retention Time-Table for Municipal Records, a municipality must maintain these recordings for two years after minutes are approved.

RULES OF EVIDENCE

An AMP may find it difficult to understand the Vermont Rules of Evidence. 24 V.S.A. § 1206 (b). However, Vermont law provides that “evidence not admissible under the rules of evidence may be admitted if it is of a type relied upon by reasonably prudent people in the conduct of their affairs.” Under this standard, hearsay and other types of testimony may be considered evidence, thereby negating the need for the public, the applicant or the board to be knowledgeable of the intricacies of rules of evidence.

HINTS ON PRODUCING A CLEAR RECORD

Evidence not submitted in the course of the AMP’s proceeding will not be considered by the Environmental Court in an on the record appeal. The court reviews the existing record produced at the local proceeding. It must be able to determine from the record exactly what evidence was presented, and whether this evidence supported the findings and conclusion of the AMP. This requires that the record be clear and understandable. Unfortunately, many municipalities realize on appeal that the record is insufficient to support the decision and settle out of court. To avoid this, the chair and the clerk of the board should consider the following:

- Make sure the recording device is working;
- Board members and interested persons should speak audibly and clearly for the recording device;
- The chair should manage interested persons by requiring speakers to introduce themselves, state for the record where they live, provide a statement of concern and prevent participants from talking over each other;
- When changing audio and/or videotapes, make sure that the proceeding is recessed so that no testimony is missed; and
- The chair should describe what is happening during the proceeding. For example, when the board is referring to plans or other documents, use the document title, the name of person or firm who generated the document, and its date of creation, or the plan sheet numbers, title, and its last revision date.

An effective method for managing evidence is to list all evidence received as part of the AMP’s review within the written decision. All evidence entered into the record is a public record and is governed by Vermont’s public records law.

In addition to producing a clear record and managing evidence, the board must ensure that the applicant submits the information it needs to make findings; an insufficient record could be the result of inadequate information. Twenty-four V.S.A. § 4461 (b) gives an AMP the authority to “examine or cause to be examined any property, maps, books, or records bearing upon the matters concerned” and “may require the attendance of any person having knowledge in the premises.”

DECISIONS

Finally, decisions in a contested hearing must be in writing and include findings of facts and conclusions of law. Findings must be clear and concise, address all the applicable criteria found in the bylaws, and be supported by the record. The conclusions must be based on the findings. 24 V.S.A. § 1209. Chapter 117, § 4464 (b)(1), outlines similar requirements; however, after a municipality adopts on the record review, the minutes of the meeting will not suffice as the written decision, and could jeopardize the validity of the decision on appeal. A VLCT technical paper titled *Making it Stick: The Art of Writing Effective Zoning Decisions* can be found in the VLCT resource library at www.vlct.org.

WHAT DOESN'T CHANGE ABOUT THE APPEAL PROCESS?

After a municipality adopts on the record review, many appeal process fundamentals remain the same. Appeals of an AMP's decision still go to the Environmental Court. The appeal notice, including fees, must be sent via certified mail to the Environmental Court and a copy to the municipal clerk or administrative officer within 30 days of the AMP's decision (appeal period). The designated officer must supply a list of interested persons to the appellant within five working days of the notice of appeal. 24 V.S.A. § 4471 (c).

Any interested person (defined in 24 V.S.A. § 4465) who participated in a local proceeding may appeal the AMP's decision to the Environmental Court. Participation is defined as offering, through oral or written testimony, evidence or a statement of concern related to the subject of the proceeding. 24 V.S.A. § 4471 (a). All parties who participate in the local proceeding may participate in the higher court proceeding, but can only question the AMP's application of a bylaw or state law and whether a party's right to due process was violated. As with a *de novo* appeal, a municipality can opt not to enter an appearance, unless it wishes to make oral arguments before the court.

CONCLUSION

Before adopting on the record review, a municipality should know the capabilities of its staff and board members. The board/clerk and/or staff will be required to effectively manage evidence, write exemplary decisions, and keep an adequate record of proceedings. The public should be aware that they only have the opportunity at the local proceeding to provide evidence on the matter before the AMP, as the Environmental Court will not take additional evidence at its hearing.

After evaluating the impacts and the process of adopting on the record review, a municipality might seek expert advice and training for appointed or elected officials and occasionally retrain individuals on requirements and expectations of on the record review. If a municipality finds that on record review is not appropriate for its community, the *de novo* review process is the default, and most communities in Vermont still operate under this model.

ABOUT THE MAC TECHNICAL PAPERS

The Municipal Assistance Center began publishing its series of technical papers in 2007. Based on member inquiries, the MAC staff picks topics that need to be treated in more detail than a newsletter article, but less than a handbook. Papers previously issued are:

- #1, *Making It Stick: The Art of Writing Effective Zoning Decisions*, March, 2007.
- #2, *Creating an Effective Riparian Buffer Ordinance*, April, 2007.
- #3, *Creating a Development Review Board*, July, 2007.

PAPERS ON THE FOLLOWING TOPICS ARE COMING SOON:

- Roles and Responsibilities in Planning and Zoning
- The Intersection of Agricultural Practices and Zoning: Q & A
- Managing Stormwater through Low Impact Development Techniques