



Appeals

Background

The right of an applicant, neighbor, municipality or other "interested person" to appeal a local permit decision - the right to due process and equal protection under the law - is clearly defined under Chapter 117. A principal goal of Chapter 117 updates was to streamline the local appeals process to make it more efficient and to avoid unnecessary and frivolous appeals, while at the same time protecting the rights of applicants and persons potentially affected by a proposed development. The 2004 changes to statutory appeal provisions include

the following:

- Revised definitions of who may appeal - i.e., "interested persons,"
- A requirement that interested persons participate in the local regulatory process in order to appeal a decision to the Vermont Environmental Court,
- Elimination of the authority for the Board of Adjustment or Development Review Board to grant a stay of enforcement for the duration of the local appeal process,
- Revised and expanded public notification requirements related to appeal hearings,

- Clarification of the requirements for decisions regarding matters on appeal,
- Modifications to the process for filing appeals of municipal decisions to the Environmental Court, and
- Authorization for the granting of dimensional "waivers" which may provide an alternative to variances.

Types of Appeal

Chapter 117 provides for two types of appeal processes:

1) Appeals of actions taken by the Administrative Officer (Zoning Administrator) [§§4465, 4469]. This type of appeal is heard by the Board of Adjustment or Development Review Board, and may further be divided into two categories:

- An appeal based upon an allegation that the Administrative Officer committed an error in taking a particular action, in which case the appellant requests the Board to review the matter and decide whether the action should be upheld or overturned. An "action" of the Administrative Officer broadly includes any "order, requirement, decision or determination" made in the administration of the local bylaws.
- An appeal in which an appellant requests a variance from one or more provisions of the bylaw, not because the Administrative Officer erred, but because in specific circumstances, strict application of the regulations may result in undue hardship to the applicant, or allow no reasonable use of a property.

2) Appeals of decisions of an "appropriate municipal panel" to Environmental Court [§4471]. This includes the appeal of any regulatory

Definition of Interested Person

An "interested person," defined in §4465, includes the following (*with substantive Act 115 changes highlighted in bold*):

- A person owning title to property, or a municipality or solid waste management district empowered to condemn it or an interest in it, affected by a bylaw, who alleges that the bylaw imposes on the property unreasonable or inappropriate restrictions of present or potential use under the particular circumstances of the case.
- A municipality that has a plan or a bylaw at issue in an appeal brought under this chapter or any municipality that adjoins that municipality.
- A person owning or occupying property in the immediate neighborhood of a property that is the subject of any decision or act taken under this chapter, **who can demonstrate a physical or environmental impact on the person's interest under the criteria reviewed**, and who

alleges that the decision or act, if confirmed, will not be in accord with the policies, purposes, or terms of the plan or bylaw of that municipality.

- Any ten persons **who may be any combination of voters or real property owners** within a municipality listed in subdivision (2) of this subsection who, by signed petition to the appropriate municipal panel of a municipality, the plan or a bylaw of which is at issue in any appeal brought under this title, allege that any relief requested by a person under this title, if granted, will not be in accord with the policies, purposes, or terms of the plan or bylaw of that municipality. **This petition to the appropriate municipal panel must designate one person to serve as the representative of the petitioners regarding all matters related to the appeal.**
- Any department and administrative subdivision of this state owning property or any interest in property within a municipality listed in subdivision (2) of this subsection, and the agency of commerce and community development of this state.

decision issued by an "appropriate municipal panel" - the Board of Adjustment, Development Review Board, Planning Commission or, in certain instances, the Selectboard - to the Environmental Court (*see Bulletin #10 Appropriate Municipal Panels*).

Waivers:

An Alternative to Variances?

The statutory criteria necessary to obtain a variance from a provision of a bylaw [§4469] is, by design, very difficult for most landowners to meet. This is because the purpose of a variance is to alleviate an "unnecessary hardship" - resulting from the characteristics of a particular property - so that a landowner is not denied all reasonable use his or her property. Variances are not intended to allow greater flexibility in applying zoning standards beyond alleviating unnecessary hardship.

Many communities have found it difficult to apply the variance criteria stringently. Under Act 115, a provision was added to Chapter 117 [§4414(8)] that provides an alternative means of granting greater flexibility in how dimensional standards are applied.

Municipalities are now authorized to include a bylaw provision that allows the granting of waivers for specified dimensional standards. Such waivers must be in conformance with the municipal plan and state planning goals [§4302], and may:

- allow mitigation through design, screening or other remedy;
- allow waivers for structures providing for disability accessibility, fire safety and other legal requirements; and
- provide for energy conservation and renewable energy structures.

Waivers are not necessarily reviewed and granted as a result of an appeal, although the bylaw must specify the process by which waivers may be granted and appealed.

Right to Appeal

Any "**interested person**," as defined in Chapter 117, has the right to appeal both an action of the Administrative Officer and a decision of an appropriate municipal panel, provided that certain procedural requirements are met. This definition was revised to ensure that someone appealing a local decision has a direct interest in the matter, by demonstrating physical or environmental impact. The definition also was changed to require that a group filing an appeal designate a single representative to avoid confusion as the appeal process moves forward, and to eliminate the appeal rights of conservation commissions.

Appeals of the Administrative Officers' Actions

The process for appealing an action of the Administrative Officer remains largely unchanged, however the process to warn and conduct appeal hearings was revised under Act 115. Also, while not directly related to the appeal process, notification requirements related to the issuance of zoning permits were expanded to better inform adjoining property owners and neighbors of permit activity within the community (*see Bulletin # 7 Zoning Permits and Bulletin #8 Development Review*).

Filing an Appeal. Any decision or act taken by the Administrative Officer may be appealed by an interested person by filing a notice of appeal with the secretary of the Board of Adjustment or Development Review Board. If no secretary has been elected by the Board the appeal may be filed with the Municipal Clerk. The notice of appeal must be filed within 15 days of the date of the Board's decision or act, and a copy must be filed with the Administrative Officer.

The notice of appeal must be in writing and include the following

information:

- the name and address of the appellant,
- a brief description of the property with respect to which the appeal is taken (i.e., a description of the property that is the subject of the appeal),
- a reference to the regulatory provisions applicable to that appeal (i.e., what specific bylaw provision is involved in the appeal), and
- the relief requested by the appellant and the alleged grounds why the requested relief is believed proper under the circumstances (i.e., the reasons why appellant believes he or she is entitled to some form of remedy).

Appeal Hearings. The Board is required to conduct a warned public hearing to consider the appeal in accordance with the following requirements. The hearing process must:

- occur within 60 days after the notice of appeal is filed;
- be noticed 15 days in advance of the hearing date (see Bulletin #8 for related notification requirements), at which time the Board must mail a copy of the notice to the appellant;
- provide an opportunity for all persons to appear and be heard on the matter under appeal, and/or be represented by an agent or attorney;
- be open to the public; and
- incorporate the same "rules of evidence" as applicable in contested cases in hearings before state administrative agencies [under 3 V.S.A. §810].

A hearing to consider an appeal may be adjourned from time to time provided the date and time that the adjourned hearing will be reconvened is announced at the time of adjournment.

Variance Requests. As previously noted, a request for a variance from one or more bylaw provisions does not require the Board to consider whether the Administrative Officer erred in making a decision. Rather, a request for a variance authorizes the Board of Adjustment or Development Review Board (and the Vermont

Local Participation Required to Appeal

Before Act 115, there was no explicit requirement in Chapter 117 that interested persons participate in local development review and appeal proceedings before appealing the outcome to the Environmental Court.

The statutory provisions governing hearing procedures [§4461] was amended to require that:

- in any hearing, each person wishing to receive party status (i.e., the right to participate and appeal) be given an opportunity to demonstrate that they meet one of the definitions of "interested person," and
- a written record be kept of the name, address, and participation of each of these persons.

Meeting the definition of interested person does not ensure the right to appeal a panel decision to the Environmental Court. A person, group or municipality must also participate in the local regulatory process. Participation involves "offering, through oral or written testimony, evidence or a statement of concern related to the subject of the hearing" [§4471].

Environmental Court on appeal of a local Board decision) to vary provisions related to a structure. (Note that "use variances" are not authorized in Vermont, except in highly unusual circumstances to avoid regulatory takings.)

In order to grant a variance the Board must find that the appellant's request meets all five criteria specified in the Act [§4469]. Alternative variance criteria are specified for renewable energy structures, and additional criteria apply specifically to requests for variances from flood hazard area review standards.

Decisions on Appeal. Decisions of the Board must meet the same statutory requirements as decisions made under other regulatory proceedings. Decisions on appeals must be:

- issued within 45 days of hearing adjournment;

- issued in writing and include a statement of the factual bases on which the Board's conclusions were made and a statement of those conclusions - meeting minutes may serve as a written decision providing the factual bases and conclusions are included;
- sent by certified mail to the appellant;
- sent to all other persons or bodies appearing and having been heard; and
- filed with the Administrative Officer and Municipal Clerk for the public record.

Requests for Reconsideration. An appeal or request for reconsideration may be rejected and a decision issued within ten days of the date of filing the notice of appeal if the Board determines that the issues raised in the appeal have been decided in a previous appeal or "involve substantially or materially the same facts by or on behalf of that appellant" [§4470].

Stay of Enforcement. A former statutory provision authorizing the Board to grant a stay of enforcement for the duration of the local appeal process was deleted from Chapter 117 under Act 115. In the event that an appeal is filed with regard to a zoning permit issued by the Administrative Officer, the permit does not take effect until after the adjudication of the appeal.

Appeals to Environmental Court

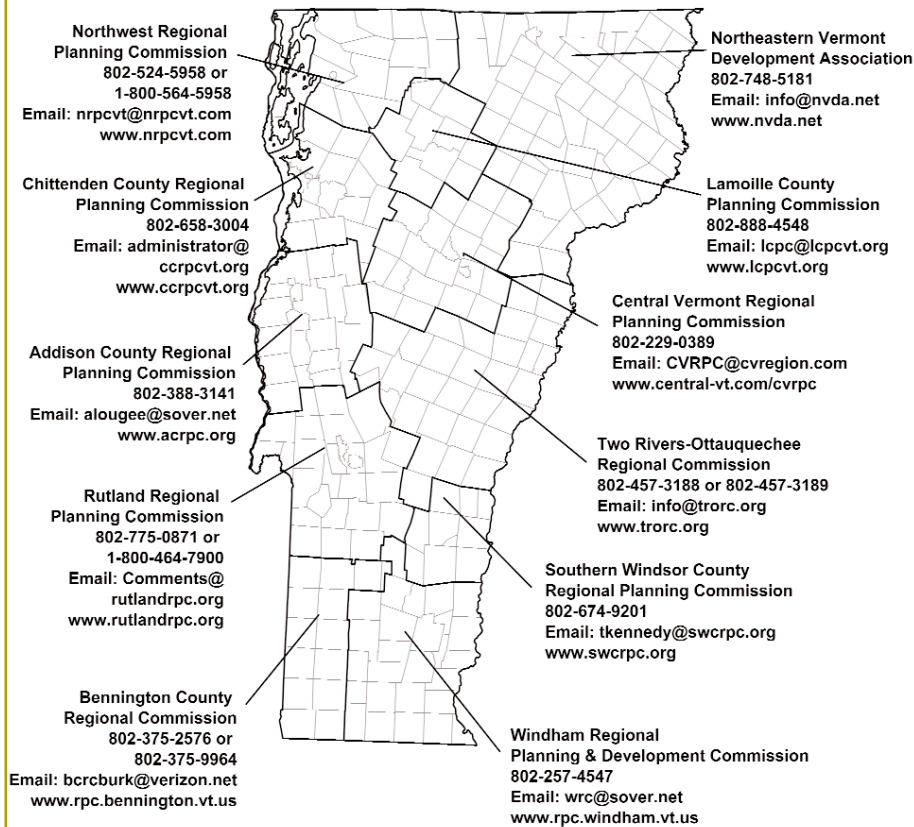
An interested person who has participated in a municipal regulatory proceeding (e.g., site plan, conditional use, subdivision review) may appeal the resulting decision to the Vermont Environmental Court (*see sidebar*). According to Chapter 117 [§4471], the appeal "shall be taken in such manner as the supreme court may by rule provide for appeals from state agencies governed by sections 801 through 816 of Title 3," unless the community has decided that the decision is to be reviewed "on the record" by the court (*see below*).

Filing an Appeal. As revised under Chapter 117, the notice of appeal is now sent by certified mail, with fees, directly to the Environmental Court. A copy of the notice must also be sent to the Administrative Officer, or the Municipal Clerk, who is required to provide a list of interested persons to the appellant within five days of receipt of the notice. Upon receipt of the list, the appellant is required to send a copy of the notice, via certified mail, to each interested person. This provides all parties with an opportunity to intervene in the appeal if they are not already parties.

On the Record Review. Typically, decisions appealed to the Environmental Court are heard "de novo," meaning that the case is heard again in its entirety by the court, with parties offering evidence and the judge making a decision based on the facts of the case. A municipality may, however, require that appeals of certain local decisions be heard "on the record" [§4471(b)]. When an appeal is heard on the record, no new evidence is presented - the judge determines whether the record submitted is adequate, and the decision issued based on the record was proper. For appeals to be heard on the record, the Legislative Body, or as instructed by voters (e.g., through adopted bylaws), must:

- Provide that appeals of certain local determinations shall be on the record.
- Define the "magnitude and nature" of development proposals that are subject to the production of an adequate record to support on the record review - e.g., by type of review or the scale of a project.
- Adopt and adhere to the Municipal Administrative Procedure Act (MAPA) [24 V.S.A. Chapter 36] to ensure that an adequate record of local regulatory proceedings is produced.

**Contact information:
Regional Planning Commissions**



Chapter 117 Bulletins

The following ten bulletins were published in November 2004 to provide information about the changes to 24 V.S.A. Chapter 117, the state statute governing local planning and regulation, enacted in 2004. These all are available through www.vpic.info and from the Education and Training Collaborative partners listed below.

1. **Chapter 117 Overview** (legislative intent and effective dates)
2. **Conformance with the Municipal Plan**
3. **Permissible Regulations**
4. **Bylaw Preparation & Adoption**
5. **Required Provisions & Limitations**
6. **Equal Treatment of Housing**
7. **Zoning Permits**
8. **Development Review Procedures**
9. **Appeals**
10. **Appropriate Municipal Panels**

Vermont Land Use Education and Training Collaborative

Working Together to Provide Improved Learning Opportunities for Vermont's Local Boards and Commissions

Questions about this bulletin and other chapter 117 materials produced by the Collaborative may be directed to the following members of the Vermont Land Use Education and Training Collaborative Steering Committee. For links to websites go to "About Us" at www.vpic.info.

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