CHAPTER 117: Frequently Asked Questions (FAQs)

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Introduction

The Land Use and Education Collaborative is pleased to present you with this list of Frequently Asked Questions (FAQs). Questions were gathered from local officials at various venues throughout the Fall of 2004. Answers were written and reviewed by multiple attorneys, but should not take the place of timely counsel for the facts of any particular situation.

Mechanics of Timing

1. ***In light of the substantial changes to Chapter 117, what bylaw changes should a municipality make and when should those changes be made?***

By September 1, 2005, existing zoning bylaws should be modified to conform to sections 4412 and 4413, as well as to subchapters 9, 10, and 11 of the new Chapter 117. 24 V.S.A. § 4481. Related definitions should also be revised to conform to 24 V.S.A. § 4303. By September 1, 2011, existing zoning bylaws and subdivision regulations must be amended to conform to all the other provisions of the new Chapter 117.

The topics found in sections 4412 and 4413 and subchapters 9, 10, and 11 of the new Chapter 117 include (not an exhaustive list):

- Affordable housing;
- Multifamily dwellings;
- Accessory apartments;
- Existing small lots;
- Nonconformities;
- Limitations on zoning;
- The adoption, amendment, and repeal process;
- The development review process; and
- The appeals process.

2. ***What should be done if an existing bylaw references, or incorporates by reference, a section of the old Chapter 117?***

Effective September 1, 2005, sections 4412 and 4413 and subchapters 9, 19, and 11 of the new Chapter 117 will control over any inconsistent bylaw provisions. 24 V.S.A. § 4481. Until September 1, 2005, the bylaw, including the section of the old Chapter 117 referenced, or incorporated by reference, should be followed. 24 V.S.A. § 4480. After September 1, 2005, the applicable section of the new Chapter 117 must be followed.

At that time, if a bylaw does not comply with state law, the state law will control. 24 V.S.A. §§ 4480, 4481. If a bylaw is currently silent on a topic, the new state law already applies.

3. ***What if a municipality doesn't make its bylaws consistent with state law by September 1, 2005?***

Regardless of whether a municipality has amended its bylaws to be consistent with state law, it must issue permits in accordance with state law. If a municipality fails to do so, it faces the possibility of legal action, either as an appeal in the Environmental Court, or as a lawsuit instituted by the Vermont Attorney General.

The Adoption, Amendment and Repeal Process

4. ***What is the process for adopting, amending, or repealing a bylaw in a rural town?***

Between now and September 1, 2005, each town amending bylaws will need to evaluate whether its currently existing bylaw spells out a procedure for amending bylaws. If so, that bylaw procedure will apply until September 1, 2005. See 24 V.S.A. § 4480, as well as FAQ #2. Towns amending their bylaws should consult with legal counsel for guidance on which procedure applies.

The general rule is that a bylaw, amendment, or repeal must be adopted by a majority of the members of the legislative body. 24 V.S.A. § 4442(c)(1). In rural towns, the legislative body, or the town, may elect to require *amendments* or *repeals* be adopted by Australian ballot. 24 V.S.A.§ 4442(c)(2). However, because of the omission of a comma in section 4442(c)(2), there is a question as to whether rural towns can adopt new *bylaws* by Australian ballot. At this time, the Vermont Land Use Education and Training Collaborative advises rural towns that the clearly permissible method of bylaw adoption is by vote of the legislative body. If a rural town adopts a bylaw by Australian ballot, it risks legal challenge to the bylaw.

The process for revising bylaws was made more efficient by granting municipalities the ability to regularly update their bylaws without requiring that the voters vote on every change to the bylaw. However, voter authority was preserved by permitting the voters to petition to consider any vote of the selectboard. Also, the voters may petition to retain the right to vote by Australian ballot. 24 V.S.A. §§ 4442(c)(2), (d).

5. ***If the selectboard in a rural town approves a resolution to give authority to the voters to amend or repeal bylaws via Australian ballot, can the selectboard take it back?***

No. Once a rural town elects to amend or repeal its bylaws by Australian ballot (either by action of the selectboard or by town vote), only the voters may return this authority to the selectboard. 24 V.S.A. § 4442(c)(2).

6. ***Can the selectboard in a rural town give voters this authority for just one year?***

No. If a selectboard elects to require that the voters approve amendments or repeals by Australian ballot, then the town must do so until the voters vote otherwise. The selectboard has no authority to grant this power for a limited period of time. 24 V.S.A. § 4442(c)(2).

7. ***Can the voters petition to overturn a vote of the selectboard if the selectboard voted down an ordinance?***

While currently an open question of law, the answer is likely yes. Unlike the permissive referendum process for voting on traditional municipal ordinances, which allows the voters to "disapprove" an ordinance, five percent of the voters can petition to "consider" a zoning bylaw, amendment, or repeal. This subtle difference in language leads the Collaborative to believe that it is possible for the voters to reverse the decision of the legislative body, whatever it may have been. 24 V.S.A. § 4442(d).

8. ***Can a municipality adopt changes to its bylaws on a piecemeal basis?***

Yes. There is no law that mandates wholesale changes to a bylaw if a municipality only seeks to change a few provisions. However, the bylaw amendment process is the opportunity to consolidate many of the necessary changes to your bylaw into one event, which should speed up the process and allow towns to focus on the *possible* aspects of zoning, rather than solely on the *mandates*.

9. ***Is a zoning bylaw in jeopardy if the municipal plan expires?***

No. When a municipal plan (also referred to as a town plan or master plan) expires, it can still be enforced and administered as if it had not expired. However, if the plan expires, a municipality cannot amend its bylaws, including the changes required by the new law. 24 V.S.A. § 4387(c).

10. ***What if a bylaw amendment doesn't further the objectives of the municipal plan?***

There is a new requirement in local zoning that bylaw provisions be adopted in conformance with an adopted municipal plan. 24 V.S.A. § 4441(c). A definition of conformance was also added. 24 V.S.A. § 4303(6). If a municipality amends a bylaw in a way that doesn't conform with the plan – or worse, conflicts with the plan – it risks the validity of the bylaw provision being questioned.

It is a case-by-case determination as to whether a bylaw conforms to a municipal plan. In some cases, municipalities may find it necessary to adopt bylaws that don't conform to the plan. For example: Not many existing plans contain provisions concerning affordable housing (even though this is now a required plan element in 24 V.S.A. § 4382(10)), yet state law now requires that bylaws not exclude affordable housing from the municipality.

In such a case, the planning commission, in submitting its report on the bylaw amendment, should explain that the amendment does not further a provision of the municipal plan, yet it is a necessary amendment based on the requirements of state law. The report should also describe the planning commission's vision for eventually amending the plan, so that it conforms to state law.

11. ***Can a municipality adopt freestanding flood plain regulations without a municipal plan?***

No. A municipality without zoning regulations can adopt freestanding flood plain regulations, but they must conform to a valid municipal plan. 24 V.S.A. § 4424. It is important to note that flood plain regulations that were adopted in towns without bylaws prior to the enactment of Act 115, will continue in full force and effect and are not impacted by the recent changes to the law, until 2011. Those flood plain regulations will be rendered invalid on September 1, 2011, if they are not based on a town plan. In the meantime, if a municipality seeks to amend that bylaw, it will need a valid town plan on which to base that new bylaw.

Affordable Housing

12. ***How must a municipality provide for affordable housing?***

Municipal zoning regulations must not exclude, or have the effect of excluding, affordable housing from the municipality. In particular, state law requires that municipal plans include a housing element with a recommended program for addressing low and moderate income persons' housing needs, as identified in the regional plan, based on studies, data, or some other empirical evidence of affordability. 24 V.S.A. §§ 4348a, 4382(c). This program should account for accessory apartments that are located within or appurtenant to an owner-occupied single-family dwelling. 24 V.S.A. § 4382(a)(10).

13. ***Can a municipality prohibit mobile homes from a design control district, historic district, or other type of special district?***

While a municipality may not prohibit mobile homes from the municipality, it may prohibit mobile homes from design control districts, historic districts, or other places having "unique patriotic, ecological, historical, archaeological, or community interest or value..." 24 V.S.A. § 4411(b)(3)(F). Additionally, if design control regulations have the effect of prohibiting mobile homes or other prefabricated housing, those regulations must exclude conventional housing on the same terms and conditions. 24 V.S.A. § 4412(1)(B). Any regulations prohibiting mobile homes in any way must be rationally related to advancing the municipality's legitimate interest in protecting the unique values of that district.

Multifamily Dwellings

14. ***Is there a statutory definition for "multifamily dwellings?"***

No. Because this term is not defined in Chapter 117, municipalities are free to define it in their bylaws. However, since the Legislature has specifically exempted one- and two-family dwellings from site plan review, bylaws should not define multifamily dwellings as anything less than three dwellings per unit. 24 V.S.A. § 4416.

15. ***Can multifamily dwellings be reviewed as a conditional use?***

Yes. A municipality may subject multifamily dwellings to conditional use review. However, multifamily dwellings should not be defined as anything less than three dwellings per unit. Moreover, the bylaws cannot be so strict as to have the effect of prohibiting multifamily dwellings from the municipality. 24 V.S.A. §§ 4416, 4412(1)(D), 4414(3).

16. ***Can multifamily dwellings be relegated to a particular district in a municipality?***

Yes. A municipal zoning bylaw may not prohibit multifamily dwellings from the municipality entirely, but the bylaw may relegate those dwellings to a particular district or districts in the municipality. 24 V.S.A. § 4412(1)(D).

17. ***Can a municipality limit the number of multifamily dwellings in a district?***

No. Municipalities may not limit, or cap, the number of multi-family dwellings in a district. However, municipalities may establish a density requirement or other planning device to limit the intensity to which multifamily dwellings could be built in a particular district. Any regulations prohibiting multifamily dwellings in any way must be rationally related to advancing a legitimate municipal interest, such as using a density requirement to inhibit overly intensive land development in a particular district. 24 V.S.A. § 4412(1)(D).

18. ***Are multifamily dwellings permitted as of right?***

No, multi-family dwellings are not permitted as of right; municipalities can require multi-family dwellings to undergo any review (such as site plan, conditional use, etc.) that is specified in the municipal bylaw. However, those reviews and their associated regulations cannot have the effect of excluding these types of dwellings from the municipality. 24 V.S.A. § 4412.

Accessory Apartments

19. ***Can a municipal bylaw permit accessory dwellings that are larger than 30% of the total habitable floor space of the single-family dwelling?***

Yes. At the very least, a municipality must allow single-family dwellings to have an accessory dwelling, which may be up to 30% of the total habitable floor space of the main dwelling. A bylaw may be more permissive of accessory apartments, in that it can permit accessory apartments to be larger than 30% of the single-family dwelling. On the other hand, bylaws cannot define accessory apartments as anything smaller than 30% of the total habitable floor space of the single-family dwelling. 24 V.S.A. § 4412(1)(E)(ii).

20. ***Can a municipality permit an accessory dwelling that is (for example) 500 feet away from the primary dwelling?***

Yes, provided the structure is truly "accessory" and not a second primary dwelling. Vermont

law merely prohibits a municipality from excluding, as a permitted use, an accessory dwelling that is attached or "appurtenant" to an owner-occupied single-family dwelling. A municipal bylaw could broaden the definition of appurtenant to include anywhere on the same parcel as the primary structure. 24 V.S.A. § 4412(1)(F)(i).

Most zoning bylaws prohibit having more than one primary structure on a parcel. A satellite "accessory apartment" built on the same parcel may be more akin to a second primary dwelling, if not carefully defined in a bylaw.

21. ***A municipality must permit accessory dwelling units that are within or "appurtenant" to an owner-occupied single-family dwelling. Is the term "appurtenant" defined in state law, or anywhere else?***

While the term "appurtenant" is not defined in Ch. 117, the Collaborative believes that the intent of the new law is that the word means "next to" an owner-occupied single-family dwelling. It is recommended that municipalities further define the word in their zoning bylaw. Bylaw drafters may wish to have the word mean "physically attached," or may broaden the term to mean "incidental or subordinate to the primary dwelling." Additionally, those municipalities choosing the broader meaning of the term may wish to include a permissible measurable distance between the two structures.

22. ***Can the owner of the single-family primary dwelling occupy the accessory apartment and rent out the larger, formerly primary dwelling?***

Yes, if the municipality's bylaw permits. Again, a municipality may be more permissive of accessory dwellings. This must be clearly delineated in the zoning bylaw. 24 V.S.A. § 4412(1)(F)(i).

23. ***Can a condominium contain an accessory dwelling?***

Presumably yes, if the municipality's bylaws permit such an accessory dwelling and the apartment is truly accessory to the condominium, and not another primary structure. Recall that an accessory apartment is defined as "an efficiency or one-bedroom apartment that is clearly subordinate to a single-family dwelling, and has facilities and provisions for independent living, including sleeping, food preparation, and sanitation, and has sufficient wastewater capacity, does not exceed 30% of the total habitable floor space of the single-family dwelling, and applicable setback, coverage, and parking requirements specified in the bylaws are met." 24 V.S.A. § 4412(1)(E), (F).

24. ***What are the wastewater permit requirements for accessory apartments? For example, is a state wastewater permit required for accessory apartments?***

Accessory apartment owners must ascertain in each case whether a wastewater permit or amendment is required. Most municipal wastewater ordinances will apply until July 1, 2007. After that date, a state wastewater permit will be required, unless that municipality has been delegated septic permitting authority by the Agency of Natural Resources. 10 V.S.A. Ch. 64.

While municipalities have the clear authority to be more permissive of accessory apartments than state law, it is unlikely that they have the authority to roll back the minimum wastewater requirements. 24 V.S.A. § 4412(1)(F).

If the property is connected to a municipal sewer system, the accessory apartment may require a sewer allocation permit from the municipality.

Existing Small Lots

25. ***If a lot was merged under the old existing small lot statute, does the new law "un-merge" those lots (i.e., is it retroactive)?***

No, the law is not retroactive. Lots that were merged under the previous law will need to undergo the subdivision review process to subdivide the parcels. 24 V.S.A. § 4412(2).

26. ***What happens if a landowner tries to develop a lot that the municipality considered to be merged?***

Municipalities may be forced to take enforcement action to enjoin the development of lots that have been treated as merged under the existing small lot provisions of their bylaws. If this becomes an issue in your municipality, be sure to have your municipal attorney review the matter prior to taking any enforcement action.

27. ***How should a municipality ratify the small lots provision? Does this have to be done prior to September 1, 2005?***

The new default rule is that merger is no longer automatic. However, existing bylaw provisions that require automatic merger and were adopted under the prior enabling statute may be challenged on the grounds that bylaws that are inconsistent with state law were superceded by state law on September 1, 2005. 24 V.S.A. §§ 4412(2), 4480, 4481. If municipalities wish to continue to require merger, we recommend ratifying the small lot provision as part of these revisions since many municipalities will be revising their bylaws anyway and to help avoid legal challenges to the bylaws. This process must be done according to the amendment process prescribed in 24 V.S.A. § 4442, as there is no way to simply ratify an existing bylaw provision.

Municipalities should also be aware that they can adopt different merger requirements for different districts. For example, a bylaw could require merger of small lots along a shoreline where there is an environmental interest in reducing the amount of development adjacent to a natural resource. The same bylaw could be less restrictive of small lots, and permit their development in a village area to promote the use of available land in the village. 24 V.S.A. §§ 4414 (2)(B), (C).

Nonconformities

28. ***How should a municipality address nonconformities?***

While the law requires that municipalities address nonconformities in their bylaws, it only specifies how it *may* be done, not how it *must* be done. Many municipal bylaws already include these provisions. Possible local regulations pursuant to 24 V.S.A. § 4412(7) include:

- Defining a period that constitutes abandonment or discontinuance of nonconformities (which cannot be less than six months). Many current bylaws consider abandonment or discontinuance to occur after a year of non-use.
- Specifying the extent to which, and circumstances under which, nonconformities may be maintained or repaired. For example, a bylaw could require that repairs not expand the degree of nonconformity of the structure, or have an undue adverse effect on the character of the area.
- Specifying the extent to which, and circumstances under which, nonconformities may be changed or expanded. For example, a bylaw could require that changes or expansions not expand the degree of nonconformity of the structure, or have an undue adverse effect on the character of the area.
- Specifying the circumstances in which a nonconformity that is destroyed may be rebuilt. For example, this is typically required to occur within a year of the destruction, and the reconstruction must not expand the degree of nonconformity of the structure.

29. ***What constitutes abandonment for the purpose of regulating nonconformities?***

Abandonment typically means the non-use of a property for a particular period of time, regardless of the landowner's *intent* to use the property at some point in the future. Municipal bylaws may specify the time period that constitutes abandonment, so long as it is not less than six months. 24 V.S.A. § 4412(7)(A)(i). Because nonconformities may typically be continued in perpetuity, an event such as abandonment may be an appropriate time for a municipal bylaw to step in to prohibit the continued undue perpetuation of the nonconformity.

Limitations on Zoning

30. ***What is the definition of a church as applied to the "Limitations" statute, 24 V.S.A. § 4413?***

While Vermont law does not define what a church is, municipalities may establish a definition in their zoning bylaws. Here is one definition from the Muskegon, Michigan zoning bylaw: "A building wherein persons regularly assemble for religious worship and which is maintained and controlled by a religious body organized to sustain public worship, together with all accessory buildings and uses customarily associated with such primary purpose. Includes synagogue, temple, mosque, or other such place for worship and religious activities."

31. ***What is an "other place of worship" under 24 V.S.A. § 4413?***

An other place of worship could include mosques, synagogues, temples, or any other places of worship. These facilities should be only be regulated in the same manner and to the same degree as churches.

32. ***To what extent can municipalities regulate the facilities listed under 24 V.S.A. § 4413?***

A municipality may only regulate these facilities with respect to the following criteria: location, size, height, building bulk, yards, courts, setbacks, density of buildings, off-street parking, loading facilities, traffic, noise, lighting, landscaping, and screening requirements. It is an open legal question as to whether "location" refers to "location in the municipality" or to "location on the parcel." Clearly, there is authority to regulate location on the parcel, while it is not clear as to location within the municipality.

Additionally, regulation of these types of facilities cannot interfere with a facility's "intended functional use." 24 V.S.A. § 4413.

33. ***How do you determine if zoning bylaws have the effect of "interfering with the intended functional use" of a project under 24 V.S.A. § 4413(a)?***

This question is best answered through an example. Consider a State-operated prison, which typically requires intense lighting for security purposes. If a zoning bylaw establishes permissible lighting standards, which includes downshielding of all lights and elimination of all excess glare, such a regulation would clearly interfere with the intended functional use of keeping prisoners locked inside the prison. Therefore, municipal regulation of the facilities listed in 24 V.S.A. § 4413 must be somewhat fluid based on the needs of the facility, and is a matter to be weighed by the appropriate municipal panel hearing the application on the project.

34. ***Can a municipality regulate utilities and, if so, to what extent?***

Municipalities have no zoning authority to regulate utilities, which are regulated by the Vermont Public Service Board. This means that municipalities cannot require a zoning review process for generating plants (including wind turbines connected to the electrical grid), transmission lines, or substations. This also applies to net-metered wind turbines or solar collectors, which return excess power to the electrical grid and are regulated by the Vermont Public Service Board. 30 V.S.A. §§ 219a(c), 248.

Municipalities may, through zoning regulations, regulate wind turbines or solar collectors that are not connected to the electric grid, subject to some restrictions laid out in 24 V.S.A. § 4412(6). Additionally, the local legislative body may permit or prohibit utility lines that are placed along a municipal right of way. 19 V.S.A. § 1111, 30 V.S.A. § 2502.

Municipalities may participate in review proceedings before the Public Service Board, as they typically have party status pursuant to 30 V.S.A. § 248, the certificate of public good process.

Participation in that review process can be buttressed by adopting policies on wind and other similar projects in the municipal plan.

35. ***Are cell towers and wind towers considered utilities under the new state law?***

Vermont utilities law generally applies to companies engaged in the manufacture, transmission, distribution, or sale of gas or electricity. Therefore, wind towers connected to the grid are considered to be utilities, but cell towers are not. Municipalities may, through a zoning bylaw or stand-alone ordinance, regulate cell towers. 24 V.S.A. §§ 2291(19), § 4414 (12).

The Development Review Process

36. ***Does a municipality have to adopt the statutory language of appropriate municipal panels (AMPs)?***

No, municipalities should continue to use the existing terminology of planning commission, zoning board of adjustment, development review board, etc., in referring to their various zoning boards. For purposes of jurisdictional clarity, municipal bylaws must clearly spell out the jurisdiction of the respective boards by listing which boards will conduct which review processes. 24 V.S.A. § 4460.

37. ***Are rules of procedure and ethics policies required for municipal boards?***

Yes, AMPs must adopt both rules of procedure and rules of ethics with regard to conflicts of interest. 24 V.S.A. § 4461. Look for model policies in the near future to be developed by the Vermont Land Use Education and Training Collaborative.

38. ***What is the permitting relationship between the AMPs and the ZA?***

Little has changed in the law that specifically changes the jurisdiction or authority of either the zoning administrator or the respective zoning boards. One change that local officials should be aware of is the referral process, which now requires zoning administrators to refer applicants to the AMP with jurisdiction over the review requested by the applicant. This is in contrast to the practice of many ZAs to deny the application and then have the applicant appeal to the zoning board. The ZA's decision to refer to the AMP is an appealable one.

Also, there is new authority in Chapter 117 for the bylaws to grant zoning administrators authority that did not exist under the prior law, such as the ability to make amendments to existing permits and to review and approve applications for minor development. 24 V.S.A. § 4464(c).

39. ***How much authority does a ZA have in amending permits issued by an AMP?***

A zoning administrator has no authority to amend permits issued by an AMP, unless the zoning bylaw permits the ZA to make amendments. A bylaw that provides for administrative review must specify thresholds and conditions under which the ZA may amend permits. The primary

standard to be followed by the ZA is that no amendment issued as an administrative review can have the effect of substantively altering any of the findings of fact of the most recent approval. 24 V.S.A. § 4464(c).

40. ***What type of notice is required for a ZA to conduct minor reviews?***

The statute on administrative review does not establish any notice requirements for the ZA to perform administrative reviews. Municipalities are advised that a best practice would be to follow the same notice and warning requirements as apply to other reviews pursuant to 24 V.S.A. § 4464(a).

41. ***When does the "180-day plat approval expiration" provision take effect?***

Depending on your local bylaw, this provision may or may not be effective. If a local bylaw states the old rule that approved subdivision plats must be filed within 90 days of the approval, that rule shall apply until September 2005, at which time the new law will supersede the bylaw. At that time, the new rule in 24 V.S.A. § 4463 will be effective, which requires approved plats to be recorded within 180 days of approval. If permitted in the bylaw, the ZA will then have the authority to extend that deadline by another 90 days, if final local or state permits or approvals are still pending.

If your local bylaw is silent on this topic, the 180-day rule in 24 V.S.A. § 4463 already applies.

42. ***Do all permits issued by the zoning administrator have to be posted?***

The new law requires that a notice of permit be posted within view from the public right-of-way for 15 days from the issuance of the permit. Additionally, that same notice must be posted in at least one public place in the municipality (e.g., on the notice board outside the municipal offices) for 15 days from the issuance of the permit. 24 V.S.A. § 4449(b).

43. ***Where notice is required within view of a public right-of-way, does a private driveway suffice?***

The notice must be visible from the nearest public right-of-way. So, if a neighbor walking by on a town highway can clearly see the posted notice, posting on a private driveway will suffice. Keep in mind that if the notice is posted somewhere on a private driveway and no one can see the notice from the nearest public right-of-way, this provision will not have been satisfied. 24 V.S.A. § 4449(b).

44. ***Who is required to post the notice of permit – the ZA or the landowner?***

If a bylaw does not require the zoning administrator to post, the burden lies with the applicant to post the notice. Municipalities may decide that this is a job best handled by the zoning administrator and include a bylaw provision requiring the ZA to post the notice. Applicants are advised that if the posting provision is not satisfied, an interested person could question the validity of the permit. 24 V.S.A. § 4449(b).

45. ***Does either the ZA or the applicant have a duty to replace posted warnings and notices that have been ripped down?***

If the bylaw does not require the zoning administrator to post the notice, it is the applicant's duty to see that a copy of the notice is posted for the requisite time period. If the bylaw requires the ZA to post the notice, then it is the ZA's duty to see that the posting remains up. Applicants must consider that this provision is designed to ensure adequate notice to would-be interested persons. If those people are not adequately warned about a hearing or about their rights to appeal, the validity of the permit may be questioned. Therefore, while a bylaw may assign the duty to post to a particular municipal official, applicants still have a strong interest in making sure the notice is visible for the requisite time period.

46. ***When should warnings and notices be posted – at the time the application is submitted, or when the permit is issued?***

There are two times that posting is required: The first is when a hearing is publicly warned on an application. For conditional use review, variances, appeals of ZA decisions and final plat review for subdivisions, the warning for the public hearing must be published in a newspaper, and posted in three or more places in the municipality, which includes posting within view from the nearest public right of way. 24 V.S.A. § 4464(a). Some bylaws may require that similar procedures be followed for site plan review and other types of development review.

The second time that posting is required is when a permit is issued. 24 V.S.A. § 4449(b). When the permit is issued, a notice must be posted within view from the nearest public right of way, and in at least one public place in the municipality, both for 15 days from the date of issuance.

47. ***What are the consequences for an applicant for not posting a zoning permit on the subject property?***

This provision is designed to ensure adequate notice to would-be interested persons. If they are not adequately warned about a hearing or about their rights to appeal, interested persons may question the validity of the permit in court. Therefore, applicants are warned to make sure that the notice is visible for the requisite time period. Failure to post could be a ground on which to question the validity of the permit in court.

48. ***Is it a violation of a zoning bylaw if a posted notice gets ripped down?***

A notice that is ripped down does not rise to the level of a bylaw violation, as it is not "land development." However, it could be a reason for an interested person to challenge the issuance of a zoning permit in court.

49. ***What is deemed approval? How does an applicant assert his or her right to deemed approval?***

Generally stated, deemed approval is an applicant's right to approval for a project as applied for,

if a permitting authority has failed to issue a permit in the statutorily required time period.

It is an open question under this new version of Chapter 117 as to how an applicant must assert this right. Some believe that the right to deemed approval, and the right to take action on an application, vests immediately upon the failure of the permitting authority to issue a permit in the requisite time period. Others believe that an applicant must take an appeal to the next highest tribunal to assert that right and be granted a permit to build the project. References to deemed approval can be found at 24 V.S.A. §§ 4448(d) and 4464(b)(1).

50. ***When does the time period begin to run for deemed approval?***

A ZA has 30 days to take action and avoid deemed approval, which runs from the date that a complete application is submitted. 24 V.S.A. § 4448(d). Keep in mind that most bylaws specify the necessary elements of an application, and most ZAs use a checklist to certify completeness. If the application has not been accepted because it is incomplete, the clock does not begin to run.

An appropriate municipal panel has 45 days from the close of the final public hearing to issue a decision. If the board fails to issue a decision within that time period, the decision is deemed approved. 24 V.S.A. § 4464(b)(1).

51. ***If the zoning board of adjustment and the planning commission hold a combined review of an application, should the decisions of the two boards be separate?***

Each board issuing a decision in a matter should issue a separate decision, complete with the factual bases and conclusions relating to the review standards applied to the application. This holds even (and especially) where the two boards are comprised of the same or many of the same members.

52. ***If a municipality has a joint meeting of the ZBA and PC, which notice requirements do you follow? Is it the more restrictive of the two?***

A best practice would be to follow the warning requirements that provide more notice to more people. So, if there is a joint meeting of the ZBA and PC, and the application is for site plan and conditional use review, it would be best to follow the notice requirements laid out in 24 V.S.A. § 4464 (a), which apply to conditional use review hearings. This requires that notice be provided not less than 15 days prior to the date of the public hearing by (1) publication in a newspaper; (2) posting in three places in the municipality, which includes posting within view from the nearest public right-of-way, and (3) written notification to the applicant and to owners of all properties adjoining the property subject to development, without regard to any public right-of-way.

53. ***Does the ZA need to issue a permit after the AMP issues a decision?***

Yes. The permit issued by the ZA is issued once the AMP has issued a decision approving an application. Its purpose is to create a paper trail in that it must be recorded in the land records (as well as in the records of the zoning office) and posted within view from the nearest public right-of-way once issued. 24 V.S.A. § 4449(b), (c).

54. ***How much information must be given (e.g. date, time, place) to adjourn an AMP hearing to another time?***

An AMP may adjourn a hearing to another time, without re-warning it, by providing those in attendance with the precise date, time, and place of the continuation of the hearing. 1 V.S.A. § 312(c)(4).

55. ***Is it sufficient for an AMP to issue an oral decision to applicants?***

No. Decisions must be written. However, sending a copy of the minutes in which the decision is recorded can suffice, if they include the factual bases and conclusions relating to the review standards applied to the application. Additionally, boards are advised to not issue oral decisions "on the spot" – rather, to make use of deliberative session and issue a written decision within the requisite 45 days. It would put a board in a tough spot to issue an oral opinion approving a project, only to issue a written decision a month later denying it.

56. ***Must AMP decisions be mailed and, if so, to whom?***

Yes. All AMP decisions must be sent by certified mail to the applicant and to the appellant within 45 days of closing the final public hearing. Also, copies of the decision must be mailed to every person who participated in the proceeding (whether they submitted oral or written testimony). A copy of the decision must also be filed with the ZA wherever zoning records are kept, and another copy must be recorded in the municipal clerk's office. 24 V.S.A. § 4464(b)(3).

57. ***Should decisions be sent via certified mail to the applicant and sent via regular mail to everyone else?***

Decisions must be sent by certified mail to the applicant and any appellant. The law does not require certified mail to be used for sending copies to persons having been heard at the hearing, though it may be a best practice. 24 V.S.A. § 4464(b)(3).

58. ***Can a municipality charge to recover the cost of administering its zoning regulations?***

Municipalities cannot "direct-bill" zoning applicants for the costs of administering their respective zoning reviews, but they may establish a reasonable fee structure which may include the cost of posting and publishing notices, holding public hearings, and the cost of conducting periodic inspections during the installation of public improvements. Many bylaws currently charge fees as a percentage of the total cost of the project. Municipalities may require that applicants pay these fees upon submission of an application or prior to the issuance of any municipal land use permit. 24 V.S.A. § 4440(b).

Appeals

59. ***Who are "interested persons"?***

Interested persons are those who have status under the law to file an appeal of a zoning permit or decision. An interested person may include (not an exhaustive list): (1) a person owning title to property who alleges that a bylaw imposes on the property unreasonable or inappropriate restrictions of possible use; (2) the municipality that has a plan or bylaw at issue, or any municipality adjoining that municipality; (3) a person owning or occupying property in the immediate neighborhood of a property that is the subject of any zoning decision or act who can demonstrate a physical or environmental impact on the person's interest under the criteria reviewed in that decision or act, and who alleges that the decision or act, if confirmed, will violate the municipal plan or bylaw; (4) any ten persons, either voters or landowners, who, by signed petition to the AMP, allege that the decision or act, if confirmed, will violate the municipal plan or bylaw (these petitioners must designate one person to serve as their representative); and (5) any department and administrative subdivision of the state owning property within that municipality, and the Agency of Commerce and Community Development. 24 V.S.A. § 4465(b)(1)-(5).

Persons not meeting these preceding definitions may not appeal a decision of either the ZA or of an AMP.

60. ***How does one appeal the denial of interested person status?***

A person denied the right to appeal should appeal that decision to the next highest tribunal, which will be either the Environmental Court, in cases where the denial of the right to appeal was of a ZA's decision and interested person status is denied by the AMP, or to the Supreme Court, if denied interested party status in an appeal to the Environmental Court.

61. ***Will a DRB have to determine who is an "interested person"?***

Development review boards (DRBs) and zoning boards of adjustment (ZBAs) will need to determine who is an interested person for appeals of ZA decisions. Because only "interested persons" may appeal decisions of the ZA, and appeals of ZA decisions go to either a ZBA or a DRB, those boards will need to determine whether the would-be appellant is entitled to appeal pursuant to 24 V.S.A. § 4465.

Additionally, the Environmental Court will be required to make a party status determination for appeals to that court.

62. ***If a person attempts to demonstrate interested person status before an AMP, must the AMP develop a service list and mail all documentation to that interested person?***

As the law stands now, there is no requirement that municipalities create a service list of persons to whom to send decisions of the board and filings of parties. There is a requirement, however, that all persons "appearing and having been heard" at the hearing be mailed a copy of the

decision by the appropriate municipal panel.

Even though the law does not require it, a best practice may be for the clerk of the AMP to create a service list that lists all persons who want to receive correspondence of the board and filings of the parties. The list would then be provided to all parties, who should then send any filings to everyone on the service list.

63. ***Is the conservation commission entitled to interested person status in an AMP hearing? If so, which member should participate?***

Conservation commissions are not entitled to party status in local zoning proceedings. An individual member of the conservation commission may still be an interested person, regardless of his or her membership on the conservation commission, pursuant to 24 V.S.A. § 4465.

64. ***Can "non-interested" persons participate in any way? Does Vermont's Open Meeting Law apply?***

Most local zoning boards permit anybody the right to participate in their proceedings. In the zoning context (particularly with respect to quasi-judicial proceedings), the Vermont Open Meeting Law only requires that meetings be open to the public. In quasi-judicial proceedings, the public is not entitled to the same reasonable opportunity to express its opinion as is allowed for other types of meetings. 1 V.S.A. § 312(h). Therefore, the quasi-judicial body, in its discretion, may prescribe rules for participation that either permit, or limit, "non-interested" persons. A best practice would be to prescribe these rules either in the local zoning bylaw or in the board's rules of procedure.

65. ***Do all members of a group have to individually show they are "interested persons?"***

Yes. Each individual member of a group, who may be a voter or landowner, must sign a petition alleging that any relief requested by a person in a zoning proceeding will not be in accord with the policies, purposes, or terms of the plan or bylaw of the municipality. 24 V.S.A. § 4465(b)(4).

66. ***Can bylaws require interested parties to submit evidence in advance?***

Bylaws can only permit or *encourage* interested parties to submit evidence in advance, as state law still requires a public hearing, at least for conditional use reviews, variances, ZA appeals, and final plat review for subdivisions. Interested parties cannot be required to submit evidence in advance, as there must be some opportunity to cross-examine other witnesses or parties and to question the evidence presented by other parties. 24 V.S.A. § 4464(a).

67. ***If the zoning administrator fails to take action, is that failure to act appealable?***

Presumably, a decision of the zoning administrator not to take enforcement action against someone, for example, is appealable, though this is an open question of law. Interested persons should consult with their attorneys for available legal remedies.