COMMISSION ON ACT 250: THE NEXT 50 YEARS

SLIDES FOR 10-25-17 PRESENTATION

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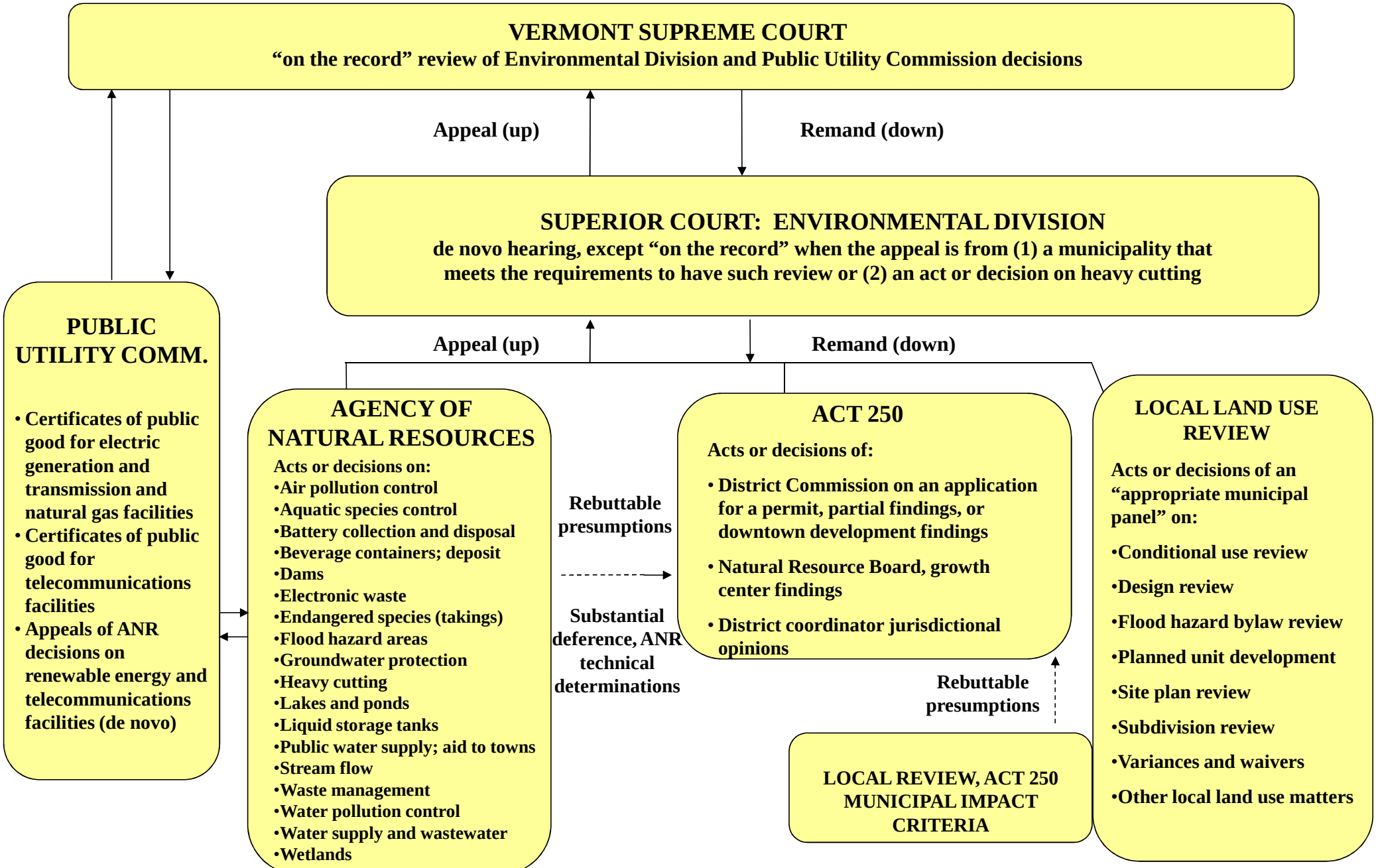
ENVIRONMENTAL, ENERGY, AND TELECOMMUNICATIONS PERMIT PROCESS AND APPEALS AS OF 10/24/17



prepared by Aaron Adler, Legislative Counsel, 10/24/17

"ACT 250"

This term typically describes one or more of the following:

(a) the State land use and development act codified at 10 V.S.A. chapter 151;

(b) the process of obtaining a permit under that act; or

(c) the program that administers the act, consisting of the Natural Resources Board and nine District Environmental Commissions.

NATURAL RESOURCES BOARD (NRB)

This five-member board is separate from ANR and has the following functions:

- adopting rules of procedure for the District Commissions and itself;
- adopting substantive rules for the Act 250 program;
- overseeing the administration and enforcement of Act 250;
- initiating permit revocation proceedings before the Environmental Division;
- participating in proceedings before the Environmental Division in all matters relating to Act 250;
- hearing appeals from decisions on whether municipal and regional plans should be given an affirmative determination of energy compliance.

DISTRICT COMMISSIONS & COORDINATORS

District Commission or District Environmental Commission – A tribunal created under Act 250 that is assigned to one of nine administrative districts. A District Commission's primary function is to hear and decide applications for Act 250 permits in its district. A District Commission consists of a chair, two members, and up to four alternates appointed by the governor.

District Coordinator – An employee of the NRB assigned to one of nine administrative districts. The primary functions of a District Coordinator are to staff and advise the District Commission, issue jurisdictional opinions, and assist with enforcement.

Appeals go to the Environmental Division of Superior Court.

DE NOVO

Anew or afresh. The term refers to the use of independent judgment in appellate review, typically without deference to the inferior court or tribunal. The phrase "de novo hearing" means that the issues on appeal are heard anew as if no prior proceedings occurred, and evidence is presented on appeal. In contrast, the phrase "review de novo" or "de novo review" means that the appellate court reappraises the record of the prior proceedings and makes a decision based on its own independent judgment; sometimes those phrases are held to mean that the appellate court has the discretion (but is not required) to hold a hearing to take more evidence.

REVIEW ON THE RECORD

In the context of an appeal, this term typically refers to a deferential standard of review in which the appellate court does not hear or apply independent judgment to the evidence and instead reviews the record below for error. Factual determinations are upheld unless clear error is shown, and discretionary determinations are upheld unless abuse of discretion is shown. The appellate court will apply independent judgment to questions of law. However, when the appeal is from an administrative agency, the appellate court typically will defer to that agency's interpretation of its enabling statute unless there is a compelling indication of error.

"DEVELOPMENT" SUBJECT TO ACT 250

1. Construction of improvements for commercial, industrial, or residential use above 2,500 feet.
2. Construction of improvements for any commercial or industrial purpose on more than 10 acres of land; or on more than one acre of land if the municipality does not have both permanent zoning and subdivision bylaws.
3. Construction of 10 or more housing units, or of mobile homes or trailer parks with 10 or more units, within a radius of 5 miles. Thresholds are higher for "priority housing projects" in areas designated under Title 24, chapter 76A.
4. Construction of improvements for a governmental purpose if the project involves more than 10 acres or is part of a larger project that will involve more than 10 acres of land.
5. Any construction of improvements which will be a substantial change to a grandfathered (existing pre-1970) development that would require a permit if built today.

"DEVELOPMENT" SUBJECT TO ACT 250 (CTD.)

6. Construction of a support structure that is primarily for communication or broadcast purposes and extends 50 feet, or more, in height above ground level or 20 feet, or more, above the highest point of an attached existing structure.
7. Exploration for fissionable source materials beyond reconnaissance or the extraction or processing of such material.
8. Drilling of an oil or gas well.
9. Any withdrawal of more than 340,000 gallons of groundwater per day from any well or spring on a single tract of land or at a place of business, independent of the acreage of the tract of land.

"SUBDIVISION" SUBJECT TO ACT 250

1. Subdivision of land creating 10 or more lots of any size within a 5-mile radius or within the jurisdictional limits of a District Commission within a continuous period of 5 years.
2. Within a town that does not have both permanent zoning and subdivision regulations, subdivision of land creating 6 or more lots of any size within a continuous period of five years.
3. The sale, by public auction, of any interest in a tract or tracts of land, owned or controlled by a person, which have been partitioned or divided for the purpose of resale into five or more lots within a radius of five miles and within any period of ten years.

EXEMPTIONS

1. Construction of improvements for farming, logging or forestry purposes below 2,500 feet.
2. Construction of improvements for an electric generation or transmission facility.
3. Construction of improvements for agricultural fairs that are registered with the Agency of Agriculture, Food and Markets and that are open to the public for 60 days per year, or fewer, provided that, if the improvement is a building, the building was constructed prior to January 1, 2011 and is used solely for the purposes of the agricultural fair.
4. Construction of improvements for the exhibition or showing of equines at events that are open to the public for 60 days per year, or fewer, provided that any improvements constructed do not include one or more buildings.
5. Construction of improvements for certain composting operations located on farms, depending on the source, composition, and amount of the inputs to such compost.
6. Construction of improvements for certain remedial actions ordered by ANR.
7. “Priority housing projects” in areas designated under Title 24, chapter 76A if the municipality has a population of 10,000 or more.

ACT 250 CRITERIA

Before granting a permit, the District Commission must find that the development or subdivision :

(1) Will not result in undue water or air pollution. This criterion deals with water and air pollution generally and such specific matters relating to water pollution as:

(A) headwaters; (B) waste disposal (including wastewater and stormwater); (C) water conservation; (D) floodways; (E) streams; (F) shorelines; and (G) wetlands.

(2) Has sufficient water available for the needs of the subdivision or development.

(3) Will not unreasonably burden any existing water supply.

(4) Will not cause unreasonable soil erosion or affect the capacity of the land to hold water.

(5) Traffic. (A) Will not cause unreasonably dangerous or congested conditions with respect to highways or other means of transportation.

(B) As appropriate, will incorporate transportation demand management strategies and provide safe access and connections to adjacent lands and facilities and to existing and planned pedestrian, bicycle, and transit networks and services.

ACT 250 CRITERIA (CTD.)

(6) Will not create an unreasonable burden on the educational facilities of the municipality.

(7) Will not create an unreasonable burden on the municipality in providing governmental services.

(8) Will not have an undue adverse effect on aesthetics, scenic beauty, historic sites or natural areas, and 8(A) will not imperil necessary wildlife habitat or endangered species in the immediate area.

(9) Conforms with the Capability and Development Plan, including the following:

(A) the impact the project will have on the growth of the town or region: (B) primary agricultural soils; (C) productive forest soils; (D) earth resources; (E) extraction of earth resources; (F) energy conservation; (G) private utility services; (H) costs of scattered development; (J) public utility services; (K) development affecting public investments; and (L) settlement patterns.

(10) Is in conformance with the local or regional plan or capital facilities program.

REBUTTABLE PRESUMPTION

A presumption is a rule of law created by statute or common law under which a finding of a basic fact gives rise to the existence of a presumed fact. For example, in an Act 250 proceeding, a finding that ANR has issued the applicant a stormwater discharge permit gives rise to a presumption that the stormwater discharge from the development in question will not create undue water pollution. A rebuttable presumption is one that can be overturned by the submission of sufficient evidence that is contrary to the presumed fact.

SUBSTANTIAL DEFERENCE

A legal standard under which the Vermont Supreme Court applies great deference to an agency in the exercise of its technical expertise and presumes such exercise is correct and valid, with the review limited to whether the agency acted arbitrarily, unreasonably, or contrary to law.

In addition to its use by the Supreme Court, a District Commission in an Act 250 proceeding is required by statute to give substantial deference to a technical determination of ANR. In an appeal of a decision of a District Commission, the Environmental Division is required to do the same.

The term also is found in statutes pertaining to energy and telecommunications facility siting review by the Public Utility Commission.

DATES IN ACT 250 HISTORY

- JUNE 1, 1970: 1970 Acts and Resolves No. 250 (Act 250) becomes effective. The central administrative and appeals body is the Environmental Board, with the District Commissions conducting the original proceedings on applications.
- 1973: The General Assembly approves the Capability and Development Plan and adopts significant amendments to the Act, including the subcriteria of 1 (undue water pollution) and 9 (capability and development plan).
- 1976: The General Assembly rejects the Land Use Plan.
- 1988: The Vermont Supreme Court issues In re Hawk Mountain Corp., 149 Vt. 179, stating:
  - "The Environmental Board is given authority to conduct an independent review of the environmental impact of proposed projects, and in doing such the Board is not limited to the considerations listed in Title 10."
  - "[T]he legislative scheme indicates that the legislature intended to confer upon the Board powers of a supervisory body in environmental matters."

DATES IN ACT 250 HISTORY (CTD)

- 1988: The General Assembly passes 1988 Acts and Resolves No. 200, an act "to encourage local, regional and state agency planning." This act comprehensively revises local and regional land use planning and requires planning by state agencies that affect land use.
- 1994: The Vermont Supreme Court issues In re Molgano, 163 Vt. 25, ruling that, to be effective in Act 250 proceedings, local and regional plans must enunciate specific policies, and broad, nonregulatory language is not an appropriate basis for denial.
- 2004: The General Assembly passes 2004 Acts and Resolves No. 115, an act relating to consolidated environmental appeals and revisions of land use development. The Environmental Board is abolished. Its administrative functions go to a new Natural Resources Board. Act 250 appeals go to the Environmental Division of the Superior Court.