

VERMONT PERMIT PROCESS GLOSSARY

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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 (NRB)* and nine *District Environmental Commissions*.

Administrative officer – A local official nominated by the local *planning commission* and appointed by the legislative body for the municipality. This officer issues development permits under the local land use bylaws. He or she is required to administer those bylaws literally and only has authority to permit land development that conforms to the bylaws. Among other duties, an administrative officer provides interested persons with the forms required to obtain a local land use approval, refers applications to the *appropriate municipal panel* having jurisdiction, and enforces violations of the local land use bylaws.

Administrative order – An order issued under Vermont’s uniform environmental law enforcement act by *ANR* or the *NRB* with respect to a violation of an environmental law or permit that is enforceable through that act (e.g., state water quality laws, *Act 250*).

Agency of Natural Resources (ANR) – Vermont state environmental agency consisting of the Departments of Environmental Conservation, Fish and Wildlife, and Forest, Parks and Recreation; the Board of Forests, Parks And Recreation; the State Natural Resources Conservation Council; and the Division of Geology and Mineral Resources. The federal Environmental Protection Agency has delegated to ANR the administration and enforcement in Vermont of all or most of the programs under the following statutes: the federal Clean Air and Water, Resource Conservation and Recovery (solid and hazardous waste regulation), and Safe Drinking Water Acts. ANR is headed by a secretary. ANR does not include the *Act 250* program.

Appeal – Resort to a superior (i.e., appellate) court or administrative agency to review the decision of an inferior (i.e., trial) court or administrative agency. There are often two stages of appeal in many systems, e.g., appeal from an agency to an intermediate appellate court and then to the system’s highest court. There may also be more than one level of appeal within an agency.

Appropriate municipal panel – A defined term in the municipal land use statutes that includes a municipal *planning commission* performing development review, a *board of adjustment*, a *development review board*, or a municipal legislative body performing development review.

Assurance of discontinuance – An alternative to administrative or judicial proceedings for enforcement of Vermont environmental laws, under which *ANR* or the *NRB* signs a settlement-like document with a respondent that contains a statement of the facts that give rise to an alleged violation and an agreement by the respondent to alleviate or prevent the environmental problems or restore the environment to its prior condition. The document may also contain schedules under which the environmental problems are addressed, monetary penalties, or contributions to other projects related to the violation. There are statutory requirements for public notice and comment on draft assurances of discontinuance. To become final, the document must be filed with the *Environmental Division* and approved by an environmental judge.

Board of adjustment – A municipal body that, under a town’s land use bylaws, hears and decides requests for conditional use approvals, variances, and waivers, and appeals from decisions of the town’s administrative officer. A board of adjustment does not propose, amend, or adopt town plans or bylaws. Many towns have replaced their boards of adjustment with *development review boards* (see below).

Conditional use – A land use that is not permitted as of right but only after review and approval to determine whether the proposed use conforms to standards stated in the applicable statute, regulation, or bylaw. This term is typically used in local zoning; it also may appear in other contexts.

Contested case – A proceeding in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing. A contested case is a court-like proceeding in which an agency hears sworn testimony from witnesses, applies the rules of evidence, and issues a written decision containing findings of fact and conclusions of law.

Deference – A plain meaning definition is the submission or yielding to the opinion or judgment of another. In a legal context, the term typically refers to the extent to which an appellate court will yield to the factual findings or legal interpretations of a lower court or to which a court will yield to the factual findings, expertise, or legal interpretations of an administrative agency.

Deference to agency legal interpretations – On appeal, the Vermont Supreme Court will defer to the interpretation of a statute by the administrative body responsible for its execution unless there is a compelling indication of error. The Court has described this test as less deferential than the *substantial deference* test described below, stating that it is subject to construing a statute consistently with its stated purposes.

“Chevron” deference – A standard applied under federal law to an agency interpretation of its enabling statute. It is based on the case of Chevron, Inc. v. NRDC, 467 U.S. 837 (1984). It consists of a two-step inquiry. In step one, a reviewing court determines if Congress has expressed an unambiguous intent on the precise question at issue. If it has, then the court must give effect to that intent, and the inquiry is over. In step two, if the relevant statute is silent or ambiguous, then the court determines whether the agency’s interpretation is a permissible construction of the statute, deferring to the agency’s resolution of conflicting policy issues. This standard is not applied in Vermont but has on occasion been raised in discussion of the state’s permit process.

Substantial deference – A standard applied under Vermont law under which the 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.

De minimis – Too small or trivial to be worth the law’s attention.

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. See also *review on the record* below.

Department of Environmental Conservation (DEC) – One of three departments within *ANR*, DEC contains the majority of *ANR*’s regulatory programs. For example, DEC administers water resources permitting, air pollution control, solid and hazardous waste disposal regulation, regulation of public drinking water systems, and regulation of on-site wastewater and potable water supply systems. It also includes other functions such as enforcement, rivers management, pollution prevention, technical assistance, and design construction supervision services for *ANR* and all of its components. DEC is run by a commissioner who reports to the *ANR* secretary.

Development review board (DRB) – A municipal body that, under a town’s land use bylaws, hears and decides all matters that would otherwise be assigned to a *board of adjustment* and exercises all development review functions that would otherwise be assigned to a *planning commission*. Adopting this type of board allows a town to consolidate all development review functions into one board, with the *planning commission* retaining its planning and bylaw development functions. A DRB does not propose, amend, or promulgate town plans or bylaws.

Discharge permit – Under state law, a permit authorizing and regulating the placement, deposit, or emission of any wastes, directly or indirectly, into an injection well, waters of the state, or publically owned treatment works. A direct discharge is typically understood to mean a discharge that is delivered by a conveyance (including over land) right to a surface water. An indirect discharge means any discharge to groundwater, whether subsurface, land-based, or otherwise. See also *general permit* and *NPDES permit*.

Dispositive – That which results in deciding a matter. Typically applied to motions, i.e., granting a dispositive motion means that a case is decided for one party or another.

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.

Environmental Division, Superior Court – A division of Vermont’s superior court with statewide jurisdiction the primary functions of which are to hear and decide:

- a. a request for hearing on an *administrative order* issued by *ANR* or the *NRB* under Vermont’s uniform environmental law enforcement act;
- b. a request to revoke an *Act 250* or a municipal land use permit for an act or omission constituting grounds for revocation (e.g., noncompliance with the permit);
- c. a request to enforce a violation of a municipal land use bylaw or permit;
- d. an appeal of an act or decision of a *District Commission (Act 250)*;
- e. an appeal of an *Act 250 jurisdictional opinion* by a *District Coordinator*;
- f. an appeal of an act or decision of *ANR*, including permits or denials; and
- g. an appeal of a decision of an *appropriate municipal panel*.

The division has two judges. By statute, the division conducts a *de novo* hearing on the appeals that come to it, with limited exceptions that are conducted *on the record*.

General permit – A permit that applies to a class or category of discharges, emissions, disposal, facilities, or other activities within a common geographic area. General permits are typically used for activities that present low risk to the environment and public health and would result in a high volume of applications if processed on an individual basis. Under state law, the activities to which a general permit applies must share the same or substantially similar qualities, and those qualities must be such that the rules applicable to the activities can be met and human health and the environment protected by the imposition of the same or substantially similar permit conditions on the class or category. Typically, a person proposing to engage in activity covered by a general permit must file a notice with required information seeking authority under the general permit from the administering agency, which then determines whether to grant authority to the activity under the general permit. Under state law, ANR has the right to require an individual permit for activity for which authority is sought under a general permit.

Growth center – A defined term in the downtown development statutes. A growth center is an area of land that is located in or adjoining a designated downtown, village center, or new town center. The growth center must have clearly defined boundaries that can accommodate a majority of anticipated growth over a 20-year period and must support Vermont's traditional land use pattern of compact centers separated by rural lands. In order to receive various benefits provided by statute, a municipality may request that the State Downtown Development Board designate an area as a growth center, which the Board must do if certain requirements are met. These requirements address such issues as incorporating a mix of uses, allowing dense development, and minimizing natural resource impacts outside of the growth center.

Interlocutory appeal – An appeal prior to final judgment of an interim, procedural, or provisional act or decision. Typically an interlocutory appeal is not as of right and a party seeking such an appeal must demonstrate that certain criteria are met. However, a preliminary, procedural, or intermediate agency ruling is immediately appealable if review of the final decision would not provide an adequate remedy, and the filing of an appeal itself does not stay enforcement of the agency's decision.

Jurisdictional opinion – A decision by a *District Coordinator* on the applicability of *Act 250* to the division of land or to activity that might or might not require a permit under that act, or on the completeness of an application for an *Act 250* permit.

Local Act 250 review – Review by a *DRB* of a project that requires an *Act 250* permit on whether the project meets the *Act 250* criteria relating to impact on the municipality's ability to provide educational, municipal, or governmental services and to conformance

with the local plan. This type of review is only authorized if the municipality meets certain statutory requirements, including adopting a *DRB* and the municipal administrative procedure act (24 V.S.A. chapter 36). A *DRB*'s determination under this process creates a *rebuttable presumption* before the *District Commission* in the actual *Act 250* proceeding for the project.

National Pollutant Discharge Elimination System (NPDES) permit – This term refers to permits issued under the federal Clean Water Act, which set up the National Pollutant Discharge Elimination System. Under that act, without a NPDES permit, no person may discharge any pollutant from any point source into the waters of the United States.

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*;
- reviewing *jurisdictional opinions* issued by *District Coordinators*;
- hearing appeals from decisions on whether municipal and regional plans should be given an affirmative determination of energy compliance.

Notice of alleged violation (NOAV) – A document sent by a land use or environmental enforcement authority to a respondent asserting that the respondent is in nonconformance with an applicable bylaw, statute, regulation, or permit.

On the record – see *review on the record*, below.

Partial findings – Findings issued by a *District Commission* on one criterion or a group of *Act 250* criteria but not all criteria. These findings remain in effect for a “reasonable and proper” period as determined by the *District Commission*. Prior to issuing a permit, the *District Commission* must proceed to determine the application’s compliance with the remaining criteria. In the case of a designated *growth center*, the *NRB*'s land use panel may make partial findings that are effective for a period of five years and are applicable to any subsequent *Act 250* applications for development within the *growth center*.

Planning commission (municipal) – A municipal body that among other things prepares the local plan, land use bylaws, and amendments for consideration by the legislative body and administers the local bylaws, except to the extent those administrative functions are performed by a *development review board*. In towns that do not have development

review boards, the *planning commission* typically performs site plan reviews. Planning commissioners are usually appointed, although a town may choose to elect them.

Planning commission (regional) – Planning commissions created by a group of contiguous municipalities to, among other tasks, promote mutual cooperation, provide advice and assistance to member municipalities, prepare the regional plan and amendments, prepare planning implementation guidelines for member municipalities, review the compatibility of local plans within the region, and appear before *District Commissions* in *Act 250* proceedings.

Quasi-judicial – A term applied to the action or decision of an administrative agency that is required to investigate or determine the existence of facts, hold hearings, and draw legal conclusions from those facts, or to exercise discretion concerning them, in a manner similar to courts. Typically, when engaged in a quasi-judicial function, the decision-maker may not have communications with the parties without notice to all parties and an opportunity to be heard, and must base its action or decision solely on evidence in a record developed through a court-like hearing process. An administrative agency that has quasi-judicial functions may also have other functions that are not quasi-judicial, such as promulgating substantive rules.

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.

Remand – To send back. In the context of an appeal, this term refers to the sending back of a case by an appellate court or board to the same court or board from which the case came, for the purpose of having some further action taken on it there.

Respondent – A person who has committed or is alleged to have committed a violation.

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. See also *deference* and *de novo* above.

Revocation – In the permitting context, this term means a type of enforcement action in which a previously issued permit or other license or certificate is taken away after notice and opportunity for hearing, typically on grounds of violation of permit conditions or making material misrepresentations in obtaining the original approval.

Site plan approval – A type of local land use review in which a site plan is reviewed concerning adequacy of parking, traffic access, and circulation for pedestrians and vehicles; landscaping and screening; protection of utilization of renewable energy resources; exterior lighting; size, location, and design of signs; and other matters specified in a local bylaw. The review is by a *DRB* in a town which has chosen to have such an entity; otherwise, it is by the local *planning commission*.

Stay – A “stopping”; the act of putting an order or decree on hold or of suspending a proceeding or some part of it, by order of a court.

Subdivision bylaw – A type of local land use bylaw that regulates the division of a lot or parcel of land into two or more lots or other division of land for sale, development, or lease. Subdivision bylaws must include procedures and requirements for design, submission, and review of plats, drawings, and plans; standards for design and layout of streets, sidewalks, utilities, landscaping, and other infrastructure; standards for the design and configuration of parcel boundaries and location of associated improvements; and standards for the protection of natural resources, cultural features, and open space. The bylaws may contain other requirements. Review under a subdivision bylaw is performed by a *DRB* in a town which has chosen to have such an entity; otherwise, it is typically performed by the local *planning commission*.

Substantial deference – See *deference* above.

Technical determination – This term is used in *Act 250* to describe decisions made by *ANR* personnel to which *District Commissions* are to give *substantial deference*. The term is not defined. One potential definition would be the application of a scientific or engineering discipline to a set of physical facts.

Variance – An authorization to depart from the literal requirements of a regulation. The term is used most often in connection with local land use, referring to a procedure under which a *Board of Adjustment* or a *DRB* grants a variance from the requirements of a zoning bylaw. This procedure is governed by a set of statutory criteria which must all be satisfied for a variance to be granted. Other environmental regulations sometimes provide for variances. For example, *ANR*'s regulations for on-site wastewater and

potable water supply systems authorize a variance from the technical requirements of the rule for replacement systems under circumstances set out in the regulations.

Waiver – A local bylaw may allow waivers to reduce dimensional requirements (e.g., setback, height) if it sets out a process for doing so and specific standards that conform with the local plan and the municipal and regional planning goals contained in statute.

Water quality standards – Detailed water quality criteria issued in rules by the Secretary of *ANR*, using appropriate numerical values, biological parameters, and narrative descriptions. These standards establish limits for Vermont waters applicable, for example, to fecal coliform, nitrates, phosphorus, and toxic substances. The standards are set based on a classification of the state’s waters and are adopted to achieve the purposes of those classifications (e.g., suitable for drinking, high quality waters with significant ecological value, suitable for recreation, etc.).

Zoning bylaw – A local land use bylaw that governs the use and development of land, including placement, spacing, and size of structures and other factors. Zoning bylaws typically divide a geographic area into districts and specify the uses that are permitted as of right or conditionally in those districts. See *conditional use* above. They may also contain provisions that apply to all districts within the area.