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H.399

Introduced by Representatives Sullivan of Dorset, Bates of Bennington,
Browning of Arlington, Carroll of Bennington, Cupoli of
Rutland City, Elder of Starksboro, Fagan of Rutland City,
Gannon of Wilmington, Harrison of Chittenden, Morrissey of
Bennington, Notte of Rutland City, and Shaw of Pittsford

Referred to Committee on

Date:

Subject: Conservation and development; land use; Act 250; Act 250 appeals

Statement of purpose of bill as introduced: This bill proposes to require
District Commissions to conduct on the record proceedings on permit
applications and issue findings of fact and conclusions of law; to clarify the
burden of persuasion and proof on appeal; and to permit the decisions by
District Commissions to be heard on the record and be overturned when it is
found that the decision was made against the weight of evidence. Appeals of
certain nonenvironmental criteria to be heard by the Civil Division of the
Superior Court.

An act relating to Act 250 reform

1 It is hereby enacted by the General Assembly of the State of Vermont:

2 Sec. 1. 10 V.S.A. § 6085a is added to read:

3 § 6085a. FORMAL REVIEW AND RECORDED HEARINGS

4 (a) A District Commission shall conduct a proceeding on an application for
5 development or subdivision in accordance with this section if requested by a
6 person other than the applicant. The request shall include a demonstration that
7 the person qualifies for party status under section 6085 of this title and the
8 rules of the Board. This shall be known as a “contested application.”

9 (b) Each of the following shall apply to the review of an application:

10 (1) Provided that any extension complies with the provisions of
11 subsection 6084(d) of this title, the District Commission shall extend the
12 hearing schedule or take other appropriate action as necessary to provide a fair
13 and reasonable opportunity for parties to prepare, present, and respond to
14 evidence without creating undue delay in the review of the application.

15 (2) The District Commission may require parties to submit prefiled
16 testimony and exhibits. If the District Commission, in its discretion as to any
17 contested application, requires submission of prefiled evidence, the applicant
18 and any parties supporting the application shall submit their prefiled direct
19 evidence first, and then other parties shall be given a reasonable opportunity to
20 submit their prefiled direct evidence. The District Commission may then allow

1 the submission or presentation of rebuttal testimony and exhibits in the
2 sequence and form that it reasonably determines to be appropriate.

3 (3) Unless the parties agree otherwise, the District Commission in a
4 prehearing order, as to any contested application, shall determine the necessity
5 for, and otherwise establish the type, sequence, and amount of discovery
6 available under Rules 26–37 of the Vermont Rules of Civil Procedure, limiting
7 the discovery permitted to that necessary for a full and fair determination of the
8 proceeding.

9 (c) During proceedings on an application under this section, the District
10 Commission shall maintain the flexibility regarding the introduction of
11 evidence provided by 3 V.S.A. § 810 and the procedural flexibility and
12 informality that has been characteristic of District Commission proceedings.

13 (d) The District Commission may record, by any manner of audio or video
14 device, any hearing on an application that is heard under this section. In the
15 event that appeal is taken from a District Commission act or decision on such
16 an application, the District Commission shall provide the Environmental or
17 Civil Division with the original recording of the hearing and a copy of the
18 complete written record and shall make and preserve a copy of the original
19 recording for the purpose of keeping a record. The appellant shall bear
20 responsibility for assuring completeness of the record.

1 Sec. 2. 10 V.S.A. § 6085 is amended to read:

2 § 6085. HEARINGS; PARTY STATUS

3 * * *

4 (f) A hearing shall not be closed until a Commission provides an

5 opportunity to all parties to respond to the last permit or evidence submitted.

6 Once a hearing has been closed, a Commission shall conclude deliberations as

7 soon as is reasonably practicable. A decision of a Commission shall be issued

8 within 20 days of the completion of deliberations. The Commission's decision

9 shall include written findings of fact and conclusions of law.

10 Sec. 3 10 V.S.A. § 6086 is amended to read:

11 § 6086. ISSUANCE OF PERMIT; CONDITIONS AND CRITERIA

12 * * *

13 (c) Requirements and conditions. A permit may contain such requirements

14 and conditions as are allowable proper exercise of the police power and which

15 are appropriate ~~within the~~ with respect to subdivisions (a)(1) through (10) of

16 this section, including those set forth in 24 V.S.A. §§ 4414(4), 4424(a)(2),

17 4414(1)(D)(i), 4463(b), and 4464, the dedication of lands for public use, and

18 the filing of bonds to ~~insure~~ ensure compliance. The requirements and

19 conditions incorporated from Title 24 may be applied whether or not a local

20 plan has been adopted. General requirements and conditions may be

21 established by rule of the Natural Resources Board. The District Commission

1 shall not delay issuing a permit under this chapter on the grounds that the
2 development or subdivision has not received one or more other required State
3 permits or approvals; however, it may include a condition that construction
4 may not commence until such other required permits or approvals are received.

5 (d) Other State and municipal permits. In this subsection, “criterion”
6 means a subdivision of subsection (a) of this section under which the District
7 Commission must make a finding before granting a permit.

8 (1) Conclusive evidence. The issuance and submission of permits and
9 approvals identified in this subdivision shall constitute conclusive evidence for
10 the District Commission that the improvement, discharge, emission, or other
11 activity described and approved in the permit or approval is not detrimental to
12 the public health and welfare and complies with the specific criterion or
13 criteria that are identified in this subdivision.

14 (A) With respect to undue water pollution under criterion (1) and to
15 criterion (1)(B) (waste disposal), each one of the following:

16 (i) A wastewater system and potable water supply permit pursuant
17 to chapter 64 of this title and the rules adopted under that chapter.

18 (ii) A discharge permit or authorization of a discharge under a
19 general permit issued pursuant to chapter 47 of this title and the rules adopted
20 under that chapter for a wastewater treatment facility owned or controlled by
21 the applicant that will be used by the development or subdivision.

1 (iii) An approval issued by a pollution abatement facility that is
2 permitted under chapter 47 of this title and is in compliance with its permit,
3 authorizing the connection of the development or subdivision to the facility.

4 As used in this subdivision, “pollution abatement facility” has the same
5 meaning as set forth in section 1278 of this title.

6 (iv) A sewer line extension permit pursuant to chapter 47 of this
7 title and rules adopted under that chapter.

8 (v) An underground injection permit for the discharge of
9 nonsanitary waste into an injection well pursuant to chapter 47 of this title and
10 rules adopted under that chapter.

11 (vi) A solid waste or hazardous waste certification pursuant to
12 chapter 159 of this title and rules adopted under that chapter.

13 (vii) An underground storage tank permit pursuant to chapter 59
14 of this title and the rules adopted under that chapter, with regard solely to the
15 substance to be stored in the tank.

16 (B) With respect to whether dust and odor from a development or
17 subdivision will create undue air pollution under criterion (1) or have an undue
18 adverse effect on aesthetics under criterion (8): an air pollution control permit
19 pursuant to section 556 of this title and rules adopted under that section.

20 (C) With respect to criteria (2) (sufficient water available) and (3)
21 (existing water supply), each of the following:

1 (i) a wastewater system and potable water supply permit pursuant
2 to chapter 64 and rules adopted under that chapter;

3 (ii) an approval issued by a public water system pursuant to
4 chapter 56 of this title authorizing the connection of the development or
5 subdivision to the system;

6 (iii) a public water system construction permit pursuant to
7 chapters 48, 56, and 61 of this title and rules adopted under those chapters; and

8 (iv) a public water system operating permit issued by the Agency
9 of Natural Resources pursuant to chapters 48, 56, and 61 of this title and rules
10 adopted under those chapters.

11 (D) With respect to undue water and air pollution under criterion (1)
12 and criteria (2) (sufficient water available) and (3) (existing water supply): a
13 permit for the application of herbicides to maintain and clear rights-of-way
14 pursuant to 6 V.S.A. chapter 87 and rules adopted under that chapter.

15 (E) With respect to criterion (1)(G) (wetlands): a permit or
16 authorization under a general permit pursuant to chapter 37 of this title and
17 rules adopted under that chapter for activities in a significant wetland as
18 defined in chapter 37 or its associated buffer zone.

19 (F) With respect to whether a stormwater discharge during
20 construction will cause undue water pollution under criterion (1) or complies
21 with criteria (1)(B) (waste disposal) and (4) (soil erosion): an individual

1 construction stormwater discharge permit or authorization under a general
2 permit for stormwater discharges from construction sites issued pursuant to
3 chapter 47 of this title and rules adopted under that chapter.

4 (2) Rebuttable presumptions. This subdivision applies to State and
5 municipal permits and approvals not set forth in subdivision (1) of this
6 subsection.

7 (A) The Natural Resources Board may by rule allow the acceptance
8 of a permit or permits or approval of any State agency with respect to
9 subdivisions (a)(1) through (5) of this section or a permit or permits of a
10 specified municipal government with respect to subdivisions (a)(1) through (7)
11 and (9) and (10) of this section, or a combination of such permits or approvals,
12 in lieu of evidence by the applicant. A District Commission, in accordance
13 with rules adopted by the Board, shall accept determinations issued by a
14 development review board under the provisions of 24 V.S.A. § 4420, with
15 respect to local Act 250 review of municipal impacts.;

16 (i) the impacts of a development or subdivision on a State
17 highway under criteria (5) (traffic) and (9)(K) (public investments): a letter of
18 intent issued by the Agency of Transportation confirming that the Agency has
19 reviewed the proposed development or subdivision and is prepared to issue an
20 access permit pursuant to 19 V.S.A. § 1111;

1 (ii) the conformance of a development or subdivision with the
2 plan of the municipality under criterion 10 (local and regional plans): a
3 municipal land use permit as defined under 24 V.S.A. § 4303 issued by the
4 municipality for the development or subdivision; and

5 (iii) impacts to the municipality under criterion (6) (educational
6 services) or (7) (governmental services) and conformance with the plan of the
7 municipality under criterion (10) (local and regional plans): a positive
8 determination concerning the development or subdivision issued by a
9 development review board pursuant to 24 V.S.A. § 4420. Such a
10 determination shall constitute conclusive evidence only with respect to those
11 criteria described in this subdivision for which the review board has issued a
12 positive determination.

13 (B) The acceptance under rules adopted pursuant to this subdivision
14 (2) of such an approval, ~~positive determinations,~~ permit, or permits shall create
15 a presumption that the application is not detrimental to the public health and
16 welfare with respect to the specific requirement for which it is accepted. In the
17 case of approvals and permits issued by the Agency of Natural Resources,
18 technical determinations of the Agency shall be accorded substantial deference
19 by the ~~Commissions~~ Commission.

20 (C) A District Commission, in accordance with rules adopted by the
21 Board, shall accept negative determinations issued by a development review

1 board under the provisions of 24 V.S.A. § 4420, with respect to local Act 250
2 review of municipal impacts. The acceptance of ~~negative such~~ determinations
3 ~~issued by a development review board under the provisions of 24 V.S.A. §~~
4 ~~4420, with respect to local Act 250 review of municipal impacts~~ shall create a
5 presumption that the application is detrimental to the public health and welfare
6 with respect to the specific requirement for which it is accepted. Any such
7 ~~determinations, positive or negative, under the provisions of 24 V.S.A. § 4420~~
8 shall create presumptions only to the extent that the impacts under the criteria
9 are limited to the municipality issuing the decision.

10 (D) Such a rule issued under this subdivision (2) may be revoked
11 or amended pursuant to the procedures set forth in ~~3 V.S.A., chapter 25,~~ the
12 Vermont Administrative Procedure Act. The rules adopted by the Board shall
13 not approve the acceptance of a permit or approval of such an agency or a
14 permit of a municipal government unless it satisfies the appropriate
15 requirements of subsection (a) of this section.

16 * * *

17 Sec. 4. 10 V.S.A. § 6089 is amended to read:

18 § 6089. APPEALS

19 (a) Appeals of ~~any~~ an act or decision of a District Commission under this
20 chapter or a district coordinator under subsection 6007(c) of this title shall be
21 made to the Environmental Division in accordance with chapter 220 of this

1 title if any part of the appeal is based on subdivisions 6086(a)(1)–(4), (8)(A),
2 and (9)(B)–(E). However, the appellant may bring the appeal in the Civil
3 Division if the appeal is based solely on issues related to subdivisions
4 6086(a)(5)–(10), not including subdivisions (8)(A) and (9)(B)–(E). For the
5 purpose of this section, a decision of the Chair of a District Commission under
6 section 6001e of this title on whether action has been taken to circumvent the
7 requirements of this chapter shall be considered an act or decision of the
8 District Commission.

9 (b) On a showing of good cause, the court may reopen the record in
10 order to permit discovery and supplement the record.

11 (c) An appeal of a decision of a District Commission on an application
12 that is subject to formal review under section 6085a of this title shall be on the
13 record. The Environmental or Civil Division shall remand to the District
14 Commission if the District Commission improperly excluded evidence, did not
15 provide adequate notice or opportunity to be heard, or otherwise failed to
16 comply with the requirements of 3 V.S.A. chapter 25 with respect to contested
17 cases. The Environmental or Civil Division shall not set aside any findings of
18 fact by the District Commission unless the appellant demonstrates that the
19 decision was made against the preponderance of the evidence on the record.

1 Sec. 5. 10 V.S.A. § 8504 is amended to read:

2 § 8504. APPEALS TO THE ENVIRONMENTAL DIVISION

3 (a) Act 250 and Agency appeals. Within 30 days of the date of the act or
4 decision, any person aggrieved by an act or decision of the Secretary, a District
5 Commission, or a district coordinator under the provisions of law listed in
6 section 8503 of this title, or any party by right, may appeal to the
7 Environmental Division, except for an act or decision of the Secretary under
8 subdivision 6086b(3)(E) of this title or governed by section 8506 of this title
9 and an act or decision of a District Commission under subdivisions
10 6086(a)(5)–(10), not including subdivisions (8)(A) and (9)(B)–(E) of this title,
11 pursuant to section 6089 of this title.

12 * * *

13 (h) ~~De novo~~ Burden of proof; de novo hearing; record review. In any
14 appeal before the Environmental Division, the burden of proof shall be on the
15 appellant. The Environmental Division, applying the substantive standards
16 that were applicable before the tribunal appealed from, shall hold a de novo
17 hearing on those issues ~~which~~ that have been appealed, except in the case of:

18 (1) a decision being appealed on the record pursuant to 24 V.S.A.
19 chapter 117;

20 (2) a decision of the Commissioner of Forests, Parks and Recreation
21 under section 2625 of this title being appealed on the record, in which case the

1 court shall affirm the decision, unless it finds that the Commissioner did not
2 have reasonable grounds on which to base the decision.

3 * * *

4 Sec. 6. 4 V.S.A. § 31 is amended to read:

5 § 31. JURISDICTION; CIVIL DIVISION

6 The Civil Division shall have:

7 * * *

8 (4) exclusive jurisdiction to hear and dispose of any requests to modify
9 or enforce orders in civil cases previously issued by the Superior or District
10 Court other than orders relating to those actions listed in sections 437 and 454
11 of this title; ~~and~~

12 (5) jurisdiction to hear and dispose of any other matter brought before
13 the court pursuant to law that is not subject to the jurisdiction of another
14 division; and

15 (6) jurisdiction to hear and dispose of appeals from the District
16 Commissions brought under 10 V.S.A. § 6086(a)(5)–(10), not including
17 subdivisions (8)(A) and (9)(B)–(E), pursuant to 10 V.S.A. § 6089.

18 Sec. 7. EFFECTIVE DATE

19 This act shall take effect on July 1, 2019.