

1 19-0040 Sheldon amendment

2 * * * District Commissions * * *

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

4 § 6085a. RECORDED HEARINGS

5 (a) Any appeal under section 6089 of this title shall be a review of the
6 record of the proceeding before the District Commission in accordance with
7 subdivision 8504(h)(3) of this title.

8 (b) Within 10 calendar days of receipt of a complete application under
9 section 6084 of this title, the District Commission shall provide notice of the
10 recorded hearings in accordance with the procedures of subdivision 6084(b)(1)
11 of this title.

12 (c) Each of the following shall apply to the review of an application under
13 this section:

14 (1) The District Commission shall extend the hearing schedule or take
15 other appropriate action as necessary to provide a fair and reasonable
16 opportunity for parties to prepare, present, and respond to evidence without
17 creating undue delay in the review of the application.

18 (2) The District Commission may require parties to submit prefiled
19 testimony and exhibits. If the District Commission requires submission of
20 prefiled evidence, the applicant and any parties supporting the application shall
21 submit their prefiled direct evidence first, and then other parties shall be given

1 a reasonable opportunity to submit their prefiled direct evidence. The District
2 Commission may then allow the submission or presentation of rebuttal
3 testimony and exhibits in the sequence and form that it determines to be
4 appropriate.

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

10 (d) On receipt of a request from the District Commission for assistance
11 with regard to an application heard under this section, the Board shall provide
12 assistance to the District Commission as necessary or the District Commission
13 may hire personnel pursuant to section 6022 of this title.

14 (e) At the expense of the applicant, the District Commission shall record by
15 video any hearing on an application. In the event that appeal is taken from a
16 District Commission act or decision on such an application, the District
17 Commission shall provide the Environmental Division with the original
18 recording of the hearing and a copy of the complete written record and shall
19 make and preserve a copy of the original recording for its own records.

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

2 § 6085. HEARINGS; PARTY STATUS

3 * * *

4 (e) The ~~Natural Resources Board and any~~ District Commission, acting
5 through one or more duly authorized representatives at any prehearing
6 conference or at any other times deemed appropriate by the ~~Natural Resources~~
7 ~~Board or by the~~ District Commission, shall promote expeditious, informal, and
8 nonadversarial resolution of issues, require the timely exchange of information
9 concerning the application, and encourage participants to settle differences.
10 No District Commissioner who is participating as a decisionmaker in a
11 particular case may act as a duly authorized representative for the purposes of
12 this subsection. These efforts at dispute resolution shall not affect the burden
13 of proof on issues before a Commission or the Environmental Division, nor
14 shall they affect the requirement that a permit may be issued only after the
15 issuance of affirmative findings under the criteria established in section 6086
16 of this title.

17 (f) At the prehearing conference or a subsequent scheduling hearing or
18 hearings, the District Commission shall establish a schedule for pretrial
19 discovery pursuant to the Vermont Rules of Civil Procedure and for disclosure
20 of and discovery with regard to any expert testimony by experts retained by the
21 District Commission. The Commission shall have the same authority to

1 supervise or limit pretrial discovery as a Superior Court Judge under the
2 Vermont Rules of Civil Procedure.

3 (g) A hearing shall not be closed until a Commission provides an
4 opportunity to all parties to respond to the last permit or evidence submitted.
5 Once a hearing has been closed, a Commission shall conclude deliberations as
6 soon as is reasonably practicable. A decision of a Commission shall be issued
7 within 20 days of the completion of deliberations.

8 Sec. 3. 10 V.S.A. § 6031 is amended to read:

9 § 6031. ETHICAL STANDARDS

10 (a) ~~The Chair and members of the Board and the~~ Chair and members of
11 each District Commission shall comply with the following ethical standards:

12 (1) The provisions of 12 V.S.A. § 61 (disqualification for interest).

13 (2) The Chair and each member shall conduct the affairs of his or her
14 office in such a manner as to instill public trust and confidence and shall take
15 all reasonable steps to avoid any action or circumstance that might result in any
16 one of the following:

17 (A) undermining his or her independence or impartiality of action;

18 (B) taking official action on the basis of unfair considerations;

19 (C) giving preferential treatment to any private interest on the basis
20 of unfair considerations;

1 (D) giving preferential treatment to any family member or member of
2 his or her household;

3 (E) using his or her office for the advancement of personal interest or
4 to secure special privileges or exemptions;

5 (F) adversely affecting the confidence of the public in the integrity of
6 the District Commission.

7 (3) The District Commission shall not initiate, permit, or consider ex
8 parte communications, or consider other communications made to the District
9 Commission outside the presence of the parties concerning a pending or
10 impending proceeding except that:

11 (A) Where circumstances require, ex parte communications for
12 scheduling, administrative purposes or emergencies that do not deal with
13 substantive matters or issues on the merits are authorized; provided:

14 (i) the District Commission reasonably believes that no party will
15 gain a procedural or tactical advantage as a result of the ex parte
16 communication, and

17 (ii) the District Commission makes provision promptly to notify
18 all other parties of the substance of the ex parte communication and allows an
19 opportunity to respond.

20 (B) The District Commission may obtain the advice of a disinterested
21 expert on the law applicable to a proceeding if the District Commission gives

1 notice to the parties of the person consulted and the substance of the advice,
2 and affords the parties reasonable opportunity to respond.

3 (C) The District Commission may consult with personnel whose
4 function is to aid the District Commission in carrying out its adjudicative
5 responsibilities.

6 (D) The District Commission may, with the consent of the parties,
7 confer separately with the parties and their lawyers in an effort to mediate or
8 settle matters pending before the District Commission.

9 (e) The District Commission may initiate or consider any ex parte
10 communications when expressly authorized by law to do so.

11 (b) As soon as practicable after grounds become known, a party may move
12 to disqualify a ~~Board member or~~ District Commissioner from a particular
13 matter before the ~~Board or~~ District Commission.

14 (1) The motion shall contain a clear statement of the specific grounds
15 for disqualification and when such grounds were first known.

16 (2) On receipt of the motion, a District Commissioner who is the subject
17 of the motion shall ~~disqualify himself or herself or shall refer the motion to the~~
18 ~~Chair of the Board~~ issue a decision after consultation with the Commission's
19 counsel.

20 ~~(A) The Chair of the Board may disqualify the District Commissioner~~
21 ~~from the matter before the District Commission if, on review of the motion, the~~

1 ~~Chair determines that such disqualification is necessary to ensure compliance~~
2 ~~with subsection (a)(ethical standards) of this section.~~

3 ~~(B)~~ On disqualification of a District Commissioner under this
4 subsection, the Chair of the ~~Board~~ District Commission shall assign another
5 District Commissioner to take the place of the disqualified Commissioner. The
6 Chair shall consider making such an assignment from among the members of
7 the same District Commission before assigning a member of another District
8 Commission.

9 ~~(3)~~ ~~On receipt of the motion, a Board member who is the subject of the~~
10 ~~motion shall disqualify himself or herself or shall refer the motion to the full~~
11 ~~Board. The Board may disqualify a member from the matter before the Board~~
12 ~~if, on review of the motion, the Board determines that such disqualification is~~
13 ~~necessary to ensure compliance with subsection (a) (ethical standards) of this~~
14 ~~section. The Board member who is the subject of the motion shall not be~~
15 ~~eligible to vote on the motion.~~

16 (c) For one year after leaving office, a former appointee to ~~the Board~~ or a
17 District Commission shall not, for pecuniary gain:

18 (1) be an advocate on any matter before ~~the Board~~ or the District
19 Commission to which he or she was appointed; or

20 (2) be an advocate before any other public body or the General
21 Assembly or its committees regarding any matter in which, while an appointee,

1 he or she exercised any official responsibility or participated personally and
2 substantively.

3 Sec. 4. 10 V.S.A. § 6084 is amended to read:

4 § 6084. NOTICE OF APPLICATION; HEARINGS; COMMENCEMENT OF
5 REVIEW

6 * * *

7 (h) Hearings on major applications shall be governed by the Vermont
8 Administrative Procedure Act. Each District Commission shall be assisted by
9 counsel, shall have the authority to retain expert witnesses, and, together with
10 their counsel, shall comply with the ethical standards established in section
11 6031 of this title.

12 Sec. 5. 10 V.S.A. § 6027 is amended to read:

13 § 6027. POWERS

14 * * *

15 ~~(j) The Natural Resources Board may participate as a party in all matters~~
16 ~~before the Environmental Division that relate to land use permits issued under~~
17 ~~this chapter. [Repealed.]~~

18 * * *

19 Sec. 6. 10 V.S.A. § 6088 is amended to read:

1 § 6088. BURDEN OF PROOF; PRODUCTION AND PERSUASION

2 (a) The initial burden of production, to produce sufficient evidence for a
3 District Commission to make a factual determination, shall be on the applicant
4 with respect to subdivisions 6086(a)(1) through (10) of this title.

5 (b) The burden of persuasion, to show that the application meets the
6 relevant standard, shall be on the applicant with respect to subdivisions
7 6086(a)(1), (2), (3), (4), (8)(A) through (C), (9), and (10) of this title.

8 ~~(b)~~(c) The burden shall be on any party opposing the applicant application
9 with respect to subdivisions 6086(a)(5) through (8), (6), (7), and (8), not
10 including (8)(A) through (8)(C), of this title to show an unreasonable or
11 adverse effect that the application does not meet the relevant standard.

12 (d) With respect to permit conditions to mitigate impacts under
13 subdivisions 6086(a)(5) through (8) of this title, the burden shall be on the
14 applicant to demonstrate that is not feasible to avoid the impact.

15 Sec. 7. 10 V.S.A. § 6007 is amended to read:

16 § 6007. ACT 250 DISCLOSURE STATEMENT; JURISDICTIONAL
17 DETERMINATION

18 * * *

19 (c) With respect to the partition or division of land, or with respect to an
20 activity which might or might not constitute development, any person may
21 submit to the ~~district coordinator~~ District Commission an “Act 250 Disclosure

1 Statement” and other information required by the rules of the Board, and may
2 request a jurisdictional opinion from the ~~district coordinator~~ District
3 Commission concerning the applicability of this chapter. If a requestor wishes
4 a final determination to be rendered on the question, the district coordinator, at
5 the expense of the requestor and in accordance with rules of the Board, shall
6 publish notice of the issuance of the opinion in a local newspaper generally
7 circulating in the area where the land which is the subject of the opinion is
8 located, and shall serve the opinion on all persons listed in subdivisions
9 6085(c)(1)(A) through (D) of this title. In addition, the requestor who is
10 seeking a final determination shall consult with the district coordinator and
11 obtain approval of a subdivision 6085(c)(1)(E) list of persons who shall be
12 notified by the district coordinator because they are adjoining property owners
13 or other persons who would be likely to be able to demonstrate a particularized
14 interest protected by this chapter that may be affected by an act or decision by
15 a District Commission.

16 (d) [Repealed.]

17 Sec. 8. 10 V.S.A. § 6022 is amended to read:

18 § 6022. PERSONNEL

19 (a) The Board may appoint legal counsel and administrative personnel, as it
20 finds necessary in carrying out its duties, unless the Governor shall otherwise
21 provide.

1 (b) The District Commissions may retain legal counsel, scientists,
2 engineers, experts, investigators, temporary employees, and administrative
3 personnel to assist in its recorded hearings. The District Commissions may use
4 funds collected under section 6083a of this title for this purpose.

5 Sec. 9. 10 V.S.A. § 6083a is amended to read:

6 § 6083a. ACT 250 FEES

7 (a) All applicants for a land use permit under section 6086 of this title shall
8 be directly responsible for the costs involved in the publication of notice in a
9 newspaper of general circulation in the area of the proposed development or
10 subdivision and the costs incurred in recording any permit or permit
11 amendment in the land records. In addition, applicants shall be subject to the
12 following fees for the purpose of compensating the State of Vermont for the
13 direct and indirect costs incurred with respect to the administration of the
14 Act 250 program:

15 (1) For projects involving construction, \$6.65 for each \$1,000.00 of the
16 first \$15,000,000.00 of construction costs, and \$3.12 for each \$1,000.00 of
17 construction costs above \$15,000,000.00. An additional \$0.75 for each
18 \$1,000.00 of the first \$15,000,000.00 of construction costs shall be paid to the
19 Agency of National Resources to account for the Agency of Natural
20 Resources' review of Act 250 applications. An additional \$3.00 for every
21 \$1,000.00 of construction costs shall be deposited in the fund created under

1 section 6029 of this title for reimbursement of the District Commission’s costs
2 incurred in retaining its own expert witnesses in that matter. Any unused fee
3 shall be returned to the applicant at the conclusion of the matter.

4 (2) For projects involving the creation of lots, \$125.00 for each lot.

5 (3) For projects involving exploration for or removal of oil, gas, and
6 fissionable source materials, a fee as determined under subdivision (1) of this
7 subsection or \$1,000.00 for each day of Commission hearings required for
8 such projects, whichever is greater.

9 (4) For projects involving the extraction of earth resources, including
10 sand, gravel, peat, topsoil, crushed stone, or quarried material, the greater of:
11 a fee as determined under subdivision (1) of this subsection; or a fee equivalent
12 to the rate of \$0.02 per cubic yard of the first million cubic yards of the total
13 volume of earth resources to be extracted over the life of the permit, and
14 \$.01 per cubic yard of any such earth resource extraction above one million
15 cubic yards. An additional \$.02 per cubic yard of the first million cubic yards,
16 and \$.01 per cubic yard of any such earth resource extraction above one
17 million cubic yards shall be deposited in the fund created under section 6029 of
18 this title for reimbursement of the District Commission’s costs incurred in
19 retaining its own expert witnesses in that matter. Any unused fee shall be
20 returned to the applicant at the conclusion of the matter. Extracted material
21 that is not sold or does not otherwise enter the commercial marketplace shall

1 not be subject to the fee. The fee assessed under this subdivision for an
2 amendment to a permit shall be based solely upon any additional volume of
3 earth resources to be extracted under the amendment.

4 (5) For projects involving the review of a master plan, a fee equivalent
5 to \$0.10 per \$1,000.00 of total estimated construction costs in current dollars in
6 addition to the fee established in subdivision (1) of this subsection for any
7 portion of the project seeing construction approval

8 (6) In no event shall a permit application fee exceed \$165,000.00.

9 (b) Notwithstanding the provisions of subsection (a) of this section, there
10 shall be a minimum fee of \$187.50 for original applications and \$62.50 for
11 amendment applications, in addition to publication and recording costs. These
12 costs shall be in addition to any other fee established by statute, unless
13 otherwise expressly stated.

14 (c) Fees, other than fees paid to reimburse the Commission for
15 expenditures on expert witnesses, shall not be required for projects undertaken
16 by municipal agencies or by State governmental agencies, except for
17 publication and recording costs.

18 * * *

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

20 § 8504. APPEALS TO THE ENVIRONMENTAL DIVISION

1 (a) Act 250 and Agency appeals. Within 30 days of the date of the act or
2 decision, any person aggrieved by an act or decision of the Secretary, or a
3 District Commission, ~~or a district coordinator~~ under the provisions of law
4 listed in section 8503 of this title, or any party by right, may appeal to the
5 Environmental Division, except for an act or decision of the Secretary under
6 subdivision 6086b(3)(E) of this title or governed by section 8506 of this title.

7 * * *

8 (e) Act 250 jurisdictional determinations by a ~~district coordinator~~ District
9 Commission.

10 (1) The appellant shall provide notice of the filing of an appeal to each
11 person entitled to notice under subdivisions 6085(c)(1)(A) through (D) of this
12 title, to each person on an approved subdivision 6085(c)(1)(E) list, and to the
13 ~~Natural Resources Board~~ District Commission.

14 (2) Failure to appeal within the time required under subsection (a) of
15 this section shall render the decision of the ~~district coordinator~~ District
16 Commission under subsection 6007(c) of this title the final determination
17 regarding jurisdiction under chapter 151 of this title unless the underlying
18 jurisdictional opinion was not properly served on persons listed in subdivisions
19 6085(c)(1)(A) through (D) of this title and on persons on a subdivision
20 6085(c)(1)(E) list approved under subsection 6007(c) of this title.

21 * * *

1 (h) De novo hearing. The Environmental Division, applying the
2 substantive standards that were applicable before the tribunal appealed from,
3 shall hold a de novo hearing on those issues which have been appealed, except
4 in the case of:

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

7 (2) a decision of the Commissioner of Forests, Parks and Recreation
8 under section 2625 of this title being appealed on the record, in which case the
9 court shall affirm the decision, unless it finds that the Commissioner did not
10 have reasonable grounds on which to base the decision;

11 (3) a permit decision from a District Commission under chapter 151,
12 which shall be on the record.

13 * * *

14 * * * Environmental Justice * * *

15 Sec. 11. 10 V.S.A. § 6001 is amended to read:

16 § 6001. DEFINITIONS

17 * * *

18 (38) “Environmental justice” means the fair treatment and meaningful
19 involvement of all people regardless of race, color, national origin, or income,
20 with respect to the development, implementation, and enforcement of this
21 chapter.

1 Sec. 12. 10 V.S.A. § 6086 is amended to read:

2 § 6086. ISSUANCE OF PERMT; CONDITIONS AND CRITERIA

3 (a) Before granting a permit, the District Commission shall find that the
4 subdivision or development:

5 * * *

6 (9) Capability and Development Plan. Is in conformance with a duly
7 adopted capability and development plan, and land use plan when adopted.
8 ~~However, the legislative findings of subdivisions 7(a)(1) through (19) of Act~~
9 ~~85 of 1973 shall not be used as criteria in the consideration of applications by a~~
10 ~~District Commission.~~

11 * * *

12 (M) Environmental justice. A permit will be granted for the
13 development or subdivision when it has been demonstrated by the applicant
14 that, in addition to all other applicable criteria, no group of people will bear a
15 disproportionate share of the negative environmental consequences of the
16 development or subdivision.

17 * * *