Vermonters for a Clean Environment

Comments to House Natural Resources, Fish & Wildlife Committee
By Annette Smith, Executive Director

**Comments on Proposed Pre-Application and Pre-Hearing Conferences**
**&**
**On-the-Record and Citizen Participation at District Commissions**

February 11, 2020

Vermonters for a Clean Environment offers the following comments on preapplication notification and pre-hearing conferences, and the use of on-the-record proceedings at District Commissions.

VCE has assisted citizens in participation at District Commissions in the last two decades. We have assisted citizens in participation at the Public Utility Commission for the last decade.

## Pre-Application and Pre-Hearing Conferences

§ 6084 of Draft 10.4 (n.b. the word "preapplication" appears once, the word "application" appears 94 times) of the bill describes a process that is remarkably similar to the PUC's process. The draft bill uses 30 days while the PUC uses 45 days. The draft bill excludes Select Boards, while the PUC includes "the legislative body of the municipality" in notice requirements.

In most cases, the PUC requires 45 day Advance Notice (the PUC terminology) to all parties required to be notified. Some processes have 60 days and some have 30 days, but the majority of cases use 45 days. 30 days has proven to be inadequate for Select Boards, Municipal and Regional Planning Commissions that meet once a month.

In practice, in our experience few town boards and municipal and regional planning commissions understand the purpose of the 45 day Advance Notice. At best, the applicant might make a presentation; a/k/ a "dog and pony show," and the Board or Commission might provide written comment to the applicant in an effort to improve the project. The PUC's Advance Notice period provides boards and commissions with the opportunity to hold a public hearing, but in practice that rarely happens and even if they want to, there usually is not enough time to warn a public hearing within the allotted time frame. I have lost track of the number of times I have had to explain the purpose of the 45-day Advance Notice to town and regional boards and commissions.

The PUC holds what used to be called a pre-hearing conference, but now calls a scheduling hearing. This hearing happens prior to applications for party status and rulings on motions to intervene, so the schedule is usually set by state agency attorneys without considering the interests of parties yet to be determined. Often, first round discovery occurs prior to the PUC's determination of party status.

The PUC process starts out placing citizen intervenors at a disadvantage.

The PUC requires the developer to make a presentation prior to the PUC's public hearing; a/k/a another "dog and pony show." After the developer presentation, the PUC holds a public hearing which is for the benefit of the PUC so they can better understand the issues. Public hearing input and public comment are not considered in the decisions made by the PUC.

None of these pre-application notifications, pre-hearing conferences or developer presentations enable any meaningful interactions with citizens and towns. The "dog and pony shows" give potential parties the opportunity to get sales pitches from developers, and they take time from citizens whose lives are interrupted by numerous opportunities for developers to reinforce what their plans are. They tend to serve no meaningful purpose in addressing issues of concern to the public.

The public is always relegated to the bleacher seats rather than having a seat at the table, unless they move to intervene and accept all that comes with the role of being your own attorney, subject to all the Vermont Rules of Civil Procedure. As noted previously to this Committee, the PUC has determined that it cannot protect *pro se* intervenors from depositions by aggressive attorneys.

In discussions about how to improve the public process at the PUC, one of the talking points we hear is that "people just want to be heard" -- as though providing a hearing where people can speak, but not have their statements, facts, information, or opinions considered at all by the decision-makers will somehow satisfy the public's concerns. The uselessness of the PUC public process is a typical complaint repeated over and over by members of the public who encounter it.

Now this Committee is proposing to create a similar waste-of-time-for-the-public process to make it appear the public can provide meaningful input, when in fact the actual process on-the record at District Commissions or before a Judge or Board that is being proposed to replace the current District Commission process would require expensive lawyers and experts, just like the PUC.

*District Commission hearings provide a single place for citizens to interact with developers in a meaningful way.*

We offer the following example in support of the value of District Commission hearings:

**VCE Case Study**

VCE worked with residents of a mobile home park who had MTBE- contaminated water with a state operated "temporary" air stripper, who were raising alarms about what they perceived to be a cancer cluster at their local elementary school.[1]


*Quarry on left. Two businesses with leaking Underground Storage Tanks on right. Mobile Home Park is to the left of businesses. Closest mobile home to quarry is 1200 ft.*

We conducted interviews with residents and learned that many of the mobile home park residents had a history of serious health problems, and some previous residents had died of cancer at a young age. As part of our research, we reviewed the Water Supply Division files at ANR's office in Waterbury and found more than 30 Notices of Alleged Violation and Assurances of Discontinuance. Residents provided us with water samples containing sediment and rocks.

While we were conducting our investigation, the aggregate quarry next to the mobile home park – owned by the owner of the quarry – filed an application with Act 250 to deepen the quarry from 70 feet to 175 feet deep, and to increase the blasting loads from 2500 pounds to 9500 pounds.[2]

I attended the Act 250 District Commission site visit, as did a number of neighbors including residents of the mobile home park. At the site visit, the neighbors asked if I would represent them at the hearing, which was to be held immediately after the site visit. I agreed, and took my files about the mobile home park water supply to the hearing along with the jar of contaminated water full of rocks and sediment.

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[1] A compilation of news stories in chronological order from newest to oldest is here http://vce.org/Jar%20News.html

[2] http://vce.org/Jar%20News.html

After the site visit, in the hearing room, the District Commission handed out a green page with all the criteria. The coordinator noted that the hearing was an amendment to an existing permit and the Commission was limiting the hearing to several specific criteria. Citizens asked for party status based on their issues of concern. After a brief recess, the Commissioners returned with their decisions on party status.

I was able to speak for the residents, but they also spoke for themselves. Residents described their trailers coming apart at the corner after a blast, of items falling off walls, of damage to mobile home park infrastructure such as water and sewer lines after blasts occurred. They asked questions of the applicant, and answered questions posed by Commissioners and the applicant's attorney.

After issuance of a recess order and a test blast, the District Commission issued a permit for the quarry expansion, with reasonable conditions attempting to provide more protection to the residents of the mobile home park. While the neighbors were not happy the permit was granted, they did feel they were listened to and if things went badly, they had some recourse to report back to the District Commission for relief and enforcement, if necessary.

The quarry owner appealed to Environmental Court. A former Federal prosecutor from New York City who viewed this case as a genuine environmental justice case was kind enough to represent the mobile home park residents *pro bono*. He also brought in a *pro bono* environmental engineer who had worked at the company that developed MTBE to be an expert on hydrogeology and contamination issues. The former head of MSHA (Mining Safety and Health Administration) in Albany, New York was an expert witness for the neighbors on blasting.

The Environmental Court vacated all the reasonable conditions the District Commission placed on the quarry in their attempt to provide more protection to the neighbors. In particular, the District Commission required a test blast at the requested level of 9500 pounds, but the applicant chose to do a blast with only 6500 pounds, so that is what the District Commission permitted. The Environmental Court judge gave the quarry owner everything he wanted, including the 9500 pound blast which was never demonstrated to show the impacts to neighboring properties.

*The District Commission process was efficient for citizens. All they had to do was show up. No paper pushing, no motions to file, the ability to speak and have their issues addressed. The site visit, party status requests and determination, and hearing were all held on the same day.*

*The mobile home park residents' interests were taken into consideration far better by the three local District Commissioners than by the Judge who heard the appeal. The Judge made fun of the idea that blasting broke apart a relatively new mobile home's corner seams by comparing blasting to his teenage daughter slamming the door.*

**Past history of "permit reform" and attempts at on-the-record proceedings**

I have lost count of how many different times VCE has had to address on-the-record at the legislature. It has been discussed and rejected numerous times. At one point, we supported a pilot project at District Commissions, where an on-the-record hearing would be held by mutual agreement of the parties. Nobody ever tried it.

In 2011, an attorney working at a firm that primarily represents developers wrote this commentary about on-the-record proceedings held by municipalities https://www.fgmvt.com/on-the-record-proceedings-before-municipal-panels-a-solution-in-need-of-fixing.html
It points out several problems with on-the-record proceedings, including the need to incorporate rules, discovery and depositions, and all the trappings of Court and the PUC. Using on-the-record at District Commissions may advance the interests of developers, but it would be unquestionably at the expense of the rights of citizens unless intervenor funding and legal counsel is provided as well as adequate time for preparation so that it is a fair proceeding.

The same problems with on-the-record proceedings at District Commissions exists with the Environmental Division of Superior Court, the proposed new VERB or NRB, and at the PUC.

*If this committee decides to incorporate on-the-record proceedings at the District Commission level or to hold Major Case hearings only at a state level Board, the application should be filed 6 months before any hearings begin and include written testimony of all the witnesses, to defray the huge advantage the applicants have in on-the-record proceedings. One-the-record proceedings at the District Commissions and Major Cases at a state level Board require adequate trial preparation time and intervenor funding that enables citizen intervenors to hire a lawyer and experts.*

Respectfully Submitted by,

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