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Sent: Monday, February 3, 2020 3:48 PM
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Subject: [External] Liam Murphy. Thought of OTR appeals and alternatives

[External]

Jim

Good to hear from you. Thank you and the committee for considering my thoughts.

Right now the process is the Commission hears the testimony and examines the evidence on all the criteria, applies the applicable law and regulations and issues a decision.

When the decision is appealed the parties must identify the exact issues being appealed. Rarely does every issue get appealed. Therefore the Commission's decisions and conditions as to the matters which are not appealed remain in force and become part of the final issued permit. This is important to note because the Commission's decision is not wholesale ignored only those findings or conditions which are appealed are not considered by the Court.

For the matters which are appealed, currently in a de novo hearing, the Court does not look at the findings of fact and law made by the Commission. The Court hears new testimony and evidence and issues its own findings of fact, conclusions of law and issues its own conditions on the matters under appeal.

In an on the record (OTR) appeal, the Court would review the Commission's record for those matters on appeal and would have to uphold those findings of fact and conclusions of law unless the Court finds that the decision on the appealed issues is clearly erroneous, arbitrary or capricious.

Because of this high standard for overturning findings of fact or conclusions of law in a OTR appeal, I have suggested certain means to make the review more reasonable for all parties—such as having the ability to supplement the record.

The issue is how to provide deference to the findings of fact of the Commission, while not limiting the appeal to the record below.

I think that one approach could be as follows:

1. The Commission decision's shall be entered as evidence in the appeal.
2. The Court would be authorized to hear new testimony and evidence only in regard to those specific findings of fact that a party specifically identifies that were not based on relevant evidence properly before the Commission. The Court would affirm the Commission's findings unless the Court makes a finding that the new testimony or evidence provides specific substantial evidence, which in the context of the record as a whole, both Commission record and Court record, supports a different finding of fact.
3. The Court shall review issues of law or statutory interpretation de novo.

This approach is somewhat similar to the appellate process used in real property tax appeals. In those cases the Town's assessment is presumed to be valid until such time as credible and substantial evidence is provided challenging the assessment—the so-called “bursting bubble” approach. See a discussion of the approach in Bilmar Team Cleaners (Margaret Murray, Appellant) 2015 VT 10.

I hope this is helpful.

Liam

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