Vermont Rules of Civil Procedure, Rule 74

RULE 74. APPEALS FROM DECISIONS OF GOVERNMENTAL AGENCIES

Currentness

(a) Applicability. Except as provided in the Vermont Rules for Environmental Court Proceedings:

(1) This rule shall apply whenever any party is entitled by statute to seek review of, or appeal from, the decision in a proceeding determined by any state board, commission, department or officer other than the legislature or courts.

(2) This rule shall also apply when any party is entitled by statute to seek review of, or appeal from, a decision in a proceeding determined by any other administrative officer or tribunal and the appeal or review is subject to procedure provided for state agencies covered by the Administrative Procedure Act (chapter 25 of Title 3 V.S.A.) or to procedure provided in this rule.

(b) Notice of Appeal; Appellee's Appearance. An appeal or review under this rule shall be taken by filing with the clerk of the administrative body described in subdivision (a) or other appropriate officer a notice of appeal in the manner and within the time provided in Rules 3 and 4 of the Rules of Appellate Procedure. If a notice of appeal is mistakenly filed in the superior court, the clerk of the superior court shall note thereon the date on which it was received and shall promptly transmit it to the clerk of the administrative body or other appropriate officer, and it shall be deemed filed with the administrative body on the date so noted. Upon the filing of the notice of appeal, the clerk of the administrative body or other appropriate officer shall provide to the appellant a list of all interested persons, with instructions to serve a copy of the notice upon each of them as provided in Rule 3(b) of the Rules of Appellate Procedure. A copy of the notice shall thereupon be served by the appellant upon the clerk of the superior court and upon each of the interested parties in accordance with that rule. Each appellee shall cause that appellee's appearance to be entered with the clerk of the superior court within 21 days after the service of the notice of appeal.

(c) Stay; Bond. Taking an appeal does not itself stay enforcement of the agency decision. If the agency does not grant a stay, the court after the filing of the notice of appeal, may, upon motion, stay the agency decision and make such other orders as are necessary to preserve the rights of the parties upon such terms and conditions as are just.

(d) Record on Appeal. The record on appeal shall consist of the original papers and exhibits enumerated in 3 V.S.A. § 809(e) or, in the case of a proceeding not subject to that section, all writings and exhibits in the agency proceeding; a transcript of any oral proceedings; and, where required by law, a statement of the questions which the appellant desires to have determined. No pleadings shall be required in the superior court. Within 30 days after the filing of the notice of appeal the clerk or other appropriate officer of the agency shall transmit the papers and exhibits filed to the clerk of the superior court in the manner provided in Rule 11(b) of the Rules of Appellate Procedure, and the appellant shall file a statement of questions, if required, with the clerk of the superior court and serve it upon all other parties in accordance with Rule 5. The appeal shall be docketed and the record deemed complete as provided in Rule 12 of the Rules of Appellate Procedure. Any party desiring a transcript of

any portion of the proceedings to be included in the record on appeal shall notify all other parties thereof, shall procure such portion at that party's own expense, and shall cause it to be filed with the clerk of the superior court within 30 days after the filing of the notice of appeal.

(e) Trial. Any question as to which there is a right to trial by jury shall be tried to a jury if one is demanded in accordance with Rule 38. Otherwise, all questions as to which by law review is available shall be tried to the court. Proceedings under this rule shall be ripe for listing on the hearing calendar in accordance with Rule 40(a) when the time for filing the record provided in subdivision (d) of this rule, and any extension thereof, have expired.

(f) Certificate of Decision. Unless otherwise provided by law, if no notice of appeal to the Supreme Court has been filed, the clerk shall, 35 days after the entry of judgment, certify the decision of the superior court to the agency, returning therewith any original document transmitted as part of the record on appeal.

(g) Rules of Civil Procedure to Apply. Except as modified by this rule, the Rules of Civil Procedure, so far as applicable, shall govern proceedings under this rule.

(h) Inconsistent Procedures Specified by Statute. Any procedure specified by statute which is inconsistent with that provided in this rule shall control to the extent of the inconsistency if that statute or the inconsistent part became effective after July 1, 1971, except that in all proceedings, the method of appeal or review shall be by notice of appeal.

Credits

[Amended effective March 15, 1995; July 1, 1996; March 25, 2003, effective July 1, 2003; December 30, 2004, effective February 21, 2005; September 20, 2017, effective January 1, 2018.]

Editors' Notes

REPORTER'S NOTES--2018 AMENDMENT

Rule 74(b) is amended to extend its 20-day time period to 21 days consistent with the simultaneous “day is a day” amendments to V.R.C.P. 6.

REPORTER'S NOTES--2005 AMENDMENT

Rule 74(a) is amended for consistency with simultaneous amendments promulgating the Vermont Rules for Environmental Court Proceedings and abrogating Rule 76. As was true of Rule 76, the Vermont Rules for Environmental Court Proceedings are intended to be the sole means of appeal or review for matters within the exclusive jurisdiction of the Environmental Court. See Reporter's Notes to Rule 76 as amended; V.R.E.C.P. 1.

REPORTER'S NOTES--2003 AMENDMENT

Rule 74(b) is amended simultaneously with amendments of V.R.C.P. 72(a) and 76(e)(2) and V.R.A.P. 3(b)(1) to make clear that the appellant serves a copy of the notice of appeal on each party and the clerk of the appellate court. (A parallel amendment has been made to V.R.S.C.P. 10(a) for consistency of language.) The original of the notice remains with the lower court or agency and is transmitted to the appellate court only as part of the transmission of the record.

REPORTER'S NOTES--1996 AMENDMENTS

Rule 74(a) was amended effective March 15, 1995, for consistency with new Rule 76(e), promulgated simultaneously by emergency amendment to provide the exclusive procedure for appeals of certain municipal land use decisions to the Environmental Court. See Reporter's Notes to those amendments. The amendment is now made permanent in conjunction with simultaneous amendments to Rule 76.

Rule 74(b) is amended to reflect the decision of the Supreme Court in Mohr v. Village of Manchester, 161 Vt. 562, 641 A.2d 89 (1993), interpreting the rule as permitting a municipal zoning notice of appeal that had been erroneously filed in the superior court to be treated as though correctly filed with the clerk of the planning commission by analogy to V.R.A.P. 4. The added language is similar to the provision of V.R.A.P. 4 relied on in Mohr, with the addition of a requirement that the superior court clerk transmit the notice "promptly" to assure that there is notice of the appeal at the administrative level.

The amendment also eliminates an obsolete reference to V.R.A.P. 3(e), abrogated in 1990, and changes the procedure for service of the notice on the parties and superior court so that it is consistent with the current procedure on appeal to the Supreme Court under V.R.A.P. 3(b). Under the amended rule, the clerk of the administrative body must give the appellant a list of the "interested parties" (i.e., those with standing to appeal) and instructions concerning the procedure for serving the notice under V.R.A.P. 3(b). This requirement is intended to assist pro se appellants, who may not know who all the "interested parties" are because individuals who did not participate in the local proceedings may be entitled to appeal. Once the list and instructions have been provided, the appellant, rather than the clerk, is responsible for making service in accordance with V.R.A.P. 3(b). The reference to that rule incorporates its provisions that service upon a represented party should be made upon that party's counsel of record, that service is sufficient notwithstanding the death of a party or counsel, and that failure to make service or take other steps does not affect the validity of the appeal.

REPORTER'S NOTES--1995 EMERGENCY AMENDMENT

Rule 74(a) is amended for conformity with the simultaneous addition of Rule 76(e) by emergency amendment. Although 24 V.S.A. §§ 4471(a), 4472(a), as amended, provide for appeals to the Environmental Court from certain municipal land use decisions in accordance with the Administrative Procedure Act and Rule 74, Rule 76(e) is intended to be the sole route for such appeals and supersedes the statute to that extent. See Reporter's Notes to Rule 76(e).

REPORTER'S NOTES--1981 AMENDMENT

The amendment to Rule 74(a) is intended both to explain the proceedings covered by the rule and to expand them. The amendment, like the original rule, is not intended to expand the jurisdiction of the superior court or to specify venue. It does, however, provide for initiation of some actions for review or appeal by notice of appeal where, prior to the amendment, the person seeking review would have begun an independent civil action under Rule 75. The amendment applies in the District Court because D.C.C.R. 74 incorporates Civil Rule 74.

The original intent behind Rule 74 was to provide a simple procedure for appeal from a state agency, board or commission where the Administrative Procedure Act applies. In such a case, there is an adequate hearing procedure and record so that judicial review can proceed along the lines specified in the Appellate Rules.

Three series of events have frustrated the intent or at least confused its application. Each has to do with the Administrative Procedure Act [hereinafter APA], 3 V.S.A. §§ 801-820, or its interrelationship with the rule.

The first is that the legislature began to use the APA appeal procedure by reference for proceedings not otherwise subject to the APA. An example of this usage is the related statutes on appeal to the superior court from zoning boards of adjustment and planning commissions. See 24 V.S.A. §§ 4471, 4475. The usage of the APA appeal provisions has led to confusion and spawned a number of decisions on whether the party appealing to the superior court has sufficiently complied with this rule so that the appeal is valid. See Vermont Division of State Buildings v. Town of Castleton Board of Adjustment, 138 Vt. 250, 415 A.2d 188 (1980) (copy of superior court complaint served on clerk of zoning board within time period for a notice of appeal gave

sufficient notice so that appeal is valid); Harvey v. Town of Waitsfield, 137 Vt. 80, 401 A.2d 900 (1979) (failure to use notice of appeal invalidated appeal); In re Appeal of Pfeiffer, 136 Vt. 52, 383 A.2d 633 (1978) (although appellant timely filed under Rule 75, the notice was sufficient to invoke jurisdiction under Rule 74 and superior court must allow amendment).

The second is that the application of the APA has proved to be narrow because of its definition of "contested case," a prerequisite to its applicability. See 3 V.S.A. §§ 801(2), 815(a). In Fitzpatrick v. Vermont State Retirement System, 136 Vt. 510, 394 A.2d 1138 (1978), the Court held that a proceeding is not a "contested case" unless the law requires a hearing in the agency. Subsequently, the Court applied Fitzpatrick where the agency actually held a hearing even though it was not statutorily required to do so in all cases. See In re Petition of Marble Savings Bank, 137 Vt. 123, 400 A.2d 1022 (1979). The notice of appeal procedure is usable whenever the agency develops a record for review, irrespective of whether a statutory hearing is required.

The third is that the legislature has gradually eroded the APA or this rule by providing inconsistent procedure for specific proceedings. See, e.g., 10 V.S.A. § 6089(a) (appeal from district environmental proceeding); 23 V.S.A. § 2005 (appeal from act or omission of the commissioner of motor vehicles with respect to title to motor vehicles). The problem created by the statutory procedure is particularly acute because the rule nowhere specifies the effect of inconsistent procedure, even that inconsistent procedure that preexists the rule. For preexisting procedure one has to apply both the rule and the APA's repealer of inconsistent procedure. See 3 V.S.A. § 801 note (all acts and parts of acts inconsistent with the APA "are repealed"). As a result, one must read the various provisions "in pari materia" to achieve a consistent scheme. See In re Preseault, 130 Vt. 343, 292 A.2d 832 (1972). The result of such a reading is unpredictable.

The amendment to Rule 74(a) is intended to cover the effect of the former two events. The rule now applies whenever a statute creates an entitlement to seek review of, or appeal from, the decision in a proceeding determined by a state agency, and the review or appeal is to be decided in the superior court. 3 V.S.A. § 815--the judicial review provision of the APA--can be such a statute if the legislature has authorized review or appeal in the superior court. Others may exist where there is no "contested case." The only exclusion would be where the legislature has specifically stated that the rule shall not apply or has designated Rule 75 as the method of review. See 23 V.S.A. § 802(i) (specifies that a finding of fault under the financial responsibility law shall be reviewed under Rule 75).

The rule also specifically applies where legislation brings review of a proceeding under the APA or designates this rule as the method of appeal or review. This covers appeals from zoning boards of adjustment or planning commissions.

Because the rule covers proceedings that are not under the APA, it is necessary to amend subdivision (d) (formerly subdivision (c)) covering the record on appeal to specify the content of the record where the APA does not apply. Thus, irrespective of whether the APA applies, the record must consist of all writings and exhibits in the agency proceedings and a transcript of any oral proceedings.

Subdivision (h) has been added to clarify the effect of inconsistent statutory provisions. Because the essence of this rule is that review on appeal should proceed by notice of appeal, rather than independent action, where appropriate, the requirement of the rule that review or appeal be initiated by notice of appeal applies in all cases subject to this rule. Statutorily mandated procedure inconsistent with this basic requirement is superseded to that extent. See, e.g., 21 V.S.A. § 227(a) (statute providing for review by "filing a written petition"; under this rule, proper method is notice of appeal).

In all other respects, the effect of inconsistent statutory procedure is determined by when the statutory procedure became effective. If it became effective before July 1, 1971, the effective date of the Vermont Rules of Civil Procedure, it is wholly superseded and the procedure specified in this rule governs. If it became effective thereafter, the statutory procedure controls *to the extent of the inconsistency*. Where the controlling statute is incomplete, the procedure in this rule applies to fill in the gaps.

The amendment is not intended to affect the question of whether review shall be de novo or on the record. See State of Vermont Department of Taxes v. Tri-State Industrial Laundries, Inc., 138 Vt. 292, 415 A.2d 216 (1980).

REPORTER'S NOTES

This rule has no equivalent in the Federal Rules. It provides for an appeal to a county court from those state agencies whose proceedings in contested cases are controlled by the Administrative Procedure Act, 3 V.S.A. §§ 801-816, on filing a notice of appeal and a formal record. The procedure is generally similar to that for probate appeals contained in Rule 72. See also Appellate Rule 13. Proceedings of state agencies not regulated by the Administrative Procedure Act, as well as local governmental agencies, may be reviewed by complaint in accordance with Rule 75. (Pending legislation (1971-H. 326, § 193) would amend 24 V.S.A. § 4471 to bring appeals from local Zoning Boards of Adjustment under Rule 74 because of the formal nature of the proceedings before such boards.)

Rule 74(a) leaves to the specific statutes dealing with particular agencies the questions of what decisions are appealable to a county court and in what county the appeal lies. An "agency" for purposes of the rule is a "state board, commission, department, or officer, other than the legislature or the courts, authorized by law to ... determine contested cases." 3 V.S.A. § 801(1). A "contested case" is "a proceeding, including but not restricted to rate-making, and licensing, 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." 3 V.S.A. § 801(2). The procedure for filing and serving the notice of appeal and for appearance by the appellee is similar to that in probate appeals under Rule 72(a). See Reporter's Notes to Rule 72(a). As in the former practice under 3 V.S.A. § 815 and 12 V.S.A. §§ 252, 2383, however, no extension of the time for appeal beyond that allowed by Appellate Rule 4 will be allowed. See Appellate Rule 26.

Rule 74(b), consistent with 3 V.S.A. § 815(a), provides for a stay only if granted by the agency or by the court on motion. This procedure is in contrast to the automatic stay provision of Rule 62(e) for appeals from a county court to the Supreme Court, which governs probate appeals by virtue of Rule 72(b). See also Rule 73(d).

Rule 74(c) provides that the record shall be those papers designated as such under the Administrative Procedure Act, 3 V.S.A. § 809(e), (f). See Appellate Rule 13(d). Where a specific statute requires it, a statement of questions such as that provided by Rule 72(c) for probate appeals is also part of the record. See, e.g., 21 V.S.A. §§ 670, 671. In other respects, the subdivision is similar to the provision of Rule 72(c) for probate appeals. See Reporter's Notes to Rule 72(c).

Rule 74(d) leaves the questions of jury trial and scope of review to specific statutory provisions or prior practice governing appeals from particular agencies. In other respects, the subdivision is similar to Rule 72(d). See Reporter's Notes to Rule 72(d).

Rule 74(e) adopts the procedure of Rule 72(e) for remand, except where specific contrary provision is made by statute for a particular agency. See Reporter's Notes to Rule 72(e).

Rule 74(f) is identical to Rule 72(f). See Reporter's Notes to Rule 72(f).

Rules Civ. Proc., Rule 74, VT R RCP Rule 74
State court rules are current with amendments received through January 15, 2022.

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