

ASK THE LEAGUE, DECEMBER 2012

Is an applicant's attendance at a development review hearing mandatory?

No, but oftentimes it is certainly in his or her best interest to do so.

Hearings for development review are quasi-judicial hearings in that they are proceedings dealing with the legal rights of one or more persons. While the land use board conducting the review must be sure to safeguard the procedural due process rights of all interested persons involved, it is the responsibility of the applicants to avail themselves of the opportunity to protect their own property rights afforded by the hearing.

There are many reasons why applicants don't show up for their own hearing. They may live out of state. They may view the town as just another stop in the permitting process and intend on appealing any denial to the Environmental Division of the Vermont Superior Court. Others may feel that there is nothing remarkable or controversial about their application warranting their attention. Or they could simply have a scheduling conflict. If it's the last reason, towns should try to be as accommodating as possible, particularly when the applicants' testimony and cross-examination by interested persons is essential to the disposition of the issues before the board. Because these requests typically arrive after the hearing has already been warned, it will be much more efficient for the board to open the hearing and continue it to a time and place certain than to re-warn it entirely.

An applicant has a right to notice and an "opportunity" to be heard, but once that opportunity is afforded, his or her attendance (or that of any interested person) is not a statutory prerequisite for rendering a decision. As for other interested parties, only those who have "participated" in a local land use hearing may appeal that decision to the Environmental Division. Participation consists of "offering, through oral or written testimony, evidence or a statement of concern related to the subject of the proceeding." 24 V.S.A. § 4471(a). Simply offering a statement of concern is all that is required for an interested person to perfect his or her appeal rights.

Whether the applicant attends the hearing or not, the board still needs to make a decision. In those instances where additional testimony from the applicant is needed but he or she refuses to attend or submit evidence on his or her behalf, the board can deny the application on the basis that the applicant has failed to provide sufficient evidence to enable the board to find on his or her behalf.

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