

MUNICIPAL ASSISTANCE CENTER TECHNICAL PAPER #1

Making It Stick: The Art of Writing Effective Zoning Decisions MARCH, 2007



INTRODUCTION

Most members of a local zoning board don't think of themselves as judges. They don't wear robes, and the formal rules of evidence that govern judicial proceedings don't usually apply. However, members of local zoning boards act in a quasi-judicial capacity when conducting local zoning hearings.

Vermont law defines a quasi-judicial proceeding as "a case in which the legal rights of one or more persons who are granted party status are adjudicated, which is conducted in such a way that all parties have an opportunity to present evidence and to cross-examine witnesses presented by other parties, which results in a written decision, the result of which is appealable by a party to a higher authority." 1 V.S.A. § 310(5)(B). Zoning proceedings clearly fall within that definition.

As a quasi-judicial body, zoning boards hold hearings, hear testimony, receive evidence, deliberate, and produce written decisions that are appealable to the Environmental Court and beyond. Often, the likelihood of appeal depends on the quality and timeliness of those decisions. To this end, this Technical Paper is dedicated to writing effective zoning decisions, which meet necessary legal requirements and reduce the likelihood of appeal.

BASIC LEGAL REQUIREMENTS

Vermont law groups all local zoning boards that review applications for development (planning commissions, zoning boards of adjustment, and development review boards) into the term "Appropriate Municipal Panel" (AMP). All AMPs are required to conclude their development review proceedings with a written decision that includes a "statement of the factual bases on which the appropriate municipal panel has made its conclusions and a statement of the conclusions." 24 V.S.A. § 4464(b)(1). Decisions must be issued within 45 days after adjournment of the hearing. Copies of the decision must be sent to the applicant and the appellant by certified mail, and to all those appearing and having been heard at the hearing. Copies must also be filed with the zoning administrator and the town clerk. 24 V.S.A. §§ 4464(b)(1), 4464(b)(3).

The decision is the board's articulation of what it decided and upon what considerations it based its decision. A good decision is a fair and impartial application of the bylaws to the facts presented during the hearing (they should never be based on personal beliefs about development, the environment, or the applicant). Decisions that rely on the rules and regulations that were adopted to guide development in the community can increase citizen confidence in the process, even when those citizens don't agree with the outcome. In contrast, decisions that rely on anything other than the bylaws reduce confidence in the process and increase the likelihood of appeal.

WHY ARE WRITTEN DECISIONS REQUIRED?

Beyond the minimum legal requirements, a well-written decision can do much to strengthen the local review process. Issuing a written decision requires members of zoning boards to sift through and consider the evidence presented at the hearing, to review that evidence in light of the relevant criteria in statutes and bylaws, and to explain the reasons for their decisions. A well-crafted decision should be brief and clear, while focusing on issues that may require articulation beyond a general statement of compliance.

Written decisions also provide the appellant with the context and rationale for the board's decision, the facts the board relied upon in making its decision, and any conditions related to specific findings of fact or conclusions. Appellants

who understand the reasons underlying the board's decision are more likely to feel that they were treated fairly, thereby instilling confidence in the decision-making process and reducing the likelihood of appeal.

Written decisions also perform one more vital purpose: they trigger the running of any applicable appeal period. *Russell v. Timberlake Assoc.*, 169 Vt. 641 (1999); *Granger v. Rutland*, 156 Vt. 644 (1991).

WELL-WRITTEN DECISIONS:

- Consider the audience for which they are written.**
- Are brief, clear, and focus on important issues.**
- Provide an understanding of how and why the board made its decision.**
- Increase the sense of fair play.**
- Create confidence in the board's decision-making process.**
- Reduce the likelihood of costly and lengthy judicial appeals.**

Finally, for municipalities that have adopted on-the-record review provided by the Municipal Administrative Procedure Act (MAPA), written decisions become part of the record upon which the Environmental Court conducts its review of the board's decision. Because new evidence cannot be submitted to the Environmental Court in an on-the-record appeal, it is important that the written decision contain adequate findings of fact addressing all of the applicable criteria. Even for towns that have not adopted MAPA, the local decision is increasingly being reviewed by the Environmental Court as part of its decision-making process.

WHAT ARE FINDINGS OF FACT?

Findings of fact are defined as “a determination by a judge, jury, or administrative agency of a fact supported by the evidence in the record.” *Black's Law Dictionary* 664 (8th ed. 2004). Findings are those facts gleaned from the evidence presented at the hearing that the board deems credible and relevant and are used by the board to develop and support the reasoning behind its decision. A board's decision, which includes its findings of fact and conclusions, must “convey not only a result, but also an indication of how the result was arrived at” and “should be sufficient to inform interested persons of the reasons for the decision.” *City of Rutland v. McDonald's Corp.*, 146 Vt. 324 (1985).

Beyond referencing the facts of a project, findings of fact must also address the criteria contained in the statute or bylaw under which relief or approval is sought. For example, 24 V.S.A. § 4469, regarding the issuance of variances, authorizes a board to “render a decision in favor of the appellant, if all of the following facts [lists five variance requirements] are found and the finding is specified in its decision.” Thus, in order to issue a decision that grants a variance, the board, at a minimum, must draft findings that address each of the five variance requirements and how the facts of the application are applied to the criteria.

Likewise, conditional use permits may only be granted if the board finds that such use conforms to the general and specific standards contained in the applicable zoning bylaws and the statute. 24 V.S.A. § 4414(3); *Nash v. Warren Zoning Board of Adjustment*, 153 Vt. 108 (1989). When issuing a decision that either grants or denies a conditional use application, the board must prepare findings which address each of the general and specific standards contained in the bylaw.

“Findings” are “found” after board members hear testimony and review, analyze, and deliberate over the facts that are presented as evidence at the hearing. Not all evidence presented at the hearing needs to be contained in the board's decision as a finding of fact. Only that evidence that the board finds most credible and relevant to the application must be contained in its decision. Boards will likely hear multiple assertions of fact about a particular topic. The board's findings will show which assertions it believed and now considers to be a fact.

HOW TO FIND FACTS:

- ❑ Review, analyze, and deliberate over the evidence presented at the hearing.
- ❑ Assess what evidence is reliable, relevant, and credible.
- ❑ Keep an open mind. Do not prejudge the case until you have heard all of the evidence and applied it to the applicable statutory criteria.

Poorly written zoning decisions can be a reason to overturn a board's decision. The Vermont Supreme Court has held decisions inadequate when they do not provide an explanation or reason for the board's decision. *Potter v. Hartford Zoning Board of Adjustment*, 137 Vt. 445 (1979). Decisions have been held inadequate where they contain conclusions of law without any explanation of the facts supporting that conclusion. Mere recitations of testimony presented at hearing, without any analysis of the board, will not suffice. For example, if a board took testimony from three people on one topic and each witness offered a different version of the facts, would it be logical to write all of them as "found facts" in a decision?

HOW CAN A VOLUNTEER BOARD ACCOMPLISH ALL THIS?

Appropriate municipal panels are comprised of volunteers who dedicate their time to ensure the proper administration of the local development review process. Nobody has the time to write lengthy, formal decisions for every application the board hears. The following list of strategies can make the decision-writing process easier.

1. **Use the minutes from the hearing.** Minutes can be sufficient so long as the factual bases (findings) and conclusions relating to the review standards are provided. 24 V.S.A. § 4464(b)(1). When using minutes of the hearing for the written decisions, a cover letter should be sent, in accordance with the statutory notice procedures, along with the minutes indicating that they contain the board's final decision. *Hinesburg v. Dunkling*, 167 Vt. 514 (1997). This is recommended so that the appellant or interested person is made aware that the minutes constitute the final decision of the board and start the running of the appeal period.

One danger in using the minutes as the board's decision is that the court may deem them inadequate to form the basis of the decision if it finds that the board's purpose in using the minutes was to "bury" the decision, or where the notification requirements of the statute have not been followed. *Hinesburg v. Dunkling*, 167 Vt. 514 (1997). Remember, the requirement that the board explain the reasons for its decision applies whether the board is using its minutes as its final decision, writing a simple standalone decision, or issuing a formal decision.

2. **Create a template.** While minutes comply with the minimum statutory thresholds, the spirit of the law calls for written decisions that lay out the bases for granting or denying permits and clearly articulate the reasons for making that decision. One way to efficiently draft freestanding written decisions is to create a template that incorporates all of the required information. Templates should be created for each of the major types of review (conditional use, variance, appeals, and subdivision) and should include space for the result of the decision (denied or approved) and any conditions that may be included. For copies of sample decision templates, visit www.vpic.info or contact the VLCT Municipal Assistance Center.

In addition to creating templates, boards should, in advance of the hearing, designate one board member or a staff member to take notes at the hearing and at any deliberative session and to draft a decision to be presented at the next deliberation.

3. **Develop a checklist.** Another strategy for issuing effective decisions is to develop a checklist of the criteria involved. As the board deliberates, the chairperson can go down the list and solicit opinions as to each criteria. Then, a member can incorporate those findings into a formally written decision to be voted upon at the next board meeting, or the board can vote on the findings of fact as represented by the checklist and incorporate those findings into a written decision. Alternatively, after considering each of the requisite criteria, a board member can make a motion to approve or deny and explain the reasons that support that outcome and incorporate the findings with regard to criteria. For example, after applying the conditional use general and specific standards, a member could move to "approve the application because it conforms to the general and

specific standards for the district and impose the following conditions” The result of that motion can then be recorded in the minutes and mailed to the applicant.

Boards must be cautious about using this approach if conducting their deliberations in public. Public deliberations after a closed hearing can produce an “oral decision” which may be changed upon reviewing the final written decision at the next meeting. This puts the board into the untenable position of issuing an amended decision that reverses or modifies the oral decision. Preferably, boards should never issue an oral decision. It is far easier to ask parties to wait a few weeks for a carefully reasoned written decision than to issue a quick oral decision, only to reverse it later on.

WHAT SHOULD THE DECISION LOOK LIKE?

There are no legal requirements regarding the format of a written quasi-judicial decision. The Vermont Supreme Court, in upholding a zoning board of adjustment’s use of its minutes as its final written decision, has recognized that Vermont law does not “delineate the form or style in which the decision must be memorialized or how the decision must be organized.” *Hinesburg v. Dunkling*, 167 Vt. 514 (1997) (interpreting Chapter 117 requirements).

Because there is no statutory requirement dictating the form or style of a board’s written decision, a board is free to format its decisions in ways that account for its staffing resources, or lack thereof, and other factors that may limit the board’s ability to issue formal written decisions in every case. If an application is especially complicated or controversial, however, a board is well advised to take the time and effort to draft a more formal decision to ensure that all applicable criteria are addressed, and to provide a comprehensive explanation of the reasons for the decision.

AT A MINIMUM, QUASI-JUDICIAL DECISIONS MUST:

- be in writing;
- contain adequate findings of fact that explain what the board decided and the reasons for its decision; and
- be properly served on all interested persons, including the applicant.

AS A BEST PRACTICE, THE WRITTEN DECISION SHOULD CONTAIN:

- an introduction identifying the applicant/appellant and property owner;
- the procedural history of the issue;
- the approval requested;
- findings of fact gleaned from sifting through the evidence presented at the hearing (which may or may not include a list of the relevant materials);
- conclusions based upon application of the facts to the applicable legal criteria or standards;
- a simple sentence of the board’s decision granting or denying the relief requested;
- any conditions the board places on the approval; and
- a notice of the parties’ appeal rights.

Organizationally, each of the above-mentioned sections of a decision should be contained in separately numbered paragraphs.

Finally, make sure all conditions are enforceable, can be measured or observed, and include a timeframe for when they should be addressed. Remember that others will need to interpret the board’s decision so it is critical that the decision be clear and concise.

In summary, the clarity and professionalism with which the decision is written speaks volumes about the integrity of the local review process and can increase or decrease the public confidence in your proceedings.