Zoning Administrator 101 Q&A

11/30/2022

Question: Can you explain, a hired ZA can only be removed for cause, correct?
Answer: Yes. This is a statutory protection granted by Vermont law for the ZA position, as Kail mentioned. See 24 V.S.A. 4448. The ZA will also be subject to the town's personnel policy.

Question: VT is an at-will state, correct?
Answer: This topic is outside the scope of this training but suffice it to say the ZA position is granted protection by Vermont law which would supersede any other default rule that might otherwise apply.

Question: Please define 'AMP.'
Answer: Appropriate Municipal Panel. Kail mentioned at the beginning that he'd use the term "AMP" for short to refer to this statutory term for the reviewing public bodies (Development Review Board or Zoning Board of Adjustment/Planning Commission) to which an application might be referred.

Question: Is the ZA the only person who can determine if an application is complete or incomplete?
Answer: Not necessarily; a ZA is the first person to receive an application, determine whether it's complete, and act on it by processing an approval or denial or referring it to an AMP (DRB/ZBA/PC). However, the AMP might determine it needs/wants more evidence from the applicant or interested parties and can ask for it and continue a hearing to a date/time/place certain to receive and review this information. Once a ZA refers to the AMP an application that they have deemed complete, though, the AMP would have to at least meet to discuss whether it's complete or they need more. The better way would be to warn a hearing and open it, review everything in the hearing, and ask for more if necessary and continue the hearing.

Question: As ZA, I am also a clerk for a planning commission and DRB. Does Title 24 cover DRB and/or PC clerk duties? I have a job description to follow but some aspects of my job are not well defined.
Answer: Chapter 117 of Title 24 details some duties of these boards' clerks, but to the extent you're like a clerk/administrative assistant to these boards, your job description or zoning bylaws should specify these duties. If they don't, you can seek clarification from these boards in conjunction with the selectboard.

Question: Does posting permits issued on the city website count as a "public posting"?
Answer: No. Permits issued by ZAs must follow 24 V.S.A. 4449. In that statute, subsection (b) says, in part, "...require posting of a notice of permit on a form prescribed by the municipality within view from the public right-of-way most nearly adjacent to the subject property until the time for appeal in section 4465 of this title has passed."
Additionally, it says "...(2) post a copy of the permit in at least one public place in the municipality until the expiration of 15 days from the date of issuance of the permit..." Posting to a website doesn't count as a public posting in this law; therefore, it would only supplement the public posting. There are other requirements when issuing a permit, so I recommend reviewing 24 VSA section 4449. Your bylaws may also require more posting/notice of issuance of permit, including the website.

Question: Can a ZA withhold a zoning permit for a property if that property is in violation of a separate/unrelated ordinance?

Answer: No. We are a Dillon's Rule state which means we only have authority granted by the Legislature. There is nothing in Vermont law that allows for withholding a permit that is otherwise in compliance with the bylaws and approvable due to the existence of a violation on the same property. There are limited exceptions to this specifically detailed in state law. Most notably is in 24 VSA section 4414(13) that allows the town to adopt bylaws that:

> "...(i) prohibit the initiation of construction under a zoning permit unless and until a wastewater and potable water supply permit is issued under 10 V.S.A. chapter 64; or
> (ii) establish an application process for a zoning or subdivision permit, under which an applicant may submit a permit application for municipal review, and the municipality may condition the issuance of a final permit upon issuance of a wastewater and potable water supply permit under 10 V.S.A. chapter 64....."

Question: If the local bylaws say the ZA cannot issue a new permit if a zoning violation exists on the subject property, do we follow that provision or does Vermont law supersede it? Should the bylaws be amended?
Answer: As ZA, you are bound to literally interpret and apply your bylaws. Therefore, you might consider seeking authorization from the selectboard to pose this question to the town attorney. Legally, there is nothing allowing towns to include this in the local bylaws but that would be an argument for the applicant to raise on appeal. Concurrently, the planning commission should amend the bylaws to comply with Vermont law in consultation with the RPC, and the town's attorney should review them before adoption. In the meantime, the rest of your bylaws are still valid and applicable.

Question: Does the DRB have 30 days to issue a decision, or would it be the full 45 days?
Answer: The DRB has 45 days from closing/adjourning the hearing to issue a decision. Even if the deadline has expired, the DRB should issue its decision as soon as possible. The "deemed approval" argument would be for the applicant to raise on any potential appeal, as it's a court remedy and not one the DRB should impose on itself. However, the DRB should certainly make every attempt to issue a decision within the 45 days. The 30 day deadline is for appeals of DRB decisions, not the period by which the DRB must make its decision.

Question: Our regulations require a permit to be issued within 3 days of an AMP decision. How do we handle noticing the appeal periods?
Answer: A written decision issued by an AMP has a 30-day appeal period. A permit issued by the ZA has a 15-day appeal period. If a permit is issued 3 days after an AMP decision, the permit's appeal period will end prior to the AMP decision's appeal period. However, this doesn't give the permit holder the right to start their land development after the tolling of the permit's appeal period. State law says, under 24 V.S.A. 4449(a)(3), that "[n]o permit issued pursuant to this section shall take effect until the time for appeal in section 4465 of this title has passed, or in the event that a notice of appeal is properly filed, no such permit shall take effect until adjudication of that appeal by the appropriate municipal panel is complete and the time for taking an appeal to the Environmental Division has passed without an appeal being taken. If an appeal is taken to the Environmental Division, the permit shall not take effect until the Environmental Division rules in accordance with 10 V.S.A. § 8504 on whether to issue a stay, or until the expiration of 15 days, whichever comes first." This means that the permit holder can't (or shouldn't) start development until *all* appeal periods have passed, less they risk a court order compelling them to remove their construction.
Both the permit and an AMP decision must include information on the separate appeal periods in accordance with the law. As a former ZA, I used a cover letter to notify and explain each appeal period

and that, if an interested party is appealing a permit that was issued along with an AMP approval, both must be appealed.

Question: Should a ZA not schedule an appeal with DRB if they staff it?
Answer: A ZA can help administratively schedule/set up a ZA appeal, but during the hearing on appeal of a ZA's action, the ZA should avoid "staffing" or assisting the DRB during that hearing and must not attend or participate in deliberative session or drafting the decision. During this type of appeal hearing, the ZA is a party to the applicant's appeal and the ZA will be defending their position to the DRB. Your town's conflict of interest policy may be applicable too.

Question: For ZA determinations that are not approving or denying a permit (such as deciding no permit is required), what must be done for notice and recording purposes? How must we process these?
Answer: The only real direction that statute provides is as follows:
24 V.S.A. § 4465. Appeals of decisions of the administrative officer

(a) An interested person may appeal **any decision or act** taken by the administrative officer in any municipality by filing a notice of appeal with the secretary of the board of adjustment or development review board of that municipality or with the clerk of that municipality if no such secretary has been elected. This notice of appeal must be filed within 15 days of the date of that decision or act, and a copy of the notice of appeal shall be filed with the administrative officer.

As you may know, "*any decision or act*" may include inaction such as not enforcing against an alleged violation or determining no permit is required where there may not be paperwork involved. The bylaws may say something about how to issue determinations that are not a direct result of a permit application in which case you must follow that procedure.
Because these inactions are appealable, I recommend putting all official determinations in writing and issuing them to at least the applicant/landowner and maybe notifying abutters. You could have someone apply for a permit and process it so the determination that it's incomplete or that no permit is required, etc., is an action on a permit application. Otherwise, I suggest developing a process where it is documented somewhere publicly so an interested party can learn about it. As a former ZA, I adopted a practice of cataloguing all determinations (exemptions, no permit required, etc.) the same way as I did permits. I would log it, give it a number, issue a written decision and appeal information, record a MOU, and post notice in a public place. This is not required by statute, but I found it increased notice to the applicant and public of my appealable determinations and provided a traceable record of that determination.

Question: A direct abutter writes a letter of concern and can't make the public hearing. The letter is entered as an exhibit. Does the letter make the direct abutter an "interested party"?
Answer: The letter is evidence/testimony, but their interested party status is created by statute if they meet one of the criteria Kail reviewed. Some AMPs determine interested party status and usually it is clear; otherwise, I recommend erring on the side of letting folks that claim to be interested parties submit testimony at the hearing. Once they have submitted written or verbal testimony, they will have "participated." When someone claims interested party status and want to provide testimony, at the minimum, the AMP should record their name/address/contact information.

Question: Should ZA do systematic sweeps of their town to identify potential violations?
Answer: You will receive complaints that will require a response, but you may also be expected/want to occasionally travel through town to see if there are any obvious violations. It will depend on time, capacity, direction from the selectboard, etc.

Question: For the "gang of 10" with respect to interested parties - do the 10 have to be town residents? Over 18/voters?
Answer: Either one. Interested party is defined in 24 V.S.A. 4465(b). The gang of 10 criterion says "(4) [a]ny ten persons who may be **any combination of voters or real property owners** within a municipality listed in subdivision (2) of this subsection who, by signed petition to the appropriate municipal panel of a municipality, the plan or a bylaw of which is at issue in any appeal brought under this title, allege that any relief requested by a person under this title, if granted, will not be in accord with the policies, purposes, or terms of the plan or bylaw of that municipality. This petition to the appropriate municipal panel must designate one person to serve as the representative of the petitioners regarding all matters related to the appeal."

Question: When you identify and notify landowner there is a violation, should these be recorded?
Answer: It depends on what enforcement mechanism you are using. Judicial bureau tickets are filed a specific way and don't have to (but can) be recorded in the town's records. A formal Notice of Violation must be recorded per 24 V.S.A. 4449(c):

> (c)(1) Within 30 days after a municipal land use permit has been issued or within 30 days of the issuance of any notice of violation, the appropriate municipal official shall:
>
> (A) deliver the original or a legible copy of the municipal land use permit or notice of violation or a notice of municipal land use permit generally in the form set forth in subsection 1154(c) of this title to the town clerk for recording as provided in subsection 1154(a) of this title; and
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> (B) file a copy of that municipal land use permit in the offices of the municipality in a location where all municipal land use permits shall be kept.
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> (2) The municipal officer may charge the applicant for the cost of the recording fees as required by law.

Question: Can a town require that a written complaint be signed by the complainant (rather than being anonymous) before the ZA will investigate the complaint?
Answer: Yes but it may not be good policy and you must avoid selective or discriminatory enforcement. The ZA should investigate an alleged violation that it has reason to believe exists and a ZA can learn about alleged violations in many ways. A ZA must take action to "prevent, restrain, correct or abate" violations. See https://legislature.vermont.gov/statutes/section/24/117/04452. If the ZA fails to enforce a violation, the Environmental Court can compel the ZA and the municipality to bring an action to prevent the landowner from continuing to violate the municipal regulations [see *in re Fairchild*, 159 Vt. 125 (1992)]. Therefore, an anonymous complaint should still be investigated because the underlying principle of consistent enforcement is at play. If the town isn't going to enforce its rules, it signals to folks that they don't have to follow them. In small Vermont towns, some neighbors may want a violation addressed but don't want to cause strife with their neighbors. It might come down to managing workflow; if the alleged complaint is unreliable, it may not be worth the time to investigate without something more substantial. If the ZA wants to adopt some sort of form to require written complaints, it should give the selectboard an opportunity to approve such a policy.

Question: Can you drive up driveway to look at a violation?
Answer: Yes, state and federal court rulings allow a "government officer," such as the ZA, to travel the "public" portions of a private property without a warrant. This includes driving up the driveway and walking to the front door to knock – or the back door if it's obvious that it is the primary access. Once a

property owner has made it clear that the ZA does not have permission to be on their property, though, they must leave. In this situation, so long as there is some reason to believe that a violation exists – in combination with the failure to allow an inspection – the ZA can proceed as though a violation exists or seek a search warrant in consultation with the town attorney.

Question: Where can I find sample notices, etc.?
Answer: VPIC has a dated but useful Zoning Administrators Handbook that was developed by the Vermont Land Use Education and Training Collaborative online at http://www.vpic.info/Publications/Reports/ZoningAdministratorsHandbook.pdf. It contains information and samples. You should verify the accuracy of the information and notice requirements, for instance, before relying on this publication, though, as it is old.

Question: Has the Vermont Supreme Court ever addressed the "right to inspection" as included in a Town's regulation?
Answer: Yes, and it is limited without a search warrant if permission is not granted by the landowner. The Zoning Administrators Handbook contains some information on the search and seizure legal backdrop to enforcement starting on page 19 at http://www.vpic.info/Publications/Reports/ZoningAdministratorsHandbook.pdf.

Question: Can the local bylaws regulate a garden or chicken coop if the activity is not a farm subject to the RAPs?
Answer: Yes. A farm operation must meet certain standards (be of a certain size, with a certain number of animals, or generating a certain amount of income) to qualify for State regulation under the RAPs. Farm operations that do not meet the RAP standards are referred to as "Non-RAP Operations," and those operations are regulated by municipal zoning. For more information on farm determinations and RAPs, visit https://agriculture.vermont.gov/rap.

Question: If the town does not have the right to regulate WW permits, can they regulate having to have specific types of septic systems in specific districts. For example, can the municipality say you cannot have a composting toilet in the residential area even if the state has approved a permit to do so…?
Answer: No. The state decides what type of system is acceptable for the issuance a WW permit. You can only require that the applicant, either as a prerequisite to approval or as a condition of approval, submit an approved WW permit as evidence of sufficient WW capacity.

Question: Can you talk about timing of AMP decisions and how these are distributed. Is there a basic format for decisions?
Answer: This is a bit outside the scope of this training because it is the responsibility of the AMP rather than the ZA, but we know many ZAs often staff these boards. The decision, in short, must comply with 24 V.S.A. 4464 which prescribes notice and distribution elements to be an enforceable decision, etc.

Question: Can the “immediate neighborhood” be defined in the local zoning bylaws?
Answer: Given that this term has been the main topic of discussion in many court cases, it would be difficult to capture those cases’ nuances of the term. Therefore, we’d recommend not trying to define it in your bylaws, beyond quoting the statutory language in 24 VSA section 4465.

Question: If you elect to use ticketing in the Judicial Bureau for enforcement, who pursues collection of the ticket amount? Does the issuing town receive the money?

Answer: The Judicial Bureau would issue a judgement awarding the town the fine(s). Failure to pay that voluntarily would lead to another cause of action to recover the penalty and would constitute a lien on the person's property. See https://legislature.vermont.gov/statutes/section/24/059/01981.

Question: Who determines fine amounts for violations?
Answer: If the enforcement is through Judicial Bureau ticketing, the civil ordinance will state the penalty amount for the type of violation. We recommend escalating penalty amounts. Waiver fees are required for using the Judicial Bureau. If the enforcement is through a formal Notice of Violation/court, your bylaws may state how much each ticket should be (up to the statutory maximum). If the matter goes to the environmental division of the superior court, then the selectboard and attorney would agree to either a settlement amount or penalty amount requested in the suit.

Question: Can someone challenge a ZA's failure to determine whether an application is complete or not?
Answer: Yes. Any action or inaction or decision by the ZA is appealable. However, an applicant can argue deemed approval if there is no decision communicated by the ZA. If the ZA receives an incomplete application, they should tell the applicant this and provide guidance on what portion(s) is incomplete (preferably in writing) and include a note that the 30 days to process a complete application will not begin unless/until the application is deemed complete. Failure to act upon a submitted application (complete or not) leaves the door open for appeal; it's best to process them in a timely manner and in good communication with the applicant.

Question: What permits need to be posted in public?
Answer: Public notice is required for any zoning permit and AMP decision. See 24 V.S.A. 4449(b-c) and 4464, respectively.

Question: Just to be clear; the "Z" permit poster must be posted? Must it be red?
Answer: The permit notice poster must be posted, it is a statutory requirement to notice permits, but it need not be the "Z" poster that is commonly used. As 24 V.S.A. 4449(b) states, "(b) Each permit issued under this section shall contain a statement of the period of time within which an appeal may be taken and shall require posting of a notice of permit on a form prescribed by the municipality within view from the public right-of-way most nearly adjacent to the subject property until the time for appeal in section 4465 of this title has passed. Within three days following the issuance of a permit, the administrative officer shall:

(1) deliver a copy of the permit to the listers of the municipality; and
(2) post a copy of the permit in at least one public place in the municipality until the expiration of 15 days from the date of issuance of the permit.

The form, including color, will be determined by the town, which might mean the planning commission or ZA or selectboard, depending on what if anything your bylaws include, what is expected or customarily used by the ZA, etc.