

## DECISIONS

Making clear and concise written decisions in a quasi-judicial capacity is not something that comes naturally to most people. We are informal in our daily lives, and we also assume that we can trust what people say. We generally don't have to weigh evidence, and decide what is fact and fiction, and then write down what we did and why. However, members of Development Review Boards, Planning Commissions, Zoning Boards of Adjustment (all may fall under the category of "appropriate municipal panel" (AMPs)), and even Administrative Officers (AOs, also called Zoning Administrators) must make such decisions as part of their work, if they act in a review capacity. And a good decision begins at the beginning of the process.

### Who?

Though it may seem obvious, one should always be sure that the appropriate body is making the decision. Selectboards, for example, have virtually no role in the review process, except when pursuing enforcement is being considered. The Development Review Board has no review authority to review commercial power plants. The Planning Commission may not have authority to consider an application for subdivision without an application fee. So first check that the decision is properly yours.

Your bylaws must say *who* gets to make *which* decisions, and only as allowed by statute. For example, if you have a Development Review Board, they make all the review and approval decisions that a Planning Commission or Zoning Board of Adjustment used to make. If you don't have a

Development Review Board, statute no longer constrains you as to what body makes what decisions, and so the bylaw needs to spell it out. Also, though not commonly known, the AO can make any decision that an AMP can make, if the bylaw has so provided.

### What?

The next matter is whether the decision being sought is the correct one and the specifics of the decision. It should not be difficult to determine if the applicant is on the right track, especially if there is paid local staff, but this issue should at least be checked by someone. For example, conditional use approval and site plan approval are both *approvals* that are prerequisite to the issuance of a zoning permit. Many bylaws require both approval processes for commercial projects, so the AMP/AO must ensure that the process is being followed for both approval tracks. If flood regulations are involved in the application, the flood regulations must be satisfied before the zoning permit is issued. If an Act 250 is required, the permit processes are independent. If a state subdivision permit is required, then the state and local processes are effectively independent. If an access permit is required, that is either from the Selectboard or Road Commissioner/Foreman.

The matter of what the decision is for is a lot trickier. This can be broken into three pieces:

- What exactly is the applicant seeking permission for?
- Is this allowed under the bylaws?
- What are the applicable standards, and any ability to waive them?

Many times an applicant may not be entirely clear on what they are applying for. Sometimes this is because they are trying to hide their true intentions, but it is usually because the development is vague in their minds or they are only doing an initial phase. Since it is not easy to figure out the intentions of someone, it is best to approach all proposals on their details and request enough specifics so that any “wobble room” in the review and subsequent decision is minimized. If your standards call for review of landscaping, then there needs to be a landscaping plan on paper. This can be hand drawn, but sufficient to show what is proposed. All verbal representations should be reduced to writing *before* the final hearing is closed. If your subdivision approval requires an applicant to detail the subsequent use of the parcels (residential, commercial, etc.) then the prospective uses need to be determined or no uses allowed in the permit.

Figuring out if the proposed development is potentially compliant with your bylaw is usually straightforward. Just note what part of the bylaw allows such development. The harder cases are projects involving a pre-existing non-conformity, land in the floodplain, land in two districts, or a use that is not clearly allowed. In some of these cases, your bylaw and its definitions may be vague. For example, some bylaws allow conditional uses that are not listed but similar to those on the list for the district. Thus, you may need to make a decision about the use before the review process can proceed. Other bylaws are not clear as to what is a structure, and so things like fences and propane tanks can get appealed to AMPs. If there is not a part of the bylaw that can be referenced as providing clear authority for the project, but there is some room for discretion, then think about the project as setting a precedent and clearly

articulate your thoughts in writing and use that as a standard for such future cases. Of course, there is no need to bend things too far, and so deny projects that don't comply.

If the project is allowable and will go through review, what are the standards? It is most helpful to review these with an applicant before a hearing is warned, so that the answers needed for each standard have been provided for (at least to the applicant's satisfaction) when the hearing notice goes out. A helpful AO can smooth this process greatly. This type of assistance can also avoid delays and frustration that can lead to urges to quicken the review process, and perhaps err in haste.

Having the relevant standards written on application forms can help the applicant, and the same standards in a review sheet helps members of the AMP as they go through a review. It is very important that no question goes unanswered during the hearing, since once it is finally closed there is no ability for additional information to be provided to the review body. In order to build the basis for findings in your decision, people testifying can be put under oath, and if any matters are in dispute, then sufficient information to let the AMP/AO make its decision must be gathered.

## When?

Most review decisions must take place within certain timeframes, generally within 45 days of the close of the final hearing for AMPs as provided for in section 446b(b)(1) and within 30 days for complete permit applications for AOs as provided in section 4448(d). There is actually no statutory requirement on how fast the first hearing has to be scheduled, and there is no requirement to ever have a final hearing, but AMPs/AOs should be prompt and never

unnecessarily delay review processes out of spite. However, incomplete materials, improper notices, and legitimate scheduling difficulties happen all the time, and all parties in decisions should have a realistic idea of the time the process will require, which will help to avoid the desire to rush things.

## How?

The statute lays out in rough terms *how* the decisions of appropriate municipal panels are made in 24 VSA section 4464(b)(1):

“Decisions shall be issued in writing and shall include a statement of the factual bases on which the appropriate municipal panel has made its conclusions and a statement of the conclusions. The minutes of the meeting may suffice, provided the factual bases and conclusions relating to the review standards are provided in conformance with this subsection.”

There are practical reasons to not use minutes, since these are not final until approved (which can take weeks at least), and that is really when the appeal period begins and the decision gets mailed, though everyone will think they know what the decision is because they were there at the meeting. The other major reason for avoiding the minutes-as-decision route is that using minutes is likely a by-product of a process that lacks the clarity that comes after a good sleep, some reflection, the opportunity to dispel any anger or charm that might sway the decision, the thorough consideration of a project in private deliberations (which do not have minutes), and the ability to see the draft decision in writing. Deliberations require no outside notice, and so the AMP can meet as soon as they

desire. The AO or hired clerical help can attend deliberations and draft the decision, or a less preferred method is that a member of the review body will do this on a rotating basis.

The structure of the decision can either help or hinder its communicative purpose.

Decisions should consist of the following elements, preferably in the following logical order:

1. An introductory statement that briefly outlines the issue heard and the conclusion reached, including a description of the property in question. For example, *Joe Smith applied for conditional use in the Commercial Village District to operate a restaurant in a new building at 123 Brick Road, tax parcel 8989898. Conditional use approval is granted on 12/1/12.*
2. A listing of the dates of hearings, the parties who appeared, and witnesses, if any, and that testimony was taken and evidence accepted.
3. A clear, concise, but thorough statement of the issues involved. For example, that the use is compliant, and that the conditional use standards are met.
4. Findings of fact, which are based upon the entire record, including *consideration of* evidence, testimony, exhibits, official documents, and any other items within the record. Evidence may include testimony, records, documents, and exhibits. It is presented before the AMP/AO and made a part of the record for purposes of reaching a decision. Evidence may be accepted or excluded from the

record, depending upon the rules of evidence or other considerations.

Findings of fact are not the evidence, but are *based* upon the evidence; they are deduced or inferred from the evidence. For example, turning evidence into fact might be very straightforward: *Sally presented a landscaping plan at the hearing. This plan is labeled exhibit #3. The DRB noted there was no description of the kind of trees shown. Sally said they were all 2" dbh sugar maples. This was hand written on the plan.* And so the finding may be very straightforward: *A landscaping plan (exhibit #3) was submitted, with notations, as required by section 6.4.4.*

If it is necessary to discuss the evidence presented on particularly contentious factual issues, make certain that the finding – which should directly follow the discussion of the evidence in the written decision as presented by the parties – is clearly noted as such, so that there is no confusion between the discussion and the finding itself. For example: *Sally noted that there are plenty of trees already in front of the property so no additional plantings were needed for screening. Fred, the abutter from across the town highway, presented a picture taken in the winter showing what he claimed was the lack of screening provided by the existing trees. We find that Fred's picture is an accurate image of what current conditions would be like in the winter and that the trees do not create any visual screening at this time of year.*

All of the findings of fact, conclusions or reasons should relate in one way or another to the issues presented. Facts, conclusions or reasons not relevant in light of the issues are extraneous, and should not be included.

Findings should only be made based on evidence contained within the record, which can include evidence presented by the AMP/AO on the relevant bylaw parts or standards, etc. The DRB/AO's own private knowledge of any other item outside of the record cannot be included in the findings of fact nor used to affect the decision. The findings should explain why evidence has or has not been accepted for the purpose for which it was offered. If two witnesses contradicted each other, the choice of one over the other must be explicit, with the reasons that led to the finding set out expressly in the decision.

Findings must also be factual, and not conclusory. Conclusions may mask themselves as factual findings, so it is important to pay close attention to the intricacies of each.

5. The conclusions of law or reasons for the decision should be based only on the findings of fact, which can only be based on evidence in the record, including applicable parts of state law or the local bylaw. Where conclusions are based upon the lawful exercise of discretion, this should be clearly noted. This section of the decision allows the reader to understand why the AMP/AO decided the way they did. The reasoning put forth here should bridge the gap

between the findings of fact and the ultimate conclusion. This bridge should strive to be so strong that any future person presented with the same materials would reach the same conclusion. The conclusions are based upon the findings of fact, the controlling law, the exercise of discretion (where allowed), and the AMP/AO's judgment. Though part of this process may be subjective, the aim is to have the evidence and standards clear enough, that the subjective parts in the decision are logical and would consistently be arrived at.

Each applicable standard must be addressed, even if to say it does not apply and why. Failure to address all the issues could lead to an appeal and either reversal or remand to consider the issue. It is much easier for all involved to address the relevant matters initially, rather than requiring a return trip or appellate challenge to the decision. Remember, reviewing authorities and courts will be looking to see *why* decisions were made as to facts and law.

6. The conclusion(s), based upon the findings of fact and reasons, indicating the final statement of the AMP/AO in deciding on the matter. This final section of the decision, what many can think of as the actual "decision", should again set out the brief conclusion announced at the very beginning of the decision, albeit in greater detail referencing any materials (such as photos, plans, surveys, site plans, written letters, etc.) necessary to understand exactly what is approved. The conclusion

must be explicit and unequivocal, while also being as readable and simple as possible.

\*(The above numbered sections were adapted in part from the NY Dept. of Civil Service Hearing Officer Manual.)

Unlike the minimal instruction in 4464b to AMPs, the statute is not very clear at all on *how* AOs make their decisions except to instruct them to "administer the bylaws literally", and that they "shall not have the power to permit any land development that is not in conformance with those bylaws" (4448). The admonition to be "literal" is often taken to mean there is no discretion allowed, but this is not always the case, since "in addition to the delegation of powers authorized under this chapter, any bylaws adopted under this chapter may establish procedures under which the administrative officer may review and approve new development and amendments to previously approved development that would otherwise require review by an appropriate municipal panel. If administrative review is authorized, the bylaws shall clearly specify the thresholds and conditions under which the administrative officer classifies an application as eligible for administrative review. The thresholds and conditions shall be structured such that no new development shall be approved that results in a substantial impact under any of the standards set forth in the bylaws. No amendment issued as an administrative review shall have the effect of substantively altering any of the findings of fact of the most recent approval." (4464(c)) Luckily, the statutes are relatively clear on how AOs file decisions.

## Why?

Why issue clear decisions? The statute lays out a duty to render well-justified decisions, but that is just the legal reason to do so. An even deeper foundation is that sound and reasonable decisions that result in predictable outcomes are a matter of due process and protected by the Constitution. Additional reasons are that the entire purpose of a decision is to *give permission do a particular thing*. The clearer the decision, the more sure you can be of what you are approving. The applicant, and those affected by the project, have a right to be able to understand what has been approved, and future review bodies and courts all need to understand as clearly as possible what you did and why.

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