

1 S.166

2 Introduced by Senator Brock

3 Referred to Committee on

4 Date:

5 Subject: Land use; conservation and development; Act 250; agency of natural  
6 resources; municipal land use bylaws; environmental court; permit  
7 process

8 Statement of purpose: This bill proposes to provide for “on-the-record  
9 appeals” from Act 250 district commissions to the environmental court, at the  
10 applicant’s option; modify various Act 250 criteria to allow consideration of a  
11 development’s economic, social, cultural, recreational, or other benefits;  
12 establish a presumption in Act 250 that a project approved by a development  
13 review board complies with the local plan; require that, in Act 250, technical  
14 determinations made by agency of natural resources personnel in issuing  
15 agency permits are dispositive; provide, on appeal, for deference to technical  
16 determinations and legal interpretations of the agency of natural resources and  
17 to the legal interpretations of the natural resources board; address the effective  
18 date of local permits that are delayed by litigation; allow municipal panels  
19 issuing land use decisions to make those decisions by a majority of a quorum;  
20 require appearance at the local hearing in order to appeal the local permit; and,

1 for local permit decisions, allow delivery of notices of appeal by means other  
2 than certified mail.

3 An act relating to environmental and land use permits

4 It is hereby enacted by the General Assembly of the State of Vermont:

5 \* \* \* “On-the-Record” Appeals from Act 250 District Commissions \* \* \*

6 Sec. 1. 10 V.S.A. § 6085a is added to read:

7 § 6085a. RECORDED HEARINGS

8 (a) At the time an applicant files an application under section 6084 of this  
9 title, the applicant may submit a demand for recorded hearings, in which case  
10 any appeal under section 6089 of this title shall be a review of the record of the  
11 proceeding before the district commission in accordance with subdivision  
12 8504(h)(3) of this title.

13 (b) Within 10 calendar days of receipt of both a complete application under  
14 section 6084 of this title and a timely demand for recorded hearings under  
15 subsection (a) of this section, the district commission shall provide notice of  
16 the demand for recorded hearings in accordance with the procedures of  
17 subdivision 6084(b)(1) of this title.

18 (c) Each of the following shall apply to the review of an application for  
19 which the applicant has demanded a recorded hearing:

1           (1) The district commission shall extend the hearing schedule or take  
2           other appropriate action as necessary to provide a fair and reasonable  
3           opportunity for parties to prepare, present, and respond to evidence without  
4           creating undue delay in the review of the application.

5           (2) The district commission may require parties to submit prefiled  
6           testimony and exhibits. If the district commission requires submission of  
7           prefiled evidence, the applicant and any parties supporting the application shall  
8           submit their prefiled direct evidence first, and then other parties shall be given  
9           a reasonable opportunity to submit their prefiled direct evidence. The district  
10           commission may then allow the submission or presentation of rebuttal  
11           testimony and exhibits in the sequence and form that it reasonably determines  
12           to be appropriate.

13           (3) Unless the parties agree otherwise, the district commission in a  
14           prehearing order shall establish the type, sequence, and amount of discovery  
15           available under Rules 26–37 of the Vermont Rules of Civil Procedure, limiting  
16           the discovery permitted to that necessary for a full and fair determination of the  
17           proceeding.

18           (d) During proceedings on an application for which the applicant has  
19           demand recorded hearings, the district commission shall maintain the  
20           flexibility regarding the introduction of evidence provided by 3 V.S.A. § 810

1 and the procedural flexibility and informality that has been characteristic of  
2 district commission proceedings.

3 (e) On receipt of a request from the district commission for assistance with  
4 regard to an application for which the applicant has demanded recorded  
5 hearings, the board shall provide assistance to the district commission as  
6 necessary.

7 (f) At the expense of the applicant, the district commission shall record by  
8 video any hearing on an application for which the applicant has demanded  
9 recorded hearings. In the event that an appeal is taken from a district  
10 commission act or decision on such an application, the district commission  
11 shall provide the environmental court with the original recording of the hearing  
12 and a copy of the complete written record and shall make and preserve a copy  
13 of the original recording for the purpose of keeping a record.

14 (g) The land use panel of the board may adopt rules to implement this  
15 section.

16 Sec. 2. 10 V.S.A. § 8504(h) is amended to read:

17 (h) De novo hearing. The environmental division, applying the substantive  
18 standards that were applicable before the tribunal appealed from, shall hold a  
19 de novo hearing on those issues which have been appealed, except in the  
20 case of:

1           (1) a decision being appealed on the record pursuant to 24 V.S.A.  
2 chapter 117;

3           (2) a decision of the commissioner of forests, parks and recreation under  
4 section 2625 of this title being appealed on the record, in which case the court  
5 shall affirm the decision, unless it finds that the commissioner did not have  
6 reasonable grounds on which to base the decision;

7           (3) an act or decision of a district commission on an application for  
8 which the applicant has demanded recorded hearings under section 6085a of  
9 this title, in which case the court's review shall be on the record. Each of the  
10 following shall apply to an appeal subject to this subdivision (3):

11           (A) The court shall remand to the district commission if the district  
12 commission improperly excluded evidence, did not provide adequate notice or  
13 opportunity to be heard, or otherwise failed to comply with the requirements of  
14 3 V.S.A. chapter 25 pertaining to contested cases. The court need not remand  
15 for harmless error.

16           (B) Findings of fact shall not be set aside unless clearly erroneous.

17           \* \* \* Consideration of Economic or Other Benefits \* \* \*

18           Sec. 3. 10 V.S.A. § 6086 is amended to read:

19           § 6086. ISSUANCE OF PERMIT; CONDITIONS AND CRITERIA

20           (a) Before granting a permit, the district commission shall find that the  
21 subdivision or development:

1 \* \* \*

2 (6) Will not cause an unreasonable burden on the ability of a  
3 municipality to provide educational services, giving due consideration to the  
4 economic, social, cultural, recreational, or other benefit to the public from the  
5 development or subdivision.

6 (7) Will not place an unreasonable burden on the ability of the local  
7 governments to provide municipal or governmental services, giving due  
8 consideration to the economic, social, cultural, recreational, or other benefit to  
9 the public from the development or subdivision.

10 (8) Will not have an undue adverse effect on the scenic or natural beauty  
11 of the area, aesthetics, historic sites, or rare and irreplaceable natural areas,  
12 giving due consideration to the economic, social, cultural, recreational, or other  
13 benefit to the public from the development or subdivision.

14 \* \* \*

15 (9) Is in conformance with a duly adopted capability and development  
16 plan, and land use plan when adopted. However, the legislative findings of  
17 subdivisions 7(a)(1) through (19) of Act 85 of 1973 shall not be used as criteria  
18 in the consideration of applications by a district commission.

19 (A) Impact of growth. In considering an application, the district  
20 commission shall take into consideration the growth in population experienced  
21 by the town and region in question and whether or not the proposed

1 development would significantly affect their existing and potential financial  
2 capacity to reasonably accommodate both the total growth and the rate of  
3 growth otherwise expected for the town and region and the total growth and  
4 rate of growth which would result from the development if approved. After  
5 considering anticipated costs for education, highway access and maintenance,  
6 sewage disposal, water supply, police and fire services, and other factors  
7 relating to the public health, safety and welfare, the district commission shall  
8 impose conditions which prevent undue burden upon the town and region in  
9 accommodating growth caused by the proposed development or subdivision,  
10 giving due consideration to the economic, social, cultural, recreational, or other  
11 benefit to the public from the development or subdivision. Notwithstanding  
12 section 6088 of this title, the burden of proof that proposed development will  
13 significantly affect existing or potential financial capacity of the town and  
14 region to accommodate such growth is upon any party opposing an application,  
15 excepting however, where the town has a duly adopted capital improvement  
16 program the burden shall be on the applicant.

17 \* \* \*

18 (D) Earth resources. A permit will be granted whenever it is  
19 demonstrated by the applicant, in addition to all other applicable criteria, that  
20 the development or subdivision of lands with high potential for extraction of  
21 mineral or earth resources, will not prevent or significantly interfere with the

1 subsequent extraction or processing of the mineral or earth resources, giving  
2 due consideration to the economic, social, cultural, recreational, or other  
3 benefit to the public from the development or subdivision.

4 \* \* \*

5 (G) Private utility services. A permit will be granted for a  
6 development or subdivision which relies on ~~privately owned~~ privately owned  
7 utility services or facilities, including central sewage or water facilities and  
8 roads, whenever it is demonstrated by the applicant that, in addition to all other  
9 applicable criteria, the ~~privately owned~~ privately owned utility services or  
10 facilities are in conformity with a capital program or plan of the municipality  
11 involved, or adequate surety is provided to the municipality and conditioned to  
12 protect the municipality in the event that the municipality is required to assume  
13 the responsibility for the services or facilities, giving due consideration to the  
14 economic, social, cultural, recreational, or other benefit to the public from the  
15 development or subdivision.

16 \* \* \*

17 (J) Public utility services. A permit will be granted for a  
18 development or subdivision whenever it is demonstrated that, in addition to all  
19 other applicable criteria, necessary supportive governmental and public utility  
20 facilities and services are available or will be available when the development  
21 is completed under a duly adopted capital program or plan, an excessive or



1 uneconomic demand will not be placed on such facilities and services, and the  
2 provision of such facilities and services has been planned on the basis of a  
3 projection of reasonable population increase and economic growth, giving due  
4 consideration to the economic, social, cultural, recreational, or other benefit to  
5 the public from the development or subdivision.

6 (K) Development affecting public investments. A permit will be  
7 granted for the development or subdivision of lands adjacent to governmental  
8 and public utility facilities, services, and lands, including, but not limited to,  
9 highways, airports, waste disposal facilities, office and maintenance buildings,  
10 fire and police stations, universities, schools, hospitals, prisons, jails, electric  
11 generating and transmission facilities, oil and gas pipe lines, parks, hiking  
12 trails, and forest and game lands, when it is demonstrated that, in addition to all  
13 other applicable criteria, the development or subdivision will not unnecessarily  
14 or unreasonably endanger the public or quasi-public investment in the facility,  
15 service, or lands, or materially jeopardize or interfere with the function,  
16 efficiency, or safety of, or the public's use or enjoyment of or access to the  
17 facility, service, or lands, giving due consideration to the economic, social,  
18 cultural, recreational, or other benefit to the public from the development or  
19 subdivision.

20 \* \* \*

1       \* \* \* Rebuttable Presumption: Development Review Board Decisions \* \* \*

2       Sec. 4. 10 V.S.A. § 6086(a)(10) is amended to read:

3           (10) Is in conformance with any duly adopted local or regional plan or  
4       capital program under 24 V.S.A. chapter 117 of Title 24. In making this  
5       finding, if the district commission finds applicable provisions of the town plan  
6       to be ambiguous, the district commission, for interpretive purposes, shall  
7       consider bylaws, but only to the extent that they implement and are consistent  
8       with those provisions, and need not consider any other evidence. However, the  
9       introduction by the applicant of a final decision of a development review board  
10       approving the development or subdivision under 24 V.S.A. chapter 117 shall  
11       create a rebuttable presumption that the development or subdivision complies  
12       with the local plan.

13       \* \* \* Dispositive Determinations by the Agency of Natural Resources \* \* \*

14       Sec. 5. 10 V.S.A. § 6086(d) is amended to read:

15           (d)(1)(A) In a proceeding before a district commission on a development or  
16       subdivision, a technical determination made by the agency of natural resources  
17       in issuing any of the following permits or approvals pertaining to the  
18       development or subdivision shall be dispositive of the same determination if  
19       the district commission otherwise would have to make that determination  
20       under the criteria of subsection (a) of this section.

- 1                   (i) An aquatic nuisance control permit under section 1263a of this  
2 title.
- 3                   (ii) An individual direct discharge, indirect discharge, stormwater  
4 discharge, or underground injection control permit issued under chapter 47 of  
5 this title.
- 6                   (iii) An authorization to discharge under a stormwater general  
7 permit under chapter 47 of this title.
- 8                   (iv) A conditional use determination under section 1272 of this  
9 title and rules of the board adopted under subdivision 6025(d)(7) of this title.
- 10                  (v) A water quality certification under section 1004 of this title.
- 11                  (vi) A dam order under sections 1082 and 1086 of this title.
- 12                  (vii) An encroachment permit under 29 V.S.A. chapter 11.
- 13                  (viii) A public water system permit under section 1675 of this  
14 title.
- 15                  (ix) A hazardous waste certification under section 6606 of this  
16 title.
- 17                  (x) A hazardous waste management facility certificate of need  
18 under section 6606a of this title.
- 19                  (xi) A solid waste management facility certification under section  
20 6605 of this title.

1                   (xii) A permit to construct, modify, or operate an air contaminant  
2 source under sections 556 and 556a of this title.

3                   (xiii) An authorization pursuant to a general permit under chapter  
4 165 of this title.

5                   (B) In the case of a permit or approval issued by the agency of  
6 natural resources that is not listed in subdivision (1)(A) of this subsection, a  
7 technical determination of the agency shall be accorded substantial deference  
8 by the district commission.

9                   (2) The land use panel may by rule allow the acceptance of a permit or  
10 permits or approval of any state agency with respect to subdivisions (a)(1)  
11 through (5) of this title or a permit or permits of a specified municipal  
12 government with respect to subdivisions (a)(1) through (7) and (9) and (10) of  
13 this title, or a combination of such permits or approvals, in lieu of evidence by  
14 the applicant. A district commission, in accordance with rules adopted by the  
15 land use panel, shall accept determinations issued by a development review  
16 board under the provisions of 24 V.S.A. § 4420, with respect to local Act 250  
17 review of municipal impacts. The acceptance of such approval, positive  
18 determinations, permit, or permits shall create a presumption that the  
19 application is not detrimental to the public health and welfare with respect to  
20 the specific requirement for which it is accepted. ~~In the case of approvals and~~  
21 ~~permits issued by the agency of natural resources, technical determinations of~~

1 ~~the agency shall be accorded substantial deference by the commissions.~~ The  
2 acceptance of negative determinations issued by a development review board  
3 under the provisions of 24 V.S.A. § 4420, with respect to local Act 250 review  
4 of municipal impacts shall create a presumption that the application is  
5 detrimental to the public health and welfare with respect to the specific  
6 requirement for which it is accepted. Any determinations, positive or negative,  
7 under the provisions of 24 V.S.A. § 4420 shall create presumptions only to the  
8 extent that the impacts under the criteria are limited to the municipality issuing  
9 the decision. Such a rule may be revoked or amended pursuant to the  
10 procedures set forth in 3 V.S.A., chapter 25, the Vermont Administrative  
11 Procedure Act. The rules adopted by the land use panel shall not approve the  
12 acceptance of a permit or approval of such an agency or a permit of a  
13 municipal government unless it satisfies the appropriate requirements of  
14 subsection (a) of this section.

15 \* \* \* Deference to Agency and Natural Resources Board on Appeal \* \* \*

16 Sec. 6. 10 V.S.A. § 8504(i) is amended to read:

17 (i) Deference to agency ~~technical determinations~~ district commissions,  
18 coordinators, and board. ~~In~~ Notwithstanding the requirement of subsection (h)  
19 of this section for a de novo hearing, in the adjudication of ~~appeals~~ an appeal  
20 relating to ~~land use permits under chapter 151~~ an act or decision of the

1 secretary, district coordinator, or district commission under the provisions of  
2 law listed in section 8503 of this title, the environmental court shall:

3 (1) Defer to a technical ~~determinations~~ determination of the secretary  
4 ~~shall be accorded the same deference as they are accorded by a district~~  
5 ~~commission under subsection 6086(d) of this title unless clearly erroneous,~~  
6 except that in an appeal from a district commission, the environmental court  
7 shall treat as dispositive any technical determination of the secretary that the  
8 district commission must treat as dispositive under subdivision 6086(d)(1)(A)  
9 of this title.

10 (2) Defer to each of the following unless there is a compelling indication  
11 of error:

12 (A) An interpretation by the secretary of the enabling statutes of or  
13 rules adopted by the agency of natural resources.

14 (B) An interpretation by the district coordinator or district  
15 commission, stated in the decision being appealed, of chapter 151 of this title  
16 or the Act 250 rules adopted under that chapter by the land use panel, unless  
17 that interpretation conflicts with an interpretation of the natural resources  
18 board or either of its panels.

19 (C) An interpretation by the natural resources board of chapter 151 of  
20 this title or the rules adopted by that board or either of its panels.

1       \* \* \* Amendments Relating to Municipal Land Use Permits and Appeals \* \* \*

2       Sec. 7. 24 V.S.A. § 4449 is amended to read:

3       § 4449. ZONING PERMIT, CERTIFICATE OF OCCUPANCY, AND

4               MUNICIPAL LAND USE PERMIT

5       (a) Within any municipality in which any bylaws have been adopted:

6               (1) No land development may be commenced within the area affected  
7       by the bylaws without a permit issued by the administrative officer. No permit  
8       may be issued by the administrative officer except in conformance with the  
9       bylaws.

10              (2) If the bylaws so adopted so provide, it shall be unlawful to use or  
11       occupy or permit the use or occupancy of any land or structure, or part thereof,  
12       created, erected, changed, converted, or wholly or partly altered or enlarged in  
13       its use or structure after the effective date of this chapter, within the area  
14       affected by those bylaws, until a certificate of occupancy is issued therefor by  
15       the administrative officer, stating that the proposed use of the structure or land  
16       conforms to the requirements of those bylaws.

17              (3) No permit issued pursuant to this section shall take effect until the  
18       latest of any of the following has occurred:

19              (A) The time for appeal in section 4465 of this title has passed, ~~or in.~~

20              (B) In the event that a notice of appeal is properly filed, ~~no such~~  
21       ~~permit shall take effect until~~ adjudication of that appeal by the appropriate

1 municipal panel is complete and the time for taking an appeal to the  
2 environmental division has passed without an appeal being taken.

3 (C) If an appeal is taken to the environmental division, ~~the permit~~  
4 ~~shall not take effect until~~ the date the environmental division rules in  
5 accordance with 10 V.S.A. § 8504 on whether to issue a stay, or until the  
6 expiration of 15 days, whichever comes first.

7 (D) If the permit applies to land development that is also subject to  
8 jurisdiction under 10 V.S.A. chapter 151 and a complete application has been  
9 filed under that chapter prior to issuance of a permit under this section, the date  
10 of final decision by the district environmental commission on that application  
11 or, if that decision is appealed, the date of final decision of the environmental  
12 division or the supreme court on that appeal.

13 (4) The administrative officer or appropriate municipal panel shall grant  
14 a request to extend any permit that has taken effect under this section for a  
15 reasonable period if the land development approved in the permit is delayed by  
16 litigation or proceedings to secure other permits or to secure title through  
17 foreclosure or because of market conditions.

18 \* \* \*



1 Sec. 8. 24 V.S.A. § 4461 is amended to read:

2 § 4461. DEVELOPMENT REVIEW PROCEDURES

3 (a) Meetings. An appropriate municipal panel shall elect its own officers  
4 and adopt rules of procedure, subject to this section and other applicable state  
5 statutes, and shall adopt rules of ethics with respect to conflicts of interest.

6 Meetings of any appropriate municipal panel shall be held at the call of the  
7 chairperson and at such times as the panel may determine. The officers of the  
8 panel may administer oaths and compel the attendance of witnesses and the  
9 production of material germane to any issue under review. All meetings of the  
10 panel, except for deliberative and executive sessions, shall be open to the  
11 public. The panel shall keep minutes of its proceedings, showing the vote of  
12 each member upon each question, or, if absent or failing to vote, indicating  
13 this, and shall keep records of its examinations and other official actions, all of  
14 which shall be filed immediately in the office of the clerk of the municipality  
15 as a public record. For the conduct of any hearing and the taking of any action,  
16 a quorum shall be not less than a majority of the members of the panel, and any  
17 action of the panel shall be taken by the concurrence of a majority of the panel.  
18 However, notwithstanding the foregoing or the provisions of 1 V.S.A. § 172,  
19 an action on an application for a municipal land use permit shall be taken by  
20 the concurrence of a majority of a quorum of the appropriate municipal panel.

21 \* \* \*

1 Sec. 9. 24 V.S.A. § 4471 is amended to read:

2 § 4471. APPEAL TO ENVIRONMENTAL DIVISION

3 (a) Participation required. An interested person who has participated in a  
4 municipal regulatory proceeding authorized under this title may appeal a  
5 decision rendered in that proceeding by an appropriate municipal panel to the  
6 environmental division. Participation in a local regulatory proceeding shall  
7 consist of appearing at hearing, if held, and offering, through oral or written  
8 testimony, evidence or a statement of concern related to the subject of the  
9 proceeding. An appeal from a decision of the appropriate municipal panel, or  
10 from a decision of the municipal legislative body under subsection 4415(d) of  
11 this title, shall be taken in such manner as the supreme court may by rule  
12 provide for appeals from state agencies governed by 3 V.S.A. §§ 801-816,  
13 unless the decision is an appropriate municipal panel decision which the  
14 municipality has elected to be subject to review on the record.

15 \* \* \*

16 (c) Notice. Notice of the appeal shall be filed by certified ~~mailing~~ mail,  
17 hand delivery, or regular mail, with fees, to the environmental division and by  
18 mailing a copy to the municipal clerk or the administrative officer, if so  
19 designated, who shall supply ~~a list of interested persons~~ to the appellant within  
20 five working days a list of persons who participated in the municipal  
21 proceeding. Upon receipt of ~~the~~ this list of ~~interested persons~~, the appellant

1 shall by certified mail, hand delivery, or regular mail, provide a copy of the  
2 notice of appeal to every ~~interested~~ person who participated in the municipal  
3 proceeding, and, if any one or more of those persons are not then parties to the  
4 appeal, upon motion they shall be granted leave by the court to intervene. The  
5 appellant also shall file a certificate of service stating the name and address of  
6 each party or party representative and the date and manner of service.

7 \* \* \*

8 Sec. 10. EFFECTIVE DATE

9 This act shall take effect on passage.