

1 H.676

2 Introduced by Representative Turner of Milton

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 Act 250’s traffic criterion to require that it be  
11 waived if the municipality has assessed a fee to mitigate traffic impacts, unless  
12 the evidence demonstrates a substantial traffic impact outside the municipality;  
13 modify various Act 250 criteria to allow consideration of a development’s  
14 economic, social, cultural, recreational, or other benefits; establish a  
15 presumption in Act 250 that a project approved by a development review board  
16 complies with the local plan; require that, in Act 250, technical determinations  
17 made by agency of natural resources personnel in issuing agency permits are  
18 dispositive; provide, on appeal, for deference to technical determinations and  
19 legal interpretations of the agency of natural resources and to the legal  
20 interpretations of the natural resources board; address the effective date of  
21 local permits that are delayed by litigation; allow municipal panels issuing land

1 use decisions to make those decisions by a majority of a quorum; require  
2 appearance at the local hearing in order to appeal the local permit; and, for  
3 local permit decisions, allow delivery of notices of appeal by means other than  
4 certified mail.

5 An act relating to environmental and land use permits

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

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

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

9 § 6085a. RECORDED HEARINGS

10 (a) At the time an applicant files an application under section 6084 of this  
11 title, the applicant may submit a demand for recorded hearings, in which case  
12 any appeal under section 6089 of this title shall be a review of the record of the  
13 proceeding before the district commission in accordance with subdivision  
14 8504(h)(3) of this title.

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

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

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

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

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

20           (d) During proceedings on an application for which the applicant has  
21           demanded recorded hearings, the district commission shall maintain the

1 flexibility regarding the introduction of evidence provided by 3 V.S.A. § 810  
2 and the procedural flexibility and informality that has been characteristic of  
3 district commission proceedings.

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

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

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

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

18 (h) De novo hearing. The environmental division, applying the substantive  
19 standards that were applicable before the tribunal appealed from, shall hold a  
20 de novo hearing on those issues which have been appealed, except in the  
21 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.

1 \* \* \* Act 250 Criteria; Waiver of Traffic Criterion if Local Traffic Mitigation  
2 Fee Assessed; Consideration of Economic or Other Benefits \* \* \*

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

4 § 6086. ISSUANCE OF PERMIT; CONDITIONS AND CRITERIA

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

7 \* \* \*

8 (5) Will not cause unreasonable congestion or unsafe conditions with  
9 respect to use of the highways, waterways, railways, airports and airways, and  
10 other means of transportation existing or proposed. However, notwithstanding  
11 any other provision of law, an applicant may obtain waiver of this criterion by  
12 submitting to the district commission a final municipal land use permit issued  
13 under 24 V.S.A. chapter 117 (municipal and regional planning and  
14 development) that requires the applicant to pay a fee to mitigate traffic impacts  
15 to the municipality in which the development or subdivision will be located.  
16 On such submission, this criterion shall be waived unless the evidence  
17 demonstrates that the development or subdivision will have a substantial traffic  
18 safety or congestion impact outside the municipality.

19 (6) Will not cause an unreasonable burden on the ability of a  
20 municipality to provide educational services, giving due consideration to the

1 economic, social, cultural, recreational, or other benefit to the public from the  
2 development or subdivision.

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

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

11 \* \* \*

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

16 (A) Impact of growth. In considering an application, the district  
17 commission shall take into consideration the growth in population experienced  
18 by the town and region in question and whether or not the proposed  
19 development would significantly affect their existing and potential financial  
20 capacity to reasonably accommodate both the total growth and the rate of  
21 growth otherwise expected for the town and region and the total growth and

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

14 \* \* \*

15 (D) Earth resources. A permit will be granted whenever it is  
16 demonstrated by the applicant, in addition to all other applicable criteria, that  
17 the development or subdivision of lands with high potential for extraction of  
18 mineral or earth resources, will not prevent or significantly interfere with the  
19 subsequent extraction or processing of the mineral or earth resources, giving  
20 due consideration to the economic, social, cultural, recreational, or other  
21 benefit to the public from the development or subdivision.



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

\* \* \*

(J) Public utility services. A permit will be granted for a development or subdivision whenever it is demonstrated that, in addition to all other applicable criteria, necessary supportive governmental and public utility facilities and services are available or will be available when the development is completed under a duly adopted capital program or plan, an excessive or uneconomic demand will not be placed on such facilities and services, and the provision of such facilities and services has been planned on the basis of a projection of reasonable population increase and economic growth, giving due

1 consideration to the economic, social, cultural, recreational, or other benefit to  
2 the public from the development or subdivision.

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

17 \* \* \*

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

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

20 (10) Is in conformance with any duly adopted local or regional plan or  
21 capital program under 24 V.S.A. chapter 117 ~~of Title 24~~. In making this

1 finding, if the district commission finds applicable provisions of the town plan  
2 to be ambiguous, the district commission, for interpretive purposes, shall  
3 consider bylaws, but only to the extent that they implement and are consistent  
4 with those provisions, and need not consider any other evidence. However, the  
5 introduction by the applicant of a final decision of a development review board  
6 approving the development or subdivision under 24 V.S.A. chapter 117 shall  
7 create a rebuttable presumption that the development or subdivision complies  
8 with the local plan.

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

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

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

17 (i) An aquatic nuisance control permit under section 1263a of this  
18 title.

19 (ii) An individual direct discharge, indirect discharge, stormwater  
20 discharge, or underground injection control permit issued under chapter 47 of  
21 this title.

1                   (iii) An authorization to discharge under a stormwater general  
2 permit under chapter 47 of this title.

3                   (iv) A conditional use determination under section 1272 of this  
4 title and rules of the board adopted under subdivision 6025(d)(7) of this title.

5                   (v) A water quality certification under section 1004 of this title.

6                   (vi) A dam order under sections 1082 and 1086 of this title.

7                   (vii) An encroachment permit under 29 V.S.A. chapter 11.

8                   (viii) A public water system permit under section 1675 of  
9 this title.

10                   (ix) A hazardous waste certification under section 6606 of this  
11 title.

12                   (x) A hazardous waste management facility certificate of need  
13 under section 6606a of this title.

14                   (xi) A solid waste management facility certification under section  
15 6605 of this title.

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

18                   (xiii) An authorization pursuant to a general permit under chapter  
19 165 of this title.

20                   (B) In the case of a permit or approval issued by the agency of  
21 natural resources that is not listed in subdivision (1)(A) of this subsection, a

1 technical determination of the agency shall be accorded substantial deference  
2 by the district commission.

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

1 under the provisions of 24 V.S.A. § 4420 shall create presumptions only to the  
2 extent that the impacts under the criteria are limited to the municipality issuing  
3 the decision. Such a rule may be revoked or amended pursuant to the  
4 procedures set forth in 3 V.S.A., chapter 25, the Vermont Administrative  
5 Procedure Act. The rules adopted by the land use panel shall not approve the  
6 acceptance of a permit or approval of such an agency or a permit of a  
7 municipal government unless it satisfies the appropriate requirements of  
8 subsection (a) of this section.

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

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

11 (i) Deference to agency ~~technical determinations~~ district commissions,  
12 coordinators, and board. ~~In~~ Notwithstanding the requirement of subsection (h)  
13 of this section for a de novo hearing, in the adjudication of appeals an appeal  
14 relating to land use permits under chapter 154 an act or decision of the  
15 secretary, district coordinator, or district commission under the provisions of  
16 law listed in section 8503 of this title, the environmental court shall:

17 (1) Defer to a technical ~~determinations~~ determination of the secretary  
18 shall be accorded the same deference as they are accorded by a district  
19 commission under subsection 6086(d) of this title unless clearly erroneous,  
20 except that in an appeal from a district commission, the environmental court  
21 shall treat as dispositive any technical determination of the secretary that the

1 district commission must treat as dispositive under subdivision 6086(d)(1)(A)  
2 of this title.

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

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

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

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

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

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

16 § 4449. ZONING PERMIT, CERTIFICATE OF OCCUPANCY, AND

17 MUNICIPAL LAND USE PERMIT

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

19 (1) No land development may be commenced within the area affected  
20 by the bylaws without a permit issued by the administrative officer. No permit

1 may be issued by the administrative officer except in conformance with the  
2 bylaws.

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

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

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

13 (B) In the event that a notice of appeal is properly filed, ~~no such~~  
14 ~~permit shall take effect until~~ adjudication of that appeal by the appropriate  
15 municipal panel is complete and the time for taking an appeal to the  
16 environmental division has passed without an appeal being taken.

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



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

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

12 \* \* \*

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

14 § 4461. DEVELOPMENT REVIEW PROCEDURES

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

18 Meetings of any appropriate municipal panel shall be held at the call of the  
19 chairperson and at such times as the panel may determine. The officers of the  
20 panel may administer oaths and compel the attendance of witnesses and the  
21 production of material germane to any issue under review. All meetings of the

1 panel, except for deliberative and executive sessions, shall be open to the  
2 public. The panel shall keep minutes of its proceedings, showing the vote of  
3 each member upon each question, or, if absent or failing to vote, indicating  
4 this, and shall keep records of its examinations and other official actions, all of  
5 which shall be filed immediately in the office of the clerk of the municipality  
6 as a public record. For the conduct of any hearing and the taking of any action,  
7 a quorum shall be not less than a majority of the members of the panel, and any  
8 action of the panel shall be taken by the concurrence of a majority of the panel.

9 However, notwithstanding the foregoing or the provisions of 1 V.S.A. § 172,  
10 an action on an application for a municipal land use permit shall be taken by  
11 the concurrence of a majority of a quorum of the appropriate municipal panel.

12 \* \* \*

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

14 § 4471. APPEAL TO ENVIRONMENTAL DIVISION

15 (a) Participation required. An interested person who has participated in a  
16 municipal regulatory proceeding authorized under this title may appeal a  
17 decision rendered in that proceeding by an appropriate municipal panel to the  
18 environmental division. Participation in a local regulatory proceeding shall  
19 consist of appearing at hearing, if held, and offering, through oral or written  
20 testimony, evidence or a statement of concern related to the subject of the  
21 proceeding. An appeal from a decision of the appropriate municipal panel, or

1 from a decision of the municipal legislative body under subsection 4415(d) of  
2 this title, shall be taken in such manner as the supreme court may by rule  
3 provide for appeals from state agencies governed by 3 V.S.A. §§ 801-816,  
4 unless the decision is an appropriate municipal panel decision which the  
5 municipality has elected to be subject to review on the record.

6 \* \* \*

7 (c) Notice. Notice of the appeal shall be filed by certified ~~mailing~~ mail,  
8 hand delivery, or regular mail, with fees, to the environmental division and by  
9 mailing a copy to the municipal clerk or the administrative officer, if so  
10 designated, who shall supply ~~a list of interested persons~~ to the appellant within  
11 five working days a list of persons who participated in the municipal  
12 proceeding. Upon receipt of ~~the~~ this list of ~~interested persons~~, the appellant  
13 shall by certified mail, hand delivery, or regular mail, provide a copy of the  
14 notice of appeal to every ~~interested~~ person who participated in the municipal  
15 proceeding, and, if any one or more of those persons are not then parties to the  
16 appeal, upon motion they shall be granted leave by the court to intervene. The  
17 appellant also shall file a certificate of service stating the name and address of  
18 each party or party representative and the date and manner of service.

19 \* \* \*

20 Sec. 10. EFFECTIVE DATE

21 This act shall take effect on passage.