

**From:** Shems, Ron  
**Sent:** Tuesday, January 31, 2012 5:30 PM  
**To:** MacLean, Alex; Markowitz, Deb; Recchia, Chris; Mears, David  
**Subject:** Fwd: [vtbar\_environmental\_law] On the record review

This was just sent out on the list serve. I suggest that I set a meeting with David to explain our position, not that it will change his mind but to avoid engaging on the list serve and to act on good faith.

Ron  
Sent from my iPhone

Begin forwarded message:

**From:** David Grayck <[DGrayck@cbs-law.com](mailto:DGrayck@cbs-law.com)>  
**Date:** January 31, 2012 16:34:33 EST  
**To:** vtbar\_Environmental\_Law <[vtbar\\_environmental\\_law@intustalk.com](mailto:vtbar_environmental_law@intustalk.com)>  
**Subject:** RE:[vtbar\_environmental\_law] On the record review  
**Reply-To:** vtbar\_Environmental\_Law  
<[vtbar\\_environmental\\_law@intustalk.com](mailto:vtbar_environmental_law@intustalk.com)>

Ron,  
Is there any chance Governor Shumlin would agree to back down on his insistence that there be on the record review?  
David

David L. Grayck, Esq.  
Cheney, Brock & Saudek, P.C.  
159 State Street  
Montpelier, VT 05602

(802) 223-4000  
(802) 229-0370 (facsimile)

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**From:** Frank Kochman [<mailto:frank@kochmanlaw.com>]  
**Sent:** Tuesday, January 31, 2012 4:19 PM

**To:** vtbar\_Environmental\_Law  
**Subject:** RE:[vtbar\_environmental\_law] On the record review

Stephen Reynes' remarks pretty much nail the core objections in readily understandable terms and should be presented as written to the relevant committees.

Frank Kochman, Esq.  
F.L. Kochman, Inc.  
30 Elmwood Ave.  
P.O. Box 8084  
Burlington, VT 05402-8084

Tel: (802) 863-2640  
Fax: (802) 660-2477  
email: [frank@kochmanlaw.com](mailto:frank@kochmanlaw.com)

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**From:** Steve Reynes [mailto:SReynes@ppeclaw.com]  
**Sent:** 01/31/2012 3:30 PM  
**To:** vtbar\_Environmental\_Law  
**Subject:** [vtbar\_environmental\_law] On the record review

I agree with Mark Hall's comments below regarding on-the-record review. The trend is that District Coordinators and District Commissions have become increasingly efficient and focused on the real issues that may be presented by a land use application, which saves everyone time, money and health. Adding unnecessary complexity at the district commission level is going the other way and will cause citizen resentment. My impression is that if the bill creating Act 250 had been proposed to require on-the-record process and formality at the entry-level for land use, it would not have been enacted.

The drum-beat for on-the-record review has been beating on and off for 20 years. From the comments of the land use bar who have done an on-the-record review in a zoning appeal, the supposed big savings in time and money generally have not materialized.

There are many people in our country who are angry and frustrated with their government. The cultural incidence of that is less in Vermont, partly because our governmental institutions tend to be more accessible and we tend to do things in a more personal and respectful way. Requiring on-the-record process for all land use applications would, in my judgment, be a giant step in the wrong direction for Vermont, creating more frustration and expense, and greater alienation between citizens and their local and regional land use institutions.

Steve

Stephen A. Reynes  
Primmer Piper Eggleston & Cramer PC  
100 E. State Street  
Montpelier, VT 05602  
Tel: (802) 223-2102

Fax: (802) 223-2628  
[sreyes@ppeclaw.com](mailto:sreyes@ppeclaw.com)

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**From:** Mark G. Hall [mailto:MHall@pfclaw.com]  
**Sent:** Tuesday, January 31, 2012 2:03 PM  
**To:** vtbar\_Environmental\_Law  
**Subject:** RE: [vtbar\_environmental\_law] h.59

I don't see how "on the record" review is going to make any significant difference in length of time or cost in permitting process. District Commission proceedings will become much longer and more litigious and citizens trying to participate will be lost in a process. Moreover, unless there are significant structural changes/investments in the EC, it's still going to take a 8-12 months to rule on an appeal on the record when you consider ordering a transcript, transmitting the record to the EC and dealing with all the other trappings of an appeal. Utilizing the VRAP, the Vermont Supreme Ct. can't reach a decision on the rocket docket in less than eight months. I don't see the EC with two judges being more productive utilizing the same rules. With an appeal from the EC to the Supreme Court, the developer is still going to face an automatic 3 year process regardless of the merits of any claim if an opposition is determined.

Cost wise, I've found Commission hearings move very quickly, usually only one or two days, even in contested projects. Evidence is usually submitted by report, so there are not huge expert expenses involved that I would associate with putting on live testimony on the stand. My sense is that going to on-the-record will result in a lot more delay upfront as opposing parties seek to gain time to get attorneys/experts on board and accommodation from the developer with regard to disclosures. As the hearings become more court-like, it will take many more days and dollars to deal with the new formalities. There may be some small savings by switching to on-the-record, but I don't think it's going to be anywhere near the amounts sponsors of the bill are anticipating.

If the intent of the legislation is to streamline and economize the process, I don't see this proposal helping much. All it does is set up the EC as an intermediate appellate court. Perhaps it would be work as intended if the Legislature were to dispense with one level of appeal. In any case, if the intent is save time and cost, it would be more

beneficial to work on tweaking the existing system to shorten timelines in the process by limiting discovery, using masters, etc.

Paul Frank + Collins P.C.

One Church Street | P.O. Box 1307 | Burlington, VT 05402-1307

phone 802.658.2311 | fax 802.658.0042 | [www.pfclaw.com](http://www.pfclaw.com) |

[mhall@pfclaw.com](mailto:mhall@pfclaw.com)

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**From:** Gerry Tarrant [mailto:gtarrant@tgrvt.com]

**Sent:** Tuesday, January 31, 2012 12:06 PM

**To:** vtbar\_Environmental\_Law

**Subject:** RE: [vtbar\_environmental\_law] h.59

Any other thoughts on H.59? I don't think there is a concern. Anyone?

In terms of Senate Natural Resources & Energy Committee and the permitting reform bill, I understand the committee is taking testimony again on its bill this Friday. The Administration continues to support "on-the-record" review with Ernie Pomerleau and the Lake Champlain Chamber in support. There seems to be less support for a "super" administrative panel and I am not aware of anyone supporting replacing the Environmental Division but the Senate Natural Resources & Energy Committee was fairly strong on that issue two weeks ago. I'll know more after Friday.

It's difficult to see where all the parts fit at this point. I anticipate that some bill will be passed out of the Senate, and likewise some bill will be voted out of the House and find its way over to the Senate. I'll provide an up-date early next week.

Gerry

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**From:** Tom Little [mailto:TLittle@VSAC.org]

**Sent:** Tuesday, January 31, 2012 11:14 AM

**To:** vtbar\_Environmental\_Law

**Subject:** RE: [vtbar\_environmental\_law] h.59

<http://www.leg.state.vt.us/docs/2012/bills/Intro/H-059.pdf>

A link to H. 59 is above. It passed the House with no amendments to the bill as introduced, so far as I can tell.

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**From:** George T. McNaughton [mailto:gtmncn@vermontel.net]

**Sent:** Tuesday, January 31, 2012 10:53 AM

**To:** vtbar\_Environmental\_Law  
**Subject:** RE: [vtbar\_environmental\_law] h.59

Do you have a copy of this bill, or is it contained in the general bill?

**GT McNaughton**

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**From:** Jon Anderson [<mailto:janderson@vtlaw1.com>]  
**Sent:** Tuesday, January 31, 2012 10:33 AM  
**To:** vtbar\_Environmental\_Law  
**Subject:** [vtbar\_environmental\_law] h.59

I continue to be concerned about this bill, which passed out of the house last Friday. I read it as allowing the human rights commission to investigate and to bring suit, and others to bring suit, concerning any land use decisions that discriminate against affordable housing. If the statute is to be read narrowly I wonder what problem it is seeking to solve. If the statute is read broadly, can someone argue against most land use laws? For example does the protection of deer yards result in discrimination against affordable housing by shrinking the amount of land available for housing construction increasing the cost housing resulting in affordable housing being harder to build? How about minimum lot size requirements?

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**From:** Jim Goss [<mailto:jgoss@kenlanlaw.com>]  
**Sent:** Wednesday, January 25, 2012 7:35 AM  
**To:** vtbar\_Environmental\_Law  
**Subject:** RE: [vtbar\_environmental\_law] On the record review

That is a solution in search of a problem.

James P.W. Goss, Esq.  
Kenlan, Schwiebert, Facey & Goss, P.C.  
71 Allen St.  
Box 578  
Rutland, VT 05701  
Direct Dial: 802.665.2730  
O: 802.773.3300  
Fx: 802.775.1581  
Email: [Jgoss@Kenlanlaw.com](mailto:Jgoss@Kenlanlaw.com)

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-----Original Message-----

From: Frank Kochman [<mailto:frank@kochmanlaw.com>]  
Sent: Tuesday, January 24, 2012 4:52 PM  
To: vtbar\_Environmental\_Law  
Subject: RE: [vtbar\_environmental\_law] On the record review

There are lots of bad land use decisions made every day; however, in 35 years I've never seen one that turned on such factors -- or in which these kinds of discriminatory factors were alleged. Has anyone else?

Frank Kochman, Esq.  
F.L. Kochman, Inc.  
30 Elmwood Ave.  
P.O. Box 8084  
Burlington, VT 05402-8084  
Tel: (802) 863-2640  
Fax: (802) 660-2477  
email: [frank@kochmanlaw.com](mailto:frank@kochmanlaw.com)

---

From: Jon Anderson [[janderson@vtlaw1.com](mailto:janderson@vtlaw1.com)]  
Sent: Tuesday, January 24, 2012 4:40 PM  
To: vtbar\_Environmental\_Law  
Subject: RE: [vtbar\_environmental\_law] On the record review

The committee may wish to look at h.59, which has administration support. The bill would prohibit discrimination in land use decisions based on certain factors as gender, sexual orientation etc. Although I can't imagine advocating for the consideration of such issues, i wonder how much additional time and expense would be taken up showing the absence of such considerations.

From: David Grayck [<mailto:DGrayck@cbs-law.com>]  
Sent: Thursday, January 19, 2012 12:37 PM  
To: vtbar\_Environmental\_Law  
Subject: RE: [vtbar\_environmental\_law] On the record review

Ron,

Thank you for your thoughtful comments. I am sure you understand that there are many of us who disagree with your analysis. Ultimately, it is a policy choice which the Legislature will make. However, one issue which you did not address is Gerry's statement that the Administration will push hard for on-the-record review, apparently with the support, if not the insistence, of the Lake Champlain Chamber of Commerce. Could you either confirm or deny this?

Regards,  
David

David L. Grayck, Esq.  
Cheney, Brock & Saudek, P.C.  
159 State Street  
Montpelier, VT 05602

(802) 223-4000  
(802) 229-0370 (facsimile)

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From: Shems, Ron  
[\[mailto:Ron.Shems@state.vt.us\]](mailto:Ron.Shems@state.vt.us)<[mailto:\[mailto:Ron.Shems@state.vt.us\]](mailto:Ron.Shems@state.vt.us)>  
Sent: Thursday, January 19, 2012 12:30 PM  
To: vtbar\_Environmental\_Law  
Subject: RE: [vtbar\_environmental\_law] On the record review

Dear Colleagues,

I want to address concerns that have been voiced regarding on-the-record v. de novo appeals of District Commission decisions.

First, please note that there are several forms of "on-the-record" appeals. For example, a modified on-the-record review could allow new evidence when a standard (e.g. good cause) is met. Evidence allowing project modifications could be allowed to address new issues. We do not want on-the-record to result in remand "ping pong," but rather a fair and pragmatic process. I am very interested in hearing your views on various types of on-the-record review.

Second, projects that are appealed now require enormous duplication at significant cost, delay, and effort. Fairness can be achieved without such duplication, and on-the-record review can avoid this duplication.

Third, concern has been expressed that on-the-record review would require "frontloading" one's proposal or concerns. Up-front preparation by all parties makes for a more efficient and transparent process. Indeed, the failure to present issues up front leads to much of the frustration, cost, delay and unnecessary duplication described in the many comments we received over the summer. Having parties think through their positions at the start is to be encouraged, with relevant issues disclosed and resolved at the District Commission level - as they should be. We recognize that there has to be sufficient notice and time to allow parties to best address applications before the District Commissions. Detailed vetting of issues should not first take place on appeal.

Fourth is the concern that all criteria or issues will have to be addressed before the District Commission. That is already the case. Applications are not complete unless all relevant criteria are addressed, and permit decisions are not made until all material issues are resolved. Applications that address all issues up front are more likely to be processed as minors, without hearing and which cannot be appealed. At hearing, applicants have ample opportunity to respond to issues, thus avoiding the need to "overly" address them in the application. Indeed, 80% of applications are processed as minors.

Fifth, comments collected over the summer overwhelmingly confirm that the District Commission process works very well and that very few changes would be needed to create a record while maintaining the Commissions' accessible and applicant/citizen-friendly process. The District Commissions are poised to create sufficient records. Further training, adequate A/V equipment, and the backstop of an appropriate standard for allowing some new evidence on appeal will assure fairness, efficiency, and transparency before the proven District Commission process.

I am happy to discuss this in greater detail with any of you or a group that can report back to the full Environmental Section.

--Ron

Ronald A. Shems  
Chair  
Vermont Natural Resources Board  
802 828 5440  
[www.nrb.state.vt.us](http://www.nrb.state.vt.us)<<http://www.nrb.state.vt.us>>

From: Lawrence Slason [<mailto:lawrencelason@salmon->

[nostrand.com\]](mailto:lawrenceslason@salmon-nostrand.com)<<mailto:lawrenceslason@salmon-nostrand.com>>

Sent: Thursday, January 12, 2012 3:32 PM

To: vtbar\_Environmental\_Law

Subject: RE: [vtbar\_environmental\_law] On the record review

Gerry, I remain of the opinion that on the record appeals will force applicants to "front load" their presentations to cover all potential issues. This will produce work for lawyers and consultants and may be more expensive for applicants, particularly in simpler cases where appeals are less likely. In any case where a person is granted party status or if a person asks for and is denied party status then the applicant proceeds at its peril unless it produces "substantial evidence" sufficient to withstand appellate review on each of the criteria at issue.

Additionally, the cost of post hearing transcripts, preparation of the printed case and preparation of the briefs and reply briefs required for appellate review are time consuming and expensive. I am not convinced the business community knows what it is getting into.

Larry

From: Gerald Tarrant [<mailto:GTarrant@tgrvt.com>]

Sent: Thursday, January 12, 2012 2:51 PM

To: vtbar\_Environmental\_Law

Subject: [vtbar\_environmental\_law] On the record review

Despite what I see as fairly broad support for a de novo appeal before the Environmental Court I understand the Administration apparently believes the development community desires legislation for on-the-record review. Apparently this is the result of a recent meeting with the Lake Champlain Chamber of Commerce. I understand the Administration will push for on-the-record review.

I believe Will Dodge has clients who have expressed strong interest in on the record appeals. No one else has.

As I tried to explain to Sen. Brock yesterday when he asked why there was a difference between the businesses that had approached him for on the record review and the lawyers who apparently do not favor it, I responded that on-the-record review is often times perceived as saving time and money because the applicant only sees shortening the Environmental Court review (by eliminating a trial). They do not appreciate that if they do not undergo the arduous task of addressing each and every issue at the environmental commission level that they may face greater risk at the appellate task. Since most cases are not appealed there may be a large unnecessary expenditure of money by applicants. (More legal bills, more consulting bills, unnecessary studies, etc.) I believe, if my sources are correct, the Administration in trying to accommodate business interests may be making it more difficult on the business it wishes to help.

I sense the lawyers who have thought this issue through should contact their clients to discuss this. I'd be glad to help but this also is an issue some of you should undertake yourselves.

Also please understand that on-the-record review was allowed back in 2002 in a pilot program and I believe no request was made. I'm not sure whether that was because the applicant didn't want to do so or because the legislation required approval by all of the parties and there was never any agreement to do so. In any event it wasn't popular.

See

<http://www.leg.state.vt.us/database/status/summary.cfm?Bill=H%2E0475&Session=2002>

On the record review sounds great. Is it? I expect to be called to testify again, but others should know that this issue is being pushed by at least one Chamber and the Administration.

Gerry

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