April 27, 2024 Special Joint Meeting of the Selectboard, Planning Commission, Development Review Board, and Conservation Commission

Selectboard Present:	Tim McGowan, Amanda Allen
Planning Commission Present:	Jo Jackson, Katie Manaras, Chris Boyle, Ken Pohlman
Development Review Board Present:	Nicole Lee, James Needham
Other Officials Present:	Steve Gutowski, Zoning Administrator
Public Present in Person:	Jim Dumont, Karen Lueders
Public Present via Zoom:	Stacey Dobek, Sarah Laird, Marilyn Ganahl, Ken Stockman, Lisa Nading

---

Meeting called to order at 9:03am by Jo Jackson.

1. **Approve Agenda**

Jo moves to approve agenda; Chris seconds; no discussion.

Motion passes 4-0.

2. **Public Comment**

No public comment.

3. **New Business**

Jim Dumont gave a presentation on "Introduction to Zoning, Planning and Open Meeting Law: Training and Open Discussion." See attached outline.

Adjourn

Jo moves to adjourn at 11:08am; Katie seconds; no discussion.

- 4-0 in favor; motion passes.

Respectfully submitted,

Chris Boyle

Secretary

LINCOLN PLANNING COMMISSION & DEVELOPMENT REVIEW BOARD TRAINING

Jim Dumont 4/26/24

1. ZONING ORDINANCE LANGUAGE MAY NOT MEAN WHAT YOU THINK – THE QUECHEE TEST.

Most zoning ordinances contain a conditional use standard barring "adverse impacts" or "undue adverse impacts" on the character of the area.

a. Dictionary definitions:

Adverse is "causing harm: harmful" (Merriam-Webster);*undue* is "exceeding or violating propriety or fitness: excessive." (Merriam-Webster) Can a Planning Commission or DRB rely on these dictionary definitions when drafting a conditional use ordinance, or when determining whether there will be an undue adverse impact on the character of the area from a proposed land use? No!

b. The Vermont Environmental Board does not use the dictionary definitions in applying Act 250 Criterion 8, which bars land uses with "undue adverse impact" on aesthetics.

Starting with the 1985 Environmental Board decision in *In re Quechee Lakes Corp.*, the Environmental Board that administered Act 250 developed a two-prong test when applying "undue adverse impact." *In re Quechee Lakes Corp.,* Permit Nos. 3W0411-EB &3W0439-EB, Findings of Fact, Concl. of Law & Order, at 18 (Vt. Envtl. Bd. Nov. 4, 1985).

First, is the proposed use adverse because it does not "fit" within or is not in harmony with the exiting context? If not "adverse," that ends the analysis. If the impact is adverse, is the adverse impact undue? An impact is undue if it:

i) would be shocking or offensive to the average person, or
ii) violates a clear written community standard protecting the aesthetics of the area, or
iii) it fails to utilize reasonable mitigation.

A recent example: *In Re Katzenbach Act 250 Permit* (Vt Supreme Ct 2022)

c. The Vermont courts have interpreted the conditional use standard in zoning to be the same as the Act 250 Criterion 8 standard even if the ordinance refers to "adverse impact" rather than "undue adverse impact"

Conditional use ordinances usually refer to either an adverse impact on the character of the area, or to an undue adverse impact on the character of the area. In either event, the courts hold that the Quechee test applies. Recent example: *In re Andreen CU Permit (Env'l Division of the Superior Court 2018)*

d. How is "adverse" (the first prong of the test) decided?

The *Quechee* test first requires the court to determine whether the proposed project will have any adverse effect, made by analyzing whether it will be "in harmony with its surroundings." This determination is based on the following factors for a **visual** impact:

1. What is the nature of the project's surroundings? Is the project to be located in an urban, suburban, village, rural or recreational resort area? What land uses presently exist? What is the topography like? What structures exist in the area? What vegetation is prevalent? Does the area have particular scenic values?

2. Is the project's design compatible with its surroundings? Is the architectural style of the buildings compatible with other buildings in the area? Is the scale of the project appropriate to its surroundings? Is the mass of structures proposed for the site consistent with land use and density patterns in the vicinity?

3. Are the colors and materials selected for the project suitable for the context within which the project will be located?

4. Where can the project be seen from? Will the project be in the viewer's foreground, middleground or background? Is the viewer likely to be stationary so that the view is of long duration, or will the viewer be moving quickly by the site so that the length of view is short?

5. What is the project's impact on open space in the area? Will it maintain existing open areas, or will it contribute to a loss of open space?

The Environmental Board stated that all of these factors must be weighed collectively in deciding whether the proposed project is "in harmony with – i.e., 'fits' – its surroundings." The land uses which surround a project are "crucial to the analysis." "The same building which may add to the aesthetic qualities of an urban area may detract from those qualities in a rural setting… The visual impact of a single large building may be lessened if its mass is broken up into several smaller structures." Certain types of land forms are "especially sensitive to change, because they tend to be visible from a wide area or they are seen by large numbers of people. These include ridgelines, steep slopes, shorelines and floodplains."

For a **noise** impact, the standard is less clear. This is because of uncertainty about how to measure noise and how to evaluate the harm caused by noise. Do you look at the maximum sound level, or the average, or both? Do you use the maximum during an eighth of a second (the limit of what a human ear can distinguish) or do you average the noise over an entire second or over a minute or over a ten-minute period or during an 8-hour nighttime period, or over the course of a year? A single gunshot, for example, may occupy an eighth of a second, if you average it over a second the value will be lower.

Do you use "A-weighted" noise measurements and modeling alone, or do you adjust the A-weighting?

Generally, the courts have held, noise is adverse where it exceeds 70 dBA (Lmax) at the property line and 55 dBA (Lmax) at surrounding residences and outside areas of frequent human use. There is debate about whether the "maximum" is split-second or whole-second.

It is unlikely that a noise impact can be evaluated without expert testimony from a noise engineer. Visual impacts often are addressed by landscape architects, architects, or other experts, and may not require an expert in all cases.

e. What is a clear written community standard (the second part of the second prong)?

The most common clear written community standards are Town Plans and Regional Plans. Others may be the documents creating a historic design district or a municipal or state scenic road designations.

Whatever the document, the language must be specific and unambiguous rather than visionary or aspirational (*JAM Golf,* 2008) and it must be designed to preserve existing characteristics rather than planned future characteristics. *In re Zaremba Group* (2015). Sometimes a Town Plan is also used to evaluate whether a project's impacts are "adverse" (the first prong of the test).

The "clear written community standards" are for an *area*, not for the entire town (e.g., *Rutland Renewable Energy,* 2016) A standard that generally applies to an entire town will not be used.

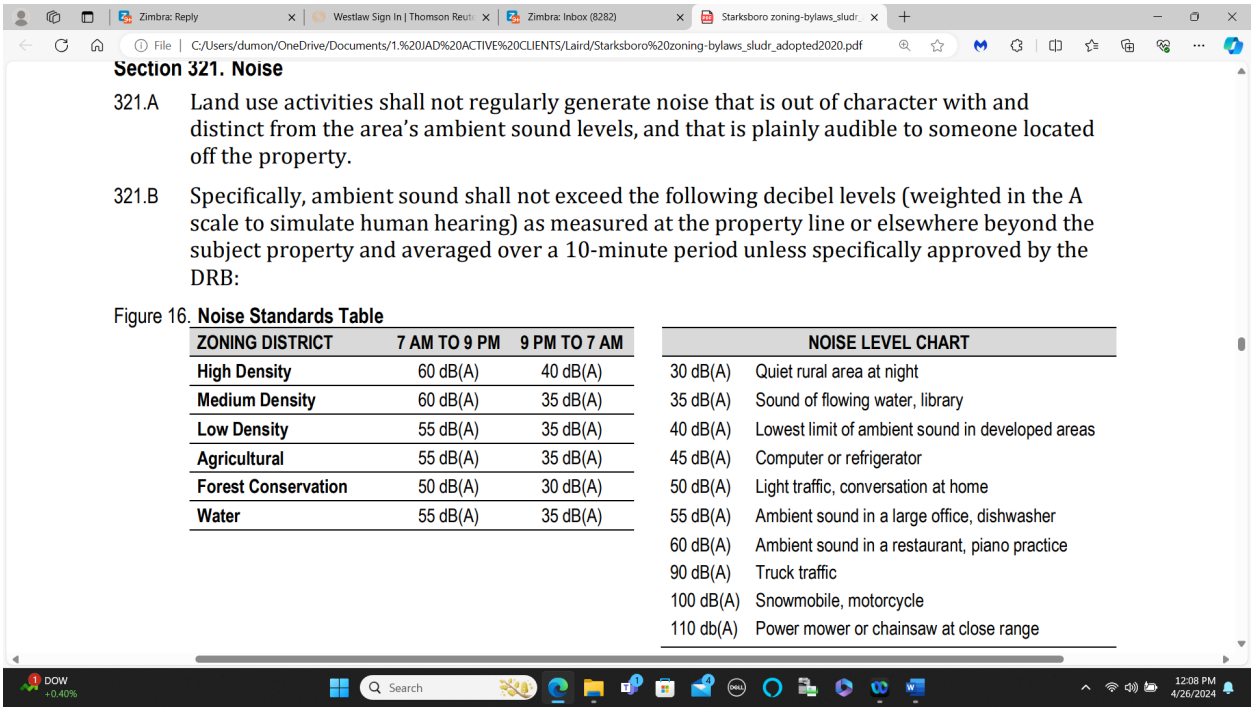
f. Specific standards that avoid the complications of the "undue" and "area" issues

However, bear in mind that the "area" limitation (adopted from Act 250) is part of determining whether there will be an undue adverse impact *on the character of the area*. The conditional use portion of a zoning ordinance can be written that provides clear, written aesthetic (visual, noise, dust, etc.) standards for an entire town that are *not* restricted to the character of the area. It could be "no undue adverse impact on the quality of the New Haven River" or "no undue adverse impact on the natural appearance of Mount Abraham when viewed from public roads and private property in Lincoln," or any other natural or aesthetic resource that the Town wants to protect so long as the standard is *specifically spelled out*.

For example: Not "should preserve Lincoln's scenic viewshed," but "no structure above 1800 feet in elevation shall be permitted if it will be recognizable as a residence or other manmade structure by persons on public roads or at private residences in Lincoln."

In lieu of "no undue adverse impact," a conditional use ordinance can contain performance standards. A common one is for noise, such as "no nighttime noise greater than 55 dbA Lmax at the property line." This means no nighttime noise greater than 55 decibels, A-weighted, either for an eighth of a second or a averaged second.

Starksboro's zoning has a great example of performance standards for noise.



Section 321. Noise

321.A Land use activities shall not regularly generate noise that is out of character with and distinct from the area's ambient sound levels, and that is plainly audible to someone located off the property.

321.B Specifically, ambient sound shall not exceed the following decibel levels (weighted in the A scale to simulate human hearing) as measured at the property line or elsewhere beyond the subject property and averaged over a 10-minute period unless specifically approved by the DRB:

Figure 16. **Noise Standards Table**

ZONING DISTRICT	7 AM TO 9 PM	9 PM TO 7 AM
High Density	60 dB(A)	40 dB(A)
Medium Density	60 dB(A)	35 dB(A)
Low Density	55 dB(A)	35 dB(A)
Agricultural	55 dB(A)	35 dB(A)
Forest Conservation	50 dB(A)	30 dB(A)
Water	55 dB(A)	35 dB(A)

NOISE LEVEL CHART	
30 dB(A)	Quiet rural area at night
35 dB(A)	Sound of flowing water, library
40 dB(A)	Lowest limit of ambient sound in developed areas
45 dB(A)	Computer or refrigerator
50 dB(A)	Light traffic, conversation at home
55 dB(A)	Ambient sound in a large office, dishwasher
60 dB(A)	Ambient sound in a restaurant, piano practice
90 dB(A)	Truck traffic
100 dB(A)	Snowmobile, motorcycle
110 db(A)	Power mower or chainsaw at close range

This has two parts – a general standard, in 321.A, and specific standards in 321.B. The ordinance specifies that the limits are a ten-minute average, and has standards for nighttime that are stricter than daytime.

3. AMBIGUITY, VAGUENESS AND DISCRETION

The challenge of writing enforceable "clear written community standards" for the Quechee test and for conditional use review generally is part of a larger issue—the problem of ambiguity in all aspects of writing a zoning ordinance.

Two principles govern. First, Vermont court decisions have rejected zoning ordinances that lack concrete standards so that a DRB or a zoning administrator is not exercising discretion without definite standards; broad or general standards are deemed to be aspirational or visionary statements and are not enforceable. Second, any ambiguity in an ordinance is interpreted in favor of the landowner. These issues show up in at least four ways:

A. Standards that are applied during review such as conditional use review. This issue overlaps with the "clear written" standard of Quechee. Whether conditional use standards are too vague may be the most important, recurring, vagueness problem in Vermont zoning caselaw. (*Town of Westford v. Kilburn,* 1973; *In re Handy,* 2000; *JAM Golf*, 2008)

Westford v. Kilburn: "When the Board of Adjustment exercises this discretion, guiding standards assure all parties concerned it has been exercised in a proper manner. When no such guiding standards are spelled out by the legislative body, the door is opened to the exercise of this discretion in an arbitrary or discriminatory fashion."

Handy: "But a grant of flexibility to the municipality is constitutional only if it is accompanied by some ability of landowners to predict how discretion will be exercised and to develop proposed land uses accordingly. Flexibility cannot be a synonym for ad-hoc decision making that is essentially arbitrary. We cannot ignore that in a small town environment, the people involved, and affected by, the decision-making process have frequently had extensive interaction with each other, and the use of flexibility may reflect that interaction rather than neutral, predictable, and universal administrative standards."/

Therefore, one must get into the weeds when writing the ordinance. Use concrete written standards for aesthetics, noise loudness, noise frequency, water pollution, pedestrian safety, etc. that are not just visionary or aspirational. Again, Starksboro is a good example, for noise and for other impacts.

B. Standards that govern whether an application must undergo conditional use review. This has been a big issue recently for Lincoln. If a proposed use is not specifically listed as subject to conditional use review, but is similar, is it subject to conditional use review or is it permitted as of right? A well-drafted ordinance takes care of this problem. Lincoln's does not.

C. Writing DRB decisions. Any ambiguity or vagueness in the decision will be interpreted in favor of the landowner/applicant. What, exactly is being approved of? Is it only what was stated in the application? Or is it what was testified to by the applicant during the hearing? If the latter, what record is there of what the testimony was, so that in applying the permit decades later the town or neighbors know what it is that was approved? Or is it what was shown in written plans submitted by the applicant weeks or months after the application was filed? It this is the answer, will the plans be kept, and kept securely, in the zoning files for decades? A well-drafted decision avoids all these problems by stating explicitly that the project being approved of consists of what was described by the applicant in documents X, Y and Z.

D. Writing conditions in DRB decisions. Imposition of conditions may be critical to successful zoning, such as conditions requiring mitigation (e.g., stormwater disposal or landscaping) and conditions requiring testing to ensure that other conditions are working (such as traffic studies). Conditions that are not specific are deemed unenforceable by the courts, and conditions that retain DRB authority to supervise, modify or reject some aspect of the project in the future have been deemed unlawful by the courts.

For reasons addressed below in more detail, the conditions imposed by a DRB may be the most important part of a permit.

3. THE BASIC TOOLS, AND HOUSING

A. Uses permitted as of right, conditional use review, site plan review, PUD review, variances, waivers, setbacks and minimum lot size.

B. Dillon's Rule. If it's not authorized by the zoning enabling act (Chapter 117 of Title 24), then it probably can't be in the zoning ordinance.

C. What zoning can do (address any topics set forth in Chapter 117) and cannot do (exceed the authority granted in Chapter 117, for example by failing to allow nonconforming "grandfathered" uses) or by trying to regulate state-owned, municipally-owned, school, and other facilities beyond what is allowed by 4413:

> (a)(1) The following uses may be regulated only with respect to location, size, height, building bulk, yards, courts, setbacks, density of buildings, off-street parking, loading facilities, traffic, noise, lighting, landscaping, and screening requirements, and only to the extent that regulations do not have the effect of interfering with the intended functional use:
> (A) State- or community-owned and -operated institutions and facilities;
> (B) public and private schools and other educational institutions certified by the Agency of Education;
> (C) churches and other places of worship, convents, and parish houses;
> (D) public and private hospitals;
> (E) regional solid waste management facilities certified under 10 V.S.A. chapter 159;
> (F) hazardous waste management facilities for which a notice of intent to construct has been received under 10 V.S.A. § 6606a; and
> (G) emergency shelters.

.

D. What Plans can do

- required as the basis for zoning
- standards in a plan can be incorporated into zoning as part of conditional use review if that is was the zoning ordinance says
- Use in Act 250, if correctly written – must state that it is a standard, not a goal
- Use in Section 248 cases (electric utility, electric transmission lines, gas transmission lines, wind turbines, solar, etc.)

E. Housing for low income citizens. Statute section 4412 since 2004 has prohibited bylaws that have the "effect" of excluding low income housing. No court reported Vermont case has ever raised this issue. Lots of ongoing statutory changes in Vermont. In other states this has been litigated, notably as an equal protection constitutional issue. *Southern Burlington' County N.A.A.C.P. v. Township of Mount Laurel,* 67 N.J. 151, 336 A.2d 713 (1975), *cert. denied* and *app. dismd* 423 U.S. 808, 96 S.Ct. 18, 46 L.Ed.2d 28 (1975), which case is popularly referred to as *Mount Laurel* I; and, *Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel,* 92 N.J. 158, 456 A.2d 390 (1983), which case is popularly referred to as *Mount Laurel* II; *Berenson v. Town of New Castle,* 38 N.Y.2d 102, 110, 378 N.Y.S.2d 672, 341 N.E.2d 236 (1975)

5. INTERESTED PERSONS

24 VSA § 4465:

"(b) As used in this chapter, an "interested person" means any one of the following:
(1) A person owning title to property, or a municipality or solid waste management district empowered to condemn it or an interest in it, affected by a bylaw, who alleges that the bylaw imposes on the property unreasonable or inappropriate restrictions of present or potential use under the particular circumstances of the case.

(2) The municipality that has a plan or a bylaw at issue in an appeal brought under this chapter or any municipality that adjoins that municipality.
(3) **A person owning or occupying property in the immediate neighborhood of a property that is the subject of any decision or act taken under this chapter, who can demonstrate a physical or environmental impact on the person's interest under the criteria reviewed, and who alleges that the decision or act, if confirmed, will not be in accord with the policies, purposes, or terms of the plan or bylaw of that municipality.**
(4) A**ny 10 persons who may be any combination of voters, residents, 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. For purposes of this subdivision, an appeal shall not include the character of the area affected if the project has a residential component that includes affordable housing.**
(5) Any department and administrative subdivision of this State owning property or any interest in property within a municipality listed in subdivision (2) of this subsection, and the Agency of Commerce and Community Development of this State."

What does subsection (4) really mean? Does it authorize any 10 persons, regardless of the impacts on them? Judge Walsh said no (*Capitol Plaza*). Pending legislation may change this.

6. ETHICS, FAIRNESS AND OPEN MEETINGS

DRB should adopt rules that make clear its obligations and duties, for DRB members to follow and for members of the public to rely on. The rules also would be a good place to include, and make clear, the duties imposed by the Open Meetings Law.

A. Ex parte communications. The rules should prohibit discussing a future or pending application with anyone – the zoning administrator, family members, Regional Planning Commission staff, the applicant, opponents - outside of a duly noticed meeting. This is prohibited "ex parte" communication. If a DRB member has questions about the law or the facts, raise them during the open meeting, not before and not after. Some DRBs open each meeting by asking each member to state whether they have had any ex parte communications. Only exception is a lawyer who works for the DRB. If an ex parte communication has occurred, that member must recuse themselves unless all interested persons and the applicant waive the objection.

B. Conflicts of interest should be set out in the rules, which will require recusal unless all interested persons and the applicant waive the objection.

C. Rules should state that all witnesses before the DRB will be sworn by a notary, JP, etc.

D. Rules should make clear that persons who are interested persons can question witnesses and present their own witnesses. Persons who are neither the applicant nor an interested person can speak (see next) but not question witnesses or present witnesses. Rules

should state that interested person status will be ruled on on the record of a hearing or in the minutes or in a written decision.

E. Rules should make clear the requirements in the Open Meetings Law for minutes (see below).

F. Rule should set forth the Open Meeting Law standards for when members of the public who are not interested persons can speak (see below).

G. Deliberative sessions can be public or nonpublic. That is a case by case decision for DRB to make when it is on the record in an open meeting, according to the Open Meetings Law. If the session will not be public, the zoning administrator must be excluded. Rules should make this explicit.

Here is the governing statute:

§ 312. Right to attend meetings of public agencies

(a)(1) All meetings of a public body are declared to be open to the public at all times, except as provided in section 313 of this title. No resolution, rule, regulation, appointment, or formal action shall be considered binding except as taken or made at such open meeting, except as provided under subdivision 313(a)(2) of this title. A meeting of a public body is subject to the public accommodation requirements of 9 V.S.A. chapter 139. A public body shall electronically record all public hearings held to provide a forum for public comment on a proposed rule, pursuant to 3 V.S.A. § 840. The public shall have access to copies of such electronic recordings as described in section 316 of this title.

(2) Participation in meetings through electronic or other means.

(A) As long as the requirements of this subchapter are met, one or more of the members of a public body may attend a regular, special, or emergency meeting by electronic or other means without being physically present at a designated meeting location.

(B) If one or more members attend a meeting by electronic or other means, such members may fully participate in discussing the business of the public body and voting to take an action, but any vote of the public body that is not unanimous shall be taken by roll call.

(C) Each member who attends a meeting without being physically present at a designated meeting location shall:

(i) identify himself or herself when the meeting is convened; and

(ii) be able to hear the conduct of the meeting and be heard throughout the meeting.

(D) If a quorum or more of the members of a public body attend a meeting without being physically present at a designated meeting location, the agenda required under subsection (d) of this section shall designate at least one physical location where a member of the public can attend and participate in the meeting. At least one member of the public body, or at least one staff or designee of the public body, shall be physically present at each designated meeting location.

(b)(1) Minutes shall be taken of all meetings of public bodies. The minutes shall cover all topics and motions that arise at the meeting and give a true indication of the business of the meeting. Minutes shall include at least the following minimal information:

(A) all members of the public body present;

(B) all other active participants in the meeting;

(C) all motions, proposals, and resolutions made, offered, and considered, and what disposition is made of same; and

(D) the results of any votes, with a record of the individual vote of each member if a roll call is taken.

(2) Minutes of all public meetings shall be matters of public record, shall be kept by the clerk or secretary of the public body, and shall be available for inspection by any person and for purchase of copies at cost upon request after five calendar days from the date of any meeting. Meeting minutes shall be posted no later than five calendar days from the date of the meeting to a website, if one exists, that the public body maintains or has designated as the official website of the body. Except for draft minutes that have been substituted with updated minutes, posted minutes shall not be removed from the website sooner than one year from the date of the meeting for which the minutes were taken.

(c)(1) The time and place of all regular meetings subject to this section shall be clearly designated by statute, charter, regulation, ordinance, bylaw, resolution, or other determining authority of the public body, and this information shall be available to any person upon request. The time and place of all public hearings and meetings scheduled by all Executive Branch State agencies, departments, boards, or commissions shall be available to the public as required under 3 V.S.A. § 2222(c).

(2) The time, place, and purpose of a special meeting subject to this section shall be publicly announced at least 24 hours before the meeting. Municipal public bodies shall post notices of special meetings in or near the municipal clerk's office and in at least two other designated public places in the municipality, at least 24 hours before the meeting. In addition, notice shall be given, either orally or in writing, to each member of the public body at least 24 hours before the meeting, except that a member may waive notice of a special meeting.

(3) Emergency meetings may be held without public announcement, without posting of notices, and without 24-hour notice to members, provided some public notice thereof is given as soon as possible before any such meeting. Emergency meetings may be held only when necessary to respond to an unforeseen occurrence or condition requiring immediate attention by the public body.

(4) Any adjourned meeting shall be considered a new meeting, unless the time and place for the adjourned meeting is announced before the meeting adjourns.

(5) A person may request in writing that a public body notify the person of special meetings of the public body. The request shall apply only to the calendar year in which it is made, unless made in December, in which case it shall apply also to the following year.

(d)(1) At least 48 hours prior to a regular meeting, and at least 24 hours prior to a special meeting, a meeting agenda shall be:

(A) posted to a website, if one exists, that the public body maintains or designates as the official website of the body; and

(B) in the case of a municipal public body, posted in or near the municipal office and in at least two other designated public places in the municipality.

(2) A meeting agenda shall be made available to a person prior to the meeting upon specific request.

(3)(A) Any addition to or deletion from the agenda shall be made as the first act of business at the meeting.

(B) Any other adjustment to the agenda may be made at any time during the meeting.

(e) Nothing in this section or in section 313 of this title shall be construed as extending to the Judicial Branch of the Government of Vermont or of any part of the same or to the Public Utility Commission; **nor shall it extend to the deliberations of any public body in connection with a quasi-judicial proceeding**; nor shall anything in this section be construed to require the making public of any proceedings, records, or acts which are specifically made confidential by the laws of the United States of America or of this State.

(f) A written decision issued by a public body in connection with a quasi-judicial proceeding need not be adopted at an open meeting if the decision will be a public record.

(g) The provisions of this subchapter shall not apply to site inspections for the purpose of assessing damage or making tax assessments or abatements, clerical work, or work assignments of staff or other personnel. Routine, day-to-day administrative matters that do not require action by the public body may be conducted outside a duly warned meeting, provided that no money is appropriated, expended, or encumbered.

(h) At an open meeting, the public shall be given a reasonable opportunity to express its opinion on matters considered by the public body during the meeting, as long as order is maintained. Public comment shall be subject to reasonable rules established by the chairperson. This subsection shall not apply to quasi-judicial proceedings.

5. "De Novo" Review in Court, and What that Means for How DRBs Make Decisions

De novo review means starting all over, as the courts have said – but it isn't really!

♦De novo review isn't really de novo, because of the role of the Statement of Questions

♦De novo review isn't really de novo, because of the law on cross-appeals

AType equation here.s a result, DRB decisions can be extremely important even after they have been appealed, especially the conditions imposed.

END