3. *District Commission Decisions: Findings of Fact and Conclusions of Law*

Introduction

A. What are findings of fact and conclusions of law?

1. Findings of fact are statements of fact that a district commission believes are true and wants to use as a basis for granting, denying or conditioning of a permit.

2. Conclusions of law are the application of law to the findings of fact (i.e. whether the statutory criteria of Act 250 have been met or whether Act 250 jurisdiction applies).

B. What is the function of findings of fact and conclusions of law?

1. "The purpose of findings of fact and conclusions of law . . . is to make a clear statement to the litigants, and to [a reviewing court] if an appeal is taken, of what was decided and how the decision was reached." Louis Anthony Corp. v. Dept. of Liquor Control, 139 Vt. 570, 573 (1981).

2. Findings of fact and conclusions of law which are supported by the evidence and well-written (1) encourage confidence in the system on the part of the litigants, making it more likely that the result will be accepted; and (2) help the reviewing court to understand better the issues and to render a just decision.

C. How do findings of fact and conclusions of law relate to one another?

Findings of fact are based on the evidentiary record. The conclusions of law are based on the findings of fact.

II. Overview of the Act 250 Process

A. Evidentiary hearings before the district commissions result in findings of fact, conclusions of law, and order granting (with or without conditions) or denying application.

1. "Before granting a permit, the district commission shall **find** that the subdivision or development will not . . . [result in undue environmental impacts]." 10 V.S.A. § 6086(a).

2. "No application shall be denied by the district commission unless it **finds** the proposed subdivision or development detrimental to the public health, safety or general welfare." 10 V.S.A. § 6087(a).

3. "A denial of a permit shall contain the specific reasons for denial." 10 V.S.A. § 6087(c).

4. "A final decision shall include findings of fact and conclusions of law, separately stated." 3 V.S.A. § 812(a).

B. Appeal to the Environmental Court is de novo "on all findings requested by any party." 10 V.S.A. § 6089(a). The evidence is presented anew and the matter is treated as if no previous decision was rendered. In re Green Peak Estates, 154 Vt. 363, 372 (1990). No deference is given to the district commission's findings of fact, conclusions of law or order.

III. Findings of Fact

A. The evidentiary record is the basis for findings

1. "Findings of fact shall be based exclusively on the evidence and on matters officially noticed." 3 V.S.A. § 809(g). Make sure that all of the findings of fact are supported by the testimony, exhibits admitted into evidence or matters officially noticed.

2. The district commissions may base findings of fact on knowledge acquired through a site visit; however, observations on which findings are to be based should be denoted clearly in the record. See In re Quechee Lakes Corp., 154 Vt. 543, 552 (1990). As long as it does not constitute the exclusive basis for the decision, evidence gathered during a site visit may satisfy the burden of proof on factors to be considered in granting an Act 250 permit. In re Denio, 158 Vt. at 238. The district commission is required to enter its observations from the site visit on the record to allow rebuttal and facilitate review. Id.

B. Relevancy

1. Findings should be based on evidence which is relevant under the Act 250 criteria. Relevant evidence is "evidence having a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Vermont Rules of Evidence (V.R.E.) 401. Relevant facts are those which "are of consequence to the determination of the action." Id.

2. It is not necessary to make findings on all the evidence you have heard. It is only necessary to make those findings necessary to support your conclusions and those finding necessary to deal with specific requests to find by the parties. See Section V.

C. Jurisdiction

Include findings as to the basis for Act 250 jurisdiction over the proposed project (this also applies if the applicant is applying for a permit post-construction). See In re Lake Sadawga Dam, 121 Vt. 367, 370 (1960) (stating that a public administrative body only has such jurisdiction as is conferred on it by statute and that it must determine and make findings of fact necessary to show that the power it exercised did exist).

D. Credibility of Witnesses

1. The district commission members do not have to believe uncontradicted evidence if it is not credible. They have the right to believe all of the testimony of any witness, believe it in part and disbelieve it in part or reject it altogether. In re Wildlife Wonderland, Inc., 133 Vt. 507, 511 (1975).

2. The district commission members may conclude that there was insufficient evidence to make a necessary finding on a particular criterion.

3. The district commission members cannot, however, disbelieve a witness and find a negative. For example, they may choose to disbelieve a witness who gives an opinion that "X chemicals will drain into Y brook." However, they may not on that basis alone find that "the development will not cause X chemical to drain into Y brook." There must be some supporting evidence in the record for that proposition.

E. Weight of the Evidence

The district commission members have the right to decide how much weight (persuasiveness) to assign to the evidence. Id. Particularly when evidence is conflicting, the weight assigned to different pieces of evidence is critical to the findings.

F. Standard of Proof

The standard of proof is the requisite degree of belief concerning a fact in the mind of the trier of fact. Black's Law Dictionary 1215 (6th ed. 1990). In Act 250 proceedings, it is the "preponderance of the evidence" standard which is applicable in most civil proceedings. This is distinguishable from the criminal standard of "beyond a reasonable doubt." Evidence which "as a whole shows that the fact sought to be proved is more probable than not" satisfies the preponderance test. Id. at 1182.

G. How to Make Findings

1. Organize the findings in a logical and comprehensive manner -- this helps the reviewer to better understand your work. Compile an outline prior to drafting findings. This is particularly helpful in complex cases with substantial amounts of evidence.

2. Do not recite who said what or what an exhibit purports to say unless it is a critical part of the analysis.

(a) A statement of evidence received at a hearing is not a proper finding, even if uncontradicted -- for example, "Dr. Jones testified that the development will cause X chemical to drain into Y brook." A proper finding would state "Construction of the development will cause X chemical to drain into Y brook."

(b) "A rambling stream of consciousness recitation of the testimony and exhibits presented at the hearing is not a finding of the facts contained in such testimony or exhibits, and does not comport with the statutory mandate of 3 V.S.A. § 812 [which requires a final decision to include separately stated findings of fact and conclusions of law]." Louis Anthony Corp. v. Dept. of Liquor Control, 139 Vt. at 573.

(c) Recitals of testimony and exhibits presented at the hearing "do not indicate the credence placed upon the evidence by the commission, or the extent to which the evidence influenced the commission's decision, and so do not measure up to [the requirement of 3 V.S.A. § 812 that a final decision shall include separately stated findings of fact and conclusions of law]." Id.

3. Do not simply mimic statutory language; include supporting facts. "Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings." 3 V.S.A. § 812(a).

4. Avoid superfluous findings. The district commissions generally must make findings necessary to support their conclusions. Superfluous findings can cause uncertainty as to whether the trier of fact relied on irrelevant evidence.

5. Make sure that no two findings are inconsistent with one another.

6. Make sure there are sufficient findings to support each of your conclusions.

IV. Conclusions of Law

A. In Act 250 decisions, the conclusions of law generally state whether or not the criteria of 10 V.S.A. § 6086(a) have been met. For example, a possible finding could be that "the development, as proposed, will result in undue water pollution." This conclusion should be based on specific findings of fact -- for example, that "the development will cause X chemical to drain into Y brook" and that "X chemical will degrade the quality of Y brook."

1. Keep findings of fact and conclusions of law segregated within the decision. "A final decision shall include findings of fact and conclusions of law, separately stated." See 3 V.S.A. § 812(a).

2. Avoid embellishment of the findings when stating the conclusions. Embellishment can create inconsistencies and ambiguities.

3. Make sure each conclusion is supported by one or more findings of fact.

B. Conclusions of law are also used to state the law and to address questions regarding interpretation of the law. For example -- in Southview Associates, 153 Vt. 171 (1989), the applicant challenged the Board's interpretation of the term"necessary wildlife habitat" under 10 V.S.A. § 6086(a)(8). Such questions are addressed as conclusions of law.

V. Requests to Find

A. "If, in accordance with agency rules, a party submitted proposed findings of fact, the decision shall include a ruling upon each proposed finding." 3 V.S.A. § 812(a). However, you do not have to make a specific finding as to each and every request or to use the precise language requested. One finding is permitted to cover multiple requests. Petition of Village of Hardwick Electric Dept., 143 Vt. at 445. In order to address the requirement of ruling on each request to find, 3 V.S.A. § 812(a), the commissions are encouraged to employ the following standard language in each decision:

"To the extent that any proposed findings of fact and conclusions of law are included below, they are granted; otherwise, they are denied". Petition of Village of Hardwick Electric Department, 143 Vt. 437, 445 (1983).

B. If there is uncontradicted testimony which is relevant from a witness who the district commission did not find credible and a request to find is made based on the witness's testimony, explicitly state in the decision that the district

commission did not find that witness to be credible. For example, “Dr. Jones’ testimony as to the pollution of Y brook was not credible.”

C. Review all requests to find and the legal memoranda again after you have finished drafting the findings and conclusions. Be sure that all arguments and all requests have been considered.

E. Although findings which are identical to or closely parallel the findings requested by one of the parties will not automatically be set aside, Bonanno v. Bonanno, 148 Vt. 248, 250 (1987), the better practice is to “customize” the findings. This reinforces the impression that the commission is exercising independent judgment.

Prepared by**:** Susan Ceglowski, Associate General Counsel, Environmental Board, and revised 8/9/2005 by Michael Zahner, Executive Director, Natural Resources Board.

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