

STATE OF VERMONT

ACT 250 JURISDICTIONAL - PROCEDURAL ACTION RECORD

Environmental Board and District Environmental Commissions

RE:	Master Permit Policy and Procedure for Partial Findings of Fact	Filing Code:	Rule 21
		Cross Reference:	10 VSA, Sections 6027(a) and 6086(b); EB Rule 21
		Supersedes:	n\a
		Date:	February 25, 1998 (Adopted) March 29, 2000 (Amended)

The objective of the master permit policy and procedure, pursuant to Board Rule 21, is to provide guidance and greater predictability to the applicant and all parties in the review of complex development projects. Pursuant to Board Rule 21, the applicant may seek permission from the district environmental commission or the board on appeal to proceed with review under specific criteria of the Act in order to gain a greater degree of assurance that future development projects may be approved on a proposed development tract. This procedure will allow for greater efficiency in the environmental review process and therefore avoid unnecessary and unreasonable costs to the applicant and parties.

Before the district commission or the board can grant a master permit for a master plan project, it must be able to make positive findings of fact and conclusions of law demonstrating compliance with all ten criteria of Act 250 for those aspects of the project seeking construction approval. For most, but not all of these issues, the burden of proof lies with the applicant pursuant to 10 VSA Section 6088. In order to receive a master permit with partial findings of fact, an applicant must carefully define the intended scope of the development and sufficiently quantify project impacts.

In order for the district commission or the board to issue a permit authorizing construction approval for a certain phase of a master plan, positive findings of fact and conclusions of law must be made under all criteria for that particular phase. In many instances, a permit may be granted for a smaller portion of the total project (including infrastructure) with partial findings of fact for the remainder of the project under the relevant criteria. These partial findings of fact will provide guidance and greater predictability to the applicant in preparing final plans for the project or for subsequent phases. Partial findings of fact are generally issued for a period of five years since this represents a reasonable planning period within which potential impacts under the relevant criteria can be ascertained. Prior to expiration, partial findings of fact may be renewed and updated as necessary. In each Regional Office, District Environmental Coordinators are available to assist applicants in proceeding under 10 V.S.A. Section 6086(b) and Rule 21 which provides the legal framework for the full implementation of this policy and procedure.

JP-21-1

Procedure

(1) Application procedure. When an applicant intends to develop a project in phases according to an overall plan (a “master plan project”), the applicant may apply for a master permit authorizing the construction of improvements for any phase of the project, or element thereof, for which positive findings of fact and conclusions of law can be made under all criteria of the Act. In addition to seeking construction approval, the applicant may seek partial findings of fact for any other phase of the project. In the alternative, the applicant may seek partial findings of fact for any aspect of the project without offering a construction element. Precise planning and engineering data may not be available for each subsequent phase of the project and therefore final findings of fact will not be possible under all criteria. In most instances, the initial review of a master plan application will focus on the project’s scale, location and impacts under the so-called “natural resource” criteria of the Act, including but not limited to, Criteria 1(A), 1(D), 1(E), 1(G), 8, 8a, 9(B), 9(C), 9(D) and 9(E).¹

¹Pursuant to Environmental Board and Supreme Court precedent and 10 V.S.A. Section 6086(b) relating to vested rights, it is generally not possible for a district commission to make final findings of fact and conclusions of law for a phased project under certain criteria, including criteria 5, 6, 7, 8, 9(A), 9(K), and 10, until a final decision is issued for a particular phase or for the entire project based upon the review of a complete application. Under current law, partial findings of fact can be appealed immediately or upon issuance of a final decision on a complete application. Rule 21 contemplates that partial findings of fact and conclusions of law are considered final for the purposes of appeal only and shall be binding for a reasonable period of time or until a final decision is issued based upon a complete application unless there is a “material” or “substantial change” or if the background facts have changed significantly. Parties may elect to reserve their appeal rights until final action on the complete application. Therefore, findings of fact and conclusions of law do not achieve true finality with vested rights until there has been final action on a complete application and all appeal issues have been fully litigated, if appeal rights are exercised. See 10 V.S.A., Section 6086(b), Rule 21(D), Rule 34 (B) and (C). Please note that Section 6086(b) was amended during the pendency of the Vermont Supreme Court decision, In re Taft Corners Associates, Inc., 160 Vt. 583 (1993), which held that unappealed decisions are final and cannot be attacked at a later date. The Court’s analysis was based in part on the prior statutory language. For a good discussion of “completeness of

JP-21-1

Pursuant to Rule 21, an applicant seeking approval for this review procedure must state this intention in the application, describing the location and scale of the project and the composition of uses proposed for future development. As mentioned above, in order to gain construction approval for any element of the project including infrastructure, detailed information needs to be supplied under all criteria of the Act. If a master permit is issued with partial findings of fact, then, for each subsequent phase seeking authorization for construction, the applicant must provide detailed and updated information under criteria for which positive findings of fact and conclusions of law have not been issued. This will allow the district commission to issue a final decision for each subsequent phase after the full impacts have been reviewed under all criteria of the Act including Criterion 10.²

(2) Master permit. If the district commission or the board grants a master permit, the decision shall:

1. Clearly describe the project, its scale, and the composition of uses proposed by the

application” which has a direct bearing on the “finality of decision” issue, please refer to Vermont Supreme Court decisions: In re Agency of Administration, 141 Vt. 158 (1981) and In re Vermont Gas Systems, Inc., 150 Vt. 34 (1988), both of which have held that Act 250 jurisdiction does not formally attach until detailed plans indicate that “construction is about to commence.” However, these decisions do not support the notion that the district commission or the Board is without authority to review applications for partial findings of fact pursuant to Rule 21(D) and 10 VSA Section 6086(b).

² As mentioned in the first footnote, affirmative findings of fact and conclusions of law under criterion 10 can not be issued for any element of a complex project which has not been adequately described in a complete application. Therefore, applicant rights do not vest under the current town or regional plan for any particular phase until a complete application has been filed for that phase with the district commission or the town. The issue of “vested rights” under Criterion 10 needs to be explored within the context of the following Vermont Supreme Court decisions: Smith v. Winhall Planning Commission, 140 Vt. 178 (1981); In re McCormick Management Company, 149 Vt. 585 (1988); In re Raymond F. Ross, 151 Vt. 54 (1989)(which holds that no “vested right” can be obtained under an existing town plan when the application is incomplete); and, In re Frank Molgano, Jr., 163 Vt. 25 (1994).

applicant in order to accurately assess the impacts under the relevant criteria of the Act;

2. Clearly state the findings of fact and conclusions of law under the relevant criteria

JP-21-1

pursuant to Board Rule 21 and statutory requirements. The decision will form the basis for future “substantial” and/or “material” change analysis. If any subsequent phase is determined to be a “substantial change” pursuant to Board Rules, then it shall be reviewed under all criteria as if it were a new application. Any “material change” will require an amendment.³ ;

3. If appropriate, establish an impact budget for the project (including but not limited to sewage capacity, vehicle trips per day, etc.) based upon affirmative findings of fact under the relevant criteria of the Act; and, establish a procedure for evaluating subsequent phases of the project against the approved impact budget;

4. Clearly state that subsequent phases falling within the impact budget should satisfy the criteria of the Act relevant to those impacts, unless a “material” or “substantial” change has occurred. Absent a “substantial” or “material” change, the partial findings of fact and conclusions of law made under the terms of this section shall be binding upon all parties during the period specified by the district commission or the Board unless it is clearly shown that there was misrepresentation or fraud or the facts relevant to the matter have so materially changed as to render the findings of fact or conclusions of law clearly erroneous, contrary to the purposes of the Act and without basis in fact;

5. State that the applicant may apply for renewal of partial findings of fact prior to the expiration period. The application for renewal shall outline any changes to the project or changes in

³ See In re Orzel, 145 Vt. 355 (1985); In re Manosh, 147 Vt. 367 (1986); In re Tucker, Inc., 149 Vt. 551 (1988); In re Barlow, 160 Vt. 513 (1993); Rule 34(B) and (C).

circumstances which may alter the findings of fact made under the criteria. The district commission or the Board on appeal shall review changes to the project and/or circumstances and issue a revised decision;

JP-21-1

6. Contain such other terms and conditions as are appropriate to carry out the intentions of the Act and the Board Rules.

(3) Subsequent phases - permit amendments. Upon application by the permittee, subsequent phases of a complex project may be approved as amendments to the master permit. The amendment process shall be conducted in conformance with the terms of Rule 34, statutory requirements and in particular, with the following:

1. The board or the district commission may find that, in addition to the permit holder and any record owner of the tract, some other person(s) (such as developer/tenants in an industrial park) are necessary co-applicants in the amendment process pursuant to Board Rule 10;

2. In order to obtain a permit amendment, the applicant(s) must define the project phase and present all information identified in previous decisions, including detailed engineering plans, for final approval under the normal application process;

3. The applicant must demonstrate compliance with the terms and conditions of the master permit;

4. The application must conform with the master permit procedures for calculating and reporting the shares of the total project impact budget that have been allocated to previous project phases, and shares that remain available for use by subsequent phases.

