

## **2. Party Status: Participation in Act 250 Proceedings**

### **I. Background**

A grant of “**party status**” confers the right to participate in Act 250 proceedings and the right to appeal a district commission decision to the Environmental Court and ultimately to the Vermont Supreme Court.

**The right to participate** is not absolute but is determined by statute. Party status is governed by 10 V.S.A. Section 6085 as amended by Act 115 of the 2004 Vermont Legislature. Party status determinations are also governed by Act 250 Rules, specifically Rule 14, *Party Status*.

### **II. Three Forms of Act 250 Participation**

#### **A. Parties by right (formerly known as “statutory parties”): 10 V.S.A. Sections 6085(c)(1)(A) through (D); 10 V.S.A. Section 8502(5)**

1. The party status of a “party by right” is automatic and without any limitation; it does not have to be requested.
2. A party by right may address or appeal any or all of the ten Act 250 criteria.
3. A party by right may appeal a decision in which it does not appear or participate (except for minor proceedings, in which case a hearing must be requested).
4. Parties by right are:
  - (a) The **applicant**
  - (b) The **landowner, if the applicant is not the landowner**
  - (c) The **municipality** in which the project site is located and **the municipal and regional planning commissions** for that municipality. If the project site is located on a boundary, any Vermont municipality adjacent to that border and the municipal and regional planning commissions for that municipality.
  - (d) The **solid waste management district** in which the land is located, if the development or subdivision constitutes a development or subdivision pursuant to 10 V.S.A. Section 6602(10).
  - (e) **Any state agency** affected by the proposed project. For example, the Agency of Natural Resources, Agency of Agriculture

and the Division of Historic Preservation are statutory parties whose interests may be affected by a proposed project.

**B. Other potential parties (adjoining property owners, other persons, organizations) 10 V.S.A. §6085(c)(1)(E).**

Under former law, adjoining property owners enjoyed an advantage over non-adjoiners. With the change in the statute, this advantage no longer exists and thus this discussion addresses party status for all interested parties who are not parties by right.

**1. Party status is not automatic.** Party status must be requested either orally or in writing on or before the first hearing or prehearing conference, whichever is held first, unless the district commission finds that the petitioner has demonstrated good cause for failure to request party status in a timely fashion, and the late appearance will not unfairly delay the proceedings or place an unfair burden on the parties.

There needs to be a demonstration of a particularized interest under one or more of the criteria relating to the project and which may be affected by an act or decision of the district commission.

**2. Requesting party status**

**(a) When petition must be filed.**

Petitioners must request party status, either orally or in writing, at or prior to the first prehearing conference or hearing, whichever occurs first, unless the district commission directs otherwise. A late petition may be accepted if the district commission finds that the petitioner has demonstrated good cause for failure to request party status in a timely fashion, and the late appearance will not unfairly delay the proceedings or place an unfair burden on the parties. **10 V.S.A. Section 6085(c)(3)**

The statute, Section 6085(c)(3), is silent if the application will be processed as a “minor,” under **Act 250 Rule 51**, as there is no prehearing conference and no hearing on the application is held unless one is requested and/or the Commission decides to hold a hearing. Logically, any potential party who is not a “party by right” must file a party status petition on or before the deadline set by the Commission for filing a request for a hearing. This requirement is set out in the notice that the Commission sends out for minors.

**(b) What the petition must contain. 10 V.S.A. Section 6085(c)(2); Act 250 Rule 14**

A party status petition must include:

1. a detailed description of the petitioner's interest and a description of the potential effect of the proposed project on such interest with respect to each of the criteria or subcriteria under which party status is being requested

"Particularized Interest" means *any interest protected under the Act 250* criteria that *may be affected* by a district commission decision on the application. In the case of an adjoiner, those interests often relate directly to the potential for impacts on land owned next to the project tract, but the interests need not relate to land ownership or the land itself. *The interest must be specific and particular to the individual and thus distinguishable from the interests of the general public.* For instance, a petitioner for party status must adequately demonstrate a potential impact relating to aesthetics, noise, stormwater runoff, traffic, air or water pollution, or other project impacts under the criteria that are specific to that individual.

A good summary of the test to be applied when determining party status for a §6085(c)(1)(E) petitioner can be found in *In re Pion Sand & Gravel Pit*, Docket No. 245-12-09 Vtec, *Decision on Motion for Party Status* at 6 – 7 (Jul. 2, 2010) in which the Environmental Division wrote:

In order to secure party status in these proceedings, Neighbors must demonstrate that they are an "adjoining property owner or other person who has a particularized interest protected by [Act 250] that may be affected by an act or decision by a district commission." 10 V.S.A. § 6085(c)(1)(E). There are essentially two components to this provision. First, Neighbors must show that they have a specified interest protected by Act 250 that is particular to Neighbors, not a general policy concern shared with the general public. *In re Champlain Marina, Inc. Dock Expansion*, No. 28-2-09 Vtec, slip op. at 5–6 (July 31, 2009) (Durkin, J.). Second, Neighbors must demonstrate a causal connection between Applicants' proposed project and the potential impact to their particularized interests. *In re Big Spruce Road Act 250 Subdivision*, No. 95-5-09 Vtec, slip op. at 6 (Apr. 21, 2010) (Durkin, J.). In other words, Neighbors must establish a connection between the project and a particularized interest and that, due to a demonstrated connection, their specified interests may be adversely affected. *Maple Tree Place Assocs.*, No. 4C0775-EB, Mem. of Decision & Order, at 6 (Vt. Env'tl. Bd. Oct. 11, 1996), *aff'd*, No. 96-559 (Vt. Oct. 10, 1997) (unpublished mem.).

The Court explained that the demonstration required of a petitioner for party status need not be exhaustive:

In making their presentation for party status, Neighbors need not demonstrate that a decision on Applicants' proposal will affect their particularized interests, or that they will prevail at a merits hearing; rather, they need only demonstrate that the project may

affect their interests. We regard this as requiring Neighbors to provide an “offer of proof.” *In re Costco Act 250 Permit Amendment*, No. 143-7-09 Vtec, slip op. at 1 (Dec. 4, 2009) (Durkin, J.) (entry order). As Applicants correctly note, this offer must be more than mere speculation and theory. An individual will not sufficiently demonstrate a causal connection with “unsupported assertions that vaguely defined interests” may be affected by a project. *Re: Village of Ludlow*, No. 2S0839-2-EB, Mem. of Decision, at 4 (Vt. Envtl. Bd. May 28, 2003) (quoting *Maple Tree Place*, No. 4C0775-EB, at 6). We have said before:

[A]n offer of proof must be specific and concrete. It must indicate what further testimony or evidence will be introduced, to show what particular circumstances or conditions, and for what purpose it is offered. An offer must be sufficiently explicit to give the trial court an understanding of the materiality of the [to-be-] offered evidence. These standards are generally taken to require that witnesses’ names and addresses be given, that acts or items be specifically described, and that the matter to be proved be carefully delineated.

*In re RCC Atlantic, Inc.*, No. 163-7-08 Vtec, slip op. at 9 (Vt. Envtl. Ct. May 8, 2009) (Durkin, J.) (quoting *R.E. Bean Constr. Co. v. Middlebury Assocs.*, 142 Vt. 1, 7 (1982) (citations omitted)).

More recently, the Environmental Court refined the level of evidence that needs to be provided in order to evaluate a request for party status under 10 V.S.A. §6085(c)(1)(E). A petitioner need not prove that it will likely prevail on the merits of its case. Rather, the relevant inquiry is whether there is a “reasonable possibility” that a petitioner’s “particularized interests may be affected by a decision on the proposed project.” *In re Bennington Wal-Mart*, No. 158-10-11 Vtec, Decision on Motion for Summary Judgment and Motion for Party Status at 9-10 (Apr. 12, 2012).

2. a statement of the reasons why the Commission should grant party status to the petitioner;

3. if known, whether the petitioner supports or opposes the application or another petitioner; and

4. a description of the location of the adjoining property in relation to the proposed project (including a map if available); and

5. in the case of an organization, a description of the organization’s purposes and the nature of its membership.

There is no statutory or rule provision that would require an organization to divulge its membership.

Vermont Supreme Court caselaw holds that an organization has standing to bring suit on behalf of its members when (1) its members have standing individually; (2) the interests it asserts are germane to the organization's purpose; and (3) the claim and relief requested do not require the participation of individual members in the action. *Parker v. Town of Milton*, 169 Vt. 74, 726 A.2d 477 at 78.

In practical terms, this means that the district commissions must make the necessary inquiries regarding any organizational petition for party status. First, the petitioner must submit a description of the organization, a statement of purpose and describe the nature of its membership (a list of the members is not required). Necessary inquiries include the following: Where do its members reside and how do they make use of the resource to be protected under the express language of specific Act 250 criteria? Do those members have a direct and particularized interest in the project that differs from the interests of the general public – and thus would they be able to attain party status on their own as individuals? Are their particularized interests related to the organization's stated purpose under the specific criteria? Often affidavits are submitted from individual members as an offer of proof. Can the organization adequately represent and protect those interests without the active participation of those individual members? If the answer is in the affirmative to all of these inquiries, then the organization may be granted party status in its "representational capacity," officially representing individual members under specified criteria.

**C. Non-Party Participation: Friends of the District Commission. 10 V.S.A. Section 6085(c)(5).**

The district commission, on its own motion or by petition, may allow persons or organizations not accorded party status the opportunity to participate in any of its proceedings if it is determined that such participation will materially assist in the review of the application.

**The participation of a non-party is permissive** and may be allowed under the following provisions:

1. The district commission may limit participation of Friends of the Commission to the filing of memoranda, proposed findings of fact and conclusions of law, and argument on legal issues.

2. However, the district commission may expand participation to include the provision of testimony, the filing of evidence, or the cross examination of witnesses.

3. A petition for non-party participation must identify the type of information or legal argument, the desired scope of participation that will be

provided under the criteria; and, shall state why the petitioner=s participation will provide assistance to the district commission.

### III. Decisions on party status

**Act 250 Rule 14(E) requires preliminary determinations, reexamination, and final determination of party status by the district commissions.** The district commission shall state the results of all party status determinations and reexaminations of party status in its final decision on the application. If requested by a party, the commission must issue a written preliminary decision or order on party status within five days of such request. **10 V.S.A. Section 6085(c)(6) and Act 250 Rule 14(E).**

### IV. Rights of Participation

A party may:

1. present evidence as to whether or not the proposed development or subdivision meets the applicable criteria under which the party is granted party status. This may be presented in the form of exhibits; oral or written testimony; cross examination of other witnesses; and, the filing of legal argument, proposed findings of fact and conclusions of law

2. cross-examine or challenge the evidence presented by the applicant or other parties to the proceeding.

3. participate in argument on any procedural or legal matters that come before the district commission provided they relate to the specific criteria to which the person or organization has been granted party status.

4. appeal a district commission decision to the Superior Court, Environmental Division (formerly Environmental Court) and ultimately to the Vermont Supreme Court. **See 10 V.S.A. Chapter 220 which governs appeals from district commission decisions.**

**V. Limitation of Participation Rights.** The party=s right to participate described above varies depending on whether the party is a party by right or an interested party.

1. **Parties by right** have all the rights described in E. above.

2. **Interested parties** have the right to participate as described in E. above, however, they participate only to the extent that they have adequately demonstrated a particularized interest relating to the potential for project impacts under the criteria of Act 250 **which is particular to the individual and distinguishable from the interests of the general public.** Participation will be limited to those **particularized interests under specific Act 250 criteria.** It can

not extend to other criteria **or to generalized concerns outside of the Act 250 criteria.**

## **VI. Appeals from District Commission Decisions on Party Status**

**Interlocutory Appeals.** The Environmental Division in its discretion may review an appeal from any interlocutory (preliminary) order or ruling of a district commission if the order or ruling grants or denies party status and the Court determines that such review will materially advance the application process. Appeals of party status determinations may also occur at the end of district commission proceedings pursuant to Chapter 220 of Title 10.

## **VII. Practical Suggestions on how to handle petitions from adjoining landowners and other interested persons**

1. **Explain the process.** As soon as the chair has opened the hearing and taken formal appearances from full parties, the district commission should request adjoining landowners and other interested persons to identify themselves and indicate whether or not they wish to participate.

(a) At this time, the chair should provide a succinct explanation of the rights of adjoining landowners and interested persons as described above; your manual provides a useful statement that can be used to provide such an explanation.

(b) Commissions may ask the applicant to make a brief "overview" presentation on the project to allow adjoining landowners and interested persons to evaluate whether they have an interest affected by the project.

(c) In most hearings, prospective participants do not have counsel and may not fully understand the process. It may be useful to recess the hearing temporarily so that prospective participants can study the Act 250 criteria and determine whether or not they have an interest under the criteria of the Act which may be affected by the project.

(d) The district coordinators also can assist prospective participants to understand the process, either in advance of the hearing, if the individual notifies the coordinator of an intention to participate, or at the outset of the hearing.

2. **Consider a public comment period.** Although not all district commissions follow this procedure, some commission chairs advise prospective participants that there will be a public-comment session at the end of the hearing in order to give those individuals who do not desire to become full parties or non-party participants an opportunity to be heard.

If the district commission chooses to have a public-comment period, it is essential that the chair advise the prospective participants that the comments are in the nature of argument as to how the commission should decide the matter and not evidence on which a decision can be made.

3. **Allow adjoining landowners and interested persons to present case.** Following the short recess (if you take one), each individual should be given an opportunity to describe his/her interest and how it may be affected under the criteria of the Act.

4. **Ask for objections.** After each presentation is made, the chair should ask whether the applicant or any of the other parties object to participation by the adjoining landowner or interested person. If there is no objection, the district commission need not spend any more time determining whether or not to permit participation provided that the commission is satisfied that the adjoining landowner or interested person has made a threshold showing of an interest that may be affected by the project.

5. **Take a recess before deciding.** If there is an objection to participation, the district commission must deliberate and reach a decision. Generally, it is desirable to recess the hearing briefly to allow the full commission to deliberate in private.

6. **Explain your decision.** Once the decision is made, it is very important that the chair not only state the decision on the record, but also explain the basis for the decision. If the decision is not to allow participation, there are fewer hard feelings if the chair explains the basis for the decision.

In addition, it is important to establish a clear record as to the basis for the district commission's decision given the opportunity to file an interlocutory appeal and, in any event, the ultimate right to appeal the denial of party status following the final decision.

*Amendment of outline prepared by John Marshall, Esq. on Jan. 15, 1993 and amended by Susan Ceglowski, Associate General Counsel, Environmental Board, and later revised on 10/13/2006 and 10/22/2007 by Michael Zahner, Executive Director and in August 2010 and December 2012 by John Hasen, General Counsel.*