



Taking Evidence

What is Evidence?

Evidence is broadly defined as “testimony, documents, and tangible objects that prove or disprove the existence of an alleged fact.” *Black’s Law Dictionary 8th Edition*. Evidence appears in many forms. Evidence includes testimony given by an applicant, an interested party, a witness, members of staff or advisory committees, and often members of the general public. Testimony can be an oral statement by an individual present at a hearing or a written statement, such as a letter. Evidence also includes documents and tangible objects, such as site plans or written staff or advisory committee reports. Evidence must be received either prior to or during a public hearing.

Evidence Plays an Important Role in:

- 1. Conducting Hearings:** Hearings are held to allow authorized parties to present facts. Testimony is heard and documents are received. This information is evidence.
- 2. Issuing a Decision:** Findings of fact are determined by reviewing, analyzing, and deliberating over the evidence and choosing what is credible and relevant. These findings are then applied to criteria contained in statutes or bylaws to determine an applicant’s legal rights
- 3. Providing Due Process and an Opportunity to be Heard.**

Well organized evidentiary procedures are essential. Effectively gathered evidence is the key to making decisions consistent with a municipality’s bylaws. Evidence takes varying forms, comes from multiple sources, and potentially

amounts to an overwhelming body of diverse information—making organization paramount.

Why is Evidence Important?

Determining Legal Standards and Applying Facts to the Law

An Appropriate Municipal Panel (AMP) is a Planning Commission exercising development review, Zoning Board of Adjustment, or Development Review Board. The AMP analyzes, reviews, and determines which evidence is reliable, relevant and credible. It consequently makes the findings of fact to use in the decision-making process. The AMP then applies these findings to the municipality’s bylaws or state statute to determine an applicant’s legal rights. An AMP can only approve applications or permit conditions that comply with the municipality’s bylaws and state statutes. If a project meets applicable standards within a municipality’s bylaws, then an AMP must approve the application.

Gathering evidence involves collecting information but not all information admitted as evidence will be applied as a finding of fact in an AMP decision. An AMP must sort through the evidence and determine which information will constitute findings of fact that support its final decisions. This module primarily focuses on the proper procedures for gathering evidence. It will also briefly discuss how an AMP should use evidence to make the factual findings necessary to apply bylaw standards and state statutes.

Acting in a Quasi-Judicial Capacity

An AMP acts in a quasi-judicial capacity when conducting a hearing. In this forum, members of an AMP act as judges. They determine people’s rights by interpreting and applying the municipality’s bylaws to specific applications. A quasi-judicial hearing is defined by statute as: “a case in which the legal rights of one or more persons who are granted party status are adjudicated, which is conducted in such a way that all parties have opportunity to present evidence and to cross-examine witnesses presented by other parties, which results in a written decision, and the result of which is appealable by a party to a higher authority.” *V.S.A. § 310(5)(B)*. Therefore, at a quasi-judicial hearing, members of an AMP serve as both judge and jury by presiding over hearings, taking evidence, reviewing evidence, determining findings of fact, and, finally, applying findings of fact to the law to issue a decision.

Written and spoken testimony also serves as an essential tool for protecting citizens’ rights to due process—testimony is an opportunity to be heard.

“Effectively gathered evidence is the key to making decisions consistent with a municipality’s bylaws.”

Adopting Evidence Procedures

An AMP should establish evidentiary procedures that are appropriate for hearings within its municipality. For example, an AMP from a municipality with volunteer boards or limited staff may aim to establish best practices to receive and identify testimony and exhibits. These procedures may be minimal and relatively informal but will promote and further a well-informed, organized decision making process. In contrast, an AMP for a municipality that chooses to adopt on-the-record review or local Act 250 review must follow specific evidence procedures required by the Municipal Administrative Procedure Act (MAPA). *24 V.S.A. §§ 1205(c) and 4471(b)*.

Required Rules of Procedure

Although an AMP is not required to adopt specific or formal “rules of evidence,” an AMP must adopt rules of procedure and rules of ethics.

“An appropriate municipal panel shall . . . adopt rules of procedure, subject to this section and other applicable state statutes, and shall adopt rules of ethics with respect to conflicts of interest.” *24 V.S.A. § 4461(a)*.

This provision authorizes an AMP to govern hearings and many other acts essential to evidentiary procedures:

- Administering oaths.
- Compelling attendance of witnesses.
- Compelling production of material germane to any issue under review.
- Taking testimony and requiring participants to produce material proof of that information or proof “bearing upon matters concerned in a hearing.” *24 V.S.A. § 4461*.
- Requesting a staff or advisory committee report, including conservation or housing commission reports, under the bylaws. *24 V.S.A. §§ 4461(b) and 4464(d)*.

Presenting Evidence

An AMP must allow the parties to present evidence. An AMP must also allow other persons wishing to achieve status as an interested person the opportunity to speak. *24 V.S.A. § 4461(b)*. Further, an AMP may allow anyone to participate in a hearing and may allow any person to present evidence—including members of the general public. The AMP can limit the presentation of evidence to applicants, parties, and interested persons in two ways. First, the AMP may opt to identify interested persons and limit hearing participation accordingly. Second, the AMP can choose to conduct on-the-record hearings and follow the MAPA’s procedures for the presentation of evidence. *24 V.S.A. §§ 1206(a) and 1201(4)*.

Procedures for Taking Evidence

Minutes and Recording Evidence

An AMP must keep minutes of its hearings. *24 V.S.A. § 4461(b)*. Minutes are kept as a public record in the clerk’s office. Minutes must include:

1. A list of members of the public and all other active participants.
2. All motions, proposals, and resolutions made, offered and considered. All decisions made on motions, proposals, and resolutions.
3. Voting results, with a record of votes from each member if roll call is taken. *1 V.S.A. § 312(b)*.

The minutes must be filed “immediately as a public record” and may be used as the written decision. *1 V.S.A. § 312(2) and 24 V.S.A. § 4464(b)(1)*.

Minutes are an essential tool for tracking and recording evidence presented at hearings. Evidence used in rendering a decision must be noted in an AMP’s final decision.

The municipality or AMP should appoint a secretary, clerk or staff recorder—preferably someone who is not a member of the AMP. In the

absence of staff support, an AMP may choose to limit evidentiary procedures to an abbreviated form of best practices. One member may be designated to record speakers and write a brief description of the subject addressed. The member should mark each physical exhibit and give a short, descriptive list of all exhibits.

Taking Minutes

The AMP should establish procedures for recording hearing minutes and should begin recording as soon as the hearing begins.

1. The applicant presents evidence regarding an application or proposal. An applicant will present the proposed development by offering evidence in the form of oral testimony, written testimony, documents and/or objects. For example, an applicant may present a site plan, letters from state agencies, covenants for a subdivision, photographs, maps, surveys, traffic studies, and other documents supporting the proposed development.
2. AMP members ask questions regarding the applicant’s proposal.
3. Interested persons and the public should present evidence. Interested persons and the public will most often offer evidence in the form of oral testimony. However, an AMP must accept written testimony or documented evidence from these participants as well.
4. AMP members should question the other participants.
5. The AMP should provide the applicant an opportunity to respond to new evidence and submit additional evidence.
6. The AMP, interested persons, and public may respond to additional evidence provided by the applicant.
7. The applicant should always receive a final opportunity for comments and questions.

Administering Oaths

Before participants present evidence, an AMP Chair should direct all participants providing testimony or offering evidence to take an oath. Administering an oath to those who participate conveys the importance of the hearing and encourages individuals to offer credible evidence. It is recommended that the AMP Chair direct all participants providing testimony or offering evidence to take an oath:

“I hereby swear that the evidence I give in the cause under consideration shall be the whole truth and nothing but the truth under the pains and penalties of perjury.”

Who are “Interested Persons”?

An individual wishing to gain interested person status must be allowed the opportunity to do so. 24 V.S.A. § 4461(b).

General AMP Review

An interested party is defined in 24 V.S.A. § 4465(b) and in MAPA as:

1. A property owner affected by a bylaw.
2. A municipality or any adjoining municipality that has a plan or a bylaw at issue.
3. A person on whom the project will have a “demonstrated impact.” Defined as: “A person owning or occupying in the immediate neighborhood of a property subject of any decision . . . who can demonstrate a physical environmental impact on the person’s interest under the criteria reviewed.”
4. Any ten persons who sign a petition to an AMP alleging that granting the applicant’s project will not be in accord with the municipality’s bylaws. The ten persons may be any combination of voters or property owners. However, one person must be designated to serve as a representative of petitioners.

In order to appeal, an interested person must participate at the hearing by **“offering, through oral or written testimony, evidence or a statement of concern related to the subject of the proceeding.”** 24 V.S.A. § 4471(a).

Only interested persons may initiate an appeal from an AMP decision. 24 V.S.A. § 4471(a). 24 V.S.A. § 4465(a).

Interested Persons and Local Act 250 Review

A person whose interests may be affected by a proposed development under a relevant provision of the ten Act 250 criteria, as described in 10 V.S.A. § 6086(a)(1).

Requirements for Listing Interested Persons

- An AMP must keep a written list containing the name, address, and subject matter addressed by each interested person who participates. 24 V.S.A. § 4461(b).
- An AMP may request those attending a hearing provide their name and contact information upon entering the hearing or may circulate a form during the hearing.
- The Chair should review the definition of “interested person” before receiving evidence and should explain that those who wish to appeal must participate at the hearing.
- The Chair should also request that those who believe they meet the definition identify themselves and provide contact information.

The Vermont Land Use Education and Training Collaborative provides a model interested persons list in its Rules of Procedure and Ethics Manual, available at www.vpic.info.

Best Practices for Gathering Evidence

Relevant and Credible Evidence

An AMP should aim to accept only evidence that is relevant—evidence tending to support the existence of facts key to the application. Relevant evidence helps an AMP determine whether or not an applicant demonstrates that a project meets the requirements of local bylaws and state statutes.

The standard for evidence to be “relevant” is generous. It errs on the side of admitting evidence. The Vermont Rules of Evidence state: **“Irrelevant, immaterial or unduly repetitious evidence shall be excluded... [evidence] may be admitted if it is of a type commonly relied upon by reasonably prudent people in the conduct of their affairs.”** 24 V.S.A. § 1206(b).

Hearsay

A speaker’s statement is hearsay when the speaker offers someone else’s statement, made outside the hearing, as evidence to prove a fact about the proposal currently up for review. This statement is therefore dependent on the credibility of someone other than the speaker. Using hearsay undermines the requirement that decisions should be made on credible and reliable evidence and facts.

Black’s Law Dictionary defines hearsay as “testimony that is given by a [speaker] who relates not what he or she knows personally, but what others have said.”

For example, it is hearsay when a community member offers a statement made by his brother that a proposed waste facility has been dispatching six trucks every morning as evidence that the proposed waste facility will increase local traffic.

An AMP should exclude comments regarding other projects that have no bearing on the project at hand. These comments would be irrelevant and immaterial.

An AMP should also attempt to exclude hearsay when gathering evidence. Hearsay statements are less reliable because the speaker is not present at the hearing and therefore cannot be questioned—the statement’s credibility cannot be tested by the AMP, the applicant, and other participants. However, the Vermont Rules of Evidence do not prohibit accepting this type of evidence. Although this form of evidence is less credible, an AMP may admit this evidence if “it is of a type commonly relied upon by reasonably prudent people in the conduct of their affairs.” 24 V.S.A. § 1206(b). An AMP may also choose to admit written evidence that would normally be presented as oral testimony “when a hearing will be expedited and the interests of the parties will not be prejudiced substantially.” 24 V.S.A. § 1206(c). However, the person submitting the written statement must be present at the hearing, in case the AMP wishes to question the person. 24 V.S.A. § 1206(c).

Credible evidence is a term that describes evidence that can be trusted as reliable and truthful. Credible evidence is based on personal experience or observation. The following forms of evidence are listed from most credible to least credible evidence:

1. Witness providing testimony at a hearing.
2. Written testimony where the writer is present for questioning.
3. Written testimony under affidavit.
4. Hearsay—most forms of evidence are more credible than hearsay.

Forms of Evidence

Oral Testimony: An AMP’s recorder or clerk should note who speaks, whether the participant was administered an oath, and the subject matter addressed. A clear record is important.

Written Testimony: An individual may participate in a hearing through written testimony, such as a letter. 24 V.S.A. § 4461(a). For statements originally made outside of the current hearing, best practice requires an AMP Chair or designated official to read statement to all present at the hearing. This provides an opportunity for interested persons to question the evidence. 1 V.S.A. § 310(5)(b).

Documents and Tangible Objects: Tangible evidence must be marked, labeled and identified. An AMP clerk should mark and create a list of all exhibits received from anywhere.

The recorder should review all exhibits before the AMP and designate different labels for each party. For example, a site plan from an applicant may be identified and marked as “A1,” while a photo from an interested party may be labeled as “I1.” The recorder may indicate whether exhibits were submitted prior to the hearing or during the hearing. The recorder should create a list, noting evidence corresponding to labeled physical exhibits.

Staff and advisory committee reports and observations made at site visits are evidence and should be recorded and gathered according to best practices.

Staff and Advisory Committee

Reports: In municipalities that have not adopted MAPA, an AMP may delegate “any of the power granted . . . to a specifically authorized agent or representative.” 24 V.S.A. § 4461(b). A staff member or advisory committee “may review an application and make recommendations on review standards.” 24 V.S.A. § 4464(d)(2). These recommendations may be presented in writing either before or at a hearing. Recommendations may also be presented as oral testimony at the hearing. 24 V.S.A. § 4464(d)(4). If presented in writing, reports should be marked and filed as a document. If

presented as oral testimony, the recorder or clerk should follow best practices for oral testimony and should administer an oath, as well as recording the speaker’s name and what was said.

Site Visits: An AMP may conduct a site visit. 24 V.S.A. §§ 4461(b) and 4464(d)(2). Site visits place a project in context. Site visits may take place before or during a hearing. It is important to enter all observations and evidence gathered at the site visit in the record by providing oral testimony at the hearing regarding what was observed. Oral testimony should describe when the visit was conducted, who was present, and what the individual/board saw. The person/board conducting the visit should then offer other parties who were present at either the site visit or present at the hearing an opportunity to make additional comments.

Group site visits trigger the open meeting law and require public notice. This is a more common practice than solo site visits, which are not considered a public meeting and do not require public notice. A group visit is helpful because one person may notice details that another does not. However, unless the site visit is actually conducted as a public meeting, which can be difficult and awkward, the only evidence that should be gathered at a site visit is visual evidence. Further, the AMP or member(s) conducting a site visit should strive to avoid ex parte communication. Although interested parties and members of the public must be able to attend site visits along with applicants, site visits should not be used as a forum for receiving testimony. The person conducting a site visit should clarify that individuals attending are expected to remain quiet and that the appropriate time to testify will be at the scheduled hearing.

Additional Considerations Required by MAPA for On-the-Record Review

An AMP serving a municipality that has adopted MAPA must adhere to the evidentiary limits set forth in *24 V.S.A. § 1206*. It is not essential to memorize the Vermont Rules of Evidence to adhere to MAPA. MAPA § 1206 permits: “evidence not admissible under the rules of evidence may be admitted if it is of a type commonly relied upon by prudent people.” For example, an AMP may admit a statement made outside the current hearing, such as a letter from an interested party, as long as a reasonably prudent person would rely on the statement. The Vermont Rules of Evidence do not prohibit this statement just because it is hearsay.

MAPA Requires:

1. An AMP to only admit relevant evidence.
2. An AMP to only receive evidence presented under oath by a party and party witnesses. *24 V.S.A. § 1206(a)*.
3. Parties and interested persons must deliver testimony under oath.
4. AMPs to create audio recordings of their proceedings.
5. Most importantly, an on-the-record evidentiary record must be complete, clear and understandable. The Environmental Court vacates (ie: dismisses and returns to the local board) decisions when an AMP’s record of a hearing is incomplete. A vacated decision requires additional local hearings, delays, and, ultimately, reduces confidence in local development review.

MAPA defines a *party* as an “interested person.” *24 V.S.A. § 1201(4)*.

MAPA defines an *interested person* as an individual with the authority to initiate an appeal from an AMP decision to the Environmental Court.

Considerations

Applying Evidence to “Findings of Fact”

An AMP must sift through the evidence presented at a hearing and select only the evidence that is credible and relevant to make findings of fact. Not all evidence presented at a hearing needs to be included as a finding of fact. An AMP should first consider the presented facts, then consider a municipality’s bylaws, and finally apply findings of fact to determine whether a specific project meets the established bylaws pursuant to state statute.

Importantly, an AMP should be careful to provide findings of fact adequate to explain its decision. An AMP’s decision must be explained and supported by facts. For example, reciting testimony without analysis is inadequate. Inadequate findings of fact lead to greater likelihood for appeal.

Through statute, an AMP has all of the tools necessary to gather evidence for well-supported findings of fact. An AMP may request or issue an order compelling an applicant or other parties to provide additional evidence, including witness testimony, to decide the matter under review. *24 V.S.A. § 4461(b)*.

Appeals

The Environmental Court usually reviews an AMP’s land use decisions *de novo*. De novo means an applicant’s case is heard “anew,” so the Environmental Court does not consider findings of fact by the AMP or evidence gathered in the original AMP hearing. Parties are entitled to present new evidence. The Environmental Court finds its own facts, applies those facts to the municipality’s bylaws, and issues a decision.

In contrast, where municipalities have adopted MAPA and elect for on-the-record review, the Environmental Court may not receive new evidence and looks to the evidentiary record developed by the AMP. The Environmental Court may only review whether the facts found by an AMP, as applied to the municipality’s bylaws and state law,

support the AMP’s decision. That is, whether or not the AMP misinterpreted the bylaw or state law or made a procedural error. *24 V.S.A. §§ 1201(1)(A) & (B) and 1202(A)*. The Environmental Court will not consider new evidence that is not submitted during the local hearing before the municipality.

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On-the-Record Review

Benefits

On-the-record review empowers communities by deferring to facts and information gathered by the local authorities most familiar with the people, place, and project at issue in each specific case. On-the-record review can lead to fewer appeals—it therefore saves in attorneys’ fees, prevents permitting delays, and can make the municipality appear professional and competent in the eyes of the public. An appeal of an on-the-record decision does not afford the parties an opportunity to build a new case with new facts. Appellate review is limited to whether an AMP misapplied the law or made procedural error.

Drawbacks

On-the-record review requires a municipality to follow specific procedures under MAPA and requires a more precise, organized, and thorough system of gathering and recording evidence. MAPA requires municipalities to follow specific ethics procedures, admit testimony only under oath, provide an audio recording and transcript of all hearings, generally adhere to the Vermont Rules of Evidence, and write clear decisions. The Environmental Court consistently vacates decisions when an AMP’s record of a hearing is incomplete and inaudible.

Ethics, Ex Parte Communications, and Misrepresentation

Evidence should be received without bias and without considering the character or personal history of an applicant. For example, an AMP should avoid considering evidence based on an applicant's financial situation. Similarly, details about a person that are not related to the bylaws at issue should be rejected. An AMP should strive to review projects, not personalities.

Possible ethical conflicts arise when AMP members engage in *ex parte communications*: direct or indirect communication with an applicant, fellow board members, or interested persons concerning the merits of an application outside a formal hearing. The prudent AMP member will only discuss the merits of development review at a hearing. When community members ask about or comment on a pending project, the appropriate response is to offer nothing more than the time and date of the hearing. Ethics and best practices require that evidence should be tested by providing all concerned parties the opportunity to be present when that information is heard at a public hearing. This lets the parties question the content and veracity of the evidence received by an AMP.

“The prudent AMP member will only discuss the merits of development review at a hearing. When community members ask about or comment on a pending project, the appropriate response is to offer nothing more than the time and date of the hearing.”

An AMP “may reject an application . . . that misrepresents any material fact.” 24 V.S.A. § 4470a. An AMP may strive to gather credible evidence by administering oaths and a municipality may require information provided in an application to be accurate and truthful. Ultimately, an AMP must decide which evidence is “competent”—reliable, relevant, and credible.

Conditioning Projects

An AMP may use evidence from a hearing to add conditions to a project permit. The conditions should be tailored to following the objectives of the municipal plan, bylaws and state statutes. It is important to connect what was said and presented in evidence at a hearing with any conditions placed on a permit. An AMP should first examine evidence to determine which facts reflect a need for placing conditions on a permit. An AMP should next examine the municipality's bylaws and the state statutory criteria to determine what conditions may be allowed by law.

Conclusion

Effective evidentiary procedures should further an AMP's goal to provide a consistent, fair, and efficient decision making process. An applicant, an interested party, or the public should be able to review an AMP's decision and follow the facts found, rationale for conditions and conclusions made according to the adopted community standards in the plan and bylaws. Ambiguity and error in the development review process increases the likelihood of appeals and may result in unfortunate costs and delays. In serving their community, AMPs should strive to implement best practices when gathering evidence in order to most effectively implement the rules and standards set forth in local and state laws.

Resources

Vermont Rules of Evidence, Michie's Legal Resources, available at <http://www.michie.com/vermont/lpext.dll?f=templates&fn=main-h.htm&2.0>.

Vermont Land Use Education and Training Collaborative, 2006, [Essentials of Local Land Use Planning and Regulation](#).

Municipal and Regional Planning and Development, Vt. Stat. Ann. tit. 24, ch. 117, available at <http://www.leg.state.vt.us/statutes/sections.cfm?Title=24&Chapter=117>.

Credits

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Produced by Vermont Law School Land Use Institute:

Author: Siobhan McIntyre
Editors: Peg Elmer, Katherine Garvey, Kirby Keeton

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