

Shaftsbury Development Review Board

June 15, 2022

Call to order

The meeting came to order at 6:08 p.m. in person in Cole Hall and remotely via Zoom. Present were board members Mike Day (vice-chair), Lon McClintock, and Tedd Habberfield. Mr. Day ran the meeting and noted that a quorum was present. Also present was zoning administrator Shelly Stiles.

Conflict of interest

No one reported a conflict of interest with any item on the agenda.

Sign in sheets

None were necessary.

Minutes

Mr. Habberfield moved to approve the May 4 minutes. Mr. McClintock seconded the motion, which passed 3-0-0.

Rules of Procedure

The Board turned to a discussion of the most recent draft by Mr. McClintock and Mr. Habberfield of the revised Rules of Procedure. That document with all markups shown is appended to these minutes.

Matters raised but not illustrated in the document included:

- Some formatting needs correcting.
- Existing number 5 on page 9 reflects the gist of the Town's civility policy.
- A definition of "agent" will be added.
- Throughout, "interested party" or "party" will be changed to "interested persons," the term used in the Statute.
- On page 9, the order of the elements will be changed.
- On page 13, the section on member voting may be better placed elsewhere.
- On page 14, the section on the submitting of a memorandum regarding ex parte communications will be removed.
- Mr. Habberfield will suggest additional organizational changes.

The Board will continue the discussion at a later meeting.

Other business

Members of the Board and the zoning administrator will talk with Tom Huncharek about his remaining on the board.

Mr. McClintock will be essentially out of touch for the last meeting in July and the first in August. It was agreed to cancel those meetings, though if something comes up a meeting on July 19 could be held.

Mr. Day moved to adjourn at 7:15. Mr. McClintock seconded the motion, which passed unanimously.

Notes by ZA Stiles

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DEVELOPMENT REVIEW BOARD

Rules of Procedure and Conflict of Interest Policy

Section I: Authority

The Development Review Board of the Town of Shaftsbury shall be governed by 24 V.S.A. § 4461(a) and 1 V.S.A. §§ 312(e), (f), and (h), Town Zoning Bylaws, Subdivision Regulation, Road Access Ordinance, and the Rules of Procedure, as amended.

Upon adoption of these rules, The Chair shall file a current copy including all amendments to the Town Clerk as public record. The Rules of Procedure shall be reviewed annually and updated when necessary.

Section II: Policy

These Rules are adopted to ensure consistent and fair treatment of applicants, interested persons, and participants, orderly and efficient public proceedings, and compliance with municipal, state and federal law. These Rules shall also ensure that no Board Member will gain an improper personal or financial advantage from his or her work for the Board, so that the public trust in municipal government will be preserved.

Section III: Definitions

- A. “Abstention” is a vote cast by a Board Member that confirms a quorum was presenting during voting, but the abstention vote is counted with the votes opposing the motion or decision. For example, a vote of 2 for, 1 against, and 2 abstentions means 5 votes were cast, meeting the quorum requirement, but the motion failed for lack of majority support – *i.e.*, 2 votes for passage of the motion and 3 against passage.
- B. “Board Member” means a regular or alternate Member of the Development Review Board.
- C. “Conflict of interest” is defined by the Town of Shaftsbury Conflict of Interest Policy, adopted by Select Board.
- D. “Decision” generally refers to the formal written decision made by the Board following a hearing on the merits of a permit application, Zoning Administrator referral or appeal
- E. “Deliberative session” means either a private or public session of the board to examine, discuss and weigh the evidence presented at the hearing, and the appropriate application of the Bylaws to the subject of the hearing. During deliberative session the Board shall not take evidence or testimony, nor shall the Board take or permit the applicant, appellant, interested

persons or the public to make any comment during the Board's deliberations. By motion and majority vote, the Board may enter deliberative session during a hearing to consider and decide a specific issue that may need to be determined prior to taking testimony or evidence. Two examples of issues that may need to be decided during a hearing: (1) is a person entitled to interested party status; and (2) should the Board conduct a site inspection.

- F. "Evidence" means documents such as maps, surveys, letters, drawings, photos and tangible material offered during a hearing to inform the Board about a particular fact or issue that is relevant and material to the issues the Board is deciding.
- G. "Executive session" means a session of a public body from which the public is excluded, pursuant to 1 V.S.A. § 313. Such private session may only be held for one of the reasons permitted by the statute, and no binding action may be taken in executive session.
- H. "Ex parte communication" means direct or indirect communication between a Member of the Board and any party, party's representative, party's counsel, witness, or any person interested in the outcome of any proceeding before the panel that occurs outside of a public proceeding, and concerns the substance or merits of the proceeding.
- I. "Hearing" means a formal Board proceeding during a Board meeting that is convened to take evidence and testimony on a particular matter requiring a formal, written decision from the Board. Matters requiring a hearing include, but are not limited to, variances, conditional uses, enforcement of the Zoning Bylaws, permit applications referred by the Zoning Administrator to the Board, and appeals of Zoning Administrator decisions, actions and/or failures to act.
- J. "Interested Party" is defined by 24 V.S.A. § 4465. An interested party has the right to give evidence and testimony, and call witnesses to testimony during a Board hearing that is relevant and material to the matter then being heard and decided by the Board.
- K. "Interested Person" means an "interested party," as that term is defined herein.
- L. "Meeting" means a Board proceeding to conduct Board business for which a quorum is required and present.
- M. "Official act or action" means any legislative, administrative, or quasi-judicial act performed by the Board.
- N. "Public deliberations" means the weighing, examining, and discussing, in a public proceeding, the reasons for and against an act or decision, but expressly excludes the taking of evidence, testimony, and the arguments of parties.
- O. "Recuse" is defined by the Town of Shaftsbury Conflict of Interest Policy, adopted by Select Board. When a Board Member withdraws from a matter, or is removed from hearing a matter as provided in the Town's Conflict of Interest Policy, the Board Member is said to be "recused" from the matter.

- P. “Written communication” includes, but is not limited to, documents, emails, text messages, and electronic messages through public or private websites, social media, or other electronic services.
- Q. “Witness” means any person who testifies during a hearing, including, but not limited to, the applicant, appellant, interested party or member of the public.

Section IV: Regular Officers & Members


The Board shall consist of five regular Members. After Town Meeting but prior to May 1, or at other times throughout the year as needed, the Board shall hold an organizational meeting and elect by majority vote, a Chair and Vice Chair.

- A. The Chair shall preside at all meetings, hearings, and deliberations, decide all points of order or procedure, and appoint Members to any committee of the Board. The Chair may administer oaths and may request the attendance of witnesses and the production of material germane to any issue under consideration.
- B. The Vice Chair shall assume the duties of the Chair whenever the Chair is absent, or at the Chair’s request. Whenever the Chair and Vice Chair are absent, or at their request, the Chairman or Vice Chairman may appoint someone, or in their absence the majority of the Members of the Board present and voting may appoint someone to temporarily assume such duties.
- C. It shall be the duty of all Members to review the minutes and other official records of Board meetings and actions, and correct and ratify minutes and records when appropriate or necessary. A Member may, but is not required to, abstain when a vote to approve the Minutes of a Board Meeting such Member did not attend.
- D. The Development Review Board Recording Clerk shall take minutes of all meetings, unless delegated to a Board Member.

Section V: Alternate Members

The Select Board shall annually, or when needed, appoint up to two Alternate Members (“Alternates”) who may serve as Board Members when a full (five Members) Board is not present due to any cause, including, but not limited to, a conflict of interest.

- A. A list of Alternates shall be kept by the Board.
- B. The assignment of Alternates for active duty shall rotate among the Alternates on the List, with the Chair or acting Chair being responsible for assigning Alternates to fill a temporary vacancy on the Board.

- C. If the Chair of the Board does not appoint an Alternate as stated in Paragraph B, a majority of the Members of the Board present and voting may appoint an Alternate to serve in accordance with Paragraph B.
- D. An Alternate who is assigned to a particular hearing or matter shall continue to serve until a final decision is made on the matter. An Alternative assigned to a matter shall participate in all phases of the proceedings, including, but not limited to, hearings, site visits, and deliberative sessions, until the matter is fully and finally decided by the Board.
- E. An Alternate who is assigned to serve on the Board for a particular hearing or matter shall vote on any and all issues requiring the Board's decision related to the matter and, if requested,  the Board's decision consistent with the Alternate's vote.



Section VI: Removal of a Member


Upon majority vote in favor, the Board may request that the Select Board remove a Board Member for good cause. See 24 V.S.A § 4460(c). The Board's request for removal shall be in writing. The Board's written request shall state the grounds for removal with sufficient clarity and specificity so that a reasonable person would understand the basis for the Board's request.

Section VII: Regular & Special Meetings

Regular meetings: Regular meetings to conduct the business of the Board shall be held in the Town Hall at 6:00 p.m. on the first and third Wednesday of the month, or as warranted.

Special Meetings: may be called by the Chair, provided at least 24-hour notice is given to each Member and the time and place of the special meeting is publicly announced at least 24 hours before the meeting. Special meetings shall only address those matters requiring the Board's immediate attention and action. A special meeting is appropriate when the interests of the Board, the Town or an interested party will suffer substantial disadvantage or harm if the Board waits until the next regularly scheduled meeting to hear or decide the time-sensitive issue.

Meeting Rules: The following Rules apply to all Regular and Special Meetings of the Board:

- A. **Cancellation of Meetings:** The Chair may cancel regular or special meetings at any time for good cause.
- B. **Quorum:** A quorum shall consist of a majority of the Member seats on the Board. Currently, the Board has five (5) seats.
- C.  **Electronic Participation in Meetings:** Members and attendees may participate by electronic means (telephone, internet conferencing service, *etc.*) provided all of the following conditions are met: (1) all Members, participants and attendees, whether attending in person

or by electronic means, can hear all other Members and participants; (2) all Members and participants, whether participating in person or by electronic means, can be heard by all other Members, participants and attendees; and (3) the Chair takes reasonable measures to assure that Members and participants attending by electronic means are provided a full and fair opportunity to participate in the meeting.

- D. **Meetings Open to Public:** All meetings shall be open to the public unless the Board, by majority vote, closes the meeting for a deliberative or executive session. To conduct business in executive session, the Board must comply with 1 V.S.A. § 313, as amended, and only after a majority vote in favor of conducting an executive session.
- E. **Agenda:** There shall be an agenda for each meeting. The Zoning Administrator and the Chair shall determine the content of the agenda, subject to reasonable input from the Board.
- F. **Order of Business:** All business shall be conducted in the same order as it appears on the agenda except, by majority consent, the Chair may alter the order of items to be considered.
- G. **Questions of Order & Procedure:** The Chair shall rule on all questions of order and procedure and shall enforce these Rules of Procedure. See 1 V.S.A. § 312(h).

Section VIII: Minutes & Records

- A. **Electronic Record of All Meetings & Hearings:** The Recording Clerk shall record all meetings and hearings of the Board electronically. Upon request, the Recording Clerk shall provide a person with digital copy of the record or a transcript of the Board proceedings provided the request is made in writing and the cost of copying the recording or producing the transcript is paid in full in advance. In the event a recording was not made, or the recording was lost, damaged or destroyed, the Recording Clerk may satisfy the request by providing the requesting person with the written record of the meeting.
- B. **Minutes:** The Recording Clerk shall take, publish and keep the minutes of all public meetings of the Board.

Section IX: Hearings

Public hearings shall be conducted as quasi-judicial proceedings pursuant to 1 V.S.A. § 310(5) (B). Hearings shall be publicly noticed in accordance with 24 V.S.A. §§ 4464(a) (1) & (2), as amended. Hearings shall not exceed three hours in length unless approved by a majority of Members present. Hearings may be adjourned and reconvened as the Board determines to be appropriate.

- A. **Presiding Member:** The Chair shall preside over hearings, affording the applicant, appellant, interested parties and members of the public a reasonable opportunity to present relevant and material testimony and evidence.

1. **Time Limits:** The Board may adopt time limits for the presentation of testimony and evidence to assure the fair and efficient presentation of relevant and material information to the Board.
2. **Electronic Hearings:** The Board may conduct hearings by electronic communication, provided electronic hearings are conducted in the same manner, and in accord with the same rules and principles, as the Board's electronic meetings.
3. **Oaths:** All oral witness testimony shall be given under oath or affirmation administered by the Chair or such other person as the Chair designates. The oath requirement may be satisfied by the witness signing a written oath provided by the Board.
4. **Testimony & Examination of Witnesses:** The Chair shall conduct the hearing so as to elicit all of the needed information from the owner of the subject property and the witnesses. The Chair may require hearing participants who wish to question a witness to direct their questions to the Chair, who will then pose appropriate questions to the witness. When the Board Chair permits questioning by Board Members, Members may question witnesses directly. During the hearing, every witness shall:
 - a. identify themselves, including their town of residence and, when relevant, the location of their property in relation to the property that is the subject of the Board hearing;
 - b. describe the nature of their interest in the matter under Board consideration;
5. **Conduct of Witnesses & Attendees:** The Chair shall conduct hearings so as to maintain order, civility and common decency. The Chair shall enforce rules of decorum and take action when necessary to assure everyone in attendance is respectful of all other participants and attendees.
6. **Presentation of Evidence:** All evidence must be presented during the hearing. The Chair shall determine the admissibility of the evidence presented during the hearing. (See Rules of Evidence, below.) The Zoning Administrator shall provide the Board with all letters sent to the Town, Zoning Administrator or Board about the matter under consideration. The Chair may accept as evidence a letter supporting, opposing or providing information about a matter under Board consideration provided:
 - a. The letter identifies the letter's author, the author's relationship, interest at stake, and/or the proximity of the writer's property to the subject to the subject property;
 - b. The letter describes the factual basis for the writer's information or opinions;
 - c. The letter is presented to the Board during the hearing;
 - d. The content of the letter is relevant and material to the matter under Board consideration; and

- e. The Chair determines that admitting the letter without giving participants an opportunity to question the letter's author will not disadvantage the participants present at the hearing.

B. Rules of Evidence: The admissibility of evidence is governed by 24 V.S.A. § 1206, as amended.

1. The Rules of Evidence used in civil court proceedings generally apply to Board hearings. When necessary to ascertain facts that are not reasonably susceptible of proof under the Rules used in civil proceedings, the Chair may admit evidence if it is of a type commonly relied upon by reasonably prudent people in the conduct of their affairs.
2. The Chair may exclude irrelevant, immaterial or unduly repetitious evidence.
3. Testimony may be offered in written form, provided the witness is available and appears for examination and cross-examination at the hearing.
4. Documentary evidence may be received in the form of copies or excerpts, if the original is not readily available. Upon request, parties shall be given an opportunity to compare the copy with the original. present at the hearing.

C. Site Visits: The Board may convene at the property under consideration if the Board believes a site visit will help the Members understand the property and the issues under consideration. Site visits are **not** hearings, and the Board shall not take testimony or evidence from the land owner or others during a site visit. Site visits are intended to familiarize Board Members with the site under consideration. Site visits shall be warned in the same manner as hearings, including adjourned hearings. The Recording Clerk shall attend and keep a record of the site visit. To avoid *ex parte* communication, the Chair shall advise the land owner and others in attendance that all testimony and evidence must be presented to the Board when the hearing reconvenes.

D. Representation: A person appearing before the Board may be represented by an attorney or agent.

E. Service List: The Zoning Administrator shall create and maintain a list of all individuals who participated in the hearing. The list shall include those who participated orally and those who participated in writing. The list shall include:

1. The names of those who participated in the proceedings.
2. A summary of the nature and content of participation by those who participated.
3. The mailing address of each of these persons.

F. **Order of Hearings:** The Chair shall conduct hearings in the following order:

1. Open the hearing by reading the warning of the hearing.
2. Review the order of events. Remind all present that the proceeding will be conducted in an orderly manner. Remind all present that testimony, comments and questions should be directed to the Board Chair, rather than to the participants or people attending the hearing.
3. Request disclosure of conflicts of interest and *ex parte* communications about the matter under consideration with Board Members.
4. Review the definition of interested persons in 24 V.S.A. § 4465(b).
5. Explain that only an interested person who has participated in the proceedings may appeal the Board's decision to the Vermont Environmental Court. See 24 V.S.A. § 4471(a),
6. Ask all who believe they meet the definition of interested person to identify themselves and to provide contact information. The Board may make a determination of a person's party status prior to taking testimony and evidence on the merits of the matter under consideration if doing so will affect the disposition of the matter. Persons who are not afforded interested person status may participate in the hearing as provided in these Rules and such other rules as the Chair or Board adopt.
7. **Remind** all persons that the Board will only consider the testimony and evidence presented during the hearing, and the observations the Board Members make during a site visit.
8. **Direct** all persons wishing to present testimony or evidence to step forward and sign both the Hearing Service List and The Oath. For participants attending electronically, administer the oath orally, making sure the witness's response to the oath is recorded.
9. Determine whether service has been made on all persons entitled to notice of the Board hearing, as required by Vermont law.
10. Invite land owner whose property is the subject of the matter, and the land owner's representative and witnesses to present their testimony and evidence.
11. Invite Board Members to ask questions of the land owner, and the land owner's representative and witnesses.
12. Invite interested persons and members of the public to present their testimony and evidence regarding the matter under consideration; and, afford the Board Members an opportunity to pose questions to the persons who provided testimony or evidence.

13. Invite the land owner whose property is the subject of the matter to respond to the testimony and evidence presented by interested persons and members of the public.
14. Invite more questions or comments from Members of the Board.
15. Invite more questions from interested persons and Members of the public.
16. Allow final comments or questions from the land owner whose property is the subject of the matter and/or the land owner's representative or witness.
17. Upon motion and majority approval, the Chair shall either adjourn the hearing to a date and time certain, or close the proceedings by stating that public hearing is closed.
18. By majority vote of the Board either begin deliberative session or set a date and time for conducting its deliberative session. See 1 V.S.A. § 312(e).

Section X: Reopening A Hearing

- A. Prior to issuing a decision, the Board may, by majority vote, reopen a hearing to take additional testimony and/or evidence on the matter, if doing so is necessary for the Board to issue a full, fair and complete decision on the matter heard by the Board.
- B. The reopening of a hearing will not extend the time within which the Board must issue a decision on the matter. The time period to issue a decision, pursuant to Vermont law, will begin to run when the evidence on the matter is first closed by the presiding officer.

Section XI: Deliberative Session & Hearing Decisions

Deliberative Session: Following a hearing, the Board shall deliberate in public unless, by majority vote, the Board determines to conduct the deliberative session in private. Deliberative sessions conducted in private need not be warned. 1 V.S.A. §§ 312(e) & (f). Board Members who have not heard all of the testimony and reviewed all of the admitted evidence, including but not limited to, the application, notice of appeal, plat map, and written testimony, shall not attend or participate in the deliberative session.

Member Voting on Board Decisions: Voting on the merits of the matter which is the subject of the Board's hearing shall be in public session. The following Rules apply to voting on decisions:

- A. Motions shall be made in the affirmative to approve or deny the action requested by an applicant, appellant or interested person.

- B. The Chair has the same voting rights as all other Board Members, and should vote on all matters for which the Chair does not have a conflict of interest or is otherwise disqualified from the matter.
- C. All Members present are expected to vote (*i.e.*, in favor, opposed or abstain) if not recused from the matter under consideration.
- D. For a motion to pass, a majority of the entire Board, which is currently five (5) Members, must vote in favor of passage of motion. 1 V.S.A. § 172; 24 V.S.A. § 4461(a). By way of emphasis, a simple majority of the Members present and voting is not sufficient for passage of a motion' regardless of the number of Members present and voting.
- E. The Board shall issue a decision within 45 days of closing the public hearing, as provided by Vermont law.

Section XII: Conflict of Interest

The Board shall follow the Town of Shaftsbury Ethical Conduct and Conflict of Interest Policy, as adopted and amended by the Select Board.

A Board Member who recuses themselves, or is recused by the Board, from hearing a particular matter cannot be prohibited from participating as a witness or interested party in the hearing on that matter. By way of emphasis, a Board Member shall not be a witness and as a Board Member in the same matter.

A Board Member may not be recused from hearing a matter solely because the Board Member is familiar with the property which is the subject of the hearing or the neighborhood of the subject property.

Section XIII: *Ex Parte* Communications

Ex parte communication between Board Members, the owner of the property under consideration by the Board, interested parties, witnesses, and members of the public is prohibited. A board Member who engages in *ex parte* communication about a matter under consideration by the Board, inadvertent or otherwise, must disclose such communication as required below.

At the start of each hearing and continuation hearing, the Chair shall ask Members to disclose the *ex parte* communications each has had concerning the matter under Board consideration. Board Members who have received written *ex parte* communications shall place in the record copies of all written communication each Member has received as well as all of the Member's written responses to those communications. Members shall prepare a memorandum describing: the time and date each *ex parte* communication; the participants in the *ex parte* communications; the substance of all oral *ex parte* communications, and all of the Member's responses thereto. The

written *ex parte* communications and memorandum shall be retained as part of the record of the proceedings. Written *ex parte* communications and Members' memoranda are subject to the Rules of Evidence and may be admitted as evidence as provided by these Rules.

Section XIV: Amendments

These Rules may be amended at any regular or special meeting by a majority vote of the entire Board, provided that each Board Member has been presented a written copy of the proposed amendment at least 24 hours before the meeting at which the vote is taken.

