

A Guide to the § 248a Process for the Siting and Deployment of Telecommunications Facilities

Overview

This guide is intended to walk readers through the Public Service Board's process for the siting and construction of telecommunications facilities. Communications facilities can, and often do, raise many legitimate concerns for the communities they serve. From public safety to environmental and aesthetic impacts, these facilities often present complex challenges. In addition, PSB practice can be confusing and difficult to those who are unfamiliar with it. This guide explains the process and the role individuals and towns can play in the process. It is our hope that with the help of this guide, cities, towns and individuals will be able to positively shape our telecommunications future through effective participation in the § 248a process.

Public Service Board

The Vermont Public Service Board (PSB) is a quasi-judicial board that regulates electric power companies, telephone service providers, cable television providers, pipeline gas companies, and some water utilities. The Board consists of three members, all of whom are appointed by the Governor for staggered six-year terms. As a quasi-judicial entity, the Board operates much like a court. The Board conducts evidentiary hearings and issues decisions, typically referred to as Orders. Orders are legally binding decisions that can be appealed to the Vermont Supreme Court. The Board manages a staff of attorneys, economists, engineers, and environmental analysts, among others. In most proceedings, a staff member acts as a hearing officer, conducting hearings and drafting proposals for decision (PFDs) for the Board's consideration and ultimate determination. Generally, a hearing officer will oversee all hearings in a § 248a proceeding.

The Public Service Board also establishes rules and procedures related to utility matters. The PSB has issued an Order establishing procedures for the administration and adjudication of § 248a applications.¹ Board interpretations of law and particular practices may be established by order.

Department of Public Service

The Vermont Department of Public Service (DPS) represents the public interest in electricity, telecommunications, and water and wastewater matters. The DPS is a part of the executive branch of Vermont state government. The Department is a statutory party to § 248a proceedings and provides comments to the Board in response to each application. The Department will also retain experts and conduct an independent analysis of a proposed facility when appropriate.

¹ See *Second Amended Order Implementing Standards and Procedures for Issuance of a Certificate of Public Good for Communications Facilities Pursuant to 30 V.S.A. 248a*, Order issued September 5, 2014 (hereinafter “*Second Amended Procedures Order*”).

Applicants

Applicants initiate a § 248a proceeding by filing an application to the PSB.² Applicants are parties to the proceeding and must represent their interests before the Board. Applicants are generally telecommunications providers, but individuals and towns may submit an application as well. Telecommunications providers typically consider many factors when choosing a site, including availability of a host property, access to utilities, the location's ability to meet service coverage goals and the ability to co-locate equipment on existing structures. These issues are often resolved prior to the submission of an application.

The Section 248a Process

The § 248a process begins with an application. Companies or persons wishing to construct a telecommunications facility may do so by applying to the Public Service Board for certificate of public good (CPG).³ This process is outlined in Vermont statute at 30 V.S.A. § 248a.

An applicant must submit an application to the PSB. For certain projects, applicants must also file a notice with a number of individuals and groups, including the PSB, the DPS, the town where the project is proposed, and adjoining land owners 45 days prior to filing a formal application with the PSB. There are three different types of projects recognized in § 248a. These are discussed in turn.

De Minimis Modification to an Existing Facility

De minimis projects are relatively small modifications to an existing facility or support structure. *De minimis* modifications can involve the co-location of new equipment on an existing structure, such as a telecommunications tower, building or farm silo. Applicants are not required to file a 45 day notice for *de minimis* projects. To qualify for *de minimis* status, the proposed project must meet the following criteria:

- (A) The height and width of the facility or support structure, excluding equipment, antennas, or ancillary improvements, are not increased;
- (B) The total amount of impervious surface, including access roads, surrounding the facility or support structure is not increased by more than 300 square feet;
- (C) The addition, modification, or replacement of an antenna or any other equipment on a facility or support structure does not extend vertically more than 10 feet above the facility or support structure and does not extend horizontally more than 10 feet from the facility or support structure; and
- (D) The additional equipment, antennas, or ancillary improvements on the support structure, excluding cabling, does not increase the aggregate surface area of the faces of the equipment, antennas, or ancillary improvements on the support structure by more than 75 square feet.

² Application requirements can be found in the *Second Amended Procedures Order*.

³ Applicants seeking a permit through the § 248a process may do so as an alternative to local zoning and Act 250.

There is no advance notice requirement for *de minimis* applications. Individuals or groups must limit comments to whether the proposed modification meets the *de minimis* criteria listed above. Comments must be filed within the 21-day comment period once the application is received by the Board. If the Board receives no objections pertaining to the classification of the project as *de minimis* within the 21-day comment period, the Board shall issue a CPG without further proceedings.

Projects of Limited Size and Scope

Limited size and scope projects include smaller new facilities and larger modifications to existing facilities. A new facility of limited size and scope must not exceed 140 feet in total height. An existing facility must remain under 200 feet after project completion and the modification cannot expand the width of the existing *support structure* by more than 20 feet. A Limited size and scope project cannot disturb more than 10,000 square feet of earth.⁴ Unlike *de minimis* projects, there are no limits on the amount of equipment the applicant is allowed to install. An applicant is required to issue a 45-day notice to the PSB and all required recipients prior to filing an application. If the PSB finds that an application does not raise a significant issue, it is required to issue a CPG within 45 days. In the event that an application raises a significant issue, the PSB must render a final determination on the application within 90 days.

Full § 248a Projects

A full § 248a project is any project that is not of limited size and scope or *de minimis* modification to an existing facility. There are no height or size limitations for a full project. The PSB must make findings that the project will not have an “undue adverse effect” on certain criteria discussed below before issuing a CPG. An applicant is required to issue a 45-day notice to the PSB and all required recipients prior to filing an application. The PSB shall issue an order within 60 days of receiving a complete application if it determines that an application does not raise a significant issue with regard to the 248a criteria. In the event that an application raises a significant issue, the Board must render a final determination on the application within 180 days.

248a Criteria

Undue Adverse Effect

Before the Board can issue a CPG, it must make findings that the project will not have an “undue adverse effect” with regard to:

- Aesthetics
- Historic sites
- Air and water purity
- The natural environment
- Public health and safety
- Public use and enjoyment of I-89 and I-91 scenic corridors, and any highway designated as a scenic road.

⁴ 30 V.S.A. 248(3)(B). The Board interprets this language to mean permanent earth disturbance and excludes temporary earth disturbance from the calculation. *See Second Amended Procedures Order* at 5.

- Criteria in 10 V.S.A §1424a(d) and 6086(a)(1)-(8).⁵

The criteria listed above are applicable to full projects. Applicants filing a project of limited size and scope must address floodways (10 V.S.A. § 6086(a)(1)(D)) and Aesthetics (30 V.S.A. § 6086(a)(8)). *De minimis* project applicants are not required to address the substantive criteria listed above.

Town Plans and Recommendations of Town Planners

In addition to the criteria listed above, the PSB must also give “substantial deference” to the “land conservation measures in the plans of the affected municipalities and the recommendations of the municipal legislative bodies and the municipal and regional plans unless “there is good cause to find otherwise.”⁶ Towns may submit recommendations to the PSB during the 21-day comment period.

Act 199 passed in 2014 directed the PSB to define “good cause” and substantial deference. The PSB adopted the following language in an Order of September 5, 2014:

“Good cause” means a showing that deferring to the land conservation measures in the plans of the affected municipalities and recommendations of the municipal legislative bodies and the municipal regional planning commissions regarding the municipal and regional plans, respectively, would be detrimental to the public good or the State’s interests articulated in 30 V.S.A. § 202c.

“Substantial deference” means to give significant and meaningful weight to the land conservation measures in the plans of the affected municipalities and the recommendations of the municipal legislative bodies and the municipal and regional planning commissions regarding the municipal and regional plans, respectively.⁷

Applicability of Local Zoning

Applicants seeking a permit through the § 248a process are not required to adhere to local zoning ordinances. Zoning ordinances are preempted by § 248a.⁸ This means that an applicant using the § 248a process is not obligated to adhere to zoning ordinances of the host town. The PSB may not deny a project based on the projects non-conformance with local zoning bylaws. This does not mean, however, that local zoning bylaws are void. An applicant seeking permission outside of the 248a framework (i.e. by applying for a zoning permit from the town planning commission) would need to follow local zoning laws.

⁵ The law incorporates by reference Act 250 criteria. It includes water and air pollution, water supply, soil erosion, congestion or unsafe conditions with respect to the use of highways, waterways, railways, airways and other means of transportation, burden on the ability of a municipality to provide municipal or governmental services, and scenic and natural beauty.

⁶ 30 V.S.A. § 248a(c)(2). This provision applies to limited size and scope and full projects.

⁷ See *Second Amended Procedures Order* at 5.

⁸ 30 V.S.A. § 248a(h).

How to Participate in a Section 248a Proceeding

Towns and Cities

Towns may participate in the § 248a review process in three primary ways. First, a town has the right to request a public meeting with the petitioner and the Department of Public Service. Second, a town may submit comments to the PSB. Third, the town has the right to intervene in the proceeding and become a formal party.

Public Hearing

During the 45 day notice period, the municipal legislative body and/or the planning commission of the host town have a statutory right to request that the petitioner attend a public meeting at the town. This meeting gives town planners and the public an opportunity to ask questions and learn about the proposed project. The DPS will also attend the meeting at the request of the town. The DPS will consider the views expressed during the public meeting in its recommendation to the Board.

Comments

Towns may file comments with the PSB during the 21-day comment period without intervening. Comments by a municipal legislative body and/or planning commissions regarding town plans are given substantial deference “unless there is good cause to find otherwise.” The PSB must provide “a detailed written response to each recommendation of the municipal legislative body and planning commission.”⁹

Intervention

A town is allowed to intervene in a § 248a proceeding by right. Intervention allows a interested person or group, such as a town planning commission, to become a formal party to the proceeding. Formal parties may provide testimony and participate in evidentiary hearings. All formal parties must follow the PSB’s rules of procedure and are subject to the rules governing discovery and cross examination. The PSB’s rules incorporate the Vermont Rules of Civil Procedure and Vermont Rules of Evidence.

Members of the Public

Members of the public may submit comments to the Board for consideration, and may do so without becoming formal parties to the case. Interested persons may also become formal parties through the intervention process. Unlike towns, however, members of the public do not have the same statutory right to participate in the proceeding and will be permitted to participate only if the party first meets certain criteria.¹⁰ Parties are allowed to appear before the Board *pro se* (i.e. without a lawyer) but it is recommended that interested persons at least consider securing legal representation before intervening in a case.

⁹ 30 V.S.A. § 248a(n).

¹⁰ See PSB Rule 2.209.

Important Information about Procedure and Process

Filing Comments with the Board

Any person wishing to file comments with the Board is required to do so within the 21-day comment period once the application is filed with the PSB and required recipients.¹¹ Comments may be sent in the form of a letter, and should be addressed to the Clerk of the Board. A copy of the comment letter should also be sent to the Department of Public Service and the applicant. Letters should include a heading stating the project type, company, and location. For example:

Re: [Company] § 248a Project of Limited Size and Scope – [Town]

Motion to Intervene and Other Pleadings

Parties wishing to intervene must file a motion to intervene. A motion to intervene, like all other formal pleadings, should be made in legal memoranda submitted to the Clerk of the Board. Parties granted intervenor status by the Board will need to file a notice of appearance, even in instances where a party will represent him or herself without a lawyer.

Prehearing Conference

In cases where a party has raised a significant issue, the Board will typically hold a prehearing conference to determine how the case will be managed. During this hearing, the Board determines potential parties (i.e. rules of motions to intervene) and sets a schedule for the case. The schedule may include a time period for discovery, evidentiary hearings, as well as time to submit legal memoranda. It is during this time that the Board will scope out the issues necessary to resolve the case.

Discovery

The Board may designate a period of time for discovery. Discovery allows parties the opportunity to ask other parties about what their witnesses have said in the exhibits they have provided. Discovery can be either written questions to the other parties (“interrogatories”) or through depositions. Parties are obligated to answer questions posed by the other side, provide documents when necessary, or provide a good faith reason why an answer or document is not necessary. Discovery is governed by the rules of civil procedure.

Evidentiary Hearings

Evidentiary hearings occur when there is an issue of material fact with regard to the substantive criteria of 248a. Litigants are allowed to put forward evidence, and cross examine other parties’ witnesses during an evidentiary hearing. The Board will schedule a hearing when it needs evidence to make a final decision. The Board will often invite parties to submit legal briefs to the Board at the close of an evidentiary hearing.

¹¹ See Vt. Rules of Civ. Pro., Rule 6 for rules governing the computation of time.

Final Order

Once the evidentiary hearings have been completed and the parties have been given the opportunity to submit briefs, the Board will issue a decision. The final Order must be based on the evidentiary record, and will include findings of fact under the Section 248a criteria as well as conclusions of law. In many cases, a hearing officer will write a preliminary decision (known as a “proposal for decision”) and solicit written comments from the parties. The proposal for decision and comments are submitted to the Board for review and issuance of a final Order. Final Orders are subject to motions for reconsideration under the Rules of Civil Procedure. Any final decision by the Board may be appealed to the Vermont Supreme Court. Appeals from a Board Order are governed by the Rules of Appellate Procedure.

Conclusion

Readers interested in participating in a 248a proceeding are encouraged to familiarize themselves with the source material discussed in this Guide. The full text of the statute can be found at 30 V.S.A. § 248a. Public Service Board Rules and Orders are accessible on the PSB’s website.¹² Statutes and PSB rules may change from time to time. Therefore parties may want to consult the Vermont General Assembly’s website for the most recent version of Section 248a,¹³ and the PSB’s website for the most up to date versions of its Rules and Procedures.

¹² <http://psb.vermont.gov/>

¹³ <http://www.leg.state.vt.us/statutesMain.cfm>. Section 248a can be found in Title 30, chapter 5. Readers should note that Vermont enacted Act 199 in 2014 which made important changes to the law. The full text of 199 can be found at <http://www.leg.state.vt.us/DOCS/2014/ACTS/ACT199.PDF>.