Our town has a seven- member planning commission. It recently held a hearing on a subdivision application. Four of the seven members were present for the hearing. A motion was made to approve the application. Three of the members voted yes and one voted no. Was the three to one vote an approval or denial of the application?

The seven-member planning commission's three to one vote brings into play two statutory provisions. The first is 24 V.S.A. § 4461(a), which provides in relevant part, "For the conduct of any hearing and the taking of any action, a quorum shall be not less than a majority of the members of the panel, and any action of the panel shall be taken by the concurrence of a majority of the panel." The second is 24 V.S.A. § 4464(b)(1), which provides in relevant part, "The [appropriate municipal] panel shall adjourn the hearing and issue a decision within 45 days after the adjournment of the hearing, and failure of the panel to issue a decision within this period shall be deemed approval and shall be effective on the 46th day."

Understanding the impact of this vote requires a two-part analysis: First, is the vote a concurrence of the majority of the planning commission, as required by 24 V.S.A. §4461(a)? If not, is the vote a "decision" under 24 V.S.A. § 4464(b)(1)? This second part of the analysis is key, because if the planning commission has failed to issue a decision, the result may be deemed approval under 24 V.S.A. § 4464(b)(1).

The Vermont Supreme Court has been wrestling with this issue for more than twenty years. The issue first arose in *66 North Main Street,* 145 Vt. 1 (1984), where an applicant appealed the denial of a building permit and sought a variance from the Rutland Zoning Board of Adjustment (ZBA). Although the ZBA consisted of five members, only three were in attendance when the board voted on the application. One of the three did not participate in the vote. The other two voted to deny the variance.

The applicant appealed the decision to the Superior Court. The Court held that the ZBA's order was invalid because only two of the five-member board signed the order. Based on this plus the ZBA's failure to issue proper findings of fact, the Superior Court ruled that the ZBA had failed to issue a decision within the prescribed time and the variance was deemed granted to the applicant. The City of Rutland appealed the Superior Court's decision to the Supreme Court. The Supreme Court held that since only two of the five-member ZBA had signed the order, the order was "patently defective." Because the Board had failed to render a decision within forty-five days after hearing, the applicant obtained the variance it sought by operation of law under 24 V.S.A. § 4470(a) - the predecessor to 24 V.S.A. § 4464(b)(1). *Id* at 3.

The issue was addressed by the Supreme Court fourteen years later in *Newton Enterprises,* 167 Vt. 459 (1998). Newton sought approval from the Fairlee ZBA to expand a non-conforming use. The ZBA held a hearing on the application. Five of the seven members of the board were present but one member abstained from participating because of a conflict of interest. Following the hearing, the remaining four members of the board voted to deny the request on a vote of three to one. The board notified the applicant of the decision four days after the hearing.

The applicant appealed the decision to the Environmental Court. Applying the holding in *66 North Main Street,* the Environmental Court ruled that the ZBA's vote was ineffective because it was not joined by a majority of the ZBA. As a result, the

Environmental Court further ruled that the ZBA had failed to take action within forty-five days and the applicant was entitled to a permit by operation of law.

The Town appealed the decision to the Supreme Court. The Supreme Court acknowledged that the Environmental Court's decision followed the holding in *66 North Main Street*, but concluded that the result carried deemed approval beyond its intended purpose. The three to one vote was "defective," but for purposes of deemed approval, the ZBA had issued a decision. *Id* at 466. The Court stated, "We hold that the board has rendered its decision when it issues a written decision and the votes are sufficient that the outcome could not change by the involvement of other members of the board." *Id*. The three to one vote, with one member abstaining, "showed that Newton Enterprises could never obtain the requisite number of votes. Of the five members present on the zoning board, three members voted against Newton Enterprises' proposal and one recused himself because of a conflict of interest. Even if the two absent members had been present and had voted for Newton Enterprises, the final vote would have been a tie with neither side receiving the requisite majority." *Id* at 464-465.

Newton Enterprises instructs that for purposes of deemed approval, when a vote has been taken by a quorum, but less than the full number of members of a zoning board, one must look to whether involvement of the other members of the board might change the outcome. If it wouldn't, a decision has been issued for purposes of 24 V.S.A. § 4464(b)(1) and deemed approval cannot occur.

Under the two-part analysis described above, your planning commission's three to one vote was not a concurrence of the majority as required by 24 V.S.A. § 4461(a). The remaining question is whether the three to one vote is a decision under 24 V.S.A. § 4464(b)(1). Applying the holding in *Newton Enterprises*, we would conclude that the planning commission's three to one vote was not a decision under 24 V.S.A § 4464(b)(1) because the outcome *could* change by involvement of other members of the planning commission. For example, if just one of the three other planning commission members voted in favor of the application, the application would be approved. It was precisely because this could have *never* occurred in *Newton Enterprises*, that the Supreme Court held that the Fairlee ZBA's three to one vote was a decision and the applicant was not entitled to deemed approval. Your planning commission's three to one vote is not a "no" decision. Rather, it is essentially a "non-decision," which, if not rectified, raises the possibility of deemed approval under 24 V.S.A. § 4464(b)(1).

If there is sufficient time, and the planning commission's vote has not been communicated to the applicant, the four members of the planning commission might attempt to hold another vote on the application. If it is not possible, the planning commission might contact the applicant, explain the situation, and ask if the applicant would agree to another hearing with a full contingent of the commission members present. Another alternative might be to issue a decision based on the three to one vote. That decision could state that the application has not been approved because, while the vote was three to one in favor of the application, the application did not receive approval of a majority of the entire board as required under 24 V.S.A. § 4464(a). On the other hand, the decision could state that while the planning commission voted three to one in favor of the application, it was unable to reach a final decision. In either case, given the vote, the applicant might appeal the decision to the Environmental Court, seeking deemed

approval. Given the time and expense of such an appeal for both the applicant and the town, either holding another vote or another hearing might make more sense.

This question points out both the risks of proceeding on an application with a bare quorum and the advantage of using alternate board members. A five-member board with two available alternates is less likely to face the specter of deemed approval for a non-decision than a seven-member board operating with a bare quorum of four members.
- Jim Barlow, Attorney, VLCT Municipal Assistance Center

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