

DEEMED APPROVAL EFFECTIVELY REVERSES DECISION OF ZONING ADMINISTRATOR

The remedy of deemed approval is a poorly understood concept in Vermont zoning law. The theory, as most observers understand it, is that if an appropriate municipal panel (a zoning board of adjustment, development review board, or planning commission performing development review) fails to issue a decision within the 45-day statutory timeline, the application is deemed to be issued in favor of the applicant. While this substantive remedy holds true, the process by which an applicant may obtain deemed approval is less clear. As the caselaw has developed, it appears that one claiming deemed approval does not have the right to pursue development until a permitting authority has granted a permit, even if the local zoning board has failed to issue a timely decision.

The Environmental Court recently issued a narrow decision in a case involving deemed approval. *Appeal of Nixon, et al.*, No. 21-2-05 Vtec (March 31, 2005). The facts of the case are difficult, and may not provide the best scenario for a court trying to formulate a cohesive rule of law. The case involved a notice of alleged violation issued by the Town of Fairfax zoning administrator (ZA). The notice was issued to a landowner based on the belief that a change of use permit was required under the Town's zoning bylaw. The landowner appealed the notice of alleged violation to the development review board (DRB). In its decision, the DRB stated that it was "unable to come to a decision," and that, "the Board is deadlocked, with no resolution." Once 45 days had passed from the close of the board's final hearing on the matter, no decision approving or denying the project had been granted. Judge Durkin (the new, second Environmental Court judge) stated, "When a zoning panel fails to act upon an appeal within a 45-day period, 24 V.S.A. § 4470(a) directs that the appeal must be 'deemed approved.'" Interestingly, Judge Durkin applied the *old* deemed approval statute under Chapter 117, as opposed to the new statute, 24 V.S.A. § 4464(b), which became effective on July 1, 2004. Nevertheless, the important principle is that the board's failure to act effectively resulted in a reversal of the ZA's notice of alleged violation.

Another interesting component of the case is that neighbors to the subject property filed a timely appeal of the DRB's "non-decision" with the Environmental Court, an appeal the Court declined to dismiss, even though the DRB's action resulted in a deemed approval for the appellant. There has been much speculation about whether the failure of a board to act, i.e., the board's non-decision, was an action capable of appeal. We see from *Nixon* that it is.

Whether the Court's decision to continue to exercise jurisdiction in this matter will have a result on the law of deemed approval in Vermont remains to be seen.

Looking ahead, in the appeal of the "non-decision" of the Town of Fairfax's DRB, the Court may decide that the deemed approval granted in the Nixon case requires the Town to issue a permit for the alleged change of use. Or, the Court could issue the permit itself. Either way, land use officials in the state will be looking for definitive guidance on the process of issuing permits after deemed approval has been granted. We will keep you posted.

- Brian Monaghan, Attorney, VLCT Municipal Assistance Center