Environmental Court Decision Sheds Light on Common Hearing Issues

In a recent decision, *Appeal of Tepper et al*, 225-12-04 Vtec (Feb. 8, 2006), the Environmental Court shed some light on how local zoning boards should approach several common hearing issues. The case involved the subdivision of a sixty-nine acre parcel in the towns of Ludlow and Plymouth. When the Ludlow Development Review Board (DRB) denied the property owners a permit for the subdivision, the property owners appealed the decision to the Environmental Court.

Ludlow is among a handful of towns that have adopted the Municipal Administrative Procedures Act (MAPA) for their zoning and subdivision hearings. 24 V.S.A. §§ 1201 et seq. MAPA sets out procedural requirements for boards conducting contested hearings. In the zoning context, adherence to MAPA is only required where the town, through its voters or the legislative body, has adopted MAPA's provisions. 24 V.S.A. § 1202(a). While the *Tepper* decision turned on several provision of MAPA, it may serve as guidance for appropriate municipal panels (AMPs) in non-MAPA towns.

Among the questions presented in the appeal was whether the Ludlow DRB should have accepted letters from ten neighbors opposing the project, which were presented to the DRB before the hearing began. The property owners asserted that these letters comprised testimony, which, pursuant to MAPA's requirements, must be made under oath. 24 V.S.A. § 1206(a). The appellants also contended that the letters comprised *ex parte* communication specifically prohibited by MAPA. 24 V.S.A. § 1207. (*Ex parte* communication is communication between a board member and a party outside of a public hearing.)

The Environmental Court rejected both these arguments, holding that because the letters were received before the start of the hearings and because they were disclosed to the property owners, who had an opportunity to subpoena and cross-examine the letter writers, the letters did not comprise *ex parte* communication. The letters were properly considered pre-hearing filings under 24 V.S.A. § 1206(c). They were not testimony, requiring submission under oath, pursuant to 24 V.S.A. § 1206(a), because they were not "evidence that a competent witness under oath or affirmation gives at trial or in an affidavit or deposition."

The property owners also asserted that the Ludlow DRB should have considered its site visit a hearing and that evidence received at the site visit should have been taken under oath. 24 V.S.A. §§ 1205(c), 1206(a). The court rejected these arguments as well, holding that, unless the DRB relies upon observations from the site visit and those observations are testified to at the hearing, evidence of the site visit need not be included in the record. Since there was no indication in the record that the DRB relied upon any statements made exclusively at the site visit, the statements could not be considered testimony.

Finally, the property owners argued that the DRB's vote was defective because one member of the DRB was absent from one of the hearings, but participated in the DRB's

decision on the proposed subdivision application. MAPA requires a member, who has been absent from a hearing but still wishes to participate in the decision, to listen to the recording or read the transcripts of any testimony missed and to review all evidence prior to participating in the decision. 24 V.S.A. § 1208. The court noted that it was the property owners' burden to show that the DRB had failed to follow MAPA's requirements in allowing the absent member to participate in the decision. Lacking such evidence, the court was obligated to presume that the DRB had followed the requirements of the law in allowing the absent member to vote.

Though only about a dozen Vermont towns have adopted MAPA, the Environmental Court's decision in *Tepper* is instructive in several respects. For example, development review boards, zoning boards of adjustment, and planning commissions are frequently presented with letters supporting or opposing specific projects. Questions often arise as to how these letters should be handled, especially where the letter writer later fails to attend the hearing on the application. These questions have been more frequent in light of changes to Chapter 117 limiting the opportunity to appeal AMP decisions to interested persons who have participated in a local regulatory proceeding.

Under the changes to Chapter 117, participation has been defined as offering, through oral or written testimony, evidence or a statement of concern related to the subject proceeding. The failure to participate at the local level can foreclose an interested person's opportunity to appeal an AMP decision. 24 V.S.A. § 4471(a). Though the question turned on interpretation of a MAPA provision, *Tepper* may indicate that the Environmental Court will take the position that the submission of a letter to an AMP opposing a project, without any further action on the part of an interested person, may not rise to the level of "written testimony, evidence or statement of concern" required to preserve an interested person's right to appeal the AMP's decision.

With regard to *ex parte* communications, the Environmental Court's narrow approach – holding that the neighbors' letters were not *ex parte* communication because they were presented before the start of the hearings – ignores the reality that *ex parte* communications can influence AMP decisions regardless of when they are made. Nonetheless, as the Court correctly points out, timely disclosure of *ex parte* communications, when combined with an opportunity to question those involved in the communication, can effectively reduce the effect such communications may have on AMP decision making. Disclosure remains the key to effectively handling *ex parte* communications.

The Environmental Court's practical view of site visits should also be welcome news. As the Court acknowledged:

> *The most valuable component of a site visit is the observations that put into context the evidence presented and arguments made at hearings. Site visits are a necessary tool for any entity charged with reviewing zoning or subdivision applications. To deny the DRB the use of this necessary tool, unless a cumbersome procedure is followed of placing attendees under*

> *oath and making a record ignores the fact that the evidence itself is derived from the physical environment and from statements made by the parties in attendance.*

The Court pointed out, however, that where a DRB relies upon observations or comments made exclusively at a site visit, that evidence should be included in the record, which would probably require that the site visit be recorded, or that the persons making the comments be under oath.

AMPs, especially large boards with no provision for the regular use of alternates, frequently face quorum problems. These problems can be especially sticky where the one or more members have been unable to attend all the hearings on an application and there is not be a quorum of members to make a decision. AMPs faced with this problem are wise to follow MAPA's requirements of requiring the absent member to listen to the recording of the hearing and review all evidence submitted prior to participating in the deliberations. The Environmental Court's approach in *Tepper* puts the burden on appellants to establish that AMP members have acted improperly when following this procedure.

For a copy of the *Tepper* decision, visit http://www.vermontjudiciary.org/tcdecisions/2006dec.aspx.

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