

DEEMED APPROVAL REMEDY NOT APPLICABLE TO DRB REMAND

Once again addressing the hot topic of deemed approval, the Environmental Court has clarified that the remedy is not available when a matter has been remanded to a development review board (DRB) for further action and the DRB fails to issue its decision in 45 days. In re: Miller Conditional Use Application, 59-3-07 Vtec (Nov. 5, 2007).

Generally, state statute provides that a DRB is required to issue a decision within 45 days after the close of evidence. If the DRB does not issue a decision within the 45-day window, that failure results in the pending application being deemed approved on the 46th day. 24 V.S.A. § 4464(b)(1). In this case, the Ludlow DRB issued a decision on a conditional use application. The decision was appealed to the Environmental Court. The Court remanded the case back to the DRB so that the DRB could reconsider its decision and issue more complete findings. (Ludlow is among the handful of Vermont municipalities conducting on the record review in accordance with 24 V.S.A. § 4471.) The DRB held no further evidentiary hearings but issued a second decision some five months later.

In light of the delay, the applicants requested that the Court award them deemed approval, contending that the failure of the DRB to render its second decision within 45 days of the Court's remand order entitled them to have their conditional use application deemed approved. The Court rejected this argument, noting that 24 V.S.A. § 4464(b)(1) refers to actions by an appropriate municipal panel. Since no mention is made in the statute of the time limits imposed upon a municipal panel after a remand order from the Environmental Court, and in light of the conservative application of the statute directed by the Supreme Court, the Environmental Court declined to read into the deemed approval doctrine an applicability to municipal panel decisions when a case has been remanded for reconsideration and further findings.

A copy of the decision can be obtained at:
www.vermontjudiciary.org/tcdecisions/Miller%20Conditional%20Use%20Application,%2059-3-07%20Vtec.pdf

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