

Environmental Court Reinforces Methodology for Determining Timely Notice of Appeal

The Vermont Environmental Court recently granted an appellee's (party against whom an appeal is taken) motion to dismiss for the appellant's (party who appeals) failure to file a timely appeal. *In re Jewish Community of Stowe and North Country Animal League*, 15-1-09 Vtec. When filing its appeal, the appellant relied on a zoning administrator's cover letter to a decision stating that the 30-day appeal period began on the date of the letter.

Appellant J.D. Associates, L.P. applied to the Town of Morrystown for a conditional use and site plan approval for a cemetery. On December 30, 2008, the Town's Zoning Administrator (ZA) sent a copy of the Development Review Board's (DRB) December 22, 2008 decision to the appellant. The cover letter to the decision informed the appellant that an appeal had to be filed "within thirty (30) days of the issuance of the decision ... beginning today." Appellant J.D. filed its appeal on January 28, 2009. Appellee Jewish Community of Greater Stowe moved to dismiss the appellant's appeal on the basis that it was filed in a timely fashion. Rule 5(b)(1) of the Vermont Rules for Environmental Court Proceedings (V.R.E.C.P.) requires appeals to be filed with the Environmental Court (Court) "within 30 days of the date of the act, [or] decision ... appealed from, unless the Court extends the time as provided in Rule 4 of the Vermont Rules of Appellate Procedure." The appellee argued that the Court should count the 30-day appeal period from the date of the DRB's decision. The appellant argued that the Court should count the 30-day appeal period from the date of the ZA's cover letter.

The Court sided with the appellee, holding that the appellant's "failure to file a timely notice of appeal, and failure of timely move to extend the time for filing the notice of appeal, deprives this Court of jurisdiction of the appeal." In reaching its decision, the Court reviewed two Vermont Supreme Court cases that address the failure to mail an otherwise timely decision with regard to deemed approval. In *Hinsdale v. Village of Essex Junction*, the Supreme Court determined that a decision is considered "rendered" even when sent outside the prescribed statutory time frame. In *Leo's Motors, Inc. v. Town of Manchester*, the Supreme Court found a decision timely when made within the statutory period, regardless of when it was sent to the appellant "so long as the failure to send a copy is inadvertent and not the result of a policy or purpose to withhold notice of the decision."

The Environmental Court discovered that the Supreme Court's reasoning in these cases was in keeping with its own. In *In Re Charbonneau* the Environmental Court held "[t]he date for appeal does not run from the date on which the applicant receives notice of the DRB decision, but from the date the decision is issued." To hold otherwise the Court reasoned "would require affidavits from the administrative officers of development review boards, zoning boards and planning commissions in every case so that potential appellants could know on what date the issued decision was filed in the municipal file cabinet."

What is most revealing about this case is that the Environmental Court seems to care little when a decision is received so long as "excusable neglect or good cause" is shown. "Even if Appellant had not been able to file a timely notice of appeal within that three-week period, Appellant could have filed a V.R.A.P. 4 motion to file a late notice of appeal..." Nevertheless ZAs should always try to mail decisions of land use panels as close as possible to the date decisions are rendered so

as not to give credence to the argument that it was willfully withholding its decision to prevent the filing of a timely appeal. A copy of the decision is at www.vermontjudiciary.org/GTC/Environmental/ENVCRT%20Opinions/09-015z.JCGS.mtd.pdf

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