Environmental Court Addresses Deliberative Session, Meeting Minutes and Deemed Approval

In 2009, applicants Jeffrey and Gregory Martin sought a variance for development of a single-family residence on property they owned in Dorset. In August of that year, the Dorset Zoning Board of Adjustment (ZBA) issued a decision denying the variance. The applicants appealed to the Environmental Court, asserting that the ZBA had not followed proper procedural steps in issuing a decision. Specifically, the applicants asserted that the ZBA did not vote to deny the variance in an open meeting as required under 1 V.S.A. § 312 and that they were entitled to deemed approval under 24 V.S.A. § 4464 (b) (1) because the ZBA failed to send the decision denying the variance by certified mail as required by 24 V.S.A. § 4464 (b) (3). *In re Martin & Martin Variance Application.*

In considering the applicants' assertion that the ZBA was obligated to render its variance decision in an open session, the Environmental Court noted that while it may be advantageous to render decisions in an open meeting, zoning boards are not required to employ the practice exclusively. When a zoning board rules on a variance request, it is performing a quasi-judicial board function and is exempt from the Vermont Open Meeting Law requirement that formal action be taken only during open meetings. Under 1 V.S.A. § 312 (f), a written decision issued by a public body in connection with a quasi-judicial proceeding need not be adopted at an open meeting if the decision will be a public record. Even if the Dorset ZBA had, as it asserted, actually adopted the decision in an open session of its meeting, the Court concluded the ZBA was not required to do so under the law.

In asserting their claim to deemed approval, the applicants argued that the ZBA's failure to send its decision by certified mail as required under 24 V.S.A. § 4464 (b) (3) meant the ZBA had failed to issue a decision within 45 days after adjournment of the hearing as required under 24 V.S.A. § 4464 (b) (1). The Environmental Court rejected this argument and noted that the Vermont Supreme Court had previously held that the question of whether a decision is issued within 45 days does not turn on whether it is mailed within that period, 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. According to the Environmental Court, deemed approval is an extreme measure reserved for remedying indecision and protracted deliberation on the part of zoning boards and eliminating deliberate or negligent inaction by public officials. Even if the ZBA had failed to mail a copy of the decision by certified mail, the Martins received notice of the decision and were able to file a timely appeal with the Court. Deemed approval would not apply in this situation.

Apart from these two holdings, the *Martin* decision carries several important messages for local zoning boards. First, beyond fulfilling the statutory requirement of 24 V.S.A. § 4464 (b) (3), sending a decision to the applicant by certified mail provides a paper trail showing when the decision was sent and, if signed for, when it was received. The absence of this important evidence opens the door to the inference that the 45-day deadline for issuing a decision may not have been met, which in turn provides applicants a claim to the deemed approval remedy.

Next, the Environmental Court was critical of the ZBA's meeting minutes, noting that they were "not a model of clarity." Unfortunately, the ZBA's minutes did not reflect when the ZBA completed its deliberative session or that the ZBA would be rendering its decision in open session after completing its deliberations. Since this information was not included in the minutes, the ZBA was required to prove to the Court that it adopted its decision in open session through an affidavit and sworn deposition testimony. More complete meeting minutes would probably have avoided this and perhaps even prevented litigation of the issue entirely.

Finally, by incorporating a description of the ZBA's decision-making process in its bylaws, rules of procedure, or as part of the hearing record, the ZBA might have been able to avoid defending its practices in court. A simple explanation of a board's decision-making process would lead to a better understanding of what applicants can expect, provide consistency in decision making, and deter an applicant's search for an explanation of the decision-making process elsewhere. A copy of this case can be found at www.vermontjudiciary.org/GTC/Environmental/ENVCRT%20Opinions/Martin%20and%20Martin%20Variance%20Application,%20No%20%20215-11-09%20Vtec.pdf .

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