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LEGAL AND REGULATORY NOTES

Environmental Court Offers Further Guidance on Deemed Approval

In the recent case *Brisson et al. v. Town of Monkton. Docket No. 24-2-13 Vtec,* the Environmental Court has provided further clarification on the often litigated concept of "deemed approval." Title 24, Chapter 117, provides that an appropriate municipal panel (AMP) – such as a Development Review Board (DRB) or Zoning Board of Adjustment – that is reviewing a land development application must issue a decision within 45 days after the adjournment of the hearing. When an AMP fails to issue a decision within that time period, the application is "deemed approved" on the 46th day. 24 V.S.A. § 4464(b)(1). Deemed approval, however, is an equitable remedy that must be asserted in the Environmental Court. In this case, the court held that only public hearings, and not deliberative sessions accompanied by nonbinding representations about the status of the evidence, can prevent deemed approval in the absence of a timely decision from an AMP. More simply put, only deliberative sessions that take place after the actual close of a public hearing will trigger the deemed approval remedy.

This case began when applicants appealed the Monkton zoning administrator's denial of a zoning permit for a gravel extraction operation to the town's DRB. The public hearing was opened April 24, 2012, and continued six different times until it was finally closed and a decision rendered on January 22, 2013. During this eight-month period, the DRB took more evidence and testimony at its continued hearings; on at least two occasions, it discussed the application in private deliberative sessions. The DRB issued its decision in writing one month after it closed the hearing. The applicants appealed the decision to the Environmental Court claiming they were entitled to deemed approval because the DRB closed the evidentiary portion of the hearing at the conclusion of its fourth continued hearing and failed to issue a decision within 45 days from that date.

The court found that so long as an AMP continues a public hearing to a date certain and actually holds that public hearing pursuant to three explicit factors, the deemed approval clock does not start until the adjournment of that hearing, absent a showing of intentional delay or inaction. In determining whether a "public hearing" has occurred for purposes of deemed approval, the three necessary factors are: (1) the hearing is open to the public, (2) the applicant receives notice of the hearing, and (3) the board offers an opportunity for interested persons to be heard on the issues before it. The court in *Brisson et al.* looked to statute and Vermont Supreme Court precedence in concluding that the "deemed approved" period begins upon the close of the last public hearing and does not wait to commence with the last "deliberative session." The court further explained that if an AMP continues a public hearing to a date certain with the sole intent of tolling (i.e., delaying) the deemed approval deadline and giving itself more time to make a decision, then deemed approval would be appropriate.

The reasoning in *Brisson et el.* is consistent with Vermont Supreme Court decisions that have consistently stated that applications to AMPs will be deemed approved only when doing so will remedy indecision and protracted deliberations on the part of a zoning board and to eliminate deliberate or negligent inaction by public officials. Further, one of the only court-directed instances in which deemed approval has ever been applied was in *Appeal of McEwing Services, LLC,* a case in which an AMP held multiple deliberative sessions over a period of more than four months after the panel had effectively closed the public hearing on the application pending before it. The Court concluded that the panel's actions amounted to issuing an "untimely decision that resulted from protracted deliberations," exactly what the principle of deemed approval is meant to remedy. This case is one of many that concern deemed

approval, and it appears the Court will continue to take a conservative approach in applying the deemed approval remedy by refusing to apply the statute in a "wooden fashion." Rather, courts will most likely reserve it for cases where it clearly implements the statutory purpose of remedying AMP indecision and protracted deliberations. There are many takeaways from this decision, and other deemed approval cases that precede it, that all AMPs should take note of, including:

1. The deemed approval remedy is available to applicants that experience deliberate or negligent inaction by an AMP. *In re: Appeal of Wesco, Inc. and Simendinger, (1996).*
2. AMPs may withhold decisions and conduct additional hearings without starting the clock if the hearings are open to the public, applicants receive notice, and interested parties are given an opportunity to be heard and are continued to a time and date certain. *In re Fish, (1988)*
3. The deemed approval clock begins with the close of the last public hearing. *In re McEwing Services, (2004).*
4. If a decision is made within the statutory timeframe yet the applicant does not receive notice of the decision within the timeframe, this will not be deemed approved. *Leo's Motors v. Town of Manchester, (1992).*
5. Deemed approval is inappropriate even though a decision is not reduced to writing. *In re White, (1990).*
6. An inadequate finding in a decision does not mean a zoning board has failed to act for the purpose of deemed approval. *City of Rutland v. McDonald's Corp., (1985).*
7. A project may be deemed approved if an insufficient number of board members attend meetings to vote, but deemed approval can be avoided when a board announces a denial within the time allowed and a majority of its members have either voted against approval or abstained from voting due to a conflict of interest. *In re: Appeal of Newton Enterprises, (1998).*
8. An applicant must appeal the AMP's decision to the Environmental Division of Superior Court in order to avail himself or herself of the deemed approval remedy. *In re Ashline, (2003).*

The decision is archived at www.vermontjudiciary.org/GTC/Environmental/ENVCRTOpinions2010-Present/Forms/AllItems.aspx

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