LACK OF TIMELY APPEAL RESULTS IN DEEMED DISAPPROVAL OF PERMIT

The Vermont Supreme Court recently issued a decision upholding deemed *disapproval* of a zoning permit. *In Re Ashline*, Vt. S.Ct. No. 2002-062 (March 28, 2003).

The case began when the Ashlines expanded a building and then applied for a certificate of occupancy for the newly created duplex. They were notified that they needed to apply for a conditional-use permit or be cited for a violation. They applied for the permit, and six of the nine members of the zoning board of adjustment (ZBA) met to consider the matter. After the hearing, the ZBA voted 4-2 to issue the permit. Because there was not approval by a *majority of the entire board*, the Ashlines did not get a conditional-use permit, and the duplex was deemed to be in violation of the bylaws.

The ZBA's written decision was issued in September 1999. The Ashlines did not appeal. In August 2000, the zoning administrator (ZA) issued a notice of violation, and the Ashlines appealed that notice of the violation to the development review board (DRB). (The town had replaced its ZBA with a DRB by that time.) The DRB ruled that the notice of violation was proper because the ZBA had not issued a conditional-use permit for the duplex. Therefore, it was in violation.

The Ashlines then appealed the DRB decision to the Environmental Court. The court held that the Ashlines could not, at this late date, appeal the 1999 decision, and so granted summary judgment in favor of the town. The appeal to the Supreme Court followed. The central issue was the status of the 1999 ZBA decision. The Ashlines argued that, because there was not a majority vote either way, the ZBA had failed to act, resulting in a deemed approval of their application. The Court rejected that argument.

The exclusive remedy for a person unhappy with a ZBA's "decision or act taken, or any failure to act" is an appeal to the Environmental Court *within 30 days of the decision.* 24 V.S.A. § 4472. Once the appeal period is over, the Environmental Court has no jurisdiction to hear the case, and the parties are "bound by decisions of the board." The Supreme Court reiterated that it *strictly construes the broad and unmistakable* language of § 4472 to prevent improper, outdated appeals of zoning matters. In this case, the ZBA's written decision was issued in September 1999. The Ashlines acted as if there had never been a decision, so there was nothing to appeal. They apparently, on their own, deemed that their application had been approved because the ZBA took no action. In fact, the ZBA's "failure to act" meant that the original denial by the ZA remained in effect. The Court refused to allow an end-run around the limited appeal period based on the deemed approval challenge. It cited a number of prior cases in which it had upheld the exclusivity of the appeal process provided in § 4472, even when the zoning decision was erroneous or when the ZA or ZBA had acted outside their authority. Section 4472 "implements a policy of repose," whereby the parties know they can rely upon a decision after the appeal period has expired. This ensures finality of decision-making, orderly governance in development and reasonable reliance on the statutory process.

In conclusion, while the non-existence of a permit in this case was upheld for failure to appeal, it is important to keep in mind the importance of full member attendance by your local boards. As this case highlights, a board cannot take binding action unless it acts with the concurrence of a quorum.

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