

WHAT CONSTITUTES “COMMENCEMENT OF CONSTRUCTION” FOR PURPOSES OF EXPIRATION OF ZONING PERMITS

Nearly every one of Vermont’s municipal zoning bylaws contains provisions stating zoning permits will expire unless construction is commenced within a specified time, generally 12 months. Prior to last month’s Vermont Supreme Court decision in *In re Appeal of Beckstrom*, 2004 Vt 32 (April 8, 2004), the extent of activity that is required on a project in order to avoid a permit from expiring was an open question of law. *In re Appeal of Beckstrom* now provides towns with guidance as to what constitutes “commencement of construction” for purposes of determining whether a permit has expired due to passage of time and non-use.

In re Appeal of Beckstrom involved a permit to erect a radio tower and support building. The permit was issued on April 23, 1997 with a stated expiration date of April 23, 1998. The plaintiffs complained to the zoning administrator alleging that the permit was void because the permittee, H.A. Manosh Corp. (“Manosh”), failed to commence construction within one year of the permit’s issuance. The zoning administrator, however, decided not to institute enforcement proceedings and the plaintiffs appealed the zoning administrator’s decision to the zoning board of adjustment (ZBA). The ZBA upheld the permit and ruled that it had not expired, despite the fact that Manosh had not started construction of the actual radio tower. The ZBA based its decision on the fact that even though Manosh had not commenced construction on the radio tower and support building identified in the permit, Manosh had conducted other site work, including laying underground electrical conduits and upgrading an access road.

The plaintiffs appealed the ZBA’s decision to the Environmental Court, which ruled that the permit expired and was void because Manosh failed to commence construction within one year of the permit’s issuance. Manosh then appealed to the Vermont Supreme Court which reversed the Environmental Court’s decision and found that the permit had not expired.

The Vermont Supreme Court ruled that the Environmental Court had erroneously “applied a legal standard which precluded consideration of work other than that directly related to the structures specified in the permit – the tower and the support building”... and “found that grading the access road, laying utility lines, and clearing the tower site were immaterial, and appeared to further conclude that the pouring of concrete at the site ... was inadequate to demonstrate that construction had commenced.” *In re Appeal of Beckstrom*, 2004 Vt. 32 (April 8, 2004).

Recognizing that “Vermont law provides little guidance on this issue,” the Court looked at how other states interpret what constitutes “commencement of construction” and whether site work that is not related to structures specified in a permit is sufficient to constitute “commencement of construction.” The Court found that other jurisdictions “have taken a broader approach” and that the “standard to be applied should reflect the purpose to be served.” The Court then went on to explain that the purpose of statutes or bylaws that provide “for automatic expiration or revocation of use permits when work has not commenced ... is to prevent the reservation of land for future purposes when the permittee has no good faith intent to presently commence upon the proposed use.”

After reviewing court decisions from around the country, the Court concluded that “a fair and reasonable approach to determine whether construction has commenced

within the time limit imposed by a zoning ordinance or permit” should focus on whether “viewed as a whole – the work, time, and expenditures invested in the project demonstrate a good faith intent to presently commence upon the permitted use.”

In applying this newly articulated standard, the Court ruled that Manosh’s permit had not expired and that Manosh had commenced work under the permit, even though work had not commenced on the two structures mentioned in the permit. The Court based its decision on the fact that “the record showed that over a period of several months, Manosh invested nearly 400 work-hours in the tower project, at a cost in excess of \$26,000. The extent and duration of the work demonstrates a good faith intent to make present use of the permit, not merely an artificial attempt to preserve the permit for future use.”

This case is important to all municipal officials involved in zoning because it provides guidance for the first time as to how municipal officials must determine if construction on a project has commenced for purposes of determining whether a permit has automatically expired due to passage of time and non-use. The take-away messages from this case are: (1) to prevent an issued permit from expiring, the permittee must demonstrate a good faith intent to exercise his or her rights under the permit; and (2) construction on the actual structures identified in a permit is not necessary to prevent a permit from automatically expiring, so long as the permittee is conducting work at the site in good faith and in furtherance of the permitted project.

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