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Environmental Court: Permit applications must be supported by adopted zoning bylaws

'Tis a lesson you should heed: Try, try, try again.
If at first you don't succeed, Try, try, try again
– William Edward Hickson

In the case of *Shatney Home Occupation Denial,* Docket No. 43-4-16 Vtec, the Environmental Division of the Vermont Superior Court (Environmental Court) recently answered a question long posed to VLCT's Municipal Assistance Center (MAC): How are towns supposed to review a zoning application while the controlling bylaw is in the process of being amended? The answer turns on the Environmental Court's interpretation of the following statutory language:

> *If a public notice for a first public hearing ... is issued under this chapter by the local legislative body with respect to the adoption or amendment of a bylaw ... the administrative officer, for a period of 150 days following that notice, shall review any application filed after the date of the notice under the proposed bylaw or amendment and applicable existing bylaws.* ... If the new bylaw or amendment has not been adopted by the conclusion of the 150-day period or if the proposed bylaw or amendment is rejected, the permit shall be reviewed under existing bylaws. ... An application that has been denied under a proposed bylaw or amendment that has been rejected or that has not been adopted within the 150-day period shall be reviewed again, at no cost, under the existing bylaws and ordinances, upon request of the applicant. 24 V.S.A. § 4449(d). (Emphasis added.)

The *Shatney* case concerns a family truck-driving business, RLBL Trucking, LLC, run by Earl Shatney, his wife Wilma, and their son Jeffrey out of Earl and Wilma's home in East Hardwick, Vermont. This is not the Shatneys' first trip to Environmental Court. In March 2015, the Court upheld the Town of Hardwick's issuance of a notice of violation (NOV) against the Shatneys for violating the performance standards laid out in the Town's Unified Development Bylaws. Shortly after this decision, the Shatneys had a voter-backed petition submitted to the Town on their behalf. The petition proposed a bylaw amendment that would allow the Shatneys to operate their business.

Title 24 Section 4441(b) states that anyone may propose a bylaw amendment to a town's planning commission, but it is still up to the planning commission to decide whether or not to act upon that proposal. However, if proposed amendment is supported by a petition signed by five percent of the town's voters, then the planning commission can only correct any technical deficiencies and must otherwise act as if it had prepared the amendment itself.

The voter-backed petition submitted on behalf of the Shatneys was filed with the town on August 5, 2015. In accordance with the controlling statute, the planning commission held a public hearing on the proposed amendment and submitted its written report with recommendations to the selectboard. The selectboard warned a public hearing on the proposed amendment on December 18, 2015. The Shatneys then submitted their application for a Home Occupation permit application on January 5,

2016. The selectboard's public hearing on the proposed amendment took place on January 7, 2016, and the selectboard rejected it at its January 21 meeting. On the basis of the selectboard's refusal, the zoning administrative officer (ZA) denied the Shatneys' application for a Home Occupation permit a day later. In her written decision, the ZA explained that she reviewed the Shatneys' application under both the Town's current zoning bylaws and the proposed amendments as the law instructs, however she could not grant approval because the selectboard had already rejected the petitioned amendment. The Shatneys appealed the ZA's decision to the Town's Development Review Board (DRB) which upheld her ruling because the Shatneys' application was "conditioned upon the adoption of the proposal to amend the existing Hardwick Unified Development Bylaws. The petition was not adopted by the Hardwick Select Board."

In their appeal of the DRB's decision to the Environmental Court, the Shatneys made several arguments, but the one of interest to this article was that their application should have been reviewed and approved under the proposed zoning amendment because 24 V.S.A. § 4449(d) requires the ZA to review any permit application filed after the notice for the selectboard's public hearing under the proposed bylaw for a period of 150 days following that notice. Since their completed application was filed within this 150-day timeframe and before the selectboard rejected the proposed amendments, their application should have been approved under the proposed amendment. In support of their position, the Shatneys pointed to the sentence in 24 V.S.A. § 4449(d) which reads, "the [ZA], for a period of 150 days following that notice, shall review any application filed after the date of the notice under the proposed bylaw or amendment and applicable existing bylaws…"

The court denied the Shatneys' appeal, citing an incomplete reading of the statute. The court reasoned that the Shatneys would be correct in their interpretation if the statute stopped at that sentence, but it does not. The statute goes on to state that "[i]f the new bylaw or amendment has not been adopted by the conclusion of the 150-day period ***or*** if the proposed bylaw or amendment is rejected, the permit shall be reviewed under existing bylaws." 24 V.S.A. § 4449(d). (Emphasis added.) The use of the disjunctive "or," the court pointed out, "makes clear that ... [t]he 150-day period does not apply if the reviewing body rejects the proposed bylaw or amendment." Because the selectboard had rejected the proposed bylaw amendment, the ZA was not obligated to review the application under that amendment. "[T]he duty to review a zoning application under the proposed bylaw or amendment ends either after the 150-day period, ***or*** any time the proposed bylaw or amendment is rejected." (Emphasis added.)

The court's decision comes as no surprise as it is the same interpretation that MAC has consistently provided our members over the years. For the court to hold otherwise would create a regulatory scheme whereby an applicant could get a permit merely be proposing a favorable bylaw amendment. Such a back door process would allow for any and all development for a 150-day period after the noticing of the selectboard's hearing on the amendment when supported by a petitioned bylaw amendment. The court's decision in this case reinforces a fundamental concept of local zoning – a bylaw must first be adopted for a permit application to be approved.

The *Shatney* case is archived here.

Garrett Baxter, Senior Staff Attorney
VLCT Municipal Assistance Center