

The Devil is in the Details (and the Deemed Approval Deadlines)

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Noted wordsmith Justice Michael Musmanno articulated the rationale for the “deemed approval” concept in Pennsylvania land use law noting: “Without this kind of coercive determination, a Board could effectively prevent the erection of needed structures through the simple process of luxurious lolling while spiders of inattention spin webs of indifference over pending public problems.” To avoid luxurious lolling by local governments, the Legislature included mandatory deadlines in the Pennsylvania Municipalities Planning Code, 53 P.S. § 10101 *et seq.* (“MPC”), which governs municipal regulation of zoning, subdivision and land development within the Commonwealth. The MPC sets forth strict requirements for when and how municipalities make decisions on land use applications, in addition to how they communicate those decisions to the applicant. A failure to comply with these requirements may result in a deemed approval of the underlying application.

Within days of each other, the Commonwealth Court issued two reported opinions which affirmed the deemed approvals of land use applications. *CRG Services Management, LLC v. Lowhill Township*, No. 1091 C.D. 2023 (Pa. Cmwlth. June 3, 2024) (deemed approval of a land development plan for a warehouse because the township’s denial letter was inadequate) and *Folk v. Mifflin Township Zoning Hearing Board*, 969 C.D. 2023 (Pa. Cmwlth. June 5, 2024) (deemed approval for a variance to operate a wedding venue on a farm because the zoning hearing board did not commence the public hearing within 60 days of application’s submission). In light of these cases, this article provides a brief overview of key MPC provisions which could result in a deemed approval of a land use application.

Timing Requirements: One way an application can be deemed approved is by a failure to meet the statutory deadlines to consider and render a decision on an application. Most deadlines contained in the MPC are mandatory unless waived or extended by the applicant in writing or on the record.

- **Zoning:** the deadline for a decision on a zoning application depends on what type of application it is, and requires a review of both the MPC and local ordinances.
 - **Zoning Permit Applications/ Uses Allowed by Right:** The MPC provides no statutory timeline in which a zoning officer must render a decision on a zoning permit application. Instead, §909.1, allows an applicant to appeal to the zoning hearing board (ZHB) on the “failure to act on the application.” However, the local zoning ordinance may establish a timeline for review. A deemed approval of the application may occur if the zoning officer fails to act within the deadline set by the ordinance. If no such deadline is set, the only remedy available to the applicant is to appeal to the ZHB.
 - **Variances and Special Exception Applications:** Variances and Special Exception applications are handled through a quasi-judicial public hearing process before the ZHB. Section 908 of the MPC governs how public hearings are conducted before the ZHB. Section 908(1.2) in relevant part requires that the first hearing before the board be commenced within 60 days from the date of receipt of the applicant’s application, unless an extension of time has been granted. Each subsequent hearing must be held within 45 days of the prior hearing, absent agreement otherwise. Under §908(9) the ZHB must render a written decision on the application within 45 days after the last hearing. A failure to commence, conduct, or complete the hearing as required by §908(1.2) or a failure to render a timely decision under §908(9) can result in a deemed approval of the application. The Court in *Folk* found the applicant’s variance application was deemed approved by the ZHB’s failure to commence a hearing on the

application within 60 days of receipt of the application as required by §908(1.2). In addition, under §908(10) a copy of the final decision, or as discussed further below, the findings, must be delivered to the applicant personally or mailed to him or her not later than the day following its date. However, the courts have determined that, where appropriate findings of fact and conclusions of law are ultimately provided, a failure to provide notice of the decision as set forth in §908(10) alone does not result in a deemed approval.

- o **Conditional Use Applications:** Conditional use applications are also handled through a quasi-judicial public hearing process, this time before the governing body of the municipality. Section 913.2 of the MPC regulates how governing bodies handle conditional use hearings. Although §913.2 does not establish a timeline to hold a first hearing on the application, it states that where the governing body fails to commence, conduct, or complete the required hearing as provided in §908(1.2) of the MPC, the decision shall be deemed to have been rendered in favor of the applicant. Consequently, the timing requirements in §908(1.2) are applicable to adjudication of a conditional use application (60 days to hold a first hearing). The governing body must make a written decision on the application within 45 days after the last hearing per §913.2(b)(1).
- **Subdivision and Land Development:** the MPC also governs how municipalities handle applications for subdivisions and land developments. These applications take many forms (lot consolidation, minor and major subdivision, , land development, etc.) and often involve a two-part approval process (preliminary and final). They may be handled either by the governing body of the municipality, or the planning agency / commission. However, in each case the applicant is required to submit a “Plat,” defined as a map or plan of a subdivision or land development. Section 508 of the MPC, governs a municipality’s process for rendering a decision on any Plat. The local subdivision and land development ordinance can establish shorter time limits for the review of Plats, but §508 requires that a decision must be made and communicated to the applicant no later than 90 days following the date of the regular meeting of the governing body or the planning agency (whichever first reviews the application) next following the date the application was filed. If the next regular meeting is more than 30 days following the date of the application, the 90-day period is measured from the 30th day following the date the application is filed. The decision needs to be communicated, in writing, to the applicant personally or mailed to the applicant’s last known address no later than 15 days following the date of the decision. A failure to render a decision and communicate it within the time allowed may result in a deemed approval of the application.

Form and Content Requirements: The second most common way that a deemed approval can occur is where a decision on the application is timely made, but not communicated to the applicant in the form or manner required by the MPC. Therefore, it is important to closely review how a decision needs to be communicated, and what it must contain.

- **Zoning:** Regardless of the type of zoning application, a decision on the application needs to be communicated to the applicant in writing. For conditional uses (§913.2(b)(1)), variances, or special exceptions, (§908(9)) where the application was contested or denied, the written decision is to be accompanied by findings of fact and conclusions of law together with the reasons for the decision. Any conclusions based on the MPC or any other rule or regulation needs to contain a reference to that provision and the reasons why the conclusion was deemed appropriate in light of the facts found. The purpose of these findings and conclusions is to aid appellate review if an appeal is filed.
- **Subdivision and Land Development:** Any decision on a “Plat” must be in writing. If the application is not approved as filed, the decision must specify the defects found in the application, and describe and cite to the specific provisions of the statute or ordinance which have not been met. In *CRG Services*, the municipality voted to deny a revised application for land development due to “[r]ecommendations from [the township] Planning Commission and Engineer.” However, it failed to specify the defects found in the application or describe the requirements which had not been met as required by §508 of the MPC by either specifying them in the denial letter or making an express incorporation of the Engineer’s letter. As a result, the Commonwealth Court determined that the application was deemed approved.

The Commonwealth Court’s affirmation of two deemed approvals in one week is a healthy reminder that although in general the law disfavors deemed approvals, where there is statutory authority for the same, municipalities must proceed

with caution in how they handle applications. The provisions cited above are not exhaustive and municipalities are urged to contact their solicitor to discuss the relevant requirements for any application. There is an entire process for perfecting a deemed approval through a mandamus action or public notice, but that is an article for another day because our deadline has expired.

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