

ORDER

Plaintiffs have moved for partial summary judgment on the grounds that the defendant, Planning Board of the Town of Westhampton did not timely issue a decision on plaintiffs' application for a special permit to operate a sawmill, as required under G.L. c. 40A, § 9, and did thereby constructively grant the permit, and that the Board then failed to appeal plaintiffs' notice of a constructive grant within the 20 day period permitted under c. 40A, § 17.

A hearing on plaintiffs' application, filed December 13, 2013, was initially properly and timely noticed. The hearing was continued many times over an extended period. At some point plaintiffs objected to the continuances. At the conclusion of a hearing on January 20, 2015, the hearing was continued to February 17, 2015. No hearing was conducted that date because of a lack of a quorum; it was continued to March 3, 2015. The hearing scheduled for March 3, 2015 was not held because of a snow storm, and was purportedly continued to March 10, 2015. On that date the Board announced that the hearing was closed.

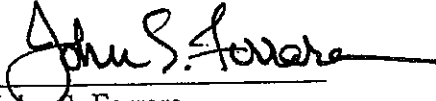
Plaintiffs' took the position that a new notice was required for the March 10th hearing, it was not given, and thus the last date of the properly continued hearing was January 20, 2015. They gave notice to the Board and all interest parties that the Board had failed to issue a decision within 90 days of the close of the hearing, resulting in a constructive grant of their application, pursuant to G.L. c. 40A, § 9. Plaintiffs filed the notice with the Town Clerk on April 24, 2015. Parties have 20 days to appeal a constructive grant under G.L. c. 40A, § 17. No appeal was filed. Plaintiffs take the position that the Board's failure to appeal the notice constitutes a waiver of its right to contest plaintiffs' claim of the constructive grant.

The Board takes the position that the hearing was properly continued to March 10, 2015, and that a decision was timely made on April 21, 2015 and filed with the Town Clerk on May 28, 2015.

The summary judgment record does not include the minutes of meetings nor communications between the Board and plaintiffs' counsel. I find that there are genuine issues of material fact, including the public notice procedures used where meetings cannot be held due to unforeseen circumstances, whether plaintiffs acquiesced to continuation of the hearing on February 17, 2015, and whether the March 10th hearing date was properly noticed.

For the foregoing reasons, plaintiffs' motion is **DENIED**; however, the issue of whether or not a constructive grant occurred is not foreclosed.

March 6, 2017



John S. Ferrara
Justice of the Superior Court