Coates' Canons Blog: Extending Permit Extension

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Remember the permit extension legislation from last fall that was designed to give developers, lenders, and property owners a reprieve from all of those governmental permits expiring? You know, the legislation that suspended development permits from running during the period from the beginning of 2008 through the end of this year. Well, just about the time this three-year tolling of permit expiration was about to wind down, the General Assembly, with some considerable prodding by the development community, acted to allow the suspension of permit expiration to continue for one more year. Developers, lenders, and government permitting personnel—no need to rev up your engines just yet.

Session Law 2010 – 177 (H 683) extends the existing permit extension legislation in such a way that the suspension period will now not come to an end until December 31, 2011 instead of December 31, 2010. The new one-year extension applies to both agencies of the State of North Carolina and local governments. But the act includes a major qualifier; local governments (but not State agencies) have been given the choice whether they wish to be subject to the one-year extension or not. A local government may "opt out" of the one-year extension (and an assortment of other amendments to the original legislation called for in the new session law)). All that is required is for the local government to adopt a resolution that provides that the one-year extension and related 2010 amendments shall not apply to a development approval issued by that governmental unit. The result of an opt-out is that the period during which permit expirations are suspended (tolled) will end on December 31, 2010, as originally called for in the 2009 legislation. A local government, then, may either choose to do nothing, thereby allowing the one-year extension to apply to the development permissions that it has granted under the 2009 legislation. Or it may opt out of the one-year extension so that the 2010 amendments are inapplicable to all or some of the permissions that it has granted.

Some local governments may choose to opt out of the extension of permit extension because of the general public nuisance effects of partially finished building sites, half-baked subdivision projects, and soil erosion and sedimentation problems in areas where control measures have not been properly maintained. Others may opt out because the delay and uncertainty affecting private development projects may affect the timing and suitability of local government public investment decisions such as utility extensions or road widening projects. Also, in some instances the administrative burden of tracking hundreds of dormant permits has turned out to be considerable. Furthermore, the one-year extension legislation of Session Law 2010 – 177 (H 683) comes weighted with some additional legal baggage that may require interpretation and complicate the administration of the legislation. These additional provisions, set forth in section 7.1 of the act, apply to all development approvals that are subject to the one-year extension.

One requirement from section 7.1 calls for the permit holder to complete infrastructure necessary in order to obtain a certificate of occupancy or other final permit approval. Another requires the permit holder to maintain all performance guarantees that are conditions of the initial development approval for the duration of new permit extension period or until released from that obligation by the affected local government. Both of these requirements probably either codify or are consistent with the existing law.

A third provision (section 7.1(a)(1)) requires that the permit holder "(c)omply with all applicable laws, regulations, and policies in effect at the time the development approval was originally issued by the governmental entity." This language appears to declare that permit holders must continue to obey the law during the tolling period — to comply with the rules in effect when the approval was granted. But keep in mind that merely obtaining a development approval subject to the act does not necessarily establish vested rights protection for the permit holder. For example, the holder of an ordinary zoning permit does not enjoy a vested zoning right in the absence of anything more. Even though the life of such a permit may have been extended by the 2009 legislation, the holder may not be shielded from changes in applicable zoning regulations. Compliance with the rules in effect when the permission was granted is required, but that is insufficient to

protect the permit holder from ordinance amendments and the like that come after the permit was issued.

The 2010 act also makes a stab at providing for the consequences of failing to comply with these new section-7.1 requirements. It provides for the "termination" of a development approval that is subject to the one-year extension. It appears that these "termination" provisions must be read in tandem with the retained language of the 2009 legislation that authorizes governmental units either to "revoke or modify" outstanding development approvals. If a local unit or state agency initiates termination proceedings, it must "provide written notice to the last known address" of the "original holder" of the permit and to include the reason for the termination. Whether this form of notice will be adequate in instances where developers have gone bankrupt, lands have been sold or foreclosed, or lien holders are managing the affected property remains to be seen.

If a local government does choose to opt out of the 2010 amendments included in the new act, it needs to adopt an appropriate resolution (not necessarily an ordinance). The adoption of such a resolution by the governing board may, but need not, be preceded by a duly noticed public hearing. In this regard it is unlikely that permit holders enjoy any due process rights with respect to a local government decision concerning whether to opt out or not.

The 2010 act declares that a local government may by resolution provide that the legislation as amended "shall not apply to a development approval issued by that unit of government." Does this language imply that the city or county must make individualized decisions about individual development approvals and refer to individual permits in such a resolution? Probably not. Instead this language may be read to apply collectively to development approvals. It seems clear enough that a city or county may opt out of the one-year extension with respect to all of the permits and development approvals that it has granted that are affected by the law. If a local government decides to opt out only for certain categories of permits (e.g., land subdivision plat approvals), or for particular projects within a category, then it appears that some appropriate justification must be offered in the resolution for the disparate treatment.

Fortunately, the General Assembly has acted some five months before the original tolling period comes to an end this coming December. Local governments should have ample time before then to assess the implications of this act and their options.

Links

- www.ncga.state.nc.us/Sessions/2009/Bills/House/PDF/H683v5.pdf