
Coates' Canons Blog: Extension Extended: General Assembly Expands Development Permit Extension

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To relieve downward economic pressures on land development resulting from the COVID-19 pandemic, the North Carolina General Assembly has extended the term of most development approvals three times: on May 4, 2020, on September 4, 2020, and on March 11, 2021. This post discusses these extensions and what they mean for permit holders and permit issuers.

[***UPDATE*** In its most recent COVID relief bill, signed by Governor Roy Cooper March 11, 2021, the General Assembly further the Second Extension described below. The most recent prior extension, Section 3.21 of S.L. 2020-97, which was signed into law in September 2020, delays the expiration of qualifying development approvals by 120 days. The new (now Third Extension), Section 2.21 of House Bill 196 / Senate Bill 172 (now Session Law 2021-3) stretches the expiration of qualifying development approvals out to 150 days from the date the executive order establishing the COVID-related state of emergency is rescinded. Unlike the 2020 extensions, which delayed permit expirations for a set period of time (five months, then 120 days), this Third Extension sets the expiration date for any development approval for which the expiration was already extended and that was valid between September 4, 2020 and 30 days after the executive order valid until 150 days after the executive order expires.]

The COVID-19 relief bill that was passed on May 4, Senate Bill 704 (now Session Law 2020-3), at Section 4.40, delayed the expiration of certain development approvals for five months. For ease of reference, I will refer to this bill as the “**First Extension**.” For more on the First Extension, check out this post from Adam Lovelady.

Section 3.21 of the second COVID relief bill, House Bill 1105 (Session Law 2020-97), further extends the life of those same development approvals for a further 120 days. For ease of reference, I will refer to this bill as the “**Second Extension**.”

Although one should read this entire post (and the relevant statutory references!) to confirm whether a given approval is covered, a few highlights of the Second Extension are listed below:

- Extends the term of most development approvals by 120 days.
- Has a few conditions:
 - Approval must be valid at any time between September 2, 2020, and 30 days after the date that the COVID-19 declaration of a state of emergency is rescinded,
 - Extension does not apply to any bonds or other contracts with third parties that might be related to a development approval, and
 - Extension does not apply to approvals issued by federal agencies or under federal law (with exceptions).
- Applies automatically – no application or notice is required and there is no opt-out.
- Can be terminated if the permit holder does not continue to comply with applicable law and maintain any performance guarantees.

WHAT APPROVALS ARE COVERED

The Second Extension applies to the following types of approvals, defined in Section 3.21(a) of the Second Extension as “development approvals”: any erosion and sedimentation control plan, building permit, sketch plan, preliminary plat, subdivision plat, site-specific development plan, phased development plan, development permit, or development agreement issued by a local government, or any certificate of approval issued by a municipality’s preservation commission.

In order to qualify for extension, a development approval must be current and valid during the period of time between September 2, 2020, and 30 days after Executive Order 116 (the Governor’s declaration of a state of emergency related to COVID-19) is rescinded. This applies whether the development approval was issued before, on, or after September 2.

Most development approvals covered by the First Extension will be covered by the Second Extension, because the definitions of “development approval” in the First and Second Extension are substantially the same. See S.L. 2020-3, Section 4.40(a); and S.L. 2020-97, Section 3.21(a). Since the Second Extension begins less than five months after the end of the First Extension, few permits covered by the First Extension will have expired by the time the Second Extension is in effect. See S.L. 2020-3, Section 4.40(b); and S.L. 2020-97, Section 3.21(b).

However, those permits that were set to expire between March 10 and April 1 would not be covered by the Second Extension. As an example, if the site plan for the Shady Acres community was due to expire on March 15, 2020, it would have been extended for five months by the First Extension and expired on August 15, 2020. It thus would not be extended or revived by the Second Extension. By comparison, the site plan for Green Acres, which was due to expire on April 2, 2020, would have been extended to September 2, 2020. Because the Green Acres site plan was valid on September 2, it would qualify for the Second Extension as well.

WHAT’S THE CATCH?

As with the First Extension, there are several kinds of approvals and documents the Second Extension does *not* cover. There are also certain conditions that need to be met by the permit holder to keep the extension.

Exceptions: Similar to the First Extension, the Second Extension does not change or extend time limits for permits issued by federal agencies or where an approval period is set by federal law. It also does not affect administrative consent orders issued by the North Carolina Department of Environmental Quality, modify any requirement necessary to retain delegation of authority from the federal government to the State, modify any contracts with other parties (bonds, for example), or authorize the charging of a water or wastewater tap fee that was already paid in full for a project. These exceptions are laid out in Session Law 2020-97, Section 3.21(c).

Conditions: In order to keep the extension valid, the holder of the development permit must (1) comply with all applicable laws, regulations, and policies in effect at the time the development approval was originally issued; (2) Maintain all performance guarantees that required as a condition of the development approval during the extension; and (3) Complete any infrastructure necessary to obtain a certificate of occupancy or other final permit approval. If the permit holder fails to meet these conditions, the permit issuer can terminate the extension, as long as they notify the holder of the development approval and provide a basis for the termination. The exact language can be found at Session Law 2020-97, Section 3.21(e) and (f).

A FEW QUESTIONS YOU MAY HAVE

What does a permittee have to do to get the extension?

Nothing. If the development approval qualifies and the permittee remains in compliance with the conditions above, the Second Extension applies automatically.

Can counties or cities “opt out” of the extension?

No. By the language of Section 3.21(b), the extension applies automatically, and the legislation does not include any opt-out provision. Some of you may recall that local governments could “opt out” of certain permit extensions that were issued during the Great Recession. That is not the case this time around.

What about performance bonds required by the approval?

Even if the time to perform is extended by the Second Extension, the Second Extension will not apply to any agreements that do not involve the local government, such as an agreement between a bond holder and a bond issuer.

For instance, imagine David Ducker holds a preliminary plat approval (currently valid) that is due to expire on December 9, 2020, and a condition of the approval is that David maintain a performance bond for the duration of the permit. If the bond is due to expire on December 9, David will need to get an extension of the bond from his bond issuer to keep the required assurance in place for the life of the permit.

Is the permit extended for 120 days after EO 116 / the state of emergency is rescinded, or 120 days from the date it would otherwise expire, or what?

The language of the bill states that the approval is extended 120 days, so the expiration is 120 days from the date it would otherwise expire. The 9/2-through-rescinding-of-state-of-emergency time period only defines *what* permits are extended, not *how long* they are extended.

For example, let's say Owen Davids's new condo building received construction approval from the City of Tartown on September 15, 2020, and the approval is good for six months. Without the Second Extension, the approval would expire on March 15, 2021. The Second Extension pushes that expiration date out 120 days, to July 13, 2021. This new expiration date applies whether Executive Order 116 is rescinded in December 2020 or in (let's hope not) July 2022.

Given the uncertain duration of the current pandemic (and thus the Governor's declaration of a state of emergency), there remains the possibility that a further extension could be approved later. Stay tuned.

Links

- www.ncleg.gov/Sessions/2021/Bills/House/PDF/H196v8.pdf
- www.ncleg.gov/EnactedLegislation/SessionLaws/PDF/2019-2020/SL2020-3.pdf
- www.ncleg.gov/EnactedLegislation/SessionLaws/PDF/2019-2020/SL2020-97.pdf
- files.nc.gov/governor/documents/files/EO116-SOE-COVID-19.pdf