Coates' Canons Blog: New Life for Old Development Approvals

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UPDATE September 2013: The permit extension law was subsequently extended an additional year. For a review of the extension, clickhere. The law has now expired. For a review of the impacts of the expiration, clickhere.

One consequence of the depressed economy of the past few years was the demise of previously approved development projects. In many instances the market for potential sales was greatly depressed or necessary financing became impossible to secure. While the development business has always had some permitted projects that never make it to construction, the number of delayed and cancelled development projects rose significantly during the recent recession. The General Assembly decided in 2009 to provide relief to permitees facing the grim prospect of seeing their development approvals expire before a project could get underway.

S.L. 2009-406 (S. 831), effective August 5, 2009, breathes new life into old state and local development approvals, as well as extending the life of new approvals. It suspends the running of time periods for development approvals that were current and valid *at any point* during the three year period running from January 1, 2008 through December 31, 2010. This law is self executing. The law itself extends the life of these development approvals. Neither local ordinance adoption, state rule amendment, nor any administrative action is required.

The law includes a detailed list of the “development approvals” that are extended. Among the state approvals are erosion and sedimentation control plans, CAMA permits, water and wastewater permits, nondischarge permits, water quality certifications, and air quality permits. Local development approvals include approval of sketch plans, preliminary and final plats under a land subdivision ordinance, site specific or phased development plans under the statutory zoning vested rights provisions, other development permits, and building permits. Federal permits are not affected. Nor does the law affect the ability of a state or local agency to extend a permit or to revoke or modify a permit if that is otherwise allowed by law.

One of the first questions that arose with the law was a difference between cities and counties in the list of covered “development approvals.” As adopted, this list included “development permits” issued by counties but substitued the term “development agreements” approved by cities instead of “development permits.” This raised the question of whether this was a drafting oversight or an intentional distinction that could be significant. For example, if the law only covered formal “development agreements” approved by municipalities rather than all “development permits,” then special and conditional use permits, site plan approvals, certificates of zoning compliance, and a variety of other city approvals would not be included. Likewise, perhaps “development agreements” approved by counties were not covered. The General Assembly quickly remedied this problem. H. 1490 was ratified on August 11 (and is awaiting gubernatorial action) to amend the definitions of “development approvals” for both cities and counties. It simply adds “development agreements” to the county list and “development permits” to the city list.

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A second question was presented by this law — what if a covered development approval that had expired had a water or sewer allocation that had been reallocated to a subsequently issued permitee? The development approval is resurrected because it was valid *at any point* during the three year period, even if it expired prior to the August 5, 2009 effective date of the new law. But if the revived development approval also revived the water or sewer allocation, it would cause serious problems if two permitees then sought to use the same limited water or sewer capacity. The law as adopted did not address this dilemma, but again the quandary was short-lived. In addition to fixing the discrepancy between the list of city and county development approvals, H. 1490 added a provision to address competing utility allocation claims. The solution was to provide that a revived development approval does not revive an associated water or sewer allocation if the capacity was reallocated and there is insufficient capacity to also serve the revived permit. However, the revived approval gets first priority if additional capacity becomes available. The fix also included a modestly different solution applicable only to Union County.

A third question still does not have a certain answer: Does the law simply move the expiration date of all covered development approvals to December 31, 2010 or do approvals retain whatever time period they had on January 1, 2008 (or that they had on the date of issuance if they were approved during the three year period)? The law says “the running of the period of the development approval” is suspended during the three year period. This could be read to mean the “running out” of the approval is suspended, which would just move the expiration date back. But since the law uses the phrases “suspends” and “running of the period,” it is likely that this stops the clock during the three year period — that is, the period is tolled and resumes once we get to January 1, 2011, when the clock starts running again. Thus if a development approval issued on July 1, 2007 had a requirement that construction start within 12 months, it still had six months of life left on January 1, 2008. Under this interpretation, which I think is the most likely reading of the law, that approval will still have six months of life on January 1, 2011. H. 1490 somewhat addressed this ambiguity by adding a provision that the law “does not reduce the original period of a development permit.” This clarification apparently only applies for Union County, but the interpretation that the new law tolls the running of any approval period likely applies statewide.

This interpretation raises another question. Simple development approvals usually have only an effective date and an expiration date. But more complex development approvals may have other deadlines. For example, a plat approval may require installation of utilities or roads by a specific date; a conditional use permit may require traffic improvements or landscaping installation by a specific date; a development agreement will often include a detailed schedule for actions required of both the landowner and unit of government. If this law stops the clock on permit expiration, what about these other deadlines? While the law does not address this, the implication is that if the clock is not running on expiration, it also may not be running on any other intermediate time requirements within a covered development approval. The new law, however, would not affect a condition based not on time but upon some other factor. For example, if a condition required installation of a vegetative buffer prior to occupancy of a permitted building, those requirements are not affected by this law and would have to be met prior to occupancy of the building, whenever that takes place.

One last technical question was also answered after this law was adopted. If a previously expired permit is automatically resurrected by this law, does it also resurrect the obligations of the permitee under that permit? The answer is likely yes. But Section 5.1 of S.L. 2009-484 (S. 838) amended the law to allow a development approval to be returned. Government entities are authorized to accept the voluntary relinquishment of a development approval by a permit holder who no longer wants the permit (or its obligations).

There will undoubtedly be more questions about the implementation of this law given the many varying development approvals that have been extended. Let us know about them so we can deal with as many as possible as our more detailed legislative summaries are prepared.

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