Coates' Canons Blog: Tolling Ends, But Permit Extension Law Leaves Many Approvals in Place

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The recession that began in 2008 hit the real estate market particularly hard. Many projects that had been approved lost their funding or had little market for the housing, offices, and shops that would have been built. One response to this was a decision by the General Assembly in 2009 to extend the life of all development approvals made between January 1, 2008 and December 31, 2010. **S.L. 2009-406** provided that any time limits for development approvals that were valid anytime within this three year period would not start running until January 1, 2011. That law is described in this **earlier blog post**, with examples of its application provided in this **additional post**. **S.L. 2010-177** added an additional fourth year to this suspension of the clock for development approvals, but allowed local governments to opt out of the fourth year. That extension for an additional year is described in this **earlier post**. So now that we have reached January 1, 2012, what is the status and impact of these permit extension laws?

The General Assembly did not act to further extend the period for tolling of time periods last year, so the clock has now resumed running on all development approvals.

What is a development approval?

It is important to remember that the permit extension law has broad coverage. It applies to all "development approvals" made by the state, cities, counties, and any other agency or unit of state or local government, regardless of the form of that approval. Just how broad that definition is was brought home by a recent case decided by our court of appeals.

Cambridge Southport, LLC v. Southeast Brunswick Sanitary District involved a fairly typical situation of a distressed and delayed development project. The developer of an **88-unit townhome development**obtained approval of the project in 2006. The developer obtained a wastewater allocation, which included a condition that the project be completed within three years. The project was started the project and the developer paid $264,000 in utility impact fees to the sanitary district for the wastewater. All of the wastewater infrastructure was built. Several of the townhomes were completed. The recession then hit in earnest, construction stopped, and the partially completed project went into default in mid-2008.

The plaintiff bought the project from the bank in December 2009 and sought to complete the balance of the townhomes. The sanitary district concluded that their contract to provide services expired in January 2009, the end of the three year period for project completion that was set in the original sewer allocation. The sanitary district offered to make a new sewer allocation, but advised the new developer that the new utility impact fee would be $648,000 (and that the previously paid $264,000 was nonrefundable and would not be applied to the amount now due).

The developer invoked the permit extension law, arguing that the three year project completion deadline tied to the wastewater allocation had not been running. The developer contended that both the original allocation and the original fee amount were still in effect. The sanitary district argued that the agreement to allocate wastewater capacity at a set fee was a contract for services, not a "development approval" and that as such, the contract was not subject to the permit extension bill. So were both the wastewater allocation and the amount of the utility fee part of a development approval that was subject to the permit extension law?

The court of appeals held the permit extension bill did in fact apply in this situation and that the new developer could use the original allocation and fee schedule. The court noted that the extension law's express purpose was to facilitate completion of development projects and included a direction that the law's terms be liberally construed to effectuate that purpose. The law explicitly addressed the question of wastewater allocation in several ways, such as: (1) including the state wastewater permit within the definition of a "development approval;" (2) addressing modification of tap fees; and (3)

setting priorities for water or sewer allocations that may have been reallocated early in the four-year tolling period. The new developer was allowed to step into the shoes of the original developer and benefit from the suspension of the running of the project completion deadline. So the court held the original allocation and fee schedule must be applied to the new developer.

The permit extension law includes provisions that apply if there had been a reallocation of the wastewater capacity. Those provisions provide that if an allocation had expired, that capacity had been reallocated in the period prior to the enactment of the permit extension bill, and there is inadequate capacity to handle both allocations, the original allocation is not revived along with the permit approval (since you cannot allocate the same limited capacity twice). However, the revived approval is to get first allocation when additional capacity becomes available. This situation was not an issue in this case.

Time is Running Out

No doubt additional controversies will arise in the next few years as local governments and developers work through the details of the scope and application of the permit extension law. For example, in this case the court of appeals declined to resolve the details of how the length of the permit extension is computed. The trial court had held the three-year time period to complete the project stopped running on January 1, 2008, when there was one year and 23 days left to run in the project completion deadline. The trial court held that the one year-23 day remaining period started to run again on January 1, 2012. That seems to be a reasonable interpretation of the law, but the court of appeals declined to resolve that since this point was not appealed by the sanitary district.

The bottom line here is that the four-year tolling period set by the 2009 and 2010 permit extension laws has now run its course. Development is beginning to pick up and new applications for development approval are trickling in around the state. But many previously approved projects still have life. If these older projects had a valid approval in place between January 1, 2008 and December 31, 2011, the clock on those development approvals has now resumed running. And whatever **time** they had on the **clock** at the start of the permit extension period is likely now just starting to run.

Links

- www.ncleg.net/EnactedLegislation/SessionLaws/PDF/2009-2010/SL2009-406.pdf
- canons.sog.unc.edu/?p=539
- canons.sog.unc.edu/?p=737
- www.ncleg.net/EnactedLegislation/SessionLaws/PDF/2009-2010/SL2010-177.pdf
- canons.sog.unc.edu/?p=2935
- appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS00MzgtMS5wZGY=
- cambridgecrossingsnc.com/CambridgeCrossingsBrochure.pdf
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