
Coates' Canons Blog: When is That Guy Going to Finish His Remodeling Job??

By Richard Ducker

Article: <https://canons.sog.unc.edu/when-is-that-guy-going-to-finish-his-remodeling-job/>

This entry was posted on February 27, 2013 and is filed under Land Use & Code Enforcement

The story goes something like this: Jones, who is something of an eccentric guy anyway, lives in a relatively good neighborhood. But his house has never really fit into the area. His house looks like a work in progress with no clear design plan. He apparently is in the process of remodeling and expanding the house himself. This project of his has gone on for several time. It seems as if the piles of construction materials scattered around the yard have been there forever. These do-it-yourself guys will drive you crazy. Isn't there something that the government can do to make him finish the job or to revoke his permit?

It is elementary that building permits are not good forever. They do expire under certain circumstances. Permit holders must make progress in performing the work authorized by the permits. In this regard permit holders must use 'em or lose 'em. That is true not only for construction permits but for the entire set of permits for work that is subject to the North Carolina State Building Code (SBC), including plumbing permits, mechanical permits, electrical permits, and the like. Several statutes, G.S. 160A-418 and G.S. 153A-358, both over 40 years old, govern. G.S. 160A-418 provides as follows:

A permit issued pursuant to G.S. 160 A-417 shall expire by limitation six months, or any lesser time fixed by ordinance of the city council, after the date of issuance if the work authorized by the permit has not been commenced. If after commencement the work is discontinued for a period of 12 months, the permit therefor shall immediately expire. No work authorized by any permit that has expired shall thereafter be performed until a new permit has been secured.

"Commencing" work and "discontinuing" work raise important questions of interpretation.

Determining whether a permit has expired

Suppose that our friend Jones started the job several years ago. Now it looks like he has abandoned his plans. The neighbors want the building inspector to visit the site and to declare the permit expired. But a building inspector would rather tend to other matters and wait for Jones to call him and request an inspection. If a year passes and Jones does not request an inspection, doesn't that prove that work has been discontinued for at least twelve months? Not necessarily. A variety of minor construction tasks can easily be performed within the course of a year without the need for a Code-required new inspection. At best the failure of a permit holder to call for the next inspection (or even the initial inspection) can be viewed as a rebuttable presumption that the permit has expired for lack of progress. A crafty permit holder can nurse a project along for years by doing a small amount of work on a regular basis.

Local authority to shorten expiration periods

What if a city or county wished to discourage slow-as-molasses, do-it-yourself construction projects? Is a city or county legally authorized, for example, to reduce the time period that triggers permit expiration from one year to a lesser period of time? Quite likely not. It is worth noting that the statutes above expressly allow cities and counties certain flexibility with regard to the time by which work under a permit must be commenced. A city or county may, by ordinance, reduce the six-month expiration period to "any lesser time." However, no such language has been added to the sentence providing for permit expiration if work is discontinued for a year. As a result, that option with respect to work already begun is probably not available.

Work as encompassing more than visible construction work

For those folks eager to see timely initiation of construction and timely construction progress, the news gets worse. The little-noticed North Carolina Supreme Court case of *Morris Communications Corp. v. City of Bessemer City Zoning Board of Adjustment*, 365 N.C. 153, 712 S.E.2d 868 (2011), surprised many by expanding what constitutes the "work" that must

be done to keep a permit alive. This case concerned a provision in the Bessemer City zoning ordinance that caused a sign permit to expire if work under the permit was not begun within six months after the permit was issued. The city took the view that the term “work” referred only to those visible activities related to on-site construction. Instead the high court ruled that the term work encompassed a broad range of activities necessary to complete a sign relocation, including negotiations with another permitting authority (the North Carolina Department of Transportation), negotiations with the landowner on whose land the sign was situated, and the activity involved in securing another applicable permit. These activities extend far beyond on-site construction work and would not typically be visible or known to a code-enforcement official unless brought to his/her attention. The court tried to distinguish its ruling by declaring that the holding was limited to the unusual facts of the case. It noted that it was interpreting a “vague ordinance” that happened to apply to zoning permits, not building permits. But the case appears to have implications for the interpretation of G.S. 160A-418 and G.S. 153-358. The effect is to make it even more unlikely that code-enforcement officials will be able to justify a determination that a building or zoning permit has expired for lack of progress.

The impact of the state’s permit extension legislation

One further consideration is the gradual inapplicability of North Carolina’s permit extension laws. (See a summary of these laws here.) First adopted in 2008, these permit extension laws suspended the expiration of a substantial number of land use, utility, public health, and environmental permits issued by agencies and departments of the State of North Carolina and by local governments, including building permits. For most permits the period of suspension began on January 1, 2008, and ended on December 31, 2011. On January 1, 2012, the expiration periods for most permits resumed, including the permit expiration periods established by G.S. 160A-418 and G.S. 153A-358 for building permits (no more than six months to commence work; no discontinuance of work for over twelve months). The result of the permit extension laws has been to provide permit holders with far more time to initiate their projects and to show progress than would otherwise have been the case. By now, the construction first authorized by most of the permits in 2007, 2008, 2009, 2010, 2011, and 2012 has either been completed or the projects abandoned. But as the construction industry continues its revival, more and more new permits are outstanding. Code-enforcement officials and permit holders will have more occasions to consider whether a permit has expired for lack of progress.

The consequences of permit expiration

What happens if a building permit does expire? The statutes provide a quick answer. They say that no work authorized by any permit that has expired shall thereafter be performed until a new permit has been secured. O.K., so the former permit holder must get a new one. But there are other consequences. First, the former permit holder must pay a new round of permit fees. Second, if there have been changes in the SBC since the original building permit was issued, the applicant must comply with the new requirements. Finally, building permits are issued only if the applicant can demonstrate compliance with “any other State and local laws applicable to the work.” Thus the building permit requires, indeed compels, coordination with other regulatory laws, ordinances, and programs. For example, a building permit might have been issued only if the applicant showed that a zoning permit, a driveway permit, a stormwater permit, and a septic tank improvement permit had already been issued. If the building permit later expires, does that mean that all of these other permits are also necessarily void and that the applicant must apply for them all over again? Not necessarily. These other permits may have expiration terms and conditions of their own. In some cases a new permit of one of these types might be required. But the mere fact that the building permit has expired does not automatically mean that prerequisite permits have also expired.

One exception to this rule is particularly important. It concerns certain zoning vested rights. The issuance of a building permit creates a statutorily recognized vested right for the permit holder with respect to the zoning that applied when the permit was issued (G.S. 160A-385(b); G.S. 153A-344(b)). However, that vested right may be lost if the permit expires. Thus if the building permit expires, the zoning approval that preceded it effectively expires as well, at least to the extent that zoning requirements have changed during the interim.

Pre-construction permits and nuisance actions

What if the neighbors decide to bring a private nuisance action against someone like Jones or to convince the local government to bring a public nuisance action under G.S. 160A-193 or G.S. 153A-140? Could it be that a construction project for which there is an outstanding building permit and otherwise complies with the law can qualify as a public or private nuisance? We lack case law on point, but it seems rather unlikely. A public nuisance generally involves an

unreasonable use of land. Construction activity on a site often produces undesirable side effects on neighbors and neighboring properties. Some of these effects can be mitigated through compliance with other pre-construction laws (e.g., soil erosion and sedimentation control regulations). Other impacts (e.g., noise) are often either unavoidable or avoidable only at unreasonable expense. In addition, it is generally assumed that these undesirable impacts will eventually disappear. A construction site may for practical purposes be a nuisance, but not one under the law.

Let's once again consider the situation of Jones, the do-it-yourselfer, who is nursing along a building permit. It is probably in his self-interest to prevent his building permit from expiring. Neighbors will find that there is relatively little they can do to speed up or halt such a project. But they can hope that eventually when the remodeling job is completed it will enhance the neighborhood and that Jones will have the same interests at heart that they do.

Links

- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_160A/GS_160A-418.html
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_153A/GS_153A-358.html
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_160A/GS_160A-417.html
- appellate.nccourts.org/opinions/?c=1&pdf=MjAxMS8xNTBBMTAtMS5wZGY=
- canons.sog.unc.edu/?p=2935
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_160A/GS_160A-385.html
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_153A/GS_153A-344.html
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_160A/GS_160A-193.html
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_153A/GS_153A-140.html