THE 2009 PERMIT-EXTENSION LEGISLATION:

SOME EXAMPLES, APPLICATIONS, AND EXERCISES

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The text of Session Law 2009 - 406 (S 831) declares that it shall be known as the "Permit Extension Act of 2009." According to the preamble of the act, the process of obtaining various development approvals "can be difficult, time consuming, and expensive" and "changes in the law can render these approvals, if expired or lapsed, difficult to renew or reobtain." An important purpose of the act, then, is to relieve developers and builders of the problems associated with lapsed or expired permits during these difficult economic times.

The legislation applies to a specific list of development approvals granted and permits issued by a broad range of State and local agencies and governmental units. The list, however, is intended to be comprehensive and apparently includes most key local government development approvals and permits. The list specifically applies to city and county building permits.

The legislation is unusual in several respects. First, the session laws that were adopted are not intended to be codified. There will be no section of the general statutes that one can refer to see the new requirements. Furthermore, it is necessary to cut and paste four different session laws to put together a full composite of the legislation. Because of ambiguities in the legislation, the General Assembly amended the act cited above three times (Session Law 2009 – 484 (S 838), Session Law 2009 – 572 (H 1490), and Session Law 2009 – 550 (H 274)) after the original act was ratified.

Second, the legislation is not enabling authority. Instead the legislation imposes mandates on local governments. No ordinance action is required by individual cities and counties. No action is required by the North Carolina Building Code Council. In this respect the legislation is self-executing.

The law suspends the running of time periods that apply to development approvals that were or will be current and valid at any point during the three-year period that runs from January 1, 2008, through December 31, 2010. Thus the legislation both extends the life of certain permits that will be issued after the effective date of the act and resurrects certain permits that had already expired before the law became effective.

The legislation, as amended, does not apply to permits and approvals that have been legally revoked. Similarly, the law does not apply to permits that are voluntarily relinquished

The legislation also addresses certain competing utility allocation claims. A resurrected development approval does not revive a water or sewer allocation associated with it if the capacity was reallocated and there is insufficient capacity also to serve the resurrected permit. However, the resurrected permit gets first priority if additional capacity becomes available.

One of the more significant parts of the legislation is Section 4 of SL 2009 – 406 (S 831), which provides as follows:

> <u>For any development approval that is current and valid at any point during the period beginning January 1, 2008, and ending December 31, 2010, the running of the period of the development approval and any associated vested right under G.S 153A-344.1 or G.S. 160A-385.1 is suspended during the period beginning January 1, 2008, and ending December 31, 2010.</u>

A second important part is section 5 of SL 2009 -406 (S 831), as amended by SL 2009 – 484 (S 838). It provides:

> This act shall not be construed or implemented to:
>
> . . .
>
> (6) Affect the ability of a government entity to revoke or modify a development approval or to accept voluntary relinquishment of a development approval by the holder of the development approval pursuant to law.

Consider the application of these sections to the following situations.

(1) Suppose a county issued a building permit to General Contractor on November 1, 2007. No work was initiated under the permit prior to May 1, 2008. Did the permit expire under G.S. 153A – 358 because the permitted work was not begun within six months after the permit was issued?

- No, the earliest the permit may expire because work was not commenced is May 1, 2011. Why? The permit was still valid at the beginning of January, 2008. The new permit-extension law is retroactive and effectively resurrects permits thought to have expired. The law suspends the running of the six-month permit expiration period for a period of three years, beginning January 1, 2008 (before the permit expired) and ending on December 31, 2010. The remaining four months of the original six-month permit-expiration period then resumes on January 1, 2011 and ends on May 1, 2011.

(2) Suppose again that a county issued a building permit to General Contractor on November 1, 2007 and work was actually commenced on February 1, 2008. Suppose further that work was discontinued on July 1, 2008 and has not been resumed. Did the permit expire under G.S. 153A-358 because the permitted work once begun was discontinued for over a year?

- No. Once work was actually begun under the permit, the six-month permit-expiration period for failure to commence work became irrelevant. Instead the one-year work-discontinuance permit-expiration period takes center stage. On July 1, 2008 the law again immediately suspends the running of the one-year permit-expiration period for a period of three years (through December 31, 2010). The full twelve-month work-discontinuance permit-expiration period then resumes on January 1, 2011 and ends on December 31, 2011. As a practical matter, then, in the above example a general contractor that initiates work under a building permit during the permit suspension

period can buy more time under the new law than one that obtained the permit but has not begun work.

(3) In November 1, 2007 West End obtained a special-use zoning permit to build a residential condominium complex and in so doing qualified his site-specific development plan for a two-year zoning vested right under G.S. 160A-385.1. However, the company has run into financial difficulty even before it obtained its building permits and sold its interest in the project this past summer to Hunter's Forest, another developer. The new owner is considering redesigning the project to include substantial office and commercial space. Does the new owner enjoy the same vested right (extended to May 1, 2013) as West End did?

- Probably not. The changes outlined above, which change the project land uses, would probably necessitate a new special-use permit. That is true whether West End voluntarily relinquished its permit or not. Vested rights under the new Hunter's Forest permit would have to be established separately. The running of the vested rights period for the old permit held by West End might actually be suspended under the new law, but that fact may be largely irrelevant since that permit would be inconsistent with plans for the property that Hunter's Forest wishes to pursue.

(4) In the last example would the result be different if Hunter's Forest was content to develop the site as set forth in West-End's original plan? In other words, would a mere change in project ownership make a difference?

- The suspension of the permit-expiration period apparently continues as if no change in ownership had occurred. It is true that some local governments may routinely require a new development permit whenever a project is sold to a new owner. However, it seems clear that one of the purposes of this new legislation (section 4) was to suspend the running of various development approvals and "any associated vested right under G.S. 153A-351 and or G.S. 160A-385.1" (the zoning vested rights statutes). Those two zoning vested rights statutes specifically provide that a vested right is not a personal right and runs with the land. All successors to the original landowner are entitled to exercise any vested rights obtained earlier. For that reason that mere change of ownership apparently does not matter for purposes of this example.

(5) Consider an example like number (3) but involving a building permit. Suppose that in early 2008 the Jones Brothers got necessary permits to convert certain first-floor storefront space into a newsstand. Sometime along the way they have apparently tried to expand their project to include both first-floor and second-floor space for serving food, drinking, dancing, and a sound stage for a night club, something their original building plans do not reflect. As a result, the city revoked the building permit on July 1, 2009. The Jones Brothers say that their permit application can be amended and, in any event, the permit is good until at least January 1, 2011. Is that true?

- The permit-extension legislation does allow local governments to retain their authority to revoke a permit for good cause. The Jones Brothers might point to G.S. 160A-419 or G.S. 153A-359. Both of these statutes say that "no changes or deviations from the terms of the application, plans and specifications, or the permit, except where changes or deviations are clearly permissible under the State Building Code, shall be made until specific written approval of proposed changes or deviations has been obtained from the inspection department." The Jones Brothers might claim that as long as what they are doing is consistent with the Code, they may change their work in accordance with their existing permit. What's more, since they have clearly begun work, they might claim that permit is now good until January 1, 2011.

  The problem with this argument is that it fails to take into account G.S. 160A-422 and G.S. 153A-362, the statutes governing permit revocation. Those statutes provide that permits "shall be revoked for any substantial departure from the approved application, plans, or specifications . . ." These statutes effectively limit the extent changes in work can be accommodated under an existing permit. In the example above, significantly expanding the area within which work is being done or converting space into a different occupancy classification likely involves a "substantial departure" that triggers a permit revocation. If a permit such as this is revoked, the permit holder does not enjoy the benefits of the permit-extension law.

(6) Consolidated United obtained building permits for a residential condominium project on October 1, 2008, but never began work. On August 1, 2009, the project lender took over the project and sold the property to Tar Heel Properties. Today Tar Heel Properties wishes to assume the permits originally issued in behalf of Consolidated United. Are Consolidated United's permits still good? If so, when is the earliest the permits might expire for failure to begin work?

- See example (4). The fundamental question here is whether a change in property ownership allows the new owner to enjoy the benefits of the permit-extension legislation or not. In example (6) no zoning vested right question is involved. There is no change in the proposed work. No substantial departure from approved plans is proposed (unless a change of ownership qualifies as such). The original version of Senate 831 provided that projects involving "structural alteration" (which included changes in ownership) were <u>not</u> subject to permit extension. However, this language had been deleted by the time the bill was enacted.

  Some local governments require new building permits whenever a property is sold or the business entity involved takes a different form. This approach needs to be altered, certainly for purposes of the new law. Given the extensive discussion of the purposes behind the legislation, the rise in the frequency of foreclosures, and the interest in avoiding reapplications for new permits, it seems likely that the General Assembly intended to provide the benefits of the new legislation to successors in interest as well as original property owners. Thus the earliest the permits of Tar Heel Properties could expire under the new law would be December 31, 2011.