Laws and Orders Addressing COVID-19 Create New Uncertainties About Beginning Work on a Project: Choices for Recent Applicants and Permit-Holders

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The flurry of recent emergency executive orders and court orders, plus a new state statute, have provided needed relief and flexibility to local and state government agencies and courts to cope with the reality of the COVID-19 pandemic in Massachusetts.

At the same time, these well-intentioned and sometimes well-crafted measures have created potential headaches for land developers, property owners, building managers, lenders and investors, and contractors desiring certainty before beginning work on their planned projects.

This is so even if they already have or soon will receive all necessary land use, environmental, and real estate permissions. Are we a go, or not? Hurry up, and wait? All dressed up, and no prom?

On April 3, 2020, Governor Baker signed Chapter 53 of the Acts of 2020, known as the "Municipal Relief Act" (the "Act") which, among other things, provides crucial flexibility to conservation commissions, planning boards, zoning appeal boards, and other local permit granting authorities to reschedule or delay opening public hearings and decisions on permit applications while social distancing prevents public hearings on permit applications from being held.

This certainly helped those permitting authorities quite a bit. For specifics about the COVID-19-era scheduling powers conservation commissions now have for wetlands permitting under the Act, please see the helpful published guidance by my colleague, Luke Legere.

The Act specifically gives municipal permitting authorities the discretion to continue with business as usual and conduct their regularly scheduled meetings and public hearings remotely through virtual meeting technologies such as Zoom.

In hopes of avoiding a backlog of permit applications that would have to be addressed after stay-at-home orders are lifted, or for other reasons, some, but certainly not all, municipal boards are forging ahead and holding hearings, deliberating, and issuing land use permits. We wish more would.

A homeowner, developer, contractor, or other lucky permit-holder at this moment likely will face a longer window of time during which the permit can be appealed (or a disapproval appealed). This is per an Order of the state Supreme Judicial Court, OE-144 (Suffolk) (first issued April 1 and extended on April 27, 2020), which tolls (legally pauses) until at least June 1, 2020 any statutes of limitation and other deadlines set forth in statutes, court rules, and court-issued standing orders that would have expired between March 16, 2020 and June 1, 2020.

More specifically, the elongated appeal period creates uncertainty about whether to proceed with the permitted project "at risk." This legal term means the chance of having to stop or undo work, or

stop or change a use, if a project opponent later challenges the permit, especially if successfully and the approval is annulled (rescinded).

For example, for the holder of a wetlands permit under a town's wetlands bylaw issued March 2, 2020, the 60 day appeal period to court would have run for 15 days and then paused under this SJC Order until June 1, 2020, at which point the clock would start running again and end on July 16, 2020 (rather than May 1, 2020 as it would have been pre-COVID-19).

This means a challenger with legal standing to sue could wait to file suit as late as July 16, 2020. On the other hand, an unhappy permit applicant who was disapproved days before March 2, 2020 (the date of the board vote) would have until about mid-July to challenge that denial. It works both ways.

Many feel a lawyer is needed to sort out these appeal deadlines. Not all land use permits allow a permit holder to proceed "at risk." Some make the permit-holder wait for the appeal period to expire before starting work. And now the appeal periods, by these new laws and orders, are much longer.

For instance, the Act has waived any prerequisite of recording a permit before it can be used, but it must be recorded eventually. But a municipality might not grant a building permit until the appeal period has run on a special permit or variance, waiting to issue the building permit until then, meaning the SJC Order now potentially places a two-and-one-half month delay to a project schedule.

A project opponent ready to commence an appeal to challenge an approval may encounter difficulty filing the complaint in court during these times. Or if they did, not much would happen on the appeal after filing. Under the SJC's Order and trial court orders, deadlines are tolled in the rules of civil procedure and various court management orders.

During and after the emergency, these influence the progress of appeals of land use, environmental, and other permits, meaning the follow up deadlines such as those for serving a complaint or filing an answer, will be postponed. So will be motion practice, discovery, hearings, mediation, and trials.

There is good news in the Act for project developers who held their permits in effect as of March 10, 2020. The Act provides that any such permit shall not lapse or expire during the state of emergency. Also, any deadline in or condition of a permit shall not lapse or otherwise expire, and the time period for meeting a deadline in the permit shall be tolled during the state of emergency.

This is good news, not great. Note how the new lapse or expire date is the end of the emergency. First, it is not known when that will be; the emergency orders declaring it keep getting extended. Secondly, the emergency may end quickly by a declaration lifting it; there may not be a lot of advance notice. All this means a permit may lapse or expire suddenly.

The Attorneys at McGregor & Legere, P.C. have years of experience assisting developers, homeowners, and other project proponents overcome permitting hurdles and helping manage permitting timelines and risks. Please contact us for any questions or a free, one-hour, no obligation consultation.