



# nerej

## **A summary of Section 173 of Chapter 240 of the Acts of 2010: A miracle may exist!**

October 27, 2010 - Spotlights

The Massachusetts Real Estate Market is hopefully on the mend, but obtaining financing is difficult at best, tenants are still contracting or at least not expanding, I'm not ready to put a shovel in the ground and my permits, which took forever and tens of thousands of dollars to obtain, are about to expire.

I need a miracle!!

One may exist.

As of August 1, Section 173 of Chapter 240 of the Acts of 2010 (the "Act") was signed into law, providing, in pertinent part, that ... an "approval" in effect or existence during the period beginning August 15, 2008 and ending August 15, 2010 shall be automatically extended for a period of two years in addition to the term of approval.

"Approval" is generally defined in the act as ...a permit, order, license, determination, variance, building permit or other approval or determination of rights from any municipal, regional or state governmental entity concerning the use or development of real property.

At the outset, it must be recognized that there are a few exclusions from the operation of the Act; one notable exception being M.G.L. Chapter 40B, the so-called "affordable housing act." Other exceptions are federal permits and permits from the State Fisheries and Wildlife Dept. under M.G.L. Chapter 131. Additionally, under the Act, if a state or local permit contains language contemplating potential revocation and/or modification, the act will not negate such rights.

A condition of the act states that if a permit holder is transferring property with the benefit of permits, in order for the permits to remain in effect and have the benefit of the extension, the purchaser must meet and abide by all of the (permit) commitments of the transferor.

As with any law of broad effect, questions arise.

One such question is how wide a net does the act cast. If "annual permits" are expiring and city and town use approvals are conditioned upon renewal of that annual permit, does that renewal condition constitute a revocation and/or modification of approval under the act? One would think not, although no definitive answers exist as of yet.

A more difficult, and certainly more interesting, question arises when one considers the potential effect of the two-year extension under the act upon "annually renewable" permits relating to land uses issued by state and municipal authorities. If an owner/user has a "license" or "permit" relating to land use and development, both defined as an "Approval" under the act, would the renewal of that permit or license have the benefit of the two-year extension under the act? Certainly, with state and local agencies being negatively impacted by budgetary and personnel constraints due to the downturn in the economy, one could assert that there is a good basis for including such annually renewable land use licenses and permits under the coverage of the act.

Some of the seemingly "easy," although one never knows for sure, determinations where the act would apply appear to be Planning Board Subdivision Approvals and Covenants and Site Plan Review Approvals, Conservation Commission Orders of Conditions, Zoning Board of Appeals Variances or Special Permits (excluding M.G.L. Chapter 40B) and Board of Health approvals.

Of course, for each so-called "easy" issue, more difficult issues are embedded in this act. For example, if a developer has a use variance that has not been exercised within the statutory (M.G.L. Chapter 40A, Â§10) one year of the date of grant of such variance, does the developer need to seek the six-month extension under the statute before or after the two-year extension provided under the act? This would be an important consideration in light of the age old, and recently litigated, question of when a "use" actually begins under a use variance; when work toward such use (e.g. construction) is commenced or when the actual use begins?

Although it is not clear from the Act or the legislative history whether the Act is applicable to Boston, which city is notably excluded from the "so-called" Zoning Enabling Act, M.G.L. Chapter 40A, it is presumed that the Act will apply to all cities and towns in Massachusetts.

Lawyers, developers and lenders may want to consider the wisdom of confirming with the pertinent board the applicability extension under the act of the expiring approval. Being only two months into the act, we, on behalf of one of our clients, were able, without resistance, to obtain a planning board's acknowledgement of the applicability of the act. However, equal consideration should be given to the possibility of receiving an undesired, and perhaps erroneous, response.

As with any such legislation, there are as many issues presented as there are opportunities for solutions. Clearly, however, this act should benefit developers, lenders and owners, but only time will tell how broad that benefit will actually be.

Gary Lilienthal is a partner and April Wilmar is an associate at Bernkopf Goodman LLP, Boston, Mass.

New England Real Estate Journal - 17 Accord Park Drive #207, Norwell MA 02061 - (781) 878-4540