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Question of the Month: What to do if considering resuming or purchasing a stalled development project?

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Once stalled construction projects are reemerging in the Northeast thanks to some slack in the financial restrictions noose as well as revived movement in the real estate market. With the wheels turning again, developers are starting to think about the next steps. Moving forward with previously approved projects was made easier in 2010 when the Massachusetts Legislature passed legislation which aimed to aide economic development and included what is known as the Permit Extension Act.

Typically it takes years to get a new project approved - starting with numerous local hearings and going through everything from zoning changes, to special permits, to wetlands permits, to traffic mitigation, to environmental reviews at the state level. Add in any appeals and you could potentially be in a whole new economic cycle!

The purpose of the Permit Extension Act was to aide projects that were "shovel-ready" when the economic downturn hit, from having to go through the permitting process a second time while waiting to secure financing. These financing delays may have meant that permits would expire before the developer could actually get a shovel in the ground.

The Permit Extension Act is simple. It extends most state and local development related permits and approvals issued or in existence between August 15, 2008 and August 15, 2010 (tolling period) for two years beyond their otherwise applicable expiration dates. As an example if your permit was first issued on August 15, 2009, and would have expired on August 15, 2012, it will now expire on August 15, 2014. The Act defines "approvals" broadly to include zoning and subdivision approvals, approvals issued under the Massachusetts Environmental Policy Act, Chapter 91 waterways permits, permits and approvals by local conservation commissions under the Wetlands Protection Act, Endangered Species Act permits, building permits, permits issued related to Smart Growth, and like permits issued under any local by-law or ordinance.

The Act does not cover a number of permits and approvals, including most notably Comprehensive Permits issued pursuant to Chapter 40B, approvals issued by the Massachusetts Historical Commission, permits and licenses issued by the Division of Fisheries and Wildlife for hunting, fishing, or aquaculture, and all other approvals issued by the government of the United States or its agencies. Further the Act also does not extend compliance dates under enforcement orders. Nor does it prevent a revocation of a permit of approval. Should an owner sell or transfer a property or project, any commitments made by the original owner must be upheld in order to receive an extension.

While the current Permit Extension Act was a tremendous shot in the arm for the idle development market over the last two years, the economic recovery in the northeast has taken longer than most people had anticipated. For large scale development projects, substantial upfront costs are

necessary to prepare and take forward applications through the planning system which is why the Massachusetts House voted to pass an economic development bill that would extend the tolling periods on projects beginning August 15, 2008, and continuing through August 15, 2012. The House sent the bill (HB 4119) to the Senate where the committee on Bonding, Capital Expenditures and State Assets is working on its final language with hopes that it will pass before the close of the legislative session on July 31st, before the current Permit Extension Act expires. If the provisions of the bill pass as written, a permit or approval issued or in existence between August 15, 2008 and August 15, 2012 would be valid for an additional four years beyond its expiration date.

Now the main question? What to do if considering resuming or purchasing a stalled development project? Simple answer: a team approach.

Developers should equip themselves with a comprehensive team that consists of an attorney who specializes in Land Use and Real Estate law and a professional engineering firm that specializes in permitting to review the existing project permits and verify the permit expiration dates. The information gathered by the team's due diligence will determine the time frame and viability of the project. The team will also be able to determine if any new regulations came into existence since the project was initially approved and identify what changes would be required in order to comply. The client would then verify which design components if any have changed from the previously approved project and work together with their team to map out a project game plan to serve as a timeline for the remainder of the project construction.

The client may also want to consider having an ALTA/ACSM Land Title Survey completed to verify that there are no existing liens or commitments on the property. This survey is specifically designed to satisfy the needs of lenders, corporations and title companies when dealing with valuable commercial properties.

In conclusion, while the current Permit Extension Act and a boosted real estate market have paved the way for stalled projects to move forward, it is necessary to proceed with forethought. Attention to detail will ensure a smooth transition with no surprises. Implementing a team approach, by partnering with a land use/real estate attorney, a professional engineering firm with knowledge and experience in permitting at all levels of government, and a professional land surveyor practiced in land title surveys, is the best way to be sure that all your bases are covered and your project can enter successfully into the construction phase.

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