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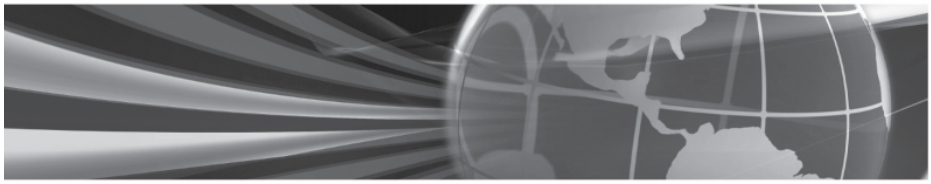
ALERT: Land Development



September 2006

Massachusetts Permitting Reform Legislation

Responding to mounting concerns in the business and real estate communities over the costs and delays associated with permitting development projects in Massachusetts, the Massachusetts legislature recently took an important step towards streamlining and improving permitting in Massachusetts by enacting House Bill 4968, An Act Relative to Streamlining and Expediting the Permitting Process in the Commonwealth ("the Act"). The Act was designated an emergency law by the legislature and took effect immediately upon signature by Governor Romney on August 2, 2006.

"…the Massachusetts legislature recently took an important step towards streamlining and improving permitting in Massachusetts."

The Act's reforms apply to all levels of the development permitting process in Massachusetts: issuance of state and local permits; administrative and judicial appeals of permits; and coordination among permit-granting authorities. How much relief the Act will provide remains to be seen, but the early consensus is that the Act provides some important tools for expediting the approval of development projects in the Commonwealth - long viewed to be a competitive disadvantage in Massachusetts' efforts to bring new businesses and jobs in-state.

Expediting the Permitting Process

With an eye towards overhauling and streamlining the permitting process, the Act requires the Board of Executive Directors of the Massachusetts Association of Regional Planning Agencies to develop a permitting model that municipalities may adopt for local permitting. The Board must report its recommendations to the House and Senate Ways and Means Committees by November 1, 2007. In addition, the Act requires that each Regional Planning District establish a technical assistance center in order to provide technical services to local governments in order to facilitate expedited permitting. Also, the Act requires the Commissioner of MassHighway to create enforceable regulations for expediting the issuance of highway access, or "curb cut," permits by July 1, 2007.

Grants and Assistance

In order to implement the required changes, the Act provides a minimum of $3 million in technical assistance grants for municipalities. In addition, the Act requires the establishment of a District Local Technical Assistance fund to be used to provide grants to Regional Planning Agencies for technical assistance services to municipalities.

Special Permits for Research and Development

Cities and towns may elect to allow,by special permit, research and development uses in districts other than residential, agricultural or open space. Research and development uses that may be allowed under this special permit include investigation, development, laboratory, and similar research uses, along with related office space, subject to certain restrictions on manufacturing.

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Priority Development Sites

The Act revises Chapter 43D, the Expedited Permitting Act, in an effort to encourage communities to adopt expedited permitting for priority development sites. The revised Chapter 43D provides for expedited permit reviews for designated priority development sites. A priority development site may be publicly or privately owned, and must be: (1) zoned either commercial or industrial; (2) eligible for at least 50,000 square feet of gross floor area (either by applicable zoning or special permit); (3) located adjacent to existing development or in underutilized buildings or facilities, having the benefit of adequate water and sewage infrastructure and water supply; or (4) located close to appropriate transit services. The site may include several parcels or projects.

To secure this designation, a developer must obtain approval from the municipality's City Council or Town Meeting. Thereafter, a formal proposal must be filed with the Interagency Permitting Board. Once deemed a priority development site, by the Board, the review process is expedited and final decisions must be completed within 180 days, otherwise the project will be deemed approved. This designation also ensures the site is eligible for priority consideration for various grants and state resources such as quasi-public financing and training programs. In addition, the site will be eligible for brownfields remediation assistance, enhanced marketing assistance, and technical assistance by the Regional Planning Council. The Act further expedites the process by setting a 120-day time limit for environmental impact and historical reviews on priority

development sites. No remedy is provided in the Act if this timeline is not met.

Appeals

The Act offers several important reforms to the appeals process for development permits. One significant change is allowing applicants who have received a special permit to proceedwith construction, at their own risk, even if an appeal has been filed and is pending.

In the case of priority development sites, appeals of permits (other than state wetlands permits) issued by a board, or deemed issued as a so-called constructive approval, must be filed within 20 days. Currently, there is a 60-day deadline for filing certiorari appeals of local permits. Appeals may be filed by aggrieved persons, even if those persons did not participate in the permit proceeding.

"In addition, the Act provides funding to the Division of Law Appeals (DALA) to reduce the backlog of environmental appeals, and requires that DALA decide all appeals within 90 days after filing."

In order to reduce frivolous appeals in the Chapter 91 filled tidelands program, the Act requires that at least five of the ten intervenors in a Chapter 91 appeal reside in the community where the project is being proposed. Also, each of the intervenors must submit an affidavit stating the intent to be part of the intervening group and to be represented by its authorized representative.

In addition, the Act provides funding to the Division of Law Appeals (DALA) to reduce the backlog of environmental appeals. For appeals of permits issued for priority development sites, DALA must issue a decision within 90 days of when the appeal is filed. For all other appeals, DALA is required to issue a decision within 90 days of when the record is complete. The Act does not provide a remedy if these deadlines are not met. DALA is also required to prepare an annual report concerning all appeals filed with the Division during the preceding year.

Specialized Permit Appeal Session in Land Court

The Act creates a separate session in the Land Court Department of the Massachusetts Trial Courts Division. This so-called "Permit Session" has concurrent jurisdiction over appeals with the Superior Court. To qualify for the "Permit Session", appeals must concern projects that either involve 25 or more dwelling units or the construction or alteration of at least 25,000 square feet of floor area, or both. At the time of filing in the Permit Session, cases are assigned to one of three tracks establishing the timelines for discovery, motions, trial and final disposition. The number of Land Court Judges has been increased from six to seven to handle the anticipated caseload.

Permitting Policy

The Governor will appoint a Director of the Massachusetts Permit Regulatory Office who will serve as the State Permit Ombudsman. The Ombudsman's role will be to facilitate communication between municipalities and state agencies. Second, an Interagency Permitting Board within the Department of Economic Development has been established among various state agencies and independent authorities. This Board will be chaired by the State Permit Ombudsman and will meet at least 8 times each year to evaluate the permit procedures of such agencies and authorities and to recommend changes.

Conclusion

Many of the Act's benefits are not self-executing, so the Act's ultimate success will hinge on how it is implemented by the Executive and Judicial branches. That said, the Act is deservedly being hailed as an important step in removing many of the time and cost inefficiencies that have plagued the development permitting process in Massachusetts.

This Alert was written by Hamilton Hackney and Christopher H. Milton in the Boston office with assistance from summer associate Sara C. Dana. Please contact Mr. Hackney or Mr. Milton at 617.310.6000 or your Greenberg Traurig liaison if you have any questions regarding the subject matter of this GT Alert.

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