HOW TO OBTAIN MULTIPLE EXTENSIONS OF PERMIT EXPIRATION DATES

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Florida frequently faces hurricanes, floods, fires, and pestilence. Nonetheless, as Albert Einstein said, “In the middle of adversity there is great opportunity.” In 2011 the Florida Legislature enacted the “State Emergency Management Act,” (the “Act”) Sections 252.31-252.60, Florida Statutes, which gave developers a great opportunity--to obtain potentially long-term extensions of certain environmental permits and development orders based upon the Florida governor’s issuance of multiple declarations of states of emergency under the Act. Governor Scott has issued such declarations, in the form of Executive Orders, with great frequency since 2011. These declarations can become long-term because the Act allows the extensions to piggyback upon each other.

Under Section 252.363 of the Act, the governor’s issuance of a declaration of public emergency can extend, for the length of the declaration (the “tolling period,” typically 60 days from the issuance date of the declaration) plus an additional six months, the expiration dates for the following: a local government development order, a building permit, an environmental resource permit issued by the Florida Department of Environmental Protection or a water management district, and the buildout of a development of regional impact.

The developer can accumulate multiple extensions provided:

- the developer has applied within 90 days prior to the end of the tolling period for each emergency declaration,
- the permit has not otherwise expired by the time each application is filed, and
- each emergency declaration includes the county for which the extension is being sought.

There is no filing fee for the application. It is not necessary that the emergency declaration have any apparent relationship to the activity authorized by the permit or order, as long as the declaration covers the same county. For example, a building permit’s expiration date can be extended whether the emergency is based upon damage in that county from a category IV hurricane, fears in various counties over being bitten by Zika bearing mosquitos, or statewide concerns that overwhelming numbers of Puerto Ricans will come to Florida to escape the impact of Hurricane Maria.

The Act defines a covered emergency as “any occurrence, or threat thereof, whether natural, technological, or manmade, in war or in peace, which results or may result in substantial injury or harm to the population or substantial damage to or loss of property.” The governor can declare other types of emergencies, such as when necessary to replace an elected public official convicted of a serious crime. Furthermore, the governor can authorize state agencies to waive or suspend other regulatory requirements, which they often do. To determine whether the declaration is for an emergency covered by the Act, the Executive Order declaring the emergency must state that it has been issued under the authority of the Act. Typically this can be determined by looking at the “NOW, THEREFORE,” clause of the Order for the words, “by virtue of the authority vested in me . . .by the Florida Emergency Management Act, as amended . . . .” It is irrelevant that the declaration have no language authorizing permit extensions, because Section 252.363(1) mandates the extensions upon

issuance of the declaration and timely application for an extension.

Subject to a short time lag, Governor Scott's Executive Orders can be accessed through the website of the Executive Office of the Governor at http://www.flgov.com/all-executive-orders/. In order to illustrate how piggybacking can work, we can begin with a review of the following Executive Orders issued in the following counties on the following dates in 2017 up to the beginning of October:

-EO #2017-259, October 2, for Hurricane Maria's impacts in Puerto Rico resulting in potential migration to all Florida counties.

-EO #2017-236, September 9, Hurricane Irma creating an election emergency in Lee, Levy, and Miami-Dade Counties.

-EO #2017-235, September 4, for Hurricane Irma impacting all counties.

-EO #2017-211, August 4, extending EOs 16-149, 16-193, 16-233, 16-288, 17-43, 17-115, and 17-166 for Zika Virus found in various counties around the state, including Miami-Dade.

-EO #2017-204, July 31, Tropical Storm Emily's impacts on many central and south Florida counties, including Miami-Dade.

-EO #2017-174, June 9, extending EO 17-120 regarding Wildfires impacting all counties.

-EO #2017-67, March 24, extending EOs 16-274, 230, regarding Hurricane Matthew impacts on all counties.

These declarations have created the opportunity for permits and orders issued anywhere in the state to be extended by at least two years plus the cumulative (but not overlapping) tolling periods. In Miami-Dade County, the extensions can be for three and one-half years plus the tolling periods. Assuming a developer can be allowed to take advantage of using declarations extending states of emergency previously issued in order to obtain further extensions, and considering executive orders issued this year alone, a developer in Miami-Dade County could have obtained extensions for at least four and one half years plus tolling periods.

This is only a rough survey of the piggybacking opportunities, and makes no effort to quantify how long permits could have been extended had a developer started seeking extensions for each emergency declaration since the Act went into effect in 2011, but the survey does show that extensions could have been for many more years than shown by these examples. Given that Governor Scott has a penchant for issuing and renewing declarations of states of emergency frequently, there will likely still be plenty of opportunities to jump on the piggybacking bandwagon as he issues more such declarations for the remainder of his term. This "penchant" may continue based upon factors that may face future governors as well, such as climate change.

This analysis is subject to (at least) the following caveats:

- Though at least some governmental agencies accept the piggybacking opportunities, others may resist extensive piggybacking, by claiming a different interpretation of the Act, or creating other obstacles.
- Pushback may be more successful when addressing whether orders extending existing emergency declarations create new piggybacking opportunities.
- Figuring out the math on how long extensions should last can be complicated, particularly when there are overlapping tolling periods, and days are calculated with months.
- Because these issues can be complicated, it is best to work with appropriate agency staff to try to work out a common understanding of how the extensions will work. And if that does not work, it may be necessary to bring in the lawyers.

For more information on this topic, please contact Dan Thompson on the firm's Government and Regulatory Team.

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