UPDATE: CAN DEVELOPMENT ORDERS AND PERMITS BE EXTENDED AS A RESULT OF COVID-19?

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My previous post explained that the state of emergency declared by the Governor's Executive Order 20-52 refers to the COVID-19 state of emergency as a "public health emergency," leaving questions as to whether the tolling and extensions of development orders, building permits, FDEP permits, water management district permits, and build out dates of developments of regional impact authorized by Florida law for "natural" emergencies, applied. The Florida Department of Business and Professional Regulation issued guidance confirming that the COVID-19 state of emergency declared by the Governor's Executive Order 20-52 is a "natural emergency." Therefore, development orders, building permits, FDEP permits and water management district permits, and build out dates of developments of regional impact can be extended pursuant to Section 252.363, Florida Statutes. In order to take advantage of the authorized extensions, written notification to the issuing agency or local government must be given within 90 days after termination of the emergency declaration. Executive Order 20-52 is currently scheduled to expire on May 8, 2020. Unless shortened or further extended, permit holds have until August 5, 2020 to provide written notice of the extension.

Prior to July 2019, Florida Statutes provided for an unconditional automatic extension of development orders and state and local permits when the governor issued a declaration of a state of emergency. The tolling and extension applied in any circumstance. During the 2019 legislative session, the legislature placed a limitation on the extension of development orders and permits, ending unconditional automatic extensions of development orders and state and local permits during a general state of emergency. Effective as of July 2019, Section 252.363, Florida Statutes, provides that the tolling and extension of permits and development orders only applies in the case of a "natural emergency":

> The declaration of a state of emergency by the Governor for a **natural emergency** tolls the period remaining to exercise the rights under a permit or other authorization for the duration of the emergency declaration. Further, the emergency declaration extends the period remaining to exercise rights under a permit or other authorization for 6 months in addition to the tolled period.

The tolling and extension provided by the statute apply to development orders, building permits, Department of Environmental Protection permits, water management district permits, and build-out dates of developments of regional impact. The question now arises whether COVID-19 is a "natural emergency." Unfortunately, the answer is not clear.

A "natural emergency" is defined by Florida Statutes as, "an emergency caused by a natural event, including, but not limited to, a hurricane, a storm, a flood, severe wave action, a drought, or an earthquake." A "natural emergency" is differentiated from a "manmade emergency" which is defined as "an emergency caused by an action against persons or society, including, but not limited to enemy attack, sabotage, terrorism, civil unrest, or other action impairing the orderly administration of government."

Governor DeSantis' emergency declaration for COVID-19 refers to the current state of emergency as a "public health emergency." A "public health emergency," although not defined by Florida Statutes relating to

emergency management, is defined by Florida Statutes relating to public health to include an occurrence or threat of an occurrence, “whether natural or manmade”. Thus, a public health emergency can be either natural or manmade. The question remains, is COVID-19 a “natural emergency” or a “manmade emergency”?

The staff analysis and committee notes regarding HB 7103, the bill which amended Section 252.363, Florida Statutes, indicate that the purpose of the amendment was to limit the availability of emergency extensions. This suggests that there will be a narrow view of what constitutes a “natural emergency.”

It is not surprising that the statutory provisions do not address whether a pandemic is a natural emergency, manmade emergency or a general emergency. A pandemic, including the current COVID-19 pandemic, is a unique event. Given the nature of the pandemic, there are arguments that it is more consistent with a “natural emergency” than a “manmade emergency,” supporting the position that permits should be extended. However, if construction sites have not been shut down, there is support for the contrary argument that there is no need for permit extensions. With no guidance in the legislation, it will be up to local authorities to determine if the tolling and extension provided by the statute are applicable to the current situation. Different local authorities may come to different conclusions.

The current situation demonstrates the need for clarification as to whether the COVID-19 is a “natural emergency.” Until the governor issues a clarification that the current public health emergency is a natural emergency, or the legislature clarifies the statutory provisions, developers will need to work with the state and local authorities which have issued permits and development orders with respect to extensions and tolling of periods remaining to exercise rights under permits and development orders.

In any case, in order to preserve their rights, developers should provide the notices required in order to take advantage of the statutory extensions and tolling of time periods under permits and development orders. Within ninety days after termination of a state of emergency, the holder of a permit or other authorization, i.e. development order, must notify the issuing authority in writing, identifying the specific permit or authorization, of the intent to exercise the statutory extension and tolling.

The COVID-19 pandemic is creating rapidly-changing issues for businesses, and government aid processes and measures designed to assist businesses may also change materially from when this post is issued. We therefore encourage you to monitor our website, review our future posts and generally remain alert for additional updates or modifications to laws and regulations.

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