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## PENNSYLVANIA ENVIRONMENTAL HEARING BOARD CONFIRMS TOLLING UNDER PA PERMIT EXTENSION ACT

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In response to the housing slump of 2010, the Pennsylvania state legislature enacted permit extension legislation that sought to provide relief from expiring building-related permits. Act 46 of 2010, and later Act 87 of 2012 and Act 54 of 2013, commonly known as the “Pennsylvania Development Permit Extension Act,” 53 P.S. §§ 11703.1 *et seq.* (the “Act”), suspended the expiration date for various building and land development approvals until July 2, 2016. This permit extension legislation offered a respite for developers and lending institutions, which feared that the investments made to obtain necessary approvals would be lost as the housing market continued to stall and their approvals lapsed.

Specifically, the Act provides for an automatic suspension of certain approvals as follows:

*The expiration date of an approval by a government agency that is granted for or in effect during the extension period, whether obtained before or after the beginning of the extension period, shall be automatically suspended during the extension period.*

The “extension period” is defined as the “period beginning after December 31, 2008, and ending before July 2, 2016.” The term “approval” is very broadly defined in the Act as “any government agency approval, agreement, permit, including a building permit or construction permit, or other authorization or decision (a) allowing a development or construction

project to proceed; or (b) relating to or affecting development, granted pursuant to a statute, regulation or ordinance adopted by a municipality...”

In addition, the Act provides that any holder or recipient of an approval may seek written verification from the issuing government agency for any of the following: (1) the existence of a valid approval; and/or (2) the expiration date of the approval under the new legislation. The request must state the approval in question and provide the anticipated expiration date in light of the extension period. Upon receipt of a request, the government agency has 30 days within which to affirm or deny the existence of the approval, its expiration date and any issues associated with its validity. If the agency fails to respond within 30 days, the approval that was the subject of the request, as well as the anticipated expiration date, shall be deemed affirmed. The agency may charge a fee of not more than \$100 for a residential approval request and \$500 for a commercial approval request. The failure of the holder of an approval to seek verification from a government agency shall not be grounds for termination, revocation or other invalidation of an approval.

The issue of whether the Act serves to “toll” the life of the permit as of the start of the extension period, which would allow the remaining life to be tacked on to the end of the extension period, or whether the Act serves to simply extend all permits

until the expiration of the extension period has been long debated since the Act was originally adopted. In a recent decision in the case of *Limerick Partners I, LP v. PA Dep't of Environ. Protection*, the Pennsylvania Environmental Hearing Board (PAEHB) confirmed that the Act does serve to "toll" the life of environmental permits.

In that case, the Pennsylvania Department of Environmental Protection (PADEP) had issued a water obstruction and encroachment permit to a developer in early 2009, prior to the original enactment of the Act. The permit had a three-year term. Both the developer and PADEP agreed that the permit was an "approval" to which the Act applied, but the parties disputed how to calculate the extension of the permit. PADEP argued that permits were only extended during the extension period and not beyond, arguing that all permits would expire on July 2, 2016, while the developer argued that the permit life was suspended during the extension period and at the expiration of the extension period, the entire three-year life of the permit would begin to run.

The PAEHB disagreed with both parties' analyses, finding there was a middle ground to the two extremes offered by each of the parties. Specifically, the PAEHB relied on the fact that the Act provides for a verification procedure for the expiration date of a permit or approval. Thus, the PAEHB found, there would be no reason for such a verification procedure if all permits and approvals expired on July 2, 2016, as argued by PADEP. Rather, the PAEHB held that the Act served to suspend the expiration date of the permit during the extension period, thereby allowing any remaining permit life to be tacked onto the end of the extension period, thus validating the need for a verification procedure.

In making its decision, the PAEHB relied on two prior Pennsylvania Court of Common Pleas decisions, *In Re: Appeal of Keystone Custom Homes, Inc.*, Lancaster Co. Court of Common Pleas No. CI-10-03933 (October 22, 2010), and *Logan Greens Comm. Assoc., Inc. v. Church Reserve, LLC*, York Co. Court of Common

Pleas No. 2011-SU-794-93 (July 20, 2012), both of which resulted in similar holdings allowing for remaining permit and approval life to be tacked onto the end of the extension period.

The *Logan Greens* case, however, involved the conversion of convertible real estate within a planned community. A few weeks after the PAEHB issued its decision, the Pennsylvania Commonwealth Court decided the *Logan Greens* case in an unreported decision (2013 WL 5302578), holding that the Act does not apply to flexible communities. Although the Pennsylvania Commonwealth Court determined in that case that the Act specifically suspends the expiration date of a "government agency approval", the Court held that the Act did not apply since the right to add additional real estate, convert convertible real estate and withdraw withdrawable real estate are permitted under the Pennsylvania Uniform Planned Community Act (PUPCA) and the Pennsylvania Uniform Condominium Act (PUCA) without the need to obtain governmental approval.

Even though the Commonwealth Court held that the Act does not apply to flexible communities, the time limit to add additional real estate, convert convertible real estate and withdraw withdrawable real estate has been extended under the PUPCA and PUCA. Both statutes have recently been amended to extend the time limit not to exceed the later of:

- Ten years after the recording of the declaration; or
- In the case of a preliminary plat calling for the installation of improvements in sections, 120 days after municipal approval or denial of each particular section's final plat that was filed prior to the deadline approved or modified by the municipal governing body pursuant to Section 508(4)(v) of the [Pennsylvania Municipalities Planning Code], or, in the event of an appeal from the municipal approval or denial of such final plat, 120 days after a final judgment on appeal.

As such, the legislature has handled the necessary extensions under the PUPCA and the PUCA. However, both the Commonwealth Court's and the PAEHB's recent decisions have provided clear interpretations of the Act to support the argument that any remaining permit or approval life is to be tacked onto the end of the extension period. This is certainly a welcome decision for developers, builders and land owners.

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- Declarants of Flexible Communities, Beware of the Deadline To Exercise Your Rights



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