



Legislative Relief For Connecticut's Development Community

NEW MEASURE PROVIDES ADDITIONAL TIME TO COMPLETE STALLED PROJECTS

By **CHRISTOPHER J. SMITH**

The Connecticut General Assembly passed two significant pieces of legislation this year that provide much needed relief to Connecticut's struggling development community during these challenging economic times. The first provides additional time to complete certain developments, and the second provides greater flexibility for posting bonds and sureties for improvements associated with certain land use approvals.

Permit Extensions

Public Act No. 11-5, entitled "An Act Extending the Time of Expiration of Certain Land Use Permits," provides that site plan, subdivision and wetlands approvals that did not expire prior to May 9, 2011, "shall expire not less than nine years after the date of such approval," and are entitled to extensions so that the total time period for all extensions shall not exceed 14 years from the date of approval. Prior to this new law, these approvals could be extended for up to 10 or even 11 years. The purpose of this new legislation is to provide additional time to complete developments stalled due to financial difficulty, and where the approved permits are about to expire and work is not completed or has not commenced.

To obtain an extension under Public Act No. 11-5, one must submit a request with the applicable land use commission and comply with all municipal filing require-

ments. The request must be submitted prior to the expiration of the approval. Public Act No. 11-5 appears to provide an automatic extension whereby all approvals prior to May 9, 2011, that have not expired, are "automatically" valid for nine years from the date of the initial approval.

For example, a site plan approved in 2007 may automatically be extended by the Act to 2016. However, one should request confirmation in writing that the initial approval is valid to 2016. Otherwise, a commission may take the position in 2016 that your approval expired in 2013, six years after the initial approval as provided under the prior statutory language. Certainly, any request for time beyond the initial nine years must be formally submitted to the commission prior to expiration. The new law does not indicate how early in the approval time period one may request an extension.

Public Act No. 11-5 does not necessarily extend time periods for conditions that commenced with an approval, such as recording plans and permits, posting bonds, commencing or completing public improvements, start of construction requirements (especially for a wetlands permit), complying with phasing provisions, and granting or recording conveyances such as open space or easements.

Therefore, when requesting an extension provided by the law, be sure to request modifications of all related conditions in the approval. In addition, if one's initial

approval is automatically extended by Public Act No. 11-5 to nine years, and time periods for certain conditions of approval will expire within such nine-year period, then one must return to the commission and request an extension of time to complete or otherwise satisfy the related condition.



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Bond, Surety Release

Public Act No. 11-79, entitled, "An Act Concerning Bonds and Other Surety for Approved Site Plans and Subdivisions," became effective Oct. 1, 2011. This new law creates a procedure for bond and surety release; permits bonding by development phasing; provides for contingency bonding with site plan approvals; eliminates lifetime maintenance bonding; and expands bonding and surety opportunities for approved site plans and subdivisions.

The purpose of this new legislation is to provide relief to developments confronted with financial constraints due, in part, to what many perceive to be inflexible and impractical bonding and surety requirements imposed by some municipal land use commissions on site plan and subdivision approvals. The intended goal of the legislation is to provide performance guaranty options to assure that improvements in approved developments are completed to pro-

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protect consumers and municipalities, while affording greater flexibility in the process to enable developers facing financial difficulty to complete their approved developments.

The new legislation makes some sensible improvements to the site improvement performance guaranty process for site plans (Connecticut General Statutes, Section 8-3) and subdivisions (C.G.S., Section 8-25), but leaves some key components unclarified.

Public Act No. 11-79 creates a process for releasing bonds or sureties. Specifically, a person posting a bond or surety may request a partial or full release of such bond or surety based upon the improvements completed. Within 65 days of receiving such request, the commission or its agent shall: (a) release such bond or surety if reasonably satisfied that the improvements are completed; or (b) provide a written explanation as to what work must be completed before the bond or surety may be released.

Public Act No. 11-79 further provides that for any site plan or subdivision approved for development in phases, any bond or surety may be posted by phases. As to site plan approvals, the new law permits a 10 percent contingency for costs associated with the development's improvements when initially computing a bond or surety amount. For some reason, this new contingency provision does not apply to subdivision approvals. The law prohibits long-term maintenance bonds or sureties for the maintenance of improvements once the improvements are accepted by the municipality. This provision was in response to at least two municipalities that required long-term maintenance bonding where the posted security was never released even though not authorized by law.

As to when a bond or surety must be

posted, Public Act No. 11-79 provides that a bond or surety may, at the discretion of the party providing the bond or surety, be posted at any time prior to the improvements being completed. However, no certificate of occupancy shall issue in the case of a site plan approval, or lot be conveyed in the case of a subdivision approval, unless all improvements are completed, or the required bond or surety is posted. In addition, a commission may require a bond or surety for erosion controls prior to the commencement of any work for either a site plan or subdivision approval.

Creating Confusion

The new legislation creates some confusion by requiring that a commission accept the type of bond or surety offered by a developer, but then providing that the commission may reject the offered bond or surety based upon "form." In addition, the law provides that if a letter of credit is offered as surety, the financial institution or other issuing entity must be acceptable to the commission. No criteria for determining what is "acceptable" as to the form of a bond or surety, or an issuer of a letter of credit, is included in the new legislation. Therefore, although at first glance it appears that a commission must accept whatever bond or surety is offered, the law actually allows the commission to review each offered bond or surety on a case by case basis, and reject the offered instrument if the commission finds such "unacceptable."

Incorrectly thinking that a commission is now mandated to accept whatever bond or surety is offered by a developer, some commissions are proposing to delete all bonding options from their regulations and to limit themselves to conditioning

an approval on the completion of all improvements. Once again, a commission may reject any offered bond or surety if the commission determines the form of the instrument unacceptable. A commission may also reject an offered letter of credit if the commission determines the issuer of the letter of credit to be unacceptable. It is important for a commission to remember that it may find it necessary to utilize a bond option to ensure the completion of an approved development's improvements. Therefore, it is questionable whether eliminating this critical planning tool from a municipality's land use regulations is good planning, necessary or even permitted.

Stakeholders including municipal attorneys, planners and developers, are considering new legislation to clarify issues left unresolved by Public Act No. 11-79, including provisions for: (a) standardized statutory criteria for what constitutes an "acceptable" bond or surety, including a letter of credit; (b) a formula for adjusting bond or surety amounts to address increases in the costs of a development's improvements over the lifetime of an approval, which, with the passage of Public Act No. 11-5, may be extended out to 14 years; and (c) a specified time period for a maintenance bond or surety, perhaps one year, for improvements after being accepted by a municipality.

Public Act Nos. 11-5 and 11-79 provide some relief to Connecticut's development community by moving toward a more rational, effective and less costly system for ensuring the completion of stressed developments throughout the state. However, the new laws leave a number of issues unresolved that require clarification through additional legislation. Stay tuned for what appears to be "round two." ■