

FOR WHOM THE PERMIT TOLLS: LIFE AFTER THE PERMIT EXTENSION ACT

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PART I

GENERAL DISCUSSION OF THE PERMIT EXTENSION ACT

Despite the continuing challenges of the economic climate, it is unlikely that the New Jersey Legislature will pass another general extension to the Permit Extension Act (“PEA”). The development and building community must prepare for the looming deadline of December 31, 2014. This is the date on which the tolling period ends for permits and approvals under the PEA.

The purpose of this article is to clarify and illuminate the real-world implications of what happens on December 31, 2014, and to give current permit holders a sense of the planning and preparation necessary to ensure that interests in permits are protected. Of course, the effect of the PEA on any individual permit is highly fact-sensitive, and the PEA contains many exceptions and qualifications. Thus, the general guidance offered in this article should not be used as a substitute for detailed analysis by the permit holders’ professionals with respect to any specific permit.

Brief Overview of History and Scope of the PEA

The PEA, N.J.S.A. 40:55D-136.1, *et seq.*, was signed into law on September 6, 2008, and was amended on January 18, 2010, and on September 21, 2012. The purpose of the PEA was to alleviate some of the impact of the recent economic recession. To that end, it originally provided that permits were tolled until July 1, 2010. Due to the slow economic recovery, the PEA was amended in 2010 to create a new deadline of December 31, 2012. In 2012, the PEA was amended for a second time, extending the tolling period by two years, to December 31, 2014.

The PEA covers permits approved, or with an expiration date, during the period covered by the statute, January 1, 2007 to December 31, 2014 (the “extension period”). The permits and approvals covered by the PEA are listed in the definitions section of the PEA. N.J.S.A. 40:55D-136.3. There are twenty-nine enumerated approvals that are automatically tolled under the PEA, as well as a catch-all provision that any “municipal, county, regional or State approval or permit granted under the general authority conferred by State law or rule or regulation” is tolled by the PEA. *Id.* For any covered permit or approval, “the running of the period of approval is automatically suspended for the extension period.” *Id.* at 136.4.

There are some specific permits and approvals that are not covered by the PEA, such as permits issued in “environmentally sensitive areas” (as defined in N.J.S.A. 40:55D-136.3), approvals by the New Jersey Department of Transportation (except for those specifically listed), Stream Encroachment Permits (unless commencement of site improvements or structures has begun), and federally-issued permits or approvals. A full list of the exceptions, and the caveats to the exceptions, can be found at N.J.S.A. 40:55D-136.4.

How Tolling Works under the PEA

To understand tolling, think of January 1, 2007 as a legislative stop watch that hit “pause.” On December 31, 2014, the Legislature will hit “start” on the stop watch, and the time remaining on the permit as of January 1, 2007 will start ticking. Therefore, tolled permits do not automatically expire on December 31, 2014.

However, there is a limit to how much time is left on the legislative stop watch. The PEA provides that June 30, 2015 is an **automatic** expiration date. The Legislature provided for this automatic expiration date, as follows: “For any government approval in existence during the extension period, the running of the period of approval is automatically suspended for the extension period...; **however, the tolling provided for herein shall not extend the government approval more than six months beyond the conclusion of the extension period.**” N.J.S.A. 40:55D-136.4. In other words, when the Legislature hits “start” on the stop watch on December 31, 2014, there is a six-month limit to how long the clock can run. Thus, any permit that had more than six months left when the PEA went into effect will automatically expire on June 30, 2015, as illustrated in the examples below.

However, the PEA cannot shorten the term of any approval. *Id.* at 136.4(a). If a permit has an original expiration date after June 30, 2015, it will not automatically expire on that date, and it is wholly outside of the PEA, as illustrated in the examples below.

OK, But What Happens to My Permit?

Once again, the specific expiration date of any permit needs to be analyzed on a case-by-case basis. However, generally permits will fall into three categories, and be affected by the PEA as follows:

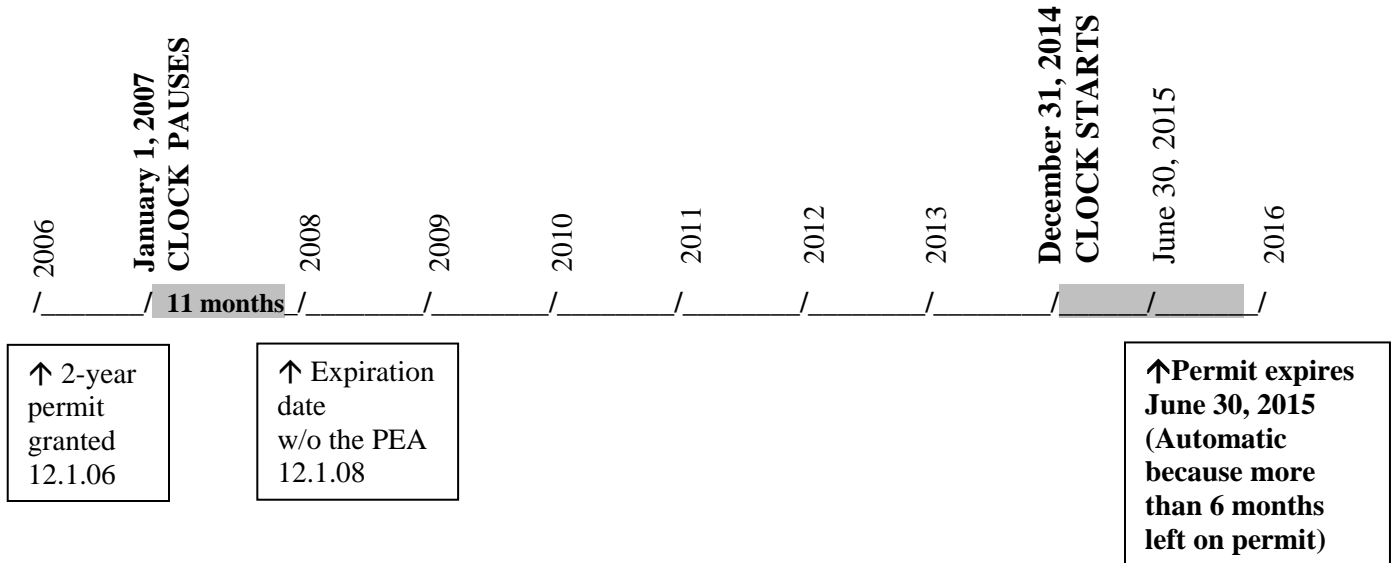
Category 1: If there were **more than 6 months left on the permit** on January 1, 2007, the permit will automatically expire on June 30, 2015. (See Examples 1, 3, and 4 below.)

Category 2: If there were **less than 6 months left on the permit** on January 1, 2007, the permit will expire December 31, 2014 plus the time remaining on the permit. (See Example 2 below.)

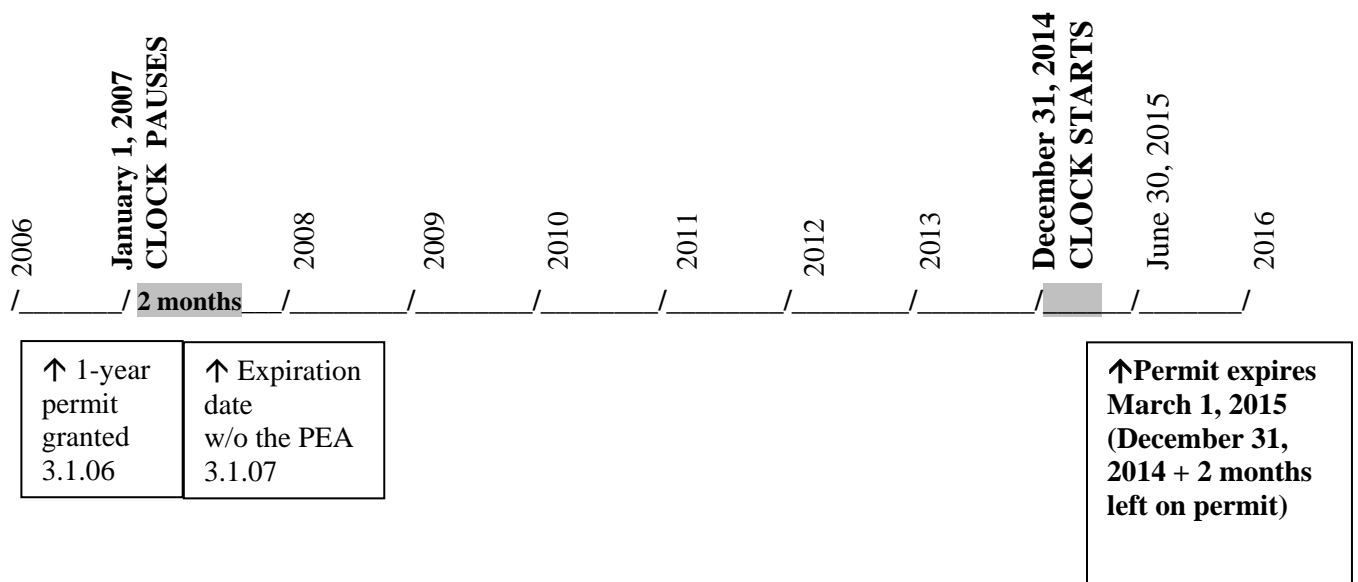
Category 3: If the **original expiration date is after June 30, 2015**, the PEA does not apply; no tolling is invoked and the legislative stop watch is not involved. The original expiration date remains the final expiration date. (See Example 5 below.)

These categories are explained using the timelines below. The shaded period represents the time left on the permit when the Legislature hit “pause” (as of January 1, 2007) by enacting the PEA.

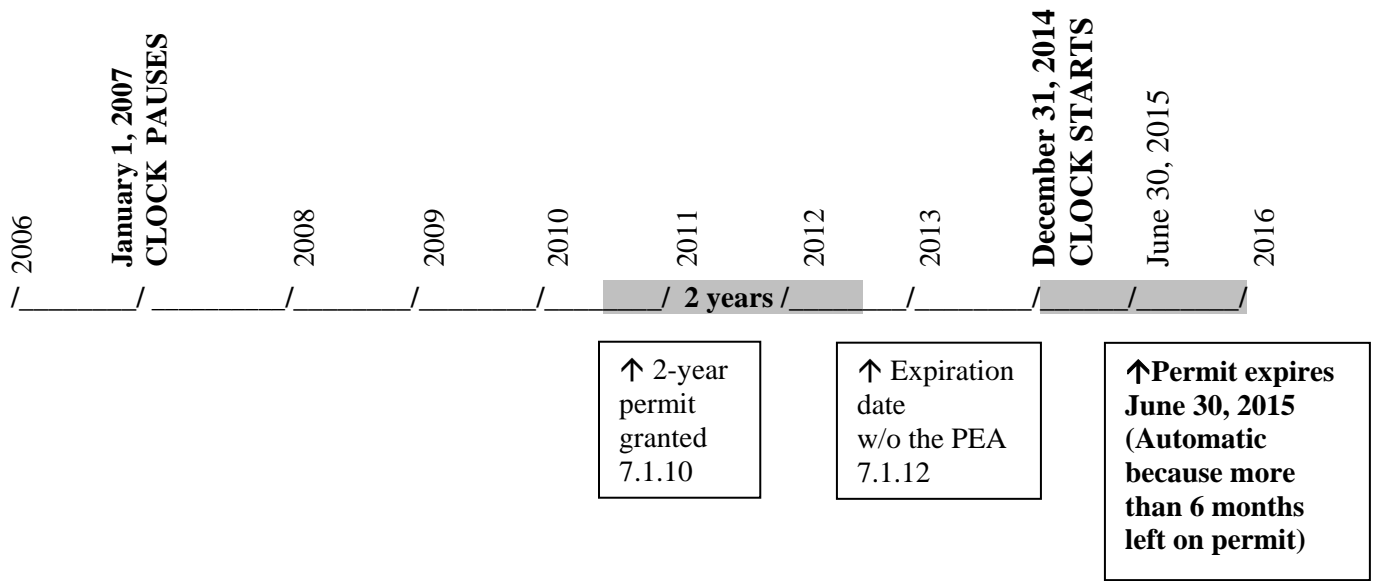
Example 1



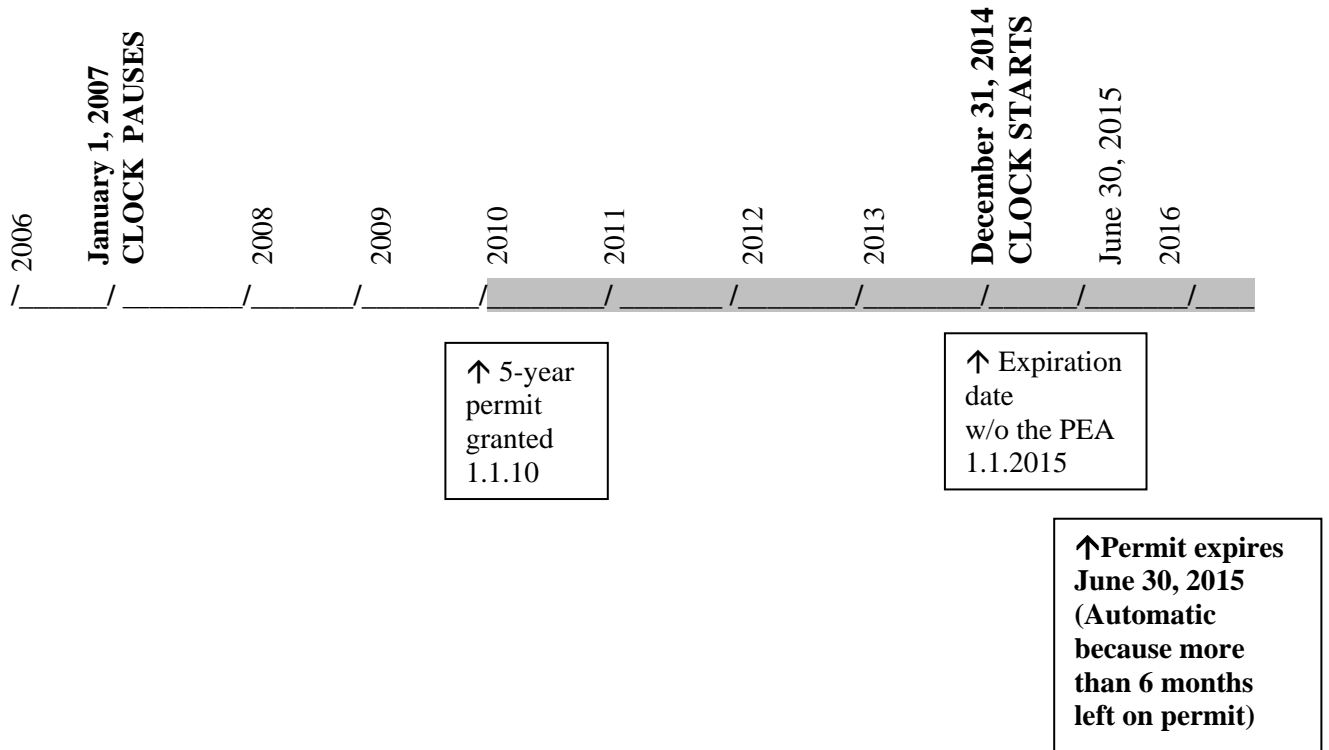
Example 2



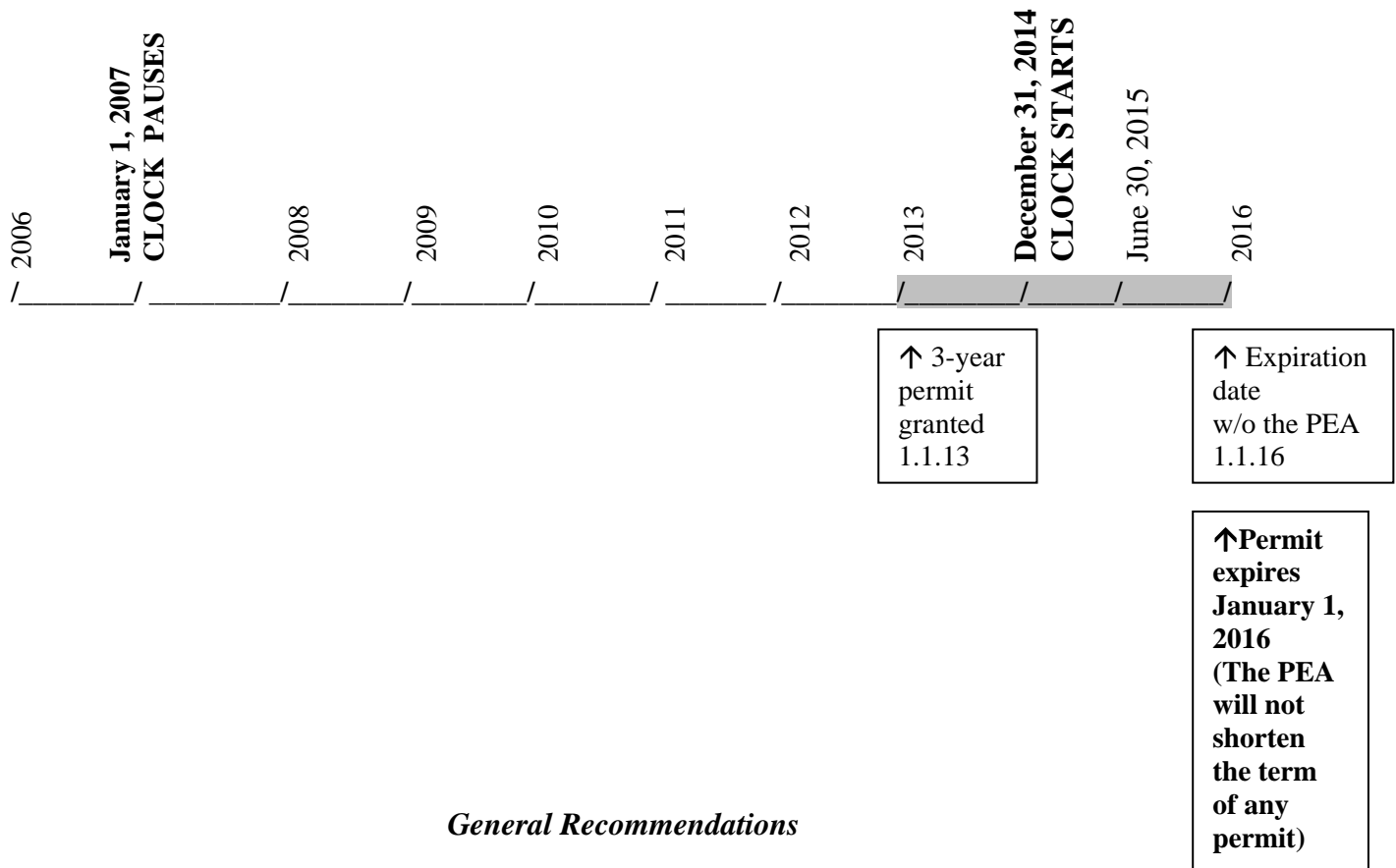
Example 3



Example 4



Example 5



General Recommendations

There are some proactive steps that can be taken to preserve existing permits and approvals. We recommend looking into the following general avenues of potential relief. Part II of this article reviews specific strategies to extend particular permits and approvals of interest to builders and developers.

- For approvals under the Municipal Land Use Law (“MLUL”), apply for available extensions with the planning board or zoning board. The PEA does not affect the planning board or zoning board’s ability to grant extensions.
- For permits and approvals granted by state agencies or other governmental jurisdictions, apply for available extensions provided under the specific program. The PEA does not affect the ability of government agencies to grant these other extensions. Many of the permits and approvals covered by the PEA have built-in mechanisms to obtain extensions. The statute and/or regulations may establish a deadline for when extension applications are due (*i.e.*, 30 days prior to expiration, 90 days prior to expiration, etc.).
- Take advantage of any non-PEA tolling provisions provided for under the MLUL or other government programs. For example, under the MLUL, if the developer is barred from proceeding with the development by a legal action or governmental or judicial order

or directive to protect the public health and welfare, the approval is tolled, provided that the developer is otherwise ready, willing, and able to proceed. N.J.S.A. 40:55D-21.

- Vest the permit by starting to build. As a general rule, under New Jersey law, once there has been “substantial reliance” on a permit, through construction or other actions, rights in the permit become vested, and irrevocable. Whether or not rights in a specific permit have become vested is a highly fact-sensitive inquiry. In some cases, the statute or regulations for the individual permit provide guidance. New Jersey law provides that there is “no easy formula” to determine when a permit becomes vested. See Tremarco Corp. v. Garzio, 32 N.J. 448, 457 (1960). The analysis requires a balancing “between the interests of the permittee and the rights and duty” of the government to make rules and regulations for the good of the public. Id.

PART II

SPECIFIC PERMITS AND APPROVALS

Set forth below is an analysis of twenty-one common permits and approvals of interest to builders and developers that are subject to the PEA. For each permit and approval, this part reviews (1) extensions available under the applicable statute and regulations, and (2) any available guidance concerning the level of activity required to vest rights in the permit or approval.

For further guidance on specific NJDEP permits, NJDEP has a PEA website: <http://www.nj.gov/dep/permitextension/>.

1. MUNICIPAL LAND USE LAW (N.J.S.A. 40:55D-1, *et seq.*)

A. Extensions Available under the Statute

The MLUL provides several extensions, which can be granted at the discretion of the approving board.

1. Preliminary subdivision and site plan approval: approving board can grant **two one-year extensions**. N.J.S.A. 40:55D-49(c). Board can also grant an **additional one-year extension** due to delays in obtaining other approvals. N.J.S.A. 40:55D-49(f).
2. If a preliminary subdivision or site plan approval consist of 50 acres or more, more than 150,000 square feet of non-residential floor area, or more than 100 residential units, the approving board can grant additional extensions. N.J.S.A. 40:55D-49(d),(g).
3. Final subdivision and site plan approval: approving board can grant **three one-year extensions**. N.J.S.A. 40:55D-52(a). Board can also grant an

additional one-year extension due to delays in obtaining other approvals. N.J.S.A. 40:55D-52(d).

4. If a final subdivision or site plan approval covers a planned development of 50 acres or more, a conventional development of more than 150 acres or 100 residential units, or non-residential floor area in excess of 150,000 square feet, approving board can grant additional extensions. N.J.S.A. 40:55D-52(b),(e).
5. For a final major subdivision approval, approving board may extend the plat recording period from 95 days for an **additional 190 days**, and **beyond 285 days** as a result of delays in obtaining other approvals. N.J.S.A. 40:55D-54(a).
6. Minor subdivision approval:
 - (a) approving board can extend for a period equal to the developer's **delay in obtaining other approvals**. N.J.S.A. 40:55D-47(f).
 - (b) approving board can extend for a period not exceeding **one year** as a result of delay in obtaining other approvals. N.J.S.A. 40:55D-47(g).
7. Minor site plan approval: approving board can grant **one one-year** extension. N.J.S.A. 40:55D-46.1(c).
8. General development plans ("GDP"s) can be approved for a 20 year period. N.J.S.A. 40:55D-45.1(b) The planning board is authorized to approve modifications to the GDP timing schedule. N.J.S.A. 40:55D-45.4.

The MLUL contains a tolling provision separate from the PEA:

If the development is barred or prevented, directly or indirectly, by legal action or governmental or judicial order or directive to protect the public health and welfare, the approval is tolled, provided that the developer is otherwise ready, willing, and able to proceed. N.J.S.A. 40:55D-21.

B. Level of Activity Required to Vest Approvals

Subdivision and site plan approvals technically do not "expire." Rather, the MLUL provides that after the vesting period, the approval loses protection against ordinance changes. However, New Jersey case law allows municipalities to impose a termination date on approvals by ordinance. Therefore, permit holders must check the municipal ordinance.

There is no statutory limitation on conditional use approvals. Also, New Jersey caselaw provides that variances run with the land and do not expire. See, Stop & Shop Supermarket Co. v. Bd. of Adjustment of Twp. of Springfield, 162 N.J. 418, 433 (2000). However, municipalities can limit the life of a conditional use or variance approval by ordinance. See

D.L. Real Estate Holdings, L.L.C. v. Point Pleasant Beach Planning Bd., 176 N.J. 126, 133 (2003) Therefore, permit holders must check the municipal ordinance.

If an MLUL approval has lost protection, the permit holder may have vested rights if there has been a substantial start on construction, which must be determined on the specific facts of each case.

2. COUNTY PLANNING BOARD APPROVALS (N.J.S.A. 40:27-1, *et seq.*)

A. Extensions Available under the Statute and Regulations

There are no specific provisions in the County Planning Act dealing with either the duration of approvals or an extension of the duration. There is also no unified set of regulations to accompany the statute. Thus, for specific extensions, the individual county planning board should be consulted, as each county planning board adopts a resolution outlining its review powers and procedures. See 36 N.J. Prac., Land Use Law § 17.16 (3d ed.).

However, a county planning board has no statutory authority to adopt a resolution limiting the duration of county approvals. In Builders League of S. Jersey, Inc. v. Burlington Cnty. Planning Bd., 353 N.J. Super. 4, 11 (App. Div. 2002), the Burlington County Planning Board adopted a resolution providing that site plan approvals granted by the Board were valid for three years, with two extensions of one-year each available on application. Id. at 19. The court invalidated the resolution, holding that “the County Planning Act does not give county planning boards the right to place expirations in its approvals.” Id. at 22.

Thus, even though county planning board approvals are tolled by express incorporation into the definitions section of the PEA, there appears to be no authority to place an expiration date on county approvals.

B. Level of Activity Required to Vest Approvals

Because the county has no authority to place limits on the duration of county approvals, there is no case law specifically discussing vested rights in county approvals. However, general principles of substantial reliance will likely apply.

3. SOIL EROSION AND SEDIMENT CONTROL CERTIFICATIONS (N.J.S.A. 4:24-39, *et seq.*)

A. Extensions Available under the Statute and Regulations

The applicable regulations, provide that “[d]istrict certification of a soil erosion and sediment control plan for any project shall be valid only for the duration of the initial project approval granted by the municipality or other land use approval agency **but in no case shall exceed three and one-half years**. All such municipal or other agency renewals of the project will require resubmission of the project plan and recertification approval by the district. Certification of the plan is conferred upon the project and may be transferred or conveyed.” N.J.A.C. 2:90-1.9(i).

There is no provision in the statute, N.J.S.A. 4:24-1, *et seq.*, or regulations providing for an extension of the three and one-half year approval period.

However, the procedures of individual soil conservation districts should be consulted. For example, the Camden County Soil Conservation District has a form for extensions available in light of the PEA. See <http://www.camdenscd.org>.

B. Level of Activity Required to Vest Certification

Based on the clear language of the regulation, a vesting argument will be difficult to make, and recertification should be applied for. However, general principles of New Jersey law regarding substantial reliance will likely apply to a soil conservation district's certification of a plan.

4. FLOOD HAZARD AREA CONTROL ACT (N.J.S.A. 58:16A-50, *et seq.*)

A. Extensions Available under the Statute and Regulations

The applicable regulations provide:

(a) Except as provided in (b) below, an individual permit is valid for **five years from its issuance date and shall not be extended**. However, the Department can transfer an individual permit with the sale of a property to a new owner pursuant to N.J.A.C. 7:13-14.1.

(b) An individual permit for a public roadway, railroad or flood control project is valid for **10 years** from its issuance date, provided the applicant is a public entity and the applicant demonstrates that the size and scope of the project is likely to prevent the completion of all regulated activities within a five-year period.

(c) All regulated activities shall cease upon expiration of an individual permit. Regulated activities cannot resume unless the applicant applies for and obtains a new individual permit from the Department. In such cases, the Department shall issue a new individual permit only as follows:

1. If no regulated activities have occurred onsite prior to the expiration of the original individual permit, a new individual permit shall be issued only if the project is revised where necessary to comply with the requirements of this chapter in effect when the new application is submitted; and

2. **If some regulated activities have occurred onsite prior to the expiration of the original individual permit**, a new individual permit shall be issued only if the project is revised where feasible to comply with the requirements of this chapter in effect when the new application is submitted. In determining the feasibility of compliance with the current requirements of this chapter, **the Department shall consider the amount of construction that was completed onsite prior to the permit expiration, as well as whether**

continuing construction as originally approved would constitute an adverse impact on flooding or the environment.

N.J.A.C. 7:13-9.4.

B. Level of Activity Required to Vest Permit - Note that Commencement of Construction is Necessary Just to Toll the Permit

The PEA has a specific provision with respect to the construction necessary to toll an approval under the Flood Hazard Area Control Act. The PEA provides that a permit or approval under the Flood Hazard Area Control Act is tolled **only**:

- (a) where work has commenced, in any phase or section of the development, on any site improvement as defined [in the MLUL], or on any buildings or structures; or
- (b) where the permit or approval authorizes work on real property owned by the government or the federal government.

N.J.S.A. 40:55D-136.4(b)(6)

Thus, the only way to invoke the tolling provisions of the PEA is to “commence” work on site improvements, buildings, or structures. This is a relatively low standard. In Friendship, Inc. v. Twp. Of New Hanover, No. A-0591-10T4, 2012 WL 715988 (N.J. Super. Ct. App. Div. Mar. 7, 2012), the court held that Friendship’s Stream Encroachment Permit was protected from a change in a municipality ordinance by virtue of the PEA, among other protections. *Id.* at *11. In that case, Friendship expended in excess of \$2,000,000 in reliance on the permit and municipal approvals when the municipality changed course and attempted to revoke approvals. *Id.* at *1.

Under the Flood Hazard Area Control Act regulations, irrespective of the PEA, there is always the option to apply for a new permit, and the standard varies depending on whether regulated activities have commenced or not. See N.J.A.C. 7:13-9.4(c). The amount of completed activity on a site will be a factor in determining whether to issue a new individual permit.

5. FRESHWATER WETLANDS PROTECTION ACT (N.J.S.A. 13:9B-1, *et seq.*)

A. General and Individual Permits

1. Extensions Available under the Statute and Regulations

The applicable regulation provides:

- (b) The Department shall issue **one five-year extension** of a permit only if:
 - 1. The permittee applies for the extension at least **90 days prior to the expiration of an individual permit** or individual transition area waiver, **and at least 30 days prior to the expiration of a general permit** authorization; and

2. The permittee demonstrates that there has been no significant change in any of the following between the date the permit was issued and the date the application for extension is submitted:
 - i. The project and activities that were approved in the original permit;
 - ii. The rules governing the site; and
 - iii. The conditions on the site, including the wetlands boundary and resource classification.

(c) The Department shall deny a permit extension if the permittee has violated the terms of the original permit, or if any of the other causes for termination at N.J.A.C. 7:7A-14.5 exist.

(d) If the requirements in this section for an extension are not met, the permit shall expire and regulated activities shall stop until a new permit is obtained.

(e) An application for an extension of a permit shall meet the application requirements at N.J.A.C. 7:7A-10, including the public notice requirements at N.J.A.C. 7:7A-10.8.

N.J.A.C. 7:7A-14.6.¹

2. Level of Activity Required to Vest Permit

Based on the unequivocal language of the regulation, extensions should be applied for if needed.

However, once there has been “substantial reliance” on a permit issued by NJDEP, rights in the permit may become vested, and irrevocable. See, e.g., In re Island Bay, LLC, No. A-3163-05T3, 2006 WL 1687222 at *7 (N.J. Super. Ct. App. Div. June 21, 2006) (noting the well established rule that “[w]here a government agency issues a permit or other approval to a property owner to construct a building or other facility, and the property owner substantially relies upon the approval, the property owner may acquire vested rights that the agency may not take away”) (citing Tremarco Corp. v. Garzio, 32 N.J. 448, 456-57 (1960)).

In In re Island Bay, LLC, the court held that NJDEP’s rescission of a CAFRA permit two and a half years after approval was arbitrary and capricious, in part because Island Bay “expended a substantial amount of money, which it estimated to total \$320,000, to design the homes, obtain the municipal approvals needed to proceed with construction and undertake site

¹ This section applies to both general and individual permits. See N.J.A.C. 7:7A-14.6(a) (“This section governs the extension of a permit, including a waiver or a general permit authorization. This section does not apply to LOIs or exemption letters. Provisions governing the duration and extension of LOIs are found at N.J.A.C. 7:7A-3.6. Provisions governing the duration of exemption letters are found at N.J.A.C. 7:7A-2.10.”).

preparation work.” *Id.* at *7. Although that case dealt with CAFRA, the general principle of substantial reliance would likely apply to a Freshwater Wetlands Permit issued by NJDEP.

B. Letters of Interpretation

1. Extensions Available under the Statute and Regulations

Letters of Interpretation (LOI) concerning the presence, absence, or extent of freshwater wetlands and/or State open waters can be relied on for a period of **five years** from the date of issuance. N.J.A.C. 7:7A-3.6(a). A person can request that the term of a letter of interpretation be extended for a period not more than **five years** from the original expiration date. *Id.* at 3.6(b). Requests shall be made before the expiration date of the LOI, but no more than one year before the expiration date. *Id.* at 3.6(c).

2. Level of Activity Required to Vest Permit

Based on the unequivocal language of the regulation that an individual is only entitled to rely on the LOI for five years, any vesting argument will be difficult to make, and extensions should be applied for if necessary.

6. WATERFRONT DEVELOPMENT PERMIT (N.J.S.A. 12:5-1, *et seq.*)

A. Extensions Available under the Statute and Regulations

The applicable regulation provides:

(c) A permit shall be valid authority to commence construction of a development for a period of **five years** from its date of issuance. **Where construction has commenced within this five year period, the permit, with the exception of permits issued for activities located below the mean high water line, shall upon written authorization of the Department be valid, as long as construction continues, until the project is completed subject to the provisions of (c)1 and 2 below.**

1. If construction continues beyond the five year period, and then, prior to completion of the project, stops for a cumulative period of one year or longer the permit shall expire, except for projects of unusual size or scope or for projects which are delayed due to circumstances beyond the permittee’s control (such as a delay in the financing of a public works project), in which case, **upon the request of the applicant prior to the expiration of the original permit, the permit may be extended for a total of 10 years from the original effective date.**

2. All requests for authorization to continue construction beyond the expiration of a permit shall be submitted to the Department no later than 20 business days prior to the expiration date of the permit.

N.J.A.C. 7:7-1.5(c).

B. Level of Activity Required to Vest Permit

Pursuant to the above language, as long as “construction has commenced” within the lifespan of the permit, the permit is valid until the project is completed.

7. PERMIT ISSUED AND CENTER DESIGNATIONS PURSUANT TO THE COASTAL AREA FACILITY REVIEW ACT (N.J.S.A. 13:19-1, *et seq.*)

A. Extensions Available under the Statute and Regulations

The applicable regulations provide:

(c) A permit shall be valid authority to commence construction of a development for a period of **five years** from its date of issuance. **Where construction has commenced within this five year period, the permit, with the exception of permits issued for activities located below the mean high water line, shall upon written authorization of the Department be valid, as long as construction continues, until the project is completed subject to the provisions of (c)1 and 2 below.**

1. If construction continues beyond the five year period, and then, prior to completion of the project, stops for a cumulative period of one year or longer the permit shall expire, except for projects of unusual size or scope or for projects which are delayed due to circumstances beyond the permittee’s control (such as a delay in the financing of a public works project), in which case, **upon the request of the applicant prior to the expiration of the original permit, the permit may be extended for a total of 10 years from the original effective date.**

2. All requests for authorization to continue construction beyond the expiration of a permit shall be submitted to the Department no later than 20 business days prior to the expiration date of the permit.

N.J.A.C. 7:7-1.5(c).

Note that NJDEP has proposed amendments to the CAFRA rules that may affect permit durations and extensions if adopted. See <http://www.nj.gov/dep/rules/proposals/20140602a.pdf>.

B. Level of Activity Required to Vest Permit

Pursuant to the above language, as long as “construction has commenced” within the life of the permit, the permit is valid until the project has been completed.

Additionally, once there has been “substantial reliance” on a CAFRA permit, it cannot be revoked by NJDEP. See, e.g., *In re Island Bay, LLC*, No. A-3163-05T3, 2006 WL 1687222 (N.J. Super. Ct. App. Div. June 21, 2006). In that case, the court held that NJDEP’s rescission of a CAFRA permit two and a half years after approval was arbitrary and capricious, in part

because Island Bay “expended a substantial amount of money, which it estimated to total \$320,000, to design the homes, obtain the municipal approvals needed to proceed with construction and undertake site preparation work.” *Id.* at *7. The court noted the well established rule that “[w]here a government agency issues a permit or other approval to a property owner to construct a building or other facility, and the property owner substantially relies upon the approval, the property owner may acquire vested rights that the agency may not take away.” *Id.* (citing *Tremarco Corp. v. Garzio*, 32 N.J. 448, 456-57 (1960)).

8. SEPTIC APPROVAL GRANTED PURSUANT TO TITLE 26 OF THE REVISED STATUTES

A. Extensions Available under the Statute and Regulations

Title 26 provides that no person, corporation, or municipality should cause any means of disposal of sewage to contaminate any water supply. The Department of Health or a local board of health has exclusive authority to file suit for violations of the act. N.J.S.A. 26:3B-11. The act is silent with respect to permitting. *See* N.J.S.A. 26:3B-1 through -17 (containing no provisions regarding permitting).

NJDEP promulgates regulations governing all “individual subsurface sewage disposal systems.” N.J.A.C. 7:9A-1.2(b). This regulation provides that the term of a permit related to a sewage disposal system shall not exceed **five years**. *See* N.J.A.C. 7:9A-3.5(e) (“The administrative authority or its authorized agent shall include an expiration date in every permit to construct, install, alter or repair an individual subsurface sewage disposal system. The expiration date shall not exceed five years from the effective date of the permit.”) There is no regulation dealing with a procedure to extend this date. Further, as defined in the regulations, the “‘administrative authority’ means the board of health having jurisdiction or its authorized agent acting on its behalf.” *See* N.J.A.C. 7:9A-2.1. Thus, the local board of health would have to be consulted for the procedure for an extension. *See, e.g.,* N.J.A.C. 7:9A-3.20 (“When any certification has been denied by the administrative authority, the aggrieved applicant may contest the denial by requesting a hearing from the applicable board of health.”).

B. Level of Activity Required to Vest Permit

There is nothing in statute, regulations, case law, or secondary sources explaining what level of activity is required to vest a permit under this statute. General principles of New Jersey law regarding substantial reliance will likely apply to a board of health’s septic approval.

9. CERTIFICATION OR PERMIT GRANTED, WASTEWATER MANAGEMENT PLAN APPROVED, AND POLLUTION DISCHARGE ELIMINATION SYSTEM PERMIT PURSUANT TO THE WATER POLLUTION CONTROL ACT (N.J.S.A. 58:10A-1, *et seq.*)

A. Extensions Available under the Statute and Regulations

This statute provides that permits issued under the act are for “fixed terms not to exceed **five years**.” N.J.S.A. 58:10A-7. “Any permittee who wishes to continue discharging after the expiration date of his permit must file for a new permit at least 180 days prior to that date.” *Id.*

B. Level of Activity Required to Vest Permit

The applicable regulations specifically provide that “[a] permit shall not convey any property rights of any sort or any exclusive privilege,” N.J.A.C. 7:14A-6.2(6), so any vesting argument is going to be very difficult to make. For example, in Clinton Twp., Petitioner, OAL Docket No. 8132-03, 2008 WL 2945539 (N.J. Adm. July 11, 2008), the township attempted to argue that it had a vested right in a Discharge Allocation Certificate (DAC) that was issued by NJDEP under the previous version of the regulation, prior to when permits were required. This argument was rejected because “[t]he law never created a property right in a DAC and, since 1997, the law has not allowed for DACs. Consequently, the Township could not have reasonably relied on the expectation of extension of the subject DAC or issuance of another DAC.” *Id.* at *5.

Therefore, an application for a new permit should be submitted if additional time is required.

10. CERTIFICATION GRANTED PURSUANT TO THE REALTY IMPROVEMENT SEWERAGE AND FACILITIES ACT (1954) (N.J.S.A. 58:11-23, *et seq.*)²

A. Extensions Available under the Statute and Regulations

The Realty Improvement Act, N.J.S.A. 58:11-23, is a comprehensive scheme for regulating any new building which requires the installation or erection of a water supply system or sewerage facilities. See N.J.S.A. 58:11-24 (defining “realty improvement” and “new residence or other building”). It provides that no building permit can be issued “until the board of health having jurisdiction shall have certified that the proposed water supply system and sewerage facilities . . . are in compliance with the provisions of this act” and the standards promulgated by NJDEP. See N.J.S.A. 58:11-25, 58:11-24; see also N.J.S.A. 58:11-26 (a board of health issues a certification of compliance with the act).

NJDEP promulgates regulations governing all “individual subsurface sewage disposal systems.” N.J.A.C. 7:9A-1.2(b). This regulation provides that the term of a permit related to a sewage disposal system shall not exceed **five years**. See N.J.A.C. 7:9A-3.5(e) There is no

² The discussion in this section is similar to the septic approvals under Title 26 discussed in Section 8, *supra*. The sections discuss different statutory schemes, but there is a unified set of NJDEP regulations for both statutes.

regulation dealing with a procedure to extend this date. Further, as defined in the regulations, the “‘administrative authority’ means the board of health having jurisdiction or its authorized agent acting on its behalf.” See N.J.A.C. 7:9A-2.1. Thus, the local board of health would have to be consulted for the procedure for an extension. See, e.g., N.J.A.C. 7:9A-3.20 (“When any certification has been denied by the administrative authority, the aggrieved applicant may contest the denial by requesting a hearing from the applicable board of health.”).

In order to extend a certification under the statute, it is likely necessary to consult the local board of health.

B. Level of Activity Required to Vest Permit

There is nothing in the statute, regulations, case law, or secondary sources explaining what level of activity is required to vest a permit under this statute. General principles of New Jersey law regarding substantial reliance will likely apply.

11. CERTIFICATION OR APPROVAL GRANTED FOR A SUBDIVISION (N.J.S.A. 58:11-25.1, *et seq.*)

A. Extensions Available under the Statute and Regulations

This section of the Realty Improvement Sewerage and Facilities Act (the same statute discussed above), deals specifically with subdivision approval that covers 50 or more realty improvements, and provides that subdivision approval cannot be granted for 50 or more realty improvements until NJDEP “has certified that the proposed water supply and sewerage facilities for realty improvements comply with applicable State standards.” N.J.S.A. 58:11-25.1.

This section of the Act has its own specific NJDEP regulation, which requires that NJDEP certify that the proposed water supply and sewerage facilities comply with applicable standards. N.J.A.C. 7:9A-3.18(a)

While the statute and regulations do not discuss extension for NJDEP’s certification, NJDEP has a standard application form for an extension, available at: http://www.nj.gov/dep/watersupply/dws_const.html. The form provides that an extension can be requested for **two years**, and the request must be made 90 days prior to the expiration date of the existing permit.

B. Level of Activity Required to Vest Permit

There is nothing in statute, regulations, case law, or secondary sources explaining what level of activity is required to vest a permit under this statute. General principles of New Jersey law regarding substantial reliance will likely apply.

12. CERTIFICATION ISSUED AND WATER QUALITY MANAGEMENT PLAN APPROVED PURSUANT TO THE WATER QUALITY PLANNING ACT (N.J.S.A 58:11A-1, *et seq.*)

A. Extensions Available under the Statute and Regulations

The purpose of this section is the implementation of an areawide waste treatment planning process by planning agencies. See N.J.S.A. 58:11A-5 (“[e]very designated planning agency and the Department of Environmental Protection for all areas of the State without a designated planning agency, shall conduct an areawide waste treatment management planning process and submit an areawide plan for that area to the Governor for adoption”). The statute further provides that all “projects and activities affecting water quality in any planning area shall be developed and conducted in a manner consistent with the adopted areawide plan” and that the “commissioner shall not grant any permit which is in conflict with an adopted areawide plan.” N.J.S.A. 58:11A-10.

This statute does not contain its own permitting requirements; rather, the regulations provide that NJDEP cannot issue permits under other existing laws without first making a “consistency determination” of any permit application. See N.J.A.C. 7:15-3.1. Thus, for specific information about extensions of permits, it is necessary to refer to the individual permit, many of which are explained elsewhere in this article (such as permits under the Safe Drinking Water Act and Water Supply Allocation rules).

B. Level of Activity Required to Vest Permit

For this information, it is likely best to refer to the rules governing the specific permit being sought in connection with the consistency determination. However, it appears that challenging a wastewater management plan based on a vesting argument is very difficult, even when there is significant expenditure of money in reliance on the plan. See In re Gloucester Cnty. Utilities Auth. Waste Water Mgmt. Plan, No. A-2480-08T1, 2012 WL 4344092 (N.J. Super. Ct. App. Div. Sept. 25, 2012). In that case, plaintiffs objected to NJDEP’s approval of the county’s wastewater management plan, which removed portions of their property from the Authority. Id. at *1. Plaintiffs argued that they had spent \$20 million “in anticipation of connecting to the Authority’s wastewater facilities.” Id. at *6. However, plaintiffs conceded that they were not guaranteed capacity at the Authority’s treatment plant; plaintiffs were repeatedly notified over the years that there was no guarantee to provide services above a specific level. Id. As such, plaintiffs’ vesting argument failed.

13. APPROVAL GRANTED BY A SEWERAGE AUTHORITY PURSUANT TO THE SEWERAGE AUTHORITIES LAW (N.J.S.A. 40:14A-1, *et seq.*)

A. Extensions Available under the Statute and Regulations

The referenced statute provides that the purpose of the act is to “author[ize] counties, or municipalities . . . by means and through the agency of a sewerage authority, to acquire, construct, maintain, operate or improve works for the collection, treatment, purification or disposal of sewage or other wastes” N.J.S.A. 40:14A-1.

There is nothing in the statute about permitting, likely because that is left to county and municipality sewerage authorities. The only regulations related to the statute are NJDEP regulations at N.J.A.C. 7:15-5.18, but this only deals with the contents of a wastewater management plan and does not deal with permitting.

Thus, the local sewerage authority needs to be consulted with respect to procedures for an extension.

B. Level of Activity Required to Vest Permit

There is nothing in statute, regulations, case law, or secondary sources explaining what level of activity is required to vest a permit under this statute. General principles of New Jersey law regarding substantial reliance will likely apply.

14. APPROVAL GRANTED BY A MUNICIPAL AUTHORITY PURSUANT TO THE MUNICIPAL AND COUNTY UTILITIES AUTHORITIES LAW (N.J.S.A. 40:14B-1, *et seq.*)

A. Extensions Available under the Statute and Regulations

Similar to the above section, this statute provides that the purpose of the act is to authorize “counties, or municipalities . . . by means and through the agency of a municipal authority, to acquire, construct, maintain, operate or improve works for the accumulation, supply or distribution of water, works for the collection, treatment, recycling, and disposal of solid wastes” N.J.S.A. 40:14B-2.

There is nothing in the statute about permitting, likely because that is left to the municipal authority. Thus, the local MUA needs to be consulted with respect to procedures for an extension.

B. Level of Activity Required to Vest Permit

There is nothing in the statute, regulations, case law, or secondary sources explaining what level of activity is required to vest a permit under this statute. General principles of New Jersey law regarding substantial reliance will likely apply.

15. PERMIT OR CERTIFICATION ISSUED PURSUANT TO THE WATER SUPPLY MANAGEMENT ACT (N.J.S.A. 58:1A-1, *et. seq.*)

A. Extensions Available under the Statute and Regulations

NJDEP is responsible for issuing water supply allocation permits under this statute. *See* N.J.S.A. 58:1A-5.11; N.J.A.C. 7:19, *et seq.* The maximum term of a permit is **10 years**. N.J.A.C. 7:19-2.14. Permit holders can submit an application for the renewal of a permit three months prior to the expiration of the permit. N.J.A.C. 7:19-2.4(a). Additionally, NJDEP may “in its discretion, grant a one-time extension of a permit for a period not to exceed **one year**.” *Id.* at 2.4(e).

B. Level of Activity Required to Vest Permit

It appears that construction beyond site preparation will vest the permit. In K. Hovnanian at W. Milford, L.L.C. v. Dep't of Env'tl. Prot., A-4407-04T3, 2006 WL 2193070 (N.J. Super. Ct. App. Div. June 14, 2006), NJDEP issued a water supply allocation permit which provided that it would expire on a certain date “unless construction beyond site preparation has begun prior to that date.” Id. at *10. NJDEP further provided that if the permit was extended by virtue of construction, it would expire if “there is a cumulative lapse in construction of more than one year” after the original expiration date. Id.

16. PERMIT GRANTED AUTHORIZING THE DRILLING OF A WELL (N.J.S.A. 58:4A-5, *et seq.*)

A. Extensions Available under the Statute and Regulations

The regulations accompanying the statute provide that well permits are valid for **one year** from the date of issuance (domestic use permits are valid for two years) and if the “well is not constructed within the appropriate period, a new well permit shall be obtained from the Department prior to the start of any well drilling activity.” N.J.A.C. 7:9D-1.1.

B. Level of Activity Required to Vest Permit

Based on the above language, complete construction of the well is necessary, and absent complete construction, a new well permit should be obtained.

17. SAFE DRINKING WATER ACT (N.J.S.A. 58:12A-1, *et seq.*)

A. Extensions Available under the Statute and Regulations

The applicable regulations provide:

(m) Each permit for a public community water system issued under this subchapter on or after February 7, 2011 is valid for a term of **five years** from the date of issuance. **If construction of a facility is not completed prior to the permit expiration date, upon request the Department shall extend the permit term by a period of up to two years, provided:**

1. The request to extend a permit is submitted to the Department at least 90 days prior to expiration date of the existing permit;
2. The permit holder demonstrates that there has been no significant change in any of the following between the date the existing permit was issued and the date the application for extension is submitted:
 - i. The project and activities that were approved in the existing permit including projected demand if applicable; and
 - ii. The available firm capacity and water allocation determined in accordance with N.J.A.C. 7:10-11.5(e);

[. . .]

4. If the requirements of this subsection are not met, the existing permit shall expire and construction activities shall stop until a new permit is obtained; and

5. An expired permit shall not be extended.

N.J.A.C. 7:10-11.5.

B. Level of Activity Required to Vest Permit

Based on the language of the regulation, extensions should be applied for prior to expiration if the construction of the facility is not complete.

18. STATE HIGHWAY PERMIT GRANTED PURSUANT TO N.J.S.A. 27:7-1, *et seq.*

This statute deals with the acquisition, construction, and maintenance of state highways. The corresponding regulations are found at N.J.A.C. 16:41-1.1. There are two types of permits provided for in the regulations -- Highway Access Permits issued pursuant to N.J.A.C. 16:47, and Highway Occupancy Permits issued pursuant to N.J.A.C. 16:41.

A. Extensions Available under the Statute and Regulations

1. Highway Access Permits

These NJDOT permits are necessary for the construction or modification of any driveway or street intersecting a highway, any subdivision that could affect highway access, and any sidewalk, curb, or drainage construction on a State highway right-of-way. N.J.A.C. 16:47-4.3.

To extend a highway access permit, N.J.A.C. 16:47-4.6(e) provides:

When the construction work under the permit, including those permits issued under N.J.A.C. 16:41, is started within **two years** of the date of permit issuance but cannot be completed in the indicated time, the permittee shall request an extension of time in writing from the appropriate Regional Maintenance Office and submit the required renewal fee in the form of a check or money order. The Department may approve **one one-year** extension.

2. Highway Occupancy Permits

These NJDOT permits are necessary when any activity is undertaken over, under, or within any portion of State highway right-of-way or property under the jurisdiction of NJDOT or for any activity which may interfere with normal highway traffic. N.J.A.C. 16:41-1.1.

To extend a highway occupancy permit, N.J.A.C. 16:41-6.10(a) provides:

If a permittee starts activity authorized by a permit within the permit time established at N.J.A.C. 16:41-6.2(f), but cannot complete the activity within the allotted time, the permittee shall request an extension of time in writing from the

appropriate Regional Maintenance Office and shall submit the required extension fee identified at N.J.A.C. 16:41-7.1 in the form of a check or money order. The Department may approve a **single, one-year** extension.

B. Level of Activity Required to Vest Permit

An extension of time should be requested if a permittee “starts” authorized activity but cannot complete it. It does not appear that starting a project vests any rights in the permit.

19. PERMIT ISSUED BY THE NEW JERSEY MEADOWLANDS COMMISSION PURSUANT TO THE HACKENSACK MEADOWLANDS RECLAMATION AND DEVELOPMENT ACT (N.J.S.A. 13:17-1, *et seq.*)

A. Extensions Available under the Statute and Regulations

There is nothing specific in the statute or regulations (N.J.A.C. 7:7E-3.45. *et seq.*) but the New Jersey Meadowlands Commission regulations provide:

A zoning certificate shall become null and void **one year** after the date on which it is issued, **unless within such one year period, the site work, construction, moving, remodeling, reconstruction or change in use of a structure, or addition thereto, is commenced.** Extensions, not exceeding one year each, may be granted by the Chief Engineer upon written application. No more than **five [one-year]** extensions, based upon the date of issuance of the original zoning certificate, shall be granted.
N.J.A.C. 19:4-4.6.

B. Level of Activity Required to Vest Permit

As stated in the above regulation, a zoning certificate expires unless “site work, construction, moving, remodeling, reconstruction or change in use of a structure, or addition thereto, is commenced.” *See* N.J.A.C. 19:4-4.6.

20. PINELANDS PROTECTION ACT (N.J.S.A. 13:18A-1, *et seq.*)

A. Extensions Available under the Statute and Regulations

Although the PEA specifically tolls permits and approvals in regional growth areas, villages and towns (N.J.S.A. 40:55D-136.3- 4(i)), the Pinelands Commission has taken the position that permits or approvals granted by the Commission, or underlying municipal, county, and state permits or approvals are not extended if there has been an amendment to the Comprehensive Management Plan (“CMP”). Since the amended stormwater requirements of the CMP became effective May 1, 2006, the Commission does not recognize the PEA in areas under its jurisdiction.

B. Level of Activity Required to Vest Permit

Since the Pinelands Commission will probably not recognize the substantial reliance doctrine, permit holders should consult directly with Commission staff.

21. STATE UNIFORM CONSTRUCTION CODE ACT (N.J.S.A. 52:27D-119, *et seq.*)

A. Extensions Available under the Statute and Regulations

A construction permit in which no construction has been undertaken above the foundation walls one year from the time of issuance of the permit automatically expires. N.J.S.A. 52:27D-131(b). Further, the enforcing agency “may revoke or cancel” a permit if the project is “not completed by the **third anniversary** of the date of issuance of the construction permit.” *Id.* at 131(c).

If construction is not complete by the third anniversary, the permittee “may submit a request for an extension of the permit to the enforcing agency for review” to extend the permit for **one year**. *Id.* at 131(d).

B. Level of Activity Required to Vest Permit

The statute specifically provides that “[a] construction permit, issued in accordance with the foregoing provisions, pursuant to which no construction has been undertaken above the foundation walls within **one year** from the time of issuance, shall expire.” N.J.S.A. 52:27D-131(b). Thus, to avoid expiration, there must be construction above the foundation walls.

Additionally, the regulations provide that any permit shall become invalid if “the authorized work is suspended or abandoned for a period of **six months** after the time of commencing the work.” N.J.A.C. 5:23-2.16(b) (“suspension of permit”). Finally, it should be noted that the regulations provide that a permit can be revoked “[i]f the project for which the permit was obtained is not completed by the third anniversary of the date of the issuance of the permit.” N.J.A.C. 5:23-2.16(f)(1)(ii) (“revocation of permits”).

CONCLUSION

We hope the above provides some useful guidance on what life after the PEA will look like, and assists developers and builders in planning for the future. Once again, we emphasize that to assess the rights and restrictions of any given permit, a detailed analysis by the permit holder’s professionals must be undertaken. If we can provide any assistance in that regard, do not hesitate to reach out to us at robert.washburn@flastergreenberg.com and emily.markos@flastergreenberg.com.