

Third Extension of Certain Land Development Approvals in North Carolina

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Many aspects of land development have been impacted over the past year due to COVID-19, and the operations of local governments and developers alike have been significantly delayed. In an effort to mitigate these delays and the related economic pressures on land development created by the pandemic, the North Carolina General Assembly extended the term for most types of local government approvals for land development pursuant to Section 4.40 of Session Law 2020-03 (Senate Bill 704) (the "*First Extension*"),^[1] which was passed on May 4, 2020. As the pandemic and its many effects persisted through the subsequent months of 2020, the North Carolina General Assembly passed a further extension of the term of qualifying development approvals on pursuant to Section 3.21 of House Bill 1105 (Session Law 2020-97) (the "*Second Extension*")^[2] on September 4, 2020. Most recently, the General Assembly has further extended the Second Extension via Section 2.21 of House Bill 196 / Senate Bill 172 (now Session Law 2021-3), which was signed into law by Governor Cooper on March 11, 2021 (the "*Third Extension*" and, together with the First Extension and the Second Extension, the "*Extension*")^[3].

Length of the Extension

The First Extension provided a five (5) month delay in the expiration of certain development approvals. The Second Extension further delayed the expiration of such development approvals for an additional one hundred twenty (120) days. The effect of the Third Extension is to defer the expiration of qualifying development approvals for **one hundred fifty (150) days from the date that Executive Order No. 116** (the "*Executive Order*")^[4] **is rescinded**. The Executive Order, dated March 10, 2020, declares a state of emergency in response to the COVID-19 pandemic. Accordingly, the Third Extension shifts away from extending the expiration date for a predetermined length of time, as was the case with the First Extension and the Second Extension, and instead ties the extended expiration date to the official end of the state of emergency related to COVID-19. By linking the extended expiration date to the rescinding of the Executive Order, the General Assembly has, in theory, avoided the need for any future extensions (or re-extensions). Substantively, the only change made by the Third Extension is to tie to the extended expiration date to the date on which the Executive Order is rescinded, and the definitions of "*development approval*" and "*development*," as well as other key terms, remain unchanged from the First Extension and Second Extension. As further discussed below, the Extension applies automatically to all qualifying development approvals, provided that developers adhere to certain minimum conditions to maintain a valid extension of such development approvals.

Definition of Development Approval

The term "*development approval*" is broadly defined under the Extension pursuant to Section 3.21(a)(1) of Session Law 2020-97, and includes all of the following types of approvals issued by any unit of local government, regardless of the form of the approval, that are for the development of land:

1. Any approval of an erosion and sedimentation control plan granted by a local government under Article 4 of Chapter 113A of the General Statutes.
2. Any building permit issued under Article 9 of Chapter 143 of the General Statutes.

3. Any approval by a county of sketch plans, preliminary plats, plats regarding a subdivision of land, a site-specific development plan (i.e., Special Use Permits) or a phased development plan, a development permit, a development agreement, or a building permit under Chapter 160D of the General Statutes.
4. Any approval by a city of sketch plans, preliminary plats, plats regarding a subdivision of land, a site-specific development plan or a phased development plan, a development permit, a development agreement, or a building permit under Chapter 160D of the General Statutes.
5. Any certificate of appropriateness issued by a preservation commission of a city under Chapter 160D of the General Statutes.

The Extension also applies to any associated vested right under N.C.G.S. 160D-108 or N.C.G.S. 160D-108.1. Section 3.21(a)(2) of Session Law 2020-97 also defines “*development*” as “[t]he division of a parcel of land into two or more parcels; the construction, reconstruction, conversion, structural alteration, relocation, or enlargement of any building or other structure or facility; or any grading, soil removal or relocation, excavation or landfill, or any use or change in the use of any building or other structure or land or extension of the use of land.” The definitions of “*development approval*” and “*development*” under the Second Extension are effectively the same as the definitions under the First Extension, which means that qualifying development approvals covered under the First Extension should also be covered under the Second Extension and the Third Extension. Furthermore, the Third Extension is automatically applicable to any qualifying development approval extended under the First Extension and Second Extension. It is important to note that the Extension does not apply to any bonds or other contracts with third parties that may be related to a development approval, nor does the Extension apply to approvals issued by federal agencies or under federal law (with a few exceptions).

Development Approvals Qualifying for the Extension—the Validity Period

To qualify under the Extension, a development approval must be current and valid at some point during the prescribed validity period under Section 3.21(b) of Session Law 2020-97. Specifically, Section 3.21(b)’s validity period is defined as “**the period beginning September 2, 2020, and ending 30 days after [the Executive Order] is rescinded**” (the “*Validity Period*”). Accordingly, a qualifying development approval which is issued on, before, or after September 2, 2020 would meet this requirement, provided that such development approval had not expired or otherwise become invalid during the applicable Validity Period. This includes any qualifying development approvals which are issued within the first thirty (30) days after the Executive Order is rescinded, subject to the same aforementioned limitations. The Second Extension served, in practical effect, as a continuous extension of the First Extension, as very few development approvals covered by the First Extension would have expired at the time the Second Extension was enacted, because the Second Extension became effective less than five (5) months after the end of the First Extension, which ended April 20, 2020. The Second Extension removed the set end date for the Validity Period—as was the case under the First Extension—and replaced it with the tie-in to the date on which the Executive Order is rescinded. This more flexible Validity Period remains in the Third Extension.

Conditions Developers/Permit Holders Must Meet to Maintain a Valid Extension

Developers and/or the applicable permit holders must meet certain conditions to maintain a valid extension of any qualifying development approval, including:

- Compliance with all applicable laws, regulations, and policies which were in effect at the time of the original development approval;
- Maintenance of all performance guarantees throughout the Extension period (or at least until having been expressly released from such performance obligation by the applicable governing body); and
- Completion of any required infrastructure for certificates of occupancy and/or any other final development approvals.

Failure to comply with the terms of the Extension may result in the applicable governmental body terminating the extension of the development approval. Such termination must be sent via written notification to the last-known address of the development approval holder, and must include the reason for termination. In the event of any such termination, the approval holder may appeal the decision to the board of adjustment or other applicable governing body.

If you are a developer, permit holder, or property owner with questions about the Extension, or land development questions generally,

please contact Mike Fox at mfox@tuggleduggins.com or (336) 271-5244, Nathan Duggins at atnduggins@tuggleduggins.com or (336) 271-5246, or Laura Krantz at lkrantz@tuggleduggins.com or (336) 271-5249.

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[1] See Section 4.40, Session Law 2020-03 (Senate Bill 704) (available at <https://www.ncleg.gov/EnactedLegislation/SessionLaws/PDF/2019-2020/SL2020-3.pdf>).

[2] See Section 3.21, Session Law 2020-97 (House Bill 1105) (available at <https://www.ncleg.gov/EnactedLegislation/SessionLaws/PDF/2019-2020/SL2020-97.pdf>).

[3] See Section 2.21, Session Law 2021-3 (House Bill 196) (available at <https://www.ncleg.gov/Sessions/2021/Bills/House/PDF/H196v8.pdf>).

[4] See Executive Order No. 116 (available at <https://files.nc.gov/governor/documents/files/EO116-SOE-COVID-19.pdf>).

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