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## PERMIT PRESERVATION DURING THE RECESSION

Residential and commercial developers who traditionally take big risks are mothballing projects until the economy recovers. Financing is difficult to obtain and speculative construction is out of the question. Real estate “experts” and economists, who thought the bottom was near in September 2008, now hope for an Obama stimulus program this year and predict new construction starts in 2010. Liquid developer clients are purchasing fully and partially approved projects from troubled builders and banks. Projects are available at fire sale prices.

**Lessons from prior recessions:** There are at least two lessons learned from the recessions of the 1980s and 1990s for developers who put projects on the shelf awaiting recovery of the real estate market: (1) Complete the permitting of partially approved projects and (2) Preserve the permits already obtained.

**Why complete permitting?** We encourage our developer clients with partially permitted projects to apply now for remaining permits and approvals. We believe communities will be more receptive to projects because they are desperate for tax revenues, construction jobs and related local spending, and the hope for economic recovery that new development represents. NIMBY resistance may be weaker because opponents have less disposable income to fight projects. They feel the real recession devaluation of their homes, rather than fearing amorphous concerns about devaluation from proposed projects.

**Why preserve permits?** Surprisingly, during the last market downturns even seasoned developers failed to preserve hard won permits. They took their eye off the ball and did not seek timely extensions of permits and approvals, or commence enough work to protect permits. Many developers were in survival mode and not attentive to details like the expiration date of a permit (which may not be obvious on its face), often because they did not have a “tickler system” in

place. Some developers believed the recession would automatically extend permits, like lawsuits which can operate to stay the running of the permit. Others did not envision potential changes in land use and environmental laws and regulations which resulted in new applications and hearings, denials, significantly downsized projects, and lengthy and expensive appeals of onerous decisions.

While projects are in a holding pattern, laws evolve. Towns may revise Home Rule wetland bylaws to add new resource areas, expanded buffer zone protections, and expensive proponent-funded technical reviews. Shelved projects may be forced to undergo new MEPA review for lapse of time. Special permits under zoning are valid for up to two years before they lapse, if a substantial use has not commenced or construction has not begun, unless good cause for the delay exists. Variances, valid for one year with an extension available for up to six months, will lapse if the authorized rights are not exercised. Failure to timely extend and use these zoning approvals will require new hearings and new findings, and invites potential appeals.

**What you can do:** Deferred projects should undergo “preventive maintenance” – an oil change now instead of rebuilding the engine later.

Developers should:

- Inventory all required permits and approvals for the project.
- Determine the expiration dates and the criteria and procedures for seeking and obtaining extensions.
- Apply timely for extensions, mustering the appropriate facts and arguments in support.
- Undertake sufficient work to prevent lapse of prior approvals.
- Apply for additional or lapsed permits before the laws and the politics change.

The investment in preserving existing and obtaining new permits now will pay dividends later. Be ready to commence construction when the recession lifts.

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