TWO YEAR ANNIVERSARY REPORT CARD: LAND COURT PERMIT SESSION MEETING GOAL OF SPEEDY DISPOSITION OF DEVELOPMENT APPEALS

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There is good news for developers eager to move project appeals swiftly through litigation – provided their cases have been (or can be) filed in or transferred to the Permit Session of the Land Court Department of the Trial Court. Based on a detailed review of docket information for all cases now in the Permit Session, that session is meeting the aggressive timetables established for resolution of cases in its jurisdiction.

The Expedited Permitting Law, Chapter 205 of the Acts of 2006, was signed into law by Gov. Mitt Romney on August 2, 2006 and went into effect immediately. Among other changes designed to streamline the permitting process for real estate development, the Expedited Permitting Law created the Permit Session of the Land Court Department with original jurisdiction (concurrent with the Superior Court) over most civil actions arising out of local and state permitting decisions, provided the project met a minimum threshold of 25 or more dwelling units or the construction or alteration of 25,000 square feet or more of gross floor area or both.

The Permit Session's jurisdiction broadly covers claims concerning local and state permitting or otherwise relating to the use or development of real property. The Permit Session's jurisdiction is more extensive than the Land Court's general jurisdiction, for example, encompassing local wetland appeals and decisions under the Boston Zoning Act. The Permit Session jurisdiction includes:

- Appeals of municipal, regional, state permits, orders, certificates of approval or denials concerning the use or development of real property including chapters 30A, 40A, 40B, 40C, 40R, 43D, 91, 131, 131A, sections 4 and 5 of Chapter 249, Chapter 665 of the Acts of 1956, and any local bylaw or ordinance;
- Claims under Chapter 231, Section 6F for malicious prosecution, abuse or process, interference with contractual or advantages relations arising out of the use or development of land; and
- Claims regarding right, title or interest in land.

In order to accomplish the stated goal of expediting permitting, Permit Session cases are assigned to one of three tracks and must meet aggressive timetables for disposition. Under Track A, cases must go to trial in 12 months and written decisions must be issued four months later. Although there are two additional tracks with shorter timelines, it appears that most, if not all, of the Permit Session cases have been assigned to Track A. Notably, as of this writing, the Land Court has not issued a Standing Order assigning different types of cases to

the three different Tracks. Cases not originally filed in the Permit Session may be transferred to the Permit Session on motion allowed by the Chief Justice for Administration and Management. However, the Chief Justice has adopted a policy of refusing to transfer cases filed in other courts prior to August 1, 2006.

Although the Land Court had feared a landslide of cases in the new Permit Session, as of October 16, 2008[1], 52 cases had been filed in or transferred to the Permit Session. Of those 52, 28 (54 percent) were filed in the Permit Session and 24 (46 percent) were transferred from the Superior Court or regular session of the Land Court by motion. The cases have been fairly evenly split among the six Land Court judges. The cases include many commercial developments and involve appeals of site plan approval decisions, special permits, wetlands decisions, and comprehensive permits. The projects are located more than 30 different cities and towns, ranging in size from Boylston to Boston and in geography from Lenox to Plymouth. There have been no trials in the Permit Session yet.

Permit Session: By the Numbers

Total cases in permit session	*52*
Open cases	*24*
Closed cases	*28*
Cases filed directly in Permit Session	*24*
Cases transferred to the Permit Session	*28*
Average time for resolution of cases	*7.5 months*
Average time for open cases	*8.2 months*
Time to resolve cases	
Less than 3 months	*5 cases*
Between 3 and 6 months	*6 cases*
Between 6 and 9 months	*8 cases*
Between 9 and 12 months	*6 cases*
More than 12 months	*3 cases*

The particular bright spot for developers is that the Permit Session does appear to be satisfying its mandate to expedite permitting-related litigation. The Permit Session has closed 28 of its cases (54 percent), with 24 remaining open (46 percent). In order to evaluate the timeliness of the Permit Session's resolution of cases, we have utilized a standard of 16 months from filing or transfer to the Permit Session as the benchmark, based on a standard Track A schedule of 12 months to trial plus four months for a decision. Based on this 16-month standard, only one case of the 28 closed cases exceeded that timetable and that case was continued by joint motion for 14 months before it was dismissed by stipulation. Indeed, the average time for resolution of these cases was just seven and one-half months. Of these cases, more than half were resolved by stipulation of dismissal, nearly a quarter by judgment

[1] All data is calculated in this article based on the Permit Session dockets as of October 16, 2008.

by the Court on motions to dismiss, summary judgment, or judgment on the pleadings, and roughly a quarter as remands.

Of the 24 cases remaining open, only three exceed the 16-month Track A timetable as of October 16, 2008. Two of these three cases have been extended by mutual agreement of the parties as external issues of settlement or other state permits have held up the Permit Session proceedings. However, the 19-month duration of the longest open case is attributable both to extensions requested by the parties pursuing settlement and a motion for summary judgment that was pending before the court for six months before it was ultimately denied, setting the stage for late discovery in the case.

Although the Permit Session is resolving cases within 16 months, one time standard it does not appear to be regularly meeting is the mandate to issue decisions on dispositive motions within four months after the motion is taken under advisement. In fact, the Permit Session had, as of October 16, 2008, four of its open cases with motions for judgment on the pleadings or summary judgment pending for more than four months, the longest waiting seven months. Interestingly, however, despite missing this time standard, nearly all of the cases resolved by dispositive motions were completed within an overall 16-month time period.

Based on the review of available data from the Permit Session, after two years in operation, the track record of the Land Court Permit Session is excellent. Developers who long sought more predictable and faster timetables for resolving permitting appeals now clearly have that venue. That at least half of the cases have been concluded through stipulations of dismissal, suggests that quick settlements between the parties have been reached. The accelerated statutory timetables within which trials must be held and decisions rendered appear to be having their intended effect: Challengers to project approvals are forced to more rapidly assess the strength of their cases and the wisdom of investing in litigation. Not surprisingly, parties are forced to seriously consider settlement earlier than if their cases were filed in Superior Court. The result is the speedier disposition of real estate development appeals just as intended by Expedited Permitting Law.

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