THE PANDEMIC'S POTENTIAL EFFECTS ON DEVELOPMENT AGREEMENTS

Developers, along with the public and private sectors, have a lot to think about when it comes to future projects as the country grapples with the impact of COVID-19.

By Jamie Thalgott

As the U.S. continues to grapple with the effects of the COVID-19 pandemic, the real estate sector has already begun climbing the first mountain of legal issues. These have largely related to reopening. Most notably, they involve contractual issues governing ongoing relationships that were immediately impacted by stay-at-home orders. A flurry of interpretation of force majeure provisions, for example, has taken center stage as companies seek to defer or abate contractual obligations affected by the rise of the virus and the government-imposed mandatory shutdowns.

We, as an industry, have understandably focused on how to move forward through the weeds of these pressing and immediate concerns. However, looking ahead, the country might face an even steeper mountain of legal issues as governmental entities and private developers grapple with the long-term consequences of the pandemic and the potential for future such events. At least initially and perhaps temporarily, the health concerns highlighted by the outbreak will affect the operational plans and interior configurations of existing businesses seeking to reopen or maintain operations post-stay-at-home orders. We have already seen fewer patrons permitted in public spaces; property owners concerned about ventilation and sanitation; and states and businesses implementing unprecedented social distancing policies to combat the spread of the virus.

The country faces the distinct possibility that social distancing is here to stay as reopening will not be the final step as this virus and others most likely continue to cycle through the population. If so, that reality will affect future and ongoing development efforts. Some of these developments are governed by existing contractual relationships, regardless of whether the project has started or not. This leads us to development agreements — how the pandemic may complicate those already executed and how it could affect drafting going forward.

What The Future May Hold

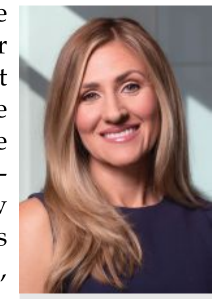
Many local jurisdictions use development agreements as a mechanism to negotiate the terms and conditions of large-scale, long-term or master-planned development projects within their boundaries. A primary benefit of such agreements from the developer's perspective is the ability to lock in (at least portions of) the jurisdiction's development code to ensure predictability as the project progresses. Nonetheless, these agreements often contain a "subsequently enacted laws" provision. This is because localities are subject to preemptory laws of the county, state or federal governments. These provisions also provide some flexibility for local governments to enact uniform regulations to protect public health and safety.

Such provisions usually provide that a developer may lock in code as of a certain date, other than, for example: (a) rules required to comply with superseding regional, state or federal requirements; or (b) rules required to protect the public health and safety in general.

As development progresses and governmental entities across the U.S. adapt to address the effects of the pandemic, these "subsequently enacted laws" provisions and carve-outs will inevitably come into play. For example, jurisdictions may increase or impose uniform cost-based review or inspection fees as the processes associated with entitlements and inspections evolve in the face of our new reality. New building requirements might also render projects subject to heightened distancing requirements (e.g., more square footage per person in a multifamily project), new ventilation standards, or new requirements to minimize surface touching like voice activation for elevators or the mandatory use of antimicrobial materials.

New impact fees could come into play if jurisdictions, in evaluating their master plans in light of the pandemic, require more expensive infrastructure or changes to existing facilities. Traffic and roadway needs could evolve as fewer commuters hit the road, all while ever-growing numbers of vehicles associated with the expansion of ecommerce utilize local roads. This, of course, changes the calculus for traffic participation costs or road construction standards. Each of these changes, though subsequently enacted, could fit within a subsequently enacted laws carve-out and add both cost and time to existing budgets and development timelines.

Developers with new projects might also see a push for tools to alleviate upfront public costs if the economy does not rebound quickly. Refunding agreements are one such tool. These agreements require the private sector to up-front the cost of an infrastructure project and receive incremental reimbursement as new development enters the neighborhood, rather than the jurisdiction utilizing its own funds and then charging a fee back to the private sector. Developers might also encounter a rethinking of traditional asks in terms of parks, trails and open space to comply with permanent social distancing best practices that emerge out of the pandemic. Perhaps even further, jurisdictions might begin requiring the private sector to own and maintain public spaces (subject to a public access easement), in lieu of dedication, to avoid expensive ongoing maintenance costs associated with heightened sanitation requirements.



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Developers and governmental entities alike are well advised to review existing agreements and pay careful attention to the drafting of subsequently enacted laws provisions as they negotiate new agreements. On the government side, jurisdictions should ensure flexibility to conform to emerging public health trends and best practices, while developers will want to avoid open-ended application of such rules, requirements and requests to avoid unforeseen costs and delays.

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to locate offices east of Seattle, with Amazon claiming nearly 6 million square feet of office space in downtown Bellevue alone. Add to these numbers an apartment development pipeline of more than 6,000 units for Bellevue and 20,000 units for the Eastside, and you can expect Bellevue and its adjacent communities to thrive in the coming years.

4. Roadmap of Growth

The Puget Sound laid plans for an expansive mass transit network over the past decade, with a rail-based system serving as a new heart and soul. The first of many rail stations has opened, with many more openings to come over the next 20 years.

Pre-COVID-19, the light rail was set to connect more suburban communities to urban employment centers. As the world is currently evolving around work-from-home strategies and revitalization of suburban office, the region's rail network provides a perfect roadmap for the region, regardless of whether employment remains urbanized, or becomes more decentralized to suburban nodes.

5. Fundamentals, Fundamentals, Fundamentals

Looking long-term, Seattle reigns supreme compared to nation-leading coastal employment/lifestyle markets. While more mature markets, such as San Francisco and Los Angeles, boast global rankings as top U.S. cities, Seattle might be the last coastal market in the nation with enough runway growth to attract talent and capital and deliver real returns to real estate investors.

These coastal "lifestyle" factors are in addition to more macro factors that bolster global investment in Seattle. These include a tech talent pool rivaling Silicon Valley, thriving start-up communities, globally ranked post-secondary universities, deep-water seaports and proximity to the Pacific Rim. Seattle and the Pacific Northwest remain in nascent stages of taking advantage of long-dormant fundamentals that will continue to drive capital investment, economic growth and human capital desirability for decades. As the nation and world grapple with economic and social challenges, the Puget Sound's future looks bright for residents and commercial real estate investors alike. ■