

CONTEMPLATING COVID-19 IMPACTS ON REAL ESTATE TRANSACTIONS IN THE WEST

This pandemic has introduced a new set of unforeseen circumstances to real estate transactions that now must be considered.

By Diane De Felice and Justin Bubenik

The West's real estate industry has not been immune from the measures being taken to curb the COVID-19 pandemic. Varying shelter-at-home orders, issued by federal and local governments, have caused cascading effects and interrupted normal business operations. Investors, developers, management and the industry at large are working to overcome any lasting impacts and move transactions forward during these tumultuous times. For those with active real estate deals, the parties continue to face an ever-changing landscape that requires diligent attention to ensure both purchaser's and seller's interests are adequately protected.

Real Estate Industry Operations

Jurisdictions across the country face different challenges with regulatory orders from governmental authorities. Western states, including Arizona, New Mexico, Utah, Colorado and California, have regulatory orders that introduced terms like "essential" and "non-essential" services and businesses to set restrictions on operations. Those businesses and services deemed "essential" are permitted to remain operational but ordered to implement specific social distancing requirements, in addition to other precautions.

Examples of general categories of exempt activities include:

- Those needed to maintain continuity of operation of the federal critical infrastructure sectors
- Critical government services, including infrastructure construction (Arizona, California, Colorado, Nevada)

- Construction in general with some states and local jurisdictions distinguishing between residential and commercial (i.e., California has permitted construction of residential units to continue while general commercial construction is ceased)

- Existing building management and maintenance

In contrast, "non-essential" services and businesses are ordered to reduce their "in-person workforces" by anywhere from 50 percent to complete closure for specific businesses.

While the restrictions continue to be adjusted as the pandemic progresses, the current trend is implementation of additional controls and expanded closures. Expanding restrictions to limit public contamination creates a downward economic trend for businesses forced to reduce staff or complete closure, which can be more severe depending on the locality status as an active "hot spot." The Bay Area cities, Los Angeles, Denver and others across the West have all released individualized orders that continue to impact real estate transactions and closings.

Force Majeure Delays

The pandemic has ultimately resulted in delays on normal real estate business operations, while deals cautiously move forward. Though purchase contracts aim to address general uncertainties — unlike construction- and financing-related contracts that typically include "force majeure" events — commercial real estate purchase contracts are customarily silent on disasters outside of condemnation or casualty. Contracts will not typically address the current pandemic or

provide an extension to deadlines or termination rights for force majeure events. The applicability of other remedies, such as the "frustration of purpose" doctrine, is also questionable. As a result, practitioners are now including force majeure and similar provisions in purchase contracts to allow flexibility for events outside of either party's control.

Absent any deal-specific termination rights, extensions or contingencies, parties under contract should operate as though they are obligated to move forward with the transaction or risk default. Both parties should prepare for unexpected delays, including tenant defaults, late rent or holdover evictions as many localities are not enforcing evictions for tenants during the crisis. Professionals have also been experiencing delays from third-party vendors, such as surveyors, title companies and local governments. While these delays may offer deadline extensions, such terms are uniquely negotiated on a deal-by-deal basis.

Purchase Contract Terms for Consideration

Some suggested topics for review are: representations and covenants relating to current operations; impacts of tenant defaults and late payments; timing of third-party deliverables and approvals; status of any necessary financing; and local government operations where the property is located.

Colorado has passed legislation permitting remote notary acknowledgement for documents such as deeds to facilitate real estate closings. However, practitioners and parties should also consider logistics beyond the actual mechanics of the agreement and how each of the parties will effectuate their own individual obligations that may be otherwise noncontroversial during less tumultuous times. Title and escrow professionals, along with attorneys, will often have creative avenues to address the ever-changing environment.

One title issue that may arise is the issuance of exceptions to the title companies' preliminary reports because they now lack access to court information due to court closures. As a result, the title companies' ability to properly insure the transaction may be affected and/or delay closing. Therefore, additional terms to handle these uncertainties, such as hold harmless and indemnity clauses, may be needed.



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Jurisdictional Contract Guidance

Many professional organizations in varying jurisdictions have released new guidance relating to their form purchase contracts to help address transactional dilemmas caused by COVID-19. The Colorado Bar Association (CBA) has approved an addendum form for existing purchase contracts, which provides extensions for delays caused by a shutdown of governmental and business operations or for individual quarantine. Though the CBA addendum addresses obligations of the parties generally, deal specifics will require review. The Colorado Real Estate Commission has yet to approve such an addendum.

The California Association of Realtors has similarly released a more expansive amendment to its form purchase agreement, Form CVA 3/20.

The Arizona Association of Realtors released a similar sample form. The new options for parties include an extension of closing to address the "unforeseen circumstances" of the pandemic, termination of the contract or a carve-out to the buyer's waiver of its financing contingency for COVID-19 impacts. As stated above, despite the offered guidance and unless otherwise indicated, modifications to existing contracts are strictly voluntary and subject to negotiation and mutual consent.

Moving Forward

Purchasers and sellers should review current or pending contract terms immediately if pending transactions are time sensitive. This will allow the contracting parties to negotiate feasible options as necessary to address any uncertainties in a time when normal services, businesses and our daily lives are in a state of flux.

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