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Special Otten Johnson Alert: Coping with Crisis and Thinking About the Future (From Our Home Offices)

As our communities, nation, and world reel from the impact of the COVID-19 public health crisis, Otten Johnson extends our sincere gratitude to all of the health care providers, first responders, public health leaders, and others who are serving those who are sick and at risk. Since we are business lawyers without the skills or expertise to provide medical care, our contributions to resolving this crisis are largely relegated to working from home to avoid spreading disease and offering financial contributions to worthy organizations supporting our community. But because we cannot help but think of this crisis through the lens of our land use, real estate, and business practices, we are bringing our clients and friends this series of alerts, exploring how the current pandemic affects our work, what we're learning from it, and what the future holds.

Part 5 –Protecting and Enhancing Real Estate Investments In Uncertain Times

April 3, 2020 • [Allison Altaras](#)

This installment in our series of alerts covering COVID-19 issues addresses how pending and approved entitlements may be impacted by the economic slowdown and considerations for mitigating these impacts.

Land use and development approvals, frequently called “entitlements,” are critical components of a real estate project. Considerable time, energy, and cost go into obtaining or amending project entitlements before construction even begins. Project components such as financing, infrastructure design, construction planning, and leasing all depend on a project’s square footage, number of units, permitted uses, design standards, and applicable impact fees and other exactions that arise from local approvals. The certainty and predictability established by approved project entitlements are critical to the success of any project.

But these are far from certain and predictable times. Financial markets are in flux. Governmental agencies and decision-making bodies are operating with few staff members and little to no in-person services, like permit counters, project meetings, and public hearings.

Although project entitlements might not be top of mind in these trying times, periods of economic uncertainty or slowdown might well present opportunities for protecting and even enhancing the value of land.

Evaluating Existing and Potential Entitlements

As a general rule, land with approved entitlements lessens risk for owners and prospective buyers, better positioning that land for sale when markets rebound. Thus, landowners with unentitled property, or even property with outdated entitlements, might now consider pursuing new entitlements to add value to their land. Rezoning agricultural land to permit residential or commercial uses, or amending an existing planned unit development (PUD) to modernize outdated design standards could assist in value creation. With markets slowing, many local governments have staff capacity to assist with these efforts (although social distancing might present some challenges).

It's also important for landowners and developers to review the status and potential lapse dates of existing entitlements. In many jurisdictions in Colorado, project approvals will lapse after a specified period of time if no building permit has been pulled, but extensions may be available where there are justifying circumstances. We also suggest closely reviewing annexation and development agreements to ensure that developer obligations can be met within any prescribed timelines, and to consider pursuing amendments as necessary.

Vested Rights in Colorado

In evaluating the firmness and enforceability of project entitlements, landowners and developers should be aware of vested rights regimes in Colorado. Generally speaking, property owners don't have a vested right to the current zoning or entitlements approvals for their property. A local government could thus rezone property or modify permitted uses or development standards at any time. Obtaining vesting—a legally enforceable assurance that future regulations will not impair or prohibit an approved project—is one way to ensure that a slowed or paused project can resume and rely on the validly issued entitlements in the future.

For projects where some vertical construction has already occurred, the doctrine of common law vested rights could prevent application of newly adopted government regulations that would impair approved development rights. Under that doctrine, a property owner needs to have taken “substantial steps” in reasonable reliance on a validly issued government approval. Vertical construction is typically required to show “substantial steps;” preliminary site work would not be enough. Landowners and developers with projects currently under construction should consider whether their projects are far enough along to reasonably claim common law vesting in the event more onerous government regulations are adopted in the future.

The Vested Property Rights Act, C.R.S. § 24-68-101 et seq., also provides a statutory mechanism for obtaining vesting at the outset of a project. Under the statute, certain types of development approvals, called “site specific development plans,” are deemed to vest automatically upon approval for a period of three years—or more, if approved via development agreement. These are approvals that describe “with reasonable certainty the type and intensity

of use for a specific parcel or parcels of property.” Local governments set their own definitions of “site specific development plans” subject to vesting, which may include PUDs, subdivision plats, site plans, and development agreements.

Statutory vested rights protect existing entitlements from impairment by subsequent governmental regulations, including rezonings, moratoria, initiated measures, new exactions, and more onerous development standards. They also confer upon the property owner the right to develop the project in accordance with the terms and conditions of existing entitlements. Now might be a good time to evaluate the current status of vesting or whether vesting might be appropriate to protect existing entitlements.

Takeaways

In these times of economic uncertainty, many property owners or developers might hunker down, wait out the downturn, and look for the better times to come. Such caution is both prudent and understandable. But these times also present an important opportunity to evaluate the rights attendant to approved or proposed projects and to take steps to protect and even enhance the value of land in anticipation of economic recovery.



Allison's Tip

Being part of a big family that gathers for, well, everything, makes social distancing emotionally wrenching. So we've decided to hold family dinners via Zoom. We cook the same recipe, discuss techniques and variations, and criticize one another's dishes, all from a safe distance. Armchair food criticism = Stress Relief.

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