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California Lawyers Association (CLA) Real Property Law E-Bulletin article: “Navigating Land Use Permitting During A Pandemic”

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As of the date of this article, we are in week 18 of the shelter-in-place (SIP) order first issued by the State of California Public Health Officer on March 18. In the early days of the pandemic, land use development immediately saw construction halted, planning departments shut down, and permit processing paused. We saw wide disparities among jurisdictions throughout California as to the strictness of SIP orders, restrictions on active construction projects, and the availability of online permit processing tools. Below is a summary of some of the specific challenges attributable to the SIP orders in the areas of construction, due diligence, and land use permitting, as well as updates on how things have evolved over the past four months.

Impacts on Construction
Governor Newsom issued California’s first statewide SIP Order on March 19, 2020 through Executive Order N-33-20, the same day that the State Public Health Officer released a Public Health Order directing all Californians to stay home unless they were “needed to maintain continuity of operations of the federal critical infrastructure sectors.” The Public Health Officer then defined “Essential Workforce” to provide additional direction regarding permissible activities related to 13 sectors of the economy, including construction. Among the sectors deemed part of the “essential workforce,” the list included “Construction Workers who support the construction, operation, inspection, and maintenance of construction sites and construction projects (including housing construction).” It also included “[w]orkers who support . . . construction of critical or strategic infrastructure” and “[w]orkers such as plumbers, electricians, exterminators, and other service providers who provide services that are necessary to . . . essential operation of construction sites and construction projects . . ..”

While the State orders were not an immediate impediment to on-going construction, in late March many local jurisdictions, especially the Bay Area counties, adopted far more restrictive SIP orders that prohibited all but a small subset of construction projects. On March 16, 2020, Bay Area counties issued identical SIP orders permitting construction to continue on housing projects, but prohibited all other construction. Then on March 31, the Bay Area counties restricted housing construction to affordable housing that is or will be income-restricted, where at least 10% of the units are income-restricted, while also permitting public works project where specifically designated as essential infrastructure. This meant that market-rate housing projects paying 10% in lieu affordable housing fees, for example, could not continue construction. Yet most counties outside the Bay Area did not restrict construction beyond what was already provided in the State’s essential workforce list.

Today, the previous more restrictive county SIP orders have been loosened to allow for most construction projects to move forward (e.g. all housing projects) subject to detailed statewide and local social distancing protocols. In addition, on May 4 through Executive Order N-60-20, the State modified its approach from a one-size-fits-all list of permissible activities, to allowing jurisdictions to proceed through the four stages outlined in the State’s “Resilience Roadmap,” depending on whether a particular jurisdiction satisfies key metrics for re-opening specified businesses. The State has made clear, however, that counties should be ready to restore limitations if outbreaks increase. None of the recent rollbacks have required construction sites to close, and such an outcome is unlikely.

The State Department of Public Health has issued industry guidance for specific sectors with safety and health guidelines to reduce risks associated with COVID-19, including a specific set of guidance for construction projects. The Department of Industrial Relations Division of Occupational Safety & Health has also issued safety and health guidance for prevention of COVID-19 on construction sites.

Renegotiating Purchase and Sale Agreements

Over the past four months, the ongoing crisis and shifting state and local SIP orders have complicated meeting benchmarks in purchase and sale agreements (PSAs) related to due diligence, deadlines for obtaining entitlements, and closing. As a result, parties to existing PSAs should consider renegotiating those agreements to ensure that they realistically account for the current and future delays and uncertainty. Parties negotiating new PSAs should also account for these uncertainties.

Typically, PSAs allow for a period of time after execution where buyers have the opportunity to conduct due diligence before their deposit becomes non-refundable. At the outset of the crisis when more restrictive state and local SIP orders were in effect, performing due diligence was difficult or altogether impossible with many third party surveyors, inspectors, and environmental consultants that perform crucial due diligence functions unable to work. Even as statewide and local SIP orders have eased, allowing consultants to operate under social distancing guidelines, uncertainties continue to complicate the due diligence process. For example, consultants may still be slowed by backlogs and social distancing guidelines and there is likely to be continued uncertainty surrounding the availability of capital resources. Uncertainty also surrounds impacts of domestic and international travel restrictions, delays confirming the feasibility of land use entitlements, and the issuance of title policies and recording of documents.

Considering these uncertainties are likely to linger for several months, buyers and sellers should renegotiate or negotiate PSA due diligence timelines so that they are realistic under the circumstances and ensure each party has enough time to complete due diligence. One reasonable solution to this problem is to incorporate language allowing buyers the automatic right to extend the Due Diligence Period only for those items the buyer is not reasonably able to complete based on existing conditions.

Regarding closings, PSAs often incorporate conditions precedent that must be satisfied by a certain deadline before transactions are finalized. Often, if such conditions are not met, the other party may terminate the PSA and retain a deposit. The most common condition precedent impacted by the current crisis is the obligation by the buyer to secure a title insurance policy subject to the payment of premiums and recordation of conveyance documents. Most title companies will not issue policies until key transactional documents are recorded, and for a time, many physical county recording offices were shut down. Although most if not all counties have resumed recording electronically, parties to existing PSAs may consider renegotiating closing language to allow for the waiver of a claim for default due to reasonable timing issues related to recordings. Parties negotiating new PSAs should consider such flexible language as well.

Finally, PSAs often include deadlines for closing based on the expiration of statute of limitations periods following approval of project entitlements. As discussed later in this post, statutory periods have been tolled for civil cases, including administrative writ of mandate cases challenging land use approvals and environmental review. Parties to an existing PSA should review these deadlines related to expiration of statutory periods to determine if an amendment is needed or whether the closing will be delayed.

Entitlement Processing and Expiration of Building Permits and Entitlements

In many ways, SIP orders have impacted all aspects of the entitlement process, including remote meetings with planning staff, delays in submittal and processing of new applications, complications in completing environmental review, and remote attendance entitlement hearings. The good news is that nearly all planning departments are now up and running remotely and able to continue performing most essential functions, including processing of existing and new applications. Moreover, while many planning departments shut down to new applications at the beginning of the crisis, most, if not all localities have made online submittal available and are now electronically processing new planning applications for everything from SB 330 preliminary applications to full development applications. Applicants should check local planning websites to confirm which modified application procedures are in place in each jurisdiction.

We note that some localities are operating more efficiently under current conditions than others, with some cities and counties facing long backlogs and staffing shortages due to SIP orders and others operating more normally. It is therefore crucial for applicants to check local planning websites and reach out to planning staff early in the due diligence and application process to determine how to efficiently navigate the entitlement process in each locality. It is worthwhile here to point out that despite an earlier request by the California League of Cities for the Governor to relax statutory deadlines under the Permit Streamlining Act, at this time, these deadlines remain in place and are enforceable.

In addition to the above considerations, another concern for developers is the potential expiration of building permits and entitlements during SIP orders. Pursuant to legislation enacted in 2018 (AB 2913), building permits issued by local agencies generally require construction to commence within one year of issuance or they will expire. Local jurisdictions also typically require building permits to be issued or construction to commence on entitlement approvals within six months to one year of approval of said entitlements. For those projects that had not commenced construction or obtained building permit before SIP orders were issued, developers may be concerned by the potential expiration of building permits or entitlements if construction activities are constrained.

On a positive note, many jurisdictions have now adopted emergency orders and ordinances that automatically toll the expiration of building permits and entitlements for a limited time. For example, some jurisdictions have issued policies stating they will not expire any permits for the remainder of 2020, while others have announced tolling periods tied to the period of time that construction is halted pursuant to an applicable SIP Order. Developers and applicants concerned that their building permits or entitlements may expire should check their relevant jurisdictions' websites and contact building and planning staff to ensure they avail themselves of any available COVID-19 related extensions.

Remote Public Hearings

A majority of land use approvals for new developments must be made at a public meeting before the Planning Commission, or in the case of General Plan Amendments, zoning code amendments, or appeals of Planning Commission decisions, to the City Council or Board of Supervisors. In the early days of the pandemic most public agencies cancelled public meetings and delayed agenda items, including items related to processing of land use approvals.

Within a matter of weeks, however, many public agencies were able to transition to remote public meetings, authorized under state executive orders. Governor Newsom signed Executive Order N-29-20 on March 17 (amending, in part, the previous Executive Order N-25-20 issued on March 12), authorizing "a local legislative body or state body . . . to hold public meetings via teleconferencing and to make public meetings accessible telephonically or otherwise electronically to all members of the public," and expressly waiving "[a]ll requirements of the Bagley-Keene Act and the Brown Act expressly or impliedly requiring the physical presence of members, the clerk or other personnel of the body, or of the public as a condition of participation in or quorum for a public meeting." The Executive Order includes a list of requirements to ensure that the electronic or telephonic meeting is adequately accessible to the public and that it provides opportunity for public comment.

Unsurprisingly, public agencies have had to respond to a host of challenges. Many public agencies experienced what has been coined "Zoom bombing," where a hacker displays obscene or offensive imagery or words on the screen of a public meeting—causing some public agencies to cut off live public comments and instead require written comments be submitted and read by staff, something many members of the public dislike. Some public agencies are even considering hiring contractors to help facilitate public meetings and add security to avoid further Zoom-bombing incidents.

Public agencies have also had to address and respond to claims that administrative hearings held as part of a remote public meeting are not providing sufficient due process. The core elements of due process are the right to notice and an opportunity to be heard. While remote meetings may, in part, be more accessible to some, full participation in a remote meeting requires access to a device with internet, and an understanding of the software. Measures that public agencies can use, and are using, to address this include: posting of physical notices at City Hall or in the newspaper (for those who still use these methods to learn about public meetings) in addition to online posting of notices, providing online instructions for using the technology as well as contacts for technical support, and allowing members of the public to submit comments in advance to be read into the record by public agency staff at a minimum or in addition to allowing live public comments.

Statutes of Limitation for Land Use and CEQA Challenges

On April 6, 2020, the Judicial Council of California released Emergency Rules pertaining to civil and criminal proceedings. The initial version of these rules, under Emergency Rule 9, tolled the statute of limitations period in all civil cases for the period of April 6, 2020 until 90 days after the Governor's emergency order was lifted. Often state emergency orders can persist for years—such as previous emergency orders related to wildfires—thus, the tolling period created under the initial version of the rule was largely undetermined. The term "civil causes of action" applies to special proceedings such as mandamus actions under Code of Civil Procedure sections 1085, 1088.5, and 1094.5, and therefore applies to land use challenges and claims brought under the California Environmental Quality Act (CEQA). Land use and CEQA challenges involve short statutory periods of 30, 35, 90, and 180 days depending on the nature of the claim. As a result, the tolling period under the first iteration of Emergency Rule 9 presented unique burdens on public agencies and applicants, and specifically housing or other construction projects, significantly increasing litigation risk.

On May 29, 2020, the Judicial Council, responding to numerous letters seeking a reduction of the tolling period for writ of mandate cases, revised Emergency Rule 9. The rule now provides two tolling periods, separating cases with statutory periods of more than 180 days, from those with statutory periods of 180 days or less, and providing a date certain for the end of the tolling period for both categories. Under the revised rule, the tolling period for statutory periods of more than 180 days ends on October 1, 2020, and the tolling period for statutory periods of 180 days or less ends on August 3, 2020. As a result, the statutory period for any challenges to CEQA exemptions, negative declarations, mitigated negative declarations, and environmental impact reports, or land use challenges under Government Code section 65009(c)(1) that had not expired as of April 6, 2020, are tolled through August 3.

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