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Protecting your entitlements

In the current economy, countless developments in Colorado have been put on hold. This article highlights issues a developer should consider if it has been forced to cease activities at a project and discusses how the developer can ensure protection during the delay period of the entitlements and other rights it already has in place.

When a development is delayed after entitlements and building permits are obtained, but before construction begins, a developer should review the entitlement documents and building permits to determine if there are actions that must be completed within specified time periods. Depending on the local jurisdiction's laws, the entitlements obtained could expire or be revoked if the specified items are not completed by the designated deadlines. The developer should review any annexation agreements, subdivision plats, site development plans, subdivision improvement agreements, development agreements or construction plans approved by the jurisdiction, as well as grading and/or building permits applicable to the development, in order to determine each such action and the date, if any, for completion set forth in the documents.

The local jurisdiction's law also may specify deadlines. For example, the town of Parker municipal code mandates a subdivision plat must be recorded within 90 days after the Town Council's approval of such plat. In addition, the municipal code states any security, such as a letter of credit, required in conjunction with the plat



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must be submitted to the town within 90 days after the plat is approved by the Town Council. Under the municipal code, if these actions are not taken within these time frames the plat is null and

void. If this occurs, the developer must resubmit the plat and go through the approval process again. The town of Parker municipal code recently was amended to allow the planning director to grant an extension of up to one year to complete required actions if the developer shows good cause for the extension.

If a developer is unable to commence construction after obtaining entitlements, it also should determine if there are any obligations to complete improvements within specified time frames. Some type of financial security instrument usually is required after the entitlements are granted to ensure public improvements and erosion control within a development are finished in a timely manner. If the developer does not complete the improvements by the specified dates, the jurisdiction has the right to call upon the instrument and complete the work. The financial security rights and requirements may be statutory in nature or otherwise codified, and if so, the legal right to draw upon the security for fail-



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ure to complete these improvements will need to be amended. The amendment must become effective before the financial security expires in order to avoid a draw otherwise permitted by the delay.

If construction within a development is commenced, but is not completed, there are additional issues a developer may need to address, such as erosion control. Most jurisdictions require a developer to obtain a grading and erosion control permit as a condition precedent to approval of a project. The developer also must provide the local jurisdiction with financial security such as a letter of credit to ensure the requirements of the permit are met. If the developer does not take the actions required by the permit or the jurisdiction's regulations, then the jurisdiction may call on the letter of credit and perform the work. Alternatively, in order to prevent runoff from the site into the public storm sewer system, the jurisdiction may require the developer to complete erosion control measures after mass grading (such as seeding or installing silt fences) even if construction ceases due to developer financial constraints.

If a partially constructed development also includes

improvements that benefit the public, such as roads, landscaping along public rights of way, shared utilities or neighborhood parks, and the construction of these improvements will be delayed, the governing jurisdiction may be concerned about when and if these amenities will be completed. In addition, if the public amenity already is constructed and will be maintained by a homeowners' association or special district, the jurisdiction may be apprehensive about whether the association or special district will have sufficient funds for maintenance of these facilities. A developer should be ready to address these matters with the applicable governmental authorities.

The good news is that, despite all these issues, in this economic environment, many local jurisdictions are willing to work with developers to extend time frames to complete required actions and keep entitlements in place. Some jurisdictions are willing to amend their municipal code to allow planning directors to grant developers more time to proceed with the development and retain entitlements. Thus, when a developer realizes it will not be able to commence or complete a development or certain improvements within the time frames required, the developer should initiate discussions with the local jurisdiction to revise agreements and, if necessary, amend the jurisdiction's law to allow the entitlements and other rights to remain in place until the development can proceed.▲