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## Half-Built Buildings: Preserving Entitlements

By Bill Curran and Maren Parry

**D**uring the Las Vegas construction boom, far more development projects were proposed than could realistically be sustained, particularly in the face of the economic downturn. Now, owners of as many as two dozen multi-million dollar projects are faced with the grim reality that restarting a suspended or abandoned project can present greater legal challenges than starting a project from scratch. Although the cost of maintaining and investing in a non-performing asset will seem daunting, attention to the maintenance of the project's entitlements, to safety, and to its relationship to the community will prove invaluable when it comes time to move forward with restarting the project.

### Entitlements

Constructing a major new project typically requires the developer to go through an entitlement process in which a variety of government agencies review the proposed project according to applicable codes and policies, including master plan and zoning issues, utility commitments, and compliance with building and fire codes. Since entitlements are typically valid for a certain period of time, they will expire unless the project either reaches certain benchmarks or are granted extensions. When financial circumstances put a project on hold, great care must be taken to prevent the entitlements from lapsing.

The preservation of necessary entitlements can often be more difficult than the initial approval, but ensur-

ing their continuity is almost always more favorable than allowing them to expire. When applications for approvals are initially made, the required development reviews are based upon the codes and regulations in place at the time of application. If the approvals expire, the applicant may need to comply with new codes and regulations, and a change in the applicable codes may require changes to the project itself.

It is also important to recognize that many of the key approvals required for the construction of the project are discretionary. A project that had the support of the community leaders and the surrounding neighborhood when it was first proposed may not have that support years later when the project requires an extension or re-entitlement. For example, a project involving the construction of a casino in an undeveloped area may initially receive no community opposition and get a unanimous vote of approval for its land use applications. But, years later when the surrounding neighborhood has been developed with homes, schools, and churches, the project may attract widespread opposition. This can be true even though hundreds of millions of dollars have been spent prior to the suspension of the project. If approvals lapse, or if any special conditions of approval are not completed prior to the applicable deadlines, the government may be under no obligation to reinstate discretionary approvals, and leaders may be less inclined to support the project at all, or without substantial revisions that can greatly reduce the viability and profitability of the project.

Public perception and community support may be particularly difficult to address when approvals contain special conditions requiring off-site improvements or other amenities benefiting the surrounding neighborhood that have not been completed. Agreeing to such amenities may have



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seemed a small price to pay for community support when the economy was good, but when money becomes scarce it is difficult to allocate funding to non-revenue-generating improvements. If the cost of these amenities appears to be a deal breaker, special negotiations may need to take place to determine whether entitlements can be changed to keep the project viable.

## **Building permits**

Government agencies may also be subject to impediments that can limit their ability to reinstate (or extend significantly) approvals under the terms previously granted, especially in the case of building permits and utility commitments. Building permits carry separate expiration dates from zoning entitlements and typically require that certain construction and inspection thresholds be met in order to remain active. Failure to satisfy these progress thresholds can lead to a cancellation of the permits and create a need to go through the entire process of submitting plans and paying permitting fees.

In addition, building codes are regularly updated in order to keep pace with new developments in safety and efficiency. If the version of the International Building Code

used by the issuing building department has changed since the project was originally designed, plans may need to be updated to bring the development into compliance with the new code. Potentially more problematic, certain portions of the project that have already been constructed may require remediation to satisfy the updated requirements. While a certain amount of leeway may be available under waiver or hardship provisions, circumstances may exist where life safety requires that the updates be made, or state or federal standards may make some waivers difficult or impossible to obtain.

## **Utility connections**

Utility connection approvals obtained at the commencement of the project normally provide a guarantee that service will be available for a certain period of time. If that time runs out, service commitments can be withdrawn and may require significant effort and cost to re-establish. Changed conditions may also create significant burdens to replacing utility connections if the originally anticipated construction date passes and the project can no longer follow its construction plan. Capacity in the original connection points may have been exceeded by other development, or cost sharing for mutual improvements in public rights of way may no longer be available. A project without utilities is worthless, and selling the project or obtaining financing for completing construction will be difficult to promote if there is any risk that utilities may not be available.

## **Site security**

Keeping the site safe and secure will improve the prospects of the project's ultimate success. It is important to prevent conditions that could constitute an attractive nuisance or create liability for injury and to keep the property clean and free from disrepair or vandalism that could result in nuisance citations or liens. Dangerous or unsightly site conditions are also likely to create a disincentive among neighborhood and government officials charged with reviewing and approving entitlements. It is also important to confirm that appropriate maintenance to the existing improvements is performed regularly. Records of this maintenance will be invaluable when it comes time to re-commission the project and prove to the building department that the portion of the project that has already been constructed remains safe. If any machinery or equipment is left on the property, care must be given to its safekeeping.

## **Communication**

Periodic communication with project partners and regulatory entities is critical to maintaining control during times of uncertainty. According to Ron Lynn, Building

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Official and Director of the Building Department in Clark County, regular consultation with the various departments charged with the oversight of construction projects can help prevent unpleasant surprises: "With a little notice and forethought, we can usually develop a joint course of action rather than having either party feel as though the other just threw a wrench in what seemed to be a good plan," Lynn said.

### What happens next?

Maintaining close contact with regulators is important in preventing surprises and keeping project owners informed about creative solutions that could make or break a project. In 2009, the Nevada Legislature extended the approval periods for tentative and final maps to four and two years, respectively, as a way of helping developers weather the down economy. Just recently Pennsylvania enacted legislation known as the Permit Extension Act to provide relief to owners and developers whose projects are currently stalled. The Act extends development approvals and permits that would have otherwise expired to July 1, 2013. Whether the Nevada Legislature would be receptive to taking similar action will depend on the degree of support expressed by developers and regulating authorities throughout the state. Maintaining good relations with governmental authori-

ties is particularly important to preserving entitlements on troubled projects.

Suspending construction can create wide-ranging problems. The most obvious and immediate relate to contractual issues with lenders, contractors and suppliers, but the long-term problems associated with preserving entitlements cannot be overlooked. Owners, developers, lenders, and lien-holders all have an interest in avoiding the waste that can occur if the project entitlements are not carefully tended to and preserved.

Attorneys must be vigilant to protect their clients' interests during a time when many are content to simply wait for the economy to improve with the hope that abandoned projects can be restarted without consequence. The cost of inattention to such issues can range from total extinguishment of development rights to expensive and difficult modifications of existing construction to comply with new building codes. □

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