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Saving Entitlements When Projects Stall **Developers look for strategies to keep hard-won approvals alive**

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Entitlements are the keys to the kingdom for developers.

This holds true even in a market like now, when vacancies in numerous areas tick up and rents tick down as tenants sit on the sidelines, wary of recession. Still, many clients continue to forge ahead through the development approval process, according to attorneys who specialize in land use and entitlements.

John Condas, a partner in **Allen Matkins Leck Gamble Mallory & Natsis LLP**, said he still has clients who are actively seeking entitlements, although there's not much demand today for what they're getting entitled. Even in a down market, he said, clients recognize the value of obtaining entitlements - and the extensive timeframe it takes to obtain them.

"They're not putting the pedal to the metal, but they are processing entitlements so that they'll be ready when the market returns," Condas said.

But today, demand is soft pretty much all over. So for now, the issue for developers is preserving entitlements that are in danger of expiring before the projects could get built.

John Erskine, a partner in the Irvine office of **Nossaman LLP**, said many of his clients now are focused on maintaining their hard-won entitlements, given the downturn in the market.

"If you have a property that you own free and clear, or a client has patient capital," Erskine said, "it's always a better approach to try to preserve the entitlements on a given piece of land than to have to come back through the entitlement process in a couple of years."

Condas agreed.

"Obviously, given the way the market is today, it benefits developers to keep those entitlements alive, and there's a lot of mechanisms to do that," he said.

For example, California's Subdivision Map Act contains a section that allows cities to approve discretionary extensions of up to six years on tentative maps. Cities give these extensions out in one-year increments, he said.

Earlier this year, state lawmakers gave builders some additional help as part of a housing recovery program sponsored by the **California Building Industry Association**. In July, the Legislature adopted Senate Bill 1185, which amended the Subdivision Map Act to extend all tentative maps or vesting tentative maps for an additional one-year period, as long as they were in effect as of the bill's effective date.

SB1185 allows for automatic one-year extensions of any approved tenant map, Erskine noted. In addition, any legislative, administrative or other regulatory approvals also are extended for 12 months.

"That's important, because you have more entitlement concerns than just your subdivision map," he said. "A developer also has to be concerned about other regulatory approvals. For example, you may have state requirements for the Endangered Species Act, incidental taking permits or regional water board 401 certificates."

These now are also extended for 12 months.

Condas called this a good starting point. He said cities want to help developers keep entitlements alive.

"Cities these days are a little more sympathetic to such extension requests," he said, "because of the fact that they're hurting, as well. They know the developers are hurting."

Another helpful new law is Assembly Bill 2604, which allows local jurisdictions to defer the collection of impact fees until the close of escrow of a home sale. This can make a huge difference to the developers of new home subdivisions, who might otherwise be required to pay fees at the time they pull building permits.

Erskine said clients are looking at fee deferrals, either through associations like the BIA, local homebuilder associations or by working directly with the local jurisdictions.

"These fee deferrals have been expressly authorized and encouraged by the passage of AB2604," he said. "This provision can enable developers to be able to afford to start the project, rather than put the project on hold."

Reexamine Existing Agreements

Another strategy for developers is to try and cut a deal on developer exactions. According to Condas, some developers got entitlements during the boom years and didn't spend a lot of time contesting these costly conditions of approval. Now, clients are going back to the jurisdiction and attempting to renegotiate some of them.

For example, he's representing one builder who is trying to get a reduction in its development agreement fee. Other clients are attempting to renegotiate their infrastructure requirements - not necessarily trying to get out of building infrastructure, Condas said, but trying to extend the timeframe for when the infrastructure has to be installed.

Public facilities, or even things like roads and sewers, are good examples. Those requirements were imposed based on the expectation of a lot of new development, which hasn't materialized because of the market decline.

Condas said that on some projects he has entitled, the high cost of exactions has left clients believing their land is "pretty much worth zero" or even has a negative value now, given the current real estate economy

Besides development agreements, Erskine said his firm also is recommending that clients look at land financing agreements or infrastructure agreements such as owner participation agreements and disposition and development agreements, with an eye toward extension or modification.

"Those types of agreements can provide for certain fees to be paid and certain project milestones to occur," he said. "

In many cases, cities are open to these types of renegotiations, because they understand the tough spot that the current market downturn has put property owners and developers in, particularly on large-scale projects.

"There may be a quid pro quo with the city," Erskine said. "The city may want to exact something in exchange for modification or extension of these agreements."

Right now, the Southern California landscape is dotted with planned projects that have entitlements in place, but the market is not ripe for them to begin construction. **First Industrial Realty Trust**, a Chicago-based real estate investment trust, has development approvals for several projects in Moreno Valley, including Indian Business Park, which is entitled for up to 1.5 million square feet, and First Park Nandina I and II, entitled for up to 769,000 square feet.

But the company won't be launching construction any time soon, according to Matt Enghard, regional development officer in First Industrial's Irvine office.

"We're kind of in the same boat everyone else is," Enghard said. "If we secure a build-to-suit, we'll build them. But speculative development today just really doesn't make sense."

He said the company has been working closely with Moreno Valley to communicate its situation. None of the entitlements will come due for another nine to 12 months, Enghard said, but when the time comes, First Industrial will work with the city to extend them.

Moreno Valley has a housing-to-jobs imbalance, he noted, so it has been very understanding with regard to the entitlement situation.

"The key is really establishing a relationship with the jurisdiction, showing the benefits of our project as a job generator and proving to them the importance of maintaining those entitlements," Enghard said.

Partner with the City

Developers also can find a sympathetic ear in Anaheim. Planning Director Sheri Vander Dussen said construction is down "dramatically" in the city with few large projects going through the permit stage right now. She said Anaheim has quite a few projects that are entitled but not being actively advanced by the developer.

"Anything in the Platinum Triangle that hadn't been under construction before the whole meltdown happened is not moving ahead," Vander Dussen said.

As of Nov. 13, the Platinum Triangle - a former industrial area of the city that was rezoned several years ago to allow residential and mixed-use development - alone had 6,450 residential units, 413,871 square feet of commercial space and 899,419 square feet of office space that was approved but not under construction. Meanwhile, as of that date the area had 1,530 residential units, 13,739 square feet of commercial space and zero office space under construction.

In fact, Vander Dussen said the City Council in mid-November was scheduled to discuss extending the development agreements for **Lennar's** two projects in the Platinum Triangle, A-Town Metro and A-Town Stadium. She said the planning commission would recommend granting the extensions and that the City Council was expected to approve them.

Besides the Lennar projects, other projects that are not making much progress include the Platinum Tower, an office tower on Orangewood Avenue, and Experience at Gene Autry Way, a mixed-use project located between the two Lennar projects.

On the other hand, Disney is moving ahead with its revamping of California Adventure, as were a new Kaiser medical center and **Panattoni's** redevelopment of a former Boeing site.

"So, we still have some major projects moving ahead," Vander Dussen said, "but none of them are residential."

Likewise, construction activity has "tailed off" in the city of Irvine, according to Tim Gehrich, manager of planning and development services.

"We just haven't had a lot of new code compliance activity, which is new building permit submittals," Gehrich said. "I think that's pretty consistent with what others have been seeing throughout the region."

He said the city does work with developers to ensure that entitlements don't expire while the market languishes. For example, master plans and conditional use permits are viable for three years, and developers can request in writing for a three-year extension. At the same time, he said developers continue to seek new entitlements, knowing it will take a period of time for them to get through that process and to prepare for construction.

"They recognize that if your conditional use permits and master plans are valid for a three-year period, that certainly gives them a window of time for the economy to catch up," Gehrich said.

In his practice, Erskine also is seeing the trend for developers to process new entitlements.

"I've actually got a couple of projects that are starting as we speak, with the view that they're going to complete the process around the time we start to see some recovery in the market," he said.

Admittedly, he sees more of this in the closer-in locations, such as certain parts of Orange County, than in outlying regions like the Inland Empire where there is less demand right now, and for mixed-use projects that are part residential and part commercial retail.

Besides preserving entitlements, there's also quite a bit of interest in modifying entitlements. Erskine said many of his clients are contemplating modifications of the product mix. It takes a nimble and forward-thinking property owner to respond to a slowing or changing market, he added.

A Wise Approach

Entitlements do add value to the land, even if the developer ultimately decides to build something less intensive.

Indeed, Condas is aware of a couple of builders who are trying to decrease the size of their homes, not to increase the overall density but to make the homes more affordable and therefore easier to sell. Depending on jurisdiction, this could necessitate revisiting the approval entitlement process.

Getting new entitlements, depending on how controversial or complicated the project is, can take several years and is such an expensive proposition, Condas noted, that it's worth it to work with the city to keep existing entitlements alive and reduce or backload some of the costlier conditions of approval.

"It's much easier to modify existing entitlements, especially if the modified project has less of an impact from an environmental standpoint," he said.

Erskine said that in general, cities are receptive to this as long as the proper amendment process is followed, although doing so may involve a fairly complex procedure. For example, depending on the jurisdiction or the type of agreement, the parties may need to reopen the CEQA process. But this may only require a mitigated negative declaration or even a negative declaration, as opposed to a full environmental impact report

However, any attempts to promote a general plan change or zoning amendment that radically changes the land use would need to take the compatibility of existing uses into account, he added.

"I think in many cases, the focus on extending the life of subdivision maps and deferring decisions on land-use changes is going to be the wiser approach," he said, "because nobody quite knows how long this current downturn is going to last."

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