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Vesting offers a sense of security in challenging times

If you think back to the early days of the 2020 pandemic, which was only three months ago (although it may feel like three years), you likely will remember the barren shelves at King Soopers, lines stretching entirely around Costco on a Saturday morning at 8:30 a.m. and, generally, the insane and insatiable demand for toilet paper. My personal conclusion on the cause for the run on toilet paper was as follows: Toilet paper is not necessarily hard to pursue, and although it may be difficult to get, if you are successful in getting it, it's extremely comforting.

For whatever reason, I saw an analogy in the commercial real estate world. With ongoing uncertainty, potential instability and (given the Great Shutdown) lack of mobility, what was out there for real estate developers to try to obtain and latch on to, that could bring peace of mind and the sense of security, akin to finding a 12-pack of Charmin sitting on a shelf at your local Target? The answer – vesting.

■ **Why vesting should be your favorite paper product.** Vesting can occur under common law and the Colorado Vested Property Rights Act. C.R.S. § 24-68-101, et seq. We'll focus on the Colorado statute. Vesting provides real estate projects that have an approved "site-specific development plan" (more on this below) with a time frame during which the projects' approvals cannot be overturned or modified (except under certain circumstances as specified in the vesting statute, one of which is the payment of just compensation for all costs, expenses and liabilities incurred by a landowner after receiving approval by the gov-



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ernmental entity), and provides developers with confidence that they can continue to invest time and money in entitling and designing their projects while significantly mitigating the risk that their approvals will disappear. To cite the Colorado statute, vesting of a property right "precludes any zoning or land use action by a local government ... which would alter, impair, prevent, diminish, impose a moratorium on development, or otherwise delay the development or use of the property as set forth in a site-specific development plan." C.R.S. 24-68-105(1).

In other words, vesting provides security that a governmental entity will not change a property right for a project. The owner of a vested project does not have to worry unnecessarily, for example, that the local municipality will rezone the owner's residential subdivision for industrial use during the vesting period.

■ **How long is the vesting period?** Under the law, once the appropriate authorities approve a site-specific development plan for a project, the project owner has the right to develop the property under the terms and conditions of the site-specific development plan (and any subsequent amendments) for a period of three years. I know what you're thinking: In the current economic climate, and with health experts speculating that COVID-19 could stay around for another 12 to 18 months

(or resurge during that period), three years may not sound like enough time to ride out this pandemic and recession, and then get back on your feet. Fortunately, in the course of obtaining your approval, you can negotiate with your governmental entity and contract for a longer vesting period than the statutory three-year period, "where warranted in light of all relevant circumstances." C.R.S. 24-68-104(2). Relevant circumstances include the estimated time required to complete design, and "the size and phasing of the development, economic cycles and market conditions." C.R.S. 24-68-104(2). Not to be glib, but commencing a historic economic downturn and experiencing record unemployment, virtually overnight, certainly falls under the category of "relevant circumstances." Taking all of this into account, a prudent project owner operating in this climate will pursue a vesting period longer than three years.

■ **Can you wipe away any confusion as to the definition of a site-specific development plan?** It's important to break down the term "site-specific development plan" into its technical meaning. A "site-specific development plan" is defined in the statute as "a plan that has been submitted to a local government by a landowner ... describing with reasonable certainty the type and intensity of use for a specific parcel or parcels of property." C.R.S. 24-68-102(4)(a). However, each local government (e.g., any county, city, town or agency with final approval authority), through adoption by ordinance or resolution, is required under the statute to determine what form the site-specific development plan

must take in order to vest property rights. C.R.S. 24-68-103(1)(a). Each local government will have a broad range of submissions from which it can select under the statute (e.g., any plan, plat, drawing or sketch that is substantially similar to a "planned unit development plan, a subdivision plat, a specially planned area, a planned building group, a general submission plan, a preliminary or general development plan, a conditional or special use plan, a development agreement, or any other land use approval designation" as the local government may use). C.R.S. 24-68-102(4). Some municipal or county codes may in fact just mimic the vesting statute and provide the same list. It's essential that you review your local land use code and consult with local government planners to identify the specific submittal required that qualifies as the site-specific development plan for which you'll need approval in order to obtain vesting. It's also important to note that project owners have the right to enter into agreements with their local government entities that identify a specific submittal requirement that will constitute the site-specific development plan for a specific project (e.g., a submittal that is otherwise acceptable under the statute but not listed in the local code).

Strategically speaking, pursuing such an agreement at the outset of a project will provide specificity and certainty as to what approvals are required for vesting. It also may be possible to negotiate a vesting agreement that extends the vesting period beyond the statutory three years or extends the vesting period if certain development milestones are

accomplished. This also can be advantageous where the local government has not passed any ordinance or resolution identifying or defining a site-specific development plan.

■ **Help! My vesting period is almost up – what can I do?** If you're approaching the third anniversary of your site-specific development plan approval or the end of your longer negotiated vesting period (your last roll, so to speak), the local approving authority can contract with you to extend the applicable vesting period where, as mentioned above, such extension is "warranted in light of all relevant circumstances." C.R.S. 24-68-104(2).

■ **Take stock.** Make sure to review your ongoing development projects to determine if a governmental entity has approved vested rights that are applicable to a site-specific development plan for your project and, if so, determine the end of your vesting period. If that date is approaching, pursue a development agreement or an amendment to an existing vesting agreement with your governmental entity to extend your vesting period. If your project is at its inception, or has not progressed to submission of an application for approval of a site-specific development plan, it is critical to review any vesting requirements set forth in the local land use code and start negotiations with your local government with the goal of entering into an agreement with a long vesting period and a site-specific development plan that is attainable under the circumstances. That way, you're covering your behind.

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