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Building during a pandemic and the potential pitfalls - by Ronald Ciotti & Lindsey Peterson

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As a result of the COVID-19 pandemic, commercial real estate owners nationwide have been impacted in numerous ways, including pandemic-related governmental orders and guidelines, safety standards, construction contract issues, delays, and work stoppage. Owners building during a pandemic may be able to find bargains, but should properly contract to avoid the following potential impacts on their projects:

Governmental Orders and Guidelines: Owners must identify any local, state or federal orders that may affect construction as well as safety protocols on their projects. These legislative directives have been issued as orders and guidelines. Although it may be difficult to determine if a local or state order takes precedence, owners should err on the side of caution and require that representatives and contractors adhere to the most rigid interpretation of the orders to avoid liability. However, in doing so, owners must understand the potential delays that may be associated with adherence to such requirements.

Material Price Escalation: Given the uncertainty in the global economy due to COVID-19, material price volatility remains high. Owners should ensure that their construction contracts contain a proper material price escalation clause which either shifts or fairly shares the risk of material price escalation (especially relating to critical or widely used project materials). Owners should also discuss with their architects and designers the choice of project materials and the supply location for such materials to minimize the risk of impact from potential border quarantines and other supply

chain interruptions.

COVID-19 Riders: Owners should utilize COVID-19 specific terms and riders in all construction contracts to avoid disputes over pandemic-related costs and delays. To avoid these costly disputes, owners should negotiate terms relating to potential COVID-19 related impacts caused by: (1) material or equipment supply chain disruptions; (2) illness and related costs; (3) labor shortages (due to actions by unions, labor force reductions required by CDC or OSHA mandates, or governmental order) and the potential associated increase in labor costs; (4) government orders, shelter-in-place orders, closures, changes in the law, or other directives or restrictions that impact the work or the project site; or (5) fulfillment of constructor's contractual obligations regarding safety specific to COVID-19.

Work Stoppage: Initially, several states and cities responded to the COVID-19 pandemic by issuing government orders stopping work on certain construction projects. However, despite states lifting such orders, other guidelines have continued to impact the progress of construction projects and project finances. Moreover, based on the fluctuating numbers of COVID-19 cases, it is still unknown as to whether there will be future stop work orders or shelter-in-place orders issued. Owners should review their contracts for suspension of work clauses or other terms that may provide some recourse and limit the financial impact of work stoppages.

In these uncertain times, commercial real estate owners must address these potential impacts at the outset of construction to protect their legal interests. Owners navigating these intricate and construction-specific issues must first understand their options and any potential costs or consequences. Owners building during a pandemic should work with an attorney specializing in construction to ensure they are doing all they can to avoid liability, disputes, and maintain project schedules and budgets.

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