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Considerations for addition of drive-thrus and contactless pick-up - by Leah Rubega & William Squires

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While drive-thrus and express or pick-up parking spaces for retail, grocery, restaurant and other uses have already been expanding, the COVID-19 pandemic has exponentially increased the demand for both drive-thrus and pick-up spaces. There has been, and will be for the foreseeable future, a large shift of customers wanting to remain in their vehicles when picking up goods rather than going into the store, and as a result, more and more businesses are likely to push for including drive-thrus and pick-up spaces and areas as part of their operation.

Unfortunately, drive-thrus are frequently disfavored in towns, and are either prohibited entirely, or are limited to specific zoning districts. In some instances, the property is located in a zoning district that prohibits a drive-thru, and therefore, a variance will be necessary to allow a drive-thru use. However, use variances (as opposed to dimensional variances) are generally disfavored, and some municipal regulations explicitly prohibit use variances. In other cases, a drive-thru use may be considered an accessory use to specific primary uses, and such accessory use may be permitted only by obtaining a special permit. The standards for the applicable board to grant a variance or special use permit vary. However, given the impact of the pandemic, it is likely that municipalities will be forced to consider the benefits that drive-thrus promote for public health, safety and welfare going forward and with a well-crafted application and approach, may be more inclined to permit drive-thrus. The incorporation of a drive-thru at a property may also impact traffic or result in the elimination of parking spaces or landscaping which could trigger other land use considerations.

Landlords should also carefully review how common areas are defined and treated in the leases, and determine if the tenants have exclusive rights to certain parking areas, or in the converse, whether any common areas are prohibited from being used or allocated to a particular tenant. Such considerations will impact where tenants may be permitted to have pick-up areas, and how and where a drive-thru and the drive-thru lanes may be configured for any particular tenant.

In light of the “new normal” and customers increasingly choosing contactless pick-up, it will be crucial for tenants and landlords to consider whether it is feasible for their business operation to add drive-thru or pick-up options, which will require a careful analysis of applicable municipal regulations and other restrictions or rules for the shopping center.

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