COVID-19 Update: Impacts on the Performance of Agreements - A Focus on Development Agreements

By Nicole Maynard and Jeneane Grundberg

COVID-19 may result in governmentally imposed restrictions on what kind of work can be performed or on trade, which may make it difficult for a developer to obtain the necessary supplies/materials needed to satisfy its obligations. There may also be a shortage of work force given the current quarantine and isolation requirements, as well as the actual illness impacting so many people. These results, as well as others not contemplated above, may impact the performance of all agreements – including development agreements.

A. Recommendations on Development Agreement Enforcement During the Pandemic

A municipality should take various steps to protect the interests of both the municipality and its ratepayers with respect to ongoing development agreements:

a. **Inventory** – Pull copies of the development agreements and complete an inventory. Confirm outstanding obligations (past deadlines) and upcoming deadlines. Incorporate and maintain a scheduling or calendar program accessible to various team members.

b. **Caveat** – consider caveating any development agreement against the certificate of title as this may assist in enforcement (*Municipal Government Act*, ss. 650 and 655).

c. **Inspection** – perform inspections of the various projects in accordance with municipal policy (as possible in light of the guidelines respecting the public health emergency issued by the Province).

As with any inspections, we recommend preparing an inspection report including: (i) the name and position of the inspector and any other persons present at the time of the inspection; (ii) the date, time and place(s) of inspection; (iii) a written summary of any statements or comments made by the owner, Developer and/or occupier of the lands; and (iv) specific details related to the condition of the lands, the nature of the development and any other unauthorized uses.

d. **Check Security** – Confirm the status of security. Ensure that any letters of credit held by the municipality remain in effect and cover the cost of remedying any deficiencies. In the event the municipality does not have sufficient security upon review, consider issuance of a request for an increase in security if the terms of the Development Agreement allow for such a request.

e. **Amending Agreements** – In the event extensions or other changes to the Development Agreement are requested and agreed to, document them in an amending agreement. Note that extensions may be required due to realities arising from legal principles of *force majeure* (discussed below).

f. **Construction Completion** – Do not issue construction completion certificates or final acceptance certificates or release any security without following the steps required in the Development Agreement. Most Development Agreements require the Developer's engineer to certify a request for issuance of a construction completion certificate or final acceptance certificate. As a result of the current pandemic, there may be delays in completing inspections

or getting certain information. Do not issue construction completion certificates or final acceptance certificates or release any security without following the procedure established by the Development Agreement simply because of the current conditions.

g. **Back Up** – during the time of the pandemic, anticipate that some municipal staff will be unable to perform their regular duties (due to illness or family requirements). Build in back up (tracking deadlines, doing inspections, issuing stop orders or notices of default etc.). Ensure that these checks and balances are in place before a staff member becomes unavailable.

h. **Promptly Enforce Where Appropriate** – act on defaults quickly through issuance of a Notice of Default under the Development Agreement and a s. 645 Stop Order under the *Municipal Government Act* (where appropriate). Delay in taking enforcement steps can prejudice a municipality's ability to enforce:

i. the expiration of limitation periods may prevent municipalities from relying on certain enforcement tools such as commencing a statement of claim through the Courts;

ii. a Developer's assets may continue to deplete, leaving fewer assets available for a municipality to enforce against;

iii. partially complete municipal improvements may begin to degrade if left incomplete and unmaintained, exacerbating both the extent of the deficiencies and cost of completion.

i. **Challenges with Delays** – If a municipality delays in commencing enforcement action, a Developer may become insolvent, in which case various processes may be triggered: the Developer's bank may pursue foreclosure; the Developer may go into receivership with a court appointing a receiver to manage the Developer's affairs; or the Developer may go into bankruptcy with a trustee in bankruptcy taking over management of the Developer's affairs. On occasion, these insolvency processes may be advantageous as they may result in a new developer that is better able to complete the development to purchase the development. However, there are numerous possible disadvantages to municipalities, for instance:

i. the insolvency process is often very expensive and may result in significant delays;

ii. a municipality may be forced to deal with competing claims by other creditors against the Developer's assets. The receiver or trustee often does not treat the municipality's interests as importantly as the municipality would like;

iii. insolvency proceedings typically give rise to a 'stay of proceedings' which may impact a municipality's ability to commence enforcement steps such as issuing a notice of default or a stop order; and

iv. an insolvency process may be generally disadvantageous for municipalities in that a municipality will have very little control over many aspects of the process and the municipality's interests will not necessarily outweigh other issues that a court will be forced to consider throughout the insolvency process.

j. In relation to future subdivisions, consider granting approvals to discreet areas. For example, rather than approving a 200 lot subdivision, consider granting approval for 40 lots. Alternately, subdivision approval can be granted in a manner that contemplates phasing - for example, 40 lots could be subject to the first phase of a multi-phase

development agreement. A smaller number of lots will require lower infrastructure costs, which in turn will help ensure appropriate security can be taken by the municipality, without pressure from the Developer that the percentage security required should be reduced.

B. L**ooking at Remedies in the Development Agreement**

Natural Remedies within the Agreement

When issues with respect to performance arise, it is worthwhile to start with a review of the agreement to determine exactly what is required as well as what the agreement allows for in the event there are concerns about performance. For example, there may be specific remedies included in the agreement such as mutual termination or the ability to extend timelines to complete certain obligations. A municipality and a developer can work together to examine and utilize any available remedies in an effort to avoid triggering default provisions with the ultimate goal of furthering the agreement.

Force Majeure

In the event the natural remedies set out in the agreement do not seem appropriate or sufficient in a given situation, *force majeure* clauses may be of assistance.

In order for *force majeure* clauses to be helpful, the clauses must first be included in an agreement. Sometimes, an agreement is silent with respect to *force majeure* simply because it is not a requirement that this language be included in an agreement.

Force majeure clauses are intended to provide relief to a party if its performance is prevented or delayed due to events beyond its control. If a *force majeure* clause is triggered, a party is protected from being considered in default of its obligations. A *force majeure* clause may afford relief in the form of additional time to perform an obligation; it may terminate a specific obligation (if it would be practical to do so); or it may even terminate the agreement. It entirely depends on the specific wording of the clause within the agreement.

A *force majeure* clause may include conditions a party must first meet in order to be able to trigger the clause and benefit from whatever remedies may be contemplated therein. For instance, one party may have to provide notice to the other party within a certain amount of time after the event has occurred. Further, a party may have to exercise reasonable efforts in figuring out a way to meet the obligation notwithstanding the occurrence of the event. For example, if all or a majority of a developer's work force falls ill, a municipality could expect the developer to exercise reasonable efforts to obtain other work force rather than just simply throwing in the towel and claiming that it's been rendered totally unable to meet its obligations (assuming the requirement to make reasonable efforts is included in the *force majeure* clause in the first instance).

In the event the parties agree that it would be appropriate to utilize a *force majeure* clause, it is likely that the obligations within the agreement will be adjusted. For example, if a developer has had to obtain new work force, it may be reasonable to extend any related timelines the developer was originally required to meet to allow for and accommodate these efforts.

We strongly suggest that any adjustments to obligations in a development agreement are explicitly set out in a formal amending agreement. We do not recommend informally agreeing to any diversion from the terms of a development agreement. It is important that any changes with respect to the expectations, rights, and responsibilities of each party are clearly delineated in a binding agreement so there is no confusion or lack of clarity in the future when things eventually settle down.

In instances where a developer is not able to perform its obligations pursuant to the terms of the agreement, ideally the parties can come to a resolution through the natural remedies or a *force majeure* clause.

Frustration of Contract

As a last resort, the concept of frustration of contract is available.

Frustration of contract results in the legal termination of an agreement. It is very rarely relied upon. The concept is a blunt and inflexible approach which automatically ends an agreement discharging the parties from further responsibility and liability. Frustration applies to any agreement. Unlike *force majeure* clauses, frustration does not have to be explicitly referenced in an agreement in order for it to be an available remedy. While frustration can be mutually agreed upon between the parties to an agreement, a court order is usually required because whether or not the agreement has truly been frustrated is often disputed.

The termination of an agreement may result in financial implications and responsibilities of each party. *The Frustrated Contracts Act* addressed this with the intention being to ensure that no one party bears the full burden of a frustrated agreement.

No "One Size Fits All Approach"

Unfortunately, there is no "one size fits all" approach. Each and every agreement as well as the specific facts surrounding the situation will require careful review and consideration. There are different approaches and avenues available in the event the performance of an agreement is interrupted. We are here to assist you in determining what approach is most appropriate in your circumstances.

Questions?

Should you have any questions with respect to this bulletin, or if you would like more detailed information, please contact the following members of the Brownlee LLP Municipal Team:

780-497-4812
jgrundberg@brownleelaw.com

403-260-5315
nmaynard@brownleelaw.com