August 6, 1987

REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL
VESTING TENTATIVE MAPS

BACKGROUND

At the conclusion of the July 21 Council hearing on the Interim Development Ordinance (IDO), you asked a series of questions concerning the effect of California Government Code sections on the subject of so-called "vesting tentative maps." This report addresses the law of vesting tentative maps and its effect on the IDO. It also addresses the apparent confusion in use of the terms, "vesting" (as in "vesting tentative map") and "vested" (as in "vested right").

"VESTING" VS. "VESTED"

The second subject, "vesting" vs. "vested" will be addressed first because it is relatively simple and can be placed at final rest with minimal intellectual effort. A "vesting tentative map" merely confers a "vested right." Section 66498.1 of the Government Code provides, among other things:

> When a local agency approves or conditionally approves a vesting tentative map, that approval shall confer a vested right to proceed with the development in substantial compliance with the ordinances, policies, and standards in effect at the time the vesting tentative map is approved or conditionally approved.
>
> Cal. Gov. Code, . 66498.1, subdiv. (b) emphasis added.

It should be apparent from the foregoing statutory language that the Legislature used the term "vesting," instead of "vested," to describe, in relatively plain English, the effect of the approval of the map in "vesting" the rights which become subsequently "vested" on the approval.

LEGAL HISTORY OF VESTING MAP LEGISLATION

Turning to the more difficult questions of what rights are vested and what their effects are in terms of the regulations the IDO seeks to impose, it is necessary to look at the legal history behind the statutory scheme on the subject as adopted in 1984 and amended in 1986. Historically, California courts have considered a developer's rights to vest only when the developer has (1)

obtained a building permit and (2) incurred substantial expense in pursuing the project. The leading California case on vested rights is Avco Community Developers, Inc. v. South Coast Regional Coastal Commission, 17 Cal.3d 785 (1976), app. dism. 429 U.S. 1083 (1977). In Avco, a developer sought an exemption from the former Coastal Zone Conservation Act (Cal. Pub. Res. Code, . 27000 et seq., now California Coastal Act of 1976, Cal. Pub. Res. Code, . 30000 et seq.) on grounds of equitable estoppel, since it had made significant progress in construction and incurred expenses in excess of $2 million. The court rejected the developer's argument and held that, absent a building permit, the developer had proceeded at its own risk and had no vested right.

Rigid application of the Avco rule was reinforced in Oceanic California, Inc. v. North Central Coastal Regional Commission, 63 Cal.App.3d 57 (1976), app. dism. 431 U.S. 951 (1977). There, the developer received extensive discretionary approvals of various uses and plans. It spent $26.9 million in "direct project expenditures" of which $9.2 million represented "hard development costs." It dedicated 120 acres for use as a county regional park. On that basis, the developer argued that the issuance of a building permit was a ministerial act and therefore that its right to proceed with development had vested. Notwithstanding the strong equitable arguments in the developer's favor, the court followed Avco and concluded that a final approved building permit was necessary for the developer to have obtained a vested right to proceed with development.

Perhaps the most extreme case dealing with the concept of vested rights is Pardee Construction Co. v. City of Camarillo, 37 Cal.3d 465 (1984). In Pardee, a developer had obtained a vested right by a consent decree, judicially approved on stipulation (agreement) by both the developer and the city. The voters then adopted a growth control ordinance which limited the number of residential units that could be built during a given year. After focusing on the language in the decree itself, the court concluded that the growth control ordinance did not violate the developer's vested right to complete development, but rather affected only the timing of that completion.

Interestingly, Justice Mosk, who wrote the majority opinion in Avco, dissented in Pardee, noting that the court had virtually emasculated the concept of vested rights. So the question remained, propounded anew by one of our most liberal Supreme Court justices, joined in his dissent by another, Chief Justice Bird, whether it is fair to permit a private landowner to proceed through a labyrinth of regulations, only to have his project eventually frustrated by new rules which effectively contradict

the permission given before the expense was incurred.

LEGISLATIVE HISTORY

On September 13, 1984, the Governor approved the Legislature's adoption of Senate Bill 1660 (Montoya), Stats. 1984, c. 1113, which added the concept of the vesting tentative map to the Subdivision Map Act, Cal. Gov. Code, .. 66410-66499.37. It is clear from its legislative history that the new vesting tentative map legislation was adopted in response to the Avco rule and was intended to cause the "right to build" to vest at an earlier point in time than recognized by the courts.

In the summary on SB 1660 prepared for the Senate Democratic Caucus for the June 7, 1984 third Senate reading of the bill, after a brief recapitulation of the Avco decision, one finds the following words:

> This bill establishes a new standard for determining the time at which a private property owner's right is vested to complete the development of a project without subsequent governmentally imposed conditions or changes emphasis added.

The summary's author concludes that those in favor of SB 1660 "argue that this bill will help reduce the costs of land development and therefore reduce the cost of housing," while its opponents "argue that this bill would interfere with the ability of governmental entities to enforce new regulations concerning land use once initial approval in the development process has been granted."

A review of correspondence sent legislators by proponents and opponents of the bill confirms the content of the pro and con arguments as stated in the summary. It is abundantly clear that SB 1660 was supported by the construction and development industry and opposed by environmentalists and local government. The developers prevailed, although an August 16, 1984 legislative analysis gave lip service to the concept that the bill's final version was a compromise.

THE LEGISLATION AS AMENDED

The core of the vesting tentative map legislation, as adopted in 1984, is found in subdivision (b) of California Government Code, Section 66498.1, which is set forth in full at p. 1, above. For ease of reference it is repeated here:

> When a local agency approves or conditionally approves a vesting tentative map, that approval shall confer a vested right to proceed with the development in substantial compliance with the ordinances, policies, and

> standards in effect at the time the vesting tentative map is approved or conditionally approved.

A vesting tentative map is a tentative map (as described in Government Code, Section 66424.5, subdivision (a)) on the face of which, at the developer's option (see Section 66498.5), is printed conspicuously: "Vesting Tentative Map ." Cal. Gov. Code, .. 66424.5, subdiv. (b); 66452. Once approved, as indicated by Section 66498.1, the vesting tentative map entitles its holder to proceed with development so long as it is accomplished in accordance with the regulations ("ordinances, policies, and standards") in effect at the time of application for approval. Cal. Gov. Code, . 66474.2.

Last year, the Legislature added (Stats. 1986, c. 613) subdivision (e) to Section 66498.1:

> Consistent with subdivision (b), an approved or conditionally approved vesting tentative map shall not limit a local agency from imposing reasonable conditions on subsequent required approvals or permits necessary for the development and authorized by the ordinances, policies, and standards described in subdivision (b) emphasis added.

This peculiar amendment, on its face, might be construed to permit a local agency to add new conditions on permits to be obtained after approval of the vesting tentative map. However, the phrase, "and authorized by the ordinances, policies, and standards described in subdivision (b)," returns the analysis of the amendment to an inquiry into the meaning of the term, "ordinances, policies, and standards described in Section 66474.2." Section 66474.2 in turn, provides that, when it decides whether to approve a tentative map application, "the

local agency shall apply only those ordinances, policies, and standards in effect at the date the local agency has determined that the application for a tentative map is complete" emphasis added.

It will no doubt be argued that the effect of the addition of subdivision (e), since the circular trail of references to other sections leads to nowhere, is merely to reiterate the original language of the 1984 legislation. If so, however, one wonders why the Legislature bothered with the amendment in the first place.

The answer may be found in the official statement of legislative intent, adopted originally in 1984. Through the 1986 amendment, it now is codified in Section 66498.9:

> By the enactment of this article Sections 66498.1 through 66498.9, the Legislature intends to accomplish all of the following objectives:
>
> (a) To establish a procedure for the approval of tentative maps that will provide certain statutorily vested rights to a subdivider.
>
> (b) To ensure that local requirements governing the development of a proposed subdivision are established in accordance with Section 66498.1 when a local agency approves or conditionally approves a vesting tentative map. The private sector should be able to rely upon an approved vesting tentative map prior to expending resources and incurring liabilities without the risk of having the project frustrated by subsequent action by the approving local agency provided the time periods established by this article have not elapsed.
>
> (c) To ensure that local agencies have maximum discretion, consistent with Section 66498.1, in the imposition of conditions on any approvals occurring subsequent to the approval or conditional approval of the vesting tentative map, so long as that discretion is not exercised in a manner which precludes a subdivider from proceeding with the proposed subdivision.

This legislative statement, now enacted twice, seems to say that, while the Legislature wants developers to be able to rely on the approval of tentative maps for authority to complete their developments without frustration caused by new conditions imposed after the approval, it does not want to preclude local entities from imposing "reasonable" conditions, even after approval, so long as they do not preclude eventual completion of the projects.

We believe your reasons for proceeding with the IDO appear consistent with the 1986 amendments to the legislation and are responsive to the legislative history of SB 1967 (Montoya), the bill from which the amendments came. In the analysis furnished the Senate Rules Committee for its April 1, 1986 hearing on SB 1967, the author, Senator Joseph B. Montoya, D-Rosemead, observed:

> The bill would clarify a local agency's

> authority to impose reasonable conditions on subsequent required approvals or permits necessary for a development for which a vesting tentative map was filed. Such conditions must have been authorized by the ordinances, policies and standards in effect at the time the vesting tentative map was approved or conditionally approved.

Similar language is found in the analyses of the bill prepared for the Senate Committee on Housing and Urban Affairs and the Assembly Committee on Housing and Community Development and in the Legislative Counsel's Digest of the bill. It is reflected in Senator Montoya's August 20, 1986 letter to the Governor urging his approval of the bill:

> This Bill (SB 1967) would clarify a local agency's authority to impose reasonable conditions on subsequent required approvals or permits necessary for a development for which a vesting tentative map was filed.

APPLICATION TO IDO

Thus, the questions become: (1) To the extent that the City Council proposes to impose time phasing of projects on which there are approved vesting tentative maps, because it has evidence that the phasing is necessary to assure that required facilities and services can be provided to the developments in a timely fashion, can it be asserted that the phasing is a reasonable condition not being exercised in a manner precluding a subdivider from proceeding with the proposed subdivision? (2) Can it be contended further that the time phasing of development arises from "ordinances, policies, and standards" reflected in the general and community plans pertaining to the development in question and in effect at the time the vesting tentative map was approved?

In this regard, we believe the question of phasing any development purportedly authorized by a vesting tentative map must be determined on a case by case basis. There may be some developments which can not be construed to be within the phasing gambit of the IDO because of the express findings made by the appropriate City body (Subdivision Review Board, Planning Commission or City Council) when the vesting tentative map was approved. For example, many vesting tentative maps contain language which acknowledges that all "ordinances, policies, and standards" in effect at the time of their approval have been complied with.

However, at this juncture, who is to say that the IDO phasing

quotas will affect adversely those vesting tentative maps which have resulted in clearly vested rights. To the extent they cannot be governed by the IDO, it will be our advice to the IDO Administrator to issue the building permits called for without reference to IDO community or overall allocations. To the extent that individual vesting tentative map resolutions can be construed to fall within the purview of the allocations, it will be our advice to the administrator to issue permits for the development based upon the community allocations and the preference criteria provided for within the IDO.

CONCLUSION

We believe the IDO must be construed as presently enacted both to (1) favor its validity and (2) preserve guaranteed or vested development rights. The ultimate question, then, is: Can the IDO impose conditions on approvals and permits remaining before completion of a development on which a vesting tentative development on which a vesting tentative map has been filed and approved? The answer is yes, as determined on a case by case basis, if the IDO requirements are (1) reasonable, (2) authorized by ordinances, policies and standards in effect at the time of vesting tentative map approval and (3) do not prevent a developer from ultimately completing his project. The resolution attached prepared for your consideration to implement Schedule "A" of the IDO accomplishes the goal.

Respectfully submitted,
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City Attorney

JWW:js(x043.1)
Attachment
RC-87-33