MEMORANDUM OF LAW

DATE: April 28, 1992

TO: Dean Gipson, Associate Civil Engineer, Clean Water Program
FROM: City Attorney
SUBJECT: Imposition of Reclaimed Water Facilities Conditions on Previously Approved Subdivision Tentative Maps

This responds to your memorandum of February 27, 1992 regarding the subject noted above. Your question concerned the tentative subdivision maps of several developersF

> Carmel Valley Village was given as an example, TM 83-0096, approved by Planning Commission Subdivision Board on September 13, 1984. Developer is Carlsberg Construction, Inc.

which were approved prior to the City Council's adoption of an ordinance on July 24, 1989, relating to the establishment of a "Water Reclamation Master Plan and Implementing Procedures." See San Diego Municipal Code (SDMC) sections 64.0801 et seq. At issue is whether the requirements of the reclaimed water ordinance may be imposed on those tentative maps which were earlier approved without any mention of reclaimed water facilities conditions. As we explain below, the general answer to the question is negative.

Initially, it should be noted that your question, and hence this answer, is limited to address only the provisions of the Subdivision Map Act (Government Code sections 66410 et seq.) which relate to the approval of tentative and final maps. We therefore recite the relevant general rule of the Map Act, but exclude discussion of non-statutory processes, such as development agreements, which involve a contractual and therefore different analysis. Also, while we believe the general rule of the Map Act will control in most cases where this reclaimed water facilities issue arises (Carmel Valley Village included), there may be extraordinary circumstances in some cases where exceptions could apply.

The express general rule of the Map Act is stated as follows: "In determining whether to approve or disapprove an application for a tentative map, a local agency shall apply only those ordinances, policies, and standards in effect at the date the local agency has determined that the application is complete ...." Government Code section 66474.2(a). A final or parcel map may not be disapproved if it is in substantial compliance with a previously approved tentative map. Government Code section 66474.1. A local agency must approve a final map that conforms to a previously approved tentative map if the subdivider has complied with all conditions attached to the earlier

approval. Youngblood v. San Diego County Board of Supervisors, 22 Cal. 3d 644, 654 (1978). With respect to noncompliance with local ordinances, a final map can be disapproved only for failure to meet or perform any of the requirements or conditions which were applicable to the subdivision at the time of approval of the tentative map. Government Code section 66473. Where a developer has relied on a tentative map approval with conditions and has produced a final tract map which satisfies those conditions, he is entitled to an acceptance and approval of that final map without imposition of new or altered conditions by the local governing agency. South Central Coast Regional Commission v. Charles Pratt Construction Co., 128 Cal. App. 3d 830 (1982); El Patio v. Permanent Rent Control Board, 110 Cal. App. 3d 915 (1980).

The rationale for this rule was stated by the Supreme Court in Youngblood as follows:

> The purpose of (Business and Professions Code) section 11549.6 (now recodified as Government Code section 66474.1), as we perceive it, was to confirm that the date when the tentative map comes before the governing body for approval is the crucial date when the body should decide whether to permit the proposed subdivision. Once the tentative map is approved, the developer often must expend substantial sums to comply with the conditions attached to that approval. These expenditures will result in the construction of improvements consistent with the proposed subdivision, but often inconsistent with alternative uses of the land. Consequently, it is only fair to the developer and to the public interest to require the governing body to render its discretionary decision whether and upon what conditions to approve the proposed subdivision when it acts on the tentative map. Approval of the final map thus becomes a ministerial act once the appropriate officials certify that it is in substantial compliance with the previously approved tentative map. (Citations omitted.)

Id. at 924.

A limited exception to the foregoing rule may apply where local ordinances or policies, though not enacted, have been publicly noticed at the time a tentative map is approved and where the local agency has already initiated action toward adoption. Government Code section

66474.2(b). However, even in such a case, if the subdivision applicant requests changes in applicable ordinances, policies, or standards in connection with the same development project, those ordinances, policies, and standards adopted pursuant to the applicant's request shall apply. Government Code section 66474.2(c).

Thus, the general answer to your question is negative: The City would not be able to impose the requirements of its reclaimed water ordinance on previously approved tentative maps. This general rule should be applied on case-by-case basis with respect to each map, however, as circumstances may be such that Section 66474.2(b) pertains.

A further point should be made of the present lack of detail with respect to what conditions exactly will be imposed on tentative maps in furtherance of the objectives of the reclaimed water ordinance. SDMC sections 64.0801 et seq. proclaim the public policy of enforcing the use of reclaimed water rather than potable water where feasible. See, SDMC section 64.0802. To this end, SDMC section 64.0806 requires the City to "prepare and adopt a Water Reclamation Master Plan to define, encourage, and develop the use of reclaimed water within its boundaries." At this time, however, the City has not yet adopted such a Master Plan, and therefore the City's own intentions have not been specifically defined and officially committed. The reclaimed water ordinance declares a policy and requires program implementation, but until the program is in place, a developer will have no knowledge of specific facilities requirements. Presently, there is nothing firm and certain to indicate to developers whether or when reclaimed water will be available to their proposed subdivisions.

Thus, while tentative map applications made at the time of or subsequent to enactment of the reclaimed water ordinance may properly be conditioned upon compliance with it (Government Code section 66473), compliance would presently amount to nothing more than acknowledging the City's policy and intentions. This is because the ordinance does not itself define specific requirements, but instead calls for adoption of a Master Plan to develop the details. Until such time as the Master Plan is adopted, compliance with the ordinance has little meaning or effect.

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By
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