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Just When You Thought You Weathered The Storm, Another Agency May Rain on Your Parade

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It is no secret that development projects throughout the state have been stalled for several years. The unprecedented global credit crisis dried up financing for development projects, and prevented even motivated owners and developers from pursuing necessary local, state, and federal project entitlements. While the state Legislature appears to have been receptive to the real estate industry's request to extend the life of certain pending entitlements, the state's administrative agencies have continued to pursue and adopt layers of new regulation that may adversely affect precisely those entitlements the Legislature agreed to extend.

In California, most development projects include a proposal to subdivide land for purposes of sale, lease, or financing. All residential projects – both single-family, and multifamily – necessarily require compliance with the Subdivision Map Act (Gov. Code, §§ 66000 et seq.) before a residential unit may be sold.

For any proposal over a handful of units, the Subdivision Map Act prescribes a two-step process. A developer must first prepare and obtain conditional approval of a tentative subdivision map. Before the first unit may be sold, the developer must comply with the conditions of approval of the tentative map, often at great expense. For a large-scale project, it is not unusual for a map to include hundreds of required conditions. Once the conditions of approval have been satisfied, a final map may be recorded, making the lots available for sale, lease, or financing. If a final map is not recorded within the "life" of the tentative map, the tentative map expires, and a developer must restart the subdivision process anew.

For obvious economic reasons, over the past couple of years many developers have been unable to timely make the transition from tentative map to final map because of the substantial expense involved, and because the market for new units is significantly depressed. In response to a large number of languishing tentative maps, in 2009 the Legislature amended section 65961 of the Government Code, and added a new section 66452.22 to the Government Code to extend the life of certain tentative, vesting tentative, and parcel maps by 24 months. This extension followed on the heels of a similar statutory map extension in 2008.

Specifically, for maps that will expire by January 1, 2012, the 2009 urgency legislation extends their life by two years. The legislation also extends certain approved state agency entitlements that pertain to development projects included in a map.

As a practical matter, the statutory extension of state agency entitlements may have little meaning. Entitlements such as permits from the Regional Water Quality Control Boards, Department of Fish and Game, or Coastal Commission are usually obtained after a tentative subdivision map is approved, as a condition of approval of that map. Because of timing and expense issues, such entitlements are typically not sought until a developer is close to satisfying the substantial majority of the tentative map conditions of approval. The reason the map extension was deemed necessary by the Legislature is because the depressed economy has precluded developers from complying with the numerous conditions of approval associated with tentative maps – including obtaining state agency entitlements.

Of course, the underlying purpose of the statutory map extension is to give developers and property owners some level of confidence that they will be able to proceed with their development projects when the economy improves. What the map act extension ignores completely is intervening legislation at both the state and federal levels that may prevent a developer from moving forward with an old project regardless of whether the map is still alive.

For example, just over six months ago, the San Francisco Bay Regional Water Quality Control Board adopted a new region-wide municipal stormwater permit. Other Regional Boards throughout the state have adopted similar comprehensive stormwater permits. The new permit – which eliminates individual permits and brings most of the region under the umbrella of a single permit - regulates any activity that causes or affects stormwater runoff in all Bay Area cities, counties, flood control districts, and water agencies. With respect to new development or regional development projects, local agencies are required to include appropriate source control, site design, and stormwater treatment measures in projects to address both soluble and insoluble stormwater runoff pollutant discharges. Trade organizations such as the Building Industry Association of the Bay Area have identified cost and technological complexities inherent in the permit requirements that will constrain development projects throughout the region.

The former individual stormwater permits included a grandfathering provision that allowed certain languishing projects to proceed provided certain approvals had been obtained. The new permit includes a more limited grandfathering provision. Specifically, development projects that have obtained their final discretionary approval before December 1, 2011 will not be required to comply with the new stormwater requirements. Additional projects that are being diligently pursued through a project applicant's submittal of supplemental information to the local agency, are similarly exempted from the new requirements.

For large scale projects, if it is necessary to take advantage of the statutory map extension, it is unlikely that the final discretionary approval for the project has been obtained. In fact, there are numerous jurisdictions that would argue that obtaining a building permit for the project is the "final discretionary approval." Accordingly, from the development community's perspective, the map extension and regulations like the new stormwater permit requirements are almost impossible to reconcile. On the one hand, the legislature clearly

understands the depressed state of the economy, and has taken steps to ensure that when the economy turns, projects will be able to proceed. On the other hand, state agencies continue to adopt inflexible regulations that will require modification to those same development projects.

California's entitlement process has always been challenging and complex. In light of the mixed messages from the Legislature and state agencies, creative, adaptive solutions and strategies will continue to be the key to obtaining final entitlements to develop real property within the state.

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