



Vol. 17, No. 3

Summer, 1999

Maximizing Tentative Map Extension Opportunities Under the Subdivision Map Act

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I. INTRODUCTION

A. Mapping Approaches under the Subdivision Map Act

The Subdivision Map Act¹ (“Map Act”) vests in cities and counties² the power to regulate and control the design and improvement of subdivisions within their boundaries.³ Generally, there are two ways to subdivide property in California: (1) through conveyance, and (2) through recorded subdivision map. There are generally two types of mapping approaches contemplated under the Map Act. The first involves a “parcel” map. A parcel map is generally used to create four or fewer lots, is instantly recordable, lasts forever once recorded unless superseded by a later recording, and normally does not require satisfaction of its conditions of approval until a later building permit or other permit for development is sought.⁴

The second mapping approach involves “tentative” and “final” maps. A tentative map is generally used to create five or more lots.⁵ The tentative map itself is not recordable and survives only a limited amount of time. During that limited life, the subdivider must satisfy the conditions imposed by the approving city/county and attached to the tentative map approval, or it must enter into an improvement agreement promising to satisfy the conditions.⁶ Upon satisfaction of the conditions, the submittal and approval of a final map in substantial conformance with the tentative map, and recordation of the final map, the lots are established as legal.⁷

B. Short Life Span of a Tentative Map

While it may take years to process and secure the approval of a tentative map—California remains one of the most difficult states for development approvals—once approved, the life of the tentative map itself is very short. Once a tentative map expires, it cannot be revived.⁸ Instead, a new tentative map must be applied for, processed, and approved.⁹ Such reappraisal can prove costly from a time and resource perspective, and it can be potentially disastrous from a political perspective. Therefore, because subdividers are in the business of creating legal lots in as resource-efficient a manner as possible, they are uniquely interested in keeping their tentative maps alive until such time as they are able to record their final maps and realize the product of their efforts—saleable lots.

This article explains potential tentative map extension opportunities under Map Act, as well as the legal arguments and issues often involved with such opportunities.

II. EXTENSION OPPORTUNITIES UNDER THE MAP ACT

A. Initial Life of a Tentative Map

As stated above, while it may take years to process and secure the approval of a tentative map, once approved, the tentative map itself is only good for 24 months (or 36 months in those communities that provide an additional 12 months by local ordinance).¹⁰ Practitioners call this time frame the tentative map’s “Initial Life.” Thus, unless a final map is filed with the city/county within this two-year time frame or the tentative map is extended, the tentative map will expire.¹¹ If the tentative map expires, the process starts all over again; a new tentative map application will have to be prepared, processed and approved.¹²

B. Extension Life of a Tentative Map

Fortunately, under the Map Act, a subdivider can seek “extensions” to the Initial Life of a tentative map. Practitioners call it a tentative map’s “Extension Life.” Sections 66452.6, 66452.11 and 66452.13 of the Map Act establish the extension periods available for a tentative map. These sections are not mutually exclusive; a subdivider may secure multiple extensions of time under the various extension provisions.¹³ The following discussion explains the types of extensions available with examples of how these extensions work in practice.

1. Development Agreement

A tentative map on property subject to a statutory “development agreement” may be extended for the period of time specified in the development agreement, which specified period cannot exceed the term of the development agreement itself.¹⁴

Example: A development agreement has a term of 25 years. The project’s tentative map could be extended, pursuant to an express provision in the development agreement to the 25-year term of the agreement.

2. Development Moratorium

The life of a tentative map is automatically stayed for up to a maximum of five years during a “development moratorium” that is imposed after a tentative map is approved.¹⁵ Once a development moratorium terminates, the tentative map remains alive for the time it would otherwise have remaining as if the moratorium had not occurred, unless that remaining period of time is less

than 120 days, in which case the tentative map will be valid for 120 days after termination of the moratorium.¹⁶

Example: If a moratorium was imposed 12 months after a tentative map was approved, and if the moratorium lasted five years, the tentative map would remain valid for 12 months after termination of the moratorium, because the map survives 24 months of Initial Life—12 months of which were used before the moratorium and 12 months that would still exist after termination of the moratorium.

A development moratorium can include moratoria based on infrastructure constraints (e.g., sewer, water), as well as other actions of public agencies which regulate land use, development, or services. This also includes conditions of approval imposed on the tentative map that necessitate action by the city/county, and the city/county prevents, delays, or fails to take that necessary action.¹⁷ A moratorium may also arise from conditions imposed by a city/county prior to approval of a project (such as to prepare, complete, and adopt subarea facilities plans and related financing).¹⁸

3. Litigation

A pending lawsuit involving the approval or conditional approval of a tentative map can also stay the life of a tentative map for up to five years. Unlike a moratorium, however, the litigation stay must be approved by the city/county that approved the tentative map. A developer may submit an application for a stay based on the city/county's adopted procedures, and the city/county must either stay the time period for up to five years or deny the stay request within 40 days of receipt of the developer's application.¹⁹ A city/county may establish by ordinance the procedures for reviewing such requests.²⁰

Example: Upon approval of the subdivider's tentative map, a neighborhood group brings a writ of mandate action challenging the city's decision, naming the developer as real party in interest, and claiming the subdivision violates the city's general plan. The city may approve a request by the subdivider to stay the life of the tentative map for the length of the litigation or for a period of up to five years, whichever occurs first. Should the city deny such a request, then the statutory time period for the life of the tentative map is tolled.

4. Discretionary Extensions

Upon application by a subdivider, a city/county may also extend the life of a tentative map for a period of time not to exceed five years.²¹ The application for such extension must be made prior to the expiration of the approved or conditionally approved tentative map.²² Once an application for a discretionary extension is properly made, the tentative map is automatically extended for 60 days or until the application for extension is acted on by the city/county, whichever occurs first.²³

Example: A subdivider's tentative map expires on January 1, 2000. On December 15, 1999, the subdivider applies for an extension. The tentative map is automatically extended for 60 days or until the application is acted upon by the city/county, whichever occurs first.

a. Applicable Standards of Review

Government Code Section 66452.6(e) provides as follows regarding discretionary extensions:

Upon application for an extension filed prior to the expiration of the approved or conditionally approved tentative map, the time at which the map expires pursuant to subdivision (a) may be extended by the legislative body or by an advisory agency authorized to approve or conditionally approve tentative maps for a period or periods not exceeding a total of five years. The period of extension specified in this subdivision shall be in addition to the period of time provided in subdivision (a).

Determining the breadth of city/county discretion under this section is, however, not instantly apparent.

(1) Regular Tentative Maps

While vesting tentative maps have certain Map Act provisions regulating their extension (see discussion below in Section II.A.4.a.(2)), the Map Act provides no express standard for the city/county approval or denial of a discretionary extension request for a "regular" (non-vesting) tentative map. This is an area in which the need for a legislative solution is long overdue. However, such actions are arguably subject to Code of Civil Procedure Section 1094.5 (quasi-judicial) and are, therefore, subject to the substantial evidence test, requiring the city/county to articulate and substantiate its reasons for denial.

(2) Vesting Tentative Maps

Government Code Section 66498.1 (regarding vesting tentative maps) provides in pertinent part as follows:

(c) Notwithstanding subdivision (b) [only laws in place at application completion may be applied to project], the local agency may condition or deny a permit, approval, extension, or entitlement if it determines any of the following:

(1) A failure to do so would place the residents of the subdivision or the immediate community, or both, in a condition dangerous to their health or safety, or both.

(2) The condition or denial is required, in order to comply with state or federal law.

In other words, Section 66498.1 disallows the denial of an extension or the addition of new conditions of approval to an extension if the city/county could find that either the failure to deny or condition the extension would "place the residents of the subdivision or the immediate community, or both, in a condition dangerous to their health or safety," or that the condition or denial was "required, in order to comply with state or federal law."

As a further caveat, the ability to attach new conditions through the granting of a discretionary extension is suspect.

b. New Conditions as Part of Extension Approval

California courts have reinterpreted the Map Act as prohibiting by a city/county from unilateral imposition a new condition to an already approved tentative map that the city/county agrees

to extend. In *El Patio v. Permanent Rent Control Board of the City of Santa Monica*,²⁴ plaintiff's existing tentative map for a condominium conversion pre-dated a city amendment granting its rent control board the authority to require permits for the removal of rent controlled units from the housing market. When the plaintiff approached the city for an extension of plaintiff's tentative map, the city agreed but attached a condition requiring compliance with the new city amendment. Plaintiff sued, claiming that the condition was not on the originally approved tentative map and that the city could not add the condition to the tentative map extension. The court agreed with the plaintiff and held that the Map Act prohibits new conditions except conditions describing the length of the extension. The court reasoned that to add new conditions to an approved tentative map would defeat the purpose of Government Code Section 66473, which provides that a final map must be approved by the city/county upon the satisfaction of conditions applicable only to the original tentative map approval, not other conditions later attached. In other words, the new intervening conditions would not be enforceable; only the original conditions would need to be satisfied to secure the final map.

Some city/county attorneys have argued that the language of Government Code Section 66452.6(e) ("upon an application by the subdivider to extend that map, the map shall automatically be extended for 60 days or until the application for the extension is approved, conditionally approved, or denied, whichever occurs first"²⁵) provided a legislative overruling of *El Patio*, and that a city/county could now impose conditions on discretionary tentative map extensions. There are several problems with this argument: (i) It fails to recognize that *El Patio*'s holding hinged on Section 66473 (a final map must be approved by the city/county upon the satisfaction of conditions applicable only to the original tentative map approval), and section 66473 was not deleted, amended or otherwise legislatively overruled by the new Map Act language of section 66452.6(e); (ii) it fails to recognize that the new language of section 66452.6(e) was added to provide subdividers with protections by providing a method of keeping tentative maps alive while their extension requests could be scheduled for hearing; it was not intended to provide new "conditioning" powers to cities/counties; and (iii) "approve, conditionally approve or deny" is boilerplate Map Act language and must be read in light of, and harmonized with, the other provisions of the Map Act and the cases like *El Patio*, which does not allow new conditions except conditions of "time" (i.e., the life of the extension itself).

c. Preemption

Finally, a city/county cannot enact local legislation limiting extensions that are otherwise allowed by the Map Act. In *Griffis v. Mono County*,²⁶ the court ruled that the county could not limit the ability of the applicant to seek the maximum extension duration (currently up to five years) to a shorter time period than that allowed by the Map Act.

5. "Special" Legislative Extensions

Reflective of the downturn in the real estate market and the economy as a whole in the early to mid-1990s, the California Legislature enacted two unique extensions. The first, Government Code Section 66452.11(a), provides that "[t]he expiration date of any tentative subdivision map or parcel map for which a tentative map has been approved that has not expired on the date

that the act that adds this section becomes effective (September 13, 1993) shall be extended by 24 months." It further states that the extension it provides "shall be in addition to any extension of the expiration date provided for in Section 66452.6..." (emphasis added).

The second, Government Code Section 66452.13, contains nearly identical language, except that it extends all approved unexpired tentative maps in existence on May 15, 1996 (its effective date) by 12 months.

Example: A subdivider's tentative map is approved by the city/county on September 12, 1993. He is entitled to the 24-month Initial Life of the tentative map, as well as the additional automatic 24-month extension under Government Code Section 66452.11(a). Thus, the life of the tentative map the day after it is approved is 48 months, or until approximately September 12, 1997. Thereafter, because the tentative map was in existence on May 15, 1996 (the date the second special legislative extension was enacted), it is automatically extended an additional 12 months to September 12, 1998.

In sum, tentative maps in existence on the operative dates of these acts received automatic extensions by these special legislative acts.

6. Using Multiple (Phased) Final Maps

Generally, a subdivider will secure a tentative map covering all the property to be subdivided and then will seek a single final map covering the entirety of the area contained in that tentative map. In certain circumstances, however, the Map Act not only allows the filing of a final map on only a portion of the area encompassed by the tentative map, but the filing of that final map also extends the life of the remaining portion of the tentative map. This process is generally referred to as filing "multiple" or "phased" final maps.

a. General Issues

A subdivider who wishes to file multiple final maps may do so prior to the expiration of the tentative map by notifying the city/county of its intent to do so either at the time the tentative map is filed or after filing of the tentative map.²⁷ If the subdivider notifies the city/county of his or her intent to file multiple final maps after the filing of a tentative map, the city/county must concur in the filing of multiple final maps.²⁸ A city/county cannot require the subdivider to define the number or configuration of proposed multiple final maps, but may impose reasonable conditions relating to the filing of such maps.²⁹ The city/county confirms the number of final maps that may be filed at the time of tentative map approval.³⁰ If a final map is filed on a portion of a tentative map, it will not invalidate any part of the remaining tentative map.³¹

The potential extension "horsepower" of multiple maps is set forth in Government Code Section 66452.6(a), which provides in pertinent part:

[I]f the subdivider is required to expend one hundred twenty-five thousand dollars (\$125,000) or more to construct, improve or finance the construction of public improvements *outside the property boundaries of the tentative map*, excluding improvements of public rights-of-way which about the boundary of the property to be subdivided..., *each filing of a final map...shall*

extend the expiration of the approved or conditionally approved [remaining] tentative map by 36 months from the date of its expiration, as provided in this section, or the date of the previously filed final map, whichever is later. The extensions shall not extend the tentative map more than 10 years from its approval or conditional approval (emphasis added).

At the time the Map Act was authorized, the statutory threshold amount for qualification of the automatic extension was \$125,000. That figure has been adjusted upward over time, according to a formula described in Government Code Section 66452.6(a)(2). The statutory threshold amount is now approximately \$163,000. The relevant date for application of any adjustment of the off-site extension amount is the date the application for the tentative map is received by the city/county.³²

b. Calculation of Off-Site Extension Amount

(1) Off-Site Improvements/Fees

To qualify for the automatic 36-month extension under the Map Act, off-site expenditures must meet the threshold amount and must be used to “construct, improve or finance the construction or improvement of public improvements outside the property boundaries of the tentative map, excluding improvements of public rights-of-way that abut the boundary of the property to be subdivided.”³³

A city/county may take the position that impact fees cannot be counted against the statutory threshold amount because they are not being used to “construct, improve or finance the construction or improvement of public improvements outside the property boundaries of the tentative map.” In the opinion of this author, however, if the purpose of the fees is to help fund the construction of improvements outside the tentative map’s boundaries, then payment of the fee should count toward the statutory threshold amount. This should include regional impact fees, city/county-wide impact fees, capital facilities improvement fees, and the like. Attorneys should obtain copies of the local ordinance creating the impact fee and scrutinize its terms closely.

For example, the cost to construct a perimeter bike path around a subdivision might not be considered an off-site expense that would count toward the \$163,000 threshold because it abuts the property, unless it exceeds the needs of the subdivision. On the other hand, the payment of impact fees imposed to help finance the construction of a nearby freeway overpass would be included in the off-site calculation.

(2) Timing of Fee Payment

The conditions of approval of a tentative map may require payment of impact fees, but the common practice is for the payment to be made at building permit issuance or later, not at the final map approval stage. A city/county might argue that because payment of a fee is not required prior to final map approval, the fee does not count toward the \$163,000 statutory threshold. In the opinion of this author, the impact fee should qualify toward the statutory threshold amount, even if it is not required to be paid until after final map approval for the following two reasons.

First, Government Code Section 66452.6(a) simply states that if the subdivider is required to expend \$125,000 (now approxi-

mately \$163,000) or more for off-site improvements, each filing of a final map extends the expiration of the vesting tentative map by 36 months. The operative words from the statute are that a subdivider’s tentative map qualifies for the automatic extension “if the subdivider is required to expend” the threshold amount. Nowhere in the statute does it say that payment must be made a condition of tentative map approval or that payment must occur prior to final map approval. The statute does not link payment of the statutory amount to any entitlement stage.

Second, Government Code Section 65961 sets forth what is commonly known as the “one-bite-of-the-apple” rule. In essence, that statute requires the imposition of all existing laws on a tentative map approval by setting a very high penalty for a city/county if such laws are not made conditions to the tentative map approval: “Upon approval or conditional approval of a tentative map for a subdivision...a city...shall not require as a condition to the issuance of any building permit any conditions that the city or county could have lawfully imposed as a condition to the previously approved tentative map.” (emphasis added). Note that this applies only to the subdivision of single- or multiple-family residential units.³⁴

The prohibition against enforcement of an existing law not made a condition to a tentative map works as follows:

- *First*, the condition must be one that could have been legally imposed by the city/county at the time the tentative map was approved.
- *Second*, the city/county must fail to impose the existing laws as a condition on the tentative map at the time of its approval (“the missed condition”).
- *Third*, the city/county must then impose that missed condition as a condition to issuance of building permits during the five-year period following recordation of the final map for the development.

When all of these elements are present, then Government Code Section 65961 prohibits the enforcement of the missed condition.

Thus, if a city/county prevails in its argument that the satisfaction of a condition—although in existence at the time of the tentative map approval—was in fact not made a condition to the tentative map, then the city/county will not be able to enforce the condition at all. Government Code Section 65961 will prohibit satisfaction of the condition at the building permit issuance stage. In other words, if a city/county did not impose fees as a condition to tentative map approval, then it is arguably barred from collecting such fees as part of building permit issuance.

Example: Typical per-unit subdivision fees that might qualify as off-site expenses under Government Code Section 66452.6(a) might look like the following:

City wide Overpass fees	\$ 259
City wide Bridges/Roadway fees	73
City wide Railroad Crossing fees	66
Regional Wells fees	500
Public Works fees	38
Muni. Facility fees	727
Regional Sewer Treatment fees	300
City wide Traffic Signals fees	29
GRAND TOTAL	\$1,992

Thus, developers of a 100-unit subdivision would be required to expend approximately \$199,200 in off-site improvement fees, and they would, therefore, would argue that they meet the off-site improvement threshold under Government Code Section 66452.6(a).

III. HYPOTHETICAL CHRONOLOGY OF A TENTATIVE MAP

The life of a typical phased map from the early 1990s that uses some, but not all, available extensions under the Map Act might reasonably have the following chronology:

September 1, 1990—Subdivider (Blackacre, Inc.) secures approval of tentative map for Blackacre residential project. tentative map calls for multiple final maps. Tentative map good for 24 months from approval unless otherwise extended.

November 1, 1990—Tentative map approval challenged in court by neighborhood group. Subdivider asks for and secures city consent to tolling of life of Map during lawsuit. Lawsuit settles 10 months later. Tentative map now good for 34 months (24 plus 10) from approval unless otherwise further extended.

November 21, 1991—The first Blackacre phased final map is recorded (covering only a small portion of the total territory of the Blackacre tentative map), thereby automatically extending the remaining portion of the tentative map for an additional 36 months from the date the tentative map would have otherwise expired. Tentative map now good for 70 months (34 plus 36) from approval unless otherwise further extended.

July 31, 1993—Subdivider seeks and city grants discretionary extension under Government Code Section 66452.6(e), extending tentative map for 12 months. Subdivider can seek four more years. Tentative map now good for 82 months (70 plus 12) from approval unless otherwise further extended.

September 13, 1993—Statewide legislative act extends all tentative maps in existence on September 13, 1993 for additional 24 months. Tentative map now good for 106 months (82 plus 24) from approval unless otherwise further extended.

May 15, 1996—Second statewide legislative act extends all tentative maps in existence on May 15, 1996 for an additional 12 months. Tentative map now good for 118 months (106 plus 12) from approval unless otherwise further extended.

November 12, 1998—City voters approve initiative imposing moratorium on the issuance of residential building permits for four (4) years. Tentative map now good for 166 months (118 plus 48) from approval unless otherwise further extended.

July 1, 2004—Tentative map expires 166 months following its approval unless additional extensions obtained. Extensions still available under the Map Act: (i) 48 months of discretionary extension pursuant to Section 66452.6(e), and (ii) up to 60 more months if two more phased final maps are recorded.

Finally, if a development agreement had been entered into between the developer and the city/county pursuant to Government Code Section 66452.6(a), and if by its terms the development agreement survived the circumstances described above, it could extend the life of the map for the period of time for which the development agreement remained valid.

IV. CONCLUSION

"Cæsar giveth, and Cæsar taketh away." Understanding tentative map extensions available under the Map Act may help ease

the pain of a tentative map whose duration might otherwise be shorter than the time it took to secure its approval.

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Endnotes

1. Cal. Gov't Code §§ 66410 *et seq.*
2. The Map Act applies to cities and counties. This article collectively refers to these public agencies as "city/county."
3. Cal. Gov't Code § 66411.
4. *Id.* §§ 66411, 66426.
5. *Id.* § 66426.
6. *Id.* § 66462.
7. *Id.* § 66412.7, 66468.
8. *Id.* § 66452.6.
9. *Id.*
10. *Id.* § 66452.6(a)(1).
11. *Id.* § 66452.6(d).
12. *Id.*
13. *Id.* § 66452.6(a)(1).
14. *Id.* § 66452.6(b).
15. *Id.* § 66452.6(b)(3).
16. *Id.* § 66452.6(f).
17. *Native Sun/Lyon Communities v. City of Escondido*, 15 Cal.App.4th 892 (1993).
18. Cal. Gov't Code § 66452.6(c).
19. *Id.*
20. *Id.* § 66452.6(e).
21. *Id.*
22. *Id.*
23. *El Patio v. Permanent Rent Control Board*, 110 Cal.App.3d 915 (1980).
24. Cal. Gov't Code § 66452.6(e).
25. *Griffis v. Mono County*, 163 Cal.App.3d 414 (1995).
26. Cal. Gov't Code § 66456.1.
27. *Id.*
28. *Id.*
29. *Id.* §§ 66452.6(a)(1), 66456.1.
30. *Id.* § 66456.1.
31. *Id.* § 66452.6(a)(2).
32. *Id.* § 66452.6(a).
33. *Id.*
34. Gov't Code § 65961.