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Protect Your Development Approvals During Market Cycles

By Michael Patrick Durkee and Thomas P. Tunny

Among the many lessons to be learned from the recent real estate downturn, probably the most important one is the simplest: It will happen again. The real estate market is by nature cyclical, and history, as they say, tends to repeat itself. The ups and downs of the market and the passage of time inevitably result in unexpected changes in the law that can be very expensive or can even kill a project.

Development Agreements and Vesting Subdivision Maps are the most effective tools for securing "vested rights" to allow a project to wait out a market downturn and protect against changes in the law.

For example, if a developer had obtained a Development Agreement in the year 2000 with a 20-year term, it would have potentially been able to "bank" its project during the downturn and then be ready to go to production as the market recovers.

This column provides a brief overview and comparison of Development Agreements and Vesting Subdivision Maps. Ideally, a developer will use both to secure vested rights for the same project. However, sometimes it is not possible to do both, and for that reason we recommend applying for a Vesting Map first, and then a Development Agreement, if possible.

The historical progression of vested rights in California began with the harsh "common law rule" as articulated by the California Supreme Court in *Avco Community Developers, Inc. v. South Coast Regional Commission*, 17 Cal.3d 785 (1976). Under the common law rule, a developer could spend millions of dollars obtaining approvals for thousands of residential units and installing all of the necessary sewer, water supply, traffic and other infrastructure for those units, and begin to pull building permits. However, in order to secure vested rights to continue with the project, the developer had to not only pull building permits, but perform substantial work pursuant to each permit. Therefore, even at that late stage in the process, a single ballot measure could forever prohibit the project from constructing any homes not already substantially constructed, without any compensation to the developer.

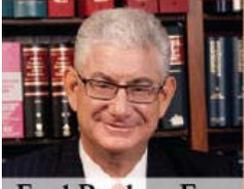
The Legislature responded to *Avco* and other similar rulings by creating Development Agreements and Vesting Maps, two vehicles through which vested rights can be secured much earlier in the development process, and the "life" of a project extended to carry it through troubling economic times and to avoid future project-threatening regulations.

Frequently it is advantageous to do both a Development Agreement and Vesting Maps for the same project. The downside to a Development Agreement is that it is "elective" on behalf of the local jurisdiction and, according to some practitioners, may not be subject to the constitutional protections of nexus and substantive due process. Therefore, a developer does not have total control over the terms and conditions of a Development Agreement.

However, a local jurisdiction is required by statute to process a Vesting Map application, and the grounds upon which a Vesting Map can be denied are limited by the Map Act. In addition, Vesting Maps and their conditions of approval are subject to constitutional, statutory and case law protections. Moreover, Vesting Map approvals can be designed so that through the use of multiple (phased) Final Maps, vested rights last well beyond 10 years. Phased Final Maps also help a developer deal with the phasing of infrastructure construction and other development timing issues.

This is not to suggest that a Development Agreement should not be pursued. If you

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can get one with terms you can accept, the Development Agreement can be a powerful tool. However, if you already have obtained approval of a Vesting Map when negotiating a Development Agreement, you can always "push away from the table" when the deal gets "too rich" because you would already have vested rights through the Vesting Map. And that ability can substantially improve your negotiation position.

What follows is a list of significant similarities and differences between Vesting Maps and Development Agreements:

A Vesting Map locks in the applicable rules and regulations in place when the Vesting Map application is "complete." A Development Agreement generally locks in the rules and regulations in place at the time of the execution of the Agreement. However, the Development Agreement may provide otherwise.

Through phasing and extensions, the life of a Vesting Tentative Map can be over 10 years. The vesting life of a Vesting Tentative Map lasts for one to two additional years after the Final Map is recorded, which may include limited extensions and building permit life. The vesting life of a Development Agreement technically is unlimited (though commonly not more than 20 to 30 years) and is set forth in the Development Agreement. One can use a Development Agreement to extend the life of a Tentative or Vesting Tentative Map and certain permits up to the life of the Development Agreement.

A Vesting Map is not subject to referendum because its approval is an adjudicatory decision by the local jurisdiction. A Development Agreement is subject to referendum because it is a legislative decision by the local jurisdiction. Therefore, if your project is located in a jurisdiction where anti-development ballot measures are common, better to go with a Vesting Map.

A successful third-party challenge can result in a loss of the approval and vested right of both a Vesting Map and a Development Agreement. There is generally a 90-day statute of limitations to file and serve a legal challenge to both a Vesting Map and a Development Agreement.

An incorporating (new) city is subject to a county-approved Vesting Map; an annexing city is not. With a Development Agreement, both the incorporating city and the annexing city are subject to the county-approved Development Agreement with certain exceptions.

The foregoing reveals that while Development Agreements and Vesting Maps have certain similarities, they also have unique strengths and weaknesses. Because of these differences, a developer ideally would maximize its protections and obtain approval of both a Development Agreement and a Vesting Map. However, as noted, obtaining both may not be possible, in which case the Vesting Map should be obtained first, with a Development Agreement to follow if possible.

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