MILLER STARR REGALIA

MEMORANDUM

TO: Barbara Thompson, Assistant County Counsel
Shirley Murphy, Deputy County Counsel

FROM: Bryan W. Wenter, AICP, Esq.
Nadia L. Costa, Esq.

DATE: June 9, 2016

RE: Appeal Issues Raised by Appellant Hollister Land Partners LLC in Connection with Bennett Ranch Project (TSM 15-93)

CC: Brent C. Barnes, AICP, Planning Director
Byron Turner, Assistant Planning Director

The purpose of this memo is to address the two issues appellant Hollister Land Partners ("Appellant") raised in its undated appeal of the County's May 2, 2016 determination that the application for the "Bennett Ranch Project" aka "Fay Subdivision Project" (TSM 15-93) ("Project") is incomplete. In particular, the Appellant alleges as follows:

> "The application for a Vesting Tentative Map was 'deemed' complete and accepted under the Permit Streamlining Act on February 29, 2016 (if not before) by operation of law. As such, the Project secured a 'vested right' under the Subdivision Map Act to be subject to only those County laws in place on that date."

Appellant's attorney Michael P. Durkee addressed these allegations in more detail in his May 10, 2016 letter regarding item #30 on the San Benito County Board of Supervisors' May 10, 2016 agenda (SBC FILE NUMBER: 790). According to Mr. Durkee, the Project application was "deemed complete" by operation of law under the Permit Streamlining Act ("PSA") either in August 2015, September 2015, or February 2016. He also concludes that, because the application is "deemed complete," the Project secured vested rights under the Subdivision Map Act.

We disagree with both appeal allegations for the reasons explained below. To fully understand our conclusions, it is helpful to briefly review the basic parameters of the PSA (Government Code[1] § 65920 *et seq*).

The Legislature enacted the PSA in 1977 to relieve applicants from protracted and unjustified governmental delays in processing their permit applications. The PSA thus expressly declares that it is intended "to ensure clear understanding of the specific requirements which must be met in connection with the approval of development projects and to expedite decisions on such projects." § 65921.

The PSA's goal of clarifying the permit process for applicants is effected by requiring state and local agencies to provide each applicant with "one or more lists" specifying the information the applicant must present to the agency when seeking approval of a development project. § 65940. Provided that the application meets certain requirements discussed further below, the agency has 30 calendar days after receipt of the application to "determine in writing whether the application is complete" and must immediately notify the applicant of that decision. If the agency fails to act within this 30-day period, the application will be "deemed complete," precluding the agency thereafter from requesting new or additional information not specified in the lists. §§ 65943, 65944.

To encourage prompt resolution of permit applications, the PSA provides that an application will be "deemed approved" if not acted upon within the statutory time period, but "only if the public notice required by law has occurred." § 65956(b). The PSA measures all time limits for final approval or disapproval of an application in terms of the environmental review process established by the California Environmental Quality Act (Pub. Res. Code § 21000 *et seq*.). § 65950. A public agency must approve or disapprove a project within 180 days from the certification of an environmental impact report ("EIR"), 60 days from the adoption of a Negative Declaration, or 60 days from a determination that a development project is exempt from CEQA. § 65950(a).

The PSA thus contains two sets of timelines for different phases of a project's process. The first phase is at the application stage when an applicant files an application for a development project. The second phase is after CEQA compliance. The second phase is not reached, however, until CEQA has been addressed via an exemption, a Negative Declaration or Mitigated Negative Declaration, or an EIR. And an application will not be "deemed approved" unless public notice required by law has occurred. *American Tower Corporation v. City of San Diego*, 763 F3d 1035, 1052 (9th Cir. 2014) (permit applications were not deemed approved before the City denied them because "the public notice required by law" did not "occur").

Turning to Appellant's claims, the question of whether the Project application is "deemed complete" under section 65943(a)—the relevant provision of the PSA—is a mixed question of fact and law. That section provides as follows:

[1] All statutory references are to the California Government Code unless otherwise stated.

> "Not later than 30 calendar days after any public agency has received an application for a development project, the agency shall determine in writing whether the application is complete and shall immediately transmit the determination to the applicant for the development project. If the written determination is not made within 30 days after receipt of the application, *and the application includes a statement that it is an application for a development permit*, the application shall be deemed complete for purposes of this chapter. Upon receipt of any resubmittal of the application, a new 30-day period shall begin, during which the public agency shall determine the completeness of the application. If the application is determined not to be complete, the agency's determination shall specify those parts of the application which are incomplete and shall indicate the manner in which they can be made complete, including a list and thorough description of the specific information needed to complete the application. The applicant shall submit materials to the public agency in response to the list and description." (Emphasis added).

Appellant refers to section 65943(a) without quoting it and concludes that "[t]he consequence of Staff [sic] failure to respond in writing within 30 days of the submission date is [sic] the application is 'deemed' complete and accepted by operation of law." As shown above, however, the section has a condition precedent that requires a development application to "include a statement that it is an application for a development permit." See also Curtin, Jr. & Merritt, *California Subdivision Map Act and the Development Process* at § 5.11 (Cont. Ed. of the Bar). The burden is on the applicant to provide that statement. Appellant did not provide any evidence that it met that burden and we are not aware of any evidence in the record that the Project application included the required statement. Thus, as a matter of fact and law, the Project application is not "deemed complete."

Appellants also refer to section 66498.1 without quoting it to claim that the Project's application completion date "is critical to the "Vested Rights" [sic] that is [sic] provided under the Subdivision Map Act . . . ." But the vested rights conferred through section 66498.1(b) of the Subdivision Map Act ("SMA") are premised upon application *approval*, not completeness. That section provides in relevant part as follows:

> "When a local agency *approves or conditionally approves* a vesting tentative map, that *approval* shall confer a vested right to proceed with development in substantial compliance with the ordinances, policies, and standards described in Section 66474.2." (Emphasis added).

On its face, section 66498.1(b) confers vested rights only once a local agency has "approved or conditionally approved" a vesting tentative map, not before. See also Curtin, Jr. & Merritt, *California Subdivision Map Act and the Development Process* at § 7.8 (Cont. Ed. of the Bar). Vested rights do not flow from the mere determination that a development application is complete. In so claiming, Appellant conflates the "deemed complete" provisions of the PSA with its "deemed approved" provisions. Thus, even if Appellant were correct that the Project application is "deemed complete," that fact would have no

bearing on whether the Project is "deemed approved" such that it could possibly have vested rights under the SMA.

Moreover, tentative maps may not be "deemed approved" under the PSA unless the map satisfies all applicable subdivision regulations. § 66452.4; see also *Pongputmong v. City of Santa Monica*, 15 Cal.App.4th 99, 104-105 (1993). There is no evidence in the record of which we are aware that the Project vesting tentative map satisfies all applicable regulations in the SMA or the County's subdivision ordinance, including sections 23.07.002, 003, 004, and 007. In addition, there is no evidence in the record of which we are aware that the "public notice required by law has occurred," whether by the County or by the Project proponent. Tentative maps may not be approved under the PSA unless due process requirements such as notice and a hearing are satisfied. See, e.g., *Horn v. Ventura*, 24 Cal.3d 605 (1979). Finally, there is no evidence in the record of which we are aware that the County has made any determination what level of CEQA review would be appropriate for the Project or that CEQA compliance has occurred to trigger the applicable PSA timelines for potential "deemed approved" status.

For the foregoing reasons, the Project application is neither "deemed complete" nor "deemed approved." Given that the Project itself is not "deemed approved" and has not in fact been approved by the County, the Project has no vested right to proceed with development in accordance with the ordinance, policies, and standards in effect at the date the application is "deemed complete," which has yet to occur.