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Sent:	Wednesday, May 06, 2015 11:57 AM
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Subject:	Vested Rights Primer
Attachments:	2015-05-06Vested Rights.docx

Laurie,

Attached please find a primer on vested rights that I thought might be helpful for our discussions this afternoon. I am working from home and my printer is a bit wonky. Could I impose on you to print copies for the meeting.

Wayne

I will be out of the office with minimal access to e-mails or phones from May 27th through June 9th. In the event of an emergency please contact my partner Suzanne Varco at svarco@envirolawyer.com (619) 231-5858 or my law clerk Josh Rosenbaum at jrosenb@gmail.com (619) 920-1535

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Vested Rights, Preemption, and the Subdivision Map Act.

What constitutes a vested right?

The concept of vesting is intended to reflect an equitable balance between the reasonable expectations of the developer and the ability of the land use agency to use its police powers to protect health and safety. In California the right to proceed with a project based on prior approvals vests under three conditions. These are: common law rights (also known as Avco rights), vesting tentative maps, and development agreements.

Common law rights

In *Avco Community Developer's v. South Coast Regional Commission* (1976) the California Supreme Court decided that a final map or a parcel map does not, standing alone, create a vested right. However, as with most court decisions there are exceptions to the rule.

- Where there are additional permits associated with construction and work has occurred the right to proceed vests.
- Where a final map has issued and the Department of Real estate has issued a public report the project has a vested right to proceed.
- Where the developer has changed its position and invested money in the project based on assurances by the land use agency, the agency is estopped from changing the rules, thus the project is vested.

Each of these situations if fact specific and requires the subjective interpretation by the land use agency. However, as long as the application of common law rights by the agency is not arbitrary, capricious or in derogation of law, the courts will generally uphold the agency's conclusions.

Vesting Tentative Maps

In response to the vagaries created by the Avco decision, in 1984 the California Legislature enacted Government Code 66498.1 et seq establishing a new form of tentative maps for subdivisions – the vesting tentative map. The approval of a vesting tentative map expressly confers a vested right to proceed with a development in substantial compliance with the ordinances, policies and standards in effect at the time the application for the approval of the vesting tentative map is deemed complete. Thus, a project with a vesting tentative map whose application was deemed complete prior to 2007 or even 2001 has the right to proceed with that project under the rules and regulations applicable at the time the application was deemed

complete and may not be required to implement any hydromodification or water quality requirements set out in later MS4 permits as adopted by the land use agency through its ordinances.

There are three general exceptions to this bar that are discussed herein. Where the land use agency later determines that to allow the project to proceed would result in health or safety impacts (note environmental impacts are not included) it may use its police power to override the provisions of the VTM. Where the land use agency imposes additional water quality or hydromodification requirements without a finding of health or safety impacts it may do so through an eminent domain action to compensate the developer for any additional costs or lost revenues resulting from the action. Finally, where the land use agency's authority has been preempted by state or federal law, state or federal law can supersede the rights and obligations of the developer and the respective land use agency.

Development Agreements

Development Agreements are adopted by ordinance between a developer and a land use agency establishing the conditions under which a particular development may occur. The local government freezes the regulations applicable to the site for an agreed upon period (frequently up to twenty years or more) to allow the project to both prepare approval of plans and to proceed with the project. See Government Code section 65864 et seq.

As with the vesting tentative map the conferred rights can be superseded by a finding of health or safety endangerment or an eminent domain action by which the land use agency would reimburse the developer for the cost of complying with later enacted requirements or a finding that the provisions of the local ordinance are preempted by state or federal law. However, as with vesting tentative maps, the developer may otherwise proceed under the requirements established in the DA even if those requirements are twenty or more years out of date.

When are vested rights preempted by superseding federal or state law?

As discussed above, vested rights can be preempted by state or federal law. However, as demonstrated below, that is not the case here.

Federal Preemption

Occasionally, Congress is sufficiently concerned about federal supremacy in an area that it expressly spells out its preemptive intent on the face of the federal law. This is called "express preemption"; and given the historical respect for state property law in general, and state water law in particular, it will not often occur in the water law arena. In legislating the Clean Water Act, Congress utilized the "cooperative federalism" model of regulation, and invited the States to take over certain programs. For example, as in the situation of MS4 permits, the majority of

§402 (33 U.S.C. §1342) NPDES permit systems have been assumed by the State. This is a far cry from the typical express preemption scenario where the state role is entirely displaced.

In addition to "express preemption", however, there are two different kinds of "implied preemption" analysis. These are the "field preemption" and the "conflict preemption" models.

In "field preemption" cases, the facts involve either a detailed and "pervasive" federal statutory and regulatory scheme; or a "dominant" federal interest; or both. In such cases, the palpable assertion of (or need for) unimpeded federal control leads the courts to attribute to Congress an intent to "occupy the field", leaving no room for state law. This is not the case with NPDES permits as discussed above. Realistically, the only area in water law where "field preemption" appears to have any role is the area of hydroelectric power generation.

At last we come to "conflict" preemption. "Conflict" analysis is really a two-step process. First, one must ascertain with fair precision what the relevant federal and state laws dictate. This may be an arduous process in itself, entailing an odyssey through reams of statutes; tomes on the rules of statutory construction; and a deluge of legislative history. Then, as a second step, the courts compare the federal and state law, and set aside those aspects of the state law that directly conflict with the federal law, as well as those that "frustrate" the accomplishment of the objectives of Congress. The field is not "occupied"; state laws that are consistent with federal programs are welcome.

Conflict preemption cases are necessarily decided on a case by case basis; one decision will not likely serve as very persuasive authority in another case involving different federal or state laws. However, I have not found any federal mandate that would require an MS4 permit to address the issues raised by the prior lawful approval provision in this or any other MS4 permit. Thus, there does not appear to be a basis for conflict preemption.

State Preemption.

The same legal doctrines that apply to federal preemption of state statutes and regulations also apply to state preemption of local ordinances. With one additional nuance in California.

Under Dillon's Rule, California's legislature has stipulated local governments are administrative arms of the states and can be ordered to carry out state programs or policies generally referred to as mandates. However, the California Constitution provides that whenever the Legislature or any state agency mandates a new program or higher level of service on a local government, the state shall reimburse the local government for the costs of that program or increased level of service. Here, where the imposition of a strict mandate on local agencies to impose new development requirements on vested projects represents a new program or higher level of

service for which the local agencies must be reimbursed; particularly if the imposition requires the local land use agency to utilize it eminent domain powers to rescind a vested right.

Moreover, the state remains liable for making reimbursements even when events render a mandate determination inappropriate or obsolete. There is no current mechanism for reducing or eliminating mandates when there is a change in law or when the cost for implementing a mandate decreases over time. For example, sometimes federal mandates are imposed subsequent to a state mandate relating to the identical program. Under the current structure, there is no mechanism to retire the state mandate. Even assuming that federal preemption existed in this case, which it does not, by incorporating a strict mandate into the MS4 permit which requires land use agencies to withdraw vested rights, the state would still be liable for the resulting costs to the jurisdictions.

It would certainly be possible for the RWQCB to adopt language that eviscerates vested rights. However, the logical consequence would be a finding of an unfunded mandate whereby the state would be required to reimburse the land use agencies for the cost of imposing such a requirement on both public and private projects.

The Solution

Given the legal analysis above, we believe that the language proposed by the Coalition in consultation with the Copermittees fairly addresses the legal concerns raised by a reversion to the "footnote" in the 2007 permit. The proposed language:

- Addresses the ambiguities that result in common law vesting.
- Provides a clear pathway by which land use agencies can use their police powers to avoid the results older vesting tentative maps and development agreements.
- Provides the necessary safeguards and protections to all parties regarding the ability to complete a project based on the regulations in place at the time the project was approved.
- Shields the State from having to reimburse the land use agencies for unfunded mandates.