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GEORGE DEUKMEJIAN
Attorney General

OPINION	:	No. CV 79-2
of	:	April 11, 1979
GEORGE DEUKMEJIAN Attorney General	:	
Rodney Lilyquist, Jr. Deputy Attorney General	:	

SUBJECT: OFFSITE AND ONSITE IMPROVEMENTS—Under the provisions of Government Code section 66411.1, a local agency may not require that the construction of offsite and onsite improvements be completed prior to the recordation of a parcel map. A local agency may require that the improvements be secured and may deny approval for development until construction requirements have been fulfilled.

The Honorable Joseph W. Kiley, District Attorney of Calaveras County, has requested an opinion on the following questions:

1. May a local agency require that the construction of offsite and onsite improvements under the provisions of Government Code section 66411.1 be completed prior to the recordation of a parcel map?

2. May a local agency require that the construction of offsite and onsite improvements under the provisions of Government Code section 66411.1 be secured pursuant to the provisions of Government Code sections 66499–66499.10?

3. Where the construction of offsite and onsite improvements under the provisions of Government Code section 66411.1 is not secured and the subdivider is no

longer the owner of the parcels, may a local agency deny approval for development of the parcels by their owners until the construction requirements have been fulfilled?

The conclusions are:

1. In general, a local agency may not require that the construction of offsite and onsite improvements under the provisions of Government Code section 66411.1 be completed prior to the recordation of a parcel map.

2. A local agency may require that the construction of offsite and onsite improvements under the provisions of Government Code section 66411.1 be secured pursuant to the provisions of Government Code sections 66499–66499.10.

3. Where the construction of offsite and onsite improvements under the provisions of Government Code section 66411.1 is not secured and the subdivider is no longer the owner of the parcels, a local agency may deny approval for development of the parcels by their owners until the construction requirements have been fulfilled.

ANALYSIS

The three questions presented for analysis concern requirements imposed upon a property owner by a city or county when the owner wishes to divide his property into four or less parcels. The applicable governing statutes are found in the Subdivision Map Act. (Gov. Code, §§ 66410, 66499.37)[1] (hereinafter "Act").)

In general, the Act provides for a rational and orderly means by which land can be divided, developed, and improved. It accomplishes this purpose by requiring, with few exceptions, that any division of land be shown on a map approved by the local agency.[2] If the division and proposed development will create the need for access, drainage, utilities, and other services, the local agency may condition the approval of the division upon such improvements being made. (See *Bright v. Board of Supervisors* (1977) 66 Cal. App. 3d 191, 193–194; 61 Ops. Cal. Atty. Gen. 299, 300 (1978); 3 Witkin, Summary of Cal. Law (8th ed. 1973), Real Property, §§ 22–24, pp. 1788–1792; 2 Ogden's Revised Cal. Real Property Law (1975) §§ 25.1–25.2, pp. 1204–1206.)

Procedurally, if the land division results in four or less parcels, a "parcel" map is normally required;[3] the recording of a "final" map involving stricter requirements is

[1] All unidentified section references hereinafter refer to the Government Code.

[2] A "local agency" is defined as "a city, county or city and county." (§ 66420.)

[3] Under section 66428 a "tentative" map (§§ 66452–66452.7) may be required where a parcel

generally necessary for a division resulting in five or more parcels. (§§ 66426, 66428; *Bright v. Board of Supervisors*, *supra*, 66 Cal. App. 3d 191, 195; 4 Miller & Start, Current Law of Cal. Real Estate (1977) §§ 24:33–24:35, pp. 60–68; 9 Hagman & Volpert, Cal. Real Estate Law Practice (1978) §§ 290.20–290.24, pp. 290:12–290:35.)

Although the "[r]egulation and control of the design and improvement of subdivisions are vested in the legislative bodies of local agencies" (§ 66411), the Legislature has imposed certain restrictions upon the supervisory role of the local governing bodies. Significant to our discussion are the restrictive provisions regarding necessary improvements in subdivisions of four or less parcels.

The first question concerns whether a local agency can require that improvements in such smaller subdivisions be completed prior to the recordation of the appropriate parcel map. Since sale of the parcels is generally dependent upon recordation of the map (§ 66499.30, subd. (b)), such a requirement would insure that the improvements were made before sale. On the other hand, it may be argued that a landowner should not be required to make the necessary improvements until he is ready to develop the property. Based upon an examination of the controlling statute, section 66411.1, we conclude that completion of the improvements may not be required prior to the recordation of the parcel map.

Section 66411.1 provides that in divisions of land into four or less parcels, the improvements required by local ordinance must be limited to "the dedication of rights-of-way, easements, and the construction of reasonable offsite and onsite improvements for the parcels being created." Under the statute, notification of the construction requirements must be "by certificate on the parcel map, on the instrument evidencing the waiver of such parcel map, or by separate instrument and shall be recorded on, concurrently with, or prior to the parcel map or instrument of waiver of a parcel map being filed for record."

Although the improvements can be specified and their description recorded prior to the recordation of the appropriate parcel map, the Legislature has further provided in the statute that:

> *"Fulfillment of such construction requirements shall not be required until such time as a permit or other grant of approval for development of the parcel is issued* by the local agency or, where provided by local ordinances, until such time as the construction of such improvements is required *pursuant to an agreement between the subdivider and the local agency, except* . . . that in the absence of such an agreement*, a local agency may require fulfillment of such construction requirements within a reasonable time following*

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snap is necessary, and a parcel map may be waived under certain conditions.

> *approval of the parcel map* and prior to the issuance of a permit or other grant of approval for the development of a parcel upon a finding by the local agency that fulfillment of the construction requirements is necessary for reasons of . . . public health and safety; or . . . orderly development of the surrounding area." (Emphasis added.)

While it is true that the words "shall" and "may" are mandatory or permissive depending upon the legislative intent (see *Jacobs v. State Bar* (1977) 20 Cal. 3d 191, 198), ordinarily "shall" is mandatory and "may" is permissive. (*California Teachers Assn. v. Governing Board* (1977) 70 Cal. App. 3d 833, 842; *County of Sacramento v. Superior Court* (1971) 20 Cal. App. 3d 469, 472; *Parks v. Superior Court* (1971) 19 Cal. App. 3d 188, 191.) When a statute contains both the words "shall" and "may," it has been held that the former most be construed as mandatory and the latter as permissive. (See *Hogya v. Superior Court* (1977) 75 Cal. App. 3d 122, 133 fn. 8; *National Automobile etc. Co. v. Garrison* (1946) 76 Cal. App. 2d 415, 417.)

In light of these principles, we construe section 66411.1 as allowing a local agency to require the completion of the necessary improvements within a reasonable time *after* the parcel map has been approved[4] if no agreement has been reached setting an earlier date of completion pursuant to a duly adopted ordinance authorizing such agreements.

The second question deals with whether a local agency may demand security from the subdivider to insure that the improvements under section 66411.1 are constructed. Since construction cannot be required before recordation of the parcel map and the subdivider may sell the parcels after recordation, a situation may arise where a subdivision is without improvements and no longer in the hands of the subdivider. We conclude that security may be required of the subdivider to insure the construction of necessary improvements in subdivisions of four or less parcels.

In subdivisions of five or more parcels, the Legislature has expressly provided that security be given by the subdivider to insure construction of the required improvements. As a condition for approving the final map where the improvements have not been completed, the local agency "shall require that performance . . . be guaranteed by the security specified in [sections 66499–66499.10]." (§ 66462, subd. (c).)

[4] Ordinarily, a parcel map with the required certificates and security is recorded by the county recorder within 10 days after approval. (§§ 66464–66468.) If the 10 days for recordation is extended by mutual consent of the subdivider and agency under section 66451.1, it would be possible for the construction to be completed before the map was actually recorded.

Although no similar statutory mandate can be found regarding security for divisions of four or less parcels, we note that section 66499 provides: "Whenever . . . a local ordinance authorizes or requires the furnishing of security in connection with the performance of any act or agreement, such security shall be . . . (a) Bond or bonds . . . (b) A deposit of money or negotiable bonds . . . (c) An instrument of credit. . . ."

We believe that pursuant to an authorizing local ordinance a local agency may demand security from a subdivider to insure construction of improvements required under section 66411.1 inasmuch as (1) it would further the agency's mandated responsibilities of "Regulation and control of the design and improvement of subdivisions" (§ 66411), (2) it would be incidental to its power of requiring the construction of the improvements under section 66411.1, and (3) it would be pursuant to the implied authorization for demanding such security under section 66499.

Moreover, as with the improvements for divisions of five or more parcels, a local agency may have a duty to maintain the section 66411.1 improvements and thereby "be entitled to demand a bond guaranteeing that the work of improvement would be done by the subdivider. (*Evola v. Wendt Construction Co*. (1959) 170 Cal. App. 2d 21, 25.) As was stated in *Hoover v. County of Kern* (1953) 118 Cal. App. 2d 139, 142: "One of the main purposes of the Subdivision Map Act seems to be to require the subdivider to do the original work of placing the streets in a proper condition before the maintenance thereof is taken over by a city or county, and to relieve the public to this extent of the burden that would otherwise exist."

The general conditions and restrictions covering security arrangements under the Act (§§ 66499–66499.10) would of course be applicable to such demand.

The conclusion to the second question, therefore, is that a local agency may require that the construction of offsite and onsite improvements pursuant to the provisions of section 66411.1 be secured as provided by the terms of sections 66499–66499.10.

The third question concerns whether a local agency can withhold approval for development of parcels where (1) the construction of the section 66411.1 improvements has not been completed, (2) the construction is not secured under the provisions of the Act, (3) the parcel map has been recorded, and (4) the subdivider is no longer the owner of the property and is unavailable. We conclude that under such circumstances, approval of development can be withheld until the improvements have been completed.

First, we note that section 66411.1 speaks in general terms concerning when the improvements must be made: "Fulfillment of such construction requirements shall not be required until such time as a permit or other grant of approval for development of the parcel

is issued by the local agency. . . ." The statute only limits the time within which the improvements must be made, thus it does not prohibit the local agency from requiring completion of the construction by whomever seeks to develop the parcels.

Second, any person who has purchased a parcel from the subdivider would have constructive notice concerning what improvements were necessary. As previously noted, section 66411.1 states in part: "Requirements for the construction of such offsite and onsite improvements shall be noticed by certificate on the parcel map, on the instrument evidencing the waiver of such parcel map, or by separate instrument and shall be recorded on, concurrently with, or prior to the parcel map or instrument of waiver of a parcel map being filed for record." Accordingly, purchasers of the parcels may not reasonably claim ignorance of the recorded improvement requirements. Rather, they would be the successors in interest to the subdivider and subject to the recorded improvement restrictions placed upon the parcels.

Third, purchasers of the parcels who seek development permits would he the actual beneficiaries of any improvements made. A similar situation was presented in *Keizer v. Adams* (1970) 2 Cal. 3d 976, 981, where the Supreme Court indicated that it would be equitable for a local agency to require the construction of necessary improvements by the purchasers "as a condition to the issuance of a building permit."

The conclusion to the third question, therefore, is that where the construction of offsite and onsite improvements under the provisions of section 66411.1 is not secured and the subdivider is no longer the owner of the parcels, a local agency may deny approval for development of the parcels by their owners until the construction requirements have been fulfilled.[5]

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[5] Since construction of the improvements primarily would be the responsibility of the subdivider and security may be required from him to insure construction, it would be rare that persons who have purchased the parcels from the subdivider would have to complete the construction before obtaining their building permits.