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OPINION	:	No. 80-702
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The Honorable Deni Greene, Director, Office of Planning and Research, has requested an opinion on questions we have rephrased as follows:

1. Is the design requirement of Government Code section 66473.1 sufficiently specific for implementation by local agencies?

2. May a local agency adopt an ordinance specifying passive and natural heating and cooling design requirements in addition to the examples given in Government Code section 66473.1?

3. May a tentative map of a subdivision be disapproved for failure to meet the design requirement of Government Code section 66473.1 even though such requirement is not mentioned in Government Code section 66474?

CONCLUSIONS

1. The design requirement of Government Code section 66473.1 is sufficiently specific for implementation by local agencies.

2. A local agency may adopt an ordinance specifying passive and natural heating and cooling design requirements in addition to the examples given in Government Code section 66473.1.

3. A tentative map of a subdivision must be disapproved if it fails to meet the design requirement of Government Code section 66473.1, even though such requirement is not mentioned in Government Code section 66474.

ANALYSIS

The Subdivision Map Act (Gov. Code §§ 66410–66499.37;[1] hereafter "Act") requires, with certain exceptions, that a subdivider of property (1) design the subdivision in conformity with applicable general and specific plans, (2) construct public purpose improvements such as streets and sewers, and (3) donate land or money for public uses such as parks and schools. (§§ 66439, 66474–66478; Longtin, Cal. Land Use Regulations (1977) § 10.03, pp. 562–563; 3 Witkin, Summary of Cal. Law (2d 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; Comment, *Land Development and the Environment*: *The Subdivision Map Act* (1974) 5 Pacific L.J. 55, 86–87.)

While the Act establishes general statewide criteria for land development planning, it delegates to local agencies the authority to regulate the details of proposed subdivisions. (§§ 66411, 66420, 66473–66479; *Simac Design, Inc. v. Alciati* (1979) 92 Cal. App. 3d 146, 157.)[2]

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[1] All section references hereafter are to the Government Code unless otherwise specified.

[2] We note that a 'local agency' under the Act is a city, city and county, or county. (§ 66420.) The Act applies to charter cities and counties, and any local ordinance in conflict with the Act's provisions is void under the California Constitution. (*Santa Clara County Contractors etc. Assn. v. City of Santa Clara* (1965) 232 Cal. App. 2d 564, 575–578; see also *The Pines v. City of Santa Monica* (1980) 108 Cal. App. 3d 577, 579–582; *Hirsch v. City of Mountain View* (1976) 64 Cal. App. 3d 425, 430, *Codding Enterprises v. City of Merced* (1974) 42 Cal. App. 3d 375, 378; *Newport Bldg. Corp. v. City of Santa Ana* (1962) 210 Cal. App. 2d 771, 774–776.)

Section 66411 states in part:

> "Regulation and control of the design and improvement of subdivisions are vested in the legislative bodies of local agencies. Each local agency shall by ordinance regulate and control subdivisions for which this division requires a tentative and final or parcel map . . . ."

In 1978, the Legislature added section 66473.1 to the Act. The statute provides:

> *"The design of a subdivision for which a tentative map is required pursuant to Section 66426 shall provide, to the extent feasible, for future passive or natural heating or cooling opportunities in the subdivision.*
>
> "*Examples* of passive or natural heating opportunities in subdivision design *include* design of lot size and configuration to permit orientation of a structure in an east-west alignment for southern exposure.
>
> "*Examples* of passive or natural cooling opportunities in subdivision design *include* design of lot size and configuration to permit orientation of a structure to take advantage of shade or prevailing breezes.
>
> "In providing for future passive or natural heating or cooling opportunities in the design of a subdivision, *consideration shall be given to local climate, to contour, to configuration of the parcel to be divided*, and to other design and improvement requirements, and *such provision shall not result in reducing allowable densities or the percentage of a lot which may be occupied by a building or structure under applicable planning and zoning* in force at the time the tentative map is filed.
>
> "The requirements of this section do not apply to condominium projects which consist of the subdivision of airspace in an existing building when no new structures are added.
>
> "For the purposes of this section*, 'feasible' means capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social and technological factors."* (Emphasis added.)

Accordingly, the local design ordinances enacted under section 66411 must contain design requirements for passive or natural heating or cooling opportunities pursuant to

section 66473.1. The latter statute contemplates that each city and county will enact such ordinance requirements tailored to its own conditions and needs.

We have been asked three questions with respect to the provisions of section 66473.1. Our general conclusions are that the statute is sufficiently specific for implementation by local agencies, the examples given in the statute are not all inclusive as to the means of compliance, and failure to comply with the statute requires disapproval of the tentative map submitted.

A. Specificity

The basic requirement of section 66473.1 is that a proposed subdivision be designed "to the extent feasible, for future passive or natural heating or cooling opportunities." The Legislature has provided specific examples in the statute of what design elements are required. It has also defined the term "feasible" for purposes of the statute. Finally, it has specified what factors must be considered in meeting the design requirement and has set certain limits on possible alternatives.

Under such circumstances, is the statute too vague to be properly administered? In answering this question, we take cognizance of several principles of constitutional law and statutory construction.

In general, "the due process clause of the California and federal Constitutions require civil as well as criminal statutes to be sufficiently clear to provide a standard for uniform application. [Citation.]" (*In re Marriage of Walton* (1972) 28 Cal. App. 3d 108, 116.) "To be valid the statute must prescribe a standard sufficiently definite to be understandable to the average person who desires to comply therewith." (*Henry's Restaurants of Pomona, Inc. v. State Ed. of Equalization* (1973) 30 Cal. App. 3d 1009, 1020.) The standard must be "one by which the courts and agencies can measure the conduct after the fact. [Citation.]" (*Wingfield v. Fielder* (1972) 29 Cal. App. 3d 209, 218; see *United Business Com. v. City of San Diego* (1979) 91 Cal. App. 3d 156, 176.)

Normally, the void for vagueness test is applied to a statute prohibiting some conduct where "the risk of incurring severe penalties" is great should the person guess wrong. (*County of Nevada v. MacMullen* (1974) 11 Cal. 3d 662, 672; see *Rowan v. Post Office Dept.* (1970) 397 U.S. 728, 740; *Henry's Restaurants of Pomona, Inc. v. State Ed. of Equalization*, *supra*, 30 Cal. App. 3d 1009, 1020; *United Business Com. v. City of San Diego*, *supra*, 91 Cal. App. 3d 156, 176.) Here, assuming we have some risk or detriment to be feared, we believe that section 66473.1 is sufficiently precise to meet a void for vagueness constitutional challenge.

As we cogently stated by the Court of Appeal in *In re Davis* (1966) 242 Cal. App. 2d 645, 651:

> "It goes without saying that 'All presumptions and intendments favor the validity of a statute and mere doubt does not afford sufficient reason for a judicial declaration of invalidity. Statutes must be upheld unless their unconstitutionality clearly, positively and unmistakably appears.' [Citation.] Further ' "Reasonable certainty, in view of the conditions, is all that is required, and liberal effect is always to be given to the legislative intent when possible." ' [Citation.] Also, 'It is not required that a statute, to be valid, have that degree of exactness which inheres in a mathematical theorem. It is not necessary that a statute furnish detailed plans and specifications of the acts or conduct prohibited.' (Citation.]"

" ' " ' 'A statute will not be held void for uncertainty if any reasonable and practical construction can be given its language.' " ' " (*County of Nevada v. MacMillen*, *supra*, 11 Cal. 3d 667, 673; see *In re Marriage of Walton*, *supra*, 28 Cal. App. 3d 108, 116.) A statute may be made reasonably certain by reference to the common law, the legislative history of the statute, the Legislature's purpose in enacting the statute, and a practical application of the "common experiences of mankind." (See *Conally v. General Const. Co.* (1925) 269 U.S. 385, 391–392; *County of Nevada v. Macmillen*, *supra*, 11 Cal. 3d 662, 673; *People v. Daniels* (1969) 71 Cal. 2d 1119, 1128–1129; *People v. Grubb* (1974) 63 Cal. 2d 614, 620; *Gutknecht v. City of Sausalito* (1974) 43 Cal. App. 2d 269, 274–275; *Winglield v. Fielder*, *supra*, 29 Cal. App. 3d 209, 218–220; *In re Marriage of Walton*, *supra*, 28 Cal. App. 3d 108, 116; *McMurtry v. State Board of Medical Examiners* (1960) 180 Cal. App. 2d 760, 767, *Smith v. Peterson* (1955) 131 Cal. App. 2d 241, 246.)

Since detailed plans and specifications are unnecessary (see *CSC v. Letter Carriers* (1973) 413 U.S. 548. 578–579; *County of Nevada v. MacMillen*, *supra*, 11 Cal. 3d 662, 673; *Lorenson v. Superior Court* (1950) 35 Cal.2d 49, 60; *Gutknecht v. City of Sausalito*. *supra*, 43 Cal. App. 3d 269, 274; *Henry's Restaurants of Pomona, Inc. v. State Bd. of Equalization*, 30 Cal. App. 3d 1009, 1020; *Wingfield v. Fielder*, *supra*, 29 Cal, App. 3d 209, 2 19–220), use of such general and relative terms as "faulty," "careless," "reasonable precautions" (*Wingfield v. Fielder*, *supra*, 29 Cal. App. 3d 209, 218), "substantial conflict," "material economic effect" (*County of Nevada v. MacMillen*, *supra*. 11 Cal. 3d 662, 672) and "imminent" (*People v. Victor* (1965) 62 Cal. 2d 280, 299) has been upheld where "their meaning can be objectively asertained by reference to common experiences of mankind." (See *People v. Daniels*, *supra*, 71 Cal. 2d 1119, 1128–1129.)

In light of these judicial authorities, we believe that section 66473.1 meets the constitutional standard for specificity. "Feasible" appears to be the most nebulous term

contained in the statute, and its usage in the California Environmental Quality Act (see Pub. Resources Code § 21002.1, subd. (b)) has not produced any consternation or concern by the courts. (See *Residents Ad Hoc Stadium Com. v. Board of Trustees* (1979) 89 Cal. App. 3d 274, 284–287; *Laurel Hills Homeowner Assn. v. City Council* (1978) 83 Cal. App. 3d 515, 520–527; *Mount Sutro Defense Committee v. Regents of University of California* (1979) 88 Cal. App. 3d 20, 36–37; *San Francisco Ecology Center v. City and County of San Francisco* (1975) 48 Cal. App. 3d 584, 589–596.)

The examples given by the Legislature in section 66473.1, together with the listed factors to be considered and the express limits imposed on the selection process, all contribute to a belief that section 66473.1 would not be subject to a successful constitutional attack on the grounds of vagueness.

We thus conclude in answer to the first question that the design requirement of section 66473.1 is sufficiently specific for implementation by local agencies.

B. Additional Design Examples

The second question posed concerns the examples contained in section 66473.1: "Examples of passive or natural heating opportunities in subdivision design, include design of lot size and configuration to permit orientation of a structure in an east-west alignment for southern exposure" and "Examples of passive or natural cooling opportunities in subdivision design include design of lot size and configuration to permit orientation of a structure to take advantage of shade or prevailing breezes." Are these examples the only possible alternatives for meeting the design requirement of the statute? We think not.

As previously mentioned, the mandate of section 66473.1 is to design a proposed subdivision so as to "provide, to the extent feasible, for future passive or natural heating or cooling opportunities." No words of limitation are contained in this controlling language.

Merely by using the term "examples," the Legislature has evidenced an intent to not be restrictive. An "example" is "a particular single item, fact, incident, or aspect that may be taken fairly as typical or representative of all of a group or type." (Webster's New Internat. Dict. (3d ed. 1966) pp. 790–791.) An example is a model or representative action and does not connote an exclusive undertaking.

Consistent with this view is the use of the term "include" by the Legislature in section 66473.1. Ordinarily, "include" is a term of enlargement and not limitation. (See *People v. Western Air Lines, Inc*. (1954) 42 Cal. 2d 621, 639; *Paramount Gen. Hosp. Co.*

v. National Medical Enterprises, Inc. (1974) 42 Cal. App. 3d 496, 501; *People v. Homer* (1970) 9 Cal. App. 3d 23, 27.)

Here, an expansive interpretation of section 66473.1 with regard to the examples given by the Legislature is consistent with the general intent of the Act as a whole. *In Benny v. City of Alameda* (1980) 105 Cal. App. 3d 1006, 1010–1011, the Court of Appeal stated:

> "The Subdivision Map Act establishes general statewide criteria for land development planning, and delegates authority to cities and counties o regulate the details of subdivisions. (*Carmel Valley View, Ltd v. Maggini*, *supra*, 91 Cal. App. 3d at p. 320.) Its purpose is to coordinate planning with the community pattern laid out by local authorities, and to assure proper improvements are made so the area does not become an undue burden on the taxpayer. (*Bright v. Board of Supervisors* (1977) 66 Cal. App. 3d 191, 194.)
>
> "The Subdivision Map Act expressly empowers local agencies to enact certain types of supplemental ordinances (e.g., § 66411: local agencies have power to regulate and control the design and improvement of subdivisions). The power to adopt supplemental ordinances in connection with matters covered by the act may also be implied, provided those regulations bear a reasonable relation to the purposes and requirements of the act and are not inconsistent with it. [Citation.]"

Finally, certain words of limitation and restriction are contained in the statute. The most noteworthy legislative expression is the following: "such provision shall not result in reducing allowable densities or the percentage of a lot which may be occupied by a building or structure under applicable planning and zoning in force at the time the tentative map is filed."

It is apparent that the Legislature intended for the examples given in section 66473.1 to be merely representative of the means for complying with the design requirement of the statute. The Legislature used restrictive language in other parts of the statute but chose to use nonexclusive terms with regard to the examples given.

In answer to the second question, therefore, we conclude that a local agency may adopt an ordinance specifying passive and natural heating and cooling design requirements in addition to those identified in section 66473.1.

C. Disapproval Authority

The third question concerns whether a local agency may disapprove a tentative map for failure to meet the design requirement of section 66473.1, even though such requirement is not mentioned in section 66474. We conclude that under section 66473, the Legislature requires local agencies to disapprove tentative maps not meeting the design requirement of section 66473.1, regardless of the provisions of section 66474.

Section 66474 states:

"A legislative body of a city or county shall deny approval of a final or tentative map if it makes any of the following findings:

"(a) That the proposed map is not consistent with applicable general and specific plans.

"(b) That the design or improvement of the proposed subdivision is not consistent with applicable general and specific plans.

"(c) That the site is not physically suitable for the type of development.

"(d) That the site is not physically suitable for the proposed density of development.

"(e) That the design of the subdivision or the proposed improvements are likely to cause substantial environmental damage or substantially and avoidably injure fish or wildlife or their habitat.

"(f) That the design of the subdivision or the type or improvements is likely to cause serious public health problems.

"(g) That the design of the subdivision or the type of improvements will conflict with easements, acquired by the public at large, for access through or use of, property within the proposed subdivision. In this connection, the governing body may approve a map if it finds that alternate easements, for access or for use, will be provided, and that these will be substantially equivalent to ones previously acquired by the public. This subsection shall apply only to easements of record or to easements established by judgment of a court of competent jurisdiction and no authority is hereby granted to a legislative body to determine that the public at large

has acquired easements for access through or use of property within the proposed subdivision."

Failure to meet the design requirement of section 66473.1 is not mentioned as a ground for denying approval of a tentative map under section 66474. Is the list in section 66474 exclusive, or has the Legislature provided authority elsewhere for denying approval of tentative maps on other grounds?

We have previously looked at this question from a different perspective. In 62 Ops. Cal. Atty. Gen. 233, 243–245 (1979), we examined whether a local agency had authority to disapprove a tentative map solely on the ground that the proposed subdivision would violate the provisions of the California Land Conservation Act of 1965. We found four statutes dealing with the disapproval of a tentative map: sections 66473, 66473.5, 66474, and 66474.6. We concluded "that the grounds stated in the cited sections are the only grounds on which the county may disapprove or deny approval of a tentative subdivision map." (*Id*, at p. 245; see also 59 Ops. Cal. Atty. Gen. 129, 136 (1976).)

Section 66474 is thus one of several statutes governing the grounds for disapproving a tentative subdivision map. With regard to the design requirement of section 66473.1, the disapproval authority contained in section 66473 appears to be most relevant:

> *"A local agency shall disapprove a map for failure to meet or perform any of the requirements or conditions imposed by this division* or local ordinance enacted pursuant thereto; provided that a final map shall be disapproved only for failure to meet or perform requirements or conditions which were applicable to the subdivision at the time of approval of the tentative map; and provided further that such disapproval shall be accompanied by a finding identifying the requirements or conditions which have not been met or performed. Such local ordinance shall include, but need not be limited to, a procedure for waiver of the provisions of this section when the failure of the map is the result of a technical and inadvertent error which, in the determination of the local agency, does not materially affect the validity of the map." (Emphasis added.)

The Legislature has used the term "shall" in section 66473, as it did in section 66473.1 ["The design of a subdivision for which a tentative map is required pursuant to Section 66426 shall provide, to the extent feasible, for future passive or natural heating or cooling opportunities in the subdivision."]

Unless the legislative intent is clearly discernible to the contrary, the term "shall" is mandatory. (*Hogya v. Superior Court* (1977) 75 Cal. App. 3d 122, 133–134;

California Teachers Assn. v. Governing Board (1977) 70 Cal. App. 3d 833, 842.) Here, a mandatory definition of the term "shall" is consistent with the Act's purpose of orderly community development (see *Simac Design, Inc. v. Alciati*, *supra*, 92 Cal. App. 3d 146, 157–158; *Bright v. Board of Supervisors* (1977) 66 Cal. App. 3d 191, 195–196) and the Legislature's general purpose of encouraging energy conservation (see Pub. Resources Code § 25007), particularly through the use of passive and natural energy systems. (See Stats. 1978, ch. 1154, § 2.)

In answer to the third question, therefore, we conclude that a tentative map that does not meet the design requirement of section 66473.1 must be disapproved by the local agency under the provisions of section 66473, even though such requirement is not mentioned in section 66474.

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