

LIENS CAN BE USED BY DEVELOPERS IN PLACE OF BONDS TO SECURE SUBDIVISION IMPROVEMENT AGREEMENTS

On September 1, 2009, Riverside County's Board of Supervisors adopted Ordinance No. 460.150, which amended the County's Subdivision Ordinance, to allow liens on land to be used in place of bonds to secure subdivision improvement agreements in order to allow the approval of final subdivision maps while delaying the construction and installation of improvements. Cox, Castle & Nicholson represented the Building Industry Association of Southern California and several major developers in working with the County to allow the substitution of a lien on land subject to a subdivision map in place of bonds.

The Ordinance applies only to unincorporated portions of Riverside County but it can serve as a template for other counties and cities. Thus, developers who are ready to seek approval of a final map, but who do not want to have to post bonds, or who have already posted bonds in connection with the approval of final subdivision maps but wish to reduce their on-going costs, should consider the possibility of convincing other counties and cities to follow Riverside County's lead and to allow the use of liens in place of the bonds.

Bonds are generally needed to secure subdivision improvement agreements. As every developer knows, conditions requiring the construction and installation of improvements, such as roads and utilities, are generally imposed at the time a tentative subdivision map is approved. Frequently, the conditions of tentative map approval require that the conditions be satisfied before the final map can be approved.

However, the Subdivision Map Act provides an alternative; the developer can enter into a subdivision improvement agreement which allows for the approval of the final subdivision map while also allowing for a delay in constructing and installing the improvements for some period of time. The right to delay, embodied in the subdivision improvement agreement, must be secured to ensure that the improvements will be constructed and installed in a timely fashion because the approval and recordation of the final subdivision map creates legal lots which can be sold, leased or improved. That security most often consists of bonds issued by a bonding company.

The bonds themselves must be paid for and the amount of each bond represents a decrease in the developer's ability to obtain additional bonding. Neither of these are attractive in today's distressed real estate economic climate, particularly when the project must be put on hold for some period of time

Riverside County allows the use of liens in place of bonds. The Ordinance adopted by Riverside County's Board of Supervisors sets forth a number of requirements that must be satisfied in order to use a lien, rather than bonds, as security.

First, the lien will be allowed only if the improvements are not intended to be constructed and installed for at least two years.

Second, the developer must provide a title insurance policy showing that the lien in favor of the County will be in first position which means that the developer will have to own the land free and clear.

Third, none of the lots can have been sold. This is of importance when there is an existing subdivision improvement agreement secured by bonds. If any of the lots have previously been sold, a lien may not be substituted for the existing bonds.

Fourth, no grading or construction can have taken place with some minor exceptions which would not require the County to do anything if the project is later abandoned. In particular, no grading will be allowed which modifies or closes any public street.

Fifth, the use of the lien will be allowed for up to three years with the possibility of three one-year extensions which is particularly helpful in today's real estate economic climate.

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Finally, all of the restrictions must be embodied in a lien agreement which will then be recorded against the newly subdivided land.

Once the lien is in place, no individual lots may be sold but the entire project may be sold in bulk to a single buyer who will have to either agree to step into the seller's shoes or else replace the lien with more traditional security such as bonds or, occasionally, letters of credit.

Once the developer decides to begin the construction and installation of the improvements, the lien must be replaced by more typical security.

If you have any questions regarding this alert, please contact:

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