

Published By
The Law Offices Of
Borton Petrini, LLP
1600 Truxtun Avenue
Bakersfield, CA 93301
bpcbak@bortonpetrini.com

Inside

EXTENDING EXPIRATION OF A TENTATIVE TRACT MAP

Page 2

SB 1535

Page 3

If you are interested in receiving the Construction Law Quarterly Update newsletter, or have someone to whom you would like it sent, call (661) 322-3051, ext. 170 or e-mail publish@bortonpetrini.com and leave your name, e-mail and/or mailing address to request a free copy.

Editor:

Calvin R. Stead
(661) 322-3051

DEALING WITH I-9S AND SOCIAL SECURITY NO-MATCH LETTERS

By Calvin R. Stead

HIRING & RECRUITING

With contractors increasingly targeted over hiring illegal immigrants, you need to know how to stay on the right side of the law. One of the critical battlegrounds over illegal immigration is the workplace, where contractors are not only being chastised for hiring undocumented workers but are now being threatened with criminal action.

Because of these circumstances, you need a basic understanding of two of the key procedures relating to unlawful employment practices : (1) proper compliance with the I-9 form; and (2) steps to take if you receive a so-called “no match” letter from the Social Security Administration (SSA).

FORM I-9s

Every new hire needs to complete an I-9, which requires the contractor to verify the person’s identity and right to work in the United States, within three days of beginning work. Proof of identity can be a driver’s license, provided it contains a photograph and certain identifying information. Right to work can be certified by a birth certificate or U.S. passport in the case of a citizen, or a so-called “green card” (it is actually white these days), which denotes permanent resident status for a “legal” alien. The I-9 form also has information on other acceptable documents.

continued on page 3

Calvin R. Stead



Calvin R. Stead is a partner in the Bakersfield office of Borton Petrini LLP. Cal’s areas of legal expertise include construction defects, realtor errors and omissions, commercial and environmental litigation, land use planning, oil field litigation and toxic tort litigation. Cal has represented builders, developers and sub-contractors on a wide variety of construction issues, including grading, soils, foundation, asphalt, concrete, flat work, tile, framing, floor coverings, roofing, masonry and stucco. Within the area of toxic torts, he has handled a vast array of cases, including toxic molds, vaccine reactions, asbestosis, cancer phobia, chemically induced asthma, pesticide and herbicide contamination, EMF, and AIDS contamination and phobia claims.

EXTENDING EXPIRATION OF A TENTATIVE TRACT MAP

By Calvin R. Stead

Imagine the following hypothetical: You have a project with an approved tract map and you submitted proposed improvement plans to the applicable jurisdiction several months ago. However, the responsible engineer delayed review and approval of the improvement plans for several months. Each time an inquiry is made, a new explanation is provided, yet, no approved plans appear to be forthcoming. These delays effectively shorten the life of a tentative map, leading to the following question: What you can do to resolve the situation short of filing a lawsuit?

One possible solution can be found in the Government Code regarding imposing a moratorium on expiration of the tentative map. Grounds for a development moratorium are provided to protect against such problems, since the approved map expires by statute, after 24 months with some specific exceptions.

The Government Code requires that an improvement plan being processed in conjunction with either an approved tentative, parcel or final map **shall** be acted on within 60 working days of its submittal. You have to deduct all weekends and government holidays, such that 60 “working days” can be a considerably longer period of time. The Government Code also defines an improvement plan to include traffic control, streets, roads, highways, freeways, bridges, overcrossings, tract interchanges, flood control, or storm drain facilities, sewer facilities, water facilities and lighting facilities.

Government Code section 66452.6(f) defines the development moratorium to include actions of public agencies which regulate land use, development or the provision of services to the land, including the public agency with the authority to approve or conditionally approve the tentative map, which thereafter prevents, provides or delays approval of a final or parcel map.

Now that we have established that at least one remedy of sorts exists, the question arises as to the best way to pursue the remedy.

Once you are in a situation where the jurisdiction has exceeded the required plan review period, you have a good factual and legal argument that the jurisdiction was required to act within the statutory mandated period, failed to do so and the delay prevents, prohibits or delays approval of the final map. The moratorium runs from the time that the

agency exceeded the review period, assuming you have not already obtained any other moratorium that would take you beyond the five-year maximum extension period.

In pursuing your remedy, particularly in those jurisdictions that routinely exceed the plan review period, a simple letter to the city or county should result in acknowledgment of the moratorium. However, city or county counsel may try to minimize the setting of a precedent by taking the position that a moratorium would not arise if the delay is due to the poor quality of the plan or does not actually delay the overall completion of tasks necessary for the final map. In order to avoid this eventuality, you may want to try to set up your jurisdiction by getting them to admit that they have not looked at the plans or something similar before raising your moratorium argument so that the jurisdiction does not have any wiggle room.

If this “informal” approach does not work, you may have to try one or more of the following:

- Try filing your final map in a timely fashion pursuant to the Government Code. You should note that if the jurisdiction has a legitimate basis to kick back the plan after the expiration date, you may have serious difficulties. However, if the jurisdiction will not acknowledge the moratorium and you are at the eleventh hour, “timely filing” could provide a hedge against this eventuality.
- A legal action could be filed seeking declaratory relief in Superior Court pursuant to the applicable Government Code, extending the life of the map for the period of the delay due to inaction of the public agency.
- Another possibility would be to file a writ against the jurisdiction to try to force the jurisdiction to act.
- Finally, a possible (CEQA) action for inactivity on a map application may be possible.

Ultimately, the moratorium mechanism is probably politically more palatable to the jurisdiction since they will not have to incur fees or provide explanations to the court in case of a legal action. The down side, of course, is that even if a moratorium is acknowledged, there is still no additional obligation of the jurisdiction to act, since no court mandate will have been issued.



SB 1535

By Calvin R. Stead

Recent new legislation (Senate Bill 1535, effective January 1, 2007) requires that all projects subject to CEQA where a Notice of Determination (NOD) is filed with the County Clerk must be accompanied with fees to the California Department of Fish and Game. The fee is \$1,800 for projects using a Negative Declaration or Mitigated Negative Declaration and \$2,500 for projects with an Environmental Impact Report. A project is not considered operative, vested, or final until the filing fees are paid. Projects exempt from CEQA are not assessed these fees.

The SB 1535 also eliminated fee exemptions determined to have a “de minimus” effect on fish and wildlife resources. This fee is only exempt if the project will have no effect on fish and wildlife as determined by the Department of Fish and Game. If a project proponent believes their project has no impacts and the Department of Fish and Game concurs, the Department will provide them a form that exempts the project from the filing fee (the proponent must also provide a copy of this approved exemption form to the public entity where the project is located).

Since many jurisdictions routinely file all NODs immediately after project approval to ensure that permits are issued allowing your project to proceed, many jurisdictions will be collecting the filing fee when you submit your land use application. The specific Fish and Game fees should be placed into a trust account, which the jurisdiction will use to make a payment to the County Clerk when the NOD is filed. Many jurisdictions will be revising their application forms to reflect these changes.



DEALING WITH I-9S AND SOCIAL SECURITY NO-MATCH LETTERS

continued from page 1

Contractors are not required to keep copies of the documents presented by potential employees; however, if you keep them, you need to keep them for all employees to avoid discriminating based on national origin.

The I-9 forms should be retained for three years or one year after the date employment is terminated, whichever is longer. If any enforcement proceedings are pending or likely, they should be retained indefinitely. The forms may be stored either on paper or electronically.

DISCLAIMER: THE INFORMATION PROVIDED IN THIS UPDATE IS NOT A SUBSTITUTE FOR LEGAL ADVICE. READERS SHOULD BE ADVISED THAT IF THEY HAVE QUESTIONS ABOUT THIS OR ANY OTHER AREA OF CONSTRUCTION LAW, THEY SHOULD SEEK THE ADVICE OF COMPETENT COUNSEL SPECIALIZING IN CONSTRUCTION LAW.

Contractors may accept any documents that meet the requirements for completing the I-9 form and should never ask for more or different documents than are minimally required. To do otherwise could leave you open to claims of national origin and citizenship discrimination.

NO-MATCH LETTERS

When the Social Security information you have sent to the government does not match what is in Social Security’s files, the agency issues a no-match letter. Some 8 million of these letters are sent out each year. The mismatch can be triggered by lots of things, including a name change or clerical errors. It also may signify that a worker is not authorized to work. In any case, the letter cannot be ignored.

Take no adverse action against the employee, but recheck your files to be sure the information you submitted is what the employee gave you. Ask the employee to look at the submitted information as well, but do not again demand to see the employee’s documentation. If the information was correctly submitted, ask the employee to try to explain or find out why the no-match situation exists. Give the worker time to resolve the problem, but ask for progress reports along the way.

If, in the course of making inquiries, you do discover that the worker is not authorized to work in the United States, the law requires immediate termination. Because this step involves legal risk, especially in today’s litigious atmosphere, you should consult with counsel before taking any such action.

Finally, send your response to the Social Security Administration. There are three possible ways of doing so: Report that (1) the employee has left the company; (2) you have found an error and provide the correct information; or (3) you and the employee have verified the submission and you cannot explain the discrepancy.



Form I-9

LAW OFFICES OF
**BORTON
PETRINI**
LLP

Bakersfield

1600 Truxtun Avenue
Bakersfield, CA 93301
(661) 322-3051
E-mail: bpcbak@bortonpetrini.com
Managing Partner: Calvin R. Stead

Fresno

2014 Tulare Street, Ste. 631
Fresno, CA 93721
(559) 268-0117
E-mail: bpcfrrs@bortonpetrini.com
Managing Partner: Bradley A. Post

Los Angeles

900 Wilshire Blvd., Ste. 500
Los Angeles, CA 90017
(213) 624-2869
E-mail: bpcla@bortonpetrini.com
Managing Partner: Rosemarie S. Lewis

Modesto

1104 12th Street
Modesto, CA 95354
(209) 576-1701
E-mail: bpcmod@bortonpetrini.com
Managing Partner: Bradley A. Post

www.bortonpetrini.com

Orange County

3020 Old Ranch Parkway, Suite 300
Seal Beach, CA 90740
(562) 596-2300
E-mail: bpcoc@bortonpetrini.com
Managing Partner: Rosemarie S. Lewis

Sacramento

P. O. Box 277790
Sacramento, CA 95827
(916) 858-1212
E-mail: bpcsac@bortonpetrini.com
Managing Partner: Mark S. Newman

San Bernardino

290 North D Street, Ste. 500
San Bernardino, CA 92401
(909) 381-0527
E-mail: bpcsbdo@bortonpetrini.com
Managing Partner: Daniel L. Ferguson

San Diego

402 W. Broadway, Ste. 880
San Diego, CA 92101
(619) 232-2424
E-mail: bpcsd@bortonpetrini.com
Managing Partner: Paul Kissel

San Francisco

535 Pacific Avenue, Suite 201
San Francisco, CA 94133
(415) 677-0730
E-mail: bpcsf@bortonpetrini.com
Managing Partner: David H. Bremer

San Jose

99 Almaden Blvd., Ste. 700
San Jose, CA 95113
(408) 535-0870
E-mail: bpcsj@bortonpetrini.com
Managing Partner: Samuel L. Phillips

Construction News You Can Use

THE LAW OFFICES OF BORTON PETRINI LLP
QUARTERLY UPDATE
CONSTRUCTION LAW



WINTER 2007

PRESORTED
STANDARD
U.S. POSTAGE
PAID
REED PRINT, INC.

LAW OFFICES OF
Borton Petrini LLP
1600 Truxtun Avenue
Bakersfield, CA 93301