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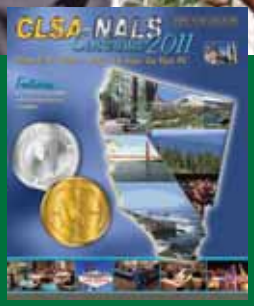

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SMA Expert Q&A

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Question

In my last Ask the Map Act Expert column, I responded to two questions concerning lot line adjustments (LLAs): (1) are the local ordinances of cities and counties required to characterize the approval of an LLA as a "discretionary" approval?; and (2) must the local ordinance limit the property owner to four total lot line adjustments over the lifetime of its ownership of the property, *i.e.*, is the local ordinance required to limit "sequential" LLAs?

These two questions are gaining attention statewide and are now the subject of litigation – in fact, the author is representing CLSA as *Amicus Curiae* (friend of the court) in litigation pending in Napa County. Therefore, this column provides further discussion and additional ideas concerning the discretionary approval question. In my column in the next issue, I will provide further discussion and additional ideas concerning the question of "sequential" LLAs.

Discussion

My analysis in the previous column began with a basic tenant of Land Use Law in California: a city or county's inherent police power derives from Article 11, § 7 of the California Constitution, and not from the delegation of authority by the state or statute. Therefore, the question when reviewing any local LLA regulation or action is simply the presence or not of conflict with the Map Act; the Map Act does not have to grant "permission" to cities or counties for the local LLA regulation or action to survive challenge. For the reasons discussed below, I submit that there is an absence of an express or implied Map Act directive that Lot Line Adjustments must be treated locally as discretionary acts (*i.e.*, a conflict).

When considering the Map Act's treatment of the ministerial or discretionary nature of LLAs, we see the *absence* of a "discretionary directive" by the Map Act regarding LLAs. In particular, Government Code section 66412 sets forth a number of different exclusions (including the LLA exclusion (§ 66412(d)), with differing express indications as to whether the activity seeking the Map Act exclusion must be subject to "discretionary action" in order to qualify for the exclusion.

For example, the Map Act exclusion for wind-powered electrical generation devices (§ 66412(i)) expressly provides that the activity seeking the exclusion must be subject to a discretionary action somewhere in the process in order to qualify for the exclusion:

> *This division shall be inapplicable to … (i) [t]he leasing of, or the granting of an easement to, a parcel of land, or any portion or portions thereof, in conjunction with the financing, erection, and sale or lease of a windpowered electrical generation device on the land, if the project is subject to discretionary action by the advisory agency or legislative body." (Emphasis added.)*

Likewise, the Section 66412(j) exclusion regarding cellular radio transmission facilities and the Section 66412(m) exclusion regarding solar electrical generation devices both expressly provide that the activity seeking the exclusion must be subject to a discretionary action somewhere in the process in order to qualify for the Map Act exclusion.

In striking contrast to these Map Act exclusions (that expressly require a discretionary action somewhere in the process to qualify for the exemption) the phrase, "if the project is subject to discretionary action by the advisory agency or legislative body," simply does not appear in the LLA exclusion, nor is it elsewhere in the Map Act, nor can it be implied to exist.

The rule of construction regarding statutory interpretation under these circumstances is clear: "'Where a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different intention existed.' [citation omitted]" (*People v. Licas* (2007) 41 Cal. 4th 362, 367.) For example, in *In re Eastport Assoc.* (C.D. Cal. 1990) 114 B.R. 686, the federal court, in reviewing a Map Act claim, made clear that the grandfathering provision set forth in one Map Act section could not be implied to exist in another Map Act section, since that omission must be assumed to be part of the statutory scheme.

In other words, the absence of the express requirement for discretionary action in the LLA subsection of the Map Act's exclusion section (§ 66412) – when that section clearly and expressly requires other activities to undergo a discretionary process – must be interpreted to conclude that the omission was intentional and that the Map Act does not require a discretionary process for LLAs.

As such, in the opinion of the author, a city's or county's determination that LLA approvals are ministerial should be "lawful" because it would not conflict with the Map Act. ■