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CONTENTS

FEATURE ARTICLE

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Volume 8, Number 5
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CONTENTS

FEATURE ARTICLE

CALIFORNIA LAND USE NEWS

RECENT CALIFORNIA DECISIONS

Continued on next page

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LAW & POLICY Reporter

FEATURE ARTICLE

LEGAL STANDARDS FOR LOCAL AGENCY REVIEW OF LOT-LINE ADJUSTMENTS: A SUBDIVIDER'S PERSPECTIVE

By Michael Patrick Durkee, Tyson H. Powell and Christopher Hansmeyer

Not surprisingly, the scope of, and legal standards applicable to, local agency review of "lot-line adjustments" continue to be debated between lot owners and local government representatives. This dispute pits local agencies' fears of unwanted development against landowners' fears of excessive/unfair local regulation. The current level of interest in lot-line adjustments reflects the remarkably difficult process that development in some parts of California has become. Back in the days when maps were regularly approved, this interest rarely arose.

The focus of this dispute is Subdivision Map Act §66412(d), (California Government Code §§ 66410-66499), which exempts lot-line adjustments between "two or more existing adjacent parcels . . . where a greater number of parcels than originally existed is not thereby created" from the Subdivision Map Act's more substantive review requirements.

In an article last year on this topic (*See*, "Legal Standards for Local Agency Review of Lot-Line Adjustments," 7 *California Land Use Law & Policy Reporter* 61, December 1997), Alan Seltzer, Esq., Wilson F. Wendt, Esq. and Arthur F. Coon, Esq. (Local Agency Authors) supported an interpretation of these Map Act provisions that would allow only those lot-line adjustments involving "friendly neighbor" accommodations. That is to say, they believe only adjustments between adjacent landowners to resolve fence-line, encroachment and similar issues should be allowed. We address their legal arguments below.

An Impediment to Lot-line Adjustment Approvals: Local Government's Fear of Development

Initially, we make the following general observation: The real issue is *not* the adjustment of lines between existing legal lots; whether open, undeveloped land is comprised of one big parcel or a thousand little parcels is both indiscernible to the eye and unimportant to the populous. The real issue is the potential development of those parcels, once they have been adjusted to conform to local building and zoning requirements that allow the development of all conforming lots. If you understand this simple underlying agenda, you will understand the amount of political pressure placed on creative minds, like the Local Agency Authors', to impede the adjustment of existing legal lots, since such adjustment could lead to development. However, we consider their fears misplaced and their legal arguments misguided.

Their fear of development can be easily assuaged. First, the Map Act provides a means to *create* and *adjust* lots (conveyance provides another). However, the Map Act looks to the general plan on issues of development. The recording and subsequent transfer of lots resulting from the adjustments does not equate to development. The allowable uses of, and the ability to develop on, adjusted lots (the real threat) can be easily controlled by the local general plan. The general plan could dictate a local discretionary review process for development proposals that do not otherwise undergo a discretionary mapping process.

In other words, there are other means at the disposal of local agencies to accomplish the Local Agency Authors' cherished goals of CEQA review, general plan consistency determinations, and development control without misusing the Map Act. Deciding to curb a development threat by disallowing the adjustment of legal lots, however, is an overreaction (and we believe an illegal one) to this development threat.

Our editorial comment for now is that we believe it inappropriate for public agencies (and their attorneys) to use their locally-centered problems and politics or their version of the Map Act's "salutary" purposes as legal grounds to disallow lot-line adjustments. The exemption of lot-line adjustments from the modern Map Act recognizes and protects the mapping decisions of our "grandfathers" while protecting a county's/city's interest by not guaranteeing the adjusted lots a right to develop. The exemption simply recognizes the adjusted parcels' existence as legal lots to be sold, leased, financed, or passed on from parent to child.

The Local Agency Authors raise several points in support of their position. First, they argue that the legislative history of the exemption supports a narrow interpretation allowing only "neighborly" adjustments. Second, they argue that the Legislature contemplated that lot-line adjustments are discretionary approvals subject to the requirements of CEQA. Lastly, they argue that due to policy considerations and fears of "takings" challenges, local agencies may condition a lot-line adjustment to conform with general plan policies, even though the statute expressly limits review to whether the adjusted lots "conform to local zoning and building ordinances."

Background

This article summarizes the arguments raised by the Local Agency Authors, then responds to each of their points.

The lot-line statute (§66412(d)) provides:

> This division [the Map Act] shall be inapplicable to: . . . (d) A lot line adjustment between two or more existing adjacent parcels, where the land taken from one parcel is added to an adjacent parcel, and where a greater number of parcels than originally existed is not thereby created, provided the lot line adjustment is approved by the local agency, or advisory agency. A local agency or advisory agency shall limit its review and approval to a determination of whether or not the parcels resulting from the lot line adjustment will conform to local zoning and building ordinances. An advisory agency or local agency shall not impose conditions or exactions on its approval of lot line adjustment except to conform to local zoning and building ordinances, or except to facilitate the relocation of existing utilities, infrastructure, or easements. No tentative map, parcel map, or final map shall be required as a condition to the approval of a lot line adjustment. The lot line adjustment shall be reflected in a deed, which shall be recorded. No record of survey shall be required for a lot line adjustment unless required by §8762 of the Business and Professions Code.

Point One: Legislative History

Summary of Their Argument

The Local Agency Authors argue that the legislative history of §66412(d) reveals that lot-line adjustments are now being sought in circumstances far beyond those originally contemplated by the Legislature, which, in any case, required local agency approval to prevent creation of "substandard" lots at the "subdivision map stage." The Local Agency Authors assert that §66412(d) was enacted to provide a simple and inexpensive "friendly neighbor" process to resolve fence-line, encroachment and similar issues. They argue that in recent years, however, there have been increasing efforts to validate fraction lots (and substandard parcels allegedly "created" before the modern Map Act) through certificates of compliance, and then to reconfigure those lots through the lot-line adjustment process to accommodate proposed development. Finally, they argue that the Map Act's provisions are "to be liberally construed to require the highest possible standards for orderly community development." (citing 61 *Ops. Atty.Gen.* 299, 301 (1978).) The Local Agency Authors conclude that public policy thus warrants a narrow application of the Map Act's lot-line adjustment exemption, and that the elements of §66412(d) lot-line adjustments should be strictly construed to avoid circumventing the Map Act's salutary purposes.

Our Response

The Local Agency Authors' focus on lot-line adjustment procedures emotionalizes the issue rather than addresses it analytically. The court in *San Dieguito Partnership v. City of San Diego*, 7 Cal. App.4th 748 (1992), flatly rejected the same legislative intent argument being advanced by the Local Agency Authors. In *San Dieguito*, the court held:

> There is no statutory language or indication of a legislative purpose to limit lot line adjustments to 'minor' [neighborly accommodations] ones as the City argues and the trial court concluded . . . .To the contrary, the express prohibition against a City's requiring a tentative map, parcel map or final map as a condition to approval of such an adjustment denotes a legislative purpose to include adjustments involving five or more lots within the application of §66412, subdivision (d), if the proposal otherwise meets the statutory criteria.

San Dieguito at page 751 [emphasis added]. Additionally, the court found no support for the narrow interpretation in the statutory language or any other source. *Id.* at page 759.

In resolving the question of legislative intent, the court adopted the rule that where "the language is clear, there can be no room for interpretation; effect must be given to the plain meaning of the words." (*Building Industry Assn. v. City of Camarillo*, 41 Cal.3d 810, 818 [226 Cal. Rptr. 81, 716 P.2d 68 (1986)].) *San Dieguito* at page 756.

Under this rule, the Local Agency Authors cannot reasonably dispute that the language "comply with building and zoning regulations" does not and was not intended to mean or require adherence to general plan-type review procedures. Additionally, the Local Agency Authors cannot reasonably argue that the Legislature did not know of the distinction between "General Plan" and "Zoning and Building Regulations" at the time they approved §66412. As the *San Dieguito* case correctly holds:

> If the Legislature had intended to restrict lot line adjustments to those involving one existing parcel [neighborly accommodations] adjusting its lot lines so as to result in only one adjacent parcel having different lot lines with land added only from the first parcel, it surely could have made this specific.

San Dieguito at page 758 [emphasis added].

The Local Agency Authors attempt to add restrictive language to the statute. That language is not there.

Point Two: CEQA

Summary of Their Argument

The Local Agency Authors argue that lot-line adjustments are not by statute made "ministerial"; rather, they argue that state law authorizes local agency discretion to approve, deny or condition lot-line adjustments, that more recent legislation reaffirms the Legislature's view of lot-line adjustment approvals as discretionary, and that as discretionary "projects," lot-line adjustments are subject to the requirements of CEQA.

Our Response

The Local Agency Authors' attempt to categorize approval of lot-line adjustments as discretionary may be good policy and a creative approach; however, *the law is the law*.

Section 66412(d) explicitly limits the agency's considerations while reviewing lot-line adjustment applications. These limitations are:

> (1) A local agency or advisory agency shall limit its review and approval to a determination of whether or not the parcels resulting from the lot line adjustment will conform to local zoning and building ordinances; (2) An advisory agency or local agency shall not impose conditions or exactions on its approval of lot line adjustment except to conform to local zoning and building ordinances, or except to facilitate the relocation of existing utilities, infrastructure, or easements; and (3) No tentative map, parcel map, or final map shall be required as a condition to the approval of a lot line adjustment.

As with the legislative intent argument analyzed above, if the Legislature intended for the review of lot-line adjustments to be a discretionary procedure—

why the need for these restrictions? The court in *San Dieguito*, *supra*, discussing these regulations, held:

> Thus, the regulatory function of the approving agency is strictly circumscribed by the Legislature in a lot line adjustment, with very little authority as compared to the agency's function and authority in connection with a subdivision . . . . Certainly, when the lot line adjustment is within the language of the first sentence [of §66412(d)], the agency is not authorized to turn down a lot line adjustment approval request on the ground asserted here, that the lot line adjustment is a subdivision.

San Dieguito at 760. *See also* footnote 13 at 760, where the court flatly rejected the City's argument that the City may require a subdivision map based on its self-serving finding that the "lot line adjustment process is not appropriate." *Id.* This was the City's response to an amicus curiae argument that the restrictions in §66412(d) were inserted by the Legislature to limit local review of lot line adjustments. *Id.*

By analogy, in *Findleton v. Board of Supervisors*, 12 Cal.App.4th 709 (1993), the court held that issuance of a certificate of compliance under the Map Act involved no exercise of discretion and was thus a ministerial project. As such, the issuance of a certificate of compliance was not like the pursuit of approval of a "development project," and was not protected by the Permit Streamlining Act. *Findleton* at 714.

Point Three: Policy Conformance (Takings Fears)

Summary of Their Argument

The Local Agency Authors argue that Local Agencies can impose conditions on the subdivision process when the Map Act is silent, but cannot regulate contrary to its specific provisions. They conclude that a local agency may therefore impose regulations for processing lot-line adjustments which require General Plan consistency absent conflicting provisions in §66412. Yet they fail to recognize that the Map Act *has* spoken (conformance with zoning and building is *all* that is required).

They argue that it is far more likely that §66412 (d)'s failure to mention a requirement that resulting parcels must conform to any applicable general plan, specific plan or local coastal plan was a result of Legislative focus on the straightforward "friendly neighbor" scenario in which such provisions would not typically play a major role.

The Local Agency Authors also argue that subdividers read too much into *San Dieguito*, and pay too little heed to §66412(d)'s language and Legislative history, as well as established land use doctrine.

Finally, the Local Agency Authors fear that the owners of reconfigured lots will then "demand" development permits under the threat of "takings" claims—even though the lots and proposed development are clearly inconsistent with general plan requirements.

Our Response

The Local Agency Authors' fear of "takings" claims (as an obstacle to applying a local cure of approving lot-line adjustments and then requiring consistency with the general plan at the time the developer attempts to build on the reconfigured lots) is absolutely misplaced. Successful takings claims can be avoided by careful regulation. The real obstacle is a political one; in our view there is no justification for warping state policy and statutes to solve a local political problem or to avoid the efforts properly required to address the takings question directly.

The *San Dieguito* court addressed these same concerns with the following language:

> Any aura of horribles sought to be created if the parcels in this lot-line adjustment are not held to be subject to the SMA [Subdivision Map Act] should be considered in light of the multitude of zoning and regional planning regulation applicable to this land. The situation is not one in which uncontrolled use of the land is available to the Owner. Part of the land in the [floodway] and overlying [Floodplain Fringe] zones is subject to building restrictions; all of the land is apparently subject to minimum 10-acre lot size along with open space requirements under the A-1-10 zoning; it is classified as Future Urbanizing held as an urban reserve; and it is subject to Coastal Commission and regional

plan provisions. *Government land-use planning and control is present with respect to this land notwithstanding its exclusion from the SMA.*

San Dieguito at 760, [emphasis added].

While understanding the difficulties inherent in that unique mix of facts, we question making statewide policy or tortured statutory interpretations to relieve local political situations, especially when they have a local cure available. If you take away any local policies and ordinances guaranteeing a right to build on any legal lot and replace them with general plan policies and ordinances controlling such reconfigured lots, the issue of whether to deny development rights to nonconforming parcels becomes far less important.

Conclusion

The Local Agency Authors have made a fundamental assumption about the purpose of the lot-line adjustment exemption from the Map Act—that it was intended to facilitate only "neighborly adjustments" and to support only the same salutary purposes as the current Map Act regarding modern local agency discretion, approval and control over the subdivision of property. The Local Agency Authors engage in clever, but tortured legal reasoning to support their basic premise. Unfortunately, for their cause, we believe this assumption is fundamentally flawed. One of the Map Act's many salutary purposes has always been to maintain stability in a regulatory system, and to avoid the unfairness that would result from extinguishing rights that have been obtained and relied on for years or even generations.

In the final analysis, it is necessary only to look at the wording of §66412(d) and the historical development of the Map Act. Both the statute and its history give the same message: When a lot is already recognized as "legal," and the owner has done nothing to extinguish it, the exemption properly recognizes that the lot continues to exist and lot-line adjustments can be made without fear of triggering the Map Act, discretionary review and the like.

The exemption does not, however, prevent a city or county from taking control of the development of the lots once adjusted by the lot-line adjustment. As the court in *San Dieguito* stressed, the Legislature has graciously provided legislative and adjudicatory planning tools that allow jurisdictions to control the adjusted lot's development outside of the Map Act. This is where development of adjusted parcels is appropriately addressed. It requires no reinterpretation of law, only the political will to regulate development while respecting the Map Act and the protections it affords landowners.

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