Volume 8 Number 2
October 1998

# CALIFORNIA LAND USE™

## LAW & POLICY Reporter

CONTENTS

### FEATURE ARTICLE





ARGENT COMMUNICATIONS GROUP

Volume 8 Number 2
October 1998

# CALIFORNIA LAND USE LAW & POLICY Reporter™

CONTENTS

## FEATURE ARTICLE



## LAND USE NEWS



## RECENT FEDERAL DECISIONS



*Continued on next page*



CALIFORNIA LAND USE™ LAW & POLICY Reporter

FEATURE ARTICLE

# MULTIPLE CONTIGUOUS PARCELS CONVEYED BY SINGLE FEDERAL PATENT SHOULD BE RECOGNIZED AS "LEGAL" UNDER THE SUBDIVISION MAP ACT

*By Michael P. Durkee and Tyson H. Powell*

## Overview

The issue of whether lots can be created by means *other* than modern-day mapping continues to attract debate.

Our position has always been that the Subdivision Map Act is largely an engineer's statute, charged with the "pedestrian" duty of creating, "establishing" says §66412.6 of the Map Act, and legalizing lots. We leave to the local general plan and other local policy-level documents the issue of the lot's land use and development potential. As such, we read the Map Act literally, and are not frightened by the lots it equires to be recognized as legal, including those created outside, or in violation, of the Map Act.

Conversely, certain advocates for cities and counties believe that any lot that was *not* created by the normal mapping process—a process that cities and counties control—is illegitimate and not worthy of recognition. They see such rogue lots as upsetting the normal development process and potentially leading to unwanted development. Such advocates tend to represent jurisdictions where the local general plan gives a development right (or at least bettered position) to every "legal lot." However, instead of simply amending their general plan to remove such an absolute right to develop, they are forced to torture the Map Act with interpretations that simply do not recognize the lot in question. Whether this is because the local political mix will not help staff by undoing the "all-legal-lots-can-develop" policy or whether they simply are not as comfortable with a system that does not give the local agency the same degree of discretion as it would have in a normal mapping process, we do not dare speculate. What we do know is that their approach is marvelously effective: No recognition of lot, no right to develop. End of discussion. Unfortunately, we also believe their approach is contrary to controlling law.

In this article, we argue that the federal government's practice of conveying its land to civilians through "patent deeds" should be recognized as creating "legal" lots under California law, even if the Official United States Survey Map—the Map the patents reference for legal descriptions—itself is not recognized under California law as a recordable map creating lots, and even if the conveyances do not reflect land that has been mapped under the local mapping process. These federal grants occur on a regular basis in California, and can involve land swaps similar to the recent swaps where the federal government traded less biotically important federal lands for more biotically important private lands, in order to protect those private lands from development or destruction.

## The Attorney General Opines in Error

In an April 3, 1998 Attorney General's Opinion (*see*, 81 Ops.Atty.Gen. 144 (1998)), the County Counsel of Mono County asked:

> If a federal patent conveying government property into private ownership describes the

property being conveyed in terms of multiple, contiguous 'lots' depicted on an official United States Government Survey Map, does each lot constitute a distinct legal parcel that a county must recognize for purposes of the California Subdivision Map Act?

In response, the Attorney General opined that in such a situation, ". . . each lot does *not* constitute a distinct legal parcel. . . ." (Emphasis added.)

We respectfully disagree with that Attorney General's Opinion. Please know that we do not do this lightly. The Attorney General, in our view, has many of the better-reasoned opinions regarding the Map Act, and we have been particularly impressed with their analysis of antiquated subdivisions under Map Act §§66412.6, 66451.10, and 66499.35. *See, for example*, 74 Ops.Atty.Gen. 149 (1991).

We are familiar with both the facts surrounding the query posed to the Attorney General (having represented property owners in that area) and with this area of law. Through this article, we hope to communicate some thoughts to consider when this issue arises again in the future.

## The Attorney General's Reliance on *Taft* is Misplaced; *Gomes* Applies

The Attorney General's Opinion relies on the decision in *John Taft Corp. v. Advisory Agency*, 161 Cal.App.3d 749 (1984). However, although *Taft* is factually similar to the setting posed by the County Counsel's question, we believe *Taft's* legal ruling should not control.

In our view, what *Taft* and the attorney General's Opinion fail to address is that there are *two* distinct ways to subdivide property in California: (1) by a subdivision map, properly prepared, approved and recorded pursuant to the Subdivision Map Act—Gov't Code §66412.7 provides that the recording "establishes" (*i.e.*, creates) the lots even if those lots are never conveyed; and (2) through actual conveyance (deed)—as discussed below, Gov't Code §§66499.34 and 66499.35 mandate the issuance of a certificate of compliance or conditional certificate of compliance for lots conveyed, even when the conveyance—and hence the lot—was illegal. *See, e.g.*, 74 Ops.Atty.Gen. 149 (1991).

Understanding that land can be divided through legal and/or illegal conveyance is critical. For example, while legal scholars disagree as to whether the modern Map Act "grandfathers" lots established (but never conveyed) by pre-1893 maps, even those who do not recognize such old maps alone as "creators" agree that once a lot from such a pre-1893 map is *conveyed*, it is created. *See, e.g.* "Antiquated Subdivisions, a Landowners Perspective," and "Antiquated Subdivisions, a Government Perspective," *Land Use & Environment Forum*, (CEB, Winter, 1996). In other words, they see the conveyance as the "creator," *not* the pre-1893 recorded map. In their eyes, while the old map itself does not create, it does provide an efficient legal description for the deed; they would argue that the creation occurs once the actual conveyance is perfected.

And why not? Before we ever had a Subdivision Map Act, we had the subdivision of the world's property through conveyance. First by passing branches and/or dirt clods, and later by written deed, the practice of subdividing a part of one's land by giving it to another through conveyance pre-dates the discovery of America.

## The *John Taft Corp. Case*

Again, we believe the Attorney General's reliance on *John Taft Corp. v. Advisory Agency*, 161 Cal.App. 3d 749 (1984) is misplaced. In *Taft*, a landowner had conveyed two contiguous lots, title to which could be traced through earlier conveyances to the federal government, which first described the property on an official United States Government Survey Map. The county determined that the conveyances were illegal subdivisions in violation of the Map Act and filed a Notice of Intention to Record a Notice of Violation under the Map Act. Taft sought a writ of mandate directing a release of the Notice. The trial court agreed with Taft and issued the writ, and the county appealed. The Court of Appeal ruled that United States Government "survey maps" alone do not meet the rigorous requirements for "subdivision maps" under the Subdivision Map Act, and therefore did not serve as the "creators" of lots.

While the "lot conveyance" facts were similar in *Taft* to the setting raised by the Mono County Counsel, at issue for the *Taft* court and ultimately where it rests its decision was whether the mere *existence* of the federal survey map "created" the lots shown on the map. The court reasoned that a federal

survey map, prepared under the federal survey laws, did no more than facilitate the conveyance of lots to the public by establishing the geographic location of lots on a descriptive map, but did not meet the more rigorous recording requirements of a "subdivision map" under California's Map Act, including being actually recorded with the local county recorder. In other words, according to *Taft*, federal survey maps can be "descriptors," but not "creators."

The true irony of the *Taft* case, and a digression from the issue at hand, is that when the Taft family first received the county's Notice of Intent to File a Notice of Violation, they should have responded by applying to the county for a certificate of compliance or conditional certificate of compliance under the Map Act. Then, even if the Tafts' conveyance was determined illegal, unless the county brought an action within the applicable statute of limitations to "undo" that illegal federal conveyance, the Tafts would have been due a certificate or conditional certificate pursuant to Map Act §66499.35 (b). *See, e.g.*, 74 Ops.Atty.Gen. 149, *supra.*

This is because the Map Act can recognize *illegal* conveyances. The Map Act requires counties to issue certificates of compliance whether such conveyances comply with the Map Act or not. *See*, Government Code §66499.35. Any landowner may request from a local agency a determination as to whether the property complies with the Map Act. Upon making its determination, the "city or county *shall* cause a certificate of compliance to be filed for record with the recorder of the county in which the real property is located." (Emphasis added.) Gov. Code §-66499.35(a). If the property does not comply with the Map Act, the city or county still must issue the certificate, although it can attach conditions to it. If the local agency determines that the property is in violation of the Map Act, it can attach conditions applicable to the division of property at the time a non offending landowner acquired the property. If, however, the current owner created the violation through a prior grant deed, the local agency may impose any conditions applicable to the current division of property. Gov. Code §66499.35(b). Thus, whether or not the conveyance by the federal government via patent is considered a violation, that landowner is entitled to a certificate of compliance or conditional certificate of compliance. *Id.* For the reasons set forth herein, we believe such a conveyance from a public agency is not in violation of the Map Act.

In essence, *Taft* holds that when seeking to create lots by mapping (under Map Act §66412.7), a federal survey map will not do. The court opined:

> The [California] Legislature places significance on subdivision map *recordation* and local agency control. We are therefore guided by this legislative intent.

*Taft* at 756; emphasis added.

## The *Gomes v. County of Mendocino* Case

What *Taft* does not address, however, is that when seeking to create lots via *conveyance* alone (creation by deed)—and not map recordation—whether a conveyed federal patent will in fact create the lots it describes.

For that answer, one must look to the more recent case of *Gomes v. County of Mendocino*, 37 Cal.App.4th 977, 983 (1995). In *Gomes*, the plaintiff landowner sought to undo what the county said had already been done—the merger of five parcels, pursuant to Map Act §66499.201/2, that had been previously subdivided via conveyance by federal patent. The county contended that those five illegally created parcels had merged through the action of a prior owner of the parcels, accomplished through a unilateral agreement with the county. The Court of Appeal agreed with the county and clarified the ruling in *Taft* by stating unequivocally that the physical *conveyance* of a federal patent (not the mere existence of a United States Government Survey Map) was a subdivision of land under the Map Act, that the federal government was a "subdivider" under the Act, and that the federal patent *conveying* a parcel lawfully created the parcel it describes. *Gomes* at 983-984. It was the conveyance of the patent deed—not the mere existence of the United States Government Survey Map—that the court held "created" the lot. In this instance, those lots merged into a larger lot by the subsequent actions of the previous landowner.

However, the importance of Gomes in this situation is that the court recognized that the five lots conveyed by federal patent were lawfully created and therefore could be re-subdivided pursuant to Map Act §66499.201/2. Interestingly, the five lots in *Gomes* were contiguous and were held in common owner-

ship. The court is silent as to whether they were originally conveyed by one federal patent.

### California Law Allows One Deed to Convey Multiple Parcels

Clearly, both by practice and by law, multiple contiguous parcels are commonly conveyed through one deed. Civil Code §1093 provides that a single instrument conveying multiple parcels is not only allowed, it does not evidence the intent to merge the parcels unless the instrument clearly states otherwise.

Therefore, we believe the issue for the Attorney General in answering the inquiry should have been whether a different legal conclusion should result (and why) dependent on whether: (1) the five lots were contiguous and were conveyed through *one* patent with five separate legal descriptions within the patent (for five separately identified parcels); or (2) the five contiguous parcels were individually conveyed through *five* separate patents; or (3) the five parcels were separately described within *one* patent but were *not* contiguous to each other.

Since *Gomes* and other authorities hold that it is the conveyance that is the creator, and California Civil Code §1093 allows such a single deed to describe multiple parcels without merging them, why should the result be any different in any of those three examples? The conveyance creates the parcel or *parcels* described in the deed. The issue, if any, should be the sufficiency of legal description, which the courts have opined is satisfied by reference to a known map.

Practically speaking, if a distinction is drawn between: (a) *one* federal patent conveying five federally-described lots, and (b) *five* federal patents individually conveying those same lots, it is easy to guess which approach (no matter how inefficient) the receivers of such federal patents should request, especially if the federal government has valued the "swapped" lots in part on the assumption that they are all separate legal lots.

### The Federal Government Should be Treated as a "Public Agency" under the Map Act

It is not clear why the Attorney General did not treat the federal government as it would any other "public agency" under the Map Act. The Map Act expressly exempts public agencies from its parcel map requirements unless there is a showing, based on substantial evidence, that public policy necessitates a parcel map. Gov't Code §66428(a)(2). The county would have to make such a showing against the federal government. No such showing appears to have been made. *See* 62 Ops.Atty.Gen. 136 (1979); 62 Ops.Atty.Gen. 140 (1979).

### The Sky Will Not Fall if Federal Patents Are Allowed to Create the Lots They Describe and Convey

Finally, the argument we urge does not impair or impede the ability of the local jurisdiction to regulate land use or new development. As was stressed in the Attorney General Opinion in 74 Ops.Atty.Gen. 149, *supra*, by the court in *San Dieguito Partnership L.P., v. City of San Diego*, 7 Cal.App.4th 748 (1992), and by the Map Act in §66499.35(f), the recognition of the *legality* of a lot does not equate to the recognition of its ability to *develop* the ability to use and develop land is determined by the local jurisdiction's land use regulations (General Plan, etc.), not the Map Act.

---

**Michael P. Durkee** is a partner in the San Francisco offices of Allen, Matkins, Leck, Gamble & Mallory, specializing in land use, local government and elections law. Mr. Durkee lectures throughout the state on the Subidivions Map Act and other land-use issues. He also serves on the Board of Advisors to *California Land Use Law & Policy Reporter*. **Tyson H. Powell** is an associate attorney in Allen Matkins' San Francisco office also specializing in land use, local government and election law.