

California Land Surveyors Association

SOME "THORNY" MAP ACT ISSUES

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2:00 – 5:00 PM.
Silver Legacy Resort Casino
Reno, CA

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COURSE OUTLINE
SUBDIVISION MAP ACT

1. INTRODUCTION

- (a) *Class introduction and materials.*
- (b) *"Caesar giveth, Caesar taketh away." Gives to and takes from public agencies, subdividers and the public.*
- (c) *As class will reveal, solutions to mapping problems not always found in the Map Act.*

2. OVERVIEW

- (a) *The Subdivision Map Act. (§ 66410¹ et seq.)*
- (b) *Relationship to Other Laws.*
 - (1) United States Constitution/Federal Law.
(5th and 14th Amendments).
 - (2) California Constitution/State Law
(Art. XI, § 7, authority to regulate for the public health, safety and general welfare.).
 - (3) Local Laws.
 - (A) General Plan.
 - (B) Specific Plan.
 - (C) Zoning.
 - (D) Subdivision Map Act/Use Permits/Variance/Other.

¹ Code references are to the California Government Code, unless otherwise stated.

3. WHEN IS A MAP REQUIRED?

(a) *Tentative and Parcel Maps* (§ 66428)

- (1) Local ordinance can require tentative map instead of parcel map ((a))
 - (A) Parcel Map is instantly recordable; Tentative Map is not.
 - (B) Parcel Map has limitation on scope (amount) of dedication. (§ 66411.1(a)); Tentative Map is not.
 - (C) Parcel Map has limitation on timing of fulfillment of conditions (§ 66411.1(b)); Tentative Map is not.
 - (i) Issuance of permit or grant of approval; or
 - (ii) At time specified in agreement required by local ordinance; or
 - (iii) If public health and safety or necessary to orderly development of the surrounding area.
- (2) No parcel map required for conveyance (fee, lease hold, easement or license) to or from governmental agency, public entity, public utility, or rights-of-way conveyed to a subsidiary of a public utility, unless substantial evidence exists of public necessity for map. ((a)(2))
- (3) Local ordinance shall provide procedure for waiving parcel map, including § 66426. Finding required by legislative body or advisory agency that specific development requirements of SMA and local ordinance are met by division of land. However, ordinance may require preparation of a tentative map. ((b))
 - (A) If no tentative map required for parcel map then subdivider can file a tentative map or a vesting tentative map. ((c))

(b) *What Is A Subdivision?* (§ 66424)

- (1) Division for sale, lease or finance.
- (2) Broad policy underpinnings.
 - (A) Encourage orderly development by regulating the design and improvement of the subdivision.
 - (B) Ensure that areas within the subdivision are dedicated for public purposes will be properly improved by the subdivider.

- (C) Protect the public and individual buyers from fraud and exploitation.
- (3) Examples:
 - (A) Probate Homestead. (33 Cal. 3d 379)
 - (B) Financing Devices. (58 Ops. Atty. Gen. 408)
 - (C) Tax Sales. (64 Ops. Atty. Gen. 814)
 - (D) University of California Property. (75 Ops. Atty. Gen. 98 (1992))
- (4) Meaning of division.
 - (A) Exclusive occupancy the key?
 - (B) Contiguity; § 66424; contiguity of parcels separated by a fee strip. (61 Ops. Atty. Gen. 299 (1978))
 - (C) Remainder Parcels -- Subdividing a portion. (§ 66424.6; Ops. Atty. Gen. 246 (1979))
 - (D) Reference to Assessor's Parcels.
 - (E) Timing of divisions. (66 Cal. App. 3d 191 (1977))
 - (F) 4 x 4ing

4. CERTIFICATES OF COMPLIANCE

- (a) *Generally.*
 - (1) In enforcement Chapter of Map Act (§ 66499.30 et seq.)
 - (2) Avoidance of potential Notice of Violation.
 - (3) Preclude a basis for purchaser to void the sale.
 - (4) Not allow the City/County to refuse to issue building permits or grant discretionary approvals.
- (b) *What is a Certificate of Compliance?*
 - (1) Sections 66499.35, 66499.34
 - (2) City's/County's Duty to Issue.

- (3) Who Can Request and When?
- (c) *Conditional Certificates.*
 - (1) Conditions that can be applied to property when the illegal subdivider applies (the "bad guy").
 - (2) Conditions that can be applied to property when the Innocent purchaser applies (the "good guy").
 - (3) New Law – SB 497 – Now must issue conditional certificate when violation found (old law was permissive).
- (d) *Other.*
 - (1) Certificates of Compliance do not insulate the property owner from compliance with general plan and zoning ordinance.
 - (2) Does a city/county have to require Notice and Hearing to approve a Certificate of Compliance?
 - (3) Is a Certificate of Compliance subject to review under CEQA?
 - (4) How does a Certificate relate to a Notice of Violation? (§ 66499.36)

5. LIFE OF TENTATIVE MAP

- (a) *Initial Life of Tentative Map.*
 - (1) Initial Life. (§ 66452.6(a))
 - (2) 24 months ⇒ statutory.
+12 months ⇒ by local ordinance.
 2 to 3 years.
- (b) *Extension Life.*
 - (1) Up to 5 years (discretionary) (§ 66452.6(e)).
 - (2) 2 years if TM existed on 9/13/93. (§ 66452.11).
 - (3) 1 year if TM existed on 5/14/96. (§ 66452.13)
 - (4) Up to 5 years from moratorium. (§ 66452.6(f))
 - (5) Up to 5 years from litigation (if local agency agrees). (§ 66452.6(f))
 - (6) Up to 10 years life from phasing (see below). (§ 66452.6(a))

(c) *Extension Steps*

- (1) Must apply for final map before TM expires
- (2) Once application seeking discretionary extension is made, automatic extension of tentative map for earlier of: 60 days or when application acted on.
- (3) If moratorium - - 120 days. (§ 66452.6 (b)(3))
- (4) Ability to condition extension? § 66452.6.(e); *El Patio v. Permanent Rent Control Board*, 110 Cal.App.3d 915 (1980)

(d) *Expiration of other permits issued in conjunction with a tentative map.*
(§ 65863.9)

- (1) Life of Tentative Map
- (2) Unless earlier date appears on face of permit

(e) *Example:*

- (1) TM to employ 4 multiple Final Maps
- (2) TM approved on September 6, 1993.
- (3) TM challenged in court; lawsuit settled 18 months from date of TM approval.
- (4) Prerequisite to all other work is a Remediation Plan for site (required by Map TM Conditions of Approval). Plan takes 18 months to be approved by State agency. Project improvements can now be built.
- (5) 1st Final Map filed on September 1, 1996.
- (6) 2nd Final Map filed September 2, 1997.
- (7) 3rd Final Map filed September 5, 1999.
- (8) 4th Final Map filed September 6, 2002.
- (9) What is life of TM?

6. VESTED RIGHTS

(a) *Effect Of Approval Of Map On The Right To Develop.*

- (1) So what!

- (2) Sell, Lease, Finance, that's all folks!
- (b) *Common Law Vested Rights Generally.*
 - (1) Late Vesting. *Avco Community Developers, Inc. v. South Coastal Regional Comm.*, 17 Cal 3d 785 (1976)
 - (A) Building Permit.
 - (B) Reliance Thereon.
 - (2) Harsh Rule - Very Late in Process.
 - (A) *Oceanic California, Inc. v. North Central Coast Regional Com.*, 63 Cal. App. 3d 57 (1976).
 - (3) Legislative Response: Vesting Maps and Development Agreements.
- (c) *Vesting Maps.*
 - (1) Uses Filing Freeze Section. (§§ 66498.1, 66474.2.)
 - (2) Duration. (§ 66452.6.)
 - (A) Tentative Map -- Life of Normal Tentative Map.
 - (B) Final Map -- 1 to 2 Years
 - (C) Building Permits -- Life of Permit plus extensions.
 - (3) Tentative Map Must Still Be Approved.
 - (4) Use multiple (phased) maps to extend vested rights
 - (5) Vesting Parcel Maps versus Vesting Tentative Maps
 - (6) City Annexations/Incorporations. (§§ 66413-66413.5.)
- (d) *Development Agreements § 65864.*
 - (1) Permissive. (§ 65864 et seq.)
 - (2) Contract Approach. (§ 65866.)
 - (3) Negotiation.
 - (A) Term
 - (B) Dedications, Fees and Other Exactions

(C) Milestones for Determining Developer Compliance

- (i) Life of Tentative Map/Phased Final Maps
- (ii) Future Process / Future Approvals
- (iii) Schedule of Development/Rate of Growth
- (iv) Annual Review/Default/Termination Provisions
- (v) Indemnification
- (vi) Other (Slush Fund for City Attorney Vacations)

(e) *Comparison of VTMs and Development Agreements:*

<u>Vesting Tentative Map (VTM)</u>	<u>Development Agreement (DA)</u>
1. Processing mandatory: cannot refuse application.	Processing elective: city's/county's discretion whether to enter.
2. Exactions subject to statutory and caselaw restrictions (e.g., "nexus").	Ad hoc negotiation -- exempt from AB 1600; waiver (of nexus, etc.) potential.
3. Other land use entitlements are discretionary.	May spell out future entitlement process.
4. Locks in rules when VTM application "complete."	Normally locks in rules at execution of DA (DA may provide otherwise).
5. Vesting life = Life of tentative map, plus 1 to 2 years after final map, plus limited extensions and building permit life. Phased final maps help extend life.	Vesting life = That set forth in DA (usually life of DA). Use DA to extend the life of tentative (or vesting tentative) map and certain permits to the life of DA.
6. Does not limit other agencies (e.g., school districts); (incorporation exception).	Does not limit agencies who are not a party to DA (incorporation/annexation exception).
7. Not subject to referendum (adjudicatory act).	Subject to referendum (legislative act).
8. No contrary future rules unless needed to prevent situation "dangerous" to health/safety or changes in State/Federal law. Review VTM conditions carefully.	No contrary rules unless consistent with Agreement. Have DA expressly list subsequent laws that would not be consistent with DA (growth management, phasing requirements, etc.).
9. Should be local implementing regulation (if	Local procedural regulation needed if

Vesting Tentative Map (VTM)

not, Map Act governs). Question of whether VTM application can require additional information.

Development Agreement (DA)

requested, otherwise use statute.

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| 10. | Gov't Code § 66499.37 - - 90-day statute of limitations after approval. | Gov't Code § 65009 - - 90-day statute of limitations. |
| 11. | Incorporating (new) city is subject to county-approved vesting tentative map; annexing city is not subject. | With certain exceptions, both incorporating city and annexing city are subject to county-approved agreement. |
| 12. | Subsequent entitlements subject to normal CEQA process. | Subsequent entitlements, subject to normal CEQA process, unless DA expressly abrogates. |
| 13. | Successful third-party challenge can result in loss of approval (and vested right). | Successful third-party challenge can result in loss of approval (and vested right). |

7. OLD MAPS

(a) *Several ways to subdivide property in California:*

- (1) Subdivision map, properly prepared, approved and recorded pursuant to the 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) -- 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 (Opinion No. 91-105, August 13, 1991).
- (3) "Lieu Lots" - - Through Federal Government grant of land to status for schools. *Alberger v. Kingsbury*, 6 Cal. App. 93, 97-98 (1907).

(b) *Old Maps Agenda.*

- (1) "Legality-of-Lot" issue versus "Right-to-Develop" issue.
- (2) Salutory Purposes of Modern Map Act versus Salutory Purposes of Modern Map Act's Grandfather" clauses.

(c) *Map Act "Grandfather" Clauses Pertaining to Old Maps.*

- (1) Establishment Clause (§ 66412.7)--Lots created or established when recorded:

§ 66412.7. Subdivision deemed established

A subdivision shall be deemed established for purposes of subdivision (d) of Section 66499.30 and any other provision of this division on the date of recordation of the final map or parcel map, except that in the case of (1) maps filed for approval prior to March 4, 1972, and subsequently approved by the local agency or (2) subdivisions exempted from map requirements by a certificate of exception (or the equivalent) applied for prior to such date and subsequently issued by the local agency pursuant to local ordinance, the subdivision shall be deemed established on the date the map or application for a certificate of exception (or the equivalent) was filed with the local agency.

* * * * *

- (2) Prior Compliance Section (§ 66499.30)--Generally prohibits sale, lease or financing of lots unless final or parcel map "established" in compliance with modern Map Act. Subdivision (d) grandfathers older lots.

§ 66499.30. No sale or lease until final maps are in full compliance

(a) No person shall sell, lease or finance any parcel or parcels of real property or commence construction of any building for sale, lease or financing thereon, except for model homes, or allow occupancy thereof, for which a final map is required by this division or local ordinance, until the final map thereof in full compliance with this division and any local ordinance has been filed for record by the recorder of the county in which any portion of the subdivision is located.

(b) No person shall sell, lease or finance any parcel or parcels of real property or commence construction of any building for sale, lease or financing thereon, except for model homes, or allow occupancy thereof, for which a parcel map is required by this division or local ordinance, until the parcel map thereof in full compliance with this division any local ordinance has been filed for record by the recorder of the county in which any portion of the subdivision is located.

(c) Conveyances of any part of a division of real property for which a final or parcel map is required by this division or local ordinance shall not be made by parcel or block number, initial or other designation, unless and until the final or parcel map has been filed for record by the recorder of the county in which any portion of the subdivision is located.

(d) Subdivisions (a), (b), and (c) do not apply to any parcel or parcels of a subdivision offered for sale or lease, contracted for sale or lease, or sold or leased in compliance with or exempt from any law (including a local ordinance), regulating the design and improvement of subdivisions in effect at the time the subdivision was established.

(e) Nothing contained in subdivisions (a) and (b) shall be

deemed to prohibit an offer or contract to sell, lease, or finance real property or to construct improvements thereon where the sale, lease, or financing, or the commencement of construction, is expressly conditioned upon the approval and filing of a final subdivision map or parcel map, as required under this division.

(f) Nothing in subdivisions (a) to (e), inclusive, shall in any way modify or affect the provisions of Section 11018.2 of the Business and Professions Code.

(g) For purposes of this section, the limitation period for commencing an action, either civil or criminal, against the subdivider or an owner of record at the time of a violation of this division or of a local ordinance enacted pursuant to this division, shall be tolled for any time period during which there is no constructive notice of the transaction constituting the violation, because the owner of record, at the time of the violation or at any time thereafter, failed to record a deed, lease, or financing document with the county recorder. (Emphasis added.)

* * * * *

- (3) Nonmerger Exemption (§ 66451.10)--Preempts field of involuntary merger and grandfathers old contiguous lots.

§ 66451.10. Unmerging of previously merged parcels; authority for new mergers

(a) Notwithstanding Section 66424, except as is otherwise provided for this in this article, two or more contiguous parcels or units of land which have been created under the provisions of this division, or any prior law regulating the division of land, or a local ordinance enacted pursuant thereto, or which were not subject to those provisions at the time of their creation, shall not be deemed merged by virtue of the fact that the contiguous parcels or units are held by the same owner, and no further proceeding under the provisions of this division or a local ordinance enacted pursuant thereto shall be required for the purpose of sale, lease, or financing of the contiguous parcels or units, or any of them. (Emphasis added.)

* * * * *

- (4) Parcel Map Presumption Clause (§ 66412.6)--Creates presumption that certain parcel map lots created before 3/4/72 were lawfully created.

§ 66412.6. Lawful parcels created before 3/4/72; sunset date

(a) For purposes of this division or of a local ordinance enacted pursuant thereto, any parcel created prior to March 4, 1972, shall be conclusively presumed to have been lawfully created if at the time of the creation of the parcel there was compliance with any local ordinance or there was no local ordinance in effect which regulated divisions of land creating fewer than five parcels.

(b) For purposes of this division or of a local ordinance enacted pursuant thereto, any parcel created prior to March 4, 1972,

shall be conclusively presumed to have been lawfully created if any subsequent purchaser acquired that parcel for valuable consideration without actual or constructive knowledge of a violation of this division or the local ordinance. Owners of parcels or units of land affected by the provisions of this subdivision shall be required to obtain a certificate of compliance or a conditional certificate of compliance pursuant to Section 66499.35 prior to obtaining a permit or other grant of approval for development of the parcel or unit of land. For purposes of determining whether the parcel or unit of land complies with the provisions of this division and of local ordinances enacted pursuant thereto, as required pursuant to subdivision (a) of Section 66499.35, the presumption declared in this subdivision shall not be operative.

(c) This section shall remain in effect only until January 1, 1995, and as of that date is repealed, unless a later enacted statute, enacted before January 1, 1995, deletes or extends that date. (Emphasis added.)

(d) *Synthesis and Summary of Grandfather Clauses:*

(1) A lot is legal if:

(A) It was lawfully created in accordance with the law in effect when it was created (or the absence of such a law) and has not subsequently been merged or altered; or

(B) It was unlawfully created but was subsequently legalized by the Map Act (see Certificates discussion below) and was not thereafter merged or altered.

(2) A lot that has been merged or altered since its creation no longer exists.

8. CONVEYANCES

(a) *Introduction.*

(1) Understanding that land can also be divided even through legal and illegal conveyance is critical. For example, while legal scholars disagree as to whether the modern Map Act “grandfathers” lots established by pre-1893 maps (but never conveyed), even those who will not recognize such maps alone as “creators,” agree that once a lot from such a pre-1893 map is conveyed, it is created. In other words, they see the conveyance as the “creator,” *not* the pre-1893 recorded map.

(2) Modernly, the “thorny” issue is the conveyance of “patents” from the Federal Government to private individuals where the single patent deed transmits more than one lot, yet the lots conveyed have not been properly mapped under the Subdivision Map Act.

(b) *Some Relevant Authorities.*

- (1) *Attorney General Opinion*, 98 C.D.O.S. 2608 (April 3, 1998). Relying on *John Taft Corp. v. Advisory Agency*, 161 Cal.App.3d 749 (1984), Attorney General opined that when 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, each lot does not constitute a distinct legal parcel under the Map Act. See, letter response from Durkee.
- (2) *John Taft Corp. v. Advisory Agency*, 161 Cal.App.3d 749 (1984). California Court of Appeal ruled that United States Government "survey maps" do not meet the requirements for "subdivision maps" under the Subdivision Map Act. While the facts involved the conveyance of lots through patent, at issue for the Court of Appeal and where it ultimately 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 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 requirements of a "subdivision map" under California's Map Act, including being recorded with the local county recorder. Court did not address whether conveyance alone could have created lots.
- (3) *Gomes v. County of Mendocino*, 37 Cal.App.4th 977, 983 (1995). Court of Appeal clarified the ruling in *Taft* by stating unequivocally that the physical conveyance of a federal patent (not the mere existence of a federal survey) was a subdivision of land under the Subdivision Map Act, that the federal government was a "subdivider" under the Act, and that the federal patent conveying a parcel lawfully creates the parcel it describes. *Gomes* at 983-984.
- (4) Gov't Code § 66428(a)(2). Exempts public agencies from its parcel map requirements unless there is a showing, based on substantial evidence, that public policy necessitates a parcel map. Should federal government qualify under this section? See also, 62 Ops.Atty.Gen. 136 (1979); 62 Ops.Atty.Gen. 140 (1979).
- (5) Civil Code § 1093. 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.

(c) *You Make the Call.*

- (1) Four lots are contiguous and were conveyed through one patent with five separate legal descriptions within the patent (for five separately identified parcels).

- (2) The four contiguous parcels were individually conveyed through five separate patents on the same day at the same time.
- (3) The four parcels were separately described within one patent but were not contiguous to each other.

9. LIEU LANDS

(a) *Generally.*

- (1) Lieu lands are also legal lots created by conveyance, or in a conveyance-like manner, without the recording of a map. Lieu Lands have their origin in land grants from the federal government to the states for schools. When sections of land granted to a state for school purposes were unavailable due to settlers, or because they were included within a Military, Indian, Forest, National Park or other Reservation, states were allowed to select other lands of equal acreage "in lieu" of those lands lost. 43 U.S.C. §§ 851-852, Cal Pub. Res. Code §7402. The lands selected by the state in lieu of the unavailable lands were called "lieu lands", or "indemnity lands." *Alberger v. Kingsbury*, 6 Cal. App. 93, 97-98 (1907).
- (2) For a state to obtain title to a parcel of land as a lieu land (therefore creating a legal lot), three steps must be taken: (1) the parcel must be selected by the state, (2) the selection must be approved by the United States Land Department, and (3) the land must be listed to the state on a lieu list. *W.H. Allen v. Manuel Pedro*, 136 Cal. 1, 2 (1902) (citing *Roberts v. Gebhart*, 104 Cal. 67 (1894)). The act of listing land on the lieu list to a state conveys legal title from the federal government to the state, and land patents are not required to convey title. *United States v. Quechan Tribe of Indians*, 601 F.2d 1059, 1061 (9th Cir. 1979).
- (3) Furthermore, the act of listing land to a state also has the effect of relating back to the date when the selection was made. *Howell v. Slauson*, 83 U.S. 539 (1890). The U.S. Supreme Court has held that a state patent to lieu lands will prevail over a federal patent to a settler whose settlement upon the land was *subsequent* to the date of the state's selection but *prior* to the actual listing. *Id.*

10. ENFORCEMENT/APPEALS/JUDICIAL REVIEW

(a) *Exhaustion of Administrative Remedies.*

- (1) Must Exhaust (appeal).
- (2) Failure is Jurisdictional.
- (3) Great Affirmative Defense.

(4) Provide § 65009 Notice.

(b) *Statute of Limitations.*

(1) Map Act – 90 days. (§ 66499.37)

(2) CEQA – 30 days (NOD), 35 days (NOE) or 180 days (failure).

(3) Planning Law – 90 days. (Gov. Code § 65009)