LOCAL ZONING CONDITIONS AND THE SUBDIVISION MAP ACT

By Elizabeth Brekhus

Like most attorneys, I enjoy when my practice involves representing clients in interesting and novel issues of law and fact. Recently I represented owners of San Francisco commercial property, who were arguing in support of a very novel easement claim over the adjacent property. The City of San Francisco public works department had imposed a condition (adjacent parking) in 1978 in connection with the approval of the subdivision of the plaintiff and defendant's property, and the issue was whether the condition was valid, decades later and given the changed circumstances of the property and present-day zoning requirements.[1]

The facts of the case were complicated but in short, my clients argued that the condition was valid, and in effect granted them a "parking easement over" over defendant's commercial property, and the other side was trying to defeat the condition. The case was novel because there are no published cases that authorize a "parking easement" of this nature and because the easement arose as a result of a planning condition imposed by the City of San Francisco in granting a parcel map waiver under the Subdivision Map Act.

The issue required a basic understanding of the history and purpose of the Subdivision Map Act ("SMA"). The SMA is the primary regulatory control governing the subdivision of real property in California. *Gardner v. County of Sonoma* (2003) ["*Gardner*"] 29 Cal.4th 990, 995-997, fn. 1. and 1005; *Lakeview Meadows Ranch v. County of Santa Clara* (1994) 27 Cal.App.4th 593, 598; and Government Code §66410 et seq. The main purposes of the SMA are to encourage and facilitate orderly community development, coordinate planning with the community pattern established by local authorities, and to assure proper improvements are made. *Gardner, supra,* 29 Cal.4th 990, 997-998; 77 Ops.Cal.Atty.Gen. 231, 233 (1994).

The SMA is an enabling act. *City of West Hollywood v. Beverly Towers, Inc.* (1991) 52 Cal.3d 1184, 1189. To implement the above-described purposes, the SMA vests local governments with the authority to regulate and control the design and improvement of

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[1] The Public Works Department was in charge of subdivisions in San Francisco at that time. Unlike the Planning Department, which is inundated by real property attorneys and paralegals conducting research on a daily basis, the Public Works Department is not used to such visits, and will go above and beyond the call of duty to help you.

land subdivisions in California. *Id.*; *Gardner, supra*, 29 Cal.4th 990, 997. To that end, legislative bodies of local agencies (i.e., the Board of Supervisors) are required to promulgate ordinances on the subject. *Gardner, supra*, 29 Cal.4th 990, 997; Gov. Code §66411. Through local review and approval of all proposed subdivisions, the SMA aims to "control the design of subdivisions for the benefit of adjacent landowners, prospective purchasers and the public in general." *Gardner, supra*, 29 Cal.4th 990, 997-998.

The SMA applies to "subdivisions." Government Code §66424 describes when a "subdivision" is created with respect to a "unit or units of... land" for purposes of triggering the SMA's requirements. 86 Ops.Cal.Atty.Gen. 70, 73 (2003). Generally speaking, a tentative map and final map are required for subdivisions involving five or more parcels (Gov. Code §66426) and a parcel map is required for subdivisions involving four or fewer parcels (Gov. Code §66428). *Gardner, supra*, 29 Cal.4th 990, 997; 86 Ops.Cal.Atty.Gen. 70 (2003; *John Taft Corp. v. Advisory Agency* (1984) 161 Cal.App.3d 749, 755.

The SMA sets forth procedures by which cities and counties may impose a variety of specific conditions when approving subdivision maps. Such conditions typically cover streets, public access rights, drainage, public utility easements, and parks, among other improvements. 77 Ops.Cal.Atty.Gen. 231, 233 (1994); Gov. Code §§ 66475-66489. A local agency approves a tentative and final map or a parcel map only after extensive review of the proposed subdivision and consideration of such matters as the property's suitability for development, the adequacy of roads, sewer, drainage, and other services, the preservation of agricultural lands and sensitive natural resources, and dedication issues. *Gardner, supra*, 29 Cal.4th 990, 997; *see e.g.*, Gov. Code §§ 66451-66451.7, 66452- 66452.13, 66453-66472.1, 66473-66474.10 & 66475-66478.

The SMA prohibits a subdivider from selling, leasing or financing parcels of property without first obtaining approval by the local agency (the City) of the appropriate map and otherwise complying with the SMA. *Lakeview Meadows, supra*, 27 Cal.App.4th 593, 598; *Bright v. Board of Supervisors* (1977) 66 Cal.App.3d 191, 193-194; Gov. Code §§ 66458(a), 66499.30 and 66499.31.

Notwithstanding the requirement that a tentative and final map are required for all subdivisions creating five or more parcels, certain exceptions apply, including an exception when the land before division contains less than five acres, each parcel created by the division abuts upon a maintained public street or highway, and no dedications or improvements are required by the legislative body. Gov. Code §66426(a). In such a case, a parcel map shall be required. Gov. Code §66426(f).

However, Government Code §66428(b) provides a procedure for waiving the requirements of a parcel map: "A local agency shall, by ordinance, provide a procedure for waiving the requirement for a parcel map, imposed by this division, including the requirements for a parcel map imposed by Section 66426." My case involved a condition placed on the property in conjunction with a parcel map waiver, which is expressly authorized.

Section 66428(b) specifically allows a local agency to require compliance with other zoning ordinances as a condition to granting approval of a parcel map: "[t]he ordinance shall require a finding by the legislative body or advisory agency, that the proposed division of land complies with the requirements established by this division or local ordinance enacted pursuant thereto as to area, improvement and design, floodwater drainage control, appropriate improved public roads, sanitary disposal facilities, water supply availability, environmental protection and other requirements of this division or local ordinance enacted pursuant thereto."

In *Soderling v. City of Santa Monica* (1983) 132 Cal.App.3d 501, the City Planning Commission approved a tentative subdivision map subject to and conditioned on the completion of repairs in a Comprehensive Building Report. At the conclusion of the twelve month term of the tentative map, the City Planning Commission denied final map approval on the basis that the developer did not complete the conditions imposed on approval of the tentative map. The developer challenged the imposition of the conditions as being not authorized by the Subdivision Map Act or any local ordinance, and therefore invalid. *Id.* at 506. The court noted "the continuing controversy raging over the scope of local authority to impose subdivision map approval conditions...." *Id.* The court went on to uphold the right of local governmental agencies to impose conditions in the course of granting subdivision map approval. The decision specifically held that conditions imposed are lawful when consistent with zoning provisions or, if not provided for by local zoning ordinances, when otherwise lawful and not inconsistent with the SMA. *Id.*

The law therefore expressly contemplates that local agencies may impose certain conditions, but this case involved the additional issue of whether the condition was of continuing validity given that the condition, parking on an adjacent property, no longer owned in common, would not have been imposed today given the changed ownership of the property and the changed zoning policies. We argued that the changed zoning requirement could be a basis for the parties to agree to appeal the condition to the Planning Department, but could not be unilaterally eliminated by the defendant given that the condition was imposed as required by law, and was a condition in the form of an easement "running with

the land." My clients' right to a parking easement on the defendant's property was clearly established, we argued, based on the history of use of the properties and the historical development and subdivision of the properties.

We also argued that it was not "unfair" to impose the condition because the defendant "had notice" of the condition. "Person receiving a deed to, or a deed of trust on, property, acquires his or her title or lien subject to all previous transfers of title, and previously created liens and encumbrances, of which he or she has *actual or constructive notice*." Miller & Starr, Cal Real Estate (3rd ed. 2011) Recording and Priorities, §11:84.

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