

*Handout by Colin Coffey 1/13/03 -
Review of subdivision at
February meeting on 2/10/03*

MEMORANDUM

TO: Colin Coffey
FROM: Edward Shaffer
DATE: January 13, 2003
RE: Los Medanos Community Healthcare District – Subdivision Issue

Our client the Los Medanos Community Healthcare District owns a parcel of land (the “Property”) in the City of Pittsburg covering the southeast corner of East Leland Road and Loveridge Road (excluding a small parcel at the very corner). This memo addresses the District’s legal ability to convey interests in separate portions of the Property to different parties.

SUMMARY

- State law appears to allow a public entity like the District to sell or lease land without subdivision approval, unless the City has a good reason to object.
- The 1998 Lease may have already divided the Property into two parcels.
- Even if subdivided, non-hospital development of the Remainder still must satisfy City conditions and gain rezoning approval.
- There are wrinkles and ambiguity in the law, giving opponents ammunition to complicate a sale and scare away potential buyers.
- The District can always apply for subdivision now, to be safe.
- The key question may be whether the City will welcome or oppose separate non-hospital development of the Remainder.

BACKGROUND

The Property measures approximately 14.35 acres. It is shown as “Parcel A” on an approved subdivision map identified as Parcel Map MS 679-96 (the “Parcel Map”). I have not researched if the Property existed as a separate legal parcel before that minor subdivision; its prior status should not affect this analysis. The Property also is identified as Assessor’s Parcel No. 088-161-028. A hospital facility, parking lots and other improvements have been developed on a portion of the Property.

In 1998 the District entered into a Lease with Contra Costa County, by which the County leased from the District both the hospital building and surrounding areas containing parking lots, driveways and other improvements. The Lease covered

approximately 12.6 acres of the Property (the "Leased Parcel") leaving about 1.75 acre not subject to the Lease (the "Remainder"). The Lease also included two roadway easements through the Remainder out to East Leland Road.

The Lease identified the Remainder as part of "District's Adjacent Land". Under Section C.4 of the Lease, if the District attempts to lease or sell any part of the Adjacent Land, the County has a right of first refusal (that is, it may match the pending offer). The Lease does not appear to contain any other mention of the Adjacent Land or the Remainder. The Lease also does not address the fact that the Leased Parcel was only part of Parcel A as shown on the Parcel Map.

The County now wants to lease the Remainde. The District has asked us to describe the legal status of the Remainder, and to consider if the District may lease or sell the Remainder to another party rather than the County.

ANALYSIS

The State Subdivision Map Act (Government Code §66410 et seq.) is intended to give cities and counties control over the design and improvement of new development. Unless exempt, no property may be divided without local approval of the subdivision. "Subdivision" is defined as dividing property for the purpose of sale, lease or financing – whether immediate or future (§66424).

Subdivisions to create five or more parcels typically require a two-part process, with approval of a "tentative" map followed by a later "final" map. Creation of four or fewer parcels usually can follow a simplified "parcel map" process, taking less time and allowing fewer conditions.

Map Act Exemptions.

The Map Act lists a number of activities that are exempt from subdivision regulation (see §§66412, 66412.1, 66412.5, 66428), including:

- Financing or leasing (but not sale) of apartments, offices, stores, etc. in existing buildings.
- Mineral, oil or gas leases.
- Land for cemetery purposes.
- "Lot line adjustments" between existing legal lots.
- Lease or easement of land for a windpowered electrical generation device (if the device itself is subject to local approval).
- Lease or easement of land for cellular communications facilities (if the facilities themselves are subject to local approval).

- Leases of agricultural land for agricultural purposes (defined as cultivation or grazing).
- Financing or leasing of land in a shopping center or business park for construction of individual commercial or industrial buildings (if the overall project and the buildings themselves are subject to local approval).
- Financing or leasing of existing separate commercial or industrial buildings on a single parcel (shopping center or business park).
- Financing or leasing (but not sale) of in-law or second residential units.
- Division of land into four or fewer parcels for construction of removable commercial buildings having less than 100 square feet of floor area.
- Short-term leases of portions of railroad right-of-way.

The District could use the lot line adjustment exemption, filing a map that would serve to remove the Remainder from the Property and merge it with the adjacent separate parcel that the District also owns at the very corner of East Leland and Loveridge Roads (APN 088-161-013). Such action may make the new larger parcel more marketable. However, I understand that a bankruptcy receiver controls the corner parcel and is working to sell it to pay off District debts. In that case, a lot line adjustment might complicate the receiver's activities and/or place the Remainder under the receiver's control – which might not be of any benefit the District.

It is not likely that any of the other exemptions listed above will be helpful to the District. The Remainder does not appear to qualify for the types of use mentioned.

Special Public Conveyance Exemption.

Section 66428(a)(2) of the Map Act provides an exemption that is most applicable to the District's situation. This appears to provide the best opportunity for the District to lease or sell the Remainder. The statute reads that a parcel map shall not be required for:

- (2) Land conveyed to or from a governmental agency, public entity, public utility, or for land conveyed to a subsidiary of a public utility for conveyance to that public utility for rights-of-way, unless a showing is made in individual cases, upon substantial evidence, that public policy necessitates a parcel map. For purposes of this subdivision, land conveyed to or from a governmental agency shall include a fee interest, a leasehold interest, an easement, or a license.

I understand you previously determined that the District qualifies as a "public entity" for other purposes. The Map Act uses this term broadly, and so the District should be covered by the Section 66428 exemption.

County Lease Created Subdivision.

It is interesting that the 1998 Lease contains no mention of the question of subdivision. This suggests that the parties believed it was valid for the District to only lease part of the Property to the County without any subdivision approval by the City. We must assume that they were relying on the Section 66428(a)(2) Map Act exemption.

Please note that the words “**a leasehold interest**” were only added to the last sentence of the Section in 2001, as part of an omnibus measure clearing up minor defects and ambiguities in the Map Act. There are no cases on this point but I am confident that even before the words were added, a court would have ruled that a lease was covered.

The Lease served to divide the Property into two legal parcels as of 1998. Lease Section C.4 discusses the District’s ability to separately sell or lease the Remainder subject only to the County’s right of first refusal. Thus one can argue that the Remainder already is a separate legal parcel and can be conveyed by the District to anyone without any subdivision approval. It stands to reason that once land is split, if one part is a legal parcel then the other part must have the same status.

Will the 1998 Subdivision Expire With the Lease?

However, relying on the 1998 Lease to create a permanent subdivision raises a question. Section 66428(a)(2) only states that a parcel map won’t be needed to lease land. It does not say what happens when the lease expires. This might be used as an argument against treating the Remainder as a separate parcel. However, the law tends to support certainty over ambiguity and favors the ability to convey property without restriction, so a court might rule that even with a lease the remaining parcel is permanently separate. I am not aware of any cases or other material on this question.

But this issue may not even be relevant. Even if the subdivision by lease is temporary, the District can rely on Section 66428(a)(2) to support a new transaction conveying the Remainder to a third party without subdivision approval by the City.

City’s Right to Require a Parcel Map.

Section 66428(a)(2) includes a caveat that the City may require a parcel map, if it can present substantial evidence that public policy requires the map approval process. Such a situation may arise if the City is concerned that the shape of proposed parcels, or the nature of access to public roads, requires some study and possibly revision. There are no published cases addressing the evidence needed to satisfy a court in this situation.

The District can take comfort from the fact that the City did not challenge the Lease on this basis. However, while the City might have accepted the Lease as beneficial and saw no problem with the County only leasing part of the Property, it might feel otherwise if the District proposes to sell the Remainder to a third party for new development along East Leland Road separate from operation of the hospital. The City might consider the Remainder as part of the hospital grounds (for parking or landscaped buffer) and not a good candidate for separate development.

If the District attempts to sell the Remainder, the buyer (or its lender) likely will need proof that the City considers the parcel separate. Typically this requirement is satisfied by obtaining a “certificate of compliance” from the City (Map Act §66499.35). This would be the point at which the City might attempt to interfere with the deal. If the District decides to pursue this avenue further, we can consider if it would be desirable for the District to request a certificate of compliance now.

City May Impose Design and Improvement Requirements.

Section 66428(a)(2) may allow the District to sell the Remainder without subdivision approval. However, several opinions by the State Attorney General suggest that the City still may be able to exercise its authority pursuant to other provisions of the Map Act to protect the public interest in orderly development (e.g., regulating provision of utilities, environmental review, payment of impact fees, access and other details). This may not represent an added burden in practice, as any non-hospital use of the Remainder likely will require City approval of rezoning (and perhaps use permits).

Possible Limitation to Rights-Of-Way.

The language of Section 66428(a)(2) presents some ambiguity. Some people read it as only exempting land conveyed for a right-of-way. This confusion carries into three major treatises on the Map Act: one completely supports a broad interpretation; one interprets the section as limited to rights-of-way; and the third seems to waffle.

This confusion is aggravated by Map Act Section §66426.5, which is related to Section 66428(a)(2). This Section allows a party conveying land to a public entity to leave out the parcel being transferred when counting the total number of lots involved. This is of value to owners when the count is four versus five parcels, allowing use of a simplified parcel map versus the more complicated tentative/final map process. It also allows an owner to convey part of a parcel to a public entity without any subdivision approval (subject to §66428(a)(2)). Section 66426.5 reads:

Any conveyance of land to a governmental agency, public entity, public utility or subsidiary of a public utility for conveyance to that public utility for rights-of-way shall not be considered a division of land for purposes of computing the number of parcels. For purposes of this section, any conveyance of land to a governmental agency shall include a fee interest, a leasehold interest, an easement, or a license.

As you see, this wording is almost identical to Section 66428(a)(2). However, the sentence reads more strongly in favor of the right-of-way restriction.

I recently spoke with Dan Curtin at Bingham McCutchen, author of the waffling source and a well-respected expert in the field. He agreed with the broad interpretation for both Map Act sections, and recognized the need to clarify his treatise. If necessary we could obtain his written conclusion on this point.

Pittsburg Subdivision Regulations.

State law allows each city to adopt subdivision regulations that can expand and supplement the Map Act. In the event of a conflict, the Map Act will govern.

Section 17.04.040.O of the Pittsburg Municipal Code states that the City's subdivision regulations do not apply to:

Land conveyed to or from a governmental agency, public entity, public utility, or for land conveyed to a subsidiary of a public utility for rights-of-way, unless a showing is made in individual cases, upon substantial evidence, that public policy necessitates a parcel map [cross-referencing Map Act §§ 66428 and 66426.5].

This wording parallels the substance of Map Act Section 66428(a)(2). However, Pittsburg Code Section 17.04.060.A then states that the city engineer may, at his or her discretion, waive the requirements for a parcel map for:

2. A division of property resulting from conveyance of land or interest therein to or from the city, public entity or public utility for a public purpose, such as school sites, public building sites, or rights-of-way or easements for streets, sewers, utilities, drainage, etc.;
4. Any other division of property which would otherwise require a parcel map.

This provision cites Map Act Section 66428. However, it seems to conflict with the Map Act in at least two respects: it gives the city engineer discretion rather than putting the burden on the City to prove the need for a map; and Paragraph 2 limits conveyances to those for a public purpose. Unfortunately, these contradictions could be used by someone opposed to the District trying to sell the Remainder for separate non-hospital development as ammunition to delay and complicate the process – and possibly scare away a potential buyer. Again, it might help the District to request a certificate of compliance from the City for the Remainder in advance, to clarify its status.

District Can Apply For Subdivision.

The District can apply for a map to divide the Property into two parcels. This may become preferable if complications arise in documenting that the Remainder already is separate pursuant to the Lease, or the potential buyer insists on the certainty of a recorded map (though a certificate of compliance should satisfy most concerns).

As mentioned above, any private development of the Remainder likely will require rezoning, involving environmental review and City processing. Including a parcel map process should not involve substantial added cost or time. The City either will approve or deny both applications, and the land will have little value even if it is a separate parcel if the City won't allow non-hospital development.