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OFFICE OF THE ATTORNEY GENERAL
State of California

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OPINION

of

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No. 81-704

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THE HONORABLE JEFFREY TUTTLE, COUNTY COUNSEL,
CALAVERAS COUNTY, has requested an opinion on the following question:

Where a court orders the physical division of real property in a partition action, must the division comply with the requirements of the Subdivision Map Act, local ordinances adopted thereunder, zoning ordinances, and the general plan for the area in which the property is located?

CONCLUSION

Where a court orders the physical division of real property in a partition action, the division must comply with the requirements of the Subdivision Map Act, local ordinances adopted thereunder, zoning ordinances, and the general plan for the area in which the property is located.

ANALYSIS

A. The Partition Action Statutory Scheme

The Legislature has enacted a comprehensive statutory scheme (Code Civ. Proc., §§ 872.010–874.240)¹ governing actions for the partition of real property. (§ 872.020.) Although such an action is a creature of statute (*Capuccio v. Caire* (1929) 207 Cal. 200, 206–210), it is nonetheless equitable in nature. (*Elbert, Ltd. v. Federated etc. Properties* (1953) 120 Cal. App. 2d 194, 200.)

Generally speaking, a partition action may be commenced and maintained by any owner of an interest in the property. (§ 872.210.) The superior court has jurisdiction over the action (§ 872.110) and determines “whether the plaintiff has the right to partition” (§ 872.710, subd. (a)) and the extent of the various ownership interests (§ 872.610). The court “may make any decrees and orders necessary or incidental to carrying out the purposes of” the statutory scheme (§ 872.120), with the manner of partition being (1) physical division of the property, (2) sale of the property and division of the proceeds, and (3) sale and division of the proceeds for part of the property and physical division of the remainder. (§§ 872.810–872.840.)

Physical division of the property rather than its sale is favored under the partition action law. (§ 872.810; *Richmond v. Dofflemyer* (1980) 105 Cal. App. 3d 745, 757.) Nevertheless, the court is directed to “order that the property be sold” if (1) the “parties agree to such relief” or (2) the “sale and division of the proceeds would be more equitable than division of the property.” (§ 872.820.) When the property is physically divided, “title vests in accordance therewith upon entry of judgment of partition.” (§ 873.290, subd. (c).)

The question presented for analysis is whether the physical division of real property in a partition action must comply with various provisions of the Planning and Zoning Act (Gov. Code, §§ 65000–66499.58),² specifically the Subdivision Map Act (§§ 65510–66499.37), the State Zoning Law (§§ 65800–65912) and the statutory requirements for local general plans (§§ 65300–65403). We conclude that it must.

The “connection” between the partition action statutory scheme and the Planning and Zoning Act is found in Code of Civil Procedure section 872.040. Therein the Legislature has declared its intent to harmonize the two legislative enactments as follows:

¹All subsequent section references prior to footnote 2 are to the Code of Civil Procedure.

²All section references hereafter are to the Government Code unless otherwise indicated.

“Nothing in this title [the partition action statutory scheme] excuses compliance with any applicable laws, regulations, or ordinances governing the division, sale, or transfer of property.”³

In commenting upon this statute at the time of its adoption, the Assembly Legislative Committee observed,

“Section 872.040 codifies the rule that the partition statute cannot be used to avoid any applicable laws governing property transactions. See, e.g., *Pratt v. Adams*, 229 Cal. App. 2d 602, 40 Cal. Rptr. 505 (1964) (Subdivision Map Act). Whether a particular law, regulation, or ordinance is applicable in a partition action is determined by the terms or a construction of that law, regulation, or ordinance.” (West’s Cal. Code Ann.)

Additionally, we note that the present partition statutory scheme (Stats. 1976, ch. 73) was enacted as the result of recommendations made by the California Law Revision Commission, which we quote in part:

“Traditionally, physical division of the property has been the preferred manner of partition. California provides for physical division in the normal course of events unless it appears that division can only be made with “great prejudice” to the parties. The Commission recommends continuation of the statutory preference for physical division with the modification discussed immediately below.

“Partition by Sale

“In many modern transactions, sale of the property is preferable to physical division since the value of the divided parcels frequently will not equal the value of the whole parcel before division. Moreover, *physical division may be impossible due to zoning restrictions* or may be highly impractical, particularly in the case of urban property.

³Another “connection” may be found in Code of Civil Procedure section 873.240, which provides, “Where real property consists of more than one distinct lot or parcel, the property shall be divided by such lots or parcels without other internal division to the extent that it can be done without material injury to the rights of the parties.” (See § 66424.2.)

“The Commission recommends that partition by physical division be required unless sale would be “more equitable.” The new standard would in effect preserve the traditional preference for physical division while broadening the use of partition by sale.” (13 Cal. Law Revision Com. Rep. (1975) pp. 413–414; fn. omitted; italics added.)

It is well settled that in construing a statute, the basic rule is to “ascertain the intent of the Legislature so as to effectuate the purpose of the law.” (*Select Base Materials v. Board of Equal.* (1959) 51 Cal. 2d 640, 645.) The “legislative history of the statute and the wider historical circumstances of its enactment are legitimate and valuable aids in divining the statutory purpose.” (*California Mfgs. Assn. v. Public Utilities Com.* (1979) 24 Cal. 3d 836, 844.) “Besides expressions of public policy, committee reports on a bill are also entitled to some weight in gauging legislative intent.” (In re Vicki H. (1979) 99 Cal. App. 3d 484, 495; see *Southern Pac. Co. v. Ind. Acc. Com.* (1942) 19 Cal. 2d 271, 278–279, *Palmer v. Agee* (1978) 87 Cal. App. 3d 377, 384.) Explanatory comments by a law revision commission are persuasive evidence of the intent of the Legislature in subsequently enacting its recommendations into law.” (*Brian W. v. Superior Court* (1978) 20 Cal. 3d 618, 623.)

Applying these principles of statutory construction, we think it clear that in a partition action, the court may not order the physical division of the property in violation of “any applicable laws, regulations or ordinances governing the division, sale, or transfer of property.” (Code Civ. Proc., § 872.040.) The short answer to the question presented, therefore, is that a court ordered physical division of real property in a partition action must comply with those provisions of the Planning and Zoning Act that by their own terms would be “applicable” to such divisions. We now examine those provisions to determine the extent of their applicability.

B. The Subdivision Map Act

The Subdivision Map Act (hereafter “Act”) is the primary regulatory control governing the division of property in California. It requires, with certain exceptions, that a subdivider of property (1) design the subdivision in conformity with applicable general and specific plans, (2) construct public purpose improvements such as streets and sewers, and (3) donate land or money for public uses such as parks and schools (See §§ 66439, 66474–66478; Longtin, Cal. Land use Regulations (1977) § 10.03, pp. 562–563; 3 Witkin, Summary of Cal. Law (2d ed. 1973) Real Property, §§ 22–24, pp. 1788–1972, 2 Ogden’s Revised Cal. Real Property Law (1975) §§ 25.1–25.2, pp. 1204–1206; Comment, *Land Development and the Environment: The Subdivision Map Act* (1974) 5 Pacific L.J. 55, 86–87.) “The purpose of the act is to coordinate planning with the community pattern laid out

by local authorities and to assure proper improvements are made so the area does not become an undue burden on the taxpayer.” (*Bright v. Board of Supervisors* (1977) 66 Cal. App. 3d 191, 194; see *Benny v. City of Alameda* (1980) 105 Cal. App. 3d 1006, 1111.)

In determining whether the requirements of the Act are applicable to court ordered partitions of real property, the provisions of section 66424 must be considered. That statute defines “subdivision” for purposes of coverage under the Act as: “The division, *by any subdivider*, of any unit or units of improved or unimproved land, or any portion thereof, shown on the latest equalized assessment roll as a unit or as contiguous units, *for the purpose of sale, lease or financing*, whether immediate or future. . . .” (Italics added.) Two questions arise in determining whether a court ordered partition is a “subdivision” governed by the Act: (1) is the division by a “subdivider” and (2) is the division “for the purpose of sale, lease or financing.”

A “subdivider” is defined in section 66423 as “a person, firm, corporation, partnership or association *who proposes to divide*, divides or causes to be divided real property into a subdivision for himself or for others. . . .” (Italics added.)

In *Pratt v. Adams* (1964) 229 Cal. App. 2d 602, 603–604, the partition of 46,237 acres into 12 parcels was ordered by a court based upon a court referee’s report recommending such a division. The parties to the action argued in a subsequent suit that they had not “caused” the division and that the superior court had not been a “subdivider” as defined in the Act. The Court of Appeal rejected the argument, holding that the parties had indeed been the “cause” of the division “even though judicial approval of the referee’s report was obtained.” (*Id.*, at p. 605.)

The Legislature has since changed the definition of “subdivider” by expanding it to include one “who proposes to divide,” thus in effect codifying *Pratt* and avoiding any similar confusion as to the definition of “subdivider.”

Next we consider whether a court ordered partition constitutes a division “for the purpose of sale, lease or financing.” In *Pratt* the parties conceded that they intended to divide, develop and sell the property. (*Id.*, at p. 603.) What is the result when no such concession is made?

While the reported cases have not been concerned with the element of intent contained in section 66424,⁴ it is clear that the provisions of the Act are to be broadly

⁴In *In re Estate of Sayewich* (1980) 120 N.H. 237 [413 A. 2d 581, 583–584], the Supreme Court of New Hampshire ruled that the division of property by a testamentary devise could not be considered to be for the purpose of sale, lease or development under the states subdivision regulations. Although it concluded

interpreted so as to prevent circumvention of its several goals and purposes. (*Hersch v. Mountain View* (1976) 64 Cal. App. 3d 425, 432–433; *Bright v. Board of Supervisors*, *supra*, 66 Cal. App. 3d 191, 195; *Pratt v. Adams*, *supra*, 229 Cal. App. 2d 602, 605–606.)⁵ We have previously concluded that purported “divisions” by public officials for purposes unrelated to the Act may not be relied upon to circumvent its requirements. (62 Ops. Cal. Atty. Gen. 147, 149 (1979).)

The considerations behind the requirements of the Act would be as applicable in a partition action as in any other division of property. Hence, the word “sale” in section 66424 should not be interpreted so narrowly as to circumvent these purposes. The conversion and exchange of property interests in a partition action may be considered a “sale” in the broad sense of the term. A “sale” is “a present transfer of ownership and title to all or a part interest in” property; it transfers “the absolute or general ownership of property from one person or corporate body to another for a price (as a sum of money or any other consideration).” (Webster’s New Internat. Dict. (3d ed. 1966) p. 2003; see *Wilson v. Superior Court* (1935) 2 Cal. 2d 632, 635–637; *Keeler v. Murphy* (1931) 177 Cal. App. 386, 392, see also *Select Base Materials v. Board of Equal.*, *supra*, 51 Cal. 2d 640, 644–646.) Here, ownership and title to partitioned property is changed and transferred among the owners in consideration for each’s mutual undertaking. Accordingly, a division under the partition action statutory scheme may be said to be “for the purpose of sale” and thus constitutes a “subdivision” for purposes of section 66424 and the requirements of the Act.

Although we believe that a partition action will always be found to meet the “purpose” element of section 66424, a contrary conclusion would have little differing consequence as a practical matter. Section 66411 states:

“Regulation and control of the design and improvement of subdivisions are vested in the legislative bodies of local agencies. Each local agency shall by ordinance regulate and control subdivisions for which this division requires a tentative and final or parcel map. *Each local agency may by ordinance regulate and control other subdivisions*, provided that such regulations are not more restrictive than the regulations for those subdivisions for which a tentative and final or parcel map are required by this

that title to the property passed in accordance with the intent of the decedent, the court held that the subdivision regulations would govern any development of the property by the devisees.

⁵Concerning another remedial statutory scheme, the Supreme Court observed, “That construction of a statute should be avoided which affords an opportunity to evade the act, and that construction is favored which would defeat subterfuges, expediences, or evasions employed to continue the mischief sought to be remedied by the statute, or to defeat compliance with its terms or any attempt to accomplish by indirection what the statute forbids.” (*Freedland v. Greco* (1955) 45 Cal. 2d 462, 468.)

division. . . .” (Italics added.)

As authorized by section 66411, therefore, a city or county may also regulate divisions of real property that are not covered by the Act. (*City of Tiburon v. Northwestern Pac. R.R. Co.* (1970) 4 Cal. App. 3d 160, 182–183. see *Benny v. City of Alameda*, *supra*. 105 Cal. App. 3d 1006, 1111; *Hersch v. Mountain View*, *supra*. 64 Cal. App. 3d 425, 431–432, *Friends of Lake Arrowhead v. Board of Supervisors* (1974) 38 Cal. App. 3d 497, 505.)

Since the statutory exclusions from the Act’s requirements (§§ 66412–66412.5) do not include partition actions, we conclude that the provisions of the Act and the local subdivision ordinances enacted thereunder are applicable to physical divisions of real property caused by the maintenance of a partition action

C. The State Zoning Law

The State-Zoning law authorizes cities and counties to regulate the use of buildings, structures and land (§ 65860; see *O’Loane v. O’Rourke* (1965) 231 Cal. App. 2d 774, 780.) The broad purposes of zoning include the reduction of traffic congestion, the prevention of undue population concentration, the provision of open space, and stabilization of property values. (Longtin, *supra*, § 2.01[2], pp. 73–74; 2 Ogden’s, *supra*, § 24.6, p. 1176; 8 Hagman & Volpert, Cal. Real Estate Law & Practice (1978) § 260.03, p. 260:6.)

Actions for the partition of real property come within the scope of the State Zoning Law and local zoning ordinances enacted thereunder for the same reasons that subdivision regulations are applicable to such divisions. While compliance with local zoning ordinances is not mandated for certain governmental entities (§§ 53090–53096), no exclusion is provided for partition actions. The function of local zoning is no less important when property is physically divided in a partition action.

D. General Plan Requirements

Pursuant to section 65300, each city and county has a general plan for its physical development, with required elements of land use, circulation, housing, conservation, open space, seismic safety, noise, scenic highways, and general safety. (§ 65302) The plan “is, in short, a constitution for all future development. . . .” (*O’Loane v. O’Rourke*, *supra*, 231 Cal. App. 2d 774, 782, see *Karlson v. City of Camarillo* (1980) 100 Cal. App. 3d 789, 801; *City of Santa Ana v. City of Garden Grove* (1980) 100 Cal. App. 3d 521, 530–532.)

Although special provisions (§§ 65401–65403) govern certain governmental bodies in regard to compliance with a local general plan, no exclusion is made in the statutory scheme for divisions of property in partition actions. The goal of orderly community development may not be ignored merely because judicial approval is obtained for a partition action division.

E. Enforcement Mechanisms

Subdivision, zoning, and general plan requirements form an integrated system of land use control in California.⁶ Subdivision (a) of section 65850 states, County or city zoning ordinances shall be consistent with the general plan of the county or city. . . .” (See 58 Ops. Cal. Atty. Gen. 21, 24–27 (1975).) As for subdivisions, the Act provides, “A legislative body of a city or county shall deny approval of a final or tentative map if . . . the proposed map is not consistent with applicable general and specific plans. 66474, subd. (a); see *Woodland hills Residents Assn. Inc. v. City Council* (1979) 23 Cal. 3d 917, 936.)⁷ Consequently, the division of property in violation of one of the land use control elements may be expected to violate the other elements.

It is the duty of a court to determine the law as it exists and to enforce it where applicable. (*Weil v. Weil* (1951) 37 Cal. 2d 770, 776; *Wadly v. County of Los Angeles* (1961) 205 Cal. App. 2d 668, 671, *Kotronakis v. City & County of San Francisco* (1961) 192 Cal. App. 2d 624, 631; 59 Ops. Cal. Atty. Gen. 577, 579 (1976); see *People v. Russell* (1968) Cal. 2d 187, 194–195; *Modesto Irr. Dist. v. City of Modesto* (1962) 210 Cal. App. 2d 652, 655–656.)

Within the area where adopted, a city or county ordinance has the character, force, and effect of a general law of the state (*City of San Luis Obispo v. Fitzgerald* (1899) 126 Cal. 279, 281; *Evola v. Wendt Construction Co.* (1959) 170 Cal. App. 2d 21, 24, *Monterey Club v. Superior Court* (1941) 48 Cal. App. 2d 131, 147.)

The partition action statutory scheme allows for the appointment of a referee or referees to make a physical division of the property. (§§ 873.010–873.290.) Through the use of an interlocutory judgment (§§ 872.720, 872.810, 873.210) with expenses being paid by the parties prior to judgment (§§ 874.010–874.140), it is entirely conceivable that the necessary local approval may be obtained for the physical division of property in a partition

⁶In light of the conclusions we have reached and because we are dealing with a general law county, the powers of a charter county or city with regard to land use control are not addressed herein.

⁷A specific plan contains detailed regulations, conditions, programs and proposed legislation for implementing a general plan (§ 65451) and may be adopted under the provisions of section 65507.

action.

If compliance with the subdivision ordinances enacted under the Act is not achieved prior to partition, the owners may be (1) guilty of a misdemeanor (§ 66499.31), (2) subject to a restraining order or injunction (§ 66499.33), and (3) denied all permits and approvals required to develop the property (§ 66499.34; see *Scrogings v. Kovatch* (1976) 64 Cal. App. 3d 54, 58). The same civil and criminal penalties and remedies are available for violations of local zoning ordinances. (See 8 Hagman & Volpert, *supra*, § 282.01–282.16, pp. 282:4–282:25.) As for general plan violations, development proposals for the property would be subject to official disapproval. (*Id.*, at p. 253:29) Numerous effective enforcement provisions thus exist to thwart such circumvention of orderly community development.

Finally, it again should be noted that the partition action statutory scheme was revised recently to avoid the problems discussed in this opinion. The reasonable alternative in many cases will be for the property to be sold and proceeds divided rather than have a physical partition of the property.

In conclusion, where a court orders the physical division of real property in a partition action, the division must comply with the provisions of the Act, local ordinances enacted thereunder, zoning ordinances, and the general plan for the area in which the property is located.
