

# COMMENTS

## THE EFFECT OF HISTORIC PARCELS ON AGRICULTURE – HARVESTING HOUSES

### INTRODUCTION

California is “home to the largest food and agricultural economy in the nation.”<sup>1</sup> The critical component of that agricultural industry is the Great Central Valley.<sup>2</sup> It has been called “the single most important agricultural resource in the United States and, arguably, the world.”<sup>3</sup>

However, the Central Valley is facing significant changes in its land use and population. Prime farmland is being converted to urban uses

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<sup>1</sup> CAL. AGRICULTURAL STATISTICS SERVICE, AGRICULTURAL OVERVIEW, 2000 (2000), <http://www.nass.usda.gov/ca/bul/agstat/indexcas.htm> (last visited Dec. 17, 2001) [hereinafter *Ag. Overview*].

<sup>2</sup> GREAT VALLEY CENTER, AGRICULTURAL LAND CONSERVATION IN THE GREAT CENTRAL VALLEY 2 (Oct. 1998), <http://www.greatvalley.org/research/publications/index.html> (last visited Dec. 17, 2001) [hereinafter *Ag. Conservation*].

<sup>3</sup> AMERICAN FARMLAND TRUST, ALTERNATIVES FOR FUTURE URBAN GROWTH IN CALIFORNIA’S CENTRAL VALLEY: THE BOTTOM LINE FOR AGRICULTURE AND TAXPAYERS, INTRODUCTION (1995), <http://www.farmlandinfo.org/fic/ft/cv/cv-intro.html> (last visited Dec. 24, 2001) [hereinafter *Urban Growth Intro*].

at an alarming rate.<sup>4</sup> The population is expected to triple in the next forty years.<sup>5</sup> People and tract housing are replacing crops as the Valley's most important products.<sup>6</sup>

When subjected to such rapidly occurring dynamics, land values change dramatically. Land devoted to housing subdivisions can be worth fifty times more than the same land used for crops.<sup>7</sup> As California's current farming generation approaches retirement age, pressure builds to yield to the temptation to cash out.<sup>8</sup>

Local government and those concerned with protecting California's agricultural economy have adopted policies and regulations and have provided financial incentives in an attempt to preserve existing farmland.<sup>9</sup> Despite these efforts, a new technique has arisen where landowners can circumvent all of the policies and regulations protecting farmland.<sup>10</sup> This then allows landowners to convert their property to urban uses without any local government review, drastically increasing property values overnight.

This conversion technique involves a two-step process. First, property owners use obscure documents called certificates of compliance to legalize "historic parcels" underlying their property title, which effectively establishes a subdivision of the property without the usual planning procedures.<sup>11</sup> Next, using a procedure known as "lot line adjustment," property owners rearrange the historic parcels like puzzle pieces to form a more marketable layout.<sup>12</sup> Typically, creation of such a subdivision would require review pursuant to the state's Subdivision Map Act<sup>13</sup> and the California Environmental Quality Act.<sup>14</sup> It must also be in conformance with local policies and regulations. This new

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<sup>4</sup> GREAT VALLEY CENTER, THE STATE OF THE GREAT CENTRAL VALLEY OF CALIFORNIA: ASSESSING THE REGION VIA INDICATORS 45 (May 1999), <http://www.greatvalley.org/research/publications/index.htm> (last visited Dec. 17, 2001) [hereinafter *Indicators*].

<sup>5</sup> *Ag. Conservation*, *supra* note 2, at 3.

<sup>6</sup> *Id.* at 3, 4.

<sup>7</sup> *Id.* at 9.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 15, 16.

<sup>10</sup> Kenneth R. Weiss & John Johnson, *In Hearst Land Fight, Old Papers Are New Weapons*, L.A. TIMES, July 22, 2001, at A1 [hereinafter *Old Papers*].

<sup>11</sup> John Johnson & Kenneth R. Weiss, *Speculator Ratchets Up Coastal Costs*, L.A. TIMES, July 22, 2001, at A26 [hereinafter *Coastal Costs*].

<sup>12</sup> John Johnson, *A Deep Divide Over Bill For Hearst Land*, L.A. TIMES, Oct. 11, 2001, at B1 [hereinafter *Deep Divide*].

<sup>13</sup> CAL. GOV'T CODE §§ 66410-66499.37 (Deering 2001).

<sup>14</sup> CAL. PUB. RES. CODE §§ 21000-21177 (Deering 2001).

technique avoids all those requirements. As a result, it has been called everything from a “land scam” to a “magic subdivision.”<sup>15</sup>

This process has already been used to drive up land values on ranching and open space lands on California’s Central Coast.<sup>16</sup> Is it only a matter of time before such technique upsets the tension between farmland preservation efforts and growth demands to help spark a Central Valley megalopolis?

### I. SUDDEN “DISCOVERY” OF HISTORIC PARCELS

The discovery of historic parcels underlying the title to prime farmland can send the value of the property skyrocketing. Examples can be seen in rural agricultural and ranch areas along the California Central Coast. In 1998, one such deal involved a 7500-acre dairy farm north of Santa Cruz that conservation groups were interested in purchasing and preserving. When 139 historic parcels were found to be underlying the property, it drastically increased the value of the property, and the purchase price to the conservation groups more than doubled to over \$43 million.<sup>17</sup> A similar deal occurred along the Big Sur coast where the discovery of eleven historic parcels underlying a 1226-acre property increased the value from \$9 million to \$37 million, also paid by a conservation group to preserve the land from development.<sup>18</sup> The owner of that property declared that finding the historic parcels was “like winning the lottery.”<sup>19</sup>

The reason for the price inflation is that historic parcels allow property owners to circumvent local zoning restrictions on land development.<sup>20</sup> A controversial example, currently unfolding, involves the Hearst Corporation and San Simeon. There, the Hearst Corporation has long sought to build a 650-room resort along the coast.<sup>21</sup> The project has been stalled due to concerns of commercial exploitation of that portion of the coast.<sup>22</sup> To address those concerns, Hearst expressed a willingness to sell their rights to develop 83,000 acres in exchange for

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<sup>15</sup> See discussion *infra* Part I.

<sup>16</sup> See discussion *infra* Part I.

<sup>17</sup> Kenneth R. Weiss, *Speculator Seeks New Riches in Malibu*, L.A. TIMES, Sept. 9, 2001, at A1 [hereinafter *Speculator*].

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Old Papers*, *supra* note 10.

<sup>21</sup> John Johnson, *Hearst Offers New Plan for Resort*, L.A. TIMES, Feb. 9, 2001, at A3 [hereinafter *New Plan*].

<sup>22</sup> *Id.*

the right to build on 257 acres near Hearst Castle.<sup>23</sup>

The California Coastal Commission, however, recently recommended actions to preserve the area as open farmland that would prevent most of Hearst's proposal.<sup>24</sup> To counter, Hearst announced the discovery of 279 historic parcels, which could give them "carte blanche to circumvent local zoning rules and other restrictions on development."<sup>25</sup> Hearst claims that they have no specific development plan for those individual parcels, only that they want to establish the value of the property and its potential for development.<sup>26</sup> A valuation of the Hearst property has not yet been determined as of this writing. Original estimates prior to the announcement of the discovery of the historic parcels were in the range of \$200-\$300 million.<sup>27</sup> Following the announcement, estimates went to "\$300 million or more,"<sup>28</sup> and may increase to a "half-billion-dollar price tag."<sup>29</sup>

This type of negotiation strategy, involving the threat to ignore development restrictions while increasing the price of the land to those interested in purchasing it for conservation, has been called "a new kind of environmental terrorism."<sup>30</sup> Landowners, in effect, hold the land hostage and boldly declare: "pay the asking price or it will be developed."<sup>31</sup>

Although it has been called "environmental terrorism,"<sup>32</sup> "land scam,"<sup>33</sup> "magic subdivision,"<sup>34</sup> and "winning the lottery,"<sup>35</sup> this practice is perfectly legal. And the increased costs to purchase such lands for conservation purposes have largely been subsidized by tax-

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<sup>23</sup> *Id.*

<sup>24</sup> Kenneth R. Weiss, *Hearst Hits Setback in San Simeon*, L.A. TIMES, July 13, 2001, at B1 [hereinafter *Setback*].

<sup>25</sup> *Old Papers*, *supra* note 10.

<sup>26</sup> *Id.*

<sup>27</sup> Kenneth R. Weiss & Margaret Talev, *Babbitt Aiding Hearst With Land Deal*, L.A. TIMES, June 6, 2001, at A1 [hereinafter *Babbitt*].

<sup>28</sup> *Old Papers*, *supra* note 10.

<sup>29</sup> John Johnson, *Hearst Ranch Sale Talks Still On*, L.A. TIMES, Oct. 17, 2001, at B8.

<sup>30</sup> *Old Papers*, *supra* note 10.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> Los Angeles Times, Editorial, *Stop the Land Scam*, L.A. TIMES, July 29, 2001, at M4.

<sup>34</sup> William Fulton, *Developers Go Antique Subdivision Shopping to Locate Hidden Treasures*, CAL. PLAN. & DEV. REP., Sept. 2001, at 1, 15 [hereinafter *Hidden Treasures*].

<sup>35</sup> *Speculator*, *supra* note 17.

payer-supported agencies.<sup>36</sup> With such high profile examples, and development pressure closing in on agricultural areas in the Central Valley, how long will it take before Central Valley landowners use this same technique to easily convert their land to high demand residential use, or alternatively to inflate the purchase price of their land to conservation groups attempting to preserve agricultural lands?

## II. THE GREAT CENTRAL VALLEY

### A. Current Status

California's Great Central Valley extends from Redding in the north to Bakersfield in the south.<sup>37</sup> It is bounded on the east and north by the Sierra Nevada and Cascade Mountains, on the west by the Coast Ranges, and on the south by the Tehachapis.<sup>38</sup> This area is 450 miles long, averaging fifty miles wide, and encompassing nineteen counties.<sup>39</sup> The Valley's fertile soil is a product of centuries of erosion of alluvial deposits coming out of the surrounding mountain rivers and floodwaters.<sup>40</sup>

California is home to the largest food and agricultural economy in the nation.<sup>41</sup> Gross cash income from agricultural production was \$27.2 billion in 2000, more than the combined total of Texas and Iowa, the second and third largest agricultural states.<sup>42</sup> The Central Valley accounts for 60% or more of this output.<sup>43</sup> Two hundred and fifty different crops and commodities are produced in the Central Valley, some grown there exclusively.<sup>44</sup> Fresno County alone, which is the number one agricultural county in the nation, produces more agricultural product than twenty-four U.S. states.<sup>45</sup>

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<sup>36</sup> *Id.*

<sup>37</sup> *Ag. Conservation, supra note 2, at 2.*

<sup>38</sup> *Indicators, supra note 4, at 3.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Ag. Overview, supra note 1.*

<sup>42</sup> *Id.*

<sup>43</sup> *Indicators, supra note 4, at 40. See also DR. TAPAN MUNROE & DR. WILLIAM E. JACKMAN, 1997 AND BEYOND — CALIFORNIA'S CENTRAL VALLEY ECONOMY 34 (1997).*

<sup>44</sup> *Ag. Conservation, supra note 2, at 2.*

<sup>45</sup> TAPAN & JACKMAN, *supra note 43, at 34. But see* Dennis Pollack, *Tulare Top Ag County in Nation*, FRESNO BEE, May 1, 2002, at A1 (reporting that Tulare County, California had edged past Fresno County in 2001 in agricultural production, but quoting Fresno County officials as predicting they would return to the top spot "over the long term").

The Central Valley is home to 6.7 million acres of irrigated cropland.<sup>46</sup> This constitutes 1% of the nation's total farmland.<sup>47</sup> Overall, the Central Valley produces a quarter of the nation's food.<sup>48</sup>

### B. Trends

The Central Valley is beginning to produce another growth crop — people.<sup>49</sup> Currently with a population of 5.4 million, the California Department of Finance projects that by 2040 the Central Valley population is expected to be more than 15.6 million people.<sup>50</sup> The average growth rate is expected to be 20-25% higher than the state's coastal areas,<sup>51</sup> a third faster than the state in general,<sup>52</sup> and one of the highest in the nation.<sup>53</sup> This will create demand for additional urban infrastructure and housing in particular.<sup>54</sup>

The impacts from this growth pressure are already visible. Between 1990 and 1996, over 50,000 acres of “important farmland” were converted to urban and built-up areas in the Central Valley.<sup>55</sup> Also, between 1988 and 1998, almost 150,000 acres were annexed by cities in the Central Valley.<sup>56</sup> Annexation is often the first step in the process of converting farmland to urban uses.<sup>57</sup> The American Farmland Trust estimated that more than one million acres of Central Valley prime farmland could be lost within the next forty years.<sup>58</sup> Building permits bear out this trend toward urbanization, showing that in the Central Valley in 1997, 88% of total building permits are for single family homes as compared to 76% overall for the state.<sup>59</sup> Fueling housing demand is the fact that Central Valley housing is 20-30% more affordable than in

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<sup>46</sup> *Ag. Conservation*, *supra* note 2, at 2.

<sup>47</sup> *Indicators*, *supra* note 4, at 38.

<sup>48</sup> *Ag. Conservation*, *supra* note 2, at 2.

<sup>49</sup> *Id.* at 3.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Indicators*, *supra* note 4, at 15.

<sup>53</sup> *Urban Growth Intro*, *supra* note 3.

<sup>54</sup> *Indicators*, *supra* note 4, at Introduction.

<sup>55</sup> *Id.* at 45.

<sup>56</sup> *Id.* at 46.

<sup>57</sup> *Id.*

<sup>58</sup> AMERICAN FARMLAND TRUST, ALTERNATIVES FOR FUTURE URBAN GROWTH IN CALIFORNIA'S CENTRAL VALLEY: THE BOTTOM LINE FOR AGRICULTURE AND TAXPAYERS, EXECUTIVE SUMMARY (1995), <http://www.farmland.org/fic/ft/cv/cv-exec.summ.html> (last visited Dec. 24, 2001) [hereinafter *Urban Growth, Executive Summary*].

<sup>59</sup> *Indicators*, *supra* note 4, at 10.

the state in general, during the period 1990-1997.<sup>60</sup> Despite this urbanization, job growth has not kept pace. In the Central Valley, the gap between labor force growth and employment growth is twice as large as that of the state as a whole, with most of the job growth coming from construction.<sup>61</sup>

So where are people coming from and how are they employed? An increasingly influential factor in this equation is the rising number of commuters from other urban areas. Commuters now rationalize one-way commutes upwards of two hours.<sup>62</sup> This includes San Francisco workers commuting into the central part of the Valley, and Los Angeles workers commuting into the southern part.<sup>63</sup> In San Francisco alone, the jobs-housing growth is such that between 1995 and 2020 there will be 1.4 million new jobs created but only .5 million new housing units built.<sup>64</sup> Furthermore, with median housing prices at \$254,000, less than 15% of those seeking housing in San Francisco will be able to afford it.<sup>65</sup> Conversely, in the Central Valley, one-acre lots sell as low as \$98,500.<sup>66</sup> Thus, tract housing for commuters is the new Central Valley cash crop.<sup>67</sup>

In addition to population growth and housing demand, other externalities are also at play. The University of California is building a new campus in Merced at a cost of \$1.2 billion, which will invariably become a growth engine for the entire region.<sup>68</sup> Also, a high-speed rail system is proposed along Interstate 5, travelling north-south through the middle of the Central Valley to connect southern and northern California.<sup>69</sup> Potential growth impacts from this project are still being evaluated.<sup>70</sup> These are major capital projects for any area. Can changes in population, housing, education, and transportation really spark a Central Valley transformation from one of the world's most productive agricultural areas to one of the world's most sprawling metropolises?

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<sup>60</sup> *Id.* at 11.

<sup>61</sup> *Id.* at 5, 6.

<sup>62</sup> *Ag. Conservation*, *supra* note 2, at 3.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 4.

<sup>68</sup> *Id.* at 8.

<sup>69</sup> *Id.*

<sup>70</sup> Letter from Mehdi Morshed, Executive Director, California High-Speed Rail Authority, to Interested Public Agencies and Other Parties (Oct. 2, 2001) (on file with the *San Joaquin Agricultural Law Review*). See also [http://www.cahighspeedrail.ca.gov/eis\\_eir/index.html](http://www.cahighspeedrail.ca.gov/eis_eir/index.html) (last visited Dec. 7, 2001).

### C. *It Can't Happen Here*

One need only look south to Los Angeles County for the quintessential example of rural to urban transformation. From 1901 through 1949, Los Angeles County was the number one agricultural county in the nation.<sup>71</sup> However, between 1940 and 1960, the county's population and farmland conversion rate reached dramatic proportions, and by 1956, "Los Angeles County had lost its preeminent status forever."<sup>72</sup> Today Fresno's rate of development exceeds that of Los Angeles County in 1960. It is estimated that in Fresno County alone, 234,000 acres of farmland could be converted to urban uses with a 164% population increase in the next forty years.<sup>73</sup> Land prices are already reflecting these dynamics. In Fresno County, land is priced as low as \$1000 an acre for cropland, as high as \$14,500 an acre for vineyards, and up to \$50,000 an acre for the same land if subdivided for development.<sup>74</sup> A further intangible factor is that according to the University of California's Agricultural Issues Center, California farmers are now at an average age of fifty years old and concerned about retirement security.<sup>75</sup> Increased land values due to development potential could prove a powerful incentive for aging farmers to cash out in favor of early retirement, further accelerating transformation of the land from agricultural to urban uses.

## III. LOCAL GOVERNMENT AGRICULTURAL PRESERVATION EFFORTS: UNDERMINED BY UNREGULATED LAND SUBDIVISIONS

### A. *General Plans*

Local governments have initiated a number of policies and regulations in an attempt to preserve agricultural lands. The general plan for each Central Valley county addresses agricultural uses, and most have "Right-to-Farm" Ordinances that provide some nuisance protection for

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<sup>71</sup> *Ag. Conservation*, *supra* note 2, at 5.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 6. *See also* Dennis Pollock, *Tulare Top Ag County in Nation*, FRESNO BEE, May 1, 2002, at A1 (reporting that Tulare County, California had edged past Fresno County in 2001 as the nation's top agricultural producer, due in part, according to Fresno County Agricultural Commissioner Jerry Prieto, Jr., to the trend that "as development continues . . . [some of Fresno County's] best farm land is being taken out of production").

<sup>74</sup> *Ag. Conservation*, *supra* note 2, at 9.

<sup>75</sup> *Id.*



farms.<sup>76</sup> However, city general plans have only “nebulous references” to minimizing urban conversions, and few have affirmative protection provisions.<sup>77</sup> As a result, farmland near urban areas is particularly vulnerable to conversion.<sup>78</sup>

### B. Williamson Act

Many Central Valley jurisdictions have adopted Williamson Act Land Conservation Programs.<sup>79</sup> This is the most popular conservation program, having been adopted by fifty-two counties and twenty cities.<sup>80</sup> The Williamson Act, or California Land Conservation Act, was adopted in 1965.<sup>81</sup> Its intent is to offer property owners reduced tax rates, based on income stream instead of normal market valuation, in exchange for voluntarily entering into contracts restricting land to agricultural or open space uses.<sup>82</sup> In this way, agricultural lands are preserved for a contract period of at least ten years.<sup>83</sup> The California Department of Conservation estimated that statewide this program has resulted in approximately 15.9 million acres of land being enrolled as of 1995, and approximately \$120 million in annual tax savings to participants as of 1989.<sup>84</sup>

To be effective, these contracts must include restrictions that are “enforceable in the face of imminent urban development.”<sup>85</sup> However, this enforceability is threatened by subdivisions occurring within contracted lands.<sup>86</sup> Subdividing agricultural land is the first step towards urbanization of those lands.<sup>87</sup> As noted by a 1975 Assembly Task Force on the Williamson Act, subdivisions converting Williamson Act agricultural land to non-agricultural uses are occurring and creating

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<sup>76</sup> *Id.* at 16. See also CAL. GOV'T CODE §§ 65100, 65300, 65302 (Deering 2001) (requiring every city and county to prepare a general plan to include policies on, among other things, agricultural uses); Cyndee Fontana, *Growth Plan Remains Mired in Disputes*, FRESNO BEE, Jan. 13, 2002 at A1, 22 (reporting that Fresno County policies shield farmland and protect against “leapfrog” development).

<sup>77</sup> *Ag. Conservation*, *supra* note 2, at 16.

<sup>78</sup> *Id.* at 26.

<sup>79</sup> CAL. GOV'T CODE §§ 51200-51297.4 (Deering 2001).

<sup>80</sup> *Ag. Conservation*, *supra* note 2, at 15.

<sup>81</sup> Dale Will, *The Land Conservation Act at the 32 Year Mark: Enforcement, Reform, and Innovation*, 9 S. J. AGRIC. L. REV. 1, 5 (1999).

<sup>82</sup> *Id.* at 2.

<sup>83</sup> *Id.* at 8. See also CAL. GOV'T CODE § 51244 (Deering 2001).

<sup>84</sup> Will, *supra* note 81, at 3, 9.

<sup>85</sup> *Id.* at 6.

<sup>86</sup> *Id.* at 10.

<sup>87</sup> *Ag. Conservation*, *supra* note 2, at 9.

pressure to develop adjoining lands.<sup>88</sup> The California Attorney General has opined that subdivisions “would generally not serve the primary goal . . . to promote the conservation of agricultural lands.”<sup>89</sup> In addition, the courts have held that the intent of the Williamson Act is to curb loss of agricultural land to residential and other developed uses, and low-density subdivisions were deemed to be an urban use.<sup>90</sup> Such subdivisions render ineffective the Williamson Act’s conservation purpose.<sup>91</sup>

A number of restrictions have been implemented to prevent subdivisions within Williamson Act contract land. The Subdivision Map Act precludes the approval of subdivisions if “resulting parcels . . . would be too small to sustain their agricultural uses . . . .”<sup>92</sup> The Williamson Act provides a presumption that an area of “ten acres or more of prime land, or forty acres or more of non-prime land, is the minimum required to sustain an agricultural use.”<sup>93</sup> In addition, the California Attorney General has opined that a subdivision for residential development of any size is prohibited by the Williamson Act.<sup>94</sup>

### C. Undermined

Historic parcels throw a wrench into this entire scheme. As defined in Part IV, historic parcels are already subdivided. They can be as small as one twenty-fifth of an acre, clearly well below the minimum required by the Williamson Act, and they can number in the hundreds within a relatively small area.<sup>95</sup> Most city and county ordinances and general plans allow at least one dwelling on each agriculture zoned parcel, even if the parcel is relatively small in area or non-conforming in parcel size.<sup>96</sup> Thus with the discovery of historic parcels underlying contract lands, housing subdivisions could spring up almost overnight.

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<sup>88</sup> Will, *supra* note 81, at 21.

<sup>89</sup> *Id.* at 22. See also 75 Op. Cal. Att’y Gen. 278, 285-86 (1992).

<sup>90</sup> Will, *supra* note 81, at 22.

<sup>91</sup> *Id.* at 24.

<sup>92</sup> *Id.* at 22. See also CAL. GOV’T CODE § 66474.4 (Deering 2001).

<sup>93</sup> Will, *supra* note 81, at 22. See also CAL. GOV’T CODE §§ 51222, 66474.4 (Deering 2001).

<sup>94</sup> *Id.* at 23. See also 62 Op. Cal. Att’y Gen. 233, 243 (1979).

<sup>95</sup> SENATE COMM. ON LOCAL GOV’T, CALIFORNIA’S HIDDEN LAND USE PROBLEM: THE REDEVELOPMENT OF ANTIQUATED SUBDIVISIONS, 1985-1986 Leg., Reg. Sess., at 19 (Cal. 1986).

<sup>96</sup> See *Old Papers*, *supra* note 10. Based on the author’s twenty-five years of land use experience as a County Planning Director, City Planning Director, or staff planner, the author has found this to be fairly typical of most zoning ordinances.

Even if the courts find such subdivisions to be unlawful under the Williamson Act statute or ensuing contract, penalties could represent a bargain over the value of the land with historic parcels. For example, penalties are assessed at 12.5% of "current fair market value," calculated as though the property had no contract restrictions or historic parcels.<sup>97</sup> However, if a property doubles or triples in value as a result of the historic parcels, as in the Hearst or Big Sur properties, a penalty of 12.5% of the original land value would be miniscule in comparison. This is a significant force for the undoing of agricultural conservation, especially on lands near or adjacent to already developed or developing areas where there are already increased risks of conversion.<sup>98</sup>

#### IV. PRIVATE SECTOR AGRICULTURAL PRESERVATION EFFORTS: UNDERMINED BY INFLATED PRICES

##### A. *Land Purchases*

Another major program for preserving agricultural land is conservation purchases. This is principally a private sector approach to addressing diminishing agricultural lands.<sup>99</sup> The most direct method is outright fee title purchases.<sup>100</sup> This has been done, for example, by conservation groups such as the Trust for Public Land, which recently paid approximately \$26 million for a small ranch on the Big Sur coast, and the Nature Conservancy, which recently negotiated a multi-million dollar deal for ranch and forest land in Cambria.<sup>101</sup>

##### B. *Conservation Easements*

More creative ways have emerged to protect agricultural lands using conservation easements rather than fee title purchases. A conservation easement is a partial interest in the property that is transferred to a non-profit organization.<sup>102</sup> The intent is to provide landowners with a vehicle for capturing the value of their land as a non-agricultural urban development use such as housing, while still restricting the actual use of the land to an agricultural use.<sup>103</sup> Of all the methods of preserving farmland, this technique has been characterized as having the most po-

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<sup>97</sup> Will, *supra* note 81, at 29.

<sup>98</sup> See *Urban Growth, Executive Summary*, *supra* note 58.

<sup>99</sup> See *Ag. Conservation*, *supra* note 2, at 7, 11-14.

<sup>100</sup> See *id.* at 11.

<sup>101</sup> *Old Papers*, *supra* note 10.

<sup>102</sup> *Ag. Conservation*, *supra* note 2, at 12.

<sup>103</sup> See *id.* at 9.

tential.<sup>104</sup> Throughout the United States, over 437,000 acres are currently protected by conservation easements.<sup>105</sup> This method has the advantage of being less expensive than buying the property outright, while allowing the landowner to retain ownership.<sup>106</sup>

Conservation easements can be purchased by or donated to land conservation groups. A donated easement is considered a charitable gift for federal tax purposes, and estate taxes are also reduced for such contributions.<sup>107</sup> The end result is that landowners cash out their equity by either selling or donating for tax purposes the development rights they would otherwise have if the property were to be developed for urban uses. At the same time, they retain the property and the agricultural uses on the property. The disadvantage of this program is that the cost is borne by non-profit groups funded by contributions and/or public funds from the taxpayer.

### C. Undermined

The discovery of historic parcels on farmland undermines these conservation efforts by sending the value of the property and any easements thereon skyrocketing, and with it the cost to public interest non-profit conservation groups and the taxpayer.<sup>108</sup> The Williamson Act likely will not protect any enrolled properties where such historic parcels are discovered. In such instances, owners can breach those contracts at a cost of a 12.5% penalty on the pre-historic parcel land values, but reap a windfall benefit as a result of having historic parcels. In contract language, this is a classic "efficient breach."<sup>109</sup>

## V. HISTORIC PARCELS DEFINED

### A. Historic Parcels Are Already Subdivided

Historic parcels increase the value of land because they are not subject to the otherwise required costly and time-consuming local government review procedures for subdividing land.

Typically, the subdivision of land into multiple, smaller parcels is

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<sup>104</sup> *Id.* at 12.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 13.

<sup>107</sup> *Id.* at 29, 30.

<sup>108</sup> See *infra* discussion Part I.

<sup>109</sup> An "efficient breach" is defined as "[a]n intentional breach of contract and payment of damages by a party who would incur greater economic loss by performing under the contract." See BLACK'S LAW DICTIONARY 183 (7th ed. 1999).

accomplished by complying with the Subdivision Map Act.<sup>110</sup> The purpose of the Act is to encourage orderly community development by providing for the regulation and control of the design and improvement of a subdivision, with proper consideration of its relation to adjoining areas.<sup>111</sup> A further purpose is to “coordinate planning with the community pattern laid out by local authorities and to insure proper improvements are made . . . .”<sup>112</sup> Such improvements could include grading and erosion control, prevention of sedimentation or damage to offsite property, dedication of rights-of-way and easements, and the construction of reasonable offsite and onsite improvements for the parcels being created.<sup>113</sup> The Subdivision Map Act could also require fees to defray the costs of local government construction of infrastructure such as bridges, freeways, or major thoroughfares.<sup>114</sup> Fees or dedication of land for schools could also be required.<sup>115</sup>

Furthermore, local government could deny the subdivision request. This could occur if the project is not consistent with local general or specific plans, the site is not physically suitable for the type of proposed development, or the project is likely to cause substantial environmental damage.<sup>116</sup> The project could also be denied if the property is subject to a Williamson Act contract and the resulting subdivided parcels would be too small to sustain their agricultural use.<sup>117</sup>

Not so for historic parcels. None of these requirements apply if a property owner discovers historic parcels on the proposed site because a historic parcel already constitutes a subdivided parcel. This is because the Subdivision Map Act contains “grandfather clauses” that recognize as lawful those parcels “created” or established in conformance with or exempt from the Subdivision Map Act or its predecessors.<sup>118</sup> The California Supreme Court, in *Morehart v. County of Santa Barbara*, implied in dicta that these grandfather clauses could also apply to lots created before any version of the Map Act was first enacted in 1893.<sup>119</sup> It is this pre-1893 category of parcels that gives rise to the

<sup>110</sup> CAL. GOV'T CODE §§ 66410-66499.37 (Deering 2001)

<sup>111</sup> *Gardner v. County of Sonoma*, 92 Cal. App. 4th 1055, 1061 (2001).

<sup>112</sup> *Bright v. Board of Supervisors*, 66 Cal. App. 3d 191, 194 (1977).

<sup>113</sup> CAL. GOV'T CODE § 66411-66411.1(a) (Deering 2001).

<sup>114</sup> CAL. GOV'T CODE § 66484(a) (Deering 2001).

<sup>115</sup> § 66478. See also DANIEL J. CURTIN, JR. ET AL., CAL. CONTINUING EDUC. OF THE BAR, CALIFORNIA SUBDIVISION MAP ACT PRACTICE 97 (1987) [hereinafter *Map Act*].

<sup>116</sup> CAL. GOV'T CODE § 66474 (Deering 2001).

<sup>117</sup> CAL. GOV'T CODE § 66474.4(a) (Deering 2001).

<sup>118</sup> CAL. GOV'T CODE §§ 66451.10, 66499.30(d) (Deering 2001).

<sup>119</sup> See *Morehart v. County of Santa Barbara*, 7 Cal. 4th 725, 761 (1994).

loopholes now being exploited. These pre-1893 parcels, if grandfathered, would have “the same status as a mapped parcel under the current Act, and no further action need be taken to comply with the Map Act . . . .”<sup>120</sup>

### B. Land Grants Are the Largest Source of Historic Parcels

Parcels were created prior to 1893 in a number of ways. The largest single source is federal patents. Federal patents were first issued to recognize Spanish and Mexican land grants. They were later issued for mining claims, homestead grants, and other government grants to private parties. The issuance of a patent constitutes government conveyance passing title of the United States to the patentee.<sup>121</sup> There is a presumption that patents are properly issued and valid.<sup>122</sup>

Land grants in California relate back to Spain’s attempt to colonize North America after Spain claimed California by right of the discovery of Juan Rodriguez Cabrillo on September 28, 1542.<sup>123</sup> According to Spanish law, all colonial property vested in the crown.<sup>124</sup> Relatively few large grants were made in California during Spanish control.<sup>125</sup> There were only about twenty-five, with less than twenty becoming permanent.<sup>126</sup>

Mexico followed Spain in possession of the province of California in 1822 and soon began its own program for granting public lands.<sup>127</sup> Mexico abandoned the cautious approach of Spain and distributed land with “lavish generosity.”<sup>128</sup> During the thirteen years that Mexico distributed such lands, some 800 grants were made encompassing 8,000,000 prime acres.<sup>129</sup>

The United States came into possession of California with the sign-

<sup>120</sup> DANIEL J. CURTIN, JR. ET AL., CAL. CONTINGU EDUC. OF THE BAR, CALIFORNIA SUBDIVISION MAP ACT PRACTICE 17, (Supp. 2000). See also CAL. GOV’T CODE § 66451.10 (Deering 2001).

<sup>121</sup> CAL. LAND TITLE ASS’N, OUTLINES OF LAND TITLES 41, 47 (1968).

<sup>122</sup> *Id.* at 49.

<sup>123</sup> IVY BELLE ROSS, THE CONFIRMATION OF SPANISH AND MEXICAN LAND GRANTS IN CALIFORNIA 1 (Adam S. Eterovich ed., R and E Research Associates 1974) (1928).

<sup>124</sup> *Id.* at 3.

<sup>125</sup> *Id.* at 10.

<sup>126</sup> ROSE H. AVINA, SPANISH AND MEXICAN LAND GRANTS IN CALIFORNIA 26, 27 (Adam S. Eterovich ed., R and E Research Associates 1973) (1932).

<sup>127</sup> CAL. LAND TITLE ASS’N, *supra* note 121, at 1.

<sup>128</sup> SHIRLEY JEAN GAFFEY, CALIFORNIA LAND GRANT DISPUTES, 1852-1872: A RHETORICAL ANALYSIS 30 (1975).

<sup>129</sup> *Id.*

ing of the treaty of Guadalupe Hidalgo in 1848.<sup>130</sup> The treaty assured that Mexicans established in the territory could retain their property.<sup>131</sup> However, title to these lands was uncertain due to lack of official records and fraud.<sup>132</sup> Also, the size of the grants was often deliberately unclear, where grants included the words “mas o menos,” meaning that the area and location were more or less as described.<sup>133</sup>

To resolve these uncertainties, the United States adopted “An Act to Ascertain and Settle the Private Land Claims in the State of California” on March 3, 1851.<sup>134</sup> This Act established a Land Commission to adjudicate all such claims.<sup>135</sup> Parties could appeal decisions of the Land Commission to the District Court and then to the United States Supreme Court.<sup>136</sup> The Land Commission and the courts had jurisdiction to determine the validity of the grant and its boundaries.<sup>137</sup> Confirmed claims were issued a patent, which was considered conclusive against the United States.<sup>138</sup> Claims not presented were forfeited.<sup>139</sup> The Land Commission conducted hearings for five years.<sup>140</sup> Six hundred and thirteen claims were eventually confirmed, covering nine million acres.<sup>141</sup> Most of the grants were located in the vicinity of the “great central valleys.”<sup>142</sup>

A foreshadowing of things to come was seen in the way the Mexican grants were written. Many grants were “floating grants” where bounds included a greater area than granted, and where the grantee was entitled to locate his land within this larger area as long as it was in a compact form.<sup>143</sup> John C. Fremont had one such grant considered by the Land Commission.<sup>144</sup> Fremont’s grant encompassed ten leagues (approximately 40,000 acres) within an area of approximately 100 leagues.<sup>145</sup> Fremont adjusted the boundaries of his grant within this

<sup>130</sup> ROSS, *supra* note 123, at 22.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 23, 25.

<sup>133</sup> *Id.* at 42. *See also* GAFFEY, *supra* note 128, at 82, 181.

<sup>134</sup> CAL. LAND TITLE ASS’N, *supra* note 121, at 4.

<sup>135</sup> *Id.* at 4-5.

<sup>136</sup> ROSS, *supra* note 123, at 33.

<sup>137</sup> CAL. LAND TITLE ASS’N, *supra* note 121, at 10.

<sup>138</sup> ROSS, *supra* note 123, at 33.

<sup>139</sup> GAFFEY, *supra* note 128, at 41. *See also* ROSS, *supra* note 123, at 41.

<sup>140</sup> ROSS, *supra* note 123, at 36.

<sup>141</sup> *Id.* at 38.

<sup>142</sup> *Id.* at 45.

<sup>143</sup> *Id.* at 42.

<sup>144</sup> *Id.* at 45.

<sup>145</sup> *Id.* at 46.

larger area to include certain gold mines in the Sierra foothills. The Land Commission confirmed this grant and the U.S. Supreme Court affirmed.<sup>146</sup> This was, in effect, California's first lot line adjustment.

Other mechanisms were used to create parcels by patent, relying mainly on federal land laws passed in the early or middle years of the nineteenth-century.<sup>147</sup> Following the war with Mexico, California was ceded to the United States and all vacant and unappropriated lands became vested in the United States.<sup>148</sup> This passed approximately forty-five million acres to the federal government.<sup>149</sup> At that time the federal government considered it to be its job to dispose of that land so as to maximize growth and development.<sup>150</sup>

The first of the federal land laws where the United States disposed of federal lands was the New Lode Mining Law, enacted in 1866.<sup>151</sup> This law has been described as "the miner's Magna Carta."<sup>152</sup> It zoned a billion acres, encompassing nearly the entire American west, for lode deposit mining.<sup>153</sup> It allowed a miner who had expended a minimum amount of labor and improvements to purchase a patent to a discovered vein or lode and the surface land overlying it.<sup>154</sup> This Act and others were combined into the General Mining Law of 1872, the so-called Hardrock Mining Law.<sup>155</sup> Through this, and the public auction of mineral lands,<sup>156</sup> the federal government disposed of over 500,000 acres of mineral lands in California.<sup>157</sup>

The "second great wave of settlement" after the miners were the homesteaders.<sup>158</sup> To address this settlement demand, lands of non-mineral character to be used as homesteads were disposed of through a number of laws, collectively known as the Homestead Act.<sup>159</sup> These Acts included the Original Homestead Act, the Soldiers' and Sailors' Homesteads for veterans of certain wars, and the Stock Raising Home-

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<sup>146</sup> *Id.*

<sup>147</sup> CAL. LAND TITLE ASS'N, *supra* note 121, at 22.

<sup>148</sup> *Id.* at 23.

<sup>149</sup> WILLIAM FULTON, CALIFORNIA — LAND AND LEGACY 28 (1998) [hereinafter *Legacy*].

<sup>150</sup> *Id.*

<sup>151</sup> CAL. LAND TITLE ASS'N, *supra* note 121 at 78.

<sup>152</sup> CHARLES F. WILKINSON, CROSSING THE NEXT MERIDIAN 42 (1992).

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 43.

<sup>155</sup> *Id.* at 40, 41.

<sup>156</sup> *Id.* at 42.

<sup>157</sup> *Legacy*, *supra* note 149, at 30.

<sup>158</sup> See WILKINSON, *supra* note 152, at 82-83.

<sup>159</sup> CAL. LAND TITLE ASS'N, *supra* note 121, at 97.



stead Act allowing patents to be obtained for stock raising lands.<sup>160</sup> Similar homestead entries were permitted on lands that would not produce agricultural crops without irrigation under the Desert Land Act.<sup>161</sup> Approximately one million acres were sold under these provisions.<sup>162</sup>

Timber lands were available for purchase under the Timber and Stone Act, which disposed of lands valuable for timber or stone resources but unfit for cultivation.<sup>163</sup> During the 1880's, federal timber was essentially made available for the taking.<sup>164</sup> Almost three million acres were disposed of in this way.<sup>165</sup>

To further encourage the growth and development of the state, the federal government sought "to accelerate the race to build a transcontinental railroad."<sup>166</sup> To facilitate this acceleration, they disposed of land through Railroad Land Grants.<sup>167</sup> It granted to the railroad companies odd numbered sections<sup>168</sup> of land within ten to twenty miles of the railroad track on either side of the track.<sup>169</sup> In California, this eventually encompassed approximately twelve million acres of land.<sup>170</sup>

In addition, prior to homestead and railroad grants, the federal government permitted the sale at auction<sup>171</sup> of eleven million acres, "largely in the Central Valley . . . ." <sup>172</sup>

All of the land discussed in this section was conveyed by patent, the existence of which is an important first step in determining the lawful subdivision of the parcel.<sup>173</sup>

### C. Other Ways Historic Parcels Were Created

Historic parcels were also created by nineteenth-century entrepreneurs who drew plans for hopeful subdivisions.<sup>174</sup> Prior to the State's

<sup>160</sup> *Id.* at 79, 96, 99, 103.

<sup>161</sup> *Id.* at 106.

<sup>162</sup> *Legacy, supra* note 149, at 28.

<sup>163</sup> CAL. LAND TITLE ASS'N, *supra* note 121, at 110.

<sup>164</sup> WILKINSON, *supra* note 152, at 120.

<sup>165</sup> *Legacy, supra* note 149, at 30.

<sup>166</sup> *Id.* at 29.

<sup>167</sup> CAL. LAND TITLE ASS'N, *supra* note 121, at 127.

<sup>168</sup> WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 1640 (2nd ed. 1983) (A "section" is a land measurement equal to 640 acres.).

<sup>169</sup> CAL. LAND TITLE ASS'N, *supra* note 121, at 128.

<sup>170</sup> *Legacy, supra* note 149, at 29.

<sup>171</sup> CAL. LAND TITLE ASS'N, *supra* note 121, at 92.

<sup>172</sup> *Legacy, supra* note 149, at 28.

<sup>173</sup> *See Hidden Treasures, supra* note 34, at 16.

<sup>174</sup> *Gardner v. County of Sonoma*, 92 Cal. App. 4th 1055, 1057 (2001), *review granted*, 2002 Cal. LEXIS 254 (2002).

first Subdivision Map Act in 1893, land could be divided and conveyed simply by deed.<sup>175</sup> These divisions were referred to as “paper subdivisions.”<sup>176</sup>

“These subdivisions are the legacies of 19th [sic] century would-be developers whose dreams of carving up their land into profitable real estate parcels went only as far as the county recorder’s office.”<sup>177</sup> Parcels such as these have been recognized as a land use problem for some time.<sup>178</sup> Branded as “antiquated subdivisions,” many of these parcels are “too remote, or too dangerous to support development.”<sup>179</sup> They have problems that include severe geological or physical limitations such that infrastructure such as roads or waste disposal systems are infeasible.<sup>180</sup> They are located in areas where they “impede timber, mineral, or agricultural production,” conflict with “wetlands, riparian habitats, or other environmentally significant lands,” and even fall within the paths of “possible landslides or avalanches.”<sup>181</sup> Sunset Magazine, when under the ownership of the Southern Pacific Railroad, created such antiquated subdivision maps in the Bay Area and gave away small parcels as a promotion for new subscriptions.<sup>182</sup> A spiritualist group in the 1920s sold lots to its followers in Santa Barbara County for \$25 a lot.<sup>183</sup>

Estimates of the number of these lots in California range from 400,000 to one million.<sup>184</sup> This has been described as “California’s hidden land use problem.”<sup>185</sup> Determining whether these parcels, created before the State’s first subdivision regulations, are lawful today has been the subject of much controversy and has been likened to “dancing on the head of a pin.”<sup>186</sup>

In total, there were up to one million “paper” lots, and millions of acres of patented lots of all sizes that were created prior to any requirement for any kind of government or environmental review.

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<sup>175</sup> SENATE COMM. ON LOCAL GOV’T, *supra* note 95, at 35.

<sup>176</sup> *Id.*

<sup>177</sup> *Morehart v. County of Santa Barbara*, 7 Cal. 4th 725, 765 (1994) (Mosk, J., concurring).

<sup>178</sup> SENATE COMM. ON LOCAL GOV’T, *supra* note 95, at 3.

<sup>179</sup> *Id.* at 13.

<sup>180</sup> *Id.* at 17.

<sup>181</sup> *Id.* at 17-18.

<sup>182</sup> *Id.* at 19.

<sup>183</sup> *Id.*

<sup>184</sup> *Antiquated Subdivisions Ruled Invalid by Appellate Court*, CAL. PLAN. & DEV. REP., Nov. 2001, at 7. See also SENATE COMM. ON LOCAL GOV’T, *supra* note 95, at 19.

<sup>185</sup> SENATE COMM. ON LOCAL GOV’T, *supra* note 95, at 10.

<sup>186</sup> *Antiquated Subdivisions Ruled Invalid by Appellate Court*, *supra* note 184, at 7.

The status of these lots is an important issue. To landowners the importance lies in economics, a “very old game in California.”<sup>187</sup> “If you want to make money easily, buy some land, subdivide it, and sell it off.”<sup>188</sup> To local government the importance lies in control of land use planning.<sup>189</sup> Subdividing land is the first step toward urbanization and lands already subdivided escape many key local review opportunities and any opportunity for agricultural preservation.

## VI. WHICH HISTORIC PARCELS ARE LAWFULLY CREATED?

Not all historic parcels are created equal. Some have been determined to be lawful while others have not. The critical factor is how they were created. Parcels found to be in compliance with the California Subdivision Map Act are lawfully created.

The Subdivision Map Act regulates the subdivision of parcels.<sup>190</sup> A parcel cannot be sold or developed unless it is in compliance with the Act.<sup>191</sup> Where there is doubt about such compliance, an owner may request a determination through a certificate of compliance process.<sup>192</sup> Upon determination of compliance, the owner is entitled to such certificate as a matter of law, a ministerial act.<sup>193</sup> A ministerial act is “one which requires no exercise of discretion.”<sup>194</sup> Thus the certificate of compliance must be issued<sup>195</sup> and no conditions can be imposed. Parcels are then determined to have been lawfully created and owners are free to proceed with the sale or development of the parcel.

Judicial review of applications for certificates of compliance has established a framework for the types of parcels that can be found to be in compliance with the Map Act and entitled to a certificate. The general rule is that to be in compliance a parcel must either comply with

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<sup>187</sup> *Hidden Treasures*, *supra* note 34, at 15.

<sup>188</sup> *Id.*

<sup>189</sup> ASSEMBLY COMM. ON LOCAL GOV'T, Analysis of S.B. 497, 2001-2002 Leg., Reg. Sess., at 3 (Cal. 2001), available at [http://www.leginfo.ca.gov/pub/bill/sen/sb\\_0451-0500/sb\\_497\\_cfa\\_20010904\\_185439\\_asm\\_comm.html](http://www.leginfo.ca.gov/pub/bill/sen/sb_0451-0500/sb_497_cfa_20010904_185439_asm_comm.html) (last visited Jan. 20, 2002).

<sup>190</sup> CAL. GOV'T CODE §§ 66410-66499.37 (Deering 2001).

<sup>191</sup> CAL. GOV'T CODE §§ 66499.30(a)-(b) (Deering 2001). See also *Map Act*, *supra* note 115, at 197.

<sup>192</sup> CAL. GOV'T CODE § 66499.35 (Deering 2001). See also *Map Act*, *supra* note 115, at 206.

<sup>193</sup> *Lakeview Meadows Ranch v. County of Santa Clara*, 27 Cal. App. 4th 593, 600 (1994).

<sup>194</sup> *Findleton v. Board of Supervisors*, 12 Cal. App. 4th 709, 713 (1993).

<sup>195</sup> CAL. GOV'T CODE § 66499.35(a) (Deering 2001). See also *Map Act*, *supra* note 115, at 206.

or be exempt from any subdivision law in effect at the time the parcel was created or the subdivision established.<sup>196</sup>

Determining exactly when a parcel was created or established is the first prong of this rule. Unfortunately, the Act contains no definition of the word "created," which confusedly has been used interchangeably with the word "established."<sup>197</sup> Case law has attempted to address this issue, however those rulings provide more guidance on "what actions will not create valid parcels than . . . what actions will create valid parcels."<sup>198</sup>

In *Taft v. Advisory Agency*, the court held that federal survey maps prepared pursuant to federal law do not establish subdivisions nor create parcels within the meaning of the California Subdivision Map Act.<sup>199</sup> In *Taft*, the subject lots were identified as lots 1, 2, and a portion of 3 on a United States Government Survey Map.<sup>200</sup> However, these lots were only described by their survey boundaries, which were administratively drawn.<sup>201</sup> Also, the lots had always been conveyed together by a single instrument.<sup>202</sup> This lack of individual conveyance, the lack of county involvement in the preparation of the survey map, and the failure to have the survey map recorded with the county led the court to hold that the survey map did not establish a subdivision that created separate parcels.<sup>203</sup>

In *Hays v. Vanek*, a similar conclusion was reached regarding a privately prepared sales map.<sup>204</sup> In that case, an "Arbitrary Office Map" was prepared which depicted 630 parcels that were being made available for sale.<sup>205</sup> Of the 630, some had been sold, but the remaining parcels located within this map were conveyed as one single unit to the appellee.<sup>206</sup> The appellee asserted that these internal parcels were subdivided by way of the Arbitrary Office Map and were therefore exempt from the Subdivision Map Act and could each be sold individu-

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<sup>196</sup> *Map Act*, *supra* note 115, at 34-35. See also CAL. GOV'T CODE §§ 66499.30(d), 66451.10(a) (Deering 2001).

<sup>197</sup> *Map Act*, *supra* note 115, at 34-35.

<sup>198</sup> *Id.* at 35.

<sup>199</sup> *John Taft Corp. v. Advisory Agency*, 161 Cal. App. 3d 749, 751, 757 (1984).

<sup>200</sup> *Id.* at 751-52.

<sup>201</sup> *Id.* at 751.

<sup>202</sup> *Id.* at 752.

<sup>203</sup> *Id.* at 756, 757.

<sup>204</sup> *Hays v. Vanek*, 217 Cal. App. 3d 271, 277, 290 (1989).

<sup>205</sup> *Id.* at 278-88.

<sup>206</sup> *Id.* at 288.

ally.<sup>207</sup> The court concluded, “the salutary purposes served by the Subdivision Map Act would be frustrated” by such exemption and that an “Arbitrary Office Map” did not constitute a valid subdivision.<sup>208</sup> Although this case dealt with a narrow issue regarding exemptions from the 1907 and 1929 Map Acts, the court’s reasoning is instructive in that it found that the legislative intent never contemplated frustrating the purposes of the current Map Act with exemptions based upon previously drawn sales maps.

The issue of parcel legality of a federal patent was addressed in *Lakeview Meadows Ranch v. County of Santa Clara*.<sup>209</sup> There, the court found that a federal patent separated the land from other units of land and its conveyance was a “subdivision” that “created” the parcel as a separate lot.<sup>210</sup>

However, those patents do not remain separate parcels indefinitely. The following year, in *Gomes v. County of Mendocino*, the court held that where there are patents or any legal parcels, and a new subdivision configuration is approved for those parcels through a final map, parcel map, or equivalent pursuant to local ordinance, the underlying parcels are at once merged and resubdivided into the new configuration.<sup>211</sup> This effectively extinguishes the underlying patent parcels, and certificates of compliance cannot later be obtained for those extinguished parcels.<sup>212</sup>

After determining whether a parcel was created, the second prong of the rule for parcel compliance with the Subdivision Map Act requires that a parcel must have been in compliance with or exempt from any subdivision law in effect at the time the parcel was created.<sup>213</sup> But what if there was no such law in effect at the time, as was the case prior to 1893? This question was raised but not decided in *Morehart*. There, as in *Taft, Hays*, and *Lakeview*, the issue was an interpretation of an exemption from the Subdivision Map Act.<sup>214</sup> However, the specific issue in *Morehart* did not concern certificates of compliance to determine whether a parcel was lawfully created, but involved the

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<sup>207</sup> *Id.* at 289.

<sup>208</sup> *Id.* at 289-90.

<sup>209</sup> *Lakeview Meadows Ranch v. County of Santa Clara*, 27 Cal. App. 4th 593, 596 (1994).

<sup>210</sup> *Id.* at 598.

<sup>211</sup> *Gomes v. County of Mendocino*, 37 Cal. App. 4th 977, 987 (1994).

<sup>212</sup> *Id.* at 981.

<sup>213</sup> *Map Act*, *supra* note 115, at 34-35. *See also* CAL. GOV'T CODE §§ 66499.30(d), 66451.10(a) (Deering 2001).

<sup>214</sup> *Morehart v. County of Santa Barbara*, 7 Cal. 4th 725, 761 (1994).

Subdivision Map Act's merger provisions regulating parcels already created.<sup>215</sup> The narrow merger provisions of section 66451.10(a) specify that such exemption applied if the parcels in question were created in compliance with any subdivision law "at the time of their *creation*."<sup>216</sup> This is language similar to, and used interchangeably with, the general exemption grandfather clause language of section 66499.31(d) which addresses any law in effect "at the time the subdivision was *established*."<sup>217</sup>

The parcels at issue in *Morehart* were stipulated to have been created prior to the State's first subdivision law in 1893, so no subdivision laws were in existence at the time of parcel creation. The court held that "[i]f, when the parcels were created, no land-division provisions were in existence, the parcels necessarily 'were not subject to those provisions at the time of their creation.'"<sup>218</sup> However, the court declined to decide if a parcel is "created" simply by recording a map prior to 1893, saying it "need not consider any of the prerequisites to creation of a parcel that preceded California's first subdivision map statute in 1893" since that question was not before them.<sup>219</sup> In a widely quoted concurring opinion, Justice Mosk cautioned that this did not resolve the issue of what constitutes the "creation" of the parcel in the first place if that parcel came into existence prior to 1893, the date of the first subdivision law.<sup>220</sup> He went on to say that an inference from the *Morehart* opinion that all subdivisions recorded before 1893 were legally "created" would be incorrect.<sup>221</sup> At the very least, accurate maps and constructive notice to the public and purchasers would be necessary.<sup>222</sup> The answer to that question, Justice Mosk wrote, "awaits further judicial — or legislative — clarification."<sup>223</sup>

Some commentators assert that such further judicial clarification came in *Gardner v. County of Sonoma*.<sup>224</sup> There, the court held that "early subdivision maps — if drawn and recorded before 1893 — do

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<sup>215</sup> *Morehart*, 7 Cal. 4th at 760-61. See also CAL. GOV'T CODE §§ 66451.10-66451.21 (Deering 2001).

<sup>216</sup> *Morehart*, 7 Cal. 4th at 761 (emphasis added).

<sup>217</sup> CAL. GOV'T CODE § 66499.30(d) (Deering 2001) (emphasis added). See also *Map Act*, *supra* note 115, at 34.

<sup>218</sup> *Morehart*, 7 Cal. 4th at 761.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.* at 765 (Mosk, J., concurring).

<sup>221</sup> *Id.* at 766.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* at 767.

<sup>224</sup> *Antiquated Subdivisions Ruled Invalid by Appellate Court*, *supra* note 184, at 7.

not create legal parcels within the meaning of California's Subdivision Map Act."<sup>225</sup>

In *Gardner*, a subdivision was recorded in 1865 consisting of almost "90 numbered rectangles."<sup>226</sup> Over time, portions of the purported subdivision were conveyed to various parties.<sup>227</sup> Appellant obtained his property, consisting of two full lots and fragments of ten other lots, conveyed as a single unit of land.<sup>228</sup> None of the twelve purported lots had ever been separately conveyed.<sup>229</sup> Relying in part on Justice Mosk's concurring opinion in *Morehart*, appellant argued that since his map was accurate and "amazingly descriptive," and since it had been relied upon by the county and others for purposes of subsequent land conveyances which provided constructive notice to the public, it met the guidance set out by Justice Mosk and should be recognized as a legal subdivision.<sup>230</sup>

The *Gardner* court did not agree. The court concluded, through statutory interpretation, that the Subdivision Map Act should be "liberally construed to apply to as many transfers or conveyances of land as possible," and that the legislature did not intend an exception to apply to the "pre-1893 legal 'State of Nature' when no subdivision statute was in existence."<sup>231</sup> The court thus held that "[s]uch maps recorded prior to the existence of the first Map Act in 1893 do not in themselves create parcels that are automatically subdividable."<sup>232</sup> The court proclaimed that "[w]e have reached our destination."<sup>233</sup>

However, this case involved purported lots that were conveyed as a unit but never as individual lots.<sup>234</sup> The court noted that this case was distinguished from other situations where individual lots were legally created by conveyance or by federal patent.<sup>235</sup>

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<sup>225</sup> *Gardner v. County of Sonoma*, 92 Cal. App. 4th 1055, 1057 (2001), *review granted*, 2002 Cal. LEXIS 254 (2002).

<sup>226</sup> *Id.* at 1058.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.* at 1058-59.

<sup>229</sup> *Id.* at 1059.

<sup>230</sup> Appellants' Opening Brief at 21-25, *Gardner v. County of Sonoma*, 92 Cal. App. 4th 1055 (2001) (No. A093139).

<sup>231</sup> *Gardner*, 92 Cal. App. 4th at 1065-66.

<sup>232</sup> *Id.* at 1067. *See also* Brief of Amicus Curiae California State Association of Counties at 19, *Gardner v. County of Sonoma*, 92 Cal. App. 4th 1055 (2001) (No. A093139) (arguing that the 1929 version of the Subdivision Map Act was the first substantive regulation of subdivisions).

<sup>233</sup> *Gardner*, 92 Cal. App. 4th at 1067.

<sup>234</sup> *Id.* at 1059.

<sup>235</sup> *Id.* at 1059, 1064.

At the time of this writing, the California Supreme Court has granted a petition for review but has not yet heard the case.<sup>236</sup> Regardless of whether the Supreme Court upholds or reverses *Gardner*, this still leaves potentially millions of acres of parcels created by federal patent, and uncounted historic parcels that were previously individually conveyed, as lawful parcels purportedly exempt from any current Subdivision Map Act provision. There is no simple way of estimating how many of these patents and conveyances still exist, and recent survey attempts have not provided any statistically dependable guidance.<sup>237</sup> By way of illustration, of the 279 historic parcels claimed by Hearst, it is estimated that 95% were created by federal patent.<sup>238</sup> Although we may have “reached our destination,” it was by way of a narrow path.

In summary, the current status is that lawful historic parcels entitled to certificates of compliance include patents and conveyances, but not parcels on federal survey maps, “Arbitrary Office Maps,” or, pending Supreme Court review, sales maps created by would-be developers.

## VII. LOT<sup>239</sup> LINE ADJUSTMENTS — THE OTHER SHOE

### A. *Completing the Puzzle*

Once the legality of historic parcels has been established through certificates of compliance, property owners can then rearrange the configuration of the lot lines to form a more marketable subdivision.<sup>240</sup> The only restriction is that the total number of parcels does not in-

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<sup>236</sup> *Gardner v. County of Sonoma*, 92 Cal. App. 4th 1055 (2001), *review granted*, 2002 Cal. LEXIS 254 (2002).

<sup>237</sup> Telephone Interview with Jonathan Wittwer, partner, Wittwer & Parkin, LLP (Nov. 16, 2001) (explaining that results were limited from a questionnaire sent to cities and counties surveying “antiquated subdivisions” as part of a grant from the Packard Foundation to the Greenbelt Alliance).

<sup>238</sup> John Johnson & Kenneth R. Weiss, *Hearst Ranch's Future Lies in His Old Papers*, L.A. TIMES, Aug. 26, 2001, at B10 [hereinafter *Future*].

<sup>239</sup> The words “lot” and “parcel” are often used interchangeably. Black’s Law Dictionary defines both as “a tract of land.” See BLACK’S LAW DICTIONARY 958, 1137 (7th ed. 1999). The Subdivision Map Act does not define either word. In fact, Cal. Gov’t Code section 66412(d) uses both words in the same context and describes a lot line adjustment as “land taken from one *parcel* [and] added to the adjoining *parcel*” (emphasis added). Although “lot” typically refers to a piece of land that has not yet been subdivided pursuant to the Subdivision Map Act, and “parcel” typically refers to one that has, this distinction has been blurred in colloquial, technical, and judicial references. The use of the words “lot” and “parcel” in this paper attempt to mirror their usage by the authors in the respective citations.

<sup>240</sup> *Hidden Treasures*, *supra* note 34, at 15.



crease.<sup>241</sup> This is achieved utilizing a lot line adjustment procedure available in the Subdivision Map Act.<sup>242</sup> The Map Act exempts lot line adjustments from almost all substantive conditions or review by local government, and local government has little authority to deny the request.<sup>243</sup> The exemption is a “loophole[] that allows major subdivisions of property to be adjusted (or ‘resubdivided’) without provision of adequate infrastructure (e.g. sewers, lighting, roads), [or] local government review . . . .”<sup>244</sup> “It is an end-run around local land use authority.”<sup>245</sup> Lot line adjustments allow property owners to move the location of parcels around “like puzzle pieces, in some cases moving the lines for an undevelopable mountain property to the beachfront.”<sup>246</sup> The threat of such reconfiguration was part of the technique used to drastically increase values of land in Big Sur, and is also anticipated to be the technique to be used by Hearst to increase the value of its land near San Simeon.<sup>247</sup> Given that government-supported conservation groups are involved in the purchase or potential purchase of such lands, this technique has been referred to as a “shakedown [of] taxpayers.”<sup>248</sup>

In 1992, the lot line adjustment exemption was challenged in *San Dieguito Partnership v. City of San Diego*. There, the court upheld the procedure and concluded that there is no “limitation of the number or size of parcels that may be affected by the lot line adjustment . . . so long as ‘a greater number of parcels than originally existed is not thereby created.’”<sup>249</sup> Thus applicants such as the Hearst Corporation would be free to request lot line adjustments for all of its 279 historic parcels. Also, the court clarified that the location of the “adjusted” lot need not even touch the location of the original lot. The court noted that the language of the Subdivision Map Act requires only that the original and adjusted lots merely be “adjacent.”<sup>250</sup> The court defined

<sup>241</sup> CAL. GOV'T CODE § 66412(d) (Deering 2001).

<sup>242</sup> § 66412(d). (The procedures changed on Jan. 1, 2002. See discussion *infra* Part VII.).

<sup>243</sup> § 66412(d); ASSEMBLY COMM. ON LOCAL GOV'T, *supra* note 189.

<sup>244</sup> SENATE RULES COMM., Analysis of S.B. 497, 2001-2002 Leg., Reg. Sess., at 5 (Cal. 2001), available at [http://www.leginfo.ca.gov/pub/bill/sen/sb\\_0451\\_0500/sb\\_497\\_cfa\\_200109\\_13\\_084453\\_sen\\_floor.html](http://www.leginfo.ca.gov/pub/bill/sen/sb_0451_0500/sb_497_cfa_200109_13_084453_sen_floor.html) (last visited Jan. 20, 2002).

<sup>245</sup> ASSEMBLY COMM. ON LOCAL GOV'T, *supra* note 189.

<sup>246</sup> *Deep Divide*, *supra* note 12, at B1.

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> *San Dieguito Partnership v. City of San Diego*, 7 Cal. App. 4th 748, 756 (1992).

<sup>250</sup> *Id.* at 755.

this as “nearby but not touching.”<sup>251</sup> “Conceivably, that means a landowner can take an isolated, largely worthless lot on a mountainside and move it to the beach, where it will be worth a fortune.”<sup>252</sup>

After a series of articles on the Hearst project in the Los Angeles Times, and a call for legislation to address this specific issue, the California Legislature took up the matter.<sup>253</sup> Near the end of the 2001 regular legislative session, Senate Bill 497 was amended to add language limiting lot line adjustments.<sup>254</sup> The bill restricted lot line adjustments to “4 [sic] or fewer existing adjoining parcels.”<sup>255</sup> The intent was to close the loopholes in the Subdivision Map Act and restore the “original intent [of allowing] two adjoining property owners to adjust their boundary lines . . . [while not adversely affecting] neighbors [or] small landowners.”<sup>256</sup> This would close the “loophole [that] has enabled speculators to reap excessive profits on properties financed in large part through state parks bonds and federal funds.”<sup>257</sup> On October 13, 2001, the Governor signed the bill as supporters proclaimed that he had “slammed the door shut” on the problem.<sup>258</sup> But did he really?

### B. New Loopholes

A careful reading of the new statute reveals nothing that prohibits a landowner from filing multiple simultaneous applications.<sup>259</sup> Thus if a landowner wished to rearrange the lot configuration of, say, 279 parcels, 70 applications of four or fewer parcels each will do the trick.

Also, there is no restriction on filing multiple sequential applications. As a result, a lot can still be moved from the mountains to the beachfront, even if the original and final adjusted lots are not initially

<sup>251</sup> *Id.* at 757.

<sup>252</sup> *Old Papers*, *supra* note 10.

<sup>253</sup> *Id.* See also *Coastal Costs*, *supra* note 11; *New Plan*, *supra* note 21; *Setback*, *supra* note 24; *Babbitt*, *supra* note 27; Los Angeles Times Editorial, *supra* note 33; *Future*, *supra* note 238.

<sup>254</sup> S.B. 497, 2001-2002 Reg. Sess. (Cal. 2001) (as amended Sept. 4, 2001). See also LEGISLATIVE COUNSEL OF CAL., BILL INFORMATION — COMPLETE BILL HISTORY OF S. B. 497, [http://www.leginfo.ca.gov/pub/bill/sen/sb\\_0451-0500/sb\\_497\\_bill\\_20011014\\_history.html](http://www.leginfo.ca.gov/pub/bill/sen/sb_0451-0500/sb_497_bill_20011014_history.html) (last visited Dec. 14, 2001).

<sup>255</sup> S.B. 497, 2001-2002 Reg. Sess. (Cal. 2001) (as amended Sept. 4, 2001).

<sup>256</sup> SENATE RULES COMM., *supra* note 244, at 5.

<sup>257</sup> *Id.*

<sup>258</sup> Miguel Bustillo & John Johnson, *Governor Gets Busy with His Green Pen*, L.A. TIMES, Oct. 14, 2001, at B1 [hereinafter *Green Pen*].

<sup>259</sup> See S.B. 497, 2001-2002 Reg. Sess. (Cal. 2001) (enacted). See also *Speculator*, *supra* note 17.

touching, by sequential “leap-frogging” of adjoining lots, much like a slinky making its way down the hill to its new, far off destination.

It could be argued, however, that simultaneous and/or sequential applications should not be allowed since it is analogous to another situation that is specifically prohibited by the Subdivision Map Act. That other situation involves a practice known as “four-by-fouring.” There, the standard of “four or fewer” parcels is also the dividing line between a requirement for a parcel map (four or fewer parcels), or a tentative map (five or more parcels).<sup>260</sup> A parcel map of four or fewer parcels is subject to lesser standards than a tentative map.<sup>261</sup> Subsequent or sequential applications cannot be used to circumvent the limitation of “four or fewer.” For example, a landowner who owns one large parcel cannot subdivide it into four parcels, and then further subdivide each of those parcels into four more parcels, resulting in a total of sixteen parcels, to circumvent the limitation of four or fewer parcels.<sup>262</sup> This also applies if a landowner owns two adjoining parcels and attempts to subdivide them into four parcels each for a total of eight parcels.<sup>263</sup> This practice of “four-by-fouring” was an attempt to avoid the higher standards of the Subdivision Map Act tentative map requirements.<sup>264</sup>

However, it was stopped by amended language of the Act defining “subdivider” and “subdivision.”<sup>265</sup> There is no parallel saving language in the lot line adjustment provisions, which the Legislature could have inserted had it so intended. Thus there is nothing stopping an applicant from pursuing this method to avoid the “four or fewer” restriction.

In opposition to such end-runs it could also be argued that the legislative intent of Senate Bill 497 was to return to the concept of adjoining property owners adjusting their common lot boundaries.<sup>266</sup> Subsequent/sequential lot line applications are inconsistent with this intent. In counterpoint, it could be argued that the legislative intent was not very emphatic. After all, these new lot line adjustment provisions were

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<sup>260</sup> CAL. GOV'T CODE § 66426 (Deering 2001).

<sup>261</sup> CAL. GOV'T CODE § 66411.1 (Deering 2001) (Parcel map regulations are “limited to the dedication of rights-of-way, easements, and the construction of reasonable offsite and onsite improvements for the parcels being created.” *Id.* Tentative map regulations are much more expansive. *See infra* Part V.A.).

<sup>262</sup> *See* 61 Op. Att’y Gen. Cal. 114, 115 (1978).

<sup>263</sup> *Id.*

<sup>264</sup> *Bright v. Board of Supervisors*, 66 Cal. App. 3d 191, 194-99 (1977).

<sup>265</sup> *See* 61 Op. Att’y Gen. Cal. 114, 116 (1978).

<sup>266</sup> SENATE RULES COMM., *supra* note 244.

added to the bill on September 4, 2001, just nine days before the legislature finished its final action on the bill.<sup>267</sup> As a result, during the debate opponents contended that the bill was “hastily drafted.”<sup>268</sup> Republicans complained that they were being rushed and objected because they were unfamiliar with the issues and provisions they were being asked to approve.<sup>269</sup> The California Association of Realtors complained that they were “blindsided at the end of the legislative session.”<sup>270</sup>

In rebuttal, supporters of the bill pointed out that it is not unusual for bills to be amended late in the legislative session, and that over 400 other bills had also been amended after SB 497 was amended.<sup>271</sup> In addition, this subject has been under discussion since the Senate Committee on Local Government initiated hearings on this general subject matter in 1986, and legislators are not unfamiliar with it.<sup>272</sup>

Such compelling counterpoints could weaken the argument that legislative intent justifies importing language into the bill that is not expressly there.<sup>273</sup> Consequently, multiple and sequential applications could be found to be within a reasonable construction of the existing language of the statute.

## VIII. LOCAL CONTROL EFFORTS

### A. *Lot Line Adjustment Review*

There are a number of other existing tools available to local government that can protect agricultural resources from the adverse impacts of lot line adjustments and certificates of compliance. One way to deal with the lot line adjustment portion of this issue is to invoke the California Environmental Quality Act (CEQA).<sup>274</sup> One of the basic purposes of CEQA is to “[p]revent significant, avoidable damage to the

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<sup>267</sup> LEGISLATIVE COUNSEL OF CAL., *supra* note 254. *See also* S.B. 497, 2001-2002 Reg. Sess. (Cal. 2001) (as amended Sept. 4, 2001).

<sup>268</sup> *Green Pen*, *supra* note 258.

<sup>269</sup> John Johnson & Kenneth R. Weiss, *Panel OKs Bill to Close Subdivision Loop-hole*, L.A. TIMES, Sept. 6, 2001, at B9.

<sup>270</sup> *Id.*

<sup>271</sup> Telephone Interview with Randy Pector, Consultant, Senate Committee on Environmental Quality (Feb. 21, 2002) (describing the legislative history of Senate hearings on SB 497 in particular, and antiquated subdivisions in general).

<sup>272</sup> *Id.*

<sup>273</sup> *See* Kimmel v. Goland, 51 Cal. 3d 202, 208-09 (1990) (“In determining intent, we look first to the language of the statute, giving effect to its ‘plain meaning.’”).

<sup>274</sup> CAL. PUB. RES. CODE § 21000-21177 (Deering 2001).

environment by requiring changes in projects.”<sup>275</sup> A “project” includes, among other things, an activity subject to a governmental agency discretionary approval.<sup>276</sup> Discretion is involved where there is the exercise of judgment or deliberation.<sup>277</sup> To determine if a project is discretionary, the question is whether the agency has “the power to deny or condition” a permit. “If it could, the process is ‘discretionary.’ ”<sup>278</sup>

Lot line adjustments are discretionary projects. Although the lot line adjustment provisions of the Subdivision Map Act provide only a limited role for local agency review, they do authorize the imposition of conditions or exactions to ensure conformance to local zoning and building ordinances.<sup>279</sup> Effective January 1, 2002, the Act extends this authority to conformance with local general plans as well.<sup>280</sup> Consequently, since they can be conditioned, lot line adjustments are discretionary and could be subjected to the review process of CEQA. Through CEQA, issues such as agricultural resources and farmland conversion to non-agricultural uses could be addressed.<sup>281</sup> Conceivably, the lot line adjustment could even be denied if significant environmental effects on these resources could not be eliminated or substantially lessened.<sup>282</sup>

A new, untested tool that could prove effective in protecting agricultural resources when reviewing lot line adjustments was provided in Senate Bill 497. Existing law was amended by Senate Bill 497 to give local government the authority to review lot line adjustments for conformity with the local general plan.<sup>283</sup> As most general plans include some policies on agriculture,<sup>284</sup> lot line adjustments presumably could be conditioned or even denied if found to be inconsistent with such policies.

Of course, lot line adjustments affect only the size and location of

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<sup>275</sup> CAL. CODE REGS. tit. 14, § 15002(a)(3) (2001).

<sup>276</sup> CAL. CODE REGS. tit. 14, § 15378(c) (2002).

<sup>277</sup> CAL. CODE REGS. tit. 14, § 15357 (2001).

<sup>278</sup> *Friends of Westwood, Inc. v. City of Los Angeles*, 191 Cal. App. 3d 259, 273 (1987).

<sup>279</sup> CAL. GOV'T CODE § 66412(d) (Deering 2001).

<sup>280</sup> S.B. 497, 2001-2002 Reg. Sess. (Cal. 2001) (enacted).

<sup>281</sup> CAL. CODE REG. tit. 14, Chap. 3, App. G (2001), available at [http://ceres.ca.gov/topic/env\\_law/ceqa/guidelines/appendicies.html](http://ceres.ca.gov/topic/env_law/ceqa/guidelines/appendicies.html) (last visited Jan. 20, 2001).

<sup>282</sup> CAL. CODE REGS. tit. 14, §§ 15074(b), 15092(b)(1)-(b)(2)(A) (2002).

<sup>283</sup> S.B. 497, 2001-2002 Reg. Sess. § 2 (Cal. 2001) (enacted).

<sup>284</sup> *Ag. Conservation*, *supra* note 2, at 16. See also CAL. GOV'T CODE §§ 65100, 65300, 65302 (Deering 2001) (requiring every city and county to prepare a general plan to include policies on, among other things, agricultural uses).

parcels and not their existence.<sup>285</sup> Even if lot line adjustments could be controlled or denied, once certificates of compliance are issued, there is nothing prohibiting the parcel from being developed with residential uses inconsistent with agricultural policies.<sup>286</sup>

### B. Certificate of Compliance Review

The ability to influence certificates of compliance and their adverse effects on agricultural resources is even more limited. The Map Act provides that, upon application by a property owner, "a local agency shall determine [] whether the real property complies with the provisions of this division . . . ." <sup>287</sup> This determination has focused on whether the parcel was lawfully "created." If it was not, a conditional certificate of compliance is issued by the local agency.<sup>288</sup> The agency can then "impose any conditions which would have been applicable to the division of the property at the time the applicant acquired his or her interest therein . . . ." <sup>289</sup> As with lot line adjustments, the ability to impose conditions subjects the application to CEQA. Thus, additional conditions and mitigation measures authorized under CEQA could be imposed to reduce farmland conversion to non-agricultural uses.<sup>290</sup>

If the local agency finds that the real property was lawfully created, a certificate of compliance *shall* be issued.<sup>291</sup> When there is no discretion in issuing the certificate no conditions can be imposed.<sup>292</sup> As discussed above, most parcels are created by patents and conveyances and are lawfully created, and thus beyond local government control regarding agricultural preservation.

### C. Mergers

Another avenue available for local government to affect historic parcels is provided in the merger provisions of the Subdivision Map Act.<sup>293</sup> Under these provisions, a local agency may merge contiguous

<sup>285</sup> See S.B. 497, 2001-2002 Reg. Sess. (Cal. 2001) (enacted).

<sup>286</sup> See discussion *infra* Part III.C.

<sup>287</sup> CAL. GOV'T CODE § 66499.35(a) (Deering 2001).

<sup>288</sup> § 66499.35(a).

<sup>289</sup> CAL. GOV'T CODE § 66499.35(b) (Deering 2001).

<sup>290</sup> See *supra* note 281.

<sup>291</sup> CAL. GOV'T CODE § 66499.35(a) (Deering 2001).

<sup>292</sup> See *Friends of Westwood, Inc. v. City of Los Angeles*, 191 Cal. App. 3d 259, 273 (1987).

<sup>293</sup> CAL. GOV'T CODE § 66451.10-66451.21 (Deering 2001).

parcels held by the same owner under certain circumstances. This procedure is available if any one of the contiguous parcels does not conform to the agency's standards for minimum parcel size, an important agricultural criterion.<sup>294</sup> In addition, at least one of the parcels proposed for merger must be undeveloped, and there must exist other conditions regarding physical infrastructure limitations or inconsistency with the agency's general plan.<sup>295</sup> Prior to such merger, all affected property owners must be given notice of their opportunity to request a hearing to consider objections.<sup>296</sup>

The disadvantage of this option is that although it would allow some control of historic parcels regarding their size, it would not affect their actual existence, location, or use.<sup>297</sup> Also, the notice requirements could be prohibitive since it would require the local agency to research the location of all historic parcels and to notify all owners.<sup>298</sup> Such research could and usually does involve extensive title searches.<sup>299</sup> In addition, owners with historic parcels feel that having these property rights is "like winning the lottery."<sup>300</sup> It seems unlikely they would be very amenable to losing those rights through a forced merger.

Potentially massive research efforts and the likelihood of severe political pressure from landowners at the time of the hearing are arguably reasons this avenue is less traveled.

#### D. Other Reviews

There are also other tools available to local government to address the impacts of lawfully created parcels. "Adequate public facilities ordinances" have been used successfully to defer development approval until public infrastructure is available to the parcels in question, discouraging development from leapfrogging urban areas into undisturbed areas.<sup>301</sup> Impact fees have been assessed against remote parcels so that public agencies can themselves provide needed infrastructure.<sup>302</sup> Trans-

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<sup>294</sup> See discussion *infra* Part III.B.

<sup>295</sup> CAL. GOV'T CODE § 66451.11 (Deering 2001).

<sup>296</sup> CAL. GOV'T CODE § 66451.13 (Deering 2001).

<sup>297</sup> See CAL GOV'T CODE § 66451.10-66451.21 (Deering 2001).

<sup>298</sup> *Id.* See also *Old Papers*, *supra* note 10.

<sup>299</sup> See *Old Papers*, *supra* note 10.

<sup>300</sup> *Speculator*, *supra* note 17.

<sup>301</sup> Jim Schwab, *The Problem of Antiquated Subdivisions*, ZONING NEWS, Apr. 1997, at 3.

<sup>302</sup> *Id.*

fer of development rights ordinances have been used successfully in a number of areas to allow owners to transfer their rights from remote or sensitive properties to other properties more suitably located.<sup>303</sup> Also, local agencies could work with landowners to replat so-called "paper subdivisions" to produce better subdivisions.<sup>304</sup> Not long ago such a "private land readjustment" program was proposed to the legislature to resolve California's problem of antiquated subdivisions.<sup>305</sup>

However, all of these efforts are remedial, necessitated by parcels found to lawfully exist in locations antagonistic to orderly community development as envisioned by the Subdivision Map Act.

## IX. CONCLUSION AND RECOMMENDATION

### A. Portent for the Central Valley

In the Central Valley there is a tension between urban growth due to changing demographics, and farmland preservation efforts aimed at maintaining a viable agricultural economy. Historic parcels shift that tension in favor of development.

The effects of this shift have been dramatically illustrated on the California Central Coast. There, the use of historic parcels and lot line adjustments to circumvent local land use controls has generated outrage resulting in new legislation. Unfortunately, there appears to remain significant possibilities to circumvent even these new provisions.

People work hard through their local government to establish policies and regulations such as general plans, right-to-farm ordinances, and Williamson Act contracts to guide the growth and development of their community and economy. Embodied in these efforts is the attempt to implement recent planning theories that have been promising in controlling community growth through the demarcation of urban boundaries that maintain "a clear edge between town and country."<sup>306</sup> The disadvantages and costs of sprawl, the alternative to clear edges, have been well documented. A recent analysis by the American Farmland Trust of an eleven county region in the Central Valley concluded that a future growth scenario of low density urban sprawl would result in budget deficits of \$1 billion annually due to increased costs of pro-

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<sup>303</sup> *Id.* at 3-4.

<sup>304</sup> Jim Schwab, *Vacating and Replatting Platted Lands*, ZONING NEWS, May 1997, at 3.

<sup>305</sup> SENATE COMM. ON LOCAL GOV'T, *supra* note 95, at 23-25.

<sup>306</sup> SIERRA BUS. COUNCIL, PLANNING FOR PROSPERITY: BUILDING SUCCESSFUL COMMUNITIES IN THE SIERRA NEVADA 13, 15-16 (1997).



viding urban services. Yet a more compact, efficient growth scenario accommodating the same population with more efficient services would result in an annual budget surplus of \$200 million annually.<sup>307</sup> More alarming, the American Farmland Trust estimated that direct agricultural commodity sales would be reduced by \$2.1 billion a year in the Central Valley by such urban sprawl.<sup>308</sup>

Historic parcels and lot line adjustments side-step urban boundaries and all the hard work of community planning. Once subdivisions become established beyond urban boundaries it is nearly impossible to halt adjoining growth of commercial support services, followed by more housing, leading to more sprawl. Although this issue is certainly not the only one causing sprawl or farmland conversion, it nevertheless is a loophole that frustrates otherwise binding efforts by communities to control their own destiny.

While tools are available to insulate agricultural resources from adverse effects of historic parcels and lot line adjustments, they offer a piecemeal, remedial respite at best. The procedures available for reviewing lot line adjustments, conditional certificates of compliance, and mergers discussed in Part VIII may allow local agencies to influence the intensity of development on a parcel through conditions of approval, but they do not affect the uses that are permitted on those parcels. They are therefore ineffective at steering urban development away from agricultural areas. Public facility ordinances, transfer of development rights, and impact fees attempt to influence and perhaps discourage urban uses, but they start with the premise that urban development is permitted and deal with the issue after-the-fact. Furthermore, the courts to date have gone about as far as they can, snipping at the edges of the issue, in defining what is or is not a lawfully created subdivision. Despite these court rulings, ninety-five percent of the problem unquestionably still remains with the exemption of federal patents from local subdivision review, as seen in the Hearst example.

### B. Recommendations

The California Supreme Court, in its upcoming review of *Gardner*, has the opportunity to re-establish the balance between private property rights and public land use policies regarding subdivisions. The Court should affirm *Gardner* by holding that its reasoning properly embraces the legislative intent of orderly community development as a

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<sup>307</sup> *Urban Growth, Executive Summary, supra* note 58.

<sup>308</sup> *Id.*

compelling state interest. The Court should also go beyond that narrow holding and take the initiative to establish a comprehensive framework of exemptions, based on legislative intent, that would resolve the status of any kind of parcel, be they created by sales maps as in *Gardner* or federal patents.

As currently interpreted, the grandfather clauses of the Subdivision Map Act exempt federal patents and conveyances created prior to the first state subdivision laws. It could be argued, however, that for federal patents this is an incorrect assessment that the Supreme Court has never endorsed. The controlling grandfather clause states that the current subdivision law does “not apply to any parcel . . . in compliance with . . . any law . . . regulating the design and improvement of subdivisions in effect at the time the subdivision was established.”<sup>309</sup> The courts have never considered, however, that the Homestead Acts, Hardrock Mining Laws, and Timber and Railroad Acts were laws, albeit federal, that carved out private holdings from federal ownership through federal patents, thus establishing subdivisions.<sup>310</sup> These laws were in effect at the time the subdivision of federal patents was established because they were the vehicle for creating the subdivision. They regulated the design, and particularly the improvement of those parcels through their basic intent of establishing on those parcels the improvements of homesteads, mines, railroads, and commercial timber and stone operations. If federal patents are no longer “in compliance” with the intent of those improvements, in particular if they are now proposed for residential housing, they do not meet the letter of the grandfather clause and cannot then be exempted from the Subdivision Map Act.

Although this situation is dissimilar to *Gardner* where there were no applicable subdivision laws in effect at the time of parcel creation while with federal patents there were, it is similar to *Gardner* in that it is an example of legislative intent regarding the determination of which parcels should be exempt from the Map Act. In deciding *Gardner*, the Supreme Court should focus on the intent of the Subdivision Map Act and provide a resolution that encompasses all parcels, regardless of method of creation.

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<sup>309</sup> CAL. GOV'T CODE § 66499.30(d) (Deering 2001) (emphasis added).

<sup>310</sup> If it can be argued, as it has in *Lakeview* (see discussion *infra* Part VI), that federal law established the subdivision, then surely it can be argued that that same federal law is a subdivision law that was in effect when the subdivision was established with which the subdivision must comply in order to qualify for an exception under the grandfather clause.

The Supreme Court should hold that federal patents are not exempt from the Map Act on public policy grounds as well. In general, a grandfather clause is intended to recognize exceptions for unique, pre-existing conditions. When a Subdivision Map Act grandfather clause results in the possibility of millions of acres of land and hundreds of thousands of parcels being excepted from its reach, the exception swallows the rule. The legislature does not intend absurd results,<sup>311</sup> and given the statewide ubiquity of historic parcel exceptions, that is certain to become the case here.

The homestead and commercial activities spawned by the policies of the Homestead Acts, Hardrock Mining Laws, and Timber and Railroad Acts of yesterday helped shape the California demographic and economic landscape. The policies of the Subdivision Map Act and California Environmental Quality Act of today attempt to move that landscape into the future with orderly community development and environmental protection, in particular with regard to the preservation of the extremely important agricultural economy. Exemption of federal patents from the Subdivision Map Act results in conflicts between these sets of policies. The legacy of sound land use decisions of the eighteenth-century that created federal patents and helped build California, should not be the shackles of sound land use decisions of the twenty-first century that attempt to guide that legacy into the future.

The California Supreme Court should seize the opportunity presented in *Gardner* and go beyond its narrow facts to establish the general rule that the Map Act should not be read to exempt any parcel created prior to the first state subdivision laws, including federal patents, consistent with logical legislative intent. This would allow California to move forward with its land use planning, unencumbered by unintended consequences from the past.

Absent such a very proactive judicial pronouncement, the only other viable solution to the dilemma of unregulated historic parcels is a comprehensive legislative effort. If parcels do indeed lawfully exist, they should not be allowed to frustrate orderly community development. Provisions should be adopted to bring existing property rights into harmony with the purposes of the Subdivision Map Act and local policies of agricultural preservation in particular. The certificate of compliance and lot line adjustment provisions of the Act should be amended to secure these compelling state interests.

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<sup>311</sup> *In re Head*, 42 Cal. 3d 223, 232 (1986); *Hunt v. County of Shasta*, 225 Cal. App. 3d 432, 443 (1990); *Gomes v. County of Mendocino*, 37 Cal. App. 4th 977, 986 (1995).

Certificate of compliance controls are needed to address the innumerable historic parcels that may lawfully exist in locations antagonistic to farmland preservation. To gain those controls, the Subdivision Map Act should be amended to explicitly state that in order for a lawfully existing parcel to be exempted from the current Act and receive a certificate of compliance, it must have been created under a previous version of the Act. If the parcel was created prior to that, such as a pre-1893 federal patent, then a conditional certificate should be issued. Standards should then be imposed based on the first Subdivision Map Act to regulate the design and improvement of subdivisions, which is the 1929 version of the Act,<sup>312</sup> arguably the least restrictive regulatory scheme of the prior versions of today's Map Act. It would then also be possible, since approval would be discretionary, to influence the use of the parcel through CEQA if agricultural policies were to be threatened. This does not fully "grandfather" historic parcels, as appears to be the case now, but it also would not impose the more stringent use, design, and improvement standards required today.<sup>313</sup> A balance would then be struck between pre-existing property rights and community planning.

Opponents could argue that historic parcels are entitled to be fully grandfathered by existing law and therefore exempted from any subdivision law, current or prior. However, as pointed out by the court in *Hays*, "[t]he clear purpose of the so-called 'grandfather' clause is to protect developers who have detrimentally relied on an earlier state of the law."<sup>314</sup> Here, no evidence of any such reliance exists. On the contrary, as seen from recent examples on the California Central Coast, developers are only now "discovering" they even have these historic parcels. Thus there has been no detrimental reliance.

This approach addresses the concern expressed in *Hays* that otherwise "the salutary purposes served by the Subdivision Map Act would be frustrated . . . ." <sup>315</sup> It also follows the rule expressed in *Gardner* that "[t]he Act is to be liberally construed to apply to as many transfers or conveyances of land as possible . . . ." <sup>316</sup> After all, it was never intended "that antiquated subdivision maps created legal parcels

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<sup>312</sup> Brief of Amicus Curiae California State Association of Counties at 19, *Gardner v. County of Sonoma*, 92 Cal. App. 4th 1055 (2001) (No. A093139).

<sup>313</sup> See discussion *infra* Part V.A, VI.

<sup>314</sup> *Hays v. Vanek*, 217 Cal. App. 3d 271, 289 (1989).

<sup>315</sup> *Id.*

<sup>316</sup> *Gardner v. County of Sonoma*, 92 Cal. App. 4th 1055, 1065 (2001), *review granted*, 2002 Cal. LEXIS 254 (2002).

in the twenty-first century.”<sup>317</sup>

Once historic parcels have been acknowledged as lawful and have been conditioned so that they do not conflict with any adjoining agricultural resources, new lot line adjustment provisions should assure that these lots do not relocate to some other, unplanned-for location. To do that, new lot line adjustment provisions should prohibit sequential and subsequent applications that circumvent the new limitation on adjusting “four or fewer” parcels. Amendments could be modeled after existing provisions in the Act that preclude the “four-by-four” subdivision of parcels by subsequent applications from the same owner to circumvent the four parcel limitation for parcel maps. New definitions for “lot line adjustment” and “lot line adjuster” that parallel existing definitions of “subdivision” and “subdivider” should be added as well.

In addition, the plain meaning<sup>318</sup> of “lot line adjustment” should be implemented. Lot boundaries should be allowed to be adjusted, but not completely eliminated such that the entire lot disappears and resurfaces in a new unrelated location. Lot configurations resulting from lot line adjustments should be required to have at least one point in common with the original lot as configured as of the effective date of this amendment, no matter how many times the lot lines are adjusted. This permanently affixes at least one point of the original lot to eliminate the possibility of moving the parcel from the mountains to the beach without undergoing a full subdivision procedure. To visualize this effect, consider the lot boundaries to be a rubber band lying on a desk. Permanently tack down any point on the rubber band, or any point within its boundaries, to the desk. The rubber band would then be permitted to expand, contract, or change in any direction as long as the tack is not dislodged or its point of attachment relocated. This “rubber band test” would then supplant the “slinky effect” of completely moving the parcel to a new far off location, and maintain some semblance of an adjustment rather than a relocation of the original parcel.

These recommendations would not guarantee that agricultural farmland would be preserved from conversion to urban uses. They would, however, go a long way in accomplishing the overall purpose of the Subdivision Map Act to encourage orderly community development and in particular to protect agricultural uses from encroaching urban development by re-balancing the tension between urban growth and

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<sup>317</sup> *Id.* at 1067.

<sup>318</sup> See *Kimmel v. Goland*, 51 Cal. 3d 202, 208-09 (1990) (“In determining intent, we look first to the language of the statute, giving effect to its ‘plain meaning.’”).

farmland preservation. This would help ensure the Central Valley's continuing dominance in harvesting food, instead of allowing it to succumb to its emerging potential for harvesting houses.

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