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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SANTA BARBARA

EMMET J. HAWKES and SALLY HAWKES,

Petitioners and Plaintiffs,

vs.

THE COUNTY OF SANTA BARBARA and its BOARD OF SUPERVISORS,

Defendants.

CASE NO. 169598

(Consolidated with case no. 167375)

TRIAL BRIEF

Date: 12/19/89
Time: 9:00 a.m.
Dept: 1

## SUMMARY

Backdrop

This trial is comprised of two cases arising out of the same transaction, facts and occurrences. They were consolidated for purposes of trial by order of this court on June 12, 1989.

In the first case, Hawkes received an unconditional certificate of compliance for his 1/2 acre Montecito lot ("parcel 6") over vigorous objection from various neighbors who all live on approximately 1/2 acre lots, meaning parcel 6 was a valid legal lot. (Santa Barbara Sup. Ct. no. 169598.) In the second case, Hawkes applied for a building permit which county staff approved

only to have the Board of Supervisors declare that while the lot was legal, it was not "buildable" because of an unrecorded and almost impossible to find planning commission decision made in 1958 ("58-V-12") allowing a building permit on an adjacent lot ("parcel 5") conditioned upon consolidation of parcels 5 and 6. (Santa Barbara Sup. Ct. No. 167375.)

For over twenty-nine (29) years county failed to enforce this 1958 decision even though for at least seventeen (17) years it possessed actual notice that the combination condition had never been fulfilled. Parcel 6 changed hands numerous times. Petitioners had no actual or inquiry notice of the alleged land use restriction. It was not recorded in petitioners' chain of title. County staff at the Department of Resource Management ("RMD") front desk did not know of its existence nor did county records readily available at the RMD front desk mention it and it was not contained in the land use file for the subject property.

Certificate of Compliance Mandatory

If the subject property was lawfully created, never successfully combined or merged, and then divided at a later date in violation of the map act, the Hawkes are entitled to an unconditional certificate of compliance as a matter of law.

While neighbors have the burden of proof to go forward with evidence to support their theories for how a merger might have occurred, the map act requires even more. It requires strict compliance with procedural requirements including recordation for a merger to be effective. Plaintiffs argue that the neighbors must accept and county acknowledge that county's repeated failure

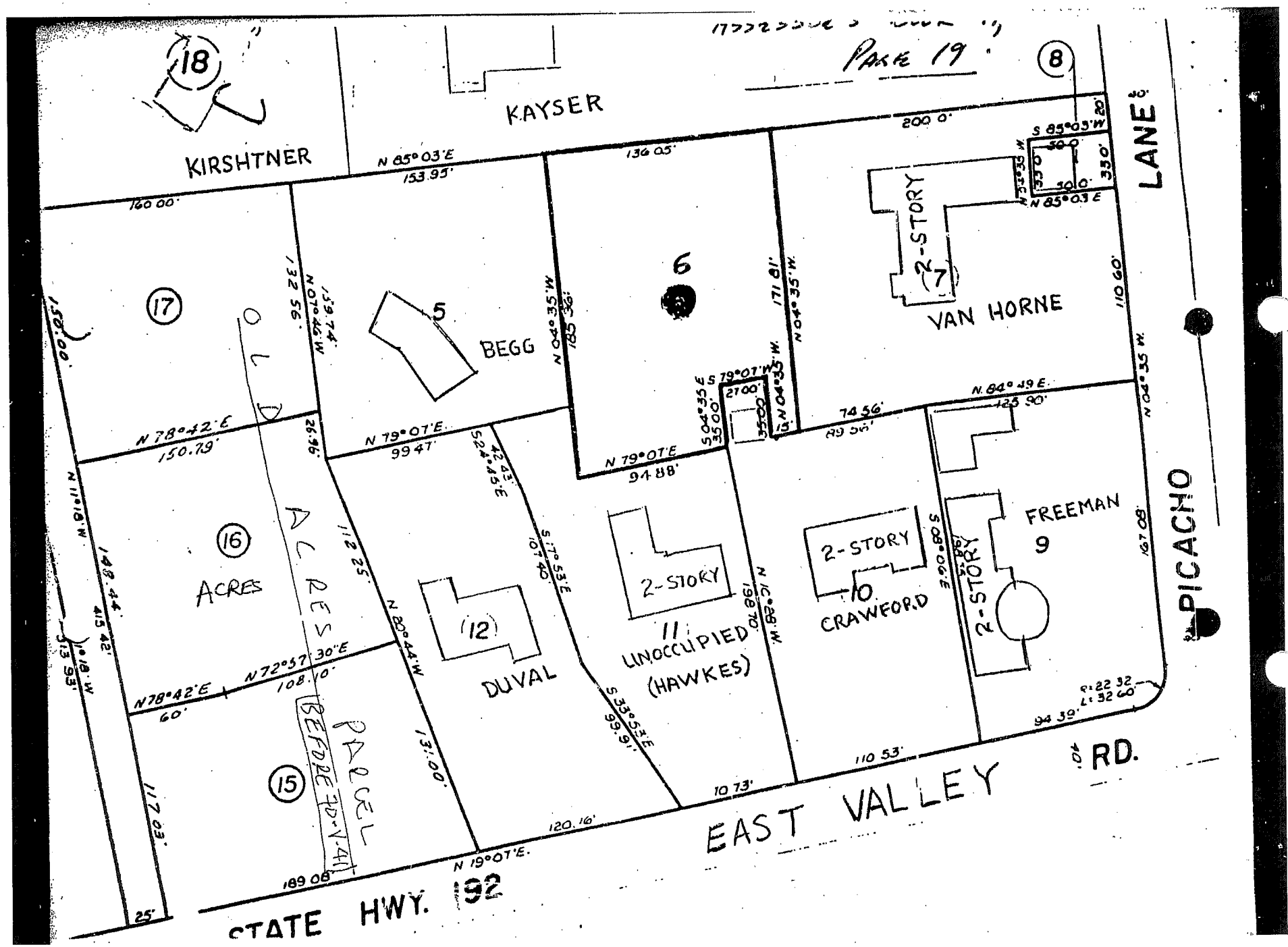
to force compliance with the map act procedureal requirements renders the 1958 decision a nullity and of no effect.

Building Permit Should Be Issued

Parcel 6 has an unconditional certificate of compliance. As long as the proposed residence presents no health and safety concerns, which no one claims, petitioners are entitled to a building permit. The issuance of the permit is a ministerial act which the county is duty bound to perform. The 1958 decision cannot bind parcel 6 because no merger occurred, it was not reduced to a written recorded instrument and Hawkes was never put on actual, inquiry or constructive notice of it. County had the means to alert purchasers to its prior decision and failed to do so. Under the Mansell estoppel tests, county may not deny a building permit under the circumstances when there is no question that the injury to Hawkes outweighs any public interest considerations. Over sixty-three per cent (63%) of the homes in the area, including the ones occupied by Mr. Van Horne and Mr. Crawford, are situated on lots of less than 1 acre. Hawkes are entitled to a building permit as a matter of both law and fairness.

STATEMENT OF FACTS

Petitioners Emmet J. and Sally Hawkes (hereinafter "petitioners" or "Hawkes") are the owners of a vacant one-half acre lot located in an unincorporated portion of Santa Barbara County near Montecito. The map on the following page demonstrates the immediate area parcels, the parcel numbers and the names of the current owners.


PAGE 19
18
KAYSER
KIRSHTNER
8
LANE
PICACHO
RD.
EAST VALLEY
RD.
STATE HWY. 92
17
OLD
AC RES
16
ACRES
15
PARCEL
BEFORE 20-V-41
5
BEGG
6
7
2-STORY
VAN HORNE
12
DUVAL
11
UNOCCUPIED
(HAWKES)
2-STORY
10
CRAWFORD
2-STORY
FREEMAN
9
2-STORY
200.0'
N 85°03'E
153.95'
136.05'
160.00'
150.00'
N 78°42'E
150.79'
N 79°07'E
99.47'
N 79°07'E
94.88'
N 64°49'E
123.90'
74.56'
89.56'
110.60'
N 04°35'W
N 04°35'W
185.36'
N 04°40'W
171.81'
S 79°07'W
27.00'
S 04°35'E
35.00'
N 04°33'W
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S 85°03'W
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33.0'
33.0'
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N 78°42'E
60.'
N 72°57'30"E
108.10'
N 20°44'W
112.25'
S 24°45'E
42.43'
S 17°53'E
107.40'
S 33°53'E
99.91'
N 10°28'W
198.70'
S 08°09'E
198.5'
167.08'
N 10°18'W
148.44'
N 10°18'W
415.42'
N 13°53'W
113.93'
117.03'
131.00'
120.16'
N 19°07'E.
189.08'
10.73'
110.53'
94.39'
R: 22.32
L: 32.40
25'

On July 27, 1955, county ordinance 791 became effective. It established the requirement, for the first time in the county, that divisions of land into four or fewer parcels were subject to the approval and recordation of a lot split plat. Prior to July 27, 1955, land divisions in the county into four or fewer parcels were permitted by recorded deed.

The subject one-half (1/2) acre parcel ("parcel 6") was created by two deeds recorded prior to July 27, 1955. The first deed was a grant from County National Bank & Company to Neustadter on May 23, 1946. The second deed was a grant deed from Havighurst to Fred and Amelia Acres ("Acres") on June 19, 1952.

These two deeds together created the current parcel 6 boundary lines in full compliance with the map act. There were no local ordinances then in existence.

Acres first acquired APN 11-190-05 ("parcel 5") by grant deed from Ralph H. and Helen Goldthwaite, recorded in Book 1040, Page 127 on December 24, 1951. Fred and Amelia Acres later acquired the adjacent parcel 6 in June 1952.

In 1958, Amelia Acres applied for a determination by the planning commission that parcel 5 was a permitted building site, since it was smaller than the one (1) acre minimum parcel size then required by the specific district regulations of county ordinance No. 453. On January 22, 1958, the planning commission granted a "variance" ("58-V-12") to allow the construction of a residence on parcel 5, on the condition that parcel 5 and parcel 6, then under common ownership, be combined into one parcel to create a single building site.

The combination condition was never fulfilled by Amelia Acres or her daughter and son-in-law, Mr. and Mrs. George C. Beggs ("Beggs"). Instead, just one week after the variance was granted (January 29, 1958), a land use rider (No. 3569) was issued to Beggs by county to allow the construction of a dwelling on parcel 5.

On March 24, 1958, Acres conveyed parcels 5 and 6 by grant deed. A dwelling was subsequently constructed and has since been occupied by Beggs. However, no deed, map or other document was ever recorded to implement the requirement that parcels 5 and 6 be combined into a single parcel.

The "land use rider" was never recorded nor was any other deed, map or other document ever executed to effectuate the combination or to provide notice of the action to subsequent purchasers of the property. No notice of merger was ever filed.

On March 1, 1965, having failed to require the original combination as contemplated by 58-V-12, Beggs conveyed parcel 6 alone by quitclaim deed back to Acres, and retained parcel 5.

In 1970, while parcels 5 and 6 were separately owned, Acres requested that the planning commission revoke the 1958 land use determination as it affected the subject parcel and also to approve the subdivision of a 1 1/2 acre parcel into three 1/2 acre parcels. Over staff opposition, the planning commission approved the subdivision request on the basis that the average lot size in the immediate vicinity was already less than .42 acres. However, before the planning commission could act on the request for revocation of variance 58-V-12, Acres withdrew their request.

Both parcels 5 and 6 subsequently came back into the common ownership of Beggs in March 1972 when Acres again conveyed parcel 6 back to the Beggs by grant deed.

In November 1978, M. Ernest and Jennifer A. Parks ("Parks") had separately acquired parcel APN 11-190-11 from David Van Horne, a neighbor and an attorney for the neighbors. On May 11, 1979, Beggs again separately transferred parcel 6, this time to Parks. As a result of this conveyance, parcel 6 and parcel 11 came into common ownership for the first time.

Petitioner Emmet Hawkes was Parks' real estate agent at the time of purchase. Hawkes was involved with Parkes' purchase of parcel 6 but received no commission. He knew that Parks paid $25,000 for parcel 6, less than market value, in large part because it had no water and the lot by itself, in separate ownership, was landlocked. Hawkes knew that Parks made an oral (and clearly unenforceable) promise to Beggs not to build on it except for a horse corral, swimming pool or extension of the back yard for parcel 11. However, no one ever put these promises in writing or even discussed the existence of any legal restriction on the suitability of the property for development. In a letter Beggs filed in 1986 with the board and in testimony at his recent deposition, it is evident that Beggs was not aware of and did not tell Parks and/or Hawkes about either the 1958 or the 1970 decisions. These decisions were buried somewhere within county's voluminous files. Nothing about the 1958 decision is mentioned in the street file for parcel 6 or noted on the RMD zoning maps then available to county personnel and the public. All variance files

for the year 1958 were recombined into a single RMD file with no coherent method of indexing.

On June 3, 1985, before he bought the property, Hawkes made inquiry with RMD planner Anna Marie Weiner to determine whether county records showed that parcel 6 was a separate, buildable parcel. She consulted the counter zoning book and the land use or street address file for parcel 6, and then informed him it was buildable.

Petitioners obtained a preliminary title report from Safeco Title Insurance Company, dated May 28, 1985, showing the vesting and condition of title on parcel 6 and APN 11-190-11. A review of this policy does not reflect the county's action taken in variance 58-V-12, nor is there any indication of a combination of parcels 5 and 6.

Parcel 6 is and always has been separately taxed and was separately financed while Parks owned it.

Hawkes purchased both parcels 11 and 6 from Santa Barbara Bank and Trust on June 24, 1985, after the bank had foreclosed against Parks' interests in the two separate parcels. At the time, parcel 11 was developed with an existing residence in need of extensive repairs. Parcel 6 was undeveloped and had no existing source of water due to a long standing moratorium on new water connections within the boundaries of the Montecito Water District.

Petitioners paid a fair price for both properties in light of the condition of the house on Parcel 11 and the fact parcel 6 had no water. The petitioners made a down payment of $233,961 and assumed an existing loan on parcel 11.

Hawkes went back a second time to make sure because an acquaintance who was developing a less than one acre lot in the area had run into difficulties with the county. Hawkes wanted to be sure. Hawkes was unequivocally told that there would be no zoning or other related problems with developing parcel 6.

Petitioners immediately undertook development plans for parcel 6, including drilling for water. Despite the presence of drilling rigs in plain view of Beggs, Mr. Van Horne, Mr. Crawford and other neighbors, no one informed petitioners that development on parcel 6 was in any way restricted. Petitioners continued to expend money for engineering and consulting costs. Finally, after the proposed development had been discussed at six (6) meetings of the Montecito Board of Architectural Review in May of 1986, neighbors first voiced objection.

Up until this time, petitioners had no knowledge of any circumstances suggesting that parcel 6 was not a valid, separate and buildable lot. In fact, as of this date, Mr. Van Horne cannot explain how in May 1986 he learned of the 1970 and 1958 decisions. The only reasonable explanation is that he knew that Acres and Beggs were related and this prompted him to search the files of surrounding and unrelated parcels. The evidence at trial will demonstrate that the only proof of the 1958 decision was contained in the file pertaining to the lot split by the Acres on land to the west of parcels 11 and 6.

Petitioners' attorney, a former deputy county counsel and experienced land use attorney, Rosanne Coit examined the county files and determined that the parcel 6 land use file contained no evidence of the 1958 or 1970 decisions. Subsequently, the Santa

Barbara County Manager for Continental Land Title Company told Ms. Coit that no record of any combination exists in the chain of title for parcel 6 or that a combination had occurred.

As a result of Mr. Van Horne's May 1986 letter and a precondition to the issuance of a building permit, RMD required petitioners to first obtain either a conditional or unconditional certificate of compliance under the map act. On March 13, 1987, the county surveyor proposed to issue an unconditional certificate of compliance. On March 20, 1987, the neighbors appealed the surveyor's determination to the planning commission.

On April 27, 1987, the supervisors denied the neighbors' appeal after hearing. Among the findings made by the supervisors was that the previous zoning decision requiring a merger of parcels 5 and 6 was never completed and that the zoning laws then in effect would allow for development of the subject property.

Subsequently, on May 22, 1987, Charles F. Wagner, acting in his capacity as county surveyor, issued an unconditional certificate of compliance for the subject property, stating: "the division creating said real property complies with the applicable provisions of the State Subdivision Map Act and county ordinances enacted pursuant thereto."

Petitioners then renewed their request to RMD to issue the requested land use/building permit. On May 29, 1987, RMD issued petitioners the requested land use/building permit. The neighbors appealed the RMD decision to the planning commission on June 8, 1987. On July 15, 1987, the planning commission granted the neighbors' appeal and invalidated the RMD's decision to issue the land use/building permit. Petitioners appealed the

planning commission's decision to the board of supervisors and on September 14, 1987, Hawkes' appeal was denied by a 3-1 vote. RMD then filed a detailed written report justifying their action. The staff findings included the following:

> "1. That the proposed development conforms to the applicable policies and provisions of Article IV and the comprehensive plan.
>
> The development conforms to the requirements of Article IV in the comprehensive plan. Specifically, the proposal is consistent with land use development policy No. 4, particularly as it related to access, as discussed in this staff report.
>
> 2. That the proposed development is located on a legally created lot as determined by the county surveyor.
>
> A certificate of compliance was recorded for the parcel on May 22, 1987, after confirmation from the Board of Supervisors, indicating the parcel is a legally created lot.
>
> 3. That the subject property is in compliance with all laws, rules and regulations pertaining to zoning uses, subdivisions, setbacks and any other applicable provisions of Article IV, and such zoning violation processing fees as established from time to time by the Board of Supervisors have been paid."

The board denied petitioners appeal in spite of the testimony that petitioners were bona fide purchasers with no actual, constructive or inquiry notice of the 1958 or 1970 decisions. However, the county sought to bind the entire world by its previous land use decisions incorporating them by reference into the existing zoning ordinance. This would apply whether an individual had notice of the decision or not.

On October 12, 1987, the board adopted final findings adverse to petitioners by a vote of 3-2. The board based its decision on findings 9 through 13 as follows:

> "9. § 35-411 of the County Code of the County of Santa Barbara (the County Zoning Ordinance) incorporates the policies of the comprehensive plan into the provisions of the Zoning Ordinance for the purposes of applying the development standards of a zoning district.
>
> 10. The property has been the subject of two previous zoning interpretations and particular applications of zoning designations in the past, 58-V-12 and 70-V-41, which have established limitations on the use of the property pursuant to previous Zoning Ordinance No. 453.
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> 11. These restrictions identified for the property are a part of the existing zoning ordinance provisions, which incorporate with the zone district text provisions applicable to a particular property under § 35-405 of the County Zoning Ordinance, and remain as limitations on the use or development of the property.
>
> 12. The restrictions are available for review by research of the files maintained by the County Resource Management Department by anyone familiar with the history of the property or able to trace its ownership through existing public records.
>
> The restrictions developed as a result of the past applications, 58-V-12 and 70-V-41, are of particular application to the property and restrict its current development as a matter of application of the current provisions of the County Zoning Ordinance."

In the absence of a land use/building permit for the subject property, petitioners have no reasonable or productive use for their property. In addition, petitioners have incurred substantial attorneys' fees and other legal costs as well as carrying costs associated with the inability to develop the subject parcel.

## ARGUMENT

### I.

### EVIDENCE APART FROM THE ADMINISTRATIVE RECORD IS PERMITTED ON ALL CAUSES OF ACTION EXCEPT CODE OF CIVIL PROCEDURE SECTION 1094.6.

Neighbors elected to seek review of the county decision to issue an unconditional certificate of compliance by traditional writ of mandate pursuant to Code of Civil Procedure § 1085. Where court review is by way of traditional writ, the trial court is not limited to the review of the administrative record, but may receive additional evidence on any triable issue of fact. See, e.g., Bruce v. Gregory (1967) 65 Cal. 2d 666, 56 Cal.Rptr. 265, 268; No Oil, Inc. v. City of Los Angeles (1974) 13 Cal. 3d 68, 79 n.6, 118 Cal.Rptr. 34, 41 n.6; Intoximeters, Inc. v. Younger (1975) 53 Cal.App.3d 262, 272, 125 Cal.Rptr. 864, 871; Lassen v. Alameda (1957) 150 Cal.App.2d 44, 48, 309 P.2d 520, 522.

The trial court's duty in traditional mandamus should be contrasted with its duty in administrative mandamus. In No Oil, supra, the Supreme Court distinguished the trial court's duty in reviewing an administrative record pursuant to Code of Civil Procedure § 1094.5 from the more expansive provisions of Code of Civil Procedure § 1085.

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> "In an action for administrative mandamus, the court reviews the administrative record, receiving additional evidence only if that evidence was unavailable at the time of the administrative hearing, or improperly excluded from the record. (Code Civ. Proc., § 1094.5.) In a traditional mandamus action, on the other hand the court is not limited to review of the administrative record, but may receive additional evidence. (Citations omitted.) Hence, the issue before the superior court in the present case was whether substantial evidence, on the whole record including the evidence presented to that court, supported the determination that no EIR was required.
>
> No Oil, Inc. v. City of Los Angeles (1974) 13 Cal. 3d 68, 79 n. 6. (Emphasis added.)

Accordingly, with respect to the neighbors' compliance case, the parties may produce any relevant evidence. Code of Civil Procedure § 1109; Evid. Code §§ 120 and 300. The court is required to determine on the basis of the entire record before it whether to grant the requested writ.

On the other hand, petitioners' complaint is comprised of causes of action for traditional mandate, declaratory relief, inverse condemnation[1/] and administrative mandate pursuant to Code of Civil Procedure § 1094.5. Therefore, the Court must evaluate petitioners' claim for administrative mandate pursuant to Code of Civil Procedure § 1094.5, solely upon the administrative record. Conversely, petitioners' remaining causes of action must be decided based upon facts contained within the administrative record or as presented to the court in the course of this trial.

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1/ By stipulation filed November 9, 1989, all parties have agreed that the inverse damage claim can be severed and heard at a later date, if necessary.

II.

CERTIFICATE OF COMPLIANCE CASE: MANDATE IS INAPPROPRIATE AS THE BOARD'S DECISION WAS CORRECT

A. Hawkes Was Entitled to an Unconditional Certificate of Compliance.

In accordance with article IV, section 35-482.5 of the county zoning ordinance, petitioners applied for a land use permit/building permit for the subject parcel. The parcel is located in an E-1 Zone. Pursuant to section 35-419.3 of article IV, a single family dwelling is a permitted use on any legal lot within the E-1 zone. Likewise, section 35-482.5 states that a land use permit shall be issued where the proposed development conforms to the applicable policies of the zoning ordinance and the comprehensive plan.

In addition, the proposed development must be located on a legally created lot as determined by the county surveyor. The legal document issued by the county surveyor demonstrating whether a lot has been lawfully created or "legal," is the "unconditional certificate of compliance". Government Code § 66499.35. The central issue in neighbors' traditional mandate case is whether petitioners were entitled to a conditional or unconditional certificate of compliance.

When requested, the county is required to evaluate the status of parcels created by deed to determine whether the division was created in compliance with land division rules at the time the parcel was created. Where the parcel was established in compliance with all existing rules regulating land division at the time of its creation, the local agency is required to issue an

unconditional certificate of compliance. Government Code §§ 66499.35(a) and § 66412.6(a). Conversely, if the land division violated the Subdivision Map Act or a local ordinance enacted pursuant thereto, a local agency has discretion to condition the issuance of a certificate of compliance upon those conditions that would have been applicable to the division of the property at the time the applicant acquired their interest in the subject parcel. Government Code §§ 66499.35(b) and 66412.6(b).

Generally matters relating to the subdivision of land are controlled by the California Subdivision Map Act. California Government Code § 66410, et seq. The legislative purpose in enacting the Subdivision Map Act was to protect individual transferees as well as the public at large. Bright v. Board of Supervisors of San Diego (1977) 66 Cal.App.3d 191, 135 Cal.Rptr. 758. While local agencies may enact measures which are complimentary to the Subdivision Map Act, any conflicting provisions are invalid as contrary to state law. Santa Clara County Contractors and Homebuilders Assoc. v. City of Santa Clara (1965) 232 Cal.App.2d 564, 43 Cal.Rptr. 86.

Before July 27, 1955, neither the State of California nor county had an ordinance which purported to regulate land divisions into four or fewer parcels which were lawfully accomplished by recorded deed. However, on July 27, 1955, county adopted ordinance 791, which established the requirement in the county that divisions of land into four or fewer parcels were

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subject to the approval and recordation of a lot split plat.[2/] Since 1955, county has continued to regulate all subdivisions of land.

The subject property was created by two deeds recorded prior to July 27, 1955. The first was a grant on May 23, 1946, from County National Bank & Company of Santa Barbara to Louis W. Neustadter. The second was a grant deed on June 19, 1952, from Peggie C. Havighurst to Fred and Amelia Acres. Together, these two deeds divided the subject parcel and created the current boundary lines in a manner which was in compliance with the Subdivision Map Act and local ordinances (none then existing). On this basis, the subject parcel qualified for the issuance of an unconditional certificate of compliance pursuant to Government Code § 66499.35(a) as a matter of law.

Because petitioners property was created by five or fewer parcels, Government Code § 66412.6(a) provides a conclusive presumption that parcel 6 was lawfully created.

> "For purposes of this division or of a local ordinance enacted thereto, any parcel created prior to March 4, 1972, shall be conclusively presumed to have been lawfully created if the parcel resulted from a division of land in which fewer than five parcels were created and if at the time of the creation there was no local ordinance in affect which regulated divisions of land creating fe er than five parcels."
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> Government Code § 66412.6.(a). (Emphasis added.)

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2/ Statutes and ordinances operate prospectively in order to avoid a declaration of unconstitutionality. See, United States v. Security Industrial Bank (1982) 459 U.S. 70, 103 S.Ct. 407, 412, 74 L.Ed. 235, 243; Saso v. Fertado (1951) 104 Cal.App.2d 759, 764, 234 P.2d 583 (holding statutory regulations restricting manner and extent of transfer of liquor licenses held inapplicable to transferor's performance of which were due before Act went into effect).

Since parcel 6 was created by two deeds recorded prior to July 27, 1955, creating fewer than five parcels, petitioners are entitled to the conclusive presumption provided by Government Code § 66412.6 and, therefore, an unconditional certificate of compliance as a matter of law.[3/]

B. The Planning Commission Action in 1958 Was a Nullity for Purposes of the Subdivision Map Act.

If the subject property was divided in compliance with all laws existing at the time of its creation, petitioners would be entitled to an unconditional certificate of compliance as a matter of law. However, if neighbors could prove the parcels were subsequently merged and later divided in violation of the map act or local ordinance, county would be allowed to attach conditions to the issuance of a certificate. Thus neighbors have creatively searched in vain to find a legal theory that would support a merger of the subject property with an adjoining parcel.

In summary, neighbors' theory in the administrative proceedings below was that if the property was actually combined after 1955, a subsequent transfer would violate the map act and thereby provide county with the authority to issue a conditional certificate of compliance. Of course, neighbors are well aware the condition would be compliance with one-acre minimum zoning, a condition that petitioners cannot fulfill.

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[3/] Contrast Government Code § 66412.6(b) which provides that a bona fide purchaser of a property divided in violation of the Subdivision Map Act or local ordinance shall not be entitled to a conclusive presumption for purposes of Government Code § 66499.35(a).

There is no statute or case law that would trigger a merger of two parcels lawfully established by pre-1955 recorded deeds by simply creating a public document somewhere in the RMD's files. The case of John Taft Corporation v. Advisory Agency for the County of Ventura (1985) 161 Cal.App.3d 749, 207 Cal.Rptr. 840, is instructive.

In John Taft, supra, the Second District Court of Appeal examined the effect of a United States Survey Map on an alleged subdivision of land within the meaning of the map act. The court held that lines drawn by a mere administrative agency, without strict compliance with the map act, were insufficient to legally subdivide parcels. John Taft, supra, 207 Cal.Rptr. at p.845. Analogously in the instant case, county's failure to follow the map act procedural requirements nullifies its attempt to create a merger.

There were a number of procedures utilized by county during the relevant time period which would have ensured the merger of parcel 5 and the subject parcel. The evidence is clear that county failed to follow these procedures.

Al Martin, a longtime employee at Ticor, will testify that not only were there procedures but that they were utilized by the county during relevant time periods. Ms. Trescher, a longtime Santa Barbara assistant county counsel who has practiced in the land use area for the county since 1958, opined to the supervisors in the administrative proceedings below and will testify at this trial that the decision of the planning commission, no matter how well intended, could not merge parcels in compliance with the map act. County could have required the

elimination of the lot line between parcels 5 and 6 by the recordation of a final map under Business and Professions Code section 11537(b). (State Subdivision Map Act.) This provision was added to the map act in 1943 and was the earliest measure designed to accomplish a reversion to acreage. Had the county followed this procedure, the subject parcel would not exist today.

County could have required a conveyance to a "straw man," usually a title company, with a conveyance of a single parcel back to the grantor. In any of these situations, an effective combination would have occurred. It would have been recorded and this dispute would not have arisen.

Last, county could have just recorded the planning commission's 58-V-12 variance decision. Mr. Martin is expected to testify that a title company has an obligation to report such decisions if they are notified.

Conversely, the Subdivision Land Exclusion Law (Business & Professions Code § 11700 et seq.) was not applicable to a combination outside of a recorded map or plat. Moreover, there was no county ordinance regulating the combination or merger of parcels.

Instead of prudently pursuing combination, the county issued a land use rider (no. 3569) for construction of a dwelling on parcel 5 to Mr. and Mrs. George A. Beggs, just one week after the variance was granted.

Once the land use rider was issued in error, the county had no proof that a deed, map or other document would ever be recorded to implement the planning commission's intention that parcels 5 and 6 be combined into a single building site. After

the county failed to enforce the terms of its land use rider, parcel 6 was placed into the stream of commerce and repeatedly conveyed and reconveyed, without limitation.

In 1965, George A. and Alice Beggs conveyed the subject parcel separately from parcel 5 by quitclaim deed to Fred and Amelia Acres. In 1970, while the subject property was still separated from parcel 5 the subject property was included within a development proposal which ultimately resulted in an additional subdivision of adjacent parcels into 1/2 acre lots. Although the applicant requested to remove the subject parcel from the development proposal, there is no factual or evidentiary basis for concluding that the county intended that the site not be built upon. See variance 70-V-41.

In 1972, the Acres reconveyed the subject parcel back to Beggs and in 1979, the Beggs separately transferred the subject property, this time to Ernest and Jennifer Parks. This was the first time that parcel 11, now owned by the petitioners, and parcel 6 came into common ownership. The Parks had previously acquired parcel 11 from David Van Horne in 1978.

Neighbors contended in the underlying administrative proceedings that mere common ownership of parcel 11 and parcel 6 served to create a "de facto boundary line adjustment." They chose to ignore the fact that there is absolutely no legal authority for this position and that such an interpretation would void the state merger and subdivision rules. Obviously, if the legislature wished to make mere common ownership of adjoining parcels effective as a merger, it could do so.

The legislature adopted in 1983 a specific procedure for merging parcels by filing a "notice of merger" pursuant to Government Code § 66451.30. The county could have cured the defect of its prior inaction by simply recording a notice of merger. However, county never followed this procedure.

C. The County May Not Enforce a Subdivision Map Act Violation Against Petitioners If Enforcement Would Result in the Denial of a Building Permit to BFP's.

1. Subdivision Map Act Violations Do Not Warrant Refusal to Issue a Building Permit to a BFP in the Absence of an Impairment of Public Health or Safety.

Even if neighbors were correct that somehow parcel 6 was magically merged with parcel 5 or later with parcel 11, the county may not enforce the map act or local ordinance against a bona fide purchaser ("BFP") so as to deny petitioners a building permit in the absence of a health and safety concern. Keizer v. Adams (1972) 2 Cal. 3d 976, 88 Cal.Rptr. 183.

Neighbors assert that whether petitioners are BFP's is irrelevant to county's determination to issue petitioners an unconditional certificate of compliance. Petitioners disagree on the basis that neighbors requested the issuance of a conditional certificate of compliance for the purpose of blocking development of the parcel. Assuming arguendo that petitioners were not entitled to an unconditional certificate, the certificate could not be conditioned to preclude development of the parcel in the absence of legitimate health and safety considerations.

This issue was first addressed by the Supreme Court in Keizer v. Adams, where an innocent purchaser for value

acquired property from a grantor who had subdivided the parcel in violation of the Subdivision Map Act. The Supreme Court held that the innocent purchaser could not be denied a building permit on a lot sold in violation of the Map Act.

> "[T]he Act does not require the innocent purchaser to suffer for a violation by his grantor, of which he has neither knowledge nor means of discovery.
>
> Keizer v. Adams, supra, 2 Cal. 3d at p. 980. (Emphasis added.)

In Keizer, as in the instant case, it was argued that the burden should be placed upon the purchaser to review all county recordings to determine whether the Map Act had been complied with. The court in Keizer rejected the county's "myopic" approach where there was no feasible method by which an individual purchaser could obtain the information. Moreover, the court considered the untenable position of the innocent purchasers who, if the county's approach were adopted, could only comply by obtaining the consent of others. The court rejected this argument, noting that no procedure existed whereby the innocent purchasers could compel other purchasers to combine their parcels in an effort to correct the illegal acts of their predecessor in interest. Id., at p. 980.

2. Petitioners Qualify as Bona Fide Purchasers.

All evidence presented in the administrative proceedings below suggested that petitioners were BFPs. In the underlying administrative proceeding, petitioners submitted a declaration which indicated that they had paid over $233,000 and assumed an existing loan for one parcel with a dilapidated building and another without water. A purchaser who pays valuable

consideration for interest in a parcel of property in good faith and without notice or knowledge of a prior outstanding adverse interest is considered to be a bona fide purchaser. Scheas v. Robertson (1951) 83 Cal.2d 119, 123-125, 238 P.2d 982; Rabbit v. Atkinson (1941) 44 Cal.App.2d 752, 757-58, 113 P.2d 14.

Generally, a party qualifies as a bona fide purchaser where the following three elements are satisfied:

> (1) Payment of valuable consideration;
>
> (2) Payment in good faith; and,
>
> (3) Payment without actual or constructive notice of another's rights or private interest in the real property.
>
> Miller & Starr, 3 California Real Estate Recording and Priorities, § 8.31 at p. 1959.

The question of whether an individual qualifies as a bona fide purchaser is a question of fact. United States v. Certain Parcels of Land (1949 D.C. Cal.) 85 F.Supp. 986, 999-1000. In the instant case, there was substantial evidence in the underlying administrative proceeding that petitioners paid value for the property and took without notice of the alleged map act violations or of the hidden and unknown 1958 and 1970 decisions.

Once petitioners have established that they paid value for the property without notice, the burden shifts to neighbors to prove that petitioners possessed notice of the alleged map act violations. See, Scheas v. Robertson, supra, 38 Cal.2d 119, 123-125; Rabbit v. Atkinson, supra, 44 Cal.App.2d 752, 757-758; 3 Miller and Star, California Real Estate Recording and Priorities, Section 8:31 (2d Ed. 1989). Neighbors have not and cannot meet this burden.

The only evidence of notice that neighbors presented involved oral communications between Parks, Emmet Hawkes and Beggs. It was common knowledge that parcel 6 had no water and was landlocked. Parks orally promised Beggs when he bought the parcel for $25,000 that he would never build on the property. This promise is unenforceable under the statue of frauds or the recording statues (see discussion infra). Moreover, an oral promise not to build infers that the property is an appropriate building site. It is a complete non sequitur to assert that knowledge of an oral promise not to build should put one on notice of a map act violation.

On the other hand, Hawkes presented substantial evidence in the administrative proceedings below that unequivocally demonstrates that they possessed no actual knowledge of the alleged zoning decisions concerning adjacent parcels or the subject parcel or map act violations. Beggs himself did not know about variance 58-V-12. If he did not know, how could Parks and Hawkes learn about it?

Petitioners went further than what was required for due diligence by researching the issue of the suitability of the property for a building site. Hawkes reviewed the existing RMD counter book and street address file and discussed the matter with Anna Marie Weiner, a county planner. Petitioners inquiry revealed no limitations on the construction of a residence on the subject property. Hawkes title report was silent on this issue.

It is respectfully contended that petitioners are BFP's and the certificate of compliance could not be

conditioned in a method that precludes development of the parcel in the absence of an impairment to public health and safety.

3. The County Identified No Health and Safety Concern That Would Be Impaired By The Issuance Of A Building Permit To Petitioners.

After the Supreme Court decided Keizer v. Adams, supra, 4 Cal.3d 976, the legislature codified the holding of the case that an innocent purchaser for value cannot be denied development approval unless the proposed development is contrary to the public health or public safety. Government Code § 66499.34; See also Scrogings v. Kovatch (1976) 64 Cal.App.3d 54, 58, 134 Cal.Rptr. 217, 219. Here there is no contention that the public health and safety will be impaired by the issuance of a building permit to petitioners.

The RMD staff report to the planning commission on appeal from its decision to grant petitioners' land use/building permit clearly states that the proposed development complies with all county comprehensive plan and zoning policies. Hawkes obtained written approvals from every required county agency and from related governmental agencies, e.g., fire, water, sewer, etc. The planning commission and the board of supervisors never based their actions on the basis of any public health and safety concern. It is respectfully asserted that county was without jurisdiction to deny Hawkes an unconditional certificate of compliance.

III.

THE LAND USE PERMIT/BUILDING PERMIT CASE: TRADITIONAL MANDATE, DECLARATORY RELIEF AND ADMINISTRATIVE MANDATE ARE APPROPRIATE

A. Introduction

Having lost their argument with the county that the subject parcel was not a legal lot entitled to an unconditional certificate of compliance, the neighbors subsequently shifted their approach and argued that although parcel 6 may be legal, it is still burdened by prior land use decisions. After petitioners received an unconditional certificate of compliance from the county surveyor, neighbors contested RMD's issuance of a land use/building permit for the subject property and successfully appealed RMD's decision to the planning commission. The board of supervisors affirmed the planning commission decision and denied petitioners' appeal. The result being that although there was no legitimate public health and safety concern presented by the proposed development, petitioners were determined to possess a legal, but unbuildable lot.

B. Hawkes is Entitled to Construct a Residence on a Legal Lot Under County Zoning Ordinance Article IV.

1. Petitioners Are Entitled to the Issuance of a Building Permit For a Legal Parcel Within an E-1 Zone.

The adoption of the existing county zoning ordinance article IV repealed the prior inconsistent provisions of ordinance No. 453 and therefore it has no application in this case. Article IV, section 35-407. See Brougher v. Board of

Public Works (1928) 205 Cal. 426, 271 P. 487. The well established general rule is that a zoning permit will be issued in conformity with the law as it exists at the time the permit is issued. Brougher v. Board of Public Works, supra. Any other interpretation would have the effect of freezing the zoning laws applicable to a land division contrary to public policy. See, Avco Developers v. South Coast Regional Commission (1976) 17 Cal. 3d 785, 553 P.2d 546, 132 Cal.Rptr. 386, 394.

Since the subject property is zoned E-1, petitioners' proposed single family residence is a permitted use on any one acre lot within the E-1 zone. Section 35-419. A dwelling may be located upon a smaller lot if the lot is a "legal" lot created by a recorded subdivision, parcel map or is a legal lot as evidenced by a recorded unconditional certificate of compliance. Section 35-419.

A land use permit was the final permit petitioners were required to obtain prior to construction of their proposed residence on the subject property. Section 35-482.1. The issuance of a building permit for a "permitted" use not requiring a conditional use permit is usually considered to be a ministerial act. Ellis v. City Council (1963) 222 Cal.App.2d 490, 498, 35 Cal.Rptr. 317; Sunset View Cemetery v. Kraintz (1961) 196 Cal.App.2d 115, 116 Cal.Rptr. 317; Munns v. Stenman (1957) 152 Cal.App.2d 543, 314 P.2d 67; Palmer v. Fox (1953) 118 Cal.App.2d 453, 258 P.2d 30. Consequently, a writ of mandate lies to compel performance of any ministerial act that a county is duty bound to perform. Code of Civil Procedure § 1085; Metropolitan Water

District v. Marquardt (1963) 59 Cal. 2d 159, 170, 28 Cal.Rptr. 724, 729.

In this instance, the characterization of the issuance of a building permit as a ministerial act is supported by the provisions of the California Environmental Quality Act ("CEQA") which mandates environmental review of discretionary projects. CEQA guidelines, § 15268(c), provide that the issuance of a building permit is generally a ministerial act. Moreover, Appendix A to the county's own CEQA implementing guidelines adopted September 12, 1988, defines the issuance of "building permits and related permits" as ministerial acts.

Likewise, when a statute requires a prescribed act upon a prescribed contingency, the county's functions are ministerial upon the fulfillment of the contingency. See Drummey v. State Board of Funeral Directors and Embalmers (1939) 13 Cal. 2d 75, 83, 87 P.2d 848, 853; Ellis v. City Council (1963) 222 Cal.App.2d 490, 35 Cal.Rptr. 317. Section 35-482.5 of Article IV specifically provides that a land use permit shall be issued only if the proposed development conforms to the zoning ordinance and the comprehensive plan. In addition, the development must be located on a legally created lot as determined by the county surveyor. Section 35-482.5.

As stated above, the county surveyor determined that the subject parcel was lawfully created (a legal lot) and issued an unconditional certificate of compliance for the property. Once the county was able to make the findings that the proposed development was located on a legally created lot as determined by the county surveyor (Section 35-482.5), the only

remaining prerequisite to county's approval of petitioners' request for a building permit was section 35-482.5(1), which required a finding of conformity with the county comprehensive plan.

Neither the county nor neighbors have identified a single adverse environmental impact or public health and safety concern that would in any way conflict with the provisions of Article IV and the comprehensive plan. See, RMD Staff Report, p. 5, July 15, 1987. Specifically, the staff report made findings that the proposed development did conform to the comprehensive plan and Article IV. The sole basis for denying petitioners' application for a land use/building permit was the existence of the two previous land use decisions allegedly burdening the subject parcel.

While both neighbors and the county acknowledge that the 1958 zoning decision was intended to combine parcels 5 and 6, neighbors mystically interpret the intentions of the 1958 planning commission to burden the subject parcel as "not a building site" even though no such intention was ever expressed in any county decision or document. Furthermore, what did exist could not be found by any reasonably intelligent person through the exercise of reasonable diligence. Hawkes, Coit and county personnel could not find it. The only person who found it was David Van Horne and he had information available to him that was not available to Hawkes, i.e. he knew of the familial and property transfer connection between Acres and Beggs.

The neighbors are forced to this interpretation since the county's failure to enforce a zoning violation of which

they have actual notice and the good faith reliance by petitoners raises serious estoppel and laches defenses. See, infra. However, a pig by any other name is still a pig. To characterize a county zoning decision to combine two parcels into one as a decision to create a "not a building site" designation does not make it so.

2. The Alleged Variance Does Not Run With the Land to Bind an Innocent Purchaser for Value.

It bears repeating that no variance was required for the proposed development in 1958 since Acres agreed to combine parcels 5 and 6 in order to comply with the applicable minimum lot size requirement. There was nothing substandard about the proposed subdivision which would require a variance. The term "variance" as applied to the 1958 decision was simply erroneous.

Neighbors argue that in accordance with the rules enunciated in County of Imperial v. McDougal (1977) 19 Cal. 3d 550, 564 P.2d 14, 138 Cal.Rptr. 472, a variance, like a conditional permit, runs with the land. Assuming arguendo that there was a variance, for a variance to "run with the land" it must meet the requirements of Civil Code § 1460 which expressly states that "covenants that run with the land are contained in grants of estates in real property and bind successors in interest." (Emphasis added.) Of course, no one would or could contend that the county has obtained an estate in the subject parcel. Moreover, the only covenants that run with the land are those specified in Civil Code §§ 1462-1470.

In addition, if the variance were characterized as an interest in land, it would be invalid for violating the

statute of frauds because the "not a building site" designation was not contained in any writing or deed. Furthermore, the variance cannot be construed as an equitable servitude because servitudes must also be contained in a deed to be enforceable. See, Orinda Homeowners v. Board of Supervisors (1970) 11 Cal.App.3d 768, 777, 90 Cal.Rptr. 88; see, also, Scrogings v. Covatch (1976) 64 Cal.App.3d 54, 58, 134 Cal.Rptr. 217, 219. Any oral promise that there would be no building, made by Parks to Beggs, wouldbe unenforceable for the same reason.

Having failed to exercise the appropriate standard of care to require the combination, county still possessed the ability to warn subsequent purchasers about its "not a building site" designation, if that is truly what it intended. But it did nothing despite repeated transfers of the property and despite notice in 1970 that the 1958 decision had not been carried out.

3. An Unrecorded Variance Cannot Be Enforced Against Petitioners Who Are BFP's.

Those cases which have held that the benefits and burdens of a conditional use permit bind successors in interest are premised on the fact that the successors possess actual, constructive or inquiry notice of the conditional use permit or variance. In essence, these cases maintain that a permitee must take the bitter with the sweet. After succeeding to the benefits which the previous land owner enjoyed, they are bound with the obligations as well. See County of Imperial v. McDougal (1977) 19 Cal. 3d 550, 564 P.2d 14, 138 Cal.Rptr. 472; Cohn v.

County Board of Supervisors of the County of Los Angeles (1955) 135 Cal.App.2d 180, 286 P.2d 836.

In the instant case, neither parcel 11 nor 6 now owned by petitioners have received any benefits from the county permitting process. If the county genuinely desires to remedy the violation of its 1958 land use decision, its appropriate remedy is against Beggs, the individual violating the 1958 decision, and not against an innocent purchaser for value.

Neighbors contend that the 1958 zoning decision can be enforced against a BFP under the county's general police power. See, Scrogings v. Covatch, supra. However, two important facts present in the Scrogings case are not present here. First, in Scrogings the county did record a restriction against subdivision in the original plat map. The restriction on subdivision was not carried over in subsequent mesne conveyances, but the county did not fail to have the restriction recorded. Consequently, the purchasers in Scrogings could be deemed to have constructive notice of the recorded county land use decision. Second, and far more important, the condition restricting subdivision in Scrogings related to a requirement that the subdivided parcel be provided with public sewer service, a matter directly related to public health and safety.

The rule enunciated in Keizer v. Adams was codified at Business & Professions Code § 11538.1 (moved by amendment to Government Code § 66499.34) and applied to limit development in Scrogings. These authorities all stand for the proposition that a building permit may not be denied on the basis

of a land division violation in the absence of a legitimate public health and safety concern.

The case of Munns v. Stenman, supra, is also dispositive of the county's argument that an innocent purchaser may be precluded from developing where local zoning ordinances would be violated.

In Munns, supra, an innocent third party purchaser acquired property which was allegedly created in violation of local municipal subdivision ordinances as well as the Subdivision Map Act. In Munns, as in the instant case, the property was otherwise suitable for development and enforcement of the ordinance against innocent purchasers would deprive them of the use of their property. In rejecting the city's contention that it could deny innocent purchasers a building permit for the subject parcels, the court stated:

> "An innocent third party may not be deprived of the use of his property because he buys into an illegally subdivided lot . . . if it were a fact that Hidden Valley was subdivided in a manner contrary to statute or ordinance, that would not afford basis for the city's refusal to permit the owner of the lot therein to beneficially enjoy it by constructing a residence."
>
> Munns v. Stenman (1957) 152 Cal.App.2d 543, 314 P.2d 67, 75. (Emphasis added.)

The California Supreme Court examined the rights of an innocent purchaser under the California Subdivision Map Act in Keizer, supra, and reaffirmed the rule that an innocent purchaser for value may not be denied a building permit in the absence of a legitimate public health and safety concern.

In the absence of some risk to public health or safety, innocent purchasers for value may not be denied a building permit regardless of whether development of the parcel violates the Subdivision Map Act or local county ordinance.

C. The Application of Prior Unrecorded Zoning Determinations is Void for Vagueness and Violates Petitioners' Rights to Due Process.

The basis for the county's denial of petitioners' request for a building permit was a decision to interpret article IV to incorporate by reference every prior county zoning decision, irrespective of whether the decision could reasonably be found by a reasonably intelligent citizen.

Zoning ordinances are subject to invalidation for vagueness as a violation of procedural and substantial due process where one must guess at their meaning. People v. Synanon (1979) 88 Cal.App.3d 374, 151 Cal.Rptr. 757; Sechrist v. Municipal Court (1976) 64 Cal.App.3d 737, 745, 134 Cal.Rptr. 733; People v. Binzley (1956) 146 Cal.App.2d Supp. 899, 303 P.2d 903.

As interpreted by neighbors and the county, article IV would bind an innocent party by zoning decisions when there is no reasonable prospect for discovery of the decision. As interpreted by the county, petitioners would be subject to constructive notice of any land use decision contained in any land use file, no matter how far away the other property may be from the subject property and regardless of whether there is any reasonable prospect of uncovering the information. Such an interpretation of the ordinance is void for vagueness as applied

to petitioners because it provides no notice of the applicable land use restrictions burdening the subject parcel.

If the court were to uphold neighbors' interpretation, it would place an intolerable burden on prospective purchasers of property. Despite what title reports, zoning parcel maps, street files and county employees suggest, a purchaser would be required to conduct an extensive search through other property files or planning commission or board of supervisors minutes without limitation as to time or distance. This is clearly an unreasonable burden.

D. The County is Estopped From Enforcing the Provisions of the 1958 Combination Condition Against Hawkes.

If the county wanted to require a combination of parcels 5 and 6 there were procedures available for it to accomplish that result. Petitioners will present expert testimony from Ms. Trescher and Mr. Martin on these issues. As previously stated, there were numerous single opportunities for county to have forced the merger or recorded the 1958 decision.

Twenty-nine (29) years after the county initially determined that parcels 5 and 6 should be combined, the county has failed to take any action to combine the parcels or even provide notice to an innocent purchaser. Initially, it was the county's negligence in issuing a land use rider for parcel 5, without assuring itself that the combination condition had been fulfilled, which has allowed parcel 6 to be repeatedly conveyed by itself.

Since 1958, numerous conveyances and reconveyances of the subject parcel have occurred between Beggs and Acres.

Neighbors assert that these conveyances did not violate the terms of the planning commission's 1958 decision because no construction was intended by the grants. However, as stated previously, other than neighbors' self-serving proclamation, there is absolutely no evidence that the county intended to burden the subject parcel with a "not a building site" designation rather than an intention to allow parcel 5 to develop on one full acre rather than one-half acre.

Approximately nineteen (19) years ago, the county received actual notice that parcels 5 and 6 had been separated when Fred and Amelia Acres applied for the subdivision and development of a neighboring lot (parcel 7). The Acres requested permission to divide parcel 4, (1 and 3/4 acres), into three 1/2-acre lots and to rescind the 1958 planning commission decision requiring the combination of the subject parcel.

Because the county failed so miserably to protect itself against claims of current purchasers for value, is estopped from denying a building permit to petitioners herein. Four elements must be present to invoke the application of equitable estoppel:

> (1) The party to be estopped must be apprised of the facts;
>
> (2) He must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended;
>
> (3) The other party must be ignorant of the true state of facts; and,
>
> (4) He must rely upon the conduct to his injury.
>
> City of Long Beach v. Mansell (1970) 3 Cal. 3d 462, 489, 476 P.2d 423, 91 Cal.Rptr. 23, 42.

Where estoppel is asserted against a public agency, the court must engage in a balancing of the private injury against the public interest. Id., at 489.

The county has always been apprised of the true facts, since the county possesses actual knowledge of its prior zoning decisions affecting the subject parcel. It possessed the skill and expertise to sift through the reams of paper and voluminous files of previous zoning decisions to determine if the subject parcel was burdened by previous county zoning decisions.

As will be demonstrated by expert testimony, there was no rational method to access the earlier planning commission decisions without a time consuming, arduous search through various historical maps and files relating to other adjacent parcels.

The county, by its inaction, and more importantly through the express conduct of its agent, intended or should have known that its conduct would be acted upon. For example, Hawkes clearly believed in good faith that Weiner was faithfully discharging her duties on the occasions he inquired whether there were any problems building a home on parcel 6.

Weiner's representation alone is a sufficient basis to give rise to an estoppel claim. Morgan v. County of San Diego (1971) 19 Cal.App.3d 636, 641, 97 Cal.Rptr. 180, 182-3; Baird v. City of Fresno (1950) 97 Cal.App.2d 336, 217 P.2d 681, 685-86. Coupled with the county's actual notice of the mesne conveyances and the proposed development of the subject parcel the county's failure to perfect a merger also supports an estoppel. City of Imperial v. Algert (1962) 200 Cal.App.2d 48-51, 19 Cal.Rptr. 144, 146.

All evidence demonstrates that petitioners were ignorant of the true state of the facts, and it cannot be contended that they did not rely on the county's inaction and the express statements of Ms. Weiner by purchasing the property and later spending a great deal of money preparing for development of the parcel.

This is a paradigm case for equitable estoppel. However, as previously stated, where the doctrine of estoppel is to be applied against the government, the court must also engage in a balancing test to weigh the private harm versus the public interest before applying the estoppel. City of Long Beach v. Mansell, supra. The harm to petitioners clearly outseighs any public interest considerations.

If petitioners are denied a building permit for parcel 6, the private injury will be substantial. The property will have been rendered valueless as an unbuildable 1/2 acre lot. It may add value to parcel 11, but this is trivial compared with the value of a separate residence. As a result, petitioners will have been deprived of their investment backed expectations and a reasonable economic return therefrom. On the other hand, there is no legitimate county policy which is impaired by issuance of a building permit for the proposed residence nor is any public interest adversely affected.

The rationale for the 1958 planning commission decision was a desire to consolidate parcels 5 and 6 to comply with the minimum one-acre zoning requirement then applicable to the property. However, before and after 1958, nearly all of the surrounding parcels have been developed on less than one-acre

zoning. As the evidence will show, the average size of the developed parcels in close proximity is approximately .42 acre and over 60% of all homes in the area are on less than 1 acre sites.

While it is true that the county possesses an interest in enforcing its zoning ordinance, it may not create an island within a sea of less restrictive zoning. Hamer v. Town of Ross (1963) 59 Cal. 2d 776, 31 Cal.Rptr. 335. In other words, the county has already allowed development on substandard lots in the vicinity of the petitioners' parcel. To single out petitioners would violate equal protection of the laws. The county has no legitimate interest in denying petitioners equal protection.

Anderson v. City of La Mesa (1981) 118 Cal.App.3d 657, 173 Cal.Rptr. 572, is also illustrative. In Anderson, the City of La Mesa issued plaintiff a building permit to construct a house under a general zoning ordinance requiring only a five foot set back. However, after completion of the construction it was determined that a ten foot setback was actually required. The appellate court held that the city was estopped from denying a building permit where there would be substantial private injury when balanced against the de minimis interference with the public interest.

Therefore, in light of the negligible public interest at issue weighed against the denial of all reasonable uses for the proposed lot resulting in substantial private harm to petitioners, county should be estopped from enforcing its 1958 planning commission decision against petitioners.

E. The County is Barred From Enforcing the Combination Restriction Against BFP's by Laches.

The twenty-nine (29) year period in which the county failed to enforce the combination provision gives rise to the equitable defense of laches. While the doctrine of estoppel is sometimes said to have more rigorous requirements, laches requires only two elements: unreasonable delay and resulting prejudice. City and County of San Francisco v. Pacello (1978) 85 Cal.App.3d 637, 645, 149 Cal.Rptr. 705, 710.

There is no vested right to violate a zoning ordinance. See, e.g., Acker v. Baldwin (1941) 18 Cal.2d 341, 346, 115 P.2d 455. These cases merely stand for the proposition that the offenders failed to exercise any measure of good faith. See City and County of San Francisco v. Pacello, supra, 85 Cal.App.3d at 646.

The Pacello case is instructive in this regard. The Pacellos bought a house with the belief that their use was lawful. While the house violated various local ordinances, the city formally expressed its opinion that the occupancy of the house should be permitted. Approximately eight and one-half years later, the city changed its mind and sought to abate the use of the house as a public nuisance. The court held that the city's lengthy delay in enforcing a violation of which it possessed actual knowledge combined with the resulting prejudice to the Pacellos supported the application of the laches doctrine.

In this case, the county's twenty-nine (29) year delay after failing to enforce the combination condition and after the seventeen (17) year delay from receiving actual notice of the

alleged violation represents an unreasonable delay. Petitioners are innocent purchasers who have paid fair value for their parcels in reliance on their belief the property was a buildable lot. Accordingly, laches bars the county's late attempt to enforce a prior zoning determination twenty-nine (29) years later which has resulted in substantial prejudice to petitioners. See People v. Department of Housing & Community Development (1975) 45 Cal.App.3d 185, 119 Cal.Rptr. 266.

F. The County's Findings are Not Supported By the Evidence.

The statement of findings adopted by the board of supervisors is not supported by the evidence presented in the administrative hearing.

To begin with, finding no. 10 that prior zoning decisions have established limitations in the use of the subject property pursuant to previous zoning ordinance no. 453 is unsupported by the evidence. Article 4 specifically states that previous county zoning ordinance no. 453 is inoperative to the extent that it conflicts with Article 4. Consequently, the minimum lot size provisions contained within Article 4 control over the particular applications of past zoning designations. Moreover, there is no evidence which would support the finding that the previous zoning interpretations intended to establish a limitation on the use of the subject property. The zoning determinations merely expressed a desire that the subject parcel be combined with parcel 5 for the purposes of complying with then existing minimum lot size regulations.

Finding no. 12 that the zoning interpretations which result in restrictions in the use of the subject property are "available for review by research of the files maintained by the county resource department..." is not supported by substantial evidence. To the contrary, substantial evidence shows that petitioner Emmet Hawkes reviewed the land use file for the southern parcel and the RMD land use map. Upon reviewing the files he uncovered no restriction or evidence of a prior zoning determination affecting the subject parcel.

There is no evidence whatsoever that before May 16, 1986, the day Mr. Van Horne wrote a letter to county about the 1958 and 1970 decisions, anyone could have been reasonably expected to know about the earlier decisions or that there was a familial connection and trading of properties between Beggs and Acres.

What more could Hawkes have done? He inquired with Anna Marie Weiner of the county RMD to determine the suitability of the subject parcel for a building site. He was informed twice by Ms. Weiner that the subject property was an appropriate building site. A former county counsel (Rosanne Coit) researched the land use file and determined that there was no restriction on development and the title report was silent. Hawkes exercised all due diligence reasonably expected. All substantial evidence available for review by the supervisors and any careful citizen indicates that the alleged restrictions arising from prior zoning determinations were not discoverable by means of a reasonable search.

Because there was no substantial evidence that the prior zoning interpretations established limitations of use upon the

property or were available for review by a reasonable search of the county RMD files, the findings are not supported by the evidence.

G. The County's Decision is Not Supported By the Findings.

The county's decision to deny petitioner's request for a building permit was predicated upon its interpretation of article 4, section 35-411. Finding no. 11 states that section 35-405 of existing county zoning ordinance incorporates by reference prior zoning interpretations applicable to the subject property irrespective of whether an individual has actual, inquiry or constructive notice of the decisions. For the reasons previously stated, this conclusion is erroneous as a matter of law. If adopted by the court, this conclusion would result in a zoning ordinance which is void for vagueness since it would require a reasonable person to guess at its meaning.

More importantly, the fact that the restrictions are available for review by research of the files maintained by the county RMD does not suggest that a reasonable person exercising due diligence would ever discover the alleged restrictions. In fact, Finding no. 12 suggests the opposite conclusion. Upon a review of the administrative record and the conclusion contained in Finding no. 12, it appears that only a individual with expertise in searching county RMD files would successfully uncover the prior zoning interpretations and alleged zoning restrictions. Thus, the findings do not support the decision that petitioner should be denied a building permit. Apparently at least two of

the supervisors agreed with this position and voted against the proposed findings ultimately adopted by the board.

## CONCLUSION

It is clear that substantial injustice and harm to petitioners will result unless this court orders the county to grant the relief requested by petitioners. It is respectfully submitted that Mr. and Mrs. Hawkes are entitled to the unconditional certificate of compliance granted to them by county and to a building permit for parcel 6.

DATED: November 17, 1989

HATCH AND PARENT

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**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**FOR THE COUNTY OF SANTA BARBARA**

| | |
|---|---|
| EMMET J. HAWKES and SALLY HAWKES,<br><br>Petitioners and Plaintiffs,<br><br>v.<br><br>COUNTY OF SANTA BARBARA and its BOARD OF SUPERVISORS,<br><br>Respondents and Defendants. | Case No. 169598<br><br>Consolidated with Case No. 167375 |
| LELAND M. CRAWFORD, Jr., et al.,<br><br>Real Parties in Interest. | |

# COUNTY'S TRIAL BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF MANDATE

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## TABLE OF AUTHORITIES

### CASES

## STATUTES

The County of Santa Barbara and its Board of Supervisors, Respondents herein ("County"), through the County Counsel, submits this brief in opposition to the petitions for writ of mandate and the complaint for declaratory relief and inverse condemnation as follows:

## INTRODUCTION

These consolidated cases involve a vacant lot in Montecito owned by Petitioner Hawkes and abutting the improved properties of Hawkes and Petitioners Crawford and Van Horne, and neighbors Beggs and Kayser. The subject lot, with street address 1382 East Valley Road, is now designated by Assessor's Parcel No. 11-190-06, and is referred to in this Brief as "Lot 6"; the lot is 1/2 acre in a 1-acre residential zone. The issue is whether Lot 6 is subject to restrictions precluding the building of a residence.

County issued Hawkes a "certificate of compliance" pursuant to the Subdivision Map Act (Government Code §66499.35) and County's Subdivision Ordinance (County Code Chapter 21) based on the finding that the lot, although substandard, was legally created by recorded deed. This is challenged by Crawford, Van Horne and other neighbors (the "Neighbors") in Case No. 167375. County denied Hawkes a land use permit to construct a residence on the parcel, based on a 1958 Planning Commission decision approving a variance and a building permit for the adjoining lot ("Lot 5") on the condition that the lot in question could not be built on. This is challenged by Hawkes in Case No. 169598.

The "certificate of compliance" action by the Neighbors is for mandate (C.C.P. §1085); the court must determine, based on the administrative record, whether substantial evidence exists to support the Board's conclusion that an "unconditional certificate" should have been issued.

The County did not base its certificate of compliance decision on the 1958 decision, which it found to be in the nature of a zoning interpretation and enforcement action, and not an instrument combining Lots 5 and 6. Hawkes' "innocence" as to the existence of the restriction is irrelevant to the certificate of compliance action because (1) the certificate was issued solely on the basis of the creation of the parcel by deed prior to the decision imposing the restriction and (2) Hawkes could have obtained a certificate before he purchased the property under the Map Act, which he chose not to do.

The "zoning" action is an administrative mandate (C.C.P. §1094.5); however, Hawkes is also claiming declaratory relief and entitlement to a judgment of liability for inverse condemnation.

Hawkes claims a form of estoppel, and seeks to introduce evidence outside the record to show that, notwithstanding the validity of the restriction at the time it was issued, he should not be bound by its terms because:

- A counter technician told him Lot 6 was a legal or buildable lot, based on an initial inspection of the County's current assessor's maps for the parcel;
- The restriction was not recorded against the property; and
- Hawkes purchased the property without knowledge of the restriction.

County contends that Hawkes was no innocent. Hawkes either knew or should have known about the restriction because:

- He was a real estate broker who transacted business in Montecito.
- He knew that the lot was substandard.
- He knew the lot, unlike most of the surrounding lots, was not built on.
- He was the broker for the sale of the lot from the Beggs' to the Parks', and set the price for the sale at $25,000, well below market value for a buildable lot; further, Hawkes was present during conversations in which Beggs not only stated his personal desire that the lot not be built on but his belief that the County would not allow the lot to be built on.

County's version of what Hawkes was told "over the counter" differs from Hawkes' in that County contends there was no unqualified oral statement that Lot 6 was buildable but that a caveat was given that Hawkes should request a written, formal parcel validity determination which could only be made upon careful research.

Hawkes knew at a minimum that there was something peculiar about the lot when he acquired it (and the adjoining improved lot ["Lot 11"]) following a lenders' foreclosure upon the Parks'. He should have asked the County to research the parcel's history and determine in writing if there were any restrictions on building. Had he done so, and the research been performed, Hawkes would have discovered that the 1958 Planning Commission decision precluded any building on Lot 6 and that its value lay in its use as an adjunct to Lot 5, or to any other abutting improved parcel (such as Hawkes' Lot 11), and not as a separately developable lot.

While Hawkes says he could not find the restriction, even upon examining the readily available assessor's parcel book, there being no address file for Lot 6 at the time of his purchase, and that the County "counter technician" told him, based on the same information, that Lot 6 was a legal or buildable lot, the evidence is that:

- Charles King, a veteran County planner (now retired), was able to find the restriction through careful research of County records tracing the history of Lot 6 back through its "parent parcel" from which it was created.
- David Van Horne, who was generally aware of prior County zoning actions in the neighborhood but not specifically aware of the subject restriction, was able to find the restriction by examining the County's files accessible through the counter technician.

Thus Hawkes had knowledge and professional training which gave him cause and imposed upon him a duty to inquire in a meaningful fashion as to whether a residence could lawfully be built on Lot 6. Had he done so, he

Hawkes further contends that because County issued a certificate of compliance and the County Zoning Ordinance for Montecito was superseded so as to permit development on undersized lots that were legally created, the County cannot deny him a land use permit based on the pre-existing building restriction on the specific parcel. County does not interpret its zoning ordinance to imply such a result. It found that the conditions and restrictions imposed on lots through particular permit and variance decisions remain in effect. Public policy compels that the zoning laws and zoning restrictions imposed for the benefit of Hawkes' predecessor in interest and the surrounding community be enforced, that the restriction runs with the land, and that the change in the zoning law does not vitiate specific restrictions on specific parcels.

Thus, County contends that its zoning restriction was properly imposed, was never rescinded by overt act or operation of law, and that it properly denied Hawkes a land use permit to construct a residence on Lot 6.

Even if this Court rules that Hawkes was improperly denied a land use permit, it should deny Hawkes' claim for inverse condemnation. He has not been deprived of all use of his property, as he may enjoy it, sell it to his neighbors, or use it to enhance the value and utility of his house on an adjoining lot.

## STATEMENT OF THE CASE

The essentials of the controversy are set forth in the County's findings:

• "FINDINGS AND CONCLUSIONS IN SUPPORT OF DETERMINATION TO RECORD A CERTIFICATE OF COMPLIANCE (Assessor's Parcel No. 11-190-06)", attached as Exhibit 3 to Hawkes' Complaint (and at AR 152). The Board of Supervisors denied Van Horne's appeal of the decision to issue a Certificate of Compliance.

• Resolution No. 87-518, Board of Supervisors "STATEMENT OF FINDINGS IN RE THE APPEAL OF [HAWKES] FROM THE PLANNING COMMISSION'S DENIAL OF A LAND USE PERMIT", attached as Exhibit 7 to Hawkes' Complaint (and at AR 574). The Board of Supervisors denied Hawkes' appeal of the Planning Commission decision to deny a Land Use Permit.

The following Statement of the Case is primarily drawn from these findings, with additional references to the record and to local regulations. Findings re: Certificate of Compliance and Land Use Permit are referred to as "Finding CC-#" and "Finding P-#", respectively. References to the Administrative Record are denoted "AR#".[1]

1. Prior to July 27, 1955, when County Ordinance No. 791 (requiring approval and recordation of a lot split plat to divide land into four or fewer parcels) became effective, land divisions in the County of Santa Barbara were lawfully accomplished by recorded deed. The separate parcel of real property known as Assessor's Parcel 11-190-06 ("Lot 6") was created by the effect of two deeds recorded prior to July 27, 1955. The first was from County National Bank to Neustadter, recorded May 23, 1946 (AR 58); the second was from Havighurst to Acres, recorded June 19, 1952 (AR 61). (Finding CC-1).

2. Since approximately 1930, the neighborhood has been zoned one-acre residential. In 1958, Mrs. Acres applied for a determination whether an adjacent lot ("Lot 5") was a permitted building site; both Lot 5 and Lot 6 were approximately 1/2 acre each. Under Ordinance No. 453, the zoning ordinance in effect in Montecito at the time, the only relief available from the lot size requirement was through a variance procedure. See Declarations of former

[1] The Administrative Record is in two volumes. Volume I is the Record of the Certificate of Compliance proceedings (Crawford v. County), with stamped numbers 1-297. Volume II is the Record of the Zoning proceedings (Hawkes v. County), with stamped numbers 300-584.

Planning Commission Secretary Girvan (AR 269, 402) and Planning Director Whitehead (AR 261, 406) The Planning Commission, in case 58-V-12 (a designation denoting "variance"), took the following action, which was approved by the Board of Supervisors on January 27, 1958:

> Approved request of Amelia Acres for combination of Lots [6] and [5] ... as one building site and issuance of a permit for a building thereon and approval of the splitting of [an adjoining one and one-half acre lot] by an east-west line dividing the lot into approximately equal parts.

On January 29, 1958, the Planning Department issued a "Land Use Rider", containing a drawing of the two lots with a notation on the line between Lot 5 [Lot 45 in original] and Lot 6 [Lot 142 in original]: "THIS LINE ELIMINATED". The Rider stated "Requirements to be made a part of Application and Permit - Division of Building & Safety, County of Santa Barbara"; it was initialed as to Zoning Approval and as to Architectural Approval by William Girvan, then Secretary of the Planning Commission. (The County file as to 58-V-12 is at AR 237, 398.)

3. The Findings in support of the Certificate of Compliance state with respect to 58-V-12 that "a variance was granted, under the applicable County Zoning Ordinance, requiring [Lot 5] and [Lot 6] to be combined into one parcel to create a single building site" (Finding CC-2), and that "subsequent to that variance, a building was constructed on [Lot 5], the construction for which the variance was requested" (Finding CC-3).

4. In 1970, Fred Acres applied to the Planning Department for a variance and lot split (Case No. 70-V-41) in order to:

- Divide the 1.5 acre parcel previously authorized by 58-V-12 to be split into two 3/4 acre parcels into three 1/2 acre parcels; and

• "[R]emove the limitations imposed on January 22, 1958 by the Planning Commission which combined lots [5] and [6] ... as one building site." (Letter of June 13, 1970 from Attorney Hatch to Planning Department).

This application was opposed by Montecitans.

On August 19, 1970, the Planning Commission took this action:

• Accepted the applicant's verbal request to withdraw that portion of the application relative to revocation of Planning Commission action on January 22, 1958, Case No. 58-V-12.

• Approved division of the 1.5 acre parcel into three 1/2 acre lots. (Zoning Report, Case No. 70-V-41).

(Portions of the County file as to 70-V-41 is at AR 242, 409.)

5. The Findings in support of the Certificate of Compliance further state that the owner of Lots 5 and 6 took no action to combine the parcels by deed, conveyance, map, or other document filed of record (Finding CC-4), and that the County did not take action to effectuate or record a merger of the two parcels pursuant to the Subdivision Map Act (Government Code §66451.10) (Finding CC-6).

6. In support of the Certificate of Compliance, the Findings state that the present zoning for the parcel (Article IV) provides that a dwelling may be located on a smaller lot than the minimum size for the district if a Certificate of Compliance is recorded for the lot (Finding CC-5); that "the action taken in January, 1958, was in interpretation of and enforcement of the provisions of the Zoning Ordinance in effect at the time and was not an approval of a subdivision or merger" (Finding CC-7); and that "the current zoning will allow development of the parcel" (Finding CC-9).

7. In its findings supporting denial of the issuance of a Land Use Permit, the Board stated with respect to Certificate of Compliance Findings Nos. 5 and 9, that:

> As findings made in the context of a Subdivision Map Act matter, those Findings were statements of general application and did not take into account the background of special zoning interpretations applicable to the Property, nor did they incorporate the determinations regarding consistency with the zoning and Comprehensive Plan which are required in a particular application for the development of property under the zone district requirements. (Finding P-5).

8. In denying the Land Use Permit for Lot 6, the Board found that the current County Zoning Ordinance for Montecito (Article IV, §35-411) incorporates the policies of the Comprehensive Plan into the provisions of the zoning ordinance for the purposes of applying the development standards of a zoning district (Finding P-9).

9. The Board further found that the Property has been the subject of two previous zoning interpretations and particular applications of zoning designations in the past, 58-V-12 and 70-V-41, which have established limitations on the use of the Property pursuant to previous Zoning Ordinance No. 453 (Finding P-10). It further found that these restrictions identified for the property are a part of the existing [Article IV] Zoning Ordinance provisions, which incorporate within the zone district text provisions applicable to a particular property under Section 35-405 of the County Zoning Ordinance, and remain as limitations on the use or development of the property (Finding P-11).

10. There was considerable controversy in the administrative proceedings between Hawkes and his neighbors over Hawkes' knowledge of these restrictions and of the non-buildable status of Lot 6.

a. Hawkes contended that he "had no knowledge, either actual or constructive, of the condition of 58-V-12 requiring combination of [Lots 5 and 6]"; that he twice inquired of the Resource Management Department whether

Lot 6 was a separate, buildable lot and was told that it was separate and buildable; and that "he cannot now be penalized for the failure of the Beggs' [Acres' daughter and son-in-law, the previous owners of Lots 5 and 6] to comply with the condition [by selling Lot 6 to Parks in 1979] and for the failure of the County to require compliance with the condition". (Letter from Attorney Coit to Earl McMahon, County Real Property Division, August 19, 1986 at p.10., AR 349)

b. The neighbors contend that the Beggs' sold Lot 6 to the Parks' in 1979 with the express understanding that it was not to be used as a building site; that Hawkes was Parks' real estate broker in the transaction and was present when the Beggs' and Parks' discussed the non-buildable status; and that Hawkes proposed the sale price of $25,000 (when buildable properties were selling for about $75,000) in recognition of the non-buildability of the lot. (Neighbors' Brief in Opposition to Hawkes' Appeal, p.4, AR 474.)

11. The Findings as to the Certificate of Compliance do not refer to Hawkes' knowledge of the non-buildable status of Lot 6. The findings as to the Land Use Permit do not expressly resolve the issue of Hawkes' knowledge but state that "the restrictions [in 58-V-12 and 70-V-41] are available for review by research of the files maintained by the County Resource Management Department by anyone familiar with the history of the Property or able to trace its ownership through existing public records". (Finding P-12).

12. The Board found that "the restrictions developed as a result of the past applications, 58-V-12 and 70-V-41, are of particular application to the Property and restrict its development as a matter of application of the current provisions of the County Zoning Ordinance" (Finding P-13). It concluded that "the Property is not suitable for the development proposed under the zoning applicable to the area", denied Hawkes' appeal, and directed the Resource Management Department not to issue a Land Use Permit.

## ARGUMENT

### I.

### THESE CASES SHOULD BE DECIDED UPON THE ADMINISTRATIVE RECORD

The administrative record, as recited above, contains the history of the parcel and the evidence supporting the County's decisions to grant a Certificate of Compliance and to deny a Land Use Permit. It further contains reports, arguments, and legal opinions by Hawkes and his neighbors. County submits that the materials in the record are sufficient for this Court to decide the certificate of compliance action (§ 1085 mandate) and the zoning action (§ 1094.5 administrative mandate).

Hawkes has taken depositions of County employees Charles King (now retired; over 30 years with Planning Department, responsible for researching land and zoning records) and Marta Macacheck (counter technician) and neighbors David Van Horne, Mr. & Mrs. Beggs, and (by phone interview not deposition) Mr. & Mrs. Parks. The King deposition was extensive and includes numerous exhibits of County historical documents, some of which are not in the administrative record. Hawkes has advised of his intent to call various witnesses at trial, including certain expert witnesses (some of whom have expressed legal opinions contained in the record). County submits that testimony outside the record is not necessary to the decision and should not be heard by this Court, and intends to bring a motion in limine to exclude evidence that is not appropriate or necessary to the decision in this case.

### II.

### STANDARD OF REVIEW

The Neighbors' petition is for traditional mandamus (C.C.P. § 1085) to compel the County to cancel the certificate of compliance as to Lot 6 and to issue a conditional certificate of compliance. Neighbors contend that County

had a clear and present, ministerial duty which it failed to perform and which may be compelled by mandate. See *Kirk v. County of San Luis Obispo* 156 Cal.App.3d 453, 459 [202 Cal.Rptr. 606] (certificate of compliance); *Youngblood v. Board of Supervisors* (1978) 22 Cal.3d 653, 664 [150 Cal.Rptr. 242]. While the Court is not limited to review of the administrative record in a § 1085 proceeding, it is County's understanding that the Neighbors do not intend to adduce evidence not already contained in the record.

Hawkes' zoning case is brought as a petition for administrative mandamus (C.C.P. § 1094.5) to challenge the denial of a land use permit, which is a discretionary decision for which a hearing was required by ordinance, evidence was taken, and discretion was exercised in the determination of facts by the Board of Supervisors. The essence of Hawkes' appeal to the County was to urge it to set aside the conditions the County imposed on the property in 1958 and reaffirmed in 1970; he contends here that the County abused its discretion in denying his appeal and failed to proceed in the manner required by law.

Judicial review in an administrative mandamus proceeding is limited to whether there has been a prejudicial abuse of discretion, which will not be found unless the court determines that the County's findings are not supported by substantial evidence in the record or the County has not proceeded in the manner required by law. See C.C.P. § 1094.5(c); *Topanga Ass'n for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515 [113 Cal.Rptr. 836]. The court's review is limited to evidence in the record; additional evidence may be received only if it was unavailable at the time of the administrative hearing or was improperly excluded from the record. See C.C.P. § 1094.5(e); *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 79 fn.6 [118 Cal.Rptr. 34].

Hawkes has also brought a complaint for declaratory relief and for inverse condemnation. He must elect his remedy as between administrative mandamus under § 1094.5, the proper vehicle for an "as-applied" challenge to a decision, and declaratory relief under C.C.P. § 1060, which is an appropriate way to challenge the constitutionality of ordinances on their face but not a substitute procedure for a matter properly reviewed as an administrative mandamus. See *Aptos Seascape Corp. v. County of Santa Cruz* (1982) 138 Cal.App.3d 484, 494 [188 Cal.Rptr. 191]. As to inverse condemnation, it has recently been held that "a property owner seeking to recover on an inverse condemnation claim [for a regulatory action] must first establish the invalidity of the condition ...[; a]n administrative mandate proceeding provides the proper vehicle for such an challenge." *California Coastal Commission v. Superior Court (Ham)* (1989) 210 Cal.App.3d 1488, 1496 [___ Cal.Rptr. ___].

Thus, in the first instance, the County's actions are reviewable by a limited search for evidence in the record to support the findings made by the administrative agency in order to ascertain whether the application of County laws to the facts constituted an abuse of discretion. See *Pescosolido v. Smith* (1983) 142 Cal.App.3d 964, 969-70 [191 Cal.Rptr. 415] (refusal to order certificate of compliance reviewed under substantial evidence test).

## III.

## THE COUNTY PROPERLY ISSUED A CERTIFICATE OF COMPLIANCE BECAUSE THE LOT WAS LEGALLY CREATED.

The certificate of compliance procedure is part of the Subdivision Map Act, Government Code §66499.35, and allows a local agency (at the request of a property owner or vendee under a contract of sale) to issue a certificate of compliance with respect to the Subdivision Map Act "and regulations thereunder". The Subdivision Regulations of the County of Santa Barbara are

contained in Chapter 21 of the County Code. The local regulation respecting certificates of compliance is §21-4(f), which states in pertinent part:

> Where a lot or parcel of land was divided by a ... deed or contract of sale recorded in the office of the county recorder prior to July 27, 1955, ... which lot or parcel conformed to all subdivision and zoning ordinance requirements when created, no lot split or subdivision shall be required to establish such lot or parcel as a separate and valid lot or parcel pursuant to this article [Chapter 21], provided, however, no such lot shall be considered to be an approved building site unless it conforms to the requirements of the applicable zoning ordinance when application for a building permit is made. ...

Government Code § 66499.35 provides that upon making a determination that a parcel of real property complies with the provisions of the Subdivision Map Act, the local agency shall cause a certificate of compliance to be filed for record with the County Recorder. If it determines that the property does not comply with the Map Act, "it shall issue a certificate of compliance or a conditional certificate of compliance". § 66499.35(b). Some initial determination has to be made whether or not there was a violation of the Map Act, as claimed by Neighbors.

The propriety of the County's determination that the parcel was created lawfully is the salient issue. The Neighbors acknowledge that if Lot 6 was created before July 27, 1955, it would not be in violation of the Map Act. They assert however, that the lot in question was combined with a neighboring lot and then divided by sale in 1972, after the effective date of the local ordinance restricting such divisions.

However, even if the County determined that the lot was created unlawfully, Government Code § 66499.35 is authority for the issuance of a Certificate of Compliance (without conditions). In this way the section is a remedial provision that allows the County to validate a past unlawful act.

The result of the determination that was made by County is that no conditions on development were considered in the certificate of compliance proceeding nor could they be applied to the certificate recorded.

If Neighbors are correct, a remand should be made directing the County to exercise discretion whether to impose conditions to remedy the situation, or choose, pursuant to that section, to simply issue the unconditional certificate, anyway. In either event the County should not be prohibited from issuing the certificate, but merely directed to consider remedial conditions on such certificate, as appropriate to the circumstances.

The County determined that the separate legal parcel was first created prior to July 27, 1955 by deeds (actual conveyances of the property in question) 1946 and in 1952. (AR 188) Further, County found that there was no voluntary action taken by the owners to record a merger of the parcel with the adjacent parcel, and no legislative action taken to force a merger of parcels pursuant to the Map Act. (AR 188).

This last finding was necessary because there has grown up an elaborate body of legislation regarding the forced merger of parcels, now found at Government Code § 66451.10, et seq. Parcels which were merged for Map Act purposes under provisions that conflict with such legislation were deemed to be unmerged by operation of law unless certain protection were adopted. The County has taken no action as would be required under Government Code § 66451.30, so even a merger by ordinance would have been undone.

Neighbors assert that to effectuate the zoning decision, it was necessary to effect the merger of Lot 5 and Lot 6, but have been unable to point to any act or proceeding by which the merger did occur.

The only reasonable resolution of the evidence before the Board of Supervisors, and before the Court even today, is that the separate lot did exist before the adoption of ordinances which require the approval of all lot

divisions (July 27, 1955), that it was the desire and determination of the County not to permit it to be developed until combined into one parcel with the adjoining parcel, but that no affirmative action or order occurred which would satisfy the requirements of the Map Act regarding merger of lots under Government Code § 66451.30.

The Board of Supervisors clearly has wide discretion to issue a certificate of compliance. The most the Neighbors can show is that the Board failed to take advantage of an opportunity that they may have had to condition the issuance of the certificate of compliance requested so that the zoning decision would be reinforced. To overcome the exercise of discretion admitted such Petitioner alleges no compelling error of determination, no abuse of discretion, no harm or damage, and no affirmation that the result would be substantially different if action were taken as the Neighbors request.

The Neighbors allege that the County will not enforce the zoning restrictions limiting the use of Lot 6, to their harm and the harm of the community. However, it is plain from the combined cases that the County regards the restrictions as applicable and enforceable under its zoning laws and intends to enforce them. This concern, however, is not related to the determination of consistency with the Map Act and should be disregarded in this context.

The allegation of the Petition that the County would be required, if Neighbors are successful, to issue a conditional certificate of compliance, in place of a certificate of compliance, is simply wrong under the statute. Government Code § 66499.35. Neighbors have not alleged, presented or argued any harm or damage, nor any circumstances demonstrating any abuse of discretion or whimsical or arbitrary action. The petition in the compliance case must fail for failure to show breach of any ministerial duty as required by C.C.P. § 1085.

## IV.

## THE COUNTY PROPERLY DENIED A LAND USE PERMIT BECAUSE THE LOT WAS AND IS SUBJECT TO A VALID RESTRICTION ON CONSTRUCTION.

The basic rule is that the Subdivision Map Act and the municipal police power are separate and distinct sources of regulatory authority. In *McMullan v. Santa Monica Rent Control Board* (1985) 168 Cal.App.3d 960 [214 Cal.Rptr. 617], the Court of Appeal held that the Subdivision Map Act:

> ... does not operate to defeat the legitimate exercise of the police power of a municipality in connection with matters outside the scope of the act and which are not calculated to circumvent its express provisions.... [W]hile the act may be the final word respecting the subdivision process, it does not purport and may not be understood to be preemptive of all land use regulation. Id. at 961-62.

See *Santa Monica Pines, Ltd. v. Rent Control Board* (1984) 35 Cal.3d 858, 869 [201 Cal.Rptr. 593] (restriction on condominium conversion in rent control law with "evident, independent police power source and purpose" not preempted by Subdivision Map Act); *Gisler v. County of Madera* (1974) 38 Cal.App.3d 303 [112 Cal.Rptr. 919] (recordation of old residential subdivision map does not vest right to use property in light of later zoning ordinance setting minimum lot size and agricultural use).

The County does not regard the restriction of case 58-V-12, in and of itself, as creating a combination of Lots 5 and 6.[2] The case was a zoning

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[2] This is the neighbors' position. See Girvan Declaration ¶ 8 ("the action [in 58-V-12] was not in interpretation or enforcement of the provisions of the Zoning Ordinance, but rather was the approval of the combination of two parcels to create a one-acre building site; and the combination of the parcels was completed as required by then existing ordinances") (AR 404). If this view prevails, the Certificate of Compliance should not have issued and *a fortiori* the Land Use Permit to build on Lot 6 should never have issued.

variance matter, and the restriction was issued in conjunction with the granting of a building permit for a residence on Lot 5, which, prior to the variance, was a substandard, non-buildable lot. An examination of the case file in 58-V-12 shows:

- The "request of Amelia Acres for determination of permitted building site on Lot [5] ... known as 1370 East Valley Road" (AR 398).
- "Approval of combination of Lots [6] and [5] ... as one building site and issuance of a permit for a building thereon ...." (Id.)
- The Land Use Rider states "Requirements to be made a part of Application & Permit" at the top and "Lots [5] and [6] to be combined to create one (1) building site" at the bottom. The drawing in the Rider shows a structure on Lot 5 and the notation "This Line Eliminated" on the boundary between Lot 5 and Lot 6. (AR 399).
- The Secretary to the Planning Commission initialed the Rider indicating "Zoning Approval". (Id., see Girvan Declaration AR 402-03)

Thus, when Ms. Acres applied for a variance, neither of the lots were buildable. Whether or not the notation on the Rider that the boundary between the lots was "eliminated" constituted a recombination or not, the intent of the Planning Commission's action was to restrict Lots 5 and 6 to one buildable lot and to approve a building permit for a residence on Lot 5. The remaining portion of the property covered by the decision and the Rider — Lot 6 — was restricted by the decision. Lot 6 is thus not buildable by virtue of the zoning variance procedure, that is, by a decision issued under the County's police power.

As such, the restriction imposed by the decision in 58-V-12 runs with the land and cannot be vitiated by subsequent sales or other private actions. The principle is relatively venerable, and was in existence at the time 58-V-12 was imposed:

> Special use permits under zoning ordinances run with the land. A variance for the use of property in a particular matter is not personal to the owner at the time of the grant, but is available to any subsequent owner, until it expires according to its terms or is effectively revoked, and this is true, even though the original owner did not act on it. *Cohn v. County Board of Supervisors* (1955) 135 Cal.App.2d 180, 184 [286 P.2d 836].

The principle remains good law. *County of Imperial v. McDougal* (1977) 19 C.3d 505, 510 [138 Cal.Rptr. 472] (special permits allowing uses incompatible with applicable zoning run with the land, citing *Cohn*). It is axiomatic that both the benefits and the burdens of variances, use restrictions, and other police power conditions on the use of property continue in force despite changes of ownership and other private actions.

The vitality of the rule that police power restrictions run with the land is not vitiated by the contention that 58-V-12 and 70-V-41 did not result in a "variance". The Planning Commission action was through a variance procedure and resulted in a building permit and in relief from the minimum lot size under the applicable zoning. Permit restrictions must be read in context and in light of their applications. See *Sports Arenas Properties v. City of San Diego* (1985) 40 Cal.3d 808, 815 [221 Cal.Rptr. 538] ("a permit must be read in light of the application for it, and when that is done it is apparent that the terms of the permit are clear"). In this case, it is apparent that the whole group of lots in the neighborhood were considered at once in 1958 and in 1970, and that the variances and building restrictions were crafted so as to permit good neighborhood planning and adequate open space. Lot 6 was specifically restricted in consideration of the approval of the building permit for Lot 5 and the division of the 1.5 acre parcel first into two, then into three lots of less than 1 acre. The Planning Commission decision was a police power

action intended to preserve community planning and afford some relief from strict application of the zoning laws. It was not intended to be a mere suggestion that private action occur in the future. Whether or not the decision effected the combination of the two adjoining parcels, the building restriction was incorporated into the building permit for Lot 5 and the decision — variance or not — runs with the land.

*Scrogings v. Kovatch* (1976) 64 Cal.App.3d 54 [134 Cal.Rptr. 217], is an example of the principle that the effects of police power decisions survive the failure of private parties to effectuate the requirements of permit decisions. In this case, a subdivision map contained a written endorsement, as required by the Planning Commission, that the property could not be re-subdivided "until such time as public sewers are available". A deed of sale of one of the subdivided lots did not contain the required restriction; a subsequent purchaser also acquired the property under a deed that did not refer to the restriction and was issued a lot split permit under local ordinance. However, the county took the position that the lot split permit did not constitute permission to violate conditions established by the subdivision map; it denied an application for a building permit to build a residence on the unimproved portion of the lot. The Court of Appeal held that the restriction on the face of the map and the refusal of a zoning clearance reflected a valid exercise of the county's police power:

> [T]he condition attached to [the] approval of the final subdivision map ... was itself valid as a regulation adopted in a proper exercise of the police power. The failure of the subdivider to include appropriate restrictions in the deeds which he issued prevented the creation of an equitable servitude. But creation of an equitable servitude is not the only means available to secure restrictions on land use necessary to protect public health: another method is for a public agency ... to withhold its consent where a development is attempted in violation of a lawful regulation.

> [The subdivider] sold the subject lot to respondent's predecessor in title in violation of a lawfully imposed condition in that he failed to insert in the deed the required restrictions. Respondents purchased their lot without notice of the violation. Although the restriction cannot be enforced against respondents as an equitable servitude, the general police power of the county ... is not vitiated by [the subdivider's] action. Id at 57-58.

The specific restriction on Lot 6 has not been rescinded. Indeed, the County was asked to revoke the restriction in 1970; the Acres' withdrew the request at the time of the hearing in light of substantial community opposition.

The restriction was not impliedly rescinded by the replacement of old Zoning Ordinance No. 453 by currently applicable Article IV. With respect to parcels that are not specifically restricted, Article IV differs from Ordinance No. 453 in that it allows construction of a dwelling on a legally created although sub-standard parcel (§35-419.6(2), AR 363), whereas Ordinance No. 453 required that any parcel satisfy the minimum area requirements of the zoning district before it constituted a building site (§11, AR 364).

The provision that dwellings may be built on substandard lots that were legally created does not expressly and should not impliedly apply to parcels that are specifically limited by "no building site" designations or similar permit restrictions. The County does not interpret its zoning laws in such a fashion and did not do so in this case. Rather, it found that found that "the restrictions developed as a result of the past applications, 58-V-12 and 70-V-41, are of particular application to the Property and restrict its development as a matter of application of the current provisions of the County Zoning Ordinance" (Finding P-13, AR 577)

To negate the enforceability of specific restrictions and applications of zoning laws would run contrary to basic purposes of the Montecito Zoning

Ordinance, including maintenance of the rural residential character of the community, guidance of the orderly growth and development of the County, and prevention of overcrowding of land. Article IV § 35-400.

Implied repeals are disfavored. It should be presumed that the local legislature intended to continue valid limitations imposed under pre-existing law with no interruption of continuity "except as explicitly modified by language admitting of no doubt of that purpose". *Berry v. Recorder's Court of Town of West Orange* (1940) 11 A.2d 743, 745 [124 N.J.L. 385]. As discussed earlier, permit conditions run with the land.

*Keizer v. Adams* (1970) 2 Cal.3d 976 [88 Cal.Rptr. 183], relied on by Hawkes in his appeal (Curtin letter, AR 382) does not apply to bar a building permit in this case, in light of the issuance of the certificate of compliance. There, an innocent purchaser sought a building permit for a parcel which had been illegally subdivided without a map. The version of the Subdivision Map Act then in force did not contain a provision for the obtaining of a certificate of compliance; the Court observed that "the act does not require the innocent purchaser to suffer for a violation by his grantor, of which he has neither knowledge nor means of discovery". Id. at 980. Further, the holding in *Keizer* does not extend to zoning restrictions, as opposed to illegal subdivisions. The Supreme Court noted:

> The writ granted below merely requires consideration of the building permit application "without regard" to the Subdivision Map Act or [like provisions of a county] ordinance. Requirements of zoning laws, building codes, lot-size limitations, and other applicable ordinances of the county are not affected. Id. at 981.

Bear in mind that at the time he acquired the property in 1985, Hawkes was neither remediless nor ignorant. He could have obtained a certificate of compliance before he purchased, pursuant to § 66499.35. He could have

obtained a written determination of parcel validity based upon careful research of the records. He did not. Rather, he obtained both Lot 11 and Lot 6 upon foreclosure of the Parks' equity. He "relied" on an oral statement from a counter technician which he interprets as an assurance that Lot 6 was separate, "legal", and buildable.

Such "reliance" is insufficient to extend the rule in *Keizer* to vitiate zoning restrictions placed on a specific parcel. Hawkes was an experienced, professional real estate broker, held to knowledge of zoning principles and the communities in which he dealt. He did business in Montecito; indeed he was a party to the transaction between the Beggs' and the Parks' resulting in the sale of Lot 6 for a fraction of its value as a buildable lot. He must have known that Lot 6 was half the size of the minimum for the zoning district. He knew that Lot 6, unlike its surrounding properties, was vacant. If he had no knowledge of the specific restriction, he certainly could ascertain from the totality of the circumstances that he should make a serious inquiry. In common parlance, Hawkes should have sensed that something was fishy; he could have and should have gotten a definitive written determination from the County as to the existence of zoning restrictions on the landlocked, substandard parcel he acquired.

Estoppel against the enforcement of the zoning laws is not to be lightly applied, because of the public interest at stake. The principle was well stated in *Pettit v. City and County of San Francisco* (1973) 34 Cal.App.3d 813, 823 [110 Cal.Rptr. 262]:

> In the field of zoning laws, we are dealing with a vital public interest — not one that is strictly between the municipality and the individual litigant. All the residents of the community have a protectable property and personal interest in maintaining the character of the area as established by comprehensive and carefully considered zoning plans in order to

> promote the orderly physical development of the district and the city and to prevent property of one person from being damaged by the use of the neighboring property in a manner not compatible with the general location of the two parcels. These protectable interests further manifest themselves in the preservation of land values, in aesthetic considerations and in the desire to increase safety by lowering traffic volume. To hold that the City can be estopped would not punish the city but it would assuredly injure the area residents, who in no way can be held responsible for the City's mistake. Thus permitting the violation to continue gives no consideration to the interests of the public in the area nor to the strong public policy in favor of eliminating non-conforming uses and against expansion of such uses. (citations omitted)

These principles and policies apply here. The zoning restriction precluding the building on Lot 6 was imposed for the benefit of the community. It was adhered to for many years. The County did nothing to rescind it and indeed refused to rescind it based on community concern. The County has continuously striven to maintain and enhance the character of the community through upgrading and enforcement of Comprehensive Plan policies preserving environmental values, adequacy of resources, and quality of residential neighborhoods. The zoning restriction, which benefitted both the community and the owner seeking the variance, should not be judicially required to disappear merely because Hawkes did not find it, may have orally been advised the lot was "legal" or "buildable", and the County issued a certificate of compliance based on a finding that the parcel was legally created by old deed and that the restriction was a zoning matter not an instrument effecting the combination of parcels.

County admits that the restriction is not easily found and is not apparent on the face of current records as to Lot 6, but must be located by careful research of the history of the parcel, its "parent parcel", and the neighborhood.

The histories of properties and County actions in Montecito are long and sometimes obscure; this is why the County employs trained professionals who can and will do the thorough work required to issue an accurate, written opinion. The County records — particularly the older ones — are not readily accessible to or understandable by the general public. The information immediately available to busy counter technicians often does not suffice as the basis for a reliable conclusion as to parcel restrictions and parcel validity. It may well be good practice to record zoning restrictions against all affected parcels, but recordation of land use decisions is by no means universal and is nowhere required by any statute, ordinance, or case. Hawkes clearly had the means to discover the truth — that the County had long ago decided that Lot 6 could not be built on — simply by asking for a written parcel validity determination. Whether or not Hawkes is as innocent as he claims to be, or was told what he claims he was told, the public policies underlying the restriction remain in effect and the County should not be estopped from enforcing its zoning determinations by denying Hawkes a land use permit.

## V.

## THE DENIAL OF A LAND USE PERMIT DID NOT DEPRIVE HAWKES OF ALL USE OF HIS PROPERTY AND THERE IS NO TAKING

Even if Hawkes cannot build on Lot 6, it is nonetheless valuable. He may sell it to one of his neighbors, use it for recreational purposes (as the Beggs did), or use or sell it in combination with his residence (Lot 11). Any of these uses is valuable.

A diminution in value as a result of a land use regulation does not constitute a taking under *Agins v. Tiburon* (1980) 447 U.S. 255, or *First*

*English Evangelical Lutheran Church of Glendale v. County of Los Angeles* (1987) 428 U.S. 384, unless the regulation does not substantially advance a legitimate public purpose or the owner has been deprived of substantially all use of his property. See *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles* (1989) 210 Cal.Rptr. 1353, 1365-72 (on remand from Supreme Court, no compensation because no deprivation of "all use"); *Gherini v. California Coastal Commission* (1988) 204 Cal.App.3d 699, 713-14 [251 Cal.Rptr. 426]; *Associated Homebuilders, Inc. v. City of Walnut Creek* (1971) 4 Cal.3d 633, 639-40 [94 Cal.Rptr. 578].[3] This is not the case here. While Hawkes may, if the decision denying the land use permit is overturned by writ of mandate, have suffered some economic loss (a matter reserved for a later stage of trial), he has, during the interim between the denial of the permit and the reinstatement of the condition, been able to enjoy, use, and sell the property, and the value of Lot 11 has been increased by the open space of the adjacent Lot 6.

Thus, even if this Court finds that the County's action in denying the land use permit was improper, it should grant a writ of mandate directing the County to issue a land use permit and find that there has been neither a temporary nor a permanent taking of property.

## CONCLUSION

The certificate of compliance was properly issued by the County because Lot 6 was created by deed before the County required formal subdivision proceedings. This determination is not affected by either the existence of the

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[3] The Court of Appeal on remand in *First English* emphasized that the Supreme Court only decided that the Constitution guarantees a remedy for "temporary takings" but did not alter the substantive law as to when a taking has occurred. 210 Cal.App.3d at 1359. It is not necessary for this Court to resolve whether there is any difference between the formulation of when there is a "taking" under *Agins* as opposed to *First English*, as there is both a substantial government interest in zoning and no deprivation of "all use" of Hawkes' property. See 210 Cal.App.3d at 1365-66.

zoning restriction precluding building on Lot 6 or by the state of Hawkes' knowledge of the restriction.

The land use permit was properly denied by the County because the 1958 and 1970 decisions properly and specifically restricted the building of a residence on the property as a matter of County zoning law. This restriction runs with the land and remains in force. The validity of this zoning restriction was not vitiated by the issuance of the certificate of compliance, by the change in the general Montecito zoning ordinance, or by Hawkes' professed ignorance or reliance on alleged oral statements of counter technicians.

The restriction on Lot 6 serves a legitimate government interest in good planning and zoning; the lot, even though not buildable, is both useful and valuable to Hawkes and no compensable taking of property has occurred.

For all of the foregoing reasons, the Petitions for Writ of Mandate should be denied in their entirety and the County should be granted judgment on the complaint for declaratory relief and inverse condemnation.

Dated: November 17, 1989

Respectfully submitted,

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SANTA BARBARA

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|---|---|
| EMMET J. HAWKES and SALLY HAWKES,<br><br>Petitioners and Plaintiffs,<br><br>v.<br><br>THE COUNTY OF SANTA BARBARA and its BOARD OF SUPERVISORS<br><br>Respondents and Defendants,<br><br>and<br><br>LELAND M. CRAWFORD, JR., FRANCESCA J. CRAWFORD, SALLIE G. KAYSER, ERNEST R. KIRSHTNER, MARY V. KIRSHTNER, MARSHALL A. ROSE, HEIDI P. ROSE, DAVID W. VAN HORNE, and POLLY H. VAN HORNE,<br><br>Real Parties in Interest.<br>AND CONSOLIDATED CASE | CASE NO. 169598<br><br>Consolidated with Case No. 167375<br><br>REAL PARTIES IN INTEREST TRIAL BRIEF |

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This brief is respectfully submitted on behalf of LELAND M. CRAWFORD, JR., FRANCESCA J. CRAWFORD, SALLIE G. KAYSER, ERNEST R. KIRSHTNER, MARY V. KIRSHTNER, MARSHALL A. ROSE, HEIDI P. ROSE, DAVID W. VAN HORNE, and POLLY H. VAN HORNE (herein "the Neighbors"). The Neighbors are the Real Parties in Interest in Case No. 169598 filed by Emmet J. Hawkes and Sally Hawkes (herein collectively "the Hawkes"), which is generally referred to as the "Zoning Case". Some of the Neighbors (Crawfords, Van Hornes, and Kayser) are the Petitioners and the Hawkes are Real Parties in Interest in Case No. 167375, generally referred to as the "Certificate of Compliance Case". The County of Santa Barbara ("County") and its Board of Supervisors are Respondents and Defendants in both cases.

## I. CENTRAL ISSUES

The central issue in the Certificate of Compliance Case is whether certain action taken in 1958 by the County and the then owners of the Subject Property was sufficient to cause its combination with an adjoining parcel, such that its later sale resulted in a violation of the Subdivision Map Act and related County ordinances.

The central issue in the Zoning Case is whether Hawkes should be excused from complying with a restriction on the use of the Subject Property which was imposed by the County in 1958 and reaffirmed in 1970.

## II. STATEMENT OF FACTS

There appears to be no dispute regarding the facts surrounding the County's prior actions with respect to the Subject Property. Rather than restate these facts here, the Court is respectfully directed to the Neighbors' Statement of Facts in the Neighbors' Memorandum of Points and Authority in Support of Petition for Writ of Mandamus filed July 24, 1987, in the Certificate of Compliance Case (pages 4 through 10) (herein "Neighbors' Certificate Case Memorandum"). In an effort to eliminate a redundant statement of the facts and determinations made after the filing of Neighbors' Certificate Case Memorandum, Neighbors adopt generally the portion of the Statement of the Case in the County's Trial Brief, relating to this period, while reserving the right to object to the County's characterization of those facts which are adverse to Neighbors' position in Certificate of Compliance Case.

## III. SCOPE OF REVIEW

1. Certificate of Compliance Case. Neighbors' petition seeks a writ of ordinary (traditional) mandamus to compel the County to cancel the Certificate of Compliance it issued to the Subject Property and to issue its Conditional Certificate of Compliance pursuant to Government Code Section 66499.35(a) and (b). As discussed at pages 10 through 13 of Neighbors' Certificate Case Memorandum, the County had a ministerial, non-discretionary obligation which it failed to perform and for which judicial review



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is available by ordinary mandamus. Youngblood v. Board of Supervisors (1978) 22 Cal.3d 644, 653.

When the purpose of the ordinary mandamus is to review a local agency decision relative to a ministerial act, the Court's inquiry involves whether there is a clear, present, and ministerial duty on the part of the agency. Benny v. City of Alameda (1980) 105 Cal.App.3d 1006, 1012. Here Neighbors intend to establish the County's clear, present, and ministerial duty by establishing, primarily from the administrative record, the combination of the Subject Property with adjoining property in 1958. It should be noted, however, that in this mandamus action, the court is not limited to a review of the administrative record but may in fact receive additional evidence. No Oil, Inc. v. City of Los Angeles (1974) 13 Cal.3d 68, 79.

2. Zoning Case. Hawkes' counsel has filed the Zoning Case as a petition for administrative mandate [CCP Section 1094.5], petition for ordinary mandate [Section 1085], complaint for declaration of rights [CCP Section 1060], and inverse condemnation. Hawkes may not pursue such diverse alternate remedies.

The action complained of by Hawkes is essentially the County's failure to grant him relief from the conditions which the County imposed upon the Subject Property in 1958 and reaffirmed in 1970. As such he is requesting relief or a variance from prior conditions imposed on the substandard Subject Property, which is the proper subject for judicial review under administrative mandamus. Topanga Association for a Scenic Community v. County of



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Los Angeles (1974) 11 Cal.3d 506, 514. As contemplated by CCP Section 1094.5(a) the denial of the land use permit which Hawkes seeks was, pursuant to Section 35-489 of Article IV of Chapter 35 of the County Code ("the Zoning Ordinance"), the subject of a final administrative decision made as a result of a proceeding in which by ordinance a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the County. For further distinction of the bases for application of administrative mandamus, see Arnel Development Co. v. City of Costa Mesa (1980) 28 Cal.3d 511, 518 fn. 8.

The consequences of the Zoning Case being an action in administrative mandamus pursuant to CCP Section 1094.5, are three-fold. First, the judicial inquiry is essentially limited to whether there has been a prejudicial abuse of discretion, which will not be found if the County's findings are supported by substantial evidence in light of the whole record. CCP 1094.5(c); Topanga, supra, at 514; Pacifica Corp. v. City of Camarillo (1983) 149 Cal.App.3d 168, 178; and Paoli v. California Coastal Commission (1986) 178 Cal.App.3d 544, 550.

Secondly, the Court's inquiry is limited to a review of the administrative record, receiving additional evidence only if that evidence was unavailable at the time of administrative hearing or improperly excluded from the record. CCP Section 1094.5(e); No Oil, Inc., supra. at 79. Hawkes does not contend that new evidence has been discovered which was unavailable at the time of the



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administrative hearing, nor that evidence was improperly excluded from the record.

Thirdly, a matter qualifying for judicial review by administrative mandamus is precluded from proceeding in the form of a complaint for declaratory relief under CCP Section 1060. See Agins v. City of Tiburon (1979) 24 Cal.3d 266, 273; Aptos Seascape Corp. v. County of Santa Cruz (1982) 138 Cal.App.3d 484, 494 fn.4.

IV. CERTIFICATE OF COMPLIANCE CASE

Neighbors' substantive analysis of the County's failure to perform its ministerial act from which Neighbors seek relief in the Certificate of Compliance Case, is fully and carefully reviewed in the Neighbors' Certificate Case Memorandum (pages 10 through 27). Rather than repeat or summarize this analysis here, the Court is respectfully requested to read such brief.

V. ZONING CASE

1. Validity of Condition. The record clearly reflects that upon the two previous occasions that the County of Santa Barbara was asked to consider the use of the Subject Property as a residential site, in 1958 and in 1970 under 58-V-12 and 70-V-41, respectively, it determined that the Subject Property is not adequate for a building site. In each instance the County proceeded to grant special relief to other properties (in 1958, permitting a residence to be constructed on an adjoining substandard lot, and in 1970, permitting three substandard lots to be created) on the condition that the Subject Property not serve

as a building site. It is unclear whether Hawkes challenges the validity of such condition. Such a challenge is not well founded.

Conditions may be attached to the granting of a variance in order to preserve the general purposes and intent of the zoning ordinance. Bringle v. Board of Supervisors (1960) 54 Cal.2d 86, 88; Santa Clara v. Paris (1977) 76 Cal.App.3d 338, 342 (the failure to comply with a condition of a variance constitutes failure to comply with the zoning ordinance entitling the municipality to bring enforcement action).

It is proper to provide for conditions to be attached to zoning variances in order that the general purpose and intent of the zoning ordinances may be preserved. Edmonds v. County of Los Angeles (1953) 40 Cal.2d 642, 652.

Prior owners of the Subject Property who have asked the County for discretionary relief from the condition have not challenged its validity. (See Stanley C. Hatch's letter June 18, 1970, requesting relief in 70-V-41, AR 307).

2. Application of Condition to Subsequent Owner. It is also unclear whether Hawkes challenges the fact that the condition on the Subject Property binds successor owners. Such a challenge is not supported by the law.

Special zoning relief or permits with respect to specific lands, such as variances or conditional use permits, are binding upon future owners of the land. County of Imperial v. McDougal (1977) 19 Cal.3d 505, 510 (both the benefits and limitations of a conditional use permit run with the land; a purchaser takes no

greater rights than his predecessor possessed); Cohn v. County Board of Supervisors (1955) 135 Cal.App. 2d 180, 184 ("A variance for the use of property in a particular manner is not personal to the owner at the time for the grant, but is available to any subsequent owner, until it expires according to its terms or is effectively revoked, and this is true, even though the original owner did not act on it.").

3. Hawkes' Claimed Innocence. In his declaration, Hawkes claims that twice he went to the County's Department of Resource Management ("DRM") to inquire orally whether there were any restrictions applicable to the Subject Property, and that twice he was told orally by a DRM counter clerk that she did not see any restrictions. He therefore appears to claim that the County is somehow estopped from applying the condition to him. Such argument is naively advanced by an experienced, licensed real estate broker such as Hawkes.

There were two avenues by which Hawkes could have sought a definitive determination regarding the Subject Property, neither of which he availed himself of. First, as a purchaser of the Subject Property, he was entitled to seek, prior to his purchase, a Certificate of Compliance. By reason of the testing and the ongoing continuing educational requirements required of real estate broker licensees, process, Hawkes is expected to know of the availability of the Certificate of Compliance procedure. Had he not known this procedure, he needed only to ask the DRM counter clerk how he could obtain a definitive determination. Had he

requested a Certificate of Compliance, he would have been alerted to the condition in question.

Secondly, Hawkes could have requested, in writing, a written parcel validity determination from DRM. In this post-Easton era [Easton v. Strassburger (1984) 152 Cal.App.3d 90, 98], real estate brokers and salespersons have become increasingly sensitive to the requirement of obtaining written verification from the appropriate governmental agencies in order to obtain definitive rulings as to the status of properties. As elaborately pointed out DRM employee Charles King in his deposition, the parcel validity procedure is intended to reveal conditions which exist upon the use of individual parcels.

But most fundamentally, are the serious questions regarding Hawkes' claimed lack of notice of the Subject Property's non-buildable status. These factors, which should have served as "bells and whistles" to a real estate professional such as Hawkes, are as follows:

A. The Subject Property is an interior property without an established access easement;

B. The Subject Property is a one-half acre property in a one-acre zoned district;

C. The Subject Property has never been improved with a structure or an improvement requiring a land use permit;

D. The Subject Property had never been utilized to the extent necessary to even require the County to issue it a street address;

E. The Subject Property had been sold just six years before his purchase for an agreed purchase price of $25,000, stated by Hawkes to be "an excellent price for the buyer," (AR 94) transaction to the buyer," a

transaction in which Hawkes served as a real estate advisor to the buyer and which he learned that the buyer and seller agreed that the property would not be used as a separate building site but would only be used as an extension of the backyard of the buyer's property; and

F. The seller of the Subject Property apparently advised the buyer and Hawkes that the County would not allow a residence to be constructed on the Subject Property.

For Hawkes to claim innocence in light of all these factors which would have caused an ordinary, reasonably prudent person to request a very careful evaluation of the property, is preposterous.

4. No Vested Rights. Hawkes is attempting to use his innocence and a quasi-estoppel argument to bootstrap himself into a vested rights position. Such cannot be achieved.

First, it is clear that an owner of undeveloped has no vested right in existing zoning or permitted uses; he has no right to have his real property zoned for its economic highest and best use. Gilliland v. County of Los Angeles (1981) 126 Cal.App.3d 610, 617. In order to obtain such a vested right, a property owner must perform substantial work of improvement and incur substantial liabilities, both in good faith reliance upon a permit validly issued by the government. Avco Community Developers, Inc. v. South Coast Regional Commission (1976) 17 Cal.3d 785, 791. And unless an owner possesses all necessary permits, the mere expenditure of funds or commencement of construction does not vest any rights in the contemplated development. Billings v. California Coastal Commission (1980) 103 Cal.App.3d 729, 735.

Further, the vested rights doctrine applies only after one has expended actual construction costs, not merely land acquisition costs. Raley v. California Tahoe Regional Planning Agency (1977) 68 Cal.App.3d 965, 985-986; Walnut Properties, Inc. v. City Council (1980) 100 Cal.App.3d 1018, 1024 (acquisition of a closed neighborhood theater did not give rise to a vested right to operate).

Finally, since a permittee does not acquire vested rights under an invalid permit even though expenditures have been made in good faith, Pettit v. City of Fresno (1973) 34 Cal.App.3d 813, 819-820, Hawkes cannot claim that erroneous advice of a counter clerk constitutes a basis for a vested right.

5. County is Not Estopped to Assert Condition. Hawkes seeks to estop County from asserting the condition based upon his alleged reliance upon a brief discussion with a counter clerk prior to his purchase from a bank following its foreclosure of the Subject Property and the adjoining improved property with which it had been used. Hawkes' argument does not satisfy the rare and extraordinary combination of government conduct and extensive reliance thereon which California courts require to invoke the doctrine of equitable estoppel.

The elements of the doctrine are (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon or must so act that the party asserting the estoppel has a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4)

he must rely upon the conduct to his injury. City of Long Beach v. Mansell (1970) 3 Cal.3d 462, 488-489; Penn-Co. v. Board of Supervisors (1984) 158 Cal.App.3d 1072, 1080. The record reflects significant question whether a counter clerk is an agent sufficient to apprise the County, or whether she had, on behalf of the County, the requisite intent, and whether Hawkes was "ignorant" of the true state of facts.

"Generally the doctrine of estoppel is disfavored. And it will be applied where the party claimed to be estopped has obtained some unconscionable advantage. Anza Parking Corporation v. City of Burlingame (1987) 195 Cal.App.3d 855, 861 (citations omitted).

Furthermore, insofar as a governmental entity cannot be estopped from raising the invalidity of a condition, Anza Parking Corp., supra. at 862, neither can the County be estopped from asserting the validity of a condition.

6. Innocence is No Excuse. A case with facts similar to the present situation is Scrogings v. Kovatch (1976) 64 Cal.App.3d 54, 57-58. The County of Sonoma approved a subdivision upon the condition that no further division of the lots would be permitted until public sewer service was provided. The owner was directed to record a restriction to reflect the condition. He failed to do so. He conveyed a lot to a third party who had no notice of the violation. The new owners split the lot in violation of the condition and then sought a building permit for the new

unimproved lot. The County Planning Commission refused to issue the land use permit.

The owners brought an action, arguing that the restriction could not be enforced against them as an equitable servitude. The court agreed but concluded that under the general police power the County may enforce the condition by refusing to issue consent to the development of the law.

In the present situation the County officials took such action as they considered necessary to implement the condition that Subject Property not be a building site. Approximately 30 years later the County has determined that such action was not sufficient under today's Subdivision Map Act to actually combine the properties. Following the principles of Scrogings, the County may nonetheless enforce the condition under its police power.

7. Certificate of Compliance Does Not Satisfy Zoning Conditions. Hawkes argues that the County's issuance of a Certificate of Compliance entitles him to a land use permit to build a residence on the Subject Property. This is not the case.

The Subdivision Map Act does not operate to defeat the legitimate exercise of the police power of municipalities in connection with matters outside the scope of the Act and which are not calculated to circumvent its expressed provisions. McMullan v. Santa Monica Rent Control Board (1985) 168 Cal.App.3d 960, 962-963. To the same effect is Santa Monica Pines Ltd. v. Rent Control Board (1984) 35 Cal.3d 858, 869 (a restriction on the removal from the rental housing market through condominium conversion is based

upon an independent police power source and purpose, and is therefore not preempted by the Subdivision Map Act where the property in question had recently been given tentative map approval for condominium conversion); CEB, California Subdivision Map Act Practice, Section 8.9 at 207-208 (1987).

## VI. CONCLUSION

Hawkes would have this Court believe that his innocence will result in his injury unless this Court grants him relief in both cases. Hawkes fails to note that by continuing to use the Subject Property in accordance with the County's 30-year-old restriction--that is as an extension of the backyard of his adjacent improved property (Lot 11)--he will profit handsomely over the $385,000 purchase price paid for both properties in 1985 while preserving the purpose and intent of the prior zoning actions in the neighborhood.

It is respectfully requested that this Court grant the Neighbors the writ of mandate they seek in the Certificate of Compliance Case and while upholding the County's restriction on the Subject Property in the Zoning Case.

Dated: November 17, 1989

Respectfully submitted,

PRICE, POSTEL & PARMA

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