By Wendy Lathrop, LS, CFM

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Those Old Non-conforming Lots

Many of us have had this experience: a client wants to develop a lot from an old subdivision map, but the lot doesn't conform to current zoning requirements. Can the lot be grandfathered to force approval? Should both sides compromise? Or do current ordinances prevail?

A company (*not* my client!) wants to build a new facility on land it has owned for many years. Its expert planner argues that this site is "particularly suited" for its purposes due to proximity to a county road, the vacant lot won't require demolition of existing structures, and the site's elevation (ranging from 2.8 to 4.0 feet) is good for drainage. This planner fails to address the fact that the site is zoned residential rather than industrial, and that it is unlikely the company would have asked a realtor to find it a site requiring at least nine variances. The zoning board of adjustment has not yet weighed in as to whether "particularly convenient" equates to "particularly suited".

Should the old undersized site be developed as desired? Or would waiving nearly every zoning requirement undermine the planning and zoning scheme meant to protect the health, safety, and welfare of the public? Does the age of the site have any bearing on the determination?

The California appellate court system published a decision this April regarding old lots and whether or not they must comply with new regulations. *Abernathy Valley, Inc. v. County of Solano* (*173 Cal. App. 4th 42, Court of Appeal of California, First Appellate District, Division Five, 2009*) looks at the history of subdivision recordation and land development regulation in order to come to its conclusions. While the laws cited are, of course, from California, the legal principles addressed have bearing on land use across the country.

Abernathy Valley owns 14 contiguous lots in "Wm. Pierce Subdivision No. 1", recorded in Solano County in 1909. The area is now zoned as "exclusive agricultural district", inconsistent with Abernathy Valley's plans for Lot 12. But if Abernathy Valley can get a "certificate of compliance" or "conditional certificate of compliance" from the County (as required by California law for parcels created before March 4, 1972), then development can proceed. The applicable statutes presume that parcels created prior to the 1972 date were "lawfully created" under specific circumstances, including lack of local regulation of land division and later purchasers' lack of either actual or constructive knowledge of ordinance violations.

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William Pierce created two maps in 1907 for the presently disputed subdivision. He recorded the first, entitled "Abernathie Field", in September of 1908, and the second, "Wm. Pierce Subdivision No. 1", in July of 1909. The first was apparently meant to be a sales map. Pierce sold lots by deed references only to the second map, although he sold five lots this way before recording the Pierce Subdivision map. Fortunately for the buyers, he also included metes and bounds descriptions in his deeds, so the lots could be located. By the time Pierce recorded the second map he did not own all the lots depicted on it, raising questions for the present-day Solano County's Board of Supervisors, which rejected the Planning Commission's vote to issue the requested certificate. The trial court reversed this action, but the Appellate Court upheld the Board of Supervisors' veto.

Why all the confusion? Aside from arguments about the propriety of recording a map without all the necessary signatures, shouldn't the current laws that are meant to grandfather ancient lots to make them developable solve the problem?

The Board of Supervisors' legal counsel noted in his recommendation to deny the requested certificate: "The California Supreme Court has said that the Subdivision Map Act's objectives are 'to encourage and facilitate orderly community development, coordinate planning with the community pattern established by local authorities, and assure proper improvements are made, so that the area does not become an undue burden on the taxpayers.'" *(Agenda Item for August 1, 2006 Board of Supervisors meeting)* In essence, this public protection is what the Court of Appeals upheld. The case evaluates both the intent and meaning of

the applicable statutes; both are steeped in history and original context.

In explaining its denial of the certificate of compliance, the Court noted that California has had subdivision legislation since 1893, but early laws merely addressed drafting requirements to assure a map's accuracy and completeness and to give local authorities better documents to accept or reject land shown on such maps as dedicated to public use. The effective laws during recordation of the Pierce Subdivision only addressed drafting standards, and it was not until 1913 that the Legislature began to give local governments meaningful control over land divisions, starting with review for frontage on public streets and highways, and evolving to the current array of stormwater management, planning, and zoning controls.

The 1907 laws controlling the 1909 Pierce Subdivision contained the first grandfathering clauses to exempt maps from current legal requirements–but only if those maps were filed or recorded before the effective date of current law and the maps were in compliance with laws effective as of the date of that filing or recordation. Considering that the 1907 laws addressed only drafting aspects of the map but did not regulate design and/or improvements, the court cannot find that Lot 12 of the Pierce Subdivision was "in compliance with or exempt from any law … regulating the design and improvement of subdivisions in effect at the time." (*Govt. Code § 66499.30, subd. (d)*),

Furthermore, lack of signatures aside, the Court notes that the 1907 subdivision law in effect when the Pierce Subdivision was recorded did not establish the validity of recorded subdivisions. "Rather, the law simply permitted the owner of the property to sell, offer for sale or lease a lot or parcel of land by reference to the recorded map." (*173 Cal. App. 4th 54*) The legal status of lots shown on a recorded map only changes through conveyancing, not by mapping. Lot 12 had never been sold as a separate tract, only together with adjoining mapped lots, and it had never been developed. The grandfathering clause offers no protection unless prior owners or developers relied on earlier laws to their detriment in attempting to use an old, non-compliant lot.

As with many surveying situations, understanding the original effective law provides proper guidance in determining modern-day practices.