Correspondence from the Applicant's Representatives

a. Letter dated received December 11, 2012 (dated November 8, 2012), by Michael Patrick Durkee
b. Letter dated July 24, 2012, by Michael Patrick Durkee
c. Letter dated July 10, 2012, by Michael Patrick Durkee
d. Letter of Appeal dated April 25, 2012, by Lisa Borba
e. Letter dated November 30, 2011, by Michael Patrick Durkee
f. Letter dated August 9, 2011, by Sanford Skaggs
g. Letter dated May 17, 2011, by Sanford Skaggs

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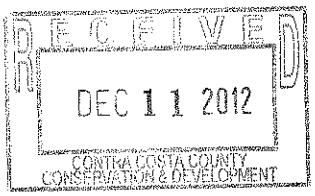
November 8, 2012

VIA ELECTRONIC MAIL



Honorable Chair Piepho
and Supervisors
Contra Costa County
Board of Supervisors
651 Pine Street
Martinez CA 94553

Re: Save Mount Diablo Appeal of Planning Commission Approval of Certificates of Compliance for Dutra Ranch County Applications CDZ11-0798, -0799, -0800, and -0801

Dear Honorable Chair Piepho and Supervisors:

We represent Ron Nunn, the owner of the Dutra Ranch, relating to the "Save Mount Diablo Appeal" filed by Mr. Seth Adams and Save Mount Diablo (collectively, "Appellant Save Mount Diablo"). As you will learn, the Planning Commission unanimously approved my client's request for four (4) separate Certificates of Compliance for the below-described "Remnant Parcels," located on the Dutra Ranch Property ("Planning Commission Decision").

For the legal and factual reasons set forth herein, we respectfully submit that the Save Mount Diablo Appeal must be denied.

I. SUMMARY

As discussed in detail below, under the controlling provisions of the Subdivision Map Act[1] (also referred to in this letter as the "Map Act") and the Contra Costa County Code, the July 24th, 2012 Planning Commission Decision was automatically "affirmed" by operation of law on October 1, 2012, without further action of the Board. For that procedural reason alone, we respectfully submit that the Save Mount Diablo Appeal must be denied.

As also discussed in detail below, without waiving our client's rights to such automatic affirmation, should the Board decide nonetheless to hear the substance of the Save Mount Diablo Appeal, we respectfully submit that the Planning Commission Decision was legally correct and reflective of controlling law. As such, we respectfully submit that the Save Mount Diablo Appeal must be denied.

As recognized by the County Planning Commission, there are at least two different ways to create new parcels from original parcels in California: (1) By recorded subdivision map, pursuant to the Subdivision Map Act; and (2) By recorded conveyance.

[1] Government Code section 66410 *et seq.*

The four (4) Remnant Parcels in question on this Save Mount Diablo Appeal were created lawfully over time by separate *conveyances* of land to governmental agencies as part of the condemnations that created Vasco Road ("Vasco Road Parcel"), and that created the Contra Costa Water District's transfer pipeline, as part of the Los Vaqueros Reservoir Project ("Pipeline Parcel"). The remaining "Remnant Parcels" (left over from each of these crisscrossing governmental condemnation conveyances) are the remains of those condemnation conveyances that were left in private ownership. These Remnant Parcels are no longer adjoining each other, are physically separated from each other by the Vasco Road Parcel and Pipeline Parcel, and do not and cannot ever physically touch. As such, they were properly recognized by the Planning Commission as four legally distinct parcels, for which 4 Certificates of Compliance are now owing.

Despite this determination by the Planning Commission, we are told that County Staff intends to support Appellant Save Mount Diablo's assertion that the four distinct Remnant Parcels are nonetheless legally only one parcel – not because the law supports this conclusion, but because of their announced surprise at the legal consequences of the government's decisions to take the Pipeline Parcel and the Vasco Road Parcel in "fee" conveyance instead of as an easement, and their "political" concerns over the precedence the Planning Commission Decision might create.

However, Appellant Save Mount Diablo's (and Staff's) concerns regarding unregulated development in the farmland areas of the County are misplaced. The recognition of lots does not lead to development. Instead, General Plan designations and Zoning districts lead to development. In the instant case, each of the four Remnant Parcels is of a sustainable farming size and configuration, is subject to a Williamson Act Contract (requiring agricultural use), is subject to and meets the agricultural requirements of the County General Plan and Zoning, and in fact is being actively farmed. Each of the 4 Remnant Parcels is considerably larger than most other active farms in the Brentwood area. The recognition of the 4 Remnant Parcels by the Planning Commission Decision does not allow them to develop; each Remnant Parcels will still be limited to Agricultural uses. But recognizing them as legal lots will allow for better farm management, better ability to secure land-based financing, and better ability to estate plan for my client. Again, by law, the use and the active practice on each of the Remnant Parcels will remain agriculture: a Certificate of Compliance simply recognizes the lot as legal; it cannot and does not change the uses allowed. Instead, uses are solely within the power of the County's General Plan and Zoning Code, both of which clearly designate this property as "agricultural."

The Subdivision Map Act, the law that governing Certificates of Compliance, makes clear that the Planning Commission Decision was the *only* conclusion that could have been reached; "politics" does not provide an avenue for a different legal outcome. My client has a right to have their applications heard and decided on their merits. But, again, Certificates of Compliance do not and cannot change the applicable General Plan and Zoning criteria for this property, which is agriculture. No development may take place within this agricultural area without those primary planning documents being changed, and no such change is being proposed or is in any way, shape or form part of this Certificate of Compliance request.

These factual and legal grounds are presented below.

II. HISTORICAL BACKGROUND

The attached *Exhibit A, Exhibit B, Exhibit C* and *Exhibit D* reveal the "configuration" history of the larger property that led to the 1952 creation of what is now referred to as the "Dutra Ranch."

Approximately forty-two years later, in or around May 1994, with the Dutra Ranch still consisting of one single parcel, a Pre-Judgment Final Order of Possession, referenced in the County's April 1996 Record of Survey, established a County right-of-way across the Dutra Ranch for what is now Vasco Road ("Vasco Road Parcel"). See *Exhibit E.*

Then, approximately three years later, in or around June 1997, the County's Final Order of Condemnation officially divided the Dutra Ranch and created the Vasco Road Parcel. That Vasco Road Parcel conveyance split the Dutra Ranch property into three (3) legal lots: the Vasco Road Parcel conveyed in fee simple absolute to the government for Vasco Road, and the two Remnant Parcels (still held in private ownership) on either side of that Vasco Road Parcel. See *Exhibit F.*

In addition, the June 1997 Final Order of Condemnation created the "Pipeline Parcel," wherein the Contra Costa Water District acquired a fee strip portion of the Dutra Ranch property that crisscrossed (is roughly perpendicular to) the Vasco Road Parcel, again splitting in two the two Remnant Parcels described above. This Contra Costa Water District condemnation of the Pipeline Parcel was again in fee simple absolute, and secured the land on which the transfer pipeline is now located as part of the Los Vaqueros Reservoir Project.

While we may quibble over exact dates, we, Appellant Save Mount Diablo and Staff agree that as of the 2011 date our client sought the Certificates of Compliance in question, the Vasco Road Parcel was (and still is) a separate legal parcel owned by Contra Costa County, and the Pipeline Parcel was (and still is) a separate legal parcel owned by the Contra Costa Water District.

Interestingly, Appellant Save Mount Diablo (and County Staff) recognizes - factually – these separate and crisscrossing condemnations and conveyances, recognizes that the two separate and distinct legal parcels to the government (Vasco Road Parcel and Pipeline Parcel) *were created* by the condemnation conveyances, that two separate governmental entities now separately hold those parcels (the County and CCWD), but nonetheless argues that while the conveyances to the government could and did create 2 new government parcels, the remaining Dutra Ranch – now cut up into four (4) separate, distinct, non-touching and non-adjacent pieces – are still just one parcel. The law does not support, nor does basic physics, such an absurd argument.

Instead, as of 1997, these two separate and crisscrossing conveyances to governmental agencies of fee strip portions of the original single Dutra Ranch parcel divided that Ranch into 6 new legal parcels: the two separate parcels conveyed to the government (the Vasco Road Parcel and the Pipeline Parcel), and the 4 remaining Remnant Parcels resulting from and as a direct consequence of those crisscrossing conveyances to the government.

III. PROCEDURAL BACKGROUND

In May and June of 2011, Mr. Nunn made applications to the County, ultimately requesting four separate Certificates of Compliance for each of the four Remnant Parcels. The application included a memorandum dated May 2, 2011 from Sanford M. Skaggs, Esq., outlining a "Division by Conveyance to Governmental Agency and Resulting Legal Parcels Under the Subdivision Map Act." Christine Louie, the planner assigned on this file, assigned Application Nos. 0798, CDZC11-0799, -0800 and -0801 to these Certificate applications.

On July 28, 2011, Ms. Louie authored a "Response to a Request for a Certificate of Compliance for Four Parcels," which concluded that the Dutra Ranch only consists of one contiguous parcel, and therefore only one Certificate of Compliance could be issued. Ms. Louie reasoned that four Certificates could not be issued since the four Remnant Parcels were not created by a grant deed conveyance or subdivision action. On August 8, 2011, Mr. Skaggs authored an additional memorandum in "Response to Application for Certificates of Compliance for Four Lots ##ZC11-798, 799, 800, and 801," which requested reconsideration of Ms. Louie's determination and provided additional factual and legal analysis of the issues involved.

Sometime during that same time period in 2011, several members of County Planning Staff attended a Subdivision Map Act course I taught in Lafayette, and asked questions regarding the legal impact of a condemnation that split a property down the middle (leaving the condemnation strip and two remaining pieces on either side of that condemnation strip). I gave the same answers in that class as I do in this writing: the condemnation created three new parcels: the parcel condemned by the government in fee, and the two remaining parcels on either side of that condemnation parcel. By follow-up conference calls, email and the like, County Staff continued to ask questions of me and the legal reasons supporting my analysis. Staff made clear to me that my analysis was contrary to earlier County determinations and that changing positions would potentially create precedent (and embarrassment) for those making those earlier decisions. My point then to them, was my point to the Planning Commission, and now my point to this Board: error in the interpretation of the law, potential embarrassment, or a fear of precedence is no reason or allowed excuse to ignore the letter and intent of the law.

Subsequently, I was hired by Mr. Ron Nunn to assist him in his efforts. On November 30, 2011, I submitted a memorandum to County Counsel that supported the two memoranda previously submitted by Mr. Skaggs. My memorandum also provided additional factual and legal analysis as to why a separate Certificate of Compliance was required for each of the 4 Remnant Parcels. Despite several attempts on my part to discuss the matter in person or over the phone, I received absolutely no response from the County Counsel's office, nor were they present at the Planning Commission hearing to support County Staff's or Save Mount Diablo's arguments.

Five months later, by letter dated April 19, 2012, County Zoning Administrator Aruna Bhat issued the Zoning Administrator Determination, which recognized the Vasco Road Parcel as a legal parcel created by condemnation and now owned by the County, recognized the Pipeline Parcel as a

legal parcel created by condemnation and now owned by CCWD, but nonetheless determined that although physically not touching each other at any point, and physically separated forever by these intervening fee strips of land now held by these two governmental agencies through condemnation, the 4 Remnant Parcels were nonetheless legally *only one parcel*, and therefore only one Certificate of Compliance could be issued by the County.

Interestingly, one of the chief arguments raised against my client by County Staff (and likely Appellant Save Mount Diablo) was my client's earlier statements and conduct. Before my or Mr. Skaggs' involvement, representatives of Ron Nunn made representations to the County that were not factually nor legally correct regarding the conveyance/condemnation history of Dutra Ranch, nor its legal consequences. Likewise, a subdivision map application had been submitted by Mr. Nunn that also was not factually nor legally correct regarding the conveyance/condemnation history of Dutra Ranch, nor its legal consequences.

Neither Ms. Borba nor Mr. Nunn are attorneys, let alone attorneys trained in the specifics of the Subdivision Map Act, and their consultant, Mr. Cunha, is well versed in subdivisions, but not the impact condemnations in fee have on adjoining property. That my client and his non-lawyer representatives earlier took inconsistent actions to the ones they now take - because they did not understand that they already possessed four separate lots created by condemnation conveyances - is an honest mistake, is one that does not change, influence or adversely affect the correct application of California law, and is offered by County Staff and Appellant Save Mount Diablo because they are intent on winning regardless of how foolish their arguments. At initial sale, the Title Company incorrectly identified the subject property as a single parcel and the government conveyances as "easements," but subsequently corrected these errors.

A point of concern must be raised here: That County Staff has chosen to attack my client for his prior actions and to now support Appellant Save Mount Diablo instead of their own County Planning Commission and its Planning Commission Decision is troublesome. Staff is not a higher policy-making body than the Planning Commission for which they work.

In short, the proper application of the law, not the prior conduct of my client, is the only thing that matters for this Save Mount Diablo Appeal. And on this topic, the law is clear: although a "local agency's decision to deny certificates of compliance is reviewable by petition for writ of administrative mandate" and that the question for a trial court is "whether the local agency's decision is supported by substantial evidence," where there is little or no dispute about the evidence, the focus of the dispute is on the meaning of statutes, and statutory construction "is a question of law which requires the exercise of [the court's] independent judgment." (*Abernathy Valley, Inc. v. County of Solano* (2009) 173 Cal. App. 4th 42, 46.)

Here, there is no argument regarding the factual history of crisscrossing condemnations. A reviewing court will therefore exercise its independent judgment of what the law is, despite County Staff's and Appellant Save Mount Diablo's admonitions to the contrary.

By letter dated April 25, 2012, Lisa Borba, as representative of Mr. Nunn, filed an appeal of the Zoning Administrator Determination to the Planning Commission. On July 24th, 2012 the Planning Commission heard the appeal. After an exhaustive Staff Report against Mr. Nunn and my legal arguments (supported by Mr. Adams of Save Mount Diablo), after a presentation by me and my client, and after testimony from Mr. Adams and other members of the public, the Planning Commission unanimously upheld Mr. Nunn's appeal of Staff's determination, and approved Mr. Nunn's request for the issuance of the four (4) Certificates of Compliance for each of the 4 Remnant Parcels.

On August 1, 2012, Appellant Save Mount Diablo filed this Save Mount Diablo Appeal. Under the Subdivision Map Act and County Code, thereafter, the County had 30 days to hear that Save Mount Diablo Appeal, or up to 60 days to hear the Save Mount Diablo Appeal if it could legally justify the delay. On approximately October 1, 2012, that time period lapsed. Pursuant to the Map Act and the County Code, once that time period has run, the Planning Commission Decision is said to be "automatically affirmed" as a matter of law. This flaw cannot be waived or forgiven; once the 60 days has run, the automatic affirmation of the Planning Commission Decision takes place.

Therefore, for the procedural and substantive arguments (factual and legal) presented in this writing, we respectfully submit that the Save Mount Diablo Appeal must be denied.

IV. LEGAL ANALYSIS

A. The Planning Commission Decision Has Been Automatically Affirmed.

1. Automatic Affirmation Pursuant to the Subdivision Map Act.

The Subdivision Map Act provides certain procedural rules regarding appeals. In particular, Map Act § 66452.5 provides, in pertinent part, that an appeal shall be filed within 10 days of the decision being appealed. As discussed below, the County Code reflects this requirement. Here, the Mount Diablo Appeal was filed on August 1, 2012, which was within 10 days of the July 24th Planning Commission Decision.

Map Act § 66452.5 then further provides that upon the filing of an appeal, the appeal shall be set for hearing "within the next 30 days after the date" of the filing of the appeal. That means that this Save Mount Diablo Appeal should have been scheduled on or before August 31st, 2012.

However, Map Act § 66452.5 also provides a caveat: if there is "no regular meeting of the legislative body within the next 30 days for which notice can be given . . . [then] the appeal may be heard at the next regular meeting for which notice can be given, or within 60 days . . . whichever period is *shorter*." (*Id.*, emphasis added.) In other words, if there was no regular meeting within 30 days of the filing of the August 1st, 2012 Save Mount Diablo Appeal for which public notice could have been properly provided, then the *outside date* by which the Save Mount Diablo Appeal had to

be heard was 60 days from August 1st, 2012, or approximately October 1st, 2012. Obviously, the Save Mount Diablo Appeal was not heard by this October 1st, 2012 outside date.

Map Act § 66452.5(c) then provides the "consequence" for such failure to act in a timely fashion: ". . . the decision from which the appeal is taken shall be *deemed affirmed* . . . " (Emphasis added.)

In the instant case, Contra Costa County has incorporated these Map Act provisions in the relevant portions of its County Code. In particular, County Code section 26-2.2402 provides that all appeals will be brought pursuant to County Code Article 26-2.24, and County Code section 26-2.2406 requires that an appeal of the Planning Commission be filed with the Clerk of the Board within 10 days of the Planning Commission action. Thereafter, it appears that appeals of Planning Commission actions on Certificates of Compliance, like the current Save Mount Diablo Appeal, are subject to County Code section 26-2.2412. County Code section 26-2.2412 incorporates by reference the relevant Map Act sections, including the automatic affirmation sections discussed above. This only makes sense, since it is has been legally determined that a local Code cannot be in conflict with the Subdivision Map Act. (*See, e.g., Griffis v. County of Mono*, 163 Cal App. 3d 414 (1985).)

In short, the County has incorporated into its County Code those provisions of the Subdivision Map Act that "automatically affirmed" the Planning Commission Decision when the Save Mount Diablo Appeal was not heard within the prescribed statutory time frame. That Planning Commission Decision is now final, and the Save Mount Diablo Appeal must be denied.

B. The Planning Commission Decision Was Legally Correct and Reflective of Controlling Law.

1. Condemnation of a Fee Interest Creates Lots Under the Subdivision Map Act

Without waiving our client's rights to claim such automatic affirmation under the Subdivision Map Act, should the Board decide nonetheless to hear the substance of the Save Mount Diablo Appeal, we respectfully submit that the Planning Commission Decision was legally correct and reflective of controlling law. As such, for the factual and legal reasons provided herein, we respectfully submit that the Save Mount Diablo Appeal must be denied.

As stated above, there are at least *two different* ways to create new parcels from originals parcels in California: (1) by recorded subdivision map, pursuant to the Subdivision Map Act; *or* (2) by *conveyance*.

A conveyance in fee simple absolute creates new parcels by simply conveying a portion of the original parcel, with the new parcel's description shown on the face of the deed (often by metes and bounds description), and the deed being recorded with the County Recorder. (*Gardner v. County of Sonoma* (2003) 29 Cal.4th 990, 1001-1002.) The Map Act recognizes this separate means

of creating new parcels in its many provisions regarding conveyances to and from governmental agencies, Certificates of Compliance, and the like, ultimately granting Conditional Certificates of Compliance even if the lot is illegally conveyed and created.

Appellant Save Mount Diablo confuses these two separate means to create lots by stating in its Appeal letter: "The applicant is suggesting that their property was subdivided by the act of conveyance by CCWD. If that were the case, CCWD would have needed to file tentative and final maps." (Save Mount Diablo Appeal letter, p. 2.) That is an incorrect statement of the facts and of controlling law.

Contrary to the assertions of Appellant Save Mount Diablo (and Staff), we are *not* arguing that the Remnant Parcels were created by recorded map, nor that the County or CCWD needed subdivision maps to "take" the Vasco Road Parcel or the Pipeline Parcel in fee. Instead, we are arguing that the *consequence* of the governmental "takes" (condemnations) of the Vasco Road Parcel and the Pipeline Parcel in fee (by *conveyance*) was that the Remnant Parcels were also created by those conveyances. No tentative maps, final maps, or parcel maps were required; all of these lot creations resulted from conveyances only.

Appellant Save Mount Diablo goes to great lengths to invoke different mapping provisions of the Map Act, either to set up straw men that it then knocks down, or to confuse the arguments we have presented. We have never argued that the County nor the Water District was or is subject to the Subdivision Map Act, including Map Act § 66426 regarding maps. Again, the government generally is not subject to any mapping requirements under the Subdivision Map Act, including § 66426, and, again, we are arguing that the Remnant Parcels were created by *conveyance*, not recorded map.

A county's mandatory duty to issue either Certificates of Compliance or Conditional Certificates of Compliance is discussed in *Lakeview Meadows Ranch v. County of Santa Clara* (1994) 27 Cal. App. 4th 593, 598, which also rejected that county's argument that the parcels were consolidated into a single parcel due to their common ownership. (*Id.* at 599-600.)

The Map Act recognizes that when a portion of a legal lot is conveyed by deed from one person to another, and that deed is then recorded, two new lots have been created, albeit potentially illegal lots that will be legalized through the Conditional Certificate of Compliance process (*see,* Map Act §§ 66499.34 and 66499.35). The Map Act does not provide – as Appellant Save Mount Diablo argues - that despite the conveyance there remains only one parcel. Instead, the Map Act provides that a *conveyance* that breaks a parcel into two or three or more pieces *creates* two or three or more parcels.

Yet, Appellant Save Mount Diablo argues that only one parcel remains, despite recognizing two separate and crisscrossing conveyances to the government that broke the original parcel into six (6) pieces: the Vasco Road Parcel, the Pipeline Parcel and the 4 Remnant Parcels.

Appellant Save Mount Diablo continually confuses the difference between lot creation by recorded map and lot creation by recorded conveyance. Appellant Save Mount Diablo cites 74 Ops. Cal. Atty. Gen 149 (1991), yet that Attorney General Opinion recognizes that lots may be created by maps *and conveyances* and that a county is *required* to issue Certificates of Compliance or Conditional Certificates of Compliance for each of the resulting lots (32 lots in that Attorney General Opinion).

Appellant Save Mount Diablo glosses over this distinction, and instead relies on that Attorney General Opinion as support for a claim that a parcel map was required to recognize the Remnant Parcels *already* created from the condemnation conveyances. As discussed in greater detail below, nothing in the 1991 Attorney General Opinion supports this claim.

Historically, condemnations and other conveyances to the government of property involving a portion of an existing legal parcel did require a subdivision map. (*See, e.g.*, 58 Ops. Cal. Atty. Gen. 593 (1975).) However, this is no longer the case. In its 1975 Attorney General Opinion, the California Attorney General addressed a situation where a proposed condemnation by a governmental agency of a portion of a single parcel would result in three lots (the condemned portion and two remnant parcels on either side of the condemned parcel). The question asked of the Attorney General was whether a parcel map was required for this 3-lot division. The Attorney General concluded that a parcel map was required, reasoning that there was "no question but that condemnation of a part of a parcel results in a 'division' of land" (*Id.* at 594), and thus, that the proposed condemnation – that divided the land into 3 parcels - was subject to the Map Act. (*Ibid.*)

However, in the very next legislative session following the Attorney General's 1975 Opinion, the Legislature amended Section 66428 to add an exemption (from any mapping requirements) for conveyances of land to a governmental agency. Section 66428(a)(2) provides in pertinent part:

> A parcel map shall not be required for... [l]and conveyed to or from a governmental agency, public entity, public utility, or for land conveyed to a subsidiary of a public utility for conveyance to that public utility for rights-of-way, unless a showing is made in individual cases, upon substantial evidence, that public policy necessitates a parcel map. For purposes of this subdivision, land conveyed to or from a governmental agency shall include a fee interest, a leasehold interest, an easement, or a license.

This was the status of the law when the Vasco Road Parcel was created and the status of the law in 1997 when the creation of the Vasco Road Parcel was again confirmed, and the Pipeline Parcel was created. In other words, no subdivision map (neither tentative map, final map, nor parcel map) is required to lawfully create parcels by conveyance, condemnation, etc. when a governmental agency is involved with that transaction. This exemption includes the new parcel

owned by the governmental agency, *as well as* the remnant parcels *left over* as a consequence of that government-involved conveyance.

Appellant Save Mount Diablo appears to adopt the earlier Zoning Administrator Determination (Staff) argument that if a conveyance to or from the government is not a "subdivision" under section 66428(a)(2) of the Map Act, then the condemnations were not "subdivisions" and therefore, that no new lots were created. However, Appellant Save Mount Diablo and the Zoning Administrator Determination are confused. The Map Act makes clear that such a conveyance involving a governmental agency shall not invoke the jurisdiction of the Map Act requiring the approval and recordation of a *subdivision map*; however, it does not provide that new parcels have not been *created* through such *conveyance*, since clearly new parcels have been created: the Vasco Road Parcel, the Pipeline Parcel, and the 4 separate Remnant Parcels those condemnation conveyances created.

Appellant appears to "want its cake, and to eat it to" – it argues that the two new government parcels were created by the condemnation conveyances, but that the breaking off of those parcels from the original Dutra Ranch through crisscrossing condemnations nonetheless did not change the Ranch at all and that it is still one parcel. Again, such reasoning is absurd.

As described above, Section 66428 expressly exempts from any mapping requirements "[l]and conveyed to or from a governmental agency." When then read in the context of the 1975 Attorney General Opinion (which reasoned definitively that a condemnation is a "division" of land) and the immediately subsequent action taken by the Legislature in response to the Attorney General Opinion, Section 66428(a)(2) must be interpreted to mean that the division of land that occurs when the portion is conveyed (through condemnation or otherwise) - including the inevitable creation of resulting remnant parcels - is exempt from the Map Act's *mapping* requirements. In other words, the condemnation exemption of Section 66428(a)(2) applies to the entirety of the land division effectuated by the conveyance to the government. No mapping is required in order to "create" the resulting parcels because they already exist *in fact* and as a matter of law through the recorded conveyances.[2]

Again, Appellant Save Mount Diablo's arguments to the contrary are nonsensical: Appellant would argue that the portion of the parcel conveyed to the government - and in so doing "creating" the Pipeline Parcel and Vasco Road Parcel, and "dividing" them away from the Remnant Parcels - is legal and recognized, but that the remaining Remnant Parcels resulting from that legal lot creation are not themselves created or legal and therefore do not separately exist. That is absurd. And, simply put, the law does not allow a statutory interpretation that results in an absurdity. (*Wells Fargo Bank v. Superior Court* (1991) 53 Cal.3d 1082.)

In a 2003 Attorney General Opinion, the Attorney General concluded that a 1965 condemnation by a governmental agency lawfully created not only the condemned parcel, but also

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[2] A parcel is lawfully created upon its conveyance by deed. (*Gardner v. County of Sonoma*, 29 Cal.4th 990, 1001-1002 (2003).)

two new legal remnant parcels located on either side of the condemned parcel. (86 Ops. Cal. Atty. Gen. 70-71 (2003).) In 1965, when the condemnation occurred, the Map Act did not require parcel maps for divisions of fewer than five parcels (no map of any kind was required). The parcel map requirement began in 1972. The Attorney General relied on Section 66412.6, which presumes that a parcel was lawfully created if it was a division that occurred prior to 1972, the division created fewer than five parcels, and the division was not regulated by a local ordinance then in effect. Because no map was required under the Map Act or local ordinance when the remnant parcels were created (in 1965), no map was now needed to recognize their lawful status.

According to the Attorney General, the parcels were created when the court ordered the condemnation and the deed was recorded. The Attorney General Opinion expressly recognized that the condemnation's *creation* of new legal parcels, for which Certificates of Compliance must be issued, was not subject to Section 66424 because no "subdivision" was proposed. (86 Ops. Cal. Atty. Gen. at 73.) Instead, the condemnation conveyances had *already* divided the property into legally-recognized separate parcels. (*Id.*)

Appellant's adoption of the reasoning in the earlier Zoning Administrator Determination completely *misses* the import of this Attorney General Opinion, and instead argues (from p. 3 of the Zoning Administrator's earlier Decision): "if the lots created by the 1965 condemnation were legal because neither the Map Act nor the ordinances in effect at the time regulated subdivisions of four or fewer lots, then it stands to reason that lots created when local ordinances regulating subdivisions of four or fewer lots are in effect are not legal." (Emphasis added.) Neither the statement from, nor the reasoning of, Appellant Save Mount Diablo or the Zoning Administrator Determination it embraces "stands to reason." Neither the Map Act nor the Attorney General Opinion provides that four or fewer lots resulting from a condemnation are by law *illegal*, as Appellant Save Mount Diablo "reasons." The Zoning Administrator Determination that Appellant Save Mount Diablo supports then quotes from footnote 5 of the 2003 Attorney General Opinion: *"Of course, new parcels created but not conveyed to a governmental agency must comply with any applicable requirements of the Act."* (Zoning Administrator Determination at 3; quoting from 58 Ops. Cal. Atty. Gen. 594-595; emphasis added by the Zoning Administrator Determination.)

Again, what Appellant Save Mount Diablo (and the Zoning Administrator Determination) fail to discern from that quoted passage is that the Attorney General recognized that the lots had already been *created*; its admonition regarding compliance with "any applicable requirements of the [Map] Act" would mean and include the very Certificates of Compliance, issued pursuant to the Subdivision Map Act, that my client received approval of through the Planning Commission Decision.

Although the 2003 Attorney General Opinion and the 1975 Attorney General Opinion addressed different Map Act sections than are at issue in our case, the common thread in each Opinion is the Attorney General's conclusion that a governmental agency-involved conveyance of fee interest (through condemnation or otherwise) severs or "divides" the land, *creating* new parcels.

In addition, at the time of the division addressed by each Attorney General Opinion, the Section 66428(a)(2) governmental agency condemnation exemption did not yet exist.

The Planning Commission Decision got it right. There is simply no argument that the criss-crossing condemnation conveyances in fee that created the Vasco Road Parcel and the Pipeline Parcel did not, as a consequence, likewise create the 4 Remnant Parcels.

2. The Conveyances Physically Divided the Land

Further, "factually" speaking, the government's acquisition of the Vasco Road Parcel and Pipeline Parcel in this case clearly "divided" the land.

"Land" is defined in Civil Code section 659 as three-dimensional:

> Land is the material of the earth, whatever may be the ingredients of which it is composed, whether soil, rock, or other substance, and includes free or occupied space for an indefinite distance upwards as well as downwards, subject to limitations upon the use of airspace imposed, and rights in the use of airspace granted, by law.

Because land is three-dimensional, the conveyance *in fee* of one new three-dimensional portion of property to the government must, as a matter of physical law, create two additional new parcels on either side of the conveyed fee portion. When the conveyances crisscross perpendicularly, as is the case here, the Remnant Parcels are each separated from each other by the intervening Conveyance Parcel, and cannot ever physically touch each other, since the Vasco Road Parcel and Pipeline Parcel fully separates the Remnant Parcels on a three-dimensional basis: the Vasco Road Parcel and Pipeline Parcel go as "high" and as "low" as land can legally go in California, thus fully separate the Remnant Parcels from each other.

If, instead, the condemnations were taken as *easements* (instead of fee), then no new lots would have been created. Easements sit of the surface of land and do not divide it. But the County chose to take the condemnations as fee simple absolute conveyances, thereby securing full, three-dimensional pieces of property that absolutely divide the land.

There is no body of law supporting the legal or factual argument that four separated pieces of property that cannot ever and do not ever physically touch each other at any point, that are physically separated from each other by intervening and crisscrossing three-dimensional fee strips of land owned by the government, are nonetheless to be treated as one parcel of land. They are clearly created by the legal fee conveyances to the government and hence are themselves legal in character.

Under the rationale of Appellant Save Mount Diablo, a large private ranch, sitting on either side of a 10-mile- wide condemnation (owned in fee simple absolute by a governmental agency)

that breaks the ranch into two distinct pieces would nonetheless still be considered one parcel. That "reasoning" is simply not reasonable, nor is it supported by controlling law.

3. Appellant's Other Arguments Raised Have No Merit.

Appellant Save Mount Diablo makes certain general references to additional arguments set forth in the earlier Zoning Administrator Determination and Staff Report that the Planning Commission Decision expressly overruled. We respond to those additional arguments below.

a. Severance Damages Cases.

The line of "severance damages" cases discussed earlier by Staff and dismissed by the Planning Commission Decision are simply inapplicable to the Certificate of Compliance and Subdivision Map Act issues presented by the Save Mount Diablo Appeal.

Despite admonitions by Appellant Save Mount Diablo to the contrary, the Attorney General has never found it appropriate to venture into "severance damages" cases to decide a question regarding the Map Act and the creation of parcels by conveyance.

As discussed above, the Attorney General has reviewed the legal question of whether a condemnation can *create* parcels, and has found that they can so create. The Attorney General did not, and would not, review severance damage cases for Map Act guidance. Each of the cases set forth in the earlier record supported by Appellant Save Mount Diablo is a severance damage case; those case have nothing to do with, and have no relevant bearing on, the Subdivision Map Act issues presented by the Save Mount Diablo Appeal.

Instead, *"severance damages"* cases focus *solely* on whether additional monies are owed by the government for property not actually condemned by the government, but impaired and rendered less valuable by the taking of the property that is condemned. In reviewing such issues of law and fact, the court focuses on the "unity of property" (interdependence of the properties in question), regardless of whether or not they are separate legal lots under the Map Act. The Map Act simply plays no role. Instead, issues such as unity of title, contiguity, unity of use, access, etc., play into the court's thinking as to whether additional monies (known as severance damages), beyond those owing for the taken land, are owed by the government to the landowner. If the court, in reviewing such issues, finds the land taken by the government to be interdependent with the land not taken by the government (often referred to as part of a "larger parcel" or a "unity of property") then severance damages may be available. Conversely, if the court finds the parcels not to be interdependent (often referred to as "separate and individual"), then severance damages may not be available. (*See City of Los Angeles v. Wolfe* (1971) 6 Cal. 3d 326.)

However, that determination has nothing to do with how many actual "physical parcels" are involved. So for example, in *City of Los Angeles v. Wolfe* (1971) 6 Cal. 3d 326, the court found two separate legal lots to be interdependent and potentially a "larger parcel" for severance damage purposes, even though the properties were separate legal lots, on separate city blocks, over 250 feet

from each other, and would have been recognized as separate legal lots for Map Act purposes. In other words, for severance damages purposes they were potentially a "larger parcel," whereas for Map Act purposes they were two separate, existing legal lots.

Again, severance damages cases have nothing to do with the Map Act, nothing to do with conveyances, nothing to do with the *creation* of parcels through condemnation conveyances, and therefore nothing to do with the issues presented by this Save Mount Diablo Appeal. They are an unnecessary distraction, nothing more.

b. "Sovereign Immunity" Arguments.

There is no over-arching "sovereign power" or "sovereign immunity" that allows Contra Costa County or CCWD to ignore California statute, including the Subdivision Map Act. The County is a "police power" entity, and as such, is bound by Article XI, § 7 of the California Constitution. That Constitutional root expressly prohibits any local action or regulation that is contrary to/in violation of state statute, such as the Subdivision Map Act. CCWD is a "granted powers" entity has even fewer powers, is created by statute, and, contrary to Appellant Save Mount Diablo, is absolutely subject to the Subdivision Map Act; it cannot ignore the Map Act by invoking sovereign immunity.

There is simply no such magic "sovereign immunity" wand that allows the County and/or CCWD to unilaterally ignore the Subdivision Map Act.

4. The Issuance of Certificates of Compliance is Mandatory Under the Subdivision Map Act

Pursuant to Map Act section 66499.35(a), any person with a financial interest in real property may request, and a city or county shall determine, whether the property complies with the Map Act and any local ordinances enacted pursuant thereto. If the city or county determines that the property complies, it *must* file a Certificate of Compliance for recording.

As set forth in Section 66499.35:

> (a) Any person owning real property or a vendee of that person pursuant to a contract of sale of the real property may request, and a local agency *shall* determine, whether the real property complies with the provisions of this division and of local ordinances enacted pursuant to this division. If a local agency determines that the real property complies, the city or the county *shall* cause a certificate of compliance to be filed for record with the recorder of the county in which the real property is located. ....
>
> (b) If a local agency determines that the real property does not comply with the provisions of this division or of local ordinances

> enacted pursuant to this division, it *shall* issue a conditional certificate of compliance. ...(Emphasis added.)

Mr. Nunn is due the 4 Certificates of Compliance he has requested.

5. Additional Questions Posed by County Staff

Additionally County Staff posed questions to Mr. Nunn's consultants as follows:

(1) If a property owner desired her land to remain as one parcel, even after a fee strip (fee simple absolute) were condemned down the middle of her land by the government, would it be one parcel? The answer is "no." Despite her wishes and desires, 3 lots would thereafter exist: the condemned parcel owned by the government, and the two left-over portions of her original property now sitting on either side of that three-dimensional fee condemnation. Her land would be two parcels and could *never* become one parcel again *unless* the condemned land owned by the government was returned to her and she then consolidated the 3 lots back together into one parcel through either a lot line adjustment pursuant to Subdivision Map Act section 66412(d) (where all interior lines would be adjusted out of existence), or a consolidating subdivision map pursuant to Subdivision Map Act sections 66499.20¼ or 66499.20½ (merger of lots and lot lines through a new recorded map).

(2) Legally can a subdivision map designate more than one remainder parcel, for example, on either side of an intervening piece of property owned by another? Again the answer is "no." Remainder parcels are very limited under the Map Act section 66224.6. An applicant can show no more than one such parcel on the face of a subdivision map, and therefore cannot show two remainders on either side of an intervening piece of property owned by another. Mr. Nunn's earlier request for two remainder parcels – one on either side of the Vasco Road Parcel – that he included in the subdivision map application he made earlier to the County was improper and not allowed by the Subdivision Map Act.

(3) May an applicant include non-adjacent, non-touching lands it owns on the face of one tentative map application? That is not so much a legal question, as it is a map *processing* question, uniquely in the hands of Contra Costa County. In other words, as long as basic Due Process (notice, opportunity to be heard, etc.) is provided by the County, the Subdivision Map Act would allow the County to decide how it wishes to *process* maps. In some cities and counties, their local practice is to *not allow* non-adjacent, non-touching lands to be included on the face of one tentative map application (see, for example, the City of Stockton); in those jurisdictions, therefore, several applications would be filed, each limited to containing only lands that physically touch. However, in other cities and counties, non-adjacent, non-touching lands are *allowed* to be included on the face of one tentative map application if all intervening property owners also sign the application. Again, that is a *processing* decision that is up to the jurisdiction to decide. I do not know what Contra Costa County's past or current practice is in this regard.

(4) How could all other surveyors in the State be wrong about this legal issue (condemnations in fee creating new lots) for all of these years? First, like any profession, there is no uniformity of opinion in California by surveyors on this or any other surveying-related topic. I teach constantly throughout the State and have countless surveyors who agree with me on this topic. And, yes, several disagree as well. Second, surveyors are surveyors, not attorneys; they are not in court arguing this or any other body of law on a regular basis. I am. Recently, on behalf of the California Land Surveyors Association, I helped secure a victory for Napa County at the Court of Appeal (Napa's new Lot Line Adjustment ordinance was being challenged by the Sierra Club). The court supported a legal opinion I had been giving for over 20 years (that the Map Act designated Lot Line Adjustments as "ministerial" and therefore not subject to CEQA, and that the Map Act did not prohibit multiple (sequential) Lot Line Adjustments), even though my opinion had many detractors over the years, including surveyors.

Again, I appreciate that County Staff is wrestling with the consequences of years of securing condemnations as fee interests instead of as easements. But the law cannot be ignored simply because one did not understand the consequences of their earlier actions.

V. CONCLUSION

In conclusion:

(i) Procedurally, the Planning Commission Decision has already been affirmed by failure of the County to act in a timely manner on the Save Mount Diablo Appeal.

(ii) Substantively, Map Act Section 66428(a)(2) exempted the condemnation conveyances of the Vasco Road Parcel and the Pipeline Parcel from any Map Act compliance, including any subdivision maps. Instead, the crisscrossing Vasco Road Parcel and the Pipeline Parcel were legally created by *conveyance,* as were the 4 Remnant Parcels that those conveyances left behind.

(ii) A "fee interest" condemnation conveyance – like the kind used to acquire the Vasco Road Parcel and the Pipeline Parcel - captures all of the interest in land. Such fee interest is three-dimensional – it includes all space for an indefinite distance upwards and downwards.

(iii) If the Vasco Road Parcel and the Pipeline Parcel are separate, legal, three-dimensional lots, which all parties agree they are, then, as a matter of physical law, the Remnant Parcels on either side of those three-dimensional government-created parcels must likewise have been created as a consequence of those condemnation fee conveyances, since the Remnant Parcels are physically *separated* from each other by those Vasco Road and Pipeline Parcels and cannot ever and do not ever physically touch. Such physically non-adjacent, non-touching land cannot be said to nonetheless be physically "one parcel."

(iv) Therefore, as separate legal parcels, Certificates of Compliance were required to be issued under the Subdivision Map Act and County Code in recognition of the 4 Remnant Parcels created through the condemnation fee conveyances.

The Planning Commission Decision followed the law. So should the Board. The Save Mount Diablo Appeal must be denied.

We copy the Clerk of the Board to ensure that this letter is made part of the administrative record for this Appeal. Thank you for this opportunity to comment on the Save Mount Diablo Appeal.

Respectfully submitted,

Michael Patrick Durkee

Cc: Clerk of the Board
County Planning Commission
Appellant Save Mount Diablo
County Counsel
County Planning Staff
Ron Nunn
Bob Nunn
Lisa Borba
Vince Cunha
Sanford M. Skaggs, Esq.

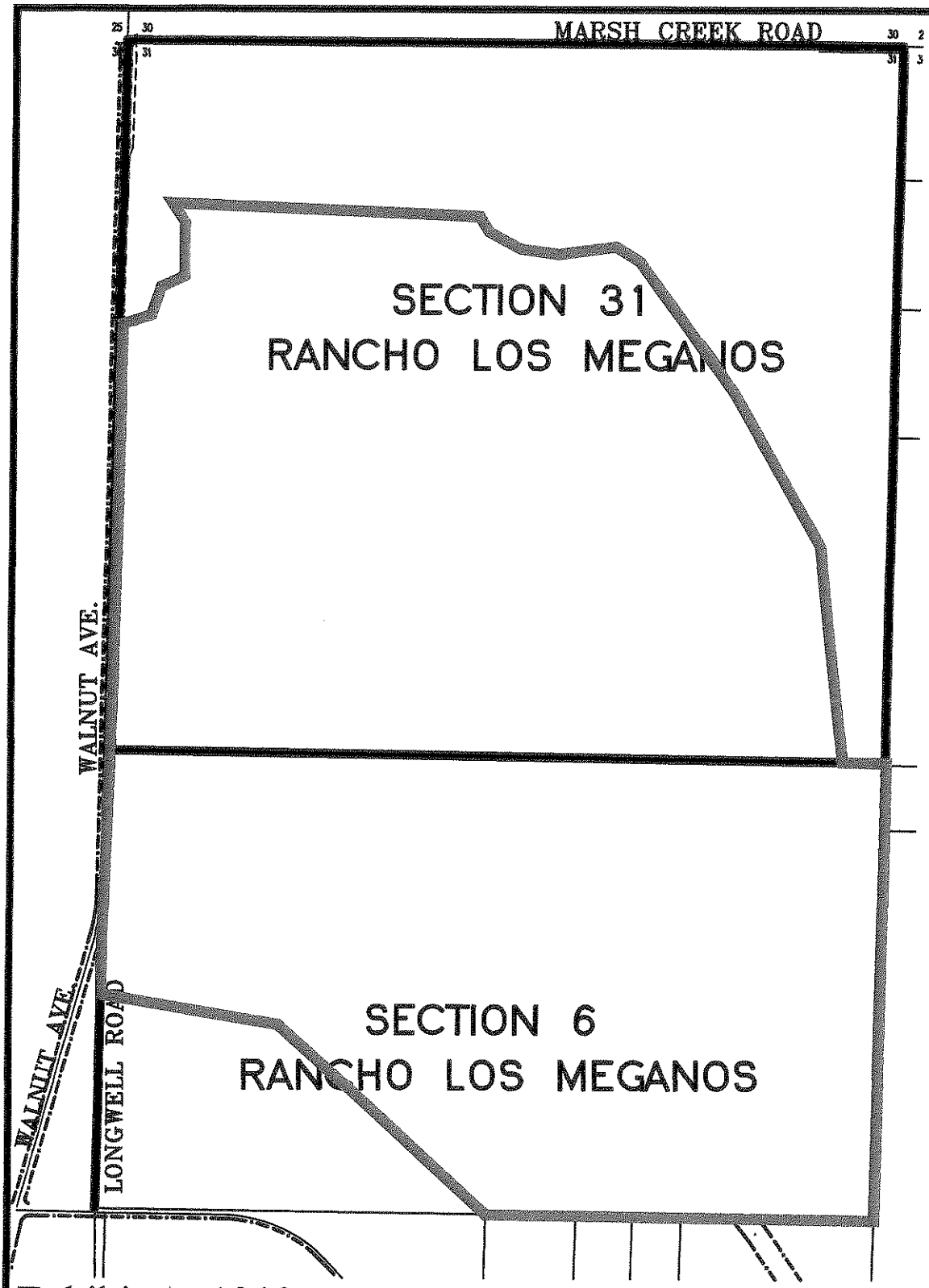

Exhibit A: 1913

Rancho Los Meganos Section 6 and 31

"The property assembled as the modern-day Dutra Ranch was created in 1952, but it has a chain of title dating back to Rancho Los Meganos in 1913. This exhibit, and the following exhibits, depict the boundary of the Dutra Ranch in a thick blue line."

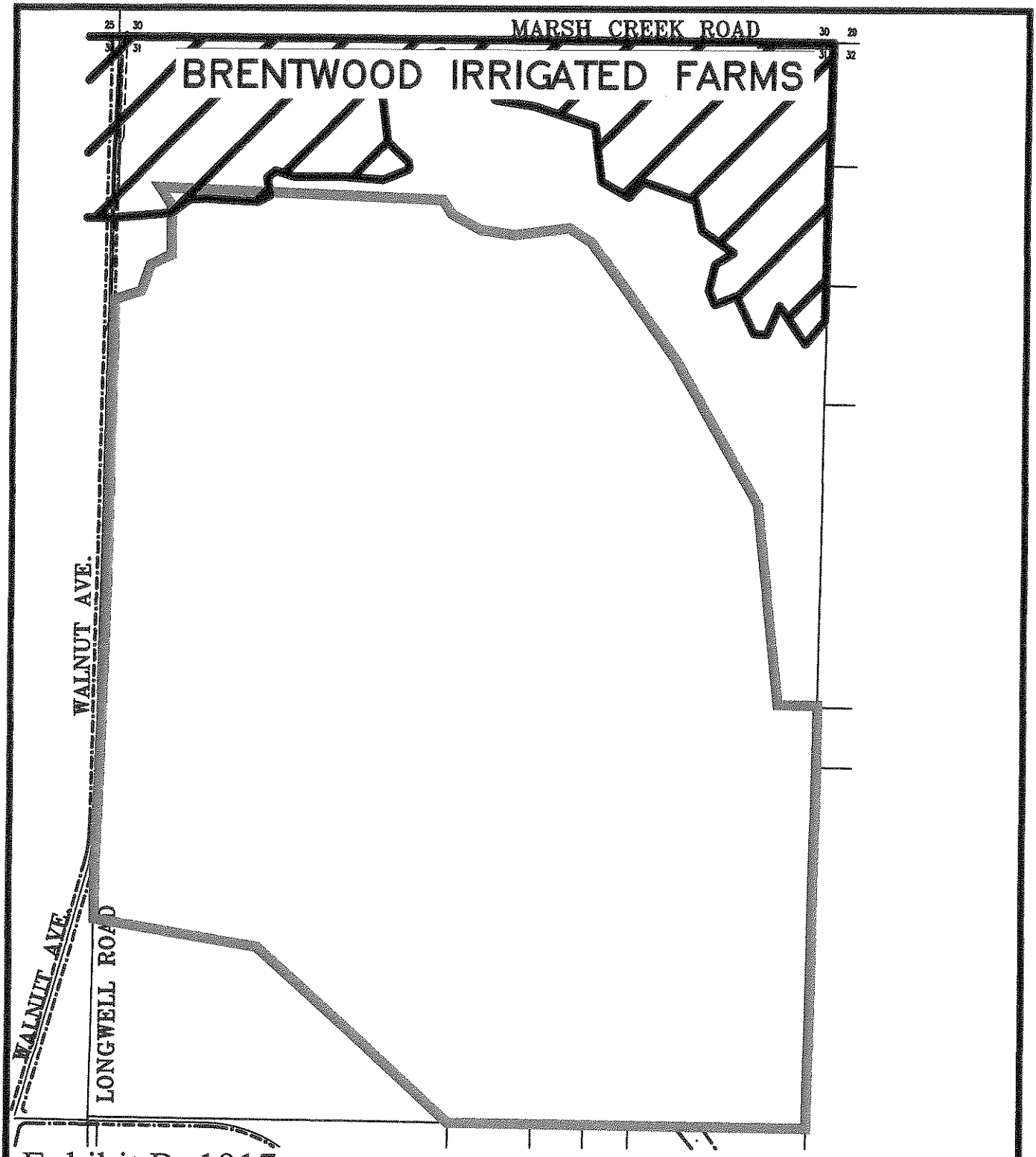

Exhibit B: 1917

Brentwood Irrigated Farms

"In 1917, the northern extent of Rancho Los Meganos was subdivided into the Brentwood Irrigated Farms maps. A small 1.23-Ac piece of the future Dutra Ranch was included in Subdivision 10 of the Brentwood Irrigated Farm. The balance of the future ranch remained in Rancho Las Meganos. All property was owned by the Balfour Guthrie Company."

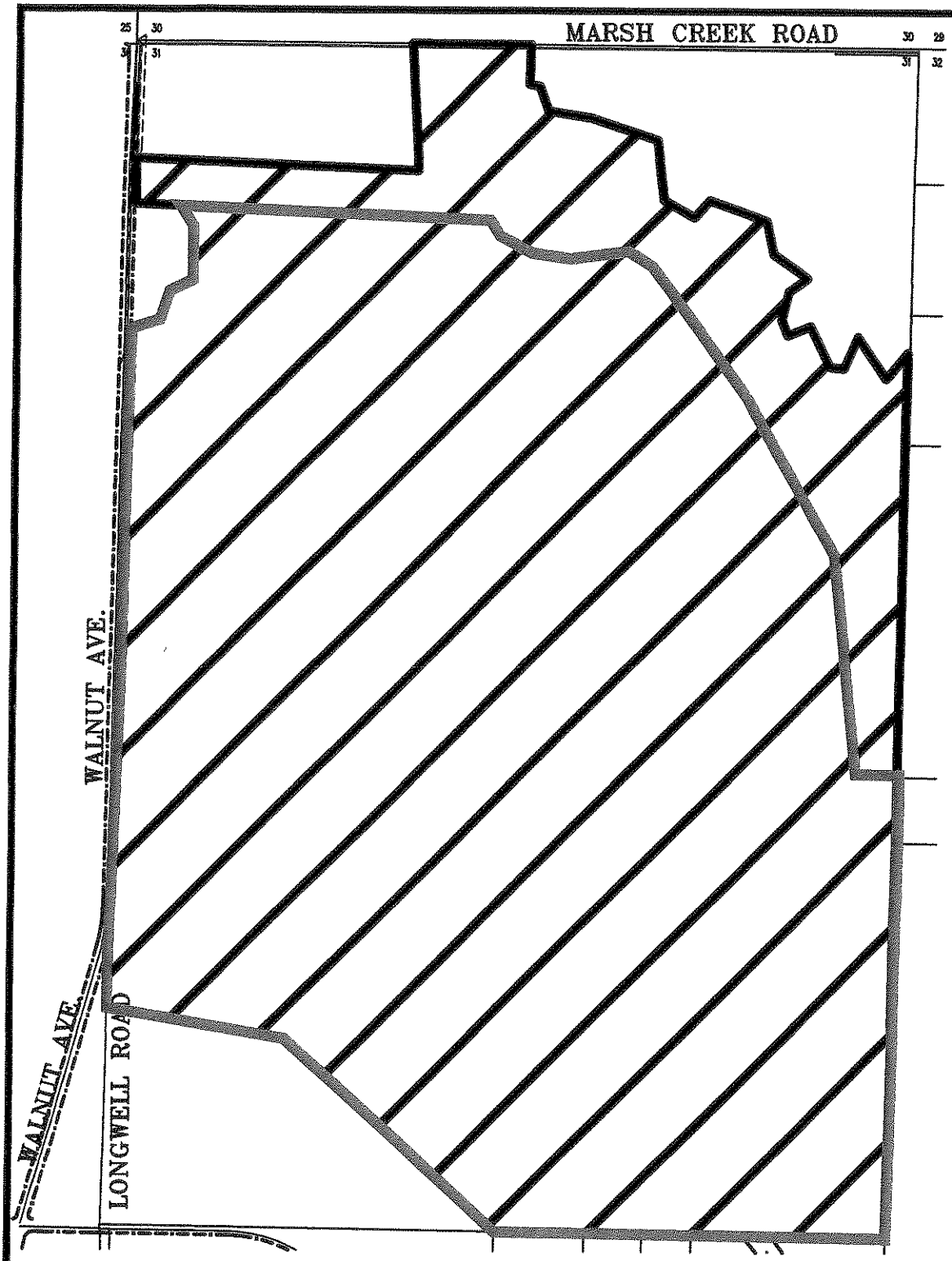

Exhibit C : 1941

Faria Ownership

"In 1941, The Balfour Guthrie Company deeded the Dutra Ranch and additional property to the north to Mr. Faria."

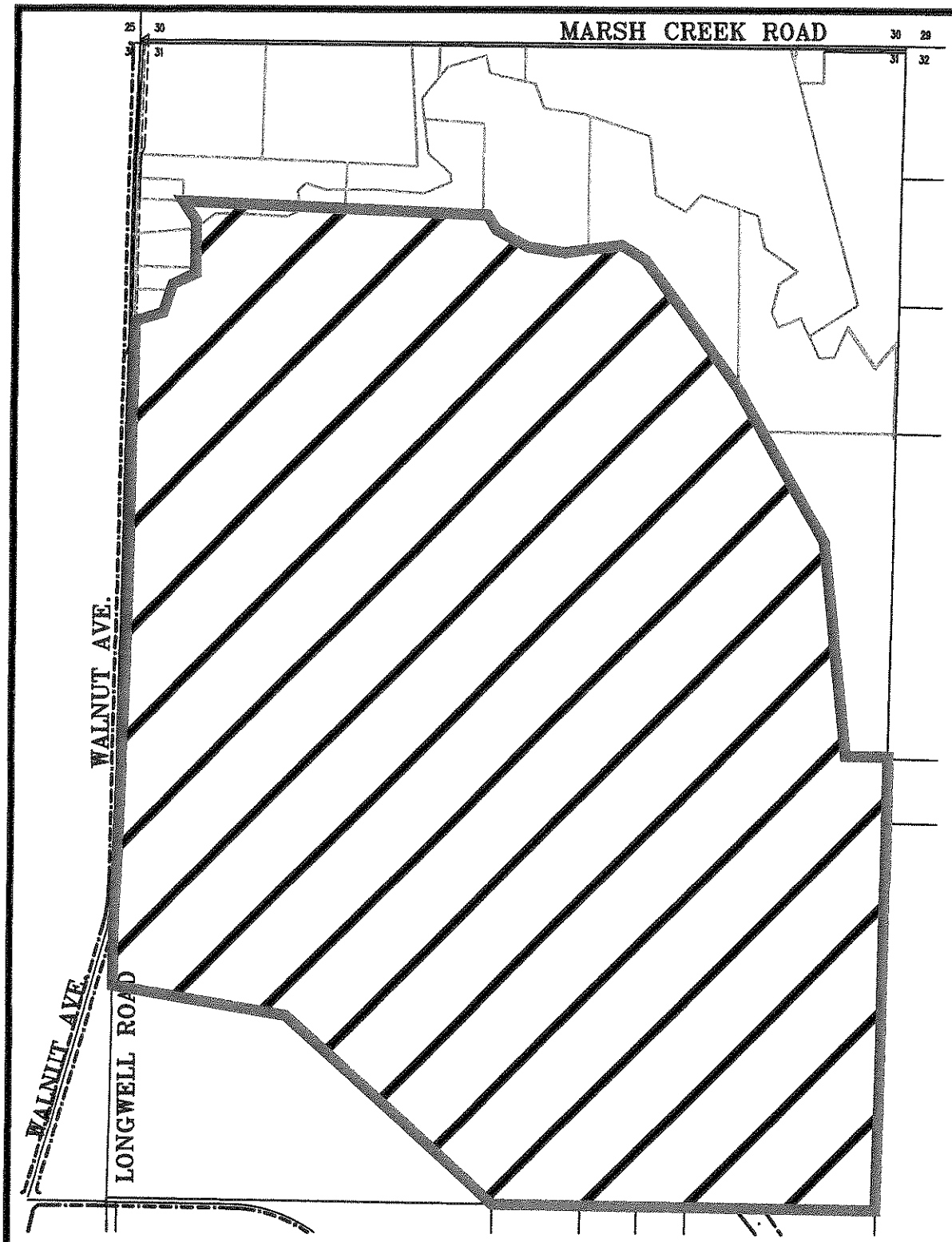

Exhibit D : 1950/1952

The Creation of the Dutra Ranch

"In 1950, Mr. Faria deeded the 1.23-Acre Brentwood Irrigated Farms piece and the larger Rancho Las Meganos portion to Mr. Jason. In 1952, Mr. Jason deeded these same properties to Mr. Dutra. This created the Dutra Ranch."

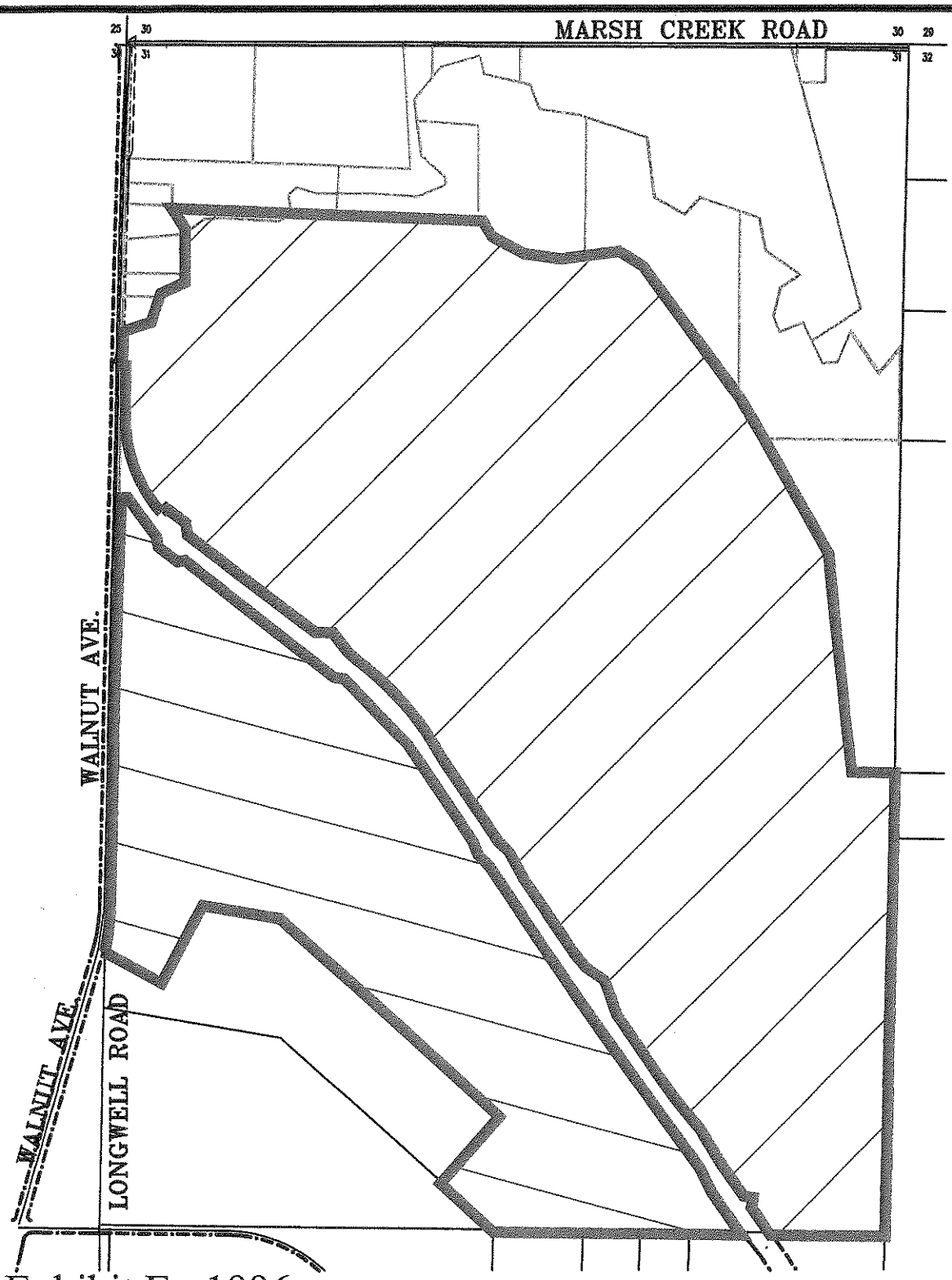

Exhibit E : 1996

Vasco Road Pre-Judgment

"In 1996, Contra Costa County recognized the 1994 Pre-Judgment Final Order of Possession for Vasco Road thru the Dutra Ranch on the County Survey. This Pre-Judgment demonstrates the creation of the three Parcels: The Vasco Road Parcel and the two Remnant Parcels. This Pre-Judgment would become the official condemnation with the Final Order of Condemnation in 1997."

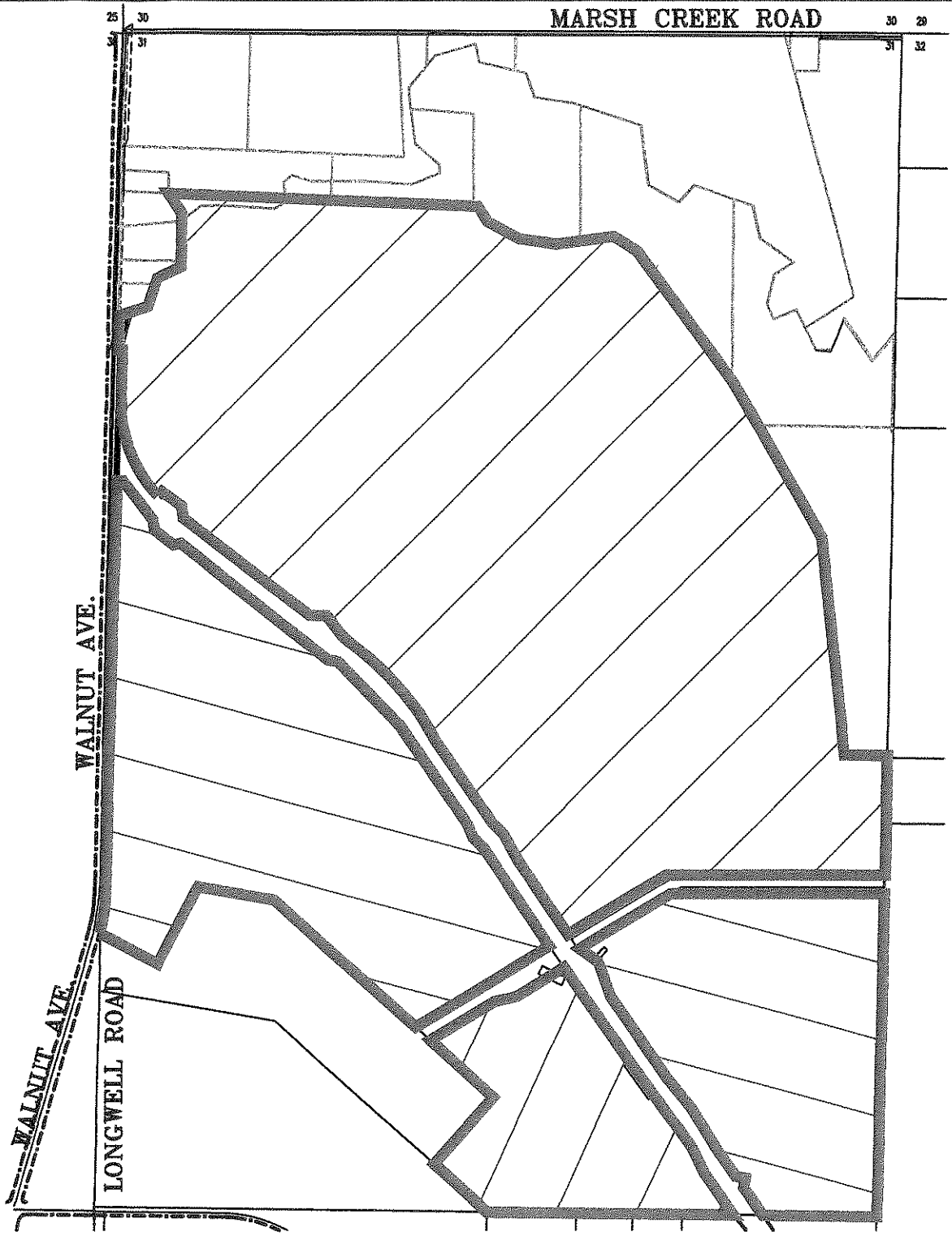

Exhibit F : 1997

The Creation of Six Parcels by Condemnation

"In 1997, the Final Order of Condemnation deeded the Vasco Road Parcel and the Pipeline Parcel for the Los Vaqueros transfer pipeline to the public agency in fee title absolute. These two crisscrossing condemnations created the four Remnant Parcels of the Dutra Ranch.

Consider w/ Item #2

Allen Matkins

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VIA FAX (925.674.7250)
AND ELECTRONIC MAIL

July 24, 2012

Marvin Terrell, Chair
and Commissioners
30 Muir Road
Martinez, CA 94553

Re: Contra Costa County Planning Commission Agenda Item #2
Meeting of Tuesday, July 24, 2012
Appeal of Zoning Administrator Denial of Certificates of Compliance
Ron Nunn and Jeffrey Tamayo

Dear Chair Terrell and Commissioners:

As you know, we represent Ron Nunn and his business partner Jeffrey Tamayo, the owners of the Dutra Ranch. On Friday, July 20th, after 4 pm, the Staff Report for this matter was transmitted to us by the County. According to the Staff Report, despite receiving our Appeal Memorandum on July 10th, Staff did not respond to that Memorandum, because they were already done preparing the Staff Report. Yet, again, Staff did not make its Staff Report available to us until literally the day before the Appeal hearing.

This letter responds to the issues raised in Staff Reports, "parrots" the headings used in that Staff Report, and provides additional factual and legal reasons why this Appeal should be approved.

A. *Responses to Staff Responses*.

☐ *Staff Response #1*.

While we may quibble over exact dates, we and Staff agree that as of the date we sought the Certificates of Compliance in question, the Vasco Road Parcel was (and still is) a separate legal parcel owned by the County, and the Pipeline Parcel was (and still is) a separate legal parcel owned by the Contra Costa Water District ("CCWD").

☒ *Staff Response #2.*

Staff misunderstands our point. If Map Act section 66428(a)(2) makes "legal" the parcel conveyed to the government through condemnation, then by deduction, the "Remnant Parcel" left over after that legal transaction is likewise legal. Clearly, the Remnant Parcels are "created" by the condemnation conveyance.

Staff worries about "subdividing" others' property. Yet, the fact is that conveyances to the government through condemnation rarely have "any regard for the needs or wishes of the property owner" (Staff Report, pages 6-7), or this very appeal would be unnecessary. Whether or not intended, the condemnations in question created new parcels, and those new parcels are due Certificates of Compliance when requested.

☒ *Staff Response #3.*

Staff is absolutely mistaken in its interpretation of the law, and, evidently, in its understanding of our legal arguments.

First, we never argued that CCWD is subject to Map Act § 66426 – that is a Staff-created distraction. Again, the government generally is not subject to any mapping requirements under the Subdivision Map Act, including § 66426.

Second, lots created legally or illegally over time may or may not comply with applicable General Plan and/or zoning regulations. Regardless of how created, and regardless of whether the lot in question remains compliant with the applicable General Plan and/or zoning regulations, a Certificate or Conditionally Certificate of Compliance must be issued. (Map Act §§ 66499.34, 66499.35.)

However, such worries are misplaced. In the instant case, each of the four Remnant Parcels is of a sustainable farming size and configuration, is subject to a Williamson Act Contract (requiring agricultural use), meets the agricultural requirements of the County General Plan and Zoning, and in fact is being actively farmed. The recognition of the four Remnant Parcels will simply allow for better business management and better estate planning for Mr. Nunn and Mr. Tamayo. My clients have a right to have their applications heard and decided on their merit; discussion of "precedent" for other properties is inappropriate.

Third, there is no over-arching "sovereign power" that allows CCWD or the County to ignore California statute. The County is a "police power" entity, and as such, is bound by Article XI, § 7 of the California Constitution. That Constitutional root prohibits any local action or regulation in violation of state statute. CCWD is created by statute, has very limited powers, and, contrary to the Staff Report, cannot ignore the Map Act "altogether by invoking sovereign immunity." (Staff report, page 8.)

There is simply no such magic "sovereign immunity" trump card that allows the County and/or CCWD to unilaterally ignore the Subdivision Map Act.

☒ *Staff Response #4*.

Again, staff attempts to mislead and distract.

First, with all due respect, what Mr. Nunn, or Ms. Borba, or their Land Surveyor, Mr. Cunha, may have thought the law was when they made earlier statements and representations to the County Staff is irrelevant. I now represent them, and I am a recognized expert in this area of the law. They are not. A reviewing court will focus on the legal issues, not what a layperson said or did in the past.

Second, the cases cited by Staff have nothing to do with the Map Act. The Staff Report provides: "However, the fact that the Attorney General found it appropriate to venture into eminent domain law in order to decide a question regarding the Map Act is significant." (Staff Report, page 9.) However, the Attorney General did no such thing. The Attorney General reviewed the legal question of whether a condemnation can *create* parcels, and found that it could so create. The Attorney General did not, and would not, review severance damage cases for Map Act guidance. Each of the cases set forth in the Staff Report is a severance damage case; those case have nothing to do with, and have no relevant bearing on, the Subdivision Map Act issues presented by this appeal.

The "*severance damages*" cases presented by Staff (and other related cases not presented by Staff) focus *solely* on whether additional monies are owed by the government for property not actually condemned by the government, but impaired and rendered less valuable by the taking of the property that is condemned. In reviewing such issues of law and fact, the court focuses on the "unity of property" (interdependence) of the properties in question, regardless of whether they are separate legal lots or the same lot. Issues such as unity of title, contiguity, unity of use, access, etc., play into the court's thinking. If the court, in reviewing such issues, finds the parcels in question to be interdependent (often referred to as part of a "larger parcel" or a "unity of property") then severance damages may be available. Conversely, if the court finds the parcels not to be interdependent (often referred to as "separate and individual"), then severance damages may not be available. (*See City of Los Angeles v. Wolfe* (1971) 6 Cal. 3d 326.)

So for example, in *City of Los Angeles v. Wolfe* (1971) 6 Cal. 3d 326, the court found two separate legal lots to be interdependent and potentially a "larger parcel" for severance damage purposes, even though the properties were separate legal lots, on separate city blocks, over 250 feet from each other – in other words, for severance damages purposes they were potentially a "larger parcel," whereas for Map Act purposes they were separate legal lots.

Again, severance damages cases have nothing to do with the *creation* of parcels through condemnation, as is the case here; such parcel creation is recognized by the Attorney General, and requires the issuance of Certificates of Compliance under the Map Act when requested.

⊡ *Staff Response #5*.

As set forth above, the Staff Report offers no proper legal support for the Zoning Administrator's denial of the requested Certificates of Compliance. Subdivision Map Act section 66428(a)(2) legally divides and yet exempts from any mapping requirements the division of land and creation of new remnant parcels that occurs when a governmental agency acquires land in fee simple absolute (through condemnation, purchase or otherwise), when that acquisition is less than the existing (pre-conveyance) legal lot. Because the four Remnant Parcels were created lawfully over time by the separate conveyances of the Vasco Road Parcel and the Pipeline Parcel, the County is required, if requested, to issue a Certificate of Compliance for each of the four (4) such Remnant Parcels still held by Mr. Nunn and Mr. Tamayo in their private ownership.

B. Additional Reasons For Certificates.

Additionally, pursuant to Map Act §§ 66499.34 and 66499.35, a "permit for development" will likewise serve as a Certificate of Compliance. We have learned that on March 24, 2012, the County issued two separate "Well Permits" for the Remnant Parcel we have designated as "Parcel A" (APN 007 150 017; APN 007 140 006). As such, pursuant to the Map Act §§ 66499.34 and 66499.35, the County has issued Certificates of Compliance for two separate portions of Parcel A, thereby recognizing two lots on Parcel A; This Commission should recognize that fact through this appeal.

⊡ ⊡ ⊡ ⊡ ⊡

We look forward to addressing all factual and legal arguments at the hearing for this appeal.

Respectfully submitted,

Michael Patrick Durkee

MPD:afm

cc: Ronald E. Nunn
Jeffrey Tamayo
Robert Nunn
Lisa Borba
Sanford M. Skaggs
Vince Cunha

Allen Matkins

Memorandum

Allen Matkins Leck Gamble Mallory & Natsis LLP
Attorneys at Law
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To: Chair Marvin Terrell and
Planning Commission
County of Contra Costa

cc: Aruna Bhat
Thomas Geiger
William Nelson
Ronald E. Nunn
Lisa Borba
Sanford M. Skaggs, Esq.

From: Michael Patrick Durkee

Date: July 10, 2012

Telephone: 415.273.7455
E-mail: mdurkee@allenmatkins.com
File Number: 246448-00002/SF842879.07

Subject: *Appeal of County Zoning Administrator's April 19, 2012 Decision Denying Requested Certificates of Compliance - County File Nos. ZC011-798, -800 and -801*

I. SUMMARY

On behalf of our client, Ron Nunn and his partner Jeffrey Tamayo, the owners of the Dutra Ranch, I respectfully submit the following factual and legal grounds why the County Zoning Administrator's April 19th 2012 denial of Mr. Nunn's request for four (4) Certificates of Compliance for the below-described "Remnant Parcels," located on the Dutra Ranch Property ("Zoning Administrator Determination"), was legally flawed and therefore must be overturned.

In short, there are at least two different ways to create new parcels from originals parcels in California: (1) by recorded subdivision map, pursuant to the Subdivision Map Act; and (2) by conveyance. The four (4) Remnant Parcels in question on this appeal were created lawfully over time by separate conveyances of land to governmental agencies as part of the condemnations that created Vasco Road, and the condemnations by Contra Costa Water District creating the transfer pipeline (as part of the Los Vaqueros Reservoir Project) ("Pipeline Parcel"). The property left over from each of these condemnations (the Remnant Parcels) are physically separated from each other by the legal conveyances of fee strips of land to these governmental agencies through condemnation. As such, they are physically and legally four distinct parcels. The County is required, by law, to issue a Certificate of Compliance for each of those four Remnant Parcels.

The Zoning Administrator Determination holding that the four distinct Remnant Parcels are nonetheless legally only one parcel – based in large part on its focus on our client's earlier

misstatements of the facts and the law – is good theater, but legally irrelevant. For the factual and legal reasons provided herein, we respectfully submit that there are four legal parcels in Mr. Nunn's ownership, that four Certificates of Compliance are due, and that therefore our appeal must be upheld.

II. PROCEDURAL BACKGROUND

In May and June of 2011, Mr. Nunn made applications to the County, ultimately requesting four separate Certificates of Compliance for each of the four Remnant Parcels. The application included a memorandum dated May 2, 2011 from Sanford M. Skaggs, Esq., outlining a "Division by Conveyance to Governmental Agency and Resulting Legal Parcels Under the Subdivision Map Act." Christine Louie, the planner assigned on this file, has assigned Application Nos. 0798, CDZC11-0799, -0800 and -0801 to these Certificate applications.

On July 28, 2011, Ms. Louie authored a "Response to a Request for a Certificate of Compliance for Four Parcels," which concluded that the Dutra Ranch only consists of one contiguous parcel, and therefore only one Certificate of Compliance could be issued. Ms. Louie reasoned that four Certificates could not be issued since the four Remnant Parcels were not created by a grant deed conveyance or subdivision action. On August 8, 2011, Mr. Skaggs authored an additional memorandum in "Response to Application for Certificates of Compliance for Four Lots ##ZC11-798, 799, 800, and 801," which requested reconsideration of Ms. Louie's determination and provided additional factual and legal analysis of the issues involved.

Several members of County Planning Staff attended a Subdivision Map Act course I taught in Lafayette in 2011 and asked questions regarding the legal impact of condemnations that split a property down the middle (leaving the condemnation strip and two remaining pieces on either side). I gave the same answers in that class as I do in this memorandum: the condemnation creates multiple new parcels. By follow-up conference calls, email and the like, Planning Staff continued to ask questions of me and the legal reasons supporting my analysis. Staff made clear that my analysis was contrary to earlier County determinations and that changing positions would potentially create precedent (and embarrassment) for those making those earlier decisions. My point then to them is my point now to this Commission: embarrassment or precedence is no reason to ignore the letter and intent of the law.

Subsequently, I was hired by Mr. Ron Nunn to assist him in his efforts. On November 30, 2011, I submitted a memorandum to County Counsel that supported the two memoranda previously submitted by Mr. Skaggs. My memorandum also provided additional factual and legal analysis as to why a separate Certificate of Compliance was required for each of the four Remnant Parcels. Despite

several attempts on my part to discuss the matter in person or over the phone, I received absolutely no response from the County Counsel's office.

Five months later, by letter dated April 19, 2012, County Zoning Administrator Aruna Bhat issued the Zoning Administrator Determination, which recognized that portions of the Dutra Ranch had been conveyed over time through crisscrossing condemnations, that separate lots did exist in the hands of the government, but nonetheless determined that although physically not touching each other at any point, and physically separated forever by these intervening fee strips of land now held by governmental agencies through condemnation, the four Remnant Parcels were nonetheless legally *only one parcel*, and therefore only one Certificate of Compliance could be issued by the County.

By letter dated April 25, 2012, Lisa Borba, as representative of Mr. Nunn, filed the instant appeal of the Zoning Administrator Determination. This writing underscore the factual and legal arguments raised earlier by Sanford Skaggs, in our communications with staff, and in my memorandum to County Counsel, all of which are incorporated herein by this reference as if set forth in full. This writing likewise responds directly to the factual and legal arguments contained in the Zoning Administrator Determination.

III. HISTORICAL BACKGROUND

The attached *Exhibit A, Exhibit B, Exhibit C* and *Exhibit D* reveal the "configuration" history of the larger property that led to the 1952 creation of what is now referred to as the "Dutra Ranch."

Approximately forty-two years later, in or around May 1994, with the Dutra Ranch still consisting of one single parcel, a Pre-Judgment Final Order of Possession, referenced in the County's April 1996 Record of Survey, established a County right-of-way across the Dutra Ranch for what is now Vasco Road ("Vasco Road Parcel"). See *Exhibit E.*

Then, approximately three years later, in or around June 1997, the County's Final Order of Condemnation officially divided the Dutra Ranch and created the Vasco Road Parcel. That Vasco Road Parcel conveyance split the Dutra Ranch property into three (3) legal lots: the Vasco Road Parcel conveyed in fee simple absolute to the government for Vasco Road, and the two Remnant Parcels still held in private ownership on either side of that Vasco Road Parcel. See *Exhibit F.*

In addition, the June 1997 Final Order of Condemnation created the "Pipeline Parcel," wherein the Contra Costa Water District acquired a fee strip portion of the Dutra Ranch property that crisscrossed (is perpendicular to) the Vasco Road Parcel, again splitting in two the two Remnant Parcels described above. This Contra Costa Water District condemnation of the Pipeline Parcel was

again in fee simple absolute, and secured the land on which the transfer pipeline is located as part of the Los Vaqueros Reservoir Project.

Interestingly, the Zoning Administrator Determination recognizes - factually – these separate and crisscrossing condemnations, recognizes that the two separate and distinct legal parcels to the government (Vasco Road Parcel and Pipeline Parcel) *were created* by condemnation, but then argues that while the conveyances to the government could and did create new government parcels, the remaining Dutra Ranch – now cut up into four (4) distinct pieces, each piece no longer adjacent to any other piece – was still just one parcel. The law does not support such an absurdity.

Instead, as of 1997, these two separate and crisscrossing conveyances to governmental agencies of fee strip portions of the original single Dutra Ranch parcel divided that Ranch into 6 new legal parcels: the two separate parcels (the Vasco Road Parcel and the Pipeline Parcel) conveyed to the government, and the 4 remaining "Remnant Parcels" resulting from (on the different sides of) those crisscrossing conveyances to the government.

IV. LEGAL ANALYSIS

A. The History of the Condemnation of Land by a Governmental Agency Under the Subdivision Map Act

As stated above, there are at least two different ways to create new parcels from originals parcels in California: (1) by recorded subdivision map, pursuant to the Subdivision Map Act, or "Map Act" (§§ 66410 *et seq.*); and (2) by conveyance.

Generally speaking, under the Map Act, a tentative and subsequent final map is required for a division of land that creates five or more parcels (§ 66426), whereas a parcel map is required for a division of land that creates four or fewer parcels (§ 66428(a)).

In contrast, a conveyance creates new parcels by simply conveying a portion of the original parcel, with the new parcel's description shown on the face of the deed (often by metes and bounds description), and the deed being recorded with the County Recorder (*Gardner v. County of Sonoma* (2003) 29 Cal.4th 990, 1001-1002). The Map Act recognizes this separate means of creating new parcels in its many provisions regarding Certificates of Compliance, ultimately granting Conditional Certificates of Compliance even if the lot is illegally conveyed and created.

As set forth in Section 66499.35:

> (a) Any person owning real property or a vendee of that person pursuant to a contract of sale of the real property may request, and a local agency *shall* determine, whether the real property complies with the provisions of this division and of local ordinances enacted pursuant to this division. If a local agency determines that the real property complies, the city or the county *shall* cause a certificate of compliance to be filed for record with the recorder of the county in which the real property is located. ....
>
> (b) If a local agency determines that the real property does not comply with the provisions of this division or of local ordinances enacted pursuant to this division, it *shall* issue a conditional certificate of compliance. ...

A county's mandatory duty to issue either certificates of compliance or conditional certificates of compliance is discussed in *Lakeview Meadows Ranch v. County of Santa Clara* (1994) 27 Cal. App. 4th 593, 598, which also rejected the county's argument that the parcels were consolidated into a single parcel due to their common ownership. (*Id.* at 599-600.)

The Map Act recognizes that when a portion of a legal lot is conveyed from one private person to another, then two new lots have been created, albeit potentially illegal lots that will be legalized through the Conditional Certificate of Compliance process (*see,* Map Act §§ 66499.34 and 66499.35). The Map Act does not provide – as the Zoning Administrator Determination argues - that despite the conveyance there remains only one parcel. Instead, the Map Act provides that a conveyance that breaks a parcel into two or three or more pieces *creates* two or three or more parcels. Yet, the Zoning Administrator Determination argues that only one parcel remains, despite recognizing two separate and crisscrossing conveyances to the government that broke the original parcel into six (6) pieces: the Vasco Road Parcel, the Pipeline Parcel and the 4 Remnant Parcels.

The Zoning Administrator Determination confuses these two different ways of *creating* new parcels: "there are two distinct ways to *subdivide* property in California: 1) by a subdivision map that has been property prepared, approved and recorded; and 2) through actual conveyance." (Zoning Administrator Determination, p. 3, emphasis added.) The Zoning Administrator Determination cites 74 Ops. Cal. Atty. Gen 149 (1991) for this statement, yet that Attorney General Opinion recognizes that lots may be created by maps and conveyances and that a county is *required* to issue Certificates of Compliance or Conditional Certificates of Compliance for each of the resulting lots (32 lots in that Attorney General Opinion). The Zoning Administrator Determination glosses over this distinction,

and instead relies on that Attorney General Opinion as support for a claim that a parcel map was required to recognize the four lots resulting from the condemnations. As discussed in greater detail below, nothing in the 1991 Attorney General Opinion supports this claim.

Historically, condemnations and other conveyances to the government of property involving a portion of an existing legal parcel required a subdivision map. (*See, e.g.*, 58 Ops. Cal. Atty. Gen. 593 (1975).) In this 1975 Attorney General Opinion, the California Attorney General addressed a situation where a proposed condemnation by a governmental agency of a portion of a single parcel would result in three lots (the condemned portion and two remnant parcels on either side of the condemned parcel). The question asked of the Attorney General was whether a parcel map was required for this 3-lot division. The Attorney General concluded that a parcel map was required, reasoning that there was "no question but that condemnation of a part of a parcel results in a 'division' of land" (*Id.* at 594), and thus, that the proposed condemnation – that divided the land into 3 parcels - was subject to the Map Act. (*Ibid.*)

The Attorney General concluded that a parcel map was required because while then-existing Section 66424 provided that a conveyance of land to a governmental agency was not counted for purposes of computing the number of parcels created (that provision is now in section 66426.5), it did not exempt the conveyance itself from the Map Act. Hence, the condemnation would divide the property into 3 new lots, and a map memorializing that proposal was required.

However, in the very next legislative session following the Attorney General's 1975 Opinion, the Legislature amended Section 66428 to add an exemption (from any mapping requirements) for conveyances of land to a governmental agency. Section 66428(a)(2) provides in pertinent part:

> A parcel map shall not be required for… [l]and conveyed to or from a governmental agency, public entity, public utility, or for land conveyed to a subsidiary of a public utility for conveyance to that public utility for rights-of-way, unless a showing is made in individual cases, upon substantial evidence, that public policy necessitates a parcel map. For purposes of this subdivision, land conveyed to or from a governmental agency shall include a fee interest, a leasehold interest, an easement, or a license.

This was the status of the law when the Vasco Road Parcel was created and the status of the law in 1997 when the creation of the Vasco Road Parcel was again confirmed and the Pipeline Parcel created. In other words, no subdivision map (neither tentative and final map, nor parcel map) is required to lawfully create parcels by conveyance, condemnation, etc. when a governmental agency is involved with that transaction. This exemption includes the new parcel owned by the

governmental agency, *as well as* the new remnant parcels created by that government-involved conveyance.

The Zoning Administrator Determination argues that if a conveyance to or from the government is not a "subdivision" under section 66428(a)(2) of the Map Act, then the condemnations were not "subdivisions" and therefore, that no new lots were created. The Zoning Administrator Determination is confused. The Map Act makes clear that such a conveyance involving a governmental agency shall not invoke the jurisdiction of the Map Act requiring the approval and recordation of a *subdivision map*; it does not provide that new parcels have not been *created* through such conveyance, since clearly new parcels have been created: the Vasco Road Parcel, the Pipeline Parcel, and the 4 separate Remnant Parcels those conveyances created. The Zoning Administrator Determination "wants its cake, and to eat it to" – it argues that two new government parcels were created, but that the breaking off of those parcels from the original Dutra Ranch through crisscrossing condemnations nonetheless did not change the Ranch at all and that it is still one parcel. Again, such reasoning is absurd.

As described above, Section 66428 expressly exempts from any mapping requirements "[l]and conveyed to or from a governmental agency." When then read in the context of the 1975 Attorney General Opinion (which reasoned definitively that a condemnation is a "division" of land) and the immediately subsequent action taken by the Legislature in response to the Attorney General Opinion, Section 66428(a)(2) must be interpreted to mean that the division of land that occurs when the portion is conveyed (through condemnation or otherwise) - including the inevitable creation of resulting remnant parcels - is exempt from the Map Act's mapping requirements. In other words, the condemnation exemption of Section 66428(a)(2) applies to the entirety of the land division effectuated by the conveyance to the government. No mapping is required in order to "create" the resulting parcels because they already exist *in fact* and as a matter of law.[1]

Again, the Zoning Administrator Determination's arguments to the contrary are nonsensical: the portion of the parcel conveyed to the government (and in so doing "dividing" the land) is legal and recognized, but the remaining land resulting from that legal division is not and in fact does not itself separately exist. Simply put, the law does not allow a statutory interpretation that results in an absurdity. (*Wells Fargo Bank v. Superior Court* (1991) 53 Cal.3d 1082.)

As the Zoning Administrator Determination recognizes (copying directly from my earlier memorandum to the County Counsel's office), in a 2003 Attorney General Opinion, the Attorney General concluded that a 1965 condemnation by a governmental agency lawfully created not only the

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[1] A parcel is lawfully created upon its conveyance by deed. (*Gardner v. County of Sonoma*, 29 Cal.4th 990, 1001-1002 (2003).)

condemned parcel, but also two new legal remnant parcels located on either side of the condemned parcel. (86 Ops. Cal. Atty. Gen. 70-71 (2003).) In 1965, when the condemnation occurred, the Map Act did not require parcel maps for divisions of fewer than five parcels (no map of any kind was required). The parcel map requirement began in 1972. The Attorney General relied on Section 66412.6, which presumes that a parcel was lawfully created if it was a division that occurred prior to 1972, the division created fewer than five parcels, and the division was not regulated by a local ordinance then in effect. Because no map was required under the Map Act or local ordinance when the remnant parcels were created (in 1965), no map was now needed to recognize their lawful status.

According to the Attorney General, the "division" occurred and the parcels were created when the court ordered the condemnation and the deed was recorded. The Attorney General Opinion expressly recognized that the condemnation's *creation* of new legal parcels, for which Certificates of Compliance must be issued, was not subject to Section 66424 because no "subdivision" was proposed. (86 Ops. Cal. Atty. Gen. at 73.) Instead, the condemnation had *already* divided the property into legally-recognized separate parcels. (*Id.*)

The Zoning Administrator Determination completely *misses* the import of this Opinion, and instead argues (at p. 3): "if the lots created by the 1965 condemnation were legal because neither the Map Act nor the ordinances in effect at the time regulated subdivisions of four or fewer lots, then it stands to reason that lots created when local ordinances regulating subdivisions of four or fewer lots are in effect are not legal." (Emphasis added.) Neither the statement from, nor the reasoning of, the Zoning Administrator Determination "stands to reason." Neither the Map Act nor the Attorney General Opinion provides that four or fewer lots resulting from a condemnation are by law *illegal*, as the Zoning Administrator Determination "reasons." The Zoning Administrator Determination then quotes from footnote 5 of the 2003 Attorney General Opinion: *"Of course, new parcels created but not conveyed to a governmental agency must comply with any applicable requirements of the Act."* (Zoning Administrator Determination at 3; quoting from 58 Ops. Cal. Atty. Gen. 594-595; emphasis added by the Zoning Administrator Determination.)

What the Zoning Administrator Determination fails to discern from that quoted passage is that the Attorney General recognized that the lots had been *created*; its admonition regarding compliance with "any applicable requirements of the [Map] Act" would mean and include the very Certificates of Compliance my client seeks from the County, pursuant to the Subdivision Map Act.

The 2003 Attorney General Opinion further explains how the eminent domain law's procedure for analyzing severance damages does not transform separate parcels into one. To the contrary the eminent domain law's aggregation of parcels "is only for purposes of possible compensation and not for other purposes, *i.e.*, what constitutes a 'parcel' or a 'division' under the terms of section 66412.6 and the [Map] Act." (86 Ops. Cal. Atty. Gen. at 73.) "In each of the cases where multiple parcels

were considered to be part of the 'remainder parcel,' the parcels were not merged for any other purpose but *remained distinct separate parcels*." (*Id.*, emphasis added.)

Although the 2003 Attorney General Opinion and the 1975 Attorney General Opinion addressed different Map Act sections than are at issue in our case, the common thread in each Opinion is the Attorney General's conclusion that a governmental agency-involved conveyance of fee interest (through condemnation or otherwise) severs or "divides" the land, creating new parcels. In addition, at the time of the division addressed by each Attorney General Opinion, the Section 66428(a)(2) governmental agency condemnation exemption did not yet exist.

Therefore, turning to the facts in our case, because we know that a conveyance of a portion of a parcel to a governmental agency divides the land and creates new parcels, and we know that Section 66428(a)(2) exempts such governmental agency-involved conveyances from any Map Act compliance, and we know that Certificates of Compliance are a means under the Map Act to bring even illegal lots into Map Act compliance, then it follows that the conveyances and acquisitions by the government over time of the separate Vasco Road Parcel and the Pipeline Parcel created those two Parcels and the four Remnant Parcels resulting from those conveyances.

There is simply no argument to the contrary. All of those lots were "created." The only question therefore is "what Map Act provisions address already-created lots?" The answer: Certificates of Compliance, as is being sought in this case by Mr. Nunn.

B. The Conveyances Physically Divided the Land

Further, "factually" speaking, the government's acquisition of the Vasco Road Parcel and Pipeline Parcel in this case clearly "divided" the land.

"Land" is defined in Civil Code section 659 as three-dimensional:

> Land is the material of the earth, whatever may be the ingredients of which it is composed, whether soil, rock, or other substance, and includes free or occupied space for an indefinite distance upwards as well as downwards, subject to limitations upon the use of airspace imposed, and rights in the use of airspace granted, by law.

Because land is three-dimensional, the conveyance of one new three-dimensional portion of property to the government must, as a matter of physical law, create two additional new parcels on either side of the conveyed portion. When the conveyances crisscross perpendicularly, as is the case here, the Remnant Parcels are each separated from each other by the intervening Conveyance Parcel,

and cannot ever physically touch each other, since the Vasco Road Parcel and Pipeline Parcel fully separates the Remnant Parcels on a three-dimensional basis: the Vasco Road Parcel and Pipeline Parcel go as "high" and as "low" as land can legally go in California, thus fully separate the Remnant Parcels from each other.

There is no body of law supporting the legal or factual argument that four parcels that cannot and do not physically touch at any point, that are physically separated from each other by intervening and crisscrossing strips of land owned in fee by the government, are nonetheless to be treated as "one parcel." They are clearly created by the legal conveyances to the government and hence are themselves legal in character.

This argument was presented to the County in my memorandum to the County Counsel; the Zoning Administrator Determination states that it reviewed that memorandum prior to reaching its conclusions. Yet, the Zoning Administrator Determination never addresses this argument. Under the rationale of the Zoning Administrator Determination, a large private ranch, sitting on either side of a 10-mile- wide condemnation (owned in fee simple absolute by a governmental agency) that breaks the ranch into two pieces would still be considered one parcel. That "reasoning" is simply not reasonable, nor is it supported by controlling law.

C. There is More Here Than Meets the Eye

We believe that for years the County has refused Certificates of Compliance on a poorly based understanding of the law, and now feels that any capitulation from those previous hard-line stances will create embarrassment and precedent. We further believe that the Zoning Administrator Determination represents a concerted effort to overrule certain planning staff. Therefore, perhaps believing "the best defense is a good offense," the Zoning Administrator Determination attacks my client in very "personal" and inappropriate ways.

For example, the opening paragraphs of the Zoning Administrator Determination set a stage that is neither reflective of controlling law nor relevant. Before my or Mr. Skaggs involvement, representatives of Ron Nunn made representations to the County that were not factually nor legally correct regarding the conveyance/condemnation history of Dutra Ranch, nor its legal consequence. The Zoning Administrator Determination pounces on those earlier statements as if they were an admission that cannot be retracted. The Zoning Administrator Determination is wrong to take that approach, and wrong regarding the consequences of earlier misstatements regarding the law.

Neither Ms. Borba nor Mr. Nunn are attorneys, let alone attorneys trained in the specifics of the Subdivision Map Act. That they earlier sought a minor subdivision - because they did not understand that they already possessed four separate lots created by condemnation - is an honest

mistake, and one that does not change, influence or adversely affect the correct application of California law. At initial sale, the Title Company incorrectly identified the subject property as a single parcel and the government conveyances as "easements," but subsequently corrected these errors.

Further, the Zoning Administrator Determination is mistaken when it asserts that such admissions therefore *shift* the burden of proof and legal standard of review to one favoring the County. This statement by the Zoning Administrator Determination Plain provides no legal citation to statute or case law, because no such rule exists. Instead, the law is clear: although a "local agency's decision to deny certificates of compliance is reviewable by petition for writ of administrative mandate" and that the question for a trial court is "whether the local agency's decision is supported by substantial evidence," where there is little or no dispute about the evidence, the focus of the dispute is on the meaning of statutes, and statutory construction "is a question of law which requires the exercise of [the court's] independent judgment." (*Abernathy Valley, Inc. v. County of Solano* (2009) 173 Cal. App. 4th 42, 46.) Here, there is no argument regarding the factual history of crisscrossing condemnations. A reviewing court will therefore exercise its independent judgment of what the law is; no deference or presumption will be given to the County's interpretation.

However, such inappropriate remarks in the Zoning Administrator Determination do reveal something else: our client's request and position on the law has raised the ire of certain persons at the County who feel that such personal attacks (against a constituent of good-standing) are appropriate when a challenge to long-standing, yet flawed, County opinions regarding Certificates of Compliance are in the breach. Where does embarrassment and precedence yield to the law? Such County behavior is actionable under 42 U.S.C. § 1983 when it unduly interferes with the use of land, as is the case here.

D. The Issuance of Certificates of Compliance is Mandatory Under the Subdivision Map Act

Pursuant to Map Act section 66499.35(a), any person with a financial interest in real property may request, and a city or county shall determine, whether the property complies with the Map Act and any local ordinances enacted pursuant thereto. If the city or county determines that the property complies, it *must* file a Certificate of Compliance for recording. (*Ibid.*)

In the present case, because the Remnant Parcels comply with the Map Act and the Contra Costa County Code, the County must approve Mr. Nunn's requested Certificates of Compliance for the four (4) Remnant Parcels.

V. CONCLUSION

Subdivision Map Act section 66428(a)(2) legally divides and yet exempts from any mapping requirements the division of land and creation of new remnant parcels that occurs when a governmental agency acquires land in fee simple absolute (through condemnation, purchase or otherwise), when that acquisition is less than the existing (pre-conveyance) legal lot. Because the four Remnant Parcels were created lawfully over time by the separate conveyances of the Vasco Road Parcel and the Pipeline Parcel, the County is required, if requested, to issue a Certificate of Compliance for each of the four (4) such Remnant Parcels still held by Mr. Nunn in his private ownership.

We look forward to presenting these and any additional factual and legal arguments at the hearing for this appeal.

Respectfully submitted,

Michael Patrick Durkee

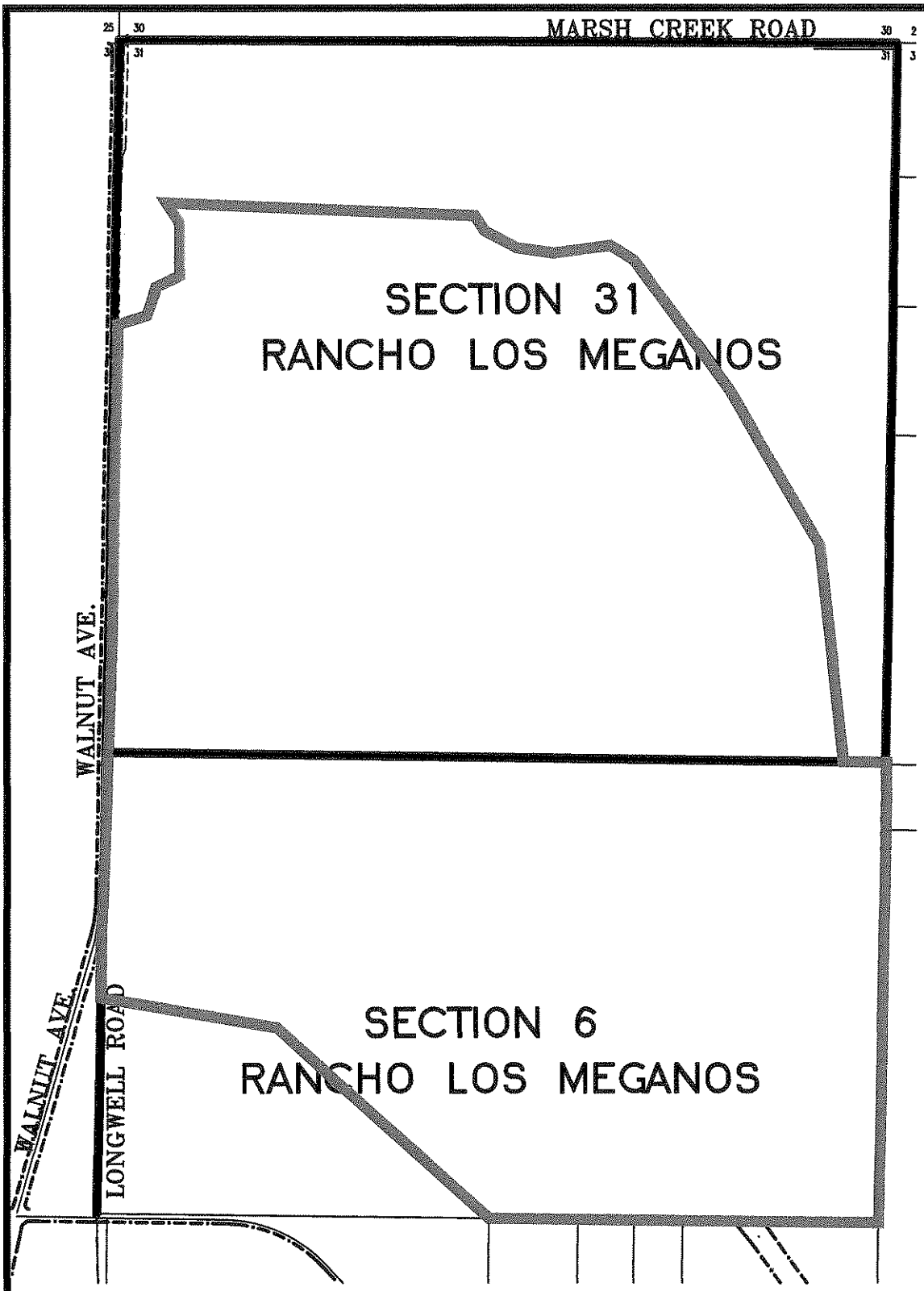


Exhibit A: 1913

Rancho Los Meganos Section 6 and 31

"The property assembled as the modern-day Dutra Ranch was created in 1952, but it has a chain of title dating back to Rancho Los Meganos in 1913. This exhibit, and the following exhibits, depict the boundary of the Dutra Ranch in a thick blue line."

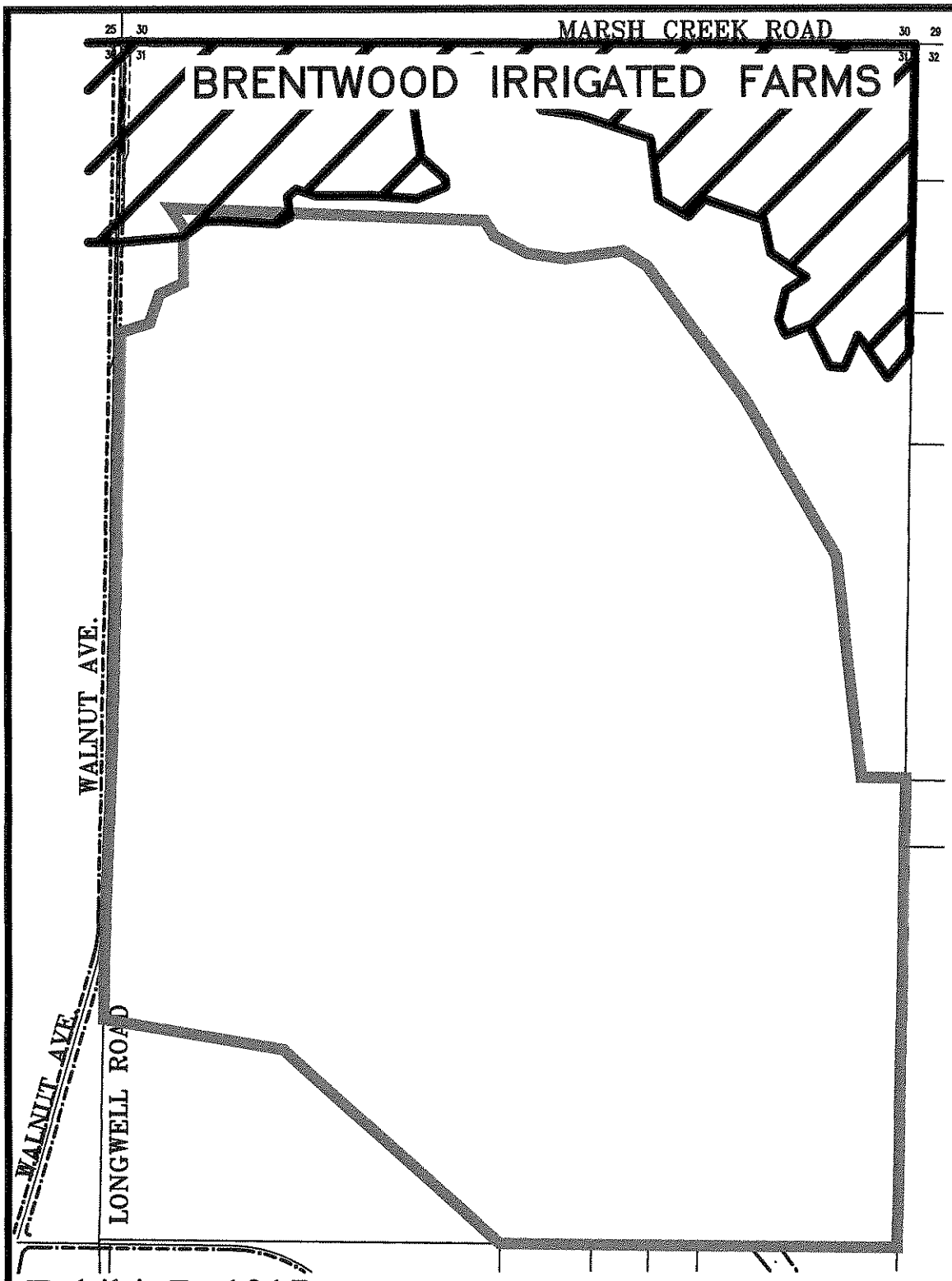


Exhibit B: 1917

Brentwood Irrigated Farms

"In 1917, the northern extent of Rancho Los Meganos was subdivided into the Brentwood Irrigated Farms maps. A small 1.23-Ac piece of the future Dutra Ranch was included in Subdivision 10 of the Brentwood Irrigated Farm. The balance of the future ranch remained in Rancho Las Meganos. All property was owned by the Balfour Guthrie Company."

Exhibit C : 1941

Faria Ownership

"In 1941, The Balfour Guthrie Company deeded the Dutra Ranch and additional property to the north to Mr. Faria."

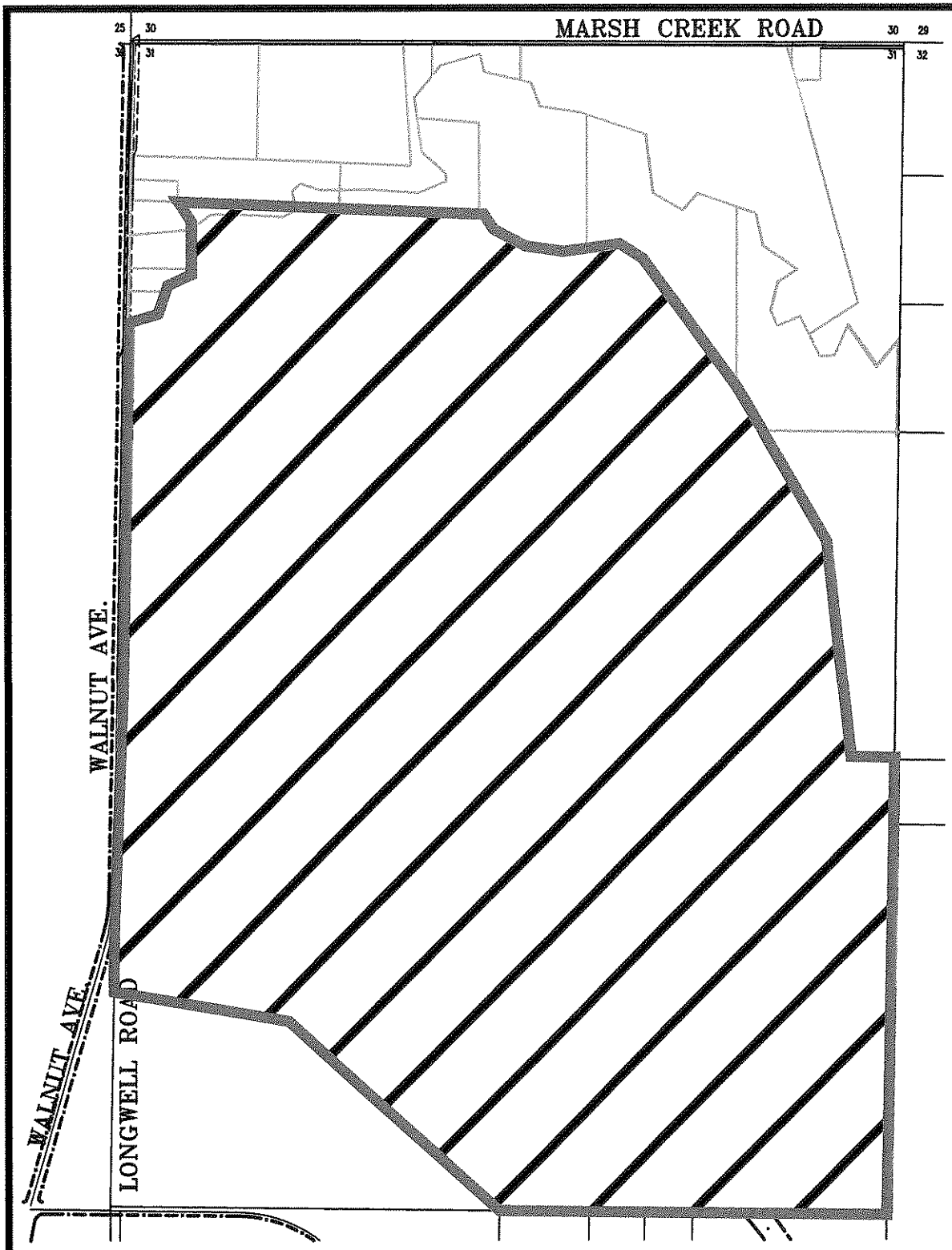


Exhibit D : 1950/1952

The Creation of the Dutra Ranch

"In 1950, Mr. Faria deeded the 1.23-Acre Brentwood Irrigated Farms piece and the larger Rancho Las Meganos portion to Mr. Jason. In 1952, Mr. Jason deeded these same properties to Mr. Dutra. This created the Dutra Ranch."

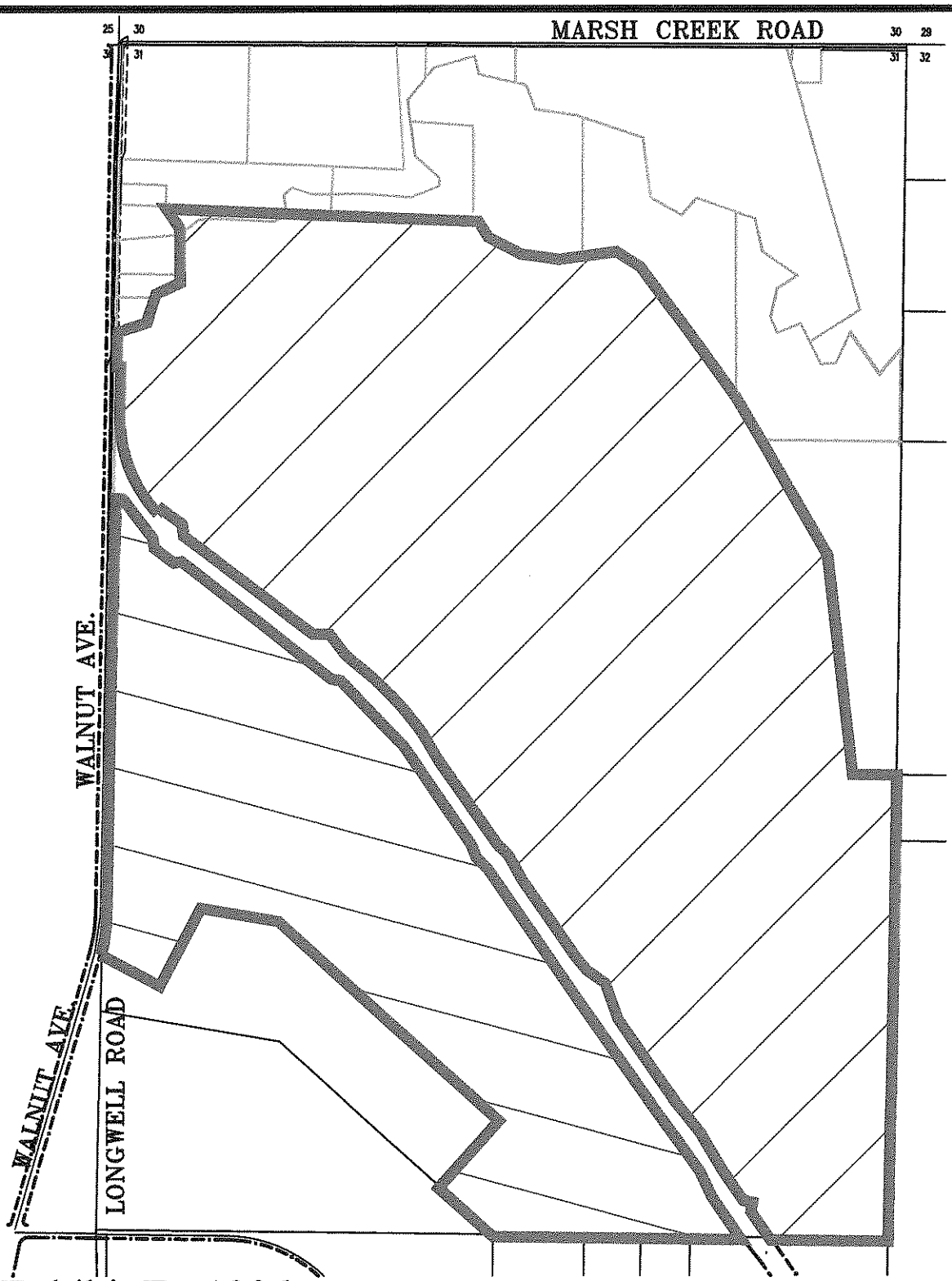


Exhibit E : 1996

Vasco Road Pre-Judgment

"In 1996, Contra Costa County recognized the 1994 Pre-Judgment Final Order of Possession for Vasco Road thru the Dutra Ranch on the County Survey. This Pre-Judgment demonstrates the creation of the three Parcels: The Vasco Road Parcel and the two Remnant Parcels. This Pre-Judgment would become the official condemnation with the Final Order of Condemnation in 1997."

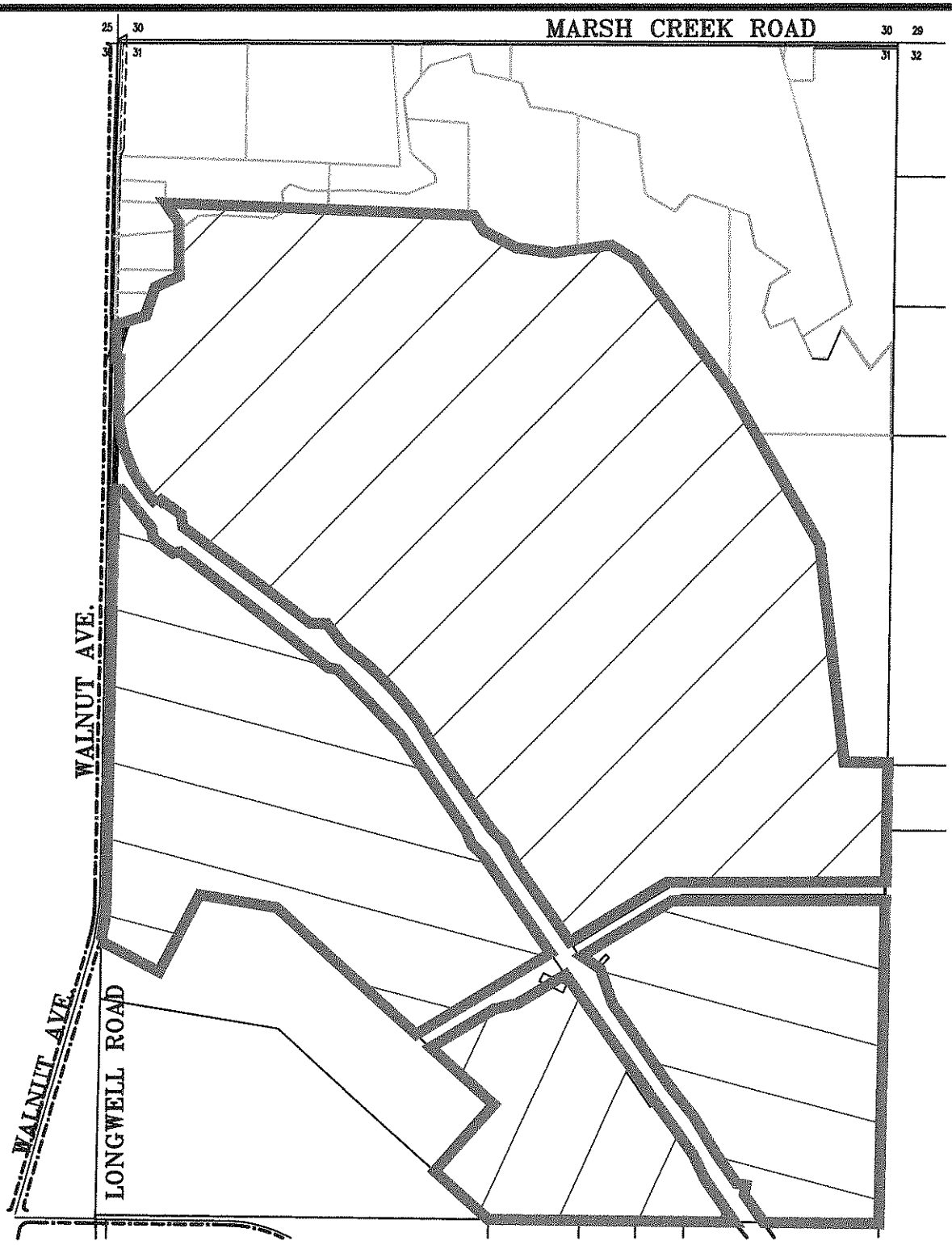


Exhibit F : 1997

The Creation of Six Parcels by Condemnation

"In 1997, the Final Order of Condemnation deeded the Vasco Road Parcel and the Pipeline Parcel for the Los Vaqueros transfer pipeline to the public agency in fee title absolute. These two crisscrossing condemnations created the four Remnant Parcels of the Dutra Ranch.

April 25, 2012

Aruna M. Bhat, County Zoning Administrator
Contra Costa County
Department of Conservation and Development
30 Muir Road
Martinez, CA 94553-4601

RE: Appeal of the Zoning Administrator's April 19, 2012 Decision regarding Requested Certificates of Compliance for Four Parcels at 0 Walnut Avenue, Byron CA
County Files ZC011-798, -799, -800 and -801

Dear Ms. Bhat,

Please consider this submittal our formal request to appeal the decision you outlined in your April 19, 2012 letter. The submittal is made up of this cover memo, the November 30, 2011 letter authored by our attorney Michael Durkee, as our official position as to why four compliance certificates are legally required to be issued for these four parcels created by a public agency condemnation, and a series of 5 maps that graphically show the history of this ranch from 1913 to the present.

We respectfully disagree with your April 19th conclusions as the Zoning Administrator, and believe that your decision is based partially on misinterpreted understandings of the law in this case. There is no new information that we would be bringing to Staff and the Planning Commission in this matter, but instead we will be restating what has already been outlined in a manner that addresses what we see has been subject to misinterpretation. We request an Appeal hearing with the Contra Costa County Planning Commission and understand the soonest meeting date our item could be heard is on May 22, 2012. We are very hopeful that we can be scheduled on this date.

We appreciate that the County has this appeal process available to us, and look forward to further discussions and progress with Staff and the County Planning Commission. You can reach me at my office number anytime (925-648-3879) with any questions.

Sincerely,

Lisa M. Borba
Owner Representative

Copy Ronald Nunn
Jeffrey Tamayo
Michael Durkee

attachments

Allen Matkins

Memorandum
Allen Matkins Leck Gamble Mallory & Natsis LLP
Attorneys at Law
www.allenmatkins.com

To: Thomas Geiger
Supervising Deputy County Counsel
County of Contra Costa

cc: William Nelson
Ronald E. Nunn

From: Michael Patrick Durkee

Date: November 30, 2011

Telephone: 415.273.7455
E-mail: mdurkee@allenmatkins.com
File Number: 246448-00002/SF828338.07

Subject: The Creation of Legal Lots by Conveyances to the Government

I. SUMMARY

We represent Ron Nunn, the owner of the Dutra Ranch. As you know, in May and June of 2011, Mr. Nunn made applications to the County, ultimately requesting four Certificates of Compliance for the below-described "Remnant Parcels," located on the Dutra Ranch Property. The application included a memorandum dated May 2, 2011 from Sanford M. Skaggs, Esq., outlining a "Division by Conveyance to Governmental Agency and Resulting Legal Parcels Under the Subdivision Map Act." Christine Louie, the planner assigned on this file, has assigned Application Nos. 0798, CDZC11-0799, -0800 and -0801 to these Certificate applications.

On July 28, 2011, Ms. Louie authored a "Response to a Request for a Certificate of Compliance for Four Parcels," which concluded that the Dutra Ranch only consists of one contiguous parcel, and therefore only one Certificate of Compliance could be issued. Ms. Louie reasoned that four Certificates could not be issued since the four Remnant Parcels were not created by a grant deed conveyance or subdivision action. On August 8, 2011, Mr. Skaggs authored an additional memorandum in "Response to Application for Certificates of Compliance for Four Lots ##ZC11-798, 799, 800, and 801," which requested reconsideration of Ms. Louie's determination and provided additional legal analysis of the issues involved.

This memorandum is submitted in support of the two memoranda previously submitted by Mr. Skaggs, and provides legal analysis as to why a separate Certificate of Compliance is merited for each of the Remnant Parcels under controlling law.

In or around 1976, the property in question consisted of a single legal parcel located on what is now known as Dutra Ranch. At that time, we understand that the County or the State acquired a strip portion of that single Dutra Ranch lot for what is now Vasco Road ("Vasco Road Parcel"); title for that acquisition was in fee simple absolute. That Vasco Road conveyance split the Dutra Ranch

property into three (3) legal lots: the Vasco Road Parcel conveyed in fee to the government for Vasco Road, and the two remnant parcels still held in private ownership on either side of that Vasco Road Parcel.

Then, in 1997, the Contra Costa Water District acquired through condemnation a fee strip portion of the Dutra Ranch property that crisscrossed (is perpendicular to) the Vasco Road Parcel, again splitting in two the two remnant parcels created by the 1976 conveyance. This 1997 Water District condemnation also confirmed the public condemnation of the Vasco Road Parcel. Therefore, as of 1997, these two separate and crisscrossing conveyances to governmental agencies of fee strip portions of the original single Dutra Ranch parcel divided that property into 6 new legal parcels: the two separate conveyances to the government of portions of the Dutra Ranch ("Conveyance Parcels"), and the 4 remaining "Remnant Parcels" resulting from (on the different sides of) those conveyances to the government.

Subdivision Map Act section 66428(a)(2) legally divides and yet exempts from any mapping requirements the division of land and creation of new remnant parcels that occurs when a governmental agency acquires land in fee simple absolute (through condemnation, purchase or otherwise), when that acquisition is less than the existing (pre-conveyance) legal lot.. Because the four Remnant Parcels were created lawfully over time by the separate conveyances of the Conveyance Parcels, the County is required, if requested, to issue a Certificate of Compliance for each such Remnant Parcel still held in private ownership.

II. LEGAL ANALYSIS

A. The History of the Condemnation of Land by a Governmental Agency Under the Subdivision Map Act

Generally speaking, under the Subdivision Map Act, or "Map Act" (§§ 66410 *et seq.*), tentative and final maps are required for a division of land that creates five or more parcels (§ 66426), whereas a parcel map is required for a division of land that creates four or fewer parcels (§ 66428(a)).

Traditionally, condemnations and other conveyances to the government of property involving a portion of an existing legal parcel required a map. (*See, e.g.*, 58 Ops.Cal.Atty.Gen. 593 (1975).) In that 1975 Attorney General Opinion, the California Attorney General addressed a situation where a proposed condemnation by a governmental agency of a portion of a single parcel would result in three lots, the condemned portion and two remnant parcels on either side of the condemned parcel. The question asked of the Attorney General was whether a parcel map was required for this 3-lot division. The Attorney General concluded that "yes," a parcel map was required, reasoning that there was "no question but that condemnation of a part of a parcel results in a 'division' of land" (*Id.* at

594), and thus, that the proposed condemnation – that divided the land into 3 parcels - was subject to the Map Act. (*Ibid.*)

The Attorney General concluded that a parcel map was required because while then-existing Section 66424 provided that a conveyance of land to a governmental agency was not counted for purposes of computing the number of parcels created (that provision is now in section 66426.5), it did not exempt the conveyance from the Map Act. Hence, the condemnation would divide the property into 3 new lots, and a map memorializing that proposal was required.

B. The Legislature Amends the Map Act Following the 1975 Attorney General Opinion

However, in the very next legislative session following the Attorney General's 1975 Opinion, the Legislature amended Section 66428 to add an exemption (from any mapping requirements) for conveyances of land to a governmental agency. Section 66428(a)(2) provides in pertinent part:

> A parcel map shall not be required for... [l]and conveyed to or from a governmental agency, public entity, public utility, or for land conveyed to a subsidiary of a public utility for conveyance to that public utility for rights-of-way, unless a showing is made in individual cases, upon substantial evidence, that public policy necessitates a parcel map. For purposes of this subdivision, land conveyed to or from a governmental agency shall include a fee interest, a leasehold interest, an easement, or a license.

In other words, no subdivision map (neither tentative and final map, nor parcel map) is required to lawfully create parcels by conveyance, condemnation, etc. when a governmental agency is involved with that transaction. As we shall explain, this exemption includes the new parcel owned by the governmental agency, *as well as* the new remnant parcels created by that government-involved conveyance.

As described above, Section 66428 expressly exempts from any mapping requirements "[l]and conveyed to or from a governmental agency." The reference to "land" conveyed may raise the question whether the exemption addresses only the particular parcel conveyed to or from a governmental agency, and not any other resulting parcels. However, when read in the context of the 1975 Attorney General Opinion (which reasoned definitively that a condemnation is a "division" of land) and the immediately subsequent action taken by the Legislature in response to the Attorney General Opinion, Section 66428(a)(2) must be interpreted to mean that the division of land that occurs when the portion is conveyed (through condemnation or otherwise) - including the inevitable creation of resulting remnant parcels - is exempt from the Map Act's mapping requirements. In other

words, the condemnation exemption of Section 66428(a)(2) applies to the entirety of the land division effectuated by the conveyance to the government. No mapping is required in order to "create" the resulting parcels because they already exist *in fact* and as a matter of law.[1]

To argue otherwise would result in an absurdity: the portion of the parcel conveyed to the government (and in so doing "dividing" the land) is legal, but the remaining land resulting from that legal division is not; the law does not allow a statutory interpretation that results in an absurdity. (*Wells Fargo Bank v. Superior Court* (1991) 53 Cal.3d 1082.)

In a 2003 Attorney General Opinion, the Attorney General concluded that a 1965 condemnation by a governmental agency lawfully created not only the condemned parcel, but also two new remnant parcels located on either side of the condemned parcel. (86 Ops.Cal.Atty.Gen. 70 (2003).) In 1965, when the condemnation occurred, the Map Act did not require parcel maps for divisions of fewer than five parcels (no map of any kind was required). The parcel map requirement began in 1972. The Attorney General relied on Section 66412.6, which presumes that a parcel was lawfully created if it was a division that occurred prior to 1972, the division created fewer than five parcels, and the division was not regulated by a local ordinance then in effect. Because no map was required under the Map Act or local ordinance when the remnant parcels were created (in 1965), no map was now needed to recognize their lawful status. According to the Attorney General, the "division" occurred and the parcels were created when the court ordered the condemnation and the deed was recorded.

Although the 2003 Attorney General Opinion and the 1975 Attorney General Opinion addressed different Map Act sections than are at issue in our case, the common thread in each Opinion is the Attorney General's conclusion that a governmental agency-involved conveyance of fee interest (through condemnation or otherwise) "divides" the land into new remnant parcels. In addition, at the time of the division addressed by each Opinion, the Section 66428(a)(2) governmental agency condemnation exemption did not yet exist. Therefore, turning to the facts in our case, because we know that a conveyance of a portion of a parcel to a governmental agency divides the land and creates new remnant parcels, and we know that Section 66428(a)(2) exempts such governmental agency-involved conveyances from any Map Act compliance, then it follows that the conveyance and acquisition by the government over time of the two separate Conveyance Parcels lawfully created four new Remnant Parcels without the need for any further Map Act compliance.

Further, "factually" speaking, the government's acquisition of the Conveyance Parcels in this case clearly "divided" the land. "Land" is defined in Civil Code section 659 as three-dimensional:

---

[1] A parcel is lawfully created upon its conveyance by deed. (*Gardner v. County of Sonoma*, 29 Cal.4th 990, 1001-1002 (2003).)

> Land is the material of the earth, whatever may be the ingredients of which it is composed, whether soil, rock, or other substance, and includes free or occupied space for an indefinite distance upwards as well as downwards, subject to limitations upon the use of airspace imposed, and rights in the use of airspace granted, by law.

Because land is three-dimensional, the conveyance of one new three-dimensional portion of property to the government must, as a matter of physical law, create two additional new parcels on either side of the conveyed portion. When the conveyances crisscross perpendicularly, as is the case here, the Remnant Parcels are each separated from each other by the intervening Conveyance Parcel, and cannot ever physically touch each other, since the Conveyance Parcels fully separates the Remnant Parcels on a three-dimensional basis: the Conveyance Parcels go as "high" and as "low" as land can legally go in California, thus fully separate the Remnant Parcels from each other.

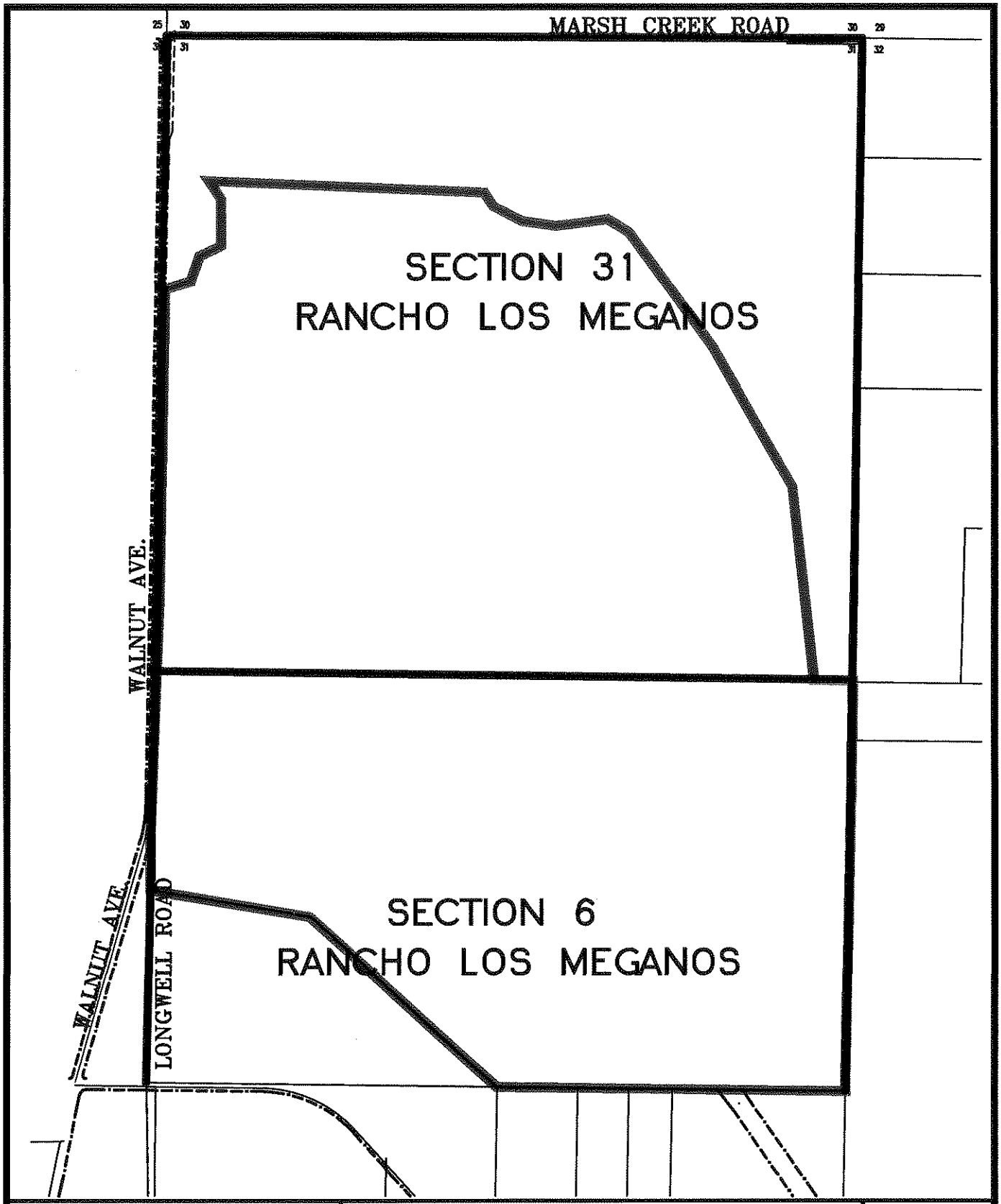
There is no body of law supporting the legal or factual argument that four parcels that cannot and do not physically touch, that are physically separated from each other by intervening and crisscrossing strips of land owned in fee by the government, are nonetheless to be treated as "one parcel." They are clearly created by the legal conveyances to the government and hence are themselves legal in character.

Finally, pursuant to Map Act section 66499.35(a), any person with a financial interest in real property may request, and a city or county shall determine, whether the property complies with the Map Act and any local ordinances enacted pursuant thereto. If the city or county determines that the property complies, it *must* file a certificate of compliance for recording. (*Ibid.*) In the present case, because the Remnant Parcels comply with the Map Act and the Contra Costa County Code, the County must file certificates of compliance.

IV. CONCLUSION

Subdivision Map Act section 66428(a)(2) legally divides and yet exempts from any mapping requirements the division of land and creation of new remnant parcels that occurs when a governmental agency acquires land in fee simple absolute (through condemnation, purchase or otherwise), when that acquisition is less than the existing (pre-conveyance) legal lot.. Because the four Remnant Parcels were created lawfully over time by the separate conveyances of the Conveyance Parcels, the County is required, if requested, to issue a Certificate of Compliance for each such Remnant Parcel still held in private ownership.

I am happy to discuss this further at your convenience.



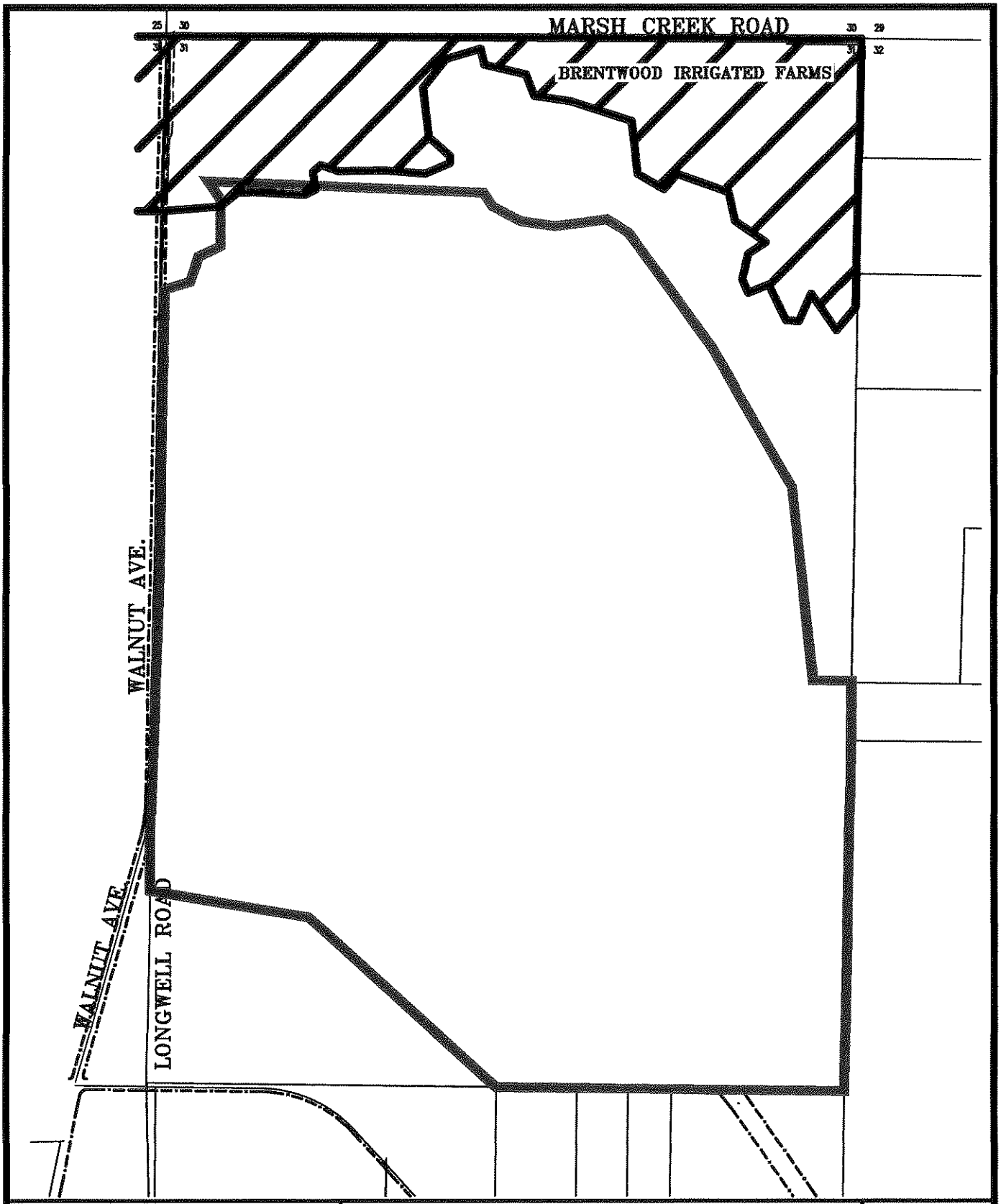
CUNHA ENGINEERING INC.
701 BELMONT WAY, STE. A
PINOLE, CALIFORNIA 94564
(510) 741-8290

1913 EXHIBIT
RANCHO LOS MEGANOS
SECTION 6 & 31

BRENTWOOD CALIFORNIA

SHEET 1 OF 1

JOB No. 206014



CUNHA ENGINEERING INC.
701 BELMONT WAY, STE. A
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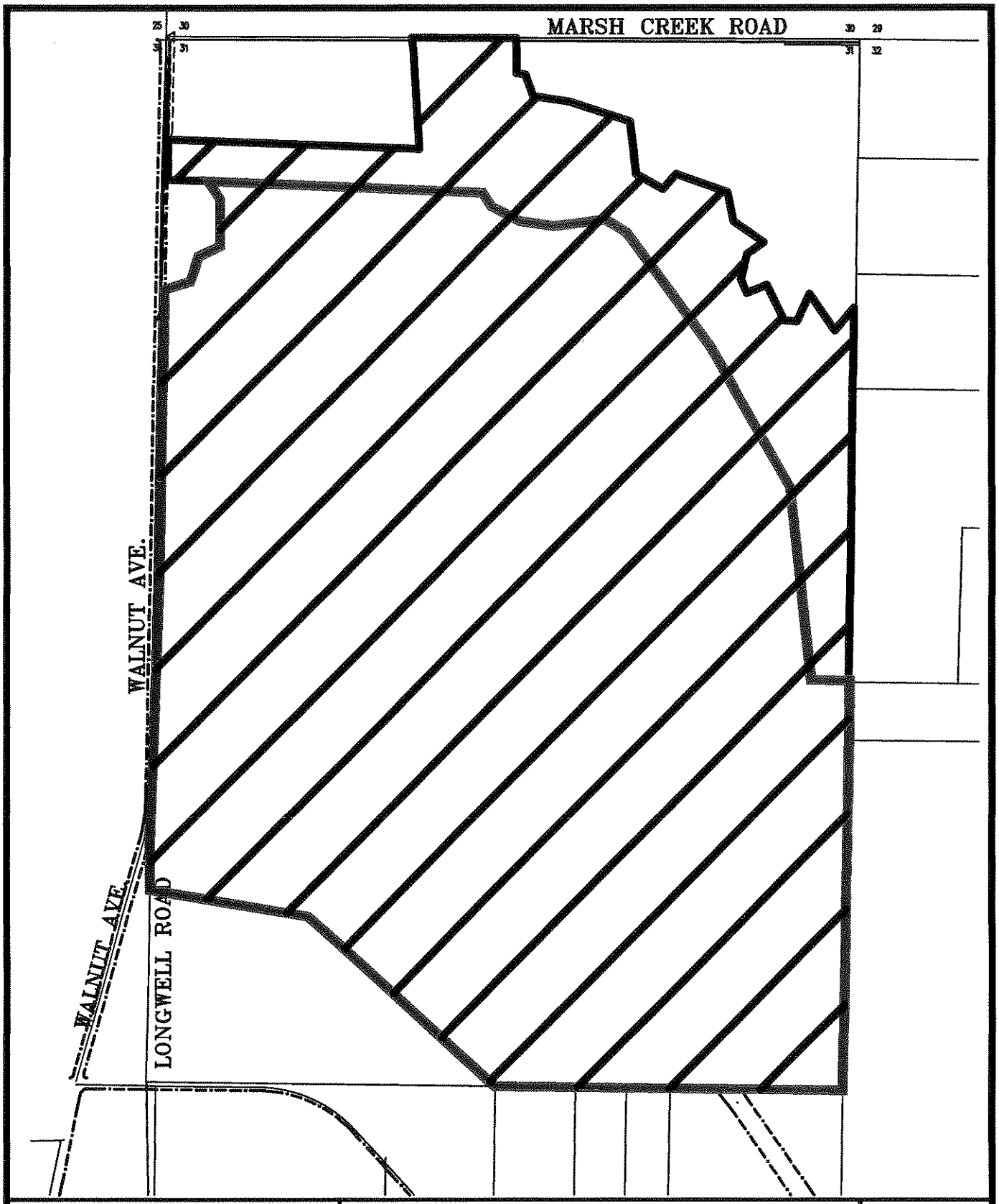
(510) 741-8290

1917 EXHIBIT
SUBDIVISION NUMBER TEN
BRENTWOOD IRRIGATED FARMS

BRENTWOOD CALIFORNIA

SHEET 1 OF 1

JOB No. 206014



CUNHA ENGINEERING INC.
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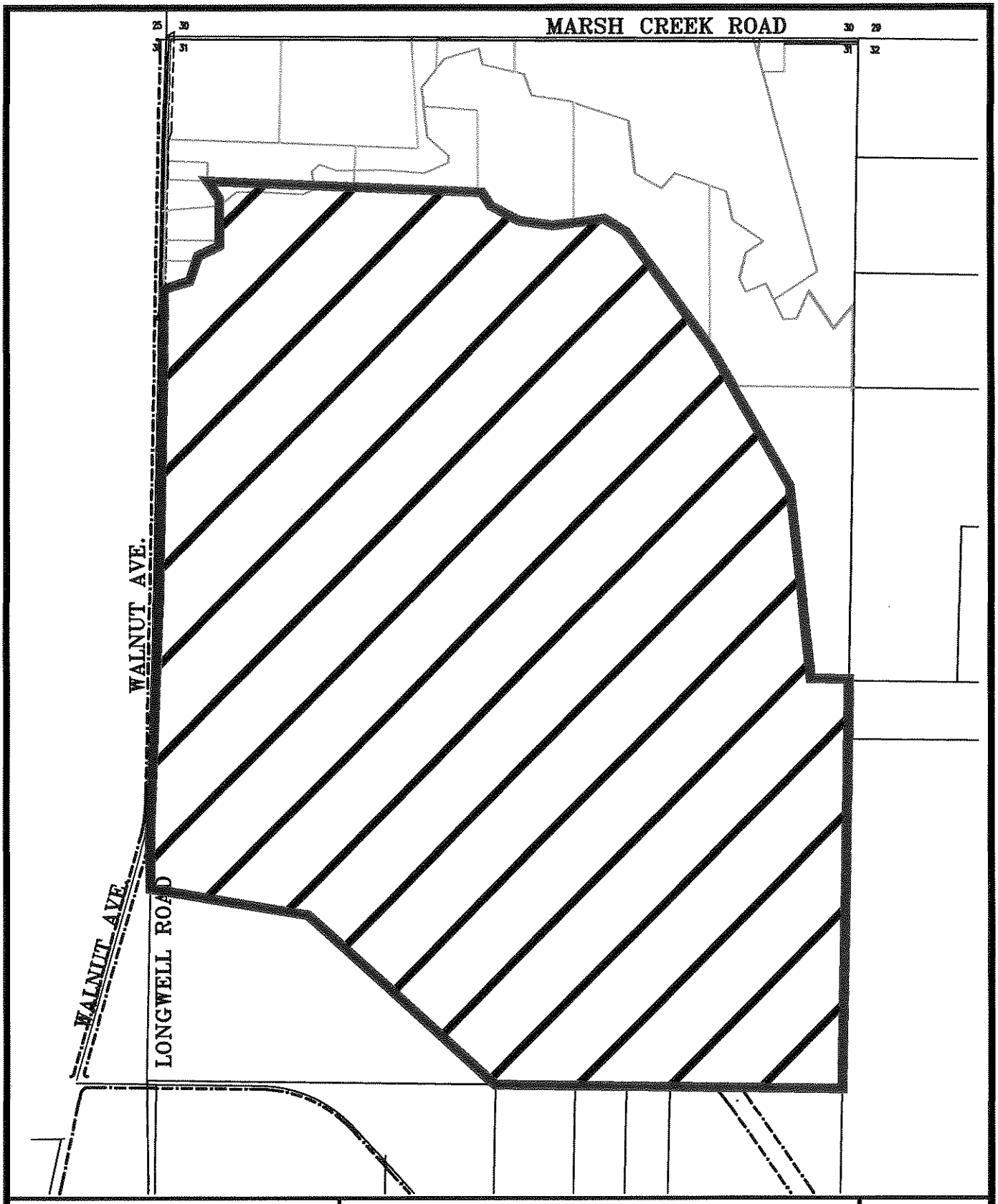
(510) 741-8290

1941 EXHIBIT
BALFOUR GUTHRIE TO FARIA

BRENTWOOD CALIFORNIA

SHEET 1 OF 1

JOB No. 206014



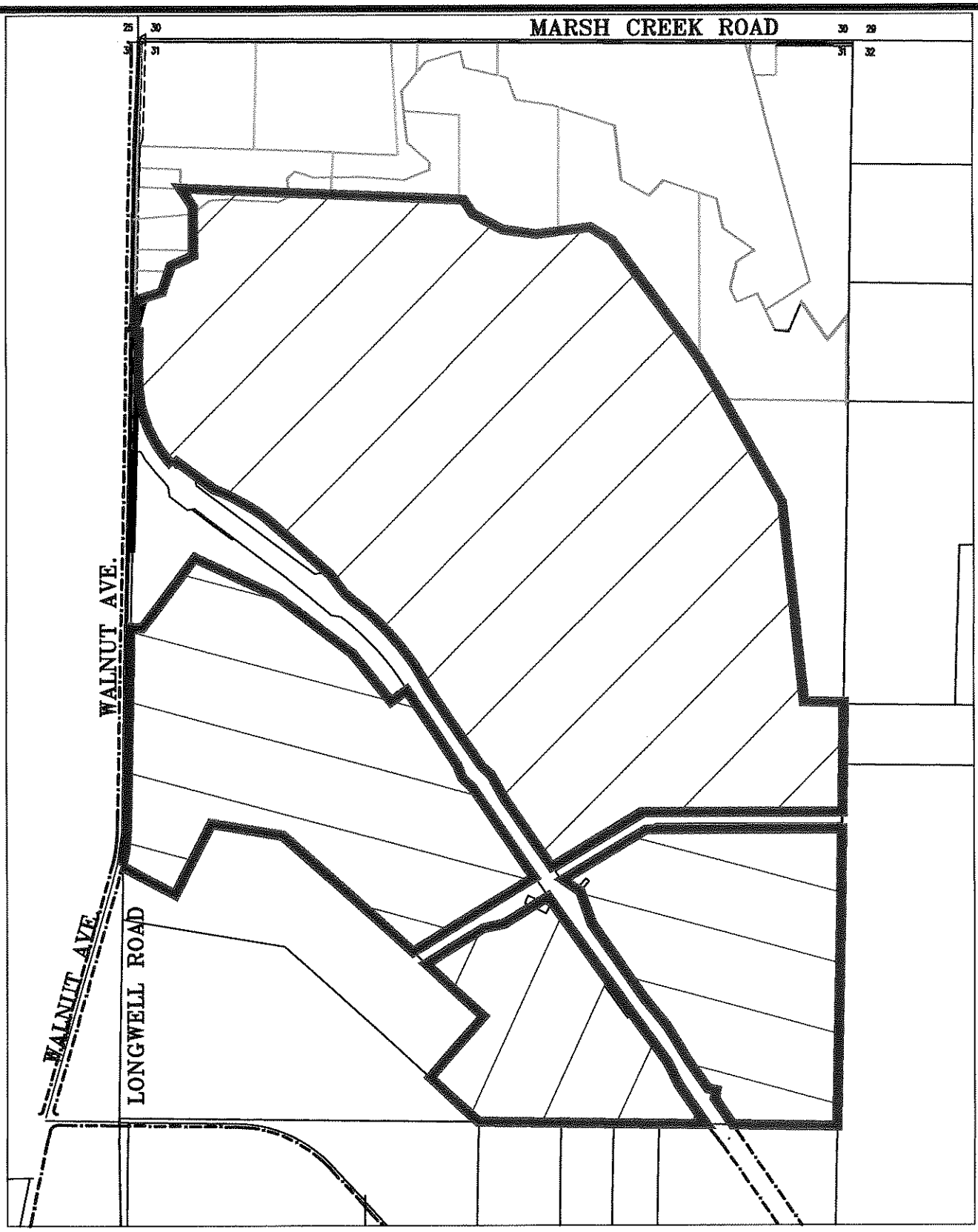
CUNHA ENGINEERING INC.
701 BELMONT WAY, STE. A
PINOLE, CALIFORNIA 94564
(510) 741-8290

1950 FARIA TO JASON AND 1952 JASON TO DUTRA

BRENTWOOD CALIFORNIA

SHEET 1 OF 1

JOB No. 206014



CUNHA ENGINEERING INC.
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PINOLE, CALIFORNIA 94564
(510) 741-8290

1997 CCWD CONDEMNATION AND 2006 DUTRA TO NUNN/TAMAYO

BRENTWOOD CALIFORNIA

SHEET 1 OF 1

JOB No. 206014

BINGHAM

Sanford M. Skaggs
Direct Phone: 415.393.2528
Direct Fax: 415.262.9233
s.skaggs@bingham.com
Our File No.: xxx

August 8, 2011

By Hand

Will Nelson
Department of Conservation & Development
County Administration Building
651 Pine Street
North Wing, Fourth Floor
Martinez CA 94553-1229

Re: Response to Application for Certificates of Compliance for Four Lots ##ZC11-798, 799, 800, and 801

Dear Mr. Nelson:

We request reconsideration of the decision communicated by the letter from Christine Louie, Project Planner, to Ms. Lisa Borba, dated July 28, 2011. In that letter, Ms. Louie concluded that the requested certificates of compliance cannot be granted "because the four parcels . . . have not been created by a grant deed conveyance or subdivision action." We disagree.

The facts and the conclusion that there are four lots, as shown on the plat included in the attachment to this letter, are straight-forward:

- ✓ The conveyances to public agencies for Vasco Road and the CCWD pipeline constituted a division of the original parcel, with four parcels remaining in private ownership.
- ✓ Pursuant to section 66428(a)(2)[1] the division did not require a parcel map.

Therefore, the four parcels are legal parcels (that is, they were created in compliance with the Subdivision Map Act) that may be sold, financed or leased without further compliance with the Map Act.

[1] Unless otherwise indicated, all citations are to the SubdivisionMap Act, Government Code sections 66410 *et seq.*

Bingham McCutchen LLP
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My reasoning and the authorities that support my conclusion are set forth in detail in my Memorandum of May 2, 2011, a copy of which is also attached.

Below, I set out the portion of Ms. Louie's letter titled Determination with interlineations and underlining designed to demonstrate the errors in her analysis and determination.

"Determination

"The request for individual certificates of compliance for each of the parcels, . . . can not be issued since staff can find no evidence that they comply with the provisions of the Subdivision Map Act. Pursuant to a 1991 Attorney General's opinion, there are two distinct ways to subdivide property in California: 1) by a subdivision map that has been properly prepared, approved, and recorded; and 2) through actual conveyance (74 Ops. Atty. Gen. 149 Opinion No 91-105, August 13, 1991). Staff can find no evidence of individual grant deeds for any of the four parcels as presented in the above referenced map by Cunha Engineering."

Comment No. 1: First, note that "subdivision" means a "division" of property. § 66424. The lots in question were created when actual conveyances were made to the public agencies. According to the Attorney General: "There can be no question but that the condemnation of a part of a parcel results in a* division *of land" and for purposes of the Map Act, "the fact that a division of land has occurred is not disregarded." 86 Ops. Cal. Atty. Gen. 70, 71 (2003).

"Conveyance of land to a government agency (e.g. roadways), public entity, or public utility is not considered a division of land pursuant to Government Code Section 66426.5 and the conveyance of any unit of land to a public entity, governmental agency, or public utility does not require the filing of a parcel map for the unit of land for sale to the public entity pursuant to Government Code Section 66428 (a) (2)."

Comment No. 2: The underlined portion is incomplete and therefore misleading. The section states: "Any conveyance of land to a governmental agency . . . shall not be considered a division of land for purposes of computing the number of parcels." Nevertheless, as stated in

Comment No. 1, there can be no question that it is a division of land for all other purposes. The second clause is correct: a parcel map is not required for such a conveyance.

"Nor does the conveyance of land to a government agency which results in the physical separation of a parcel result in the subdivision of said parcel."

Comment No. 3: This is incorrect. According to the Attorney General, there is no question that such a conveyance constitutes a division for purposes of the Act. See, Comment No. 1 above.

"According to Government Code Section 66424 and a California Attorney General's opinion, units of land may be separated by facilities roads, street, utility easements, railroad rights-of-way and "other facilities" and still be "contiguous" under the Map Act (61 Ops. Cal. Atty. Gen. 299 (1978)). The unit of land conveyed to a public entity does not then lawfully create multiple units of land with the remaining portion of the original parcel. All remaining portions of land would still be considered a contiguous unit."

Comment No. 4: The first sentence is correct; however the second and third sentences are not. This contention has been made before and rejected as explained in footnote 3 of my Memorandum which reads, in part, as follows: <u>However, the Attorney General disagrees.</u> He has "specifically reject[ed] the suggestion that the language of section 66424 has any application" to a determination whether an earlier division of property by condemnation created legal parcels under the Map Act. 86 Ops. Cal. Atty. Gen. at 72. He reiterated his 1975 opinion that a condemnation results in a division of the land. When a subsequent owner seeks to confirm that division, the section is not applicable as the owner is not then seeking to divide the land, but merely to confirm that the previous

division by condemnation complied with the law in effect at the time of the division. Applying that reasoning to the facts presented here, the division by condemnation without a map complied with the law, specifically section 66428, and the owner is not now seeking to divide the property, but only to confirm the earlier division, so section 66424 is not applicable.

Conclusion:

We request that you reconsider these applications and determine that the certificates be issued.

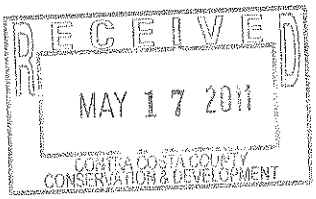
Sincerely yours,

Sanford M. Skaggs

cc: Christine Louie (by hand delivery)
Ron Nunn (by email)
Lisa Borba (by email)

Attachment: Memorandum dated May 2, 2011, titled *Division by Conveyance to Governmental Agency and Resulting Legal Parcels Under the Subdivision Map Act,* with plat attached.

BINGHAM



Memorandum

Direct Phone: 415.393.2528
Direct Fax: 415.262.9233
s.skaggs@bingham.com
Our File No.: 342978

DATE: May 2, 2011

TO: File 342978

CC: Lisa Borba
Ron Nunn

FROM: Sanford M. Skaggs

RE: **Division by Conveyance to Governmental Agency and Resulting Legal Parcels Under the Subdivision Map Act**

Questions and Short Answers:

(1) Does a conveyance to a governmental agency of a strip of land that physically divides an existing parcel into two or more parcels constitute a *division*, as defined in the Subdivision Map Act (Government Code, sections 66410 *et seq.*)?[1]

Answer: Yes. When an existing parcel is divided by a conveyance of a strip of land to a governmental agency a *division*, as defined by the Map Act, occurs.

(2) If so, does the Map Act require a map at the time of the division or at any other time prior to the sale, lease or financing of one of the resulting parcels?

Answer: No. The Map Act does not require a map at the time of a division, caused by an acquisition by a governmental agency. Nor does the Act require a map as a prerequisite to a sale, lease or finance of any of the resulting parcels.

---

[1] Statutory citations in this memorandum are to the Government Code unless otherwise indicated.

(3) In particular, are the four parcels, shown on the attached plat, legal parcels under the Map Act, which can be sold, leased or financed without the filing of a map required by the Act?

Answer: Yes. At the time of their creation by governmental acquisition, the Map Act did not require a map. Consequently, they are legal parcels that may be sold, leased or financed without the filing of a map.

Discussion: The current configuration of the Nunn/Tamayo property is depicted on the attached plat. It is bisected by (a) Vasco Road, a limited access road, presumably owned by the County or State, and (b) by a strip of land owned in fee by CCWD and used for a water pipeline. Before the acquisitions for the road and pipeline by the governmental agencies there was a single large parcel, consisting of the areas shown on the attached map as Parcels A - D.

Acquisitions by governmental agencies, after 1976, divided the larger parcel into four parcels, which are shown on the attached plat as Parcels A through D. The ultimate question is whether the four parcels resulting from the acquisitions are *legal parcels*, under the Map Act, that can be sold, financed or leased without obtaining a map and for which the County must issue an unconditional certificate of compliance.

The questions posed are answered by a review of the applicable portions of the Map Act. There are no court cases interpreting those portions of the Act. However, there are several opinions of the Attorney General that inform our analysis. While those opinions are not binding, the courts give them substantial deference. *See, e.g., State Board of Education* v. *Honig*, 13 Cal. App. 4th 720, 735 n.5 (1993) ["Although the Attorney General's interpretation of statutory law is not controlling, we accord it great respect."]

The Attorney General has opined consistently that "There can be no question but that the condemnation of a part of a parcel results in a *division* of land." And, for purposes of the Act, "the fact that a division of land has occurred is not disregarded." 86 Ops. Cal. Atty. Gen. 70, 71 (2003) [quoting and citing 58 Ops. Cal. Atty. Gen. 593, 594-595 (1975). There is no substantive difference among acquisitions by the government through (a) condemnation; (b) deed in lieu of condemnation; or (c) voluntary conveyance so opinions about the

effect of division by condemnation are equally applicable to conveyances to the government by other means.

Prior to 1976, a parcel map generally was required before parcels created by a division resulting from a governmental acquisition could be sold, leased or financed. In 1975, the Attorney General considered this question and concluded that "a division of land through eminent domain proceedings is a division of land for purposes of sale"; that the number of parcels created is disregarded for purposes of determining whether a tentative and final map or a parcel map is required under section 66426; and that "[t]herefore the only map that need be filed in order to sell a parcel resulting from a . . . division of land through a condemnation proceeding is a parcel map under section 66428, absent a local ordinance under that section waiving such a map." 58 Ops. A.G. at 595. At the time of the writing of that Opinion, section 66428 itself did not provide a waiver of a parcel map in such circumstances[2] (although it did give discretion to local agencies to adopt ordinances waiving the requirement).

Shortly thereafter, the Legislature amended the Map Act, effective January 1, 1976, to address this issue. The amendment added language that exempts divisions resulting from acquisitions by a governmental agency from the requirement of a parcel map.

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[2] As originally enacted and in effect at that time, the section read in pertinent part as follows:

> Local ordinances may require a tentative map where a parcel map is required by this chapter. A parcel map shall be required for subdivisions as to which a final or parcel map is not otherwise required by this chapter, unless waived by local ordinance as provided in this section, and provided further that a parcel map shall not be required for subdivisions created by short-term leases (terminable by either party on not more than 30 days' notice in writing) of a portion of the operating right-of-way of a railroad corporation defined as such by Section 230 of the Public Utilities Code, unless a showing is made in individual cases, upon substantial evidence, that public policy necessitates such a parcel map.

Specifically, it added subsection (a)(2), so that section 66428 now reads, in pertinent part, as follows:

> (a) Local ordinances may require a tentative map where a parcel map is required by this chapter. A parcel map shall be required for subdivisions as to which a final or parcel map is not otherwise required by this chapter, unless the preparation of the parcel map is waived by local ordinance as provided in this section. ***A parcel map shall not be required for either of the following***:
>
> (1) . . . .
>
> (2) ***Land conveyed to or from a governmental agency, [or] public entity, ...,*** unless a showing is made in individual cases, upon substantial evidence, that public policy necessitates a parcel map. For purposes of this subdivision, land conveyed to or from a governmental agency shall include a fee interest, a leasehold interest, an easement, or a license.

Since the enactment of the amendment, a map has not been required when land is divided by a conveyance to a governmental entity, by condemnation or otherwise. Subsections (a) - (c) of section 66499.30 prohibit sale, lease or finance of a parcel without a parcel or final map. However, those prohibitions do not apply to parcels created in compliance with or exempt from any law regulating the design and improvement of subdivisions in effect when the division occurred. Section 66499.30(d). In other words, if a conveyance results in a division that was permissible under the Map Act without the filing of a parcel or final map, a map is not required for a later sale, lease or finance of the parcels resulting from that division.[3]

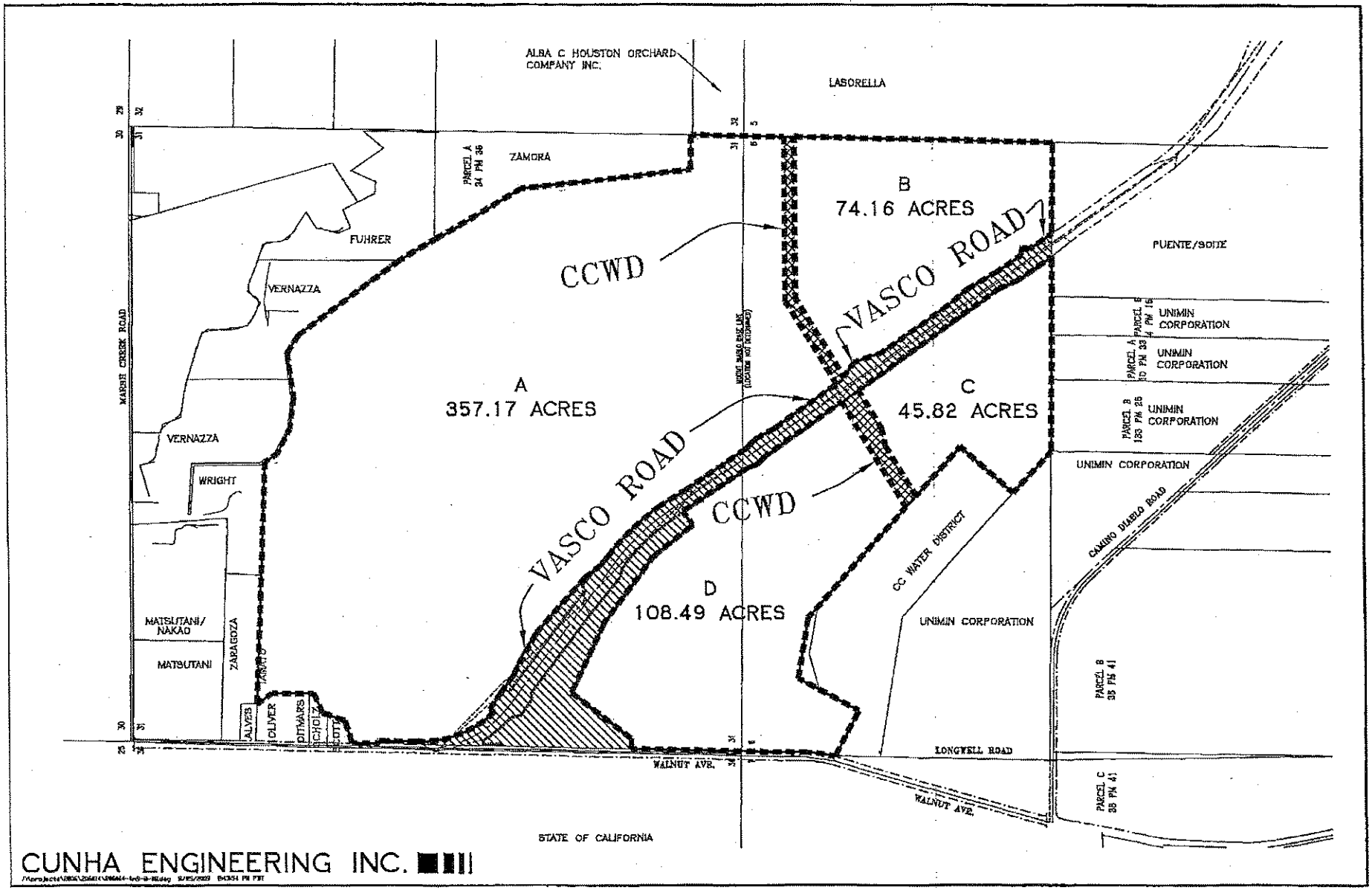
---

[3] Some have suggested that a map is required by the application of section 66424, which defines the word *subdivision* as a division of any unit or units of land shown on

Here, the original larger parcel was divided by the governmental acquisitions for Vasco Road and the Contra Costa Water District pipeline. Under the applicable provisions of the Map Act, no map was required at the time of the divisions. Therefore, the parcels are legal parcels, *i.e.* the prohibitions against sale or lease found in section 66499.30 do not apply to the parcels pursuant to subsection (d) of that section.

Conclusion: Applying the reasoning of the Attorney General to the law, as amended, one must conclude (a) there can be no question but that the governmental acquisition, by condemnation or otherwise, of a part of a parcel results in a *division* of land for purposes of sale; (b) if a map were required it would be a parcel map, not a final map, because the number of parcels is disregarded in these circumstances; (c) a parcel map is not required for such a division pursuant to the express provisions of section 66428(a)(2); and (d) the parcels resulting from the division are legal parcels that may be sold, leased or financed without the filing of a parcel or final map.

the assessment roll as a unit or as contiguous units and states that "[p]roperty shall be considered as contiguous units, even if it is separated by roads, streets utility easements or railroad rights-of-way." However, the Attorney General disagrees. He has "specifically reject[ed] the suggestion that the language of section 66424 has any application" to a determination whether an earlier division of property by condemnation created legal parcels under the Map Act. 86 Ops. Cal. Atty. Gen. at 72. He reiterated his 1975 opinion that a condemnation results in a division of the land. When a subsequent owner seeks to confirm that division, the section is not applicable as the owner is not then seeking to divide the land, but merely to confirm that the previous division by condemnation complied with the law in effect at the time of the division. Applying that reasoning to the facts presented here, the division by condemnation without a map complied with the law, specifically section 66428, and the owner is not now seeking to divide the property, but only to confirm the earlier division, so section 66424 is not applicable.



CUNHA ENGINEERING INC.