TO BE PUBLISHED IN THE OFFICIAL REPORTS

OFFICE OF THE ATTORNEY GENERAL
State of California

EDMUND G. BROWN JR.
Attorney General

OPINION	:	No. 06-801
of	:	August 14, 2007
EDMUND G. BROWN JR. Attorney General	:	
MARC J. NOLAN Deputy Attorney General	:	

THE HONORABLE DICK ACKERMAN, MEMBER OF THE STATE SENATE, has requested an opinion on the following question:

Are the requirements of the Subdivision Map Act applicable to a corporation's grant of a conservation easement under which the corporation will maintain ownership and possession of the property subject to the easement?

CONCLUSION

The requirements of the Subdivision Map Act are not applicable to a corporation's grant of a conservation easement under which the corporation will maintain ownership and possession of the property subject to the easement.

ANALYSIS

The United States Department of the Interior, Fish and Wildlife Service, operates a program that encourages landowners to create "conservation banks" to help protect endangered and threatened species. We are informed that under what is known as a "conservation banking agreement," a corporation has agreed to grant to a qualified nonprofit organization a "conservation easement" over a portion of its land for the purpose of protecting an animal listed as an endangered species under the Federal Endangered Species Act (16 U.S.C. §§ 1531-1544). The easement will act as a restrictive covenant, prohibiting the corporation from engaging in or permitting various activities on the land (e.g., agricultural activity, most commercial and industrial uses).

Under the terms of the easement, the nonprofit organization will obtain certain rights, including the right to enter upon the property in order to monitor the corporation's compliance with the terms of the easement. The corporation will retain the right to engage in or permit all uses of the property that are not prohibited under the easement or inconsistent with its purposes. The easement will also specify that the Fish and Wildlife Service may enforce the terms of the easement by, among other things, reviewing and approving any proposed measure to cure an easement violation.

As an incentive for granting the easement, the corporation will receive certain "mitigation credits," which the corporation may then sell to other landowners for use in offsetting the negative environmental or endangered-species impacts of their development activities. (See 68 Fed. Reg. 24753 (May 8, 2003); Guidance for the Establishment, Use and Operation of Conservation Banks, United States Department of the Interior, Fish and Wildlife Service (May 2, 2003), pp. 9-10, 17.)

The question presented for resolution is whether the corporation's grant of the conservation easement to the nonprofit organization will constitute a "subdivision" of the land for purposes of the Subdivision Map Act (Gov. Code, §§ 66410-66499.37; "Act") and its requirements. We conclude that the corporation's grant of the easement will not constitute a "subdivision" for purposes of the Act.

Preliminarily, we note that although the corporation's conservation easement will be granted pursuant to and in furtherance of a federal program, a "conservation easement" represents an interest in real property governed by state law. Civil Code sections

815-816[1] describe the conditions under which a conservation easement may be created and enforced in California. Section 815 identifies the general purposes of this statutory scheme as follows:

> The Legislature finds and declares that the preservation of land in its natural, scenic, agricultural, historical, forested, or open-space condition is among the most important environmental assets of California. The Legislature further finds and declares it to be the public policy and in the public interest of this state to encourage the voluntary conveyance of conservation easements to qualified nonprofit organizations.

Section 815.1 defines a "conservation easement" as:

> any limitation in a deed, will, or other instrument in the form of an easement, restriction, covenant, or condition, which is or has been executed by or on behalf of the owner of the land subject to such easement and is binding upon successive owners of such land, and the purpose of which is to retain land predominantly in its natural, scenic, historical, agricultural, forested, or open-space condition.

Further, section 815.2 provides:

> (a) A conservation easement is an interest in real property voluntarily created and freely transferable in whole or in part for the purposes stated in Section 815.1 by any lawful method for the transfer of interests in real property in this state.
>
> (b) A conservation easement shall be perpetual in duration.
>
> (c) A conservation easement shall not be deemed personal in nature and shall constitute an interest in real property notwithstanding the fact that it may be negative in character.
>
> (d) The particular characteristics of a conservation easement shall be those granted or specified in the instrument creating or transferring the easement.

---

[1] All further references to the Civil Code are by section number only.

Typically, a conservation easement specifies that the subject property will *not* be used for certain purposes, such as industrial or agricultural, that are deemed harmful to or inconsistent with the easement's conservation goal. (See *Johnston v. Sonoma County Agricultural & Open Space Dist.* (2003) 100 Cal.App.4th 973, 976.)

The easement must be "recorded in the office of the county recorder of the county where the land is situated." (§ 815.5.) The holder of the easement has monitoring and enforcement rights and responsibilities over the property subject to the easement (§ 815.7), but does not acquire any rights beyond those expressly transferred and conveyed by the grantor of the easement (§ 815.4 ["All interests not transferred and conveyed by the instrument creating the easement shall remain in the grantor of the easement, including the right to engage in all uses of the land not affected by the easement nor prohibited by the easement or by law"]).

Does the creation of a conservation easement under the terms of sections 815-816 constitute a "subdivision" of the property for purposes of the Act? In answering this question, we first note that the Act regulates the design, improvement, and sale of subdivisions throughout California. (*City of West Hollywood v. Beverly Towers, Inc.* (1991) 52 Cal.3d 1184, 1189; *Soderling v. City of Santa Monica* (1983) 142 Cal.App.3d 501, 506; 89 Ops.Cal.Atty.Gen. 193, 194 (2006).) Its three principal goals are to encourage orderly community development, prevent undue burdens on the public, and protect individual real estate buyers. (*Gardner v. County of Sonoma* (2003) 29 Cal.4th 990, 997-998; 61 Ops.Cal.Atty.Gen. 299, 301 (1978).) In *van't Rood v. County of Santa Clara* (2003) 113 Cal.App.4th 549, 564-565, the court explained:

> To comply with the Act, the landowner must secure local approval and record an appropriate map. [Citation.] A final (subdivision) map is generally required for subdivisions of five or more parcels. [Citations.] A parcel map is generally required for the creation of four or fewer parcels. [Citations.] Subdivided lands may not be legally sold, leased, or financed without the required approval and map. [Citations.]
>
> . . . .
>
> The Act currently defines "subdivision" as "the division, by any subdivider, of any unit or units of improved or unimproved land, or any portion thereof, shown on the latest equalized county assessment roll as a unit or as contiguous units, for the purpose of sale, lease or financing, whether immediate or future." [Citation.] "Subdivision" thus generally refers to a *division* of land for sale, lease, or financing. [Citation.] The Act's current

> definition of "subdivision" is not based on the number of parcels resulting from the land division; a division into as few as two parcels now constitutes a subdivision under the Act.

The key provision of the Act requiring our interpretation is Government Code section 66424, which defines a "subdivision" as:

> the division, by any subdivider, of any unit or units of improved or unimproved land, or any portion thereof, shown on the latest equalized assessment roll as a unit or as contiguous units, for the purpose of sale, lease or financing, whether immediate or future.[2]

Related provisions of the Act, which must also be considered here (see *Gomes v. County of Mendocino* (1995) 37 Cal.App.4th 977, 986), reveal that a "subdivision" is intended to result in the creation of one or more new or additional, separate parcels of property. (See Gov. Code, §§ 66426 [tentative and final map required "for all subdivisions creating five or more parcels, . . ."] 66499.30, subds. (a), (b) [prohibiting the sale, lease, or financing of "any parcel or parcels of real property" for which an approved map is required until the appropriate map is filed in full compliance with the Act]; see also *Fishback v. County of Ventura* (2005) 133 Cal.App.4th 896, 902-905; *Lakeview Meadows Ranch v. County of Santa Clara* (1994) 27 Cal.App.4th 593, 598.)

While the grant of a conservation easement may involve identifying a portion of a larger tract of land upon which will be placed enforceable use restrictions, the grant does not constitute a *division* of the land within the meaning of the Act. The owner has neither conveyed the land so designated, nor expressed any future intent to convey it, as a separate unit. The creation of a conservation easement, in which the owner maintains ownership and possession of the land, does not, in itself, evidence an intent to convert the designated property into a separate parcel that can be transferred or sold. (Cf. *Pescosolido v. Smith* (1983) 142 Cal.App.3d 964, 972.)

Moreover, the purpose of granting a conservation easement "is to retain land predominantly in its natural, scenic, historical, agricultural, forested, or open-space condition" (§ 815.1), and not to effect a "sale, lease or financing, whether immediate or future" (Gov. Code, § 66424). The grant of an easement is not a "sale" because ownership does not change hands. (See *Robinson v. City of Alameda* (1987) 194 Cal.App.3d 1286,

---

[2] The Act defines a "subdivider" as "a person, firm, corporation, partnership or association who proposes to divide, divides or causes to be divided real property into a subdivision for himself or for others . . . ." (Gov. Code, § 66423.)

1288-1289 [agreement granting mere right to use property is, by its own terms, not a sale].) Nor may a conservation easement be construed as a "lease" for purposes of the Act. A lease only arises when the contract between the owner and the occupier, among other things, gives the occupier exclusive possession of the property. (87 Ops.Cal.Atty.Gen. 87, 90-91 (2004); see *Kaiser Co. v. Reid* (1947) 30 Cal.2d 610, 619; *Bachenheimer v. Palm Springs Management Corp.* (1953) 116 Cal.App.2d 580, 591; 57 Ops.Cal.Atty.Gen. 556, 558 (1974).) Here, the grantee will obtain a limited right to enter upon the property, but will not acquire any right to actual possession, much less the right to exclusive possession. Finally, while a division of land for the purpose of "financing" under the Act occurs when the landowner places a deed of trust on one or more separate parcels, thus conveying legal title thereto (58 Ops.Cal.Atty.Gen. 408, 410-412 (1975)), the creation of a conservation easement does not have the effect of transferring legal title to the underlying fee. Consequently, the creation of a conservation easement does not constitute a "subdivision" within the meaning of Government Code section 66424.

The Act's separate treatment for "environmental subdivisions" (Gov. Code, § 66418.2) does not change our conclusion. An "environmental subdivision" is defined as a "subdivision of land pursuant to this division for biotic or wildlife purposes" and is created "upon the written request of the landowner at the time the land is divided." (Gov. Code, § 66418.2, subds. (a), (f).) Hence, an environmental subdivision involves a subdivision – i.e., a division of land for the purpose of sale, lease, or financing – in the first instance. As discussed above, the creation of a conservation easement does not satisfy the Act's definition of a "subdivision." Accordingly, the grant of an easement cannot constitute an "environmental subdivision" for purposes of the Act.

Finally, we reject the suggestion that the corporation's receipt of mitigation credits in exchange for granting the conservation easement, or the subsequent sale and use of such credits, would constitute a "subdivision" under the Act. A mitigation credit is not an interest in any specific property. Under the federal program, such a credit represents "the quantification of a species' or habitat's conservation values within a bank," so as to offset the negative impact of a credit purchaser's development of other land within the bank. (Guidance for the Establishment, Use and Operation of Conservation Banks, United States Department of the Interior, Fish and Wildlife Service (May 2, 2003), pp. 9-10, 17.) No "division" of land results from the receipt, sale, or use of mitigation credits.

We conclude that the requirements of the Act are not applicable to a corporation's grant of a conservation easement under which the corporation will maintain ownership and possession of the property subject to the easement.

*****