Attachment A

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ATTACHMENT A

SUMMARY/DISCUSSION:

Staff has evaluated whether or not past conveyances have demonstrated the grantors' intent to create separate lots for development (i.e., a land division) or whether or not past conveyances were intended as an exchange of property, similar to an LLA, between the respective property owners, and whether or not the request for two UCoCs would be consistent with state and local regulations. Staff reviewed the chain of title for the original 4.16 acre area and did not conclude that the conveyance history resulted in the creation of two separate parcels for development. In 1949, an exchange of property occurred between a 4.16 acre parcel and an adjoining 4.06 acre parcel, which resulted in one of the adjusted parcels being 0.36 acres in size. This 1949 conveyance reduced the previously adjusted 0.36 acre area to 0.35 acres. In 1962, another conveyance created the Subject Property in its current configuration consisting of 2.03 acres.

The applicant has requested that the County issue a UCoC for the 0.35 acre area and a second UCoC for the remaining 1.68 acre area within the 2.03 acre parcel. If in 1962, the 0.36 acre area was recognized as a separate legal lot, this conveyance would have resulted in a violation of the SMA, which was then a part of the California Business and Professions (B&P) Code. Specifically, B&P Section 11540.1 allowed a county to regulate divisions of land with respect to the minimum area. At the time of the 1962 conveyance, the County's Zoning Ordinance (Ordinance 1964) as applicable to the K-G-B-4, Zoning District required a minimum building site of one acre. Since the 1962 conveyance reduced the 0.36 acre area by 0.01 acres to 0.35 acres, the 1962 conveyance did not comply with the local Zoning Ordinance as applicable to the K-G-B-4, Zoning District in effect at the time of the 1962 conveyance.

Monterey County Code (MCC) Section 19.14.050(A)(1)(d) provides that a parcel "qualifies for an Unconditional Certificate of Compliance" if:

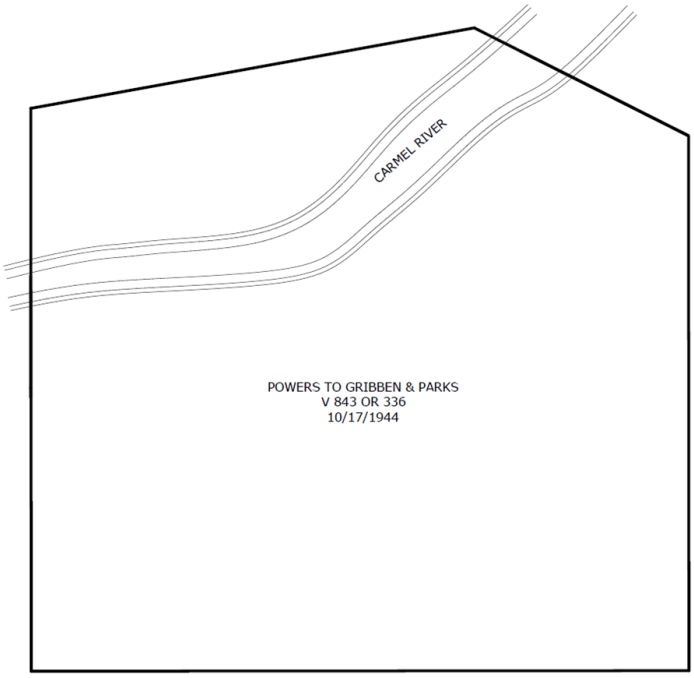
> At the time the contract, deed, or other document creating the subject parcel was signed, the subject parcel complied with the applicable County ordinances then in effect, including the parcel size required by the then applicable zone district. (Emphasis Added).

In 1949, neither the SMA nor local ordinance regulated or even contained the concept of an LLA. Government Code Section 66412 of the SMA was not amended until 1976 (effective January 1, 1977) to add LLAs as an exclusion to the SMA. Further, the 1962 conveyance which reduced the 0.36 acre area to 0.35 acres resulted in a parcel which was not in compliance with the County Ordinance and applicable Zoning because the conveyance further reduced the area of a non-conforming parcel in violation of the SMA and the local Zoning Ordinance as applicable to the corresponding K-G-B-4, Zoning District, which required a one acre minimum, in effect at the time of the 1962 conveyance..

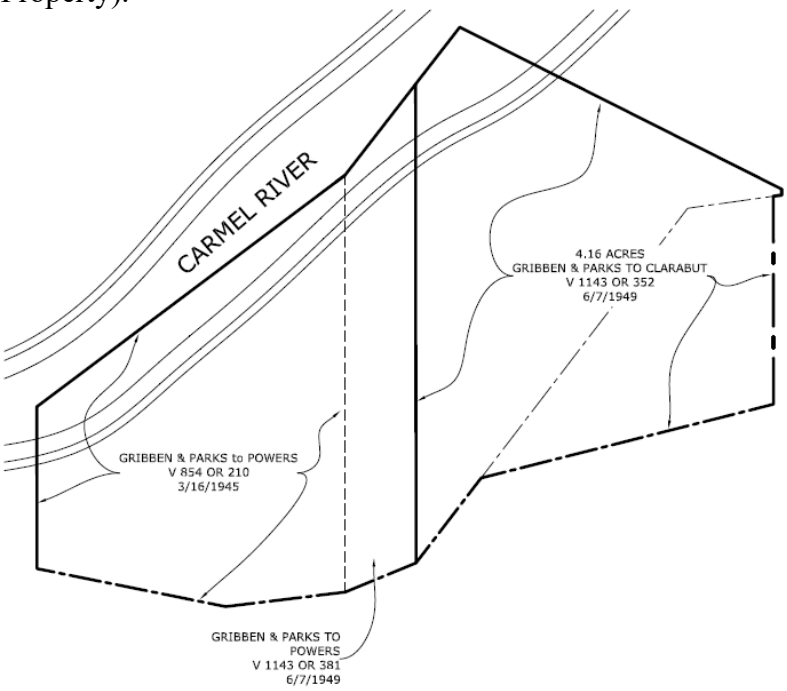
Prior to 1977, there was no codified process regarding LLAs. Boundaries that needed to be changed could be adjusted simply by one neighbor deeding a sliver, strip, or parcel to an adjoining neighbor. These slivers, strips, or parcels were not intended to be developed separately but were understood to be made a part of, or merged with, the adjoining neighbor's land. Although these conveyances did not always meet the minimum lot size required by the County Zoning Ordinance and corresponding minimum acreage in effect at the time, the resulting reconfigured areas were not considered to be illegal lots by the County. Instead, these conveyances between neighbors were considered as an area of property being merged with a neighboring lot.

Parcel Transfer History APN 461-022-006-000

- 1944 - Powers to Gribben & Parks (V 843 OR 336).



- 1949 – Gribben & Parks to Clarabut (V 843 OR 336) resulting in 4.16 acres (Clarabut Property).



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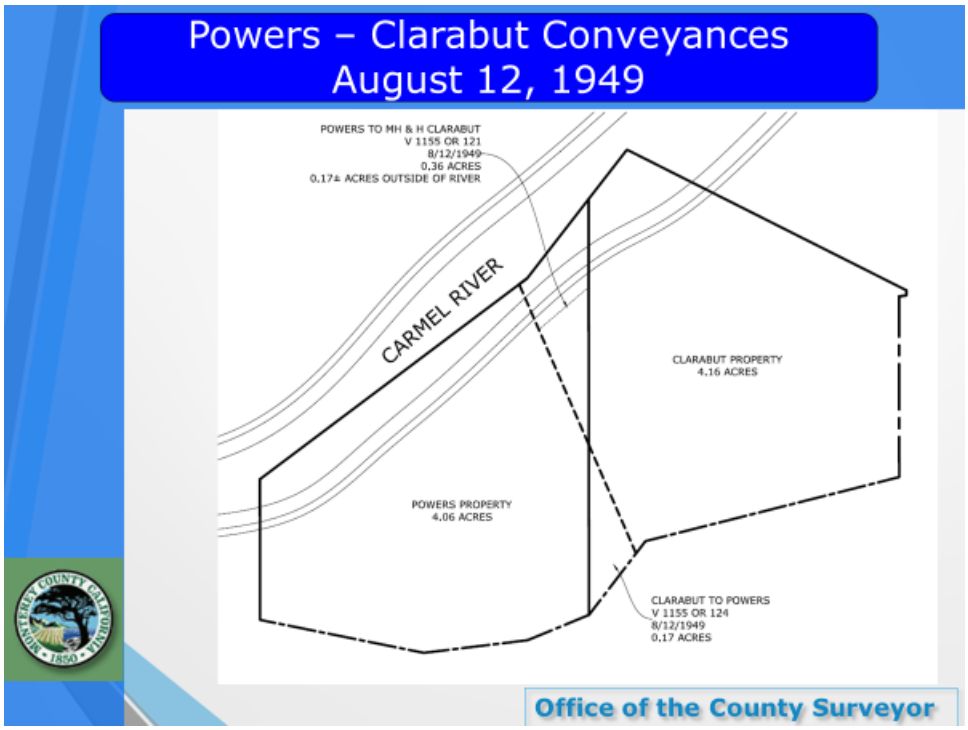
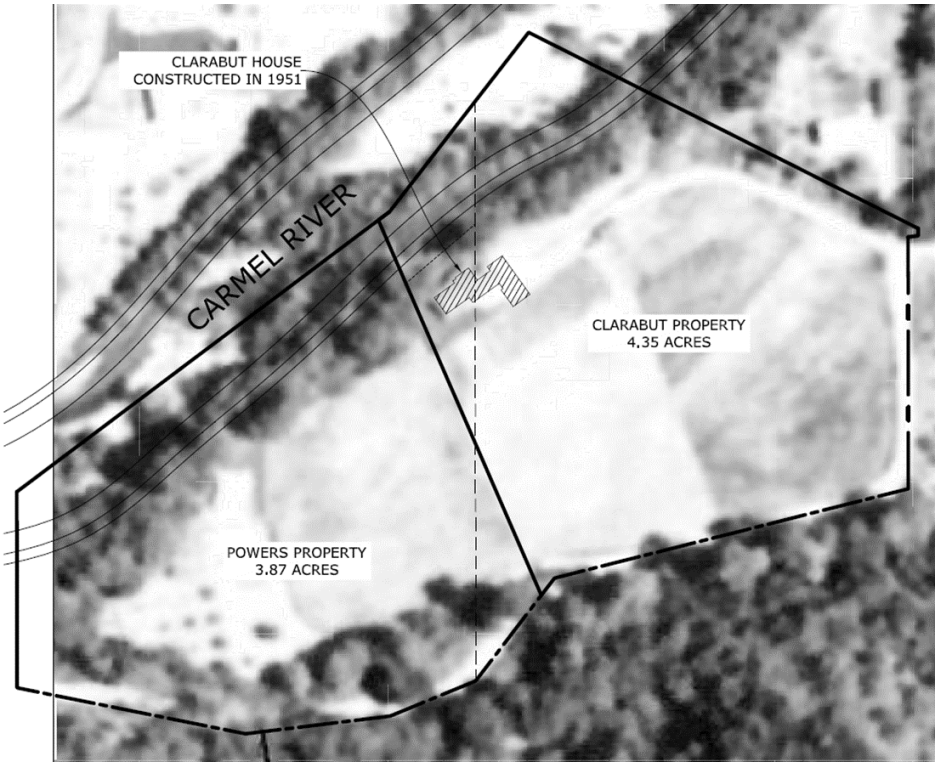
- 1949 – Powers to Clarabut (V 1152 OR 121) 0.36 acres, and Clarabut to Powers (V 1152 OR 124) 0.17 acres, resulting in an adjusted parcel size of 4.35 acres (Clarabut Property).



- 1951 – Clarabut House constructed in 1951.



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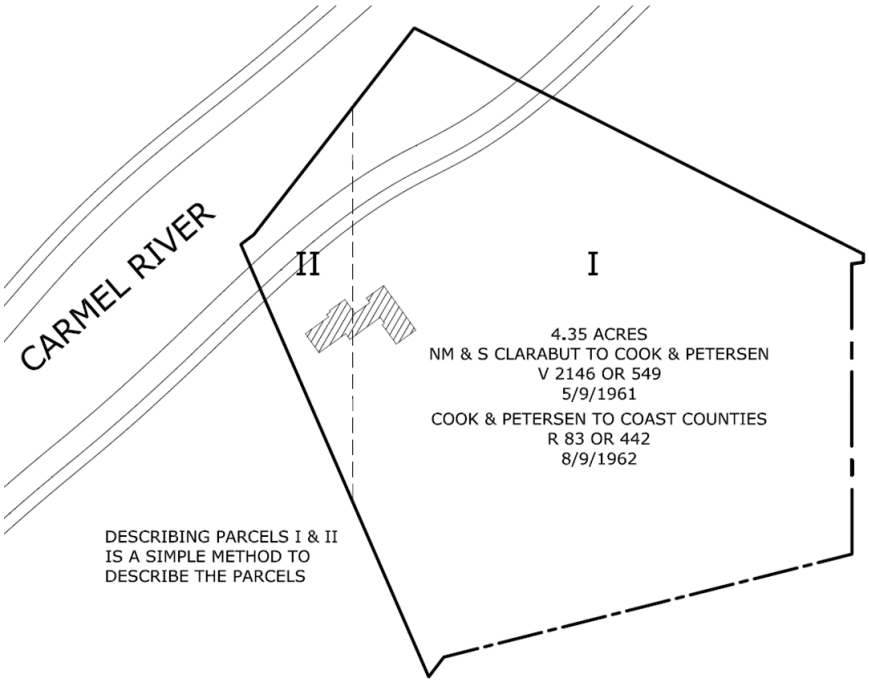
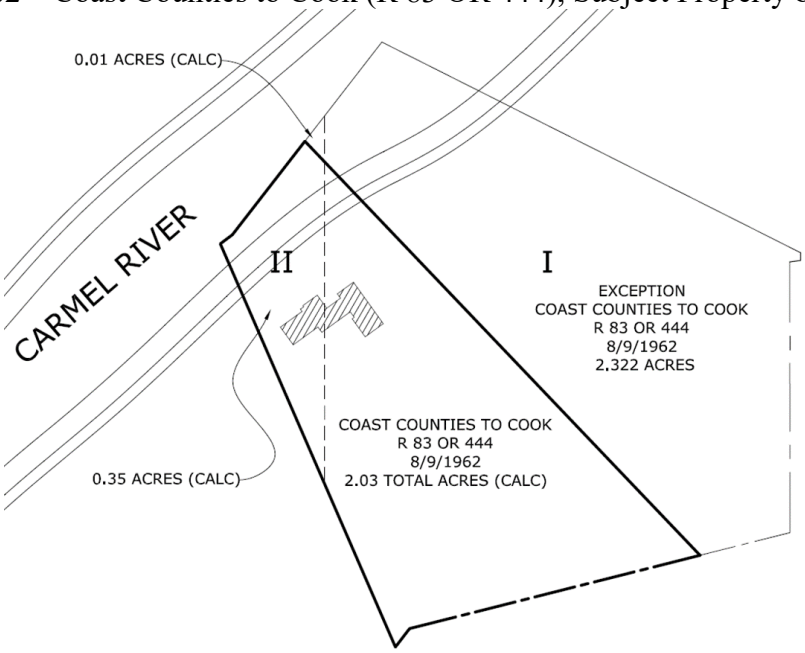
- 1961- Clarabut property is deeded to Cook & Peterson; 1962 – Cook & Peterson property is deeded to Coast Counties.



- 1962 – Coast Counties to Cook (R 83 OR 444), Subject Property being 2.03 acres.



Civil Code Section 1093 does not apply to fractional parcels

Although the legal description for the 2.03 acre parcel contains two separately described parcels, it also contains an area excepting a portion of both parcels. The effect of this exception results in fractional parcels, with neither parcel being truly separately described. Therefore, "separate and distinct legal descriptions" do not exist in order to qualify for the anti-merger provision of Civil Code Section 1093 which provides as follows:

> Civil Code Section 1093.
> Absent the express written statement of the grantor contained therein, the consolidation of separate and distinct legal descriptions of real property contained in one or more deeds, mortgages, patents, deeds of trust, contracts of sale, or other instruments of conveyance or security documents, into a subsequent single deed, mortgage, patent, deed of trust, contract of sale, or other instrument of conveyance or security document

(whether by means of an individual listing of the legal descriptions in a subsequent single instrument of conveyance or security document, or by means of a consolidated legal description comprised of more than one previously separate and distinct legal description), does not operate in any manner to alter or affect the separate and distinct nature of the real property so described in the subsequent single instrument of conveyance or security document containing either the listing of or the consolidated legal description of the parcels so conveyed or secured thereby.

This section does not constitute a change in, but is declaratory of, the existing law.

(Added by Stats. 1985, Ch. 911, Sec. 1.)

In *The PEOPLE ex rel. Edmund G. BROWN, Jr., as Attorney General, etc. et al., Plaintiffs and Appellants, v. TEHAMA COUNTY BOARD OF SUPERVISORS et al.*, Defendants and Appellants., No. C049048.*Brown v. Tehama*, 56 Cal. Rptr. 3d 558, 149 Cal. App. 4th 422, Court of Appeal, Third District, California (March 16, 2007, As Modified April 11, 2007) the Court stated:

Civil Code section 1093 was not enacted until 1985 (Stats. 1985, ch. 911, § 1, p. 2905), long after the conveyances at issue here; however, the Legislature declared that the statute did "not constitute a change in, but is declaratory of, the existing law." (Civ. Code, § 1093.) No party disputes the accuracy of this declaration. As will be seen, while we have reason to question the declaration's accuracy, there is no need here to actually determine whether section 1093 accurately expresses the law as it was before 1986. Accordingly, we will assume for purposes of this case that it does.

In the construction of boundaries, the intention of the parties is the controlling consideration. [Citation.] Whenever possible, a court should place itself in the position of the parties and ascertain their intent, as in the case of any contract. As stated in *Miller & Lux, Inc., v. Secara*, 193 Cal. 755 [227 Pac. 171], `Intention, whether express or shown by surrounding circumstances, is all controlling . . .'" (*Machado v. Title Guarantee and T. Co.* (1940) 15 Cal.2d 180, 186.)

[E]xtrinsic evidence is always admissible to explain the calls of a deed for the purpose of their application to the subject-matter, and thus to give effect to the deed. [Citation.] In construing a doubtful description in a grant, the court must assume as nearly as possible the position of the contracting parties, and consider the circumstances of the transaction between them, and then read and interpret the words used in the light of these circumstances. (*Thompson v. Motor Road Co.* (1890) 82 Cal. 497, 500.)

Moreover, in *Brown v. Tehama (2007)* 149 Cal. App. 4th 122 (March 16, 2007), the California Court of Appeals ruled that the anti-merger rule in Civil Code section 1093 does not apply to fractional parcels.

Moreover, we are particularly reluctant to extend the rule stated in Civil Code section 1093 to situations beyond the scope of the statutory language because, notwithstanding the Legislature's assertion in the statute, we have reason to question whether the rule stated in the statute actually existed before the statute was enacted. No one has cited, nor have we found, any authority (other than Civil Code section 1093 itself) supporting the assertion that before 1986, a consolidated legal description used in a deed to convey two or more parcels that had previously been separately and distinctly described in one or more instruments of conveyance or security documents could not be deemed to merge the

preexisting parcels absent an express written statement of the grantor contained in the later deed. In other words, we have found no evidence that the rule stated in Civil Code section 1093 was the law before the statute was enacted. As far as we can determine, historically the law that governs the interpretation of deeds has been that "the intention of the parties is the controlling consideration" (Machado v. Title Guarantee and T. Co., supra, 15 Cal.2d at p. 186), and "[i]n construing a doubtful description in a grant, the court must assume as nearly as possible the position of the contracting parties, and consider the circumstances of the transaction between them, and then read and interpret the words used in the light of these circumstances" (Thompson v. Motor Road Co., supra, 82 Cal. at p. 501). This law did not make an express statement of merger by the grantor an absolute prerequisite to finding an intent to merge two or more previously separate parcels. (Emphasis Added).

The Legislature's assertion that a statute is declaratory of existing law does not make it so, if the law found in the code books and case books does not in fact support that assertion. Nevertheless, because the validity of Civil Code section 1093, as it applies to the situations specifically described in the statute, has no bearing on the outcome of this case (as will be shown), we need not actually determine whether the Legislature's assertion in the statute was accurate. We do, however, conclude the apparent absence of any law consistent with the antimerger rule in Civil Code section 1093 prior to the statute's enactment is further reason for us to decline the county defendants' request that we recognize an analogous antimerger rule that applies to fractional parcels that have never before been separately and distinctly described, and that we apply that rule to transactions that occurred more than 100 years ago. (Emphasis Added).

Regulatory Background

When a request is made to a local agency by a property owner for a determination of whether a property complies with the provisions of the SMA and local ordinances, the local agency must issue either an Unconditional Certificate of Compliance (UCoC) or a Conditional Certificate of Compliance (CCoC) pursuant to California Government Code Section 66499.35 of the SMA and local ordinances. Chapter 19.14 of the Monterey County Subdivision Ordinance sets forth the process for parcel legality status determinations and the criteria for issuance of certificates of compliance. The criteria for issuance of UCoCs is set forth in MCC Section 19.14.050. The criteria for CCoCs is set forth in MCC Section 19.14.055.

At the time of the 1962 conveyance, the County's Zoning Ordinance (Ordinance 1964) as applicable to the K-G-B-4, Zoning District required a minimum building site of one acre. Since the 1962 conveyance reduced the 0.36 acre area by 0.01 acres to 0.35 acres, the 1962 conveyance did not comply with the local Zoning Ordinance as applicable to the K-G-B-4, Zoning District in effect at the time of the 1962 conveyance. Therefore, the subject request for two UCoCs is subject to Government Code Section 66499.35 (b) which provides as follows:

Government Code Section 66499.35 (b)

(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 local agency may, as a condition to granting a conditional certificate of compliance, impose any conditions that would have been applicable to the division of the property at the time the applicant acquired his or her interest therein, and that had been established at that time by this division or local ordinance enacted pursuant to this division…. (Emphasis Added).

Compliance with these conditions shall not be required until the time that a permit or other grant of approval for development of the property is issued by the local agency.

Conclusion and Recommendation

The two parcels described in the legal description for the Subject Property are fractional parcels; therefore, as fractional parcels, the anti-merger rule within Civil Code section 1093 does not apply to the Subject Property *(Brown v. Tehama [2007] - anti-merger rule in Civil Code section 1093 does not apply to fractional parcels).* The title history of the parcels indicates that the conveyances were the subject of a property exchange between adjoining property owners, similar to an LLA, in 1949. It reasonably follows that the grantors never intended that the portions which were conveyed and added to the receiving parcels consisting of 0.36 acres (conveyed from Powers to Clarabut) and 0.17 acres (conveyed from Clarabut to Powers) were intended to be separate legal parcels. Further, the construction of the Clarabut House over the former lot line in 1951 indicates that the grantors did not intend that the former lot line which existed prior to the 1949 property exchange was intended to remain in place. If the 0.36 acre area was a separate parcel, reducing it in size to a 0.35 acre area in 1962 would have been a violation of the County Zoning Ordinance. Therefore, the Subject Property is comprised of only one legal lot or parcel.

It is recommended that the Board deny the appeal and affirm the HCD Director's decision that the Subject Property does not qualify for two UCoCs.

It is also recommended that the Board authorize the HCD Director to issue one UCoC for the Subject Property which consists of 2.03 acres.

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