Tower Lane Properties, Inc. v. City of Los Angeles
BS 137339

Tentative decision on petition for writ of mandate: granted, but without the requested remedy

Petitioner Tower Lane Properties, Inc. ("Tower") seeks a traditional writ of mandate against the City of Los Angeles ("City") with respect to building and grading permits. City and Intervenors Martha and Bruce Karsh oppose. The court has read and considered the moving papers, oppositions, and replies,[1] and renders the following tentative decision.

A. Statement of the Case

Petitioner Tower commenced this proceeding on May 18, 2012. The Petition alleges a single claim of traditional mandamus seeking a writ directing Respondent City to issue building and grading permits for Tower's plan to build a residential complex (the "project"). City has refused to issue the permits because it contends that LAMC section 91.7006.8.2 (sometimes, the "Ordinance")) provides it with discretion to refuse a grading permit unless a tentative tract map has been approved or there has been a waiver of this requirement. Tower contends that City lacks that discretion and seeks a writ of mandate commanding City "to clear any and all permit conditions related to [the Ordinance] for all pending permits for construction and/or grading" on its property.

B. Standard of Review

A party may seek to set aside an agency decision by petitioning for either a writ of administrative mandamus (CCP §1094.5) or of traditional mandamus. CCP §1085. A petition for traditional mandamus is appropriate in all actions "to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station...." CCP §1085.

A traditional writ of mandate under CCP section 1085 is the method of compelling the performance of a legal, ministerial duty. Pomona Police Officers' Assn. v. City of Pomona, (1997) 58 Cal.App.4th 578, 583-84. Generally, mandamus will lie when (1) there is no plain, speedy, and adequate alternative remedy, (2) the respondent has a duty to perform, and (3) the petitioner has a clear and beneficial right to performance." Id. at 584 (internal citations omitted). Whether a statute imposes a ministerial duty for which mandamus is available, or a mere obligation to perform a discretionary function, is a question of statutory interpretation. AIDS Healthcare Foundation v. Los Angeles County Dept. of Public Health, (2011) 197 Cal.App.4th 693, 701.

Where a duty is not ministerial and the agency has discretion, mandamus relief is unavailable unless the petitioner can demonstrate an abuse of that discretion. Mandamus will not lie to compel the exercise of a public agency's discretion in a particular manner. American Federation of State, County and Municipal Employees v. Metropolitan Water District of Southern California, (2005) 126 Cal.App.4th 247, 261. It is available to compel an agency to exercise discretion where it has not done so (Los Angles County Employees Assn. v. County of Los Angeles, (1973) 33 Cal.App.3d 1, 8), and to correct an abuse of discretion actually exercised. Manjares v. Newton, (1966) 64 Cal.2d 365, 370-71. In making this determination, the court may

[1]The court did not read or consider Intervenors' unauthorized Sur-Reply.

not substitute its judgment for that of the agency, whose decision must be upheld if reasonable minds may disagree as to its wisdom. Id. at 371. A agency decision is an abuse of discretion only if it is "arbitrary, capricious, entirely lacking in evidentiary support, unlawful, or procedurally unfair." Kahn v. Los Angeles City Employees' Retiremetn System, (2010) 187 Cal.App.4th 98, 106. A writ will lie where the agency's discretion can be exercised only in one way. Hurtado v. Superior Court, (1974) 11 Cal.3d 574, 579.

No administrative record is required for traditional mandamus to compel performance of a ministerial duty or as an abuse of discretion.

C. Subdivision Map Act

"The Subdivision Map Act ["Map Act"] is 'the primary regulatory control' governing the subdivision of real property in California." Gardner v. County of Sonoma, ("Gardner") (2003) 29 Cal.4th 990, 996 (citation omitted). The Map Act "has three principal goals: to encourage orderly community development, to prevent undue burdens on the public, and to protect individual real estate buyers." Van't Rood v. County of Santa Clara, (2003) 113 Cal.App.4th 549, 563- 564. "To enforce its important public purposes, the [Map] Act generally prohibits the sale, lease, or financing of any parcel of a subdivision until the recordation of an approved map in full compliance with the law." Gardner, *supra*, 29 Cal.4th at 999 (citations omitted).

The Map Act generally requires all subdividers of property to design their subdivisions in conformity with applicable general and specific plans and to comply with all of the conditions of applicable local ordinances. Ibid. (citation omitted); *see* Blackmore v. Powell, (2007) 150 Cal.App.4th 1593 (no "subdivision" occurs without a "division" or "severance" of land into "distinguishable possessory estates or interests"). Ordinarily, subdivision under the Map Act can be accomplished only by obtaining local approval and recordation of a tentative and final map pursuant to Govt. Code section 66426 (when five or more parcels are involved), or a parcel map pursuant to section 66428 when four or fewer parcels are involved. Ibid. A local agency will approve a tentative and final map only after extensive review of the proposed subdivision and consideration of matters such as suitability for development, adequate of services, preservation of lands, and dedication issues. Ibid. The "design" of a subdivision subject to local approval includes grading and drainage. *See* Govt. Code §66418.

Though compliance with the Map Act is a necessary predicate to the sale of lands within its ambit, tract approval does not carry an unfettered right to build on those lands. Van't Rood v. County of Santa Clara, ("Van't Rood") (2003) 113 Cal.App.4th 549, 565. After subdivision, a builder must comply with the laws which are in effect when the permit is issued, including laws enacted after the application for a permit. Ibid. (citation omitted). This includes zoning ordinances that requirement minimum parcel size for development. *See* Morehart v. County of Santa Barbara, (1994) 7 Cal.4th 725, 760.

D. The LAMC

Section 91.7006.8.2 reads as follows: " No permit shall be issued for the import or export of earth materials to or from and no grading shall be conducted on any grading site in hillside areas having an area in excess of 60,000 square feet (5574 m2) unless a tentative tract map has been approved therefor by the advisory agency. The advisory agency may waive this requirement

if it determines that a tract map is not required by the division of land regulations contained in Chapter I of the Los Angeles Municipal Code."

The term "site" is defined as "any lot or parcel of land or contiguous combination thereof, under the same ownership, where grading is performed or permitted. LAMC §91.7003.

The term "tentative tract map" is defined as a map made for the purpose of showing the design of a proposed subdivision creating five or more parcels . LAMC §17.02.

A "subdivision" is defined "the division, by any subdivider, of any unit or units of improved or unimproved land, or any portion thereof." Ibid.

E. Statement of Facts[2]

1. The Project

In 2009, Petitioner Tower purchased the real properties located at 9933, 9937, and 9941 West Tower Lane in Benedict Canyon. On May 3, 2011, Tower applied to the City's Department of Building and Safety ("Building and Safety") for building and grading permits to construct a residential compound located on the properties. Tower proposes to build a compound consisting of a 24,472 square foot main residential structure, pool, spa, pool cabana building, pool service and equipment building, and "accessory living quarters" at 9941 West Tower Lane; an additional 2,824 square foot residential structure and a garage at 9937 West Tower Lane; and a third 5,156 square foot residential structure and detached carport at 9941 West Tower Lane. Tower contends that grading for the project will require 20,715 cubic yards of cut.

2. The Existing Improvements

Tower's properties have existed as three separate lots for a number of years. Tower's predecessor owner, and now Tower, have been working on developing the three lots and have spent millions of dollars to do so. A 542-foot long, 26, foot high retaining wall has been built on the properties pursuant to a 2005 permit, and a 6,256 square foot subterranean parking garage was built pursuant to grading, demolition, and building permits issued in 2005 and 2006. The predecessor owner also (1) received City approval for and built a modification of a private street to provide legal access to 9941 West Tower Lane and allow for the construction of single-family residence on each of the properties, and (2) received City approval for a lot line adjustment under

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[2]Tower and the City ask the court to take judicial notice of a wide variety of documents. Most of the documents are irrelevant to the cause of action in this case, and the vast majority are not subject to judicial notice. Not every City action qualifies as an official act under Ev. Code section 452(c). Correspondence, memoranda, letters, staff reports, and work sheets are clearly not official acts. The Los Angeles Municipal Code ("LAMC"), the City's General Plan, the Bel-Air-Beverly Crest Community Plan clearly are legislative enactments subject to judicial notice. Ev. Code §452(b). City department approvals and denials, and zoning administrator determinations are in a gray area, and may be official acts subject to judicial notice. As most of the requested documents are irrelevant to the pertinent issue in this case, the court judicially notices only the City ordinances. Ev. Code §452(b). All other requests are denied.

The court has ruled on the parties' written objections, interlineating the original evidence where an objection was sustained.

a parcel map exemption.

3. The Grading and Building Applications

In 2010, Tower submitted to the City full sets of plans together with the final building and grading permit applications needed for construction of the proposed residences contemplated for the complex. Tower ran into opposition from Intervenors, who own a neighboring mansion to Tower's properties, and from other Benedict Canyon property owners.

In May 2011, in an attempt to avoid the need for discretionary City approval for the project, Tower submitted revised plans that scaled down the size of the development and incorporated other changes. These plans are have undergone by City's departments. Issuance of the permits requires that Tower's plans undergo a "plan check" review by City departments to obtain clearances that the plans comply with the LAMC. The department reviews are reflected on Clearance Summary Worksheets.

4. The City's Position on Hillside Grading

On May 23, 2011, Building and Safety released Correction Worksheets to Tower, identifying some of the additional steps it must take before permits can issue. Among other things, the pre-printed Correction Sheets state, "City Planning approval is required for any import or export of earth materials to or from and for grading work conducted on a grading site in Hillside Areas having an area in excess of 60,000 square feet." Building and Safety circled this item, indicating that it was applicable to the project, and wrote: "Apply ASAP."

In October 2011, the Chief of the Inspection Bureau for Building and Safety sent a letter to Tower's counsel stating that Building and Safety had been advised by City's Planning Department (the "Planning Department") that a clearance under section 7006.8.2 is a "discretionary action requiring a review under the California Environmental Quality Act" ("CEQA"). Without a CEQA review, Building and Safety would not take any action approving a permit for Tower's project.

Tower's counsel investigated City's historical application of the Ordinance. Although Building and Safety does not keep records of grading and building permits by lot size, he was able to find eleven properties involving grading sites in excess of 60,000 square feet that did not propose a subdivision and yet were not subjected to discretionary review under the Ordinance. He forwarded this information in an October 11, 2011 letter to the City Attorney.

On October 18, 2011, City's Engineering Bureau, an arm of Building and Safety, issued a memorandum (the "Gill Memorandum"). The Gill Memorandum noted that plan check corrections had been "released without requiring approval from the Planning Department's Advisory Agency pursuant to LAMC Section 91.7006.8.2." The Gill Memorandum then directed all plan check engineers "effective immediately" to require an approval by the Advisory Agency of all projects subject to the Ordinance -- meaning all projects in hillside areas involving grading sites in excess of 60,000 square feet regardless of whether a subdivision is involved.

Thereafter, the Planning Department's Deputy Director, issued a January 11, 2012 memorandum entitled "Filing Procedures for Review of Grading Plans in Hillside Areas Having an Area in Excess of 60,000 Square Feet Pursuant to Los Angeles Municipal Code Section 91.7006.8.2"[.] This memorandum asserts that the Ordinance will thereafter "appl[y] to all

projects in hillside areas where the site exceeds 60,000 square feet, not just to projects proposing a subdivision." It then lays out detailed criteria and findings necessary for approval or waivers of tentative tract maps and applications.

5. The Waiver Application

In April 2012, Tower applied for the discretionary waiver that Building and Safety indicated was required in its May 2011 Correction Worksheet. For the environmental clearance, TLP sought to rely upon the categorical exemption which City issued for the 1998 lot line adjustment and 2000 private street modification obtained by Tower's predecessor. The Deputy Advisory Agency concluded that Tower's predecessor did not submit any specific building plans when the City approved the private street modification in 2000. Thus, the categorical exemption for environmental review did not evaluate the grading which Tower proposes for the project.

The Deputy Advisory Agency sent Tower a letter advising that the City was suspending Tower's waiver application for lack of an adequate environmental study. The notice directed Tower to prepare an Environmental Assessment Form to start the City's environmental review process. Tower did not file an Environmental Assessment Form and its waiver application remains suspended. Tower filed this lawsuit instead.

F. Analysis

1. The Mandamus Claim

a. The Parties' Positions

Although the parties present considerable evidence, the Petition presents only a single cause of action for mandamus alleging that section 91.7006.8.2 does not require Tower to submit a tentative tract map or apply for a waiver before obtaining a grading permit for the project.

As all parties implicitly concede, the issuance of a grading permit is ordinarily a ministerial function. *See, e.g.*, Friends of Westwood, Inc. v. City of Los Angeles, (1987) 191 Cal.App.3d 259, 270, 277 ("run-of-the mill" building permits are ministerial; such permit is ministerial if the ordinance limits public official to determining whether zoning permits structure, the structure meets Building Code strength requirements, and applicant had paid his fee).

Petitioner Tower takes the position that the requirements of section 91.7006.82 only apply to grading permits on a large[3] hillside site in connection with a proposed subdivision of land creating five or more parcels. Since Tower is not proposing any subdivision, it need not obtain approval of a tentative tract map or a waiver before receiving its grading permit. Mot. at 8-9.

The City and Intervenors assert, on the other hand, that *any* grading project in a hillside area in excess of 60,000 square feet requires discretionary approval of a tentative tract map, or a waiver of this requirement. City Opp. at 4-5; Int. Opp. at 2-3.

b. The Rules of Statutory Interpretation

This is an issue of statutory interpretation. The construction of a local ordinance is

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[3]Hereinafter, the Ordinance's requirement of a hillside grading site in excess of 60,000 square feet is referred to as a "large" hillside site.

subject to the same standards applied to the judicial review of statutory enactments. *See* Department of Health Services of County of Los Angeles v. Civil Service Commission, (1993) 17 Cal.App.4th 487, 494. In construing a legislative enactment, a court must ascertain the intent of the legislative body which enacted it so as to effectuate the purpose of the law. Brown v. Kelly Broadcasting Co., (1989) 48 Cal.3d 711, 724; Orange County Employees Assn. v. County of Orange, (1991) 234 Cal.App.3d 833, 841.

In determining such intent, a court must look first to the words of the statute themselves, giving to the language its usual, ordinary import and according significance, if possible to every word, phrase and sentence in pursuance of the legislative purpose. Neville v. County of Sonoma, (2012) 206 Cal.App.4th 61, 70. The court first looks to the language of the statute, attempting to give effect to the usual, ordinary import of the language and seeking to avoid making any language mere surplusage. Brown v. Kelly Broadcasting Co., *supra*, 48 Cal.App.3d at. 724. Significance, if possible, is attributed to every word, phrase, sentence and part of an act in pursuance of the legislative purpose. Orange County Employees Assn. v. County of Orange, *supra*, 234 Cal.App.3d at. 841. The various parts of a statute must be harmonized by considering each particular clause or section in the context of the statutory framework as a whole. Lungren v. Deukmejian, (1988) 45 Cal.3d 727, 735.

If the words are clear, a court may not alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history. Gomes v. County of Mendocino, (1995) 37 Cal.App.4th 977, 986. The enactment must be given a reasonable and commonsense interpretation consistent with the apparent purpose and intent of the lawmakers, practical rather than technical in nature, and which, when applied, will result in wise policy rather than mischief or absurdity. To that end, the court must consider, in addition to the particular language at issue and its context, the object sought to be accomplished by the statute, the evils to be remedied, and public policy. Lungren v. Deukmejian, *supra*, 45 Cal. 3d at 735.

The court must give great weight to a legislative body's interpretation of its own ordinances. *See* City of Walnut Creek v. County of Contra Costa, (1980) 101 Cal.App.3d 1012, 1021. A court will follow an agency's interpretation of its own laws and regulations unless clearly erroneous. Terminal Plaza Corp. v. City and County of San Francisco, (1986) 186 CalApp.3d 814, 825-26.

c. Plain Meaning

The meaning of the Ordinance must be understood in context with the Map Act, which has a goals of encouraging orderly community development. *See* Sixells, LLC v. Cannery Business Park, *supra*, 170 Cal.App.4th at 652. The Ordinance uses terms created by the Map Act, including the key term "tentative tract map" which is required to show the design and improvement of a proposed subdivision. Govt. Code §66424.5(a). The Map Act authorizes the creation of an "advisory agency" in each jurisdiction to be the designated official body charged with the duty of approving tentative and final maps. Govt Code §66411, 66415.

Section 71.7006.8.2 bears the title "Tentative Tract Map" and requires approval of a "tentative tract map or a waiver by the advisory agency for those applications that are subject to the Ordinance." The Ordinance uses the terms "tentative tract map," "advisory agency," and "subdivision," all of which are defined in the Map Act and/or LAMC in connection with the

division of land. As these terms are defined in both the Map Act and the City's division of land regulations, the Ordinance has a plain meaning that no permit shall be issued for grading for a subdivision project on a hillside area in excess of 60,000 square feet unless the advisory agency has approved a tentative tract map. The requirement that persons filing grading permit applications that are subject to the Ordinance obtain approval of a tentative tract map necessarily means that the intent of the Ordinance is to limit its reach to grading permit applications involving subdivisions.

The context surrounding section 71.7006.8.2 supports this limitation to subdivision projects. The Ordinance is contained within the City's Building Code, under section 91.7006 entitled "Conditions Precedent to Issuing a Grading Permit." The section immediately preceding the Ordinance is entitled "Subdivision Map Act" and requires all grading permits to comply with, among other things, LAMC's division of land requirements and the Map Act.[4] Section 71.7006.8.2 then goes on to explain that a grading permit for a large hillside project will not be issued without a tentative tract map or an advisory agency waiver.[5]

Tower explains the purpose of the Ordinance is to enable the City to control grading for an anticipated subdivision. Mot. at 8-9. Without the Ordinance, a developer planning a subdivision project could obtain a large-scale grading permit, complete the grading work, and then apply for a subdivision. This would subvert the City's ability to impose conditions on the grading. The Ordinance closes that loophole by requiring the submission, consideration, and approval of a tentative tract map (including a grading plan) by the advisory agency prior to the issuance of a grading permit for a subdivision project.

The Ordinance's invocation of the jurisdiction of the "advisory agency" also demonstrates the Ordinance's limitation to grading in large hillside subdivisions. An "advisory agency" is a creature of the Map Act, is an official designated to make investigations and reports on the design and improvement of proposed divisions of real property. The City has assigned the powers of the "advisory agency" to the Director of Planning. LAMC §12.03. The Director of Planning has expertise in the area of subdivision planning. There is no evidence that the Planning Department has any expertise on grading or soil stability. These are issues for geologists and engineers, and these people work in Building and Safety. The City deliberately

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[4]LAMC section 91.7006.8.1 provides: "No permit shall be issued for any grading or import or export of earth materials to or from any grading site except in compliance with the zoning, private street and division of land regulations contained in Chapter I of the Los Angeles Municipal Code, the Subdivision Map Act of the State of California and the approved master plan for the area in which the grading is to be done.

[5]According to Tower, the City charges a fee for a review under the Ordinance, and this provision also supports Tower's plain meaning interpretation. Mot. at 11. Tower argues that section 19.02(F) describes the application fee submitted under the Ordinance as for: "Review of grading plans in hillside areas having an area in excess of 60,000 square feet to determine whether a tract map is required to be filed." Plainly, if no tract map under the Map Act is required, the Ordinance requires no discretionary review. Ibid.

Unfortunately, the court does not have section 19.02(F), nor does Tower quote it in full.

assigned the section 91.7006.8.2 duties to the advisory agency because they would involve subdivision issues.

The City contends that section 91.7006.8.2 should not be interpreted as applying solely to subdivisions simply because the City decided to assign the advisory agency the role of reviewing grading applications and invoked the tentative tract map procedures for that review. City Opp. at 6. The City argues that section 91.7006.8.2 provides that "no grading shall be conducted. . . unless a tentative tract map has been approved therefor by the advisory agency." (Emphasis added.) The Ordinance's use of the word "therefor" to refer to the "grading," suggesting that the purpose of the tract map is for hillside grading, not the division of land. Ibid. The City concludes that section 91.7006.8.2 merely "borrows" subdivision map procedures, and "creates a process that is outside the Subdivision Map Act." Ibid.

The plain language of section 91.7006.8.2 does not support this argument. The word "therefor" in section 91.7006.8.2 refers to "site," not "grading." That is, no grading permit shall be issued for a large hillside grading site unless a tentative tract map has been approved for that site. The Ordinance contains no reference to a "grading tract map," a "grading plan," or a "grading map." It refers to a "tentative tract map," which is a defined term both in the Map Act and LAMC. That term has a meaning common understood to concern the subdivision of land, not grading. There simply is no suggestion in the Ordinance that it is merely borrowing a Map Act term or procedure to apply to the grading on all hillside large lots.

The City argues (City Opp. at 5-6) that the purpose of section 91.7006.8.2 is to protect the integrity of the hillsides and the surrounding community from harmful grading. The tentative tract map procedure requires the advisory agency to make findings regarding a project's consistency with the general and specific plan, whether the site is physically suitable for the development proposed, whether the project is likely to cause substantial environmental damage or serious public health problems, and whether the project will conflict with access easements. *See, e.g.*, Gov't. Code §66474 (setting forth grounds for denial of a tentative or parcel map).

The court accepts that in part the Ordinance's purpose is to protect hillsides from harmful grading. Of course, other Building Code provisions perform that task as well.[6] Moreover, there is simply nothing in the Ordinance that indicates it is borrowing from the Map Act to create a new procedure. The term "borrow" is not used, or implied, anywhere in section 91.7006.8.2.

No doubt that the Ordinance's purpose would be furthered by applying it to the grading of all large hillside developments, whether a planned subdivision was involved or not. Any grading on such sites would be subject to discretionary review of permits, thereby protecting hillsides generally. Discretionary review would be particularly valuable for Tower's large scale project. But the mere fact that this purpose would be served by the City's current interpretation does not mean that this was the City's intention in passing section 91.7006.8.2 in 1964. Indeed, the City could hardly have anticipated the "mansionization" of Los Angeles that has occurred over the past two decades, and which is emblematized by Tower's project.

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[6]As Tower points out, the Building Code separately regulates in detail the grading on hillside areas for non-subdivision sites. Reply at 4. *See* LAMC §91.7005. The City's interpretation of the Ordinance would require the advisory agency's approval of a grading plan even though Building and Safety already has examined and approved it under other regulations.

The City argues that Tower's interpretation of the Ordinance is inappropriate because (1) there is no indication that the City was concerned about grading impacts on large hillside projects only for subdivisions, (2) the interpretation renders the Ordinance's reference to a tentative tract map for the grading meaningless, and (3) the interpretation renders the provision ineffectual because CEQA requires review of the whole of the project anyway. City Opp. at 7-8.[7]

None of these arguments is well taken. First, the Ordinance is limited to subdivisions by its language, its title, and its placement in the Building Code after other regulation of hillside grading. Second, the City's argument about a tentative tract map for grading mixes apples and oranges. There is no such thing. Third, it is true that CEQA would require review of a discretionary project (subdivision) as part of the whole of the action. Thus, a developer would not be entitled as a matter of law to grade with a ministerial permit and then seek to subdivide. But the City certainly was entitled to frustrate a plan to split a subdivision project by enacting the Ordinance.

Tower argues that its own position shows the City's interpretation to be absurd. It has three lots, is not seeking to subdivide, and could never obtain approval of a tract map showing the design of a proposed subdivision creating five or more parcels as required in the City's interpretation of the Ordinance. Mot. at 10. The City responds that Tower could comply because nothing in the Map Act prevents Tower from applying for a tentative tract map. City Opp. at 8. However, an interpretation of the Ordinance which compels Tower to apply for a tentative tract map, even though it has no intention to subdivide, is untenable.

The City notes that the last sentence of section 91.7006.8.2 provides for a waiver: "The advisory agency *may* waive [the tentative tract map requirement] if it determines that a tract map is not required by the [LAMC's] division of land regulations...." (Emphasis added.) The City focuses on the word "may" and argues that if the Ordinance was intended to apply only to subdivisions, then the last sentence would read: "the advisory agency shall waive [the tentative tract map requirement] if it determines that a tract map is not required" by the [LAMC's] division of land regulations...." By making the waiver discretionary, section 91.7006.8.2 permits the advisory agency to require a tract map for grading, even where the City's subdivision regulations do not so require. City Opp. at 6.

This is a fair argument, which at first blush appears sound. The word "may" is generally permissive. *See* CRC 1.5(b). However, where the word may is used in connection with a condition precedent, the word "may" actually means "shall." In the pertinent last sentence of section 91.7006.8.2, there is a condition precedent that the tentative tract map is not required by LAMC's subdivision regulations. If the condition is not met, the advisory agency may not waive the requirement. If the condition is met, the advisory agency may, and in fact must, waive the tentative tract requirement. "Where persons or the public have an interest in having an act done by a public body '*may*' in a statute means '*must*.' (Citation.) Words permissive in form, when a public duty is involved, are considered as mandatory." Harless v. Carter, (1954) 42 Cal.2d 352,

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[7]The City suggests that the Ordinance's use of the word "site," a defined term which includes contiguous lots as well as individual lots, shows that section 91.7006.8.2 is not limited solely to subdivision projects because contiguous lots already have been subdivided. City Opp. at 7. The short answer is that contiguous lots can be further subdivided.

356 (italics in original; internal citation omitted).

d. The Historical Interpretation of the Ordinance

Both Tower and the City rely on the City's historical interpretation of the Ordinance, which has been in place in some for since 1964.[8]

Tower presents evidence of 11 large hillside properties which were not being subdivided for which a grading permit was issued without reference to the Ordinance. Reznik Decl., ¶12-16. Tower further argues that its predecessor obtained grading permits in 2005 and 2006 without discretionary review, as did the Karshes for nine grading projects on their property. Reply at 8-9. Thus, Tower relies on a total of 24 hillside grading projects on large lots not involving a subdivision and none were subjected to discretionary advisory agency review. Ibid.

The City acknowledges that its enforcement of the Ordinance has been "lax" (Kashefi Decl., ¶22), and not "robust" (City Opp. at 12), but points to three instances where the City applied section 91.7006.8.2's requirement to approve grading on a large hillside project that did not involve a subdivision: (a) 12473 Gladstone Ave., (b) 2236 Merton Ave., and (c) 2001 Benedict Canyon/1441 Angelo Drive. City Opp. at 11.

The court may not consider extrinsic aids such as historical interpretation of the Ordinance unless the language of a statute is susceptible to more than one reasonable construction. People v. Farrell, (2002) 28 Cal.4th 381, 394. It is not.

Assuming *arguendo* that the Ordinance is reasonably susceptible to the City's interpretation, its historical interpretation of the provision is consistent with Tower's position. The evidence concerning the City's enforcement of the Ordinance is uniquely within the City's control. While the City protests that it does not keep records of its application of section 91.7006.8.2, that fact is not relevant where it is claiming that "The City Has Always Interpreted Section 91.7006.8.2 to Apply to All Grading Projects on Large Hillside Building Sites." City Opp. at 9. If the City cannot present more than three instances of its application to grading on large hillside projects that were not subdivided, the presumption must be that there are no more. *See* Ev. Code §604. Thus, the City has applied section 91.7006.8.2 to the grading on large hillside projects not involving a subdivision only three times since 1964.[9]

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[8]In 1964, the term "site" as used in the Ordinance meant "a parcel of land upon which one or more buildings are being erected or are proposed to be erected." The City relies on this language to assert that a site could include a property on which only one structure would be built. City Opp. at 9. The old definition's focus on a building or buildings rather than the current definition's focus on a lot or multiple parcels of land does not aid the City. The Ordinance's limitation that the site must involve a tentative tract map applies in either case.

[9]The City also relies on 1990 and 2000 City Attorney opinion memoranda, both of which assumed in discussing the need for an advisory agency waiver that staff properly applied the Ordinance to large hillside grading projects where subdivision had occurred long ago. City Opp. at 10. The City does not cite any law requiring the court to consider City Attorney opinion memoranda. In any event, neither memorandum purported to interpret the Ordinance; the opinions addressed only the waiver issue.

Moreover, Tower explains in reply that the Gladstone and Merton projects were approved for grading by the advisory agency as a matter of routine, and the Benedict Canyon project was referred to the advisory agency at the request of the applicant, who wanted a finding that a tract map was not required. Reply at 8.

In sum, the City's historical interpretation of the Ordinance has been to apply it only where a large hillside lot is being subdivided. It has not applied the Ordinance to large hillside grading projects for single family homes. The construction of a statute by officials charged with its administration is entitled to great weight. *See* Mooney v. Pickett, (1971) 4 Cal.3d 669, 681. But an agency's historical interpretation is a better indicator than a recently adopted position. It is the City's historical interpretation that carries great weight.

e. Summary

Thus, the most reasonable interpretation of the Ordinance is that it applies to grading permits for large hillside projects only in the context of a subdivision. The Ordinance does not apply when a lot or lots will not be subdivided. It may be sound public policy for the City to revise the Ordinance and apply it to enormous projects like Tower's project. But the court does not set public policy. Thus, the City cannot require Tower to submit a tract map for approval or apply for a waiver of the tract map requirement.

2. The Remedy

The City may not apply the Ordinance to Tower's project. Nonetheless, it does not follow that Tower is entitled to mandamus compelling the issuance of its grading and building permits.

Both the City and Intervenors present evidence and argument on the issue of remedy. They demonstrate that the City has not yet even completed its review of the project, and several issues remain outstanding.

First, the City has concerns about Tower's private street approval and access to the project site. Although City staff "signed off" on the private street clearance for the building permit applications, the Karshes contend that Tower's predecessor never satisfied the conditions imposed for the street modification. Tokunaga Decl., ¶27. The approval states that the approval will become void unless the conditions are fulfilled within three years. The City takes the position that if the conditions were not timely satisfied, Tower may need to apply for a new private street approval, which is a discretionary action triggering environmental review. There also should be a letter from the Fire Department and Bureau of Engineering confirming their approval of the conditions. The Planning Department has no such letter. Id. at 29.

Second, the grading plans submitted by Tower to the advisory agency in connection with its waiver application show grading in close proximity to trees that are labeled on the plans as Oak and Sycamore trees, which have protected status. Gill Decl., ¶6. To ensure that the grading will not disturb protected trees, the City's Urban Forestry Division has required Tower to submit a tree report prepared and signed by a tree professional. If the proposed grading will disturb protected trees, Tower must apply for a discretionary permit from the City. Tower has not yet filed a tree survey. The City cannot accept the declaration of Tower's counsel that the project will not disturb protected trees. Id. at 9.

Third, the Bureau of Engineering has expressed concerns regarding Tower's drainage plans, and has removed its clearance for drainage. Gill Decl., ¶22.[10]

Tower dismisses these issues as pretextual. Mot. at 15. The court cannot decide the *bona fides* of the City's issues, and Intervenors' arguments, at this stage. None of them were even pled in the Petition, and Tower barely raised any of them in its moving papers. While the parties have presented abundant evidence on these issues, the fact remains that the City has not completed its review, and Tower has not exhausted its administrative remedies. As the City argues (City Opp. at 15), Tower must address the unresolved issues and, if it is not satisfied with the result, may file administrative appeals. Tower may also file a new petition for traditional mandamus addressing these issues if it concludes that the City has no intention of completing the process and has a ministerial duty to issue the permits.

G. Conclusion

At this stage, Tower has shown that the Ordinance is inapplicable to its grading permit application because it does not intend to subdivide. Tower has not demonstrated, however, that the City has a ministerial duty to issue the grading or building permits. Other obstacles remain to the issuance of those permits. A writ shall issue commanding the City not to apply the requirements of the Ordinance to the project.

Tower's counsel is ordered to prepare a proposed judgment and writ of mandate, serve them on counsel for the opposing parties for approval as to form, wait 10 days after service for any objections, meet and confer if there are objections, and then submit the proposed judgment and writ along with a declaration stating the existence/non-existence of any unresolved objections. An OSC re: judgment is set for September 20, 2012.

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[10]Intervenors raise other permit issues with which the City does not necessarily agree, including the need for a variance from the Fire Code, consent from the owners of neighboring properties for grading on their properties, and the number of permissible retaining walls. Int. Opp. at 8-10.