

**ALFRED BORDESSA, as Trustee, etc., et al., Plaintiffs and Appellants, v. FRITZ
LANKER, as Trustee, etc., et al., Defendants and Respondents.**

A113226

**COURT OF APPEAL OF CALIFORNIA,
FIRST APPELLATE DISTRICT, DIVISION FIVE**

March 27, 2007, Filed

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PRIOR HISTORY: Sonoma County Super. Ct. No. SCV 236503.

JUDGES: GEMELLO, J.; JONES, P.J., SIMONS, J. concurred.

OPINION BY: GEMELLO

OPINION

Appellant challenges the validity of a mandatory injunction entered in a partition action. ¹ Before trial, the court ordered appellant to withdraw objections to administrative applications for certificates of compliance recognizing the validity of three historical parcels on the property. We conclude the injunction was an abuse of discretion and reverse.

¹ The land is currently co-owned by trusts that were established by two sisters, the Bruno Bordessa and Dorothy Bordessa Revocable Intervivos Trust (created by Declaration of Trust dated June 12, 2002), Dorothy Bordessa, Trustee, Alfred and Joseph Bordessa, Successor Co-trustees, and the Fritz and Barbara Lanker Living Trust, UTD, October 23, 2003, Fritz Lanker and Barbara M. Lanker, Trustees. For simplicity, we refer to the parties as Bordessa and Lanker.

[*2] Background

The underlying proceeding is a partition action involving the Valley Ford Ranch (the property) in Sonoma County that Dorothy Bordessa and Barbara Lanker inherited from their parents. Each sister owns an undivided one-half interest in the property. Lanker lives on the property with her husband and son and raises cattle.

In April 2005, Bordessa filed a complaint seeking partition by sale. She alleged that a partition by sale would be more equitable than partition in kind because the property was not of uniform value and division of the property into separate lots would violate local zoning restrictions. The minimum lot size for the creation of new parcels in the zoning district was 640 acres and the entire Valley Ford property is slightly more than 460 acres.

Subsequently, Lanker hired a surveyor to investigate whether the property comprised more than one legal parcel. The surveyor concluded that the property consisted of three legally established historical parcels. On Lanker's behalf, he filed three applications for certificates of compliance with the Subdivision Map Act, ² seeking recognition of the three parcels. Lanker then filed a cross-complaint for partition [*3] in kind, alleging on information and belief that Sonoma County would recognize the existence of three legal parcels and the property could be partitioned in kind.

² "As relevant here, the Act provides that any property owner may request a determination from the appropriate local agency as to whether his or her property complies with the Act and applicable local ordinances. ([*Gov. Code*,] § 66499.35, *subd. (a)*.) If the property is found in compliance, the agency shall cause a certificate of compliance to be filed for [the] record with the recorder of the county where the property is located. (*Ibid.*) When parcels are validated by certificates of compliance, they 'may be sold, leased, or fi-

nanced without further compliance with the Subdivision Map Act or any local ordinance enacted pursuant thereto.' ([*Gov. Code*,] § 66499.35, *subd. (f)(1)(E)*.) Conversely, if the property is found lacking in compliance, the local agency shall cause the filing of a conditional certificate of compliance, imposing conditions that the owner must fulfill. ([*Gov. Code*,] § 66499.35, *subd. (b)*.)" (*Gardner v. County of Sonoma* (2003) 29 Cal.4th 990, 998.)

[*4] Bordessa's attorney requested that the county cancel Lanker's applications for certificates of compliance. "It is our understanding that all owners of a property must join in any Application for a Certificate of Compliance. . . . [T]his firm's clients are co-owners of the property, but they have not joined in and do not support the Application." County procedures require the signature of all legal owners on an application for a certificate of compliance. The county's regular practice is not to process an application if it is aware that an owner of a substantial interest in the property has not joined the application.³ The county informed Lanker that her applications were "put on hold" because of Bordessa's objections.

³ Lanker argues she had the right to apply for certificates of compliance without Bordessa's consent. *Government Code section 66499.35, subdivision (a)* states that "any person owning real property" may request a certificate. Lanker argues that county procedures conflict with the statute to the extent they require the consent of all property owners. This issue is not properly before us because Lanker did not judicially challenge the county's decision to suspend the application process once Bordessa objected in the trial court.

[*5] Lanker asked Bordessa to withdraw her objections to the applications. Bordessa refused. Lanker then sought a preliminary injunction compelling Bordessa to withdraw her objections and enjoining her from objecting or taking any further steps to obstruct or influence the processing of the applications. In the alternative, Lanker asked the court to sever the issue of whether there was more than one legal parcel on the property and to expedite trial on that issue. Bordessa objected to the injunction but agreed to severance and to expedited trial of the issue.

After a contested hearing, the trial court granted the preliminary injunction. The injunction provided: "1. . . . Plaintiffs are ordered to notify the County of Sonoma [Permit and Resource Management Department] that they withdraw their objections to the Application for Administrative Certificates of Compliance for the Valley Ford Ranch and request that the Application be pro-

cessed. Plaintiffs are ordered to withdraw their objections to the processing of the Application for Administrative Certificates of Compliance for the Valley Ford Ranch filed by the Lankers. Plaintiffs may advise the County that plaintiffs preserve their rights [*6] to contest the number or boundaries of alleged legal parcels. [P] 2. Any information or materials submitted by plaintiffs to the County shall be considered by the County consistent with its policies and practices. [P] 3. This order is without prejudice to the plaintiffs' rights to contest that the Valley Ford Ranch should be partitioned in kind."

An order granting a preliminary injunction is appealable pursuant to *Code of Civil Procedure section 904.1, subdivision (a)(6)*.⁴

4 All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

Discussion

Bordessa argues that the trial court unlawfully delegated to the county the factfinding task of determining whether there are three legally created historical parcels on the Valley Ford property. Further, she argues that the order was not a proper exercise of the trial court's power to issue preliminary injunctions and that Lanker cannot defend the trial court's mandatory injunction as an exercise [*7] of its equitable powers.

In order to provide a legal context for this argument, we describe the statutory procedures that apply to partition actions and the relationship between partition actions and administrative applications for certificates of compliance.

I. Partition Actions & Administrative Certificates of Compliance

A co-owner with an equal undivided interest in property has a right to demand partition of the property. (§ 872.710, *subd. (b)*.) The court initially determines the interests of the parties in the property, the interests of lienholders, the plaintiff's right to partition, and the manner of partition. (§§ 872.610-872.630, 872.710, 872.810-872.830, 873.910-873.930.) The court then issues an interlocutory judgment. (§ 872.720.) The actual partition of the property is then carried out with the assistance of a referee. (§§ 873.010, *subd. (a)*, 873.210, 873.290, 873.510, 873.750, 873.790, 873.810.) The partition action concludes with entry of a judgment of partition. (§§ 873.290, 873.960, 874.240.)

The manner of partition may be in kind or by sale. (§§ 873.210-873.850.) Partition in kind is favored. (*Butte Creek Island Ranch v. Crim* (Butte Creek) (1982) 136

Cal. App. 3d 360, 365, 186 Cal. Rptr. 252.) [*8] The court may order partition by sale of all or part of the property only if "under the circumstances, sale and division of the proceeds would be more equitable than division of the property." (§§ 872.820-872.830.) The party seeking partition by sale bears the burden of proving it would be more equitable than partition in kind. (*Butte Creek, at p. 366.*)

Factors relevant to whether partition by sale is more equitable than partition in kind include (1) whether partition in kind is permissible under applicable subdivision laws (§ 872.040); (2) whether the property can be divided into parcels of roughly equal value, such that any differences in value could be balanced by way of compensatory payments (*Butte Creek, supra, 136 Cal. App. 3d at p. 366*); and (3) whether division of the property would substantially diminish the value of each party's interest (*id. at p. 367*). The court may refer to a referee the issues of whether a partition by sale would be more equitable than a partition in kind. (§ 872.820, subd. (b).)

A court may order physical division of real property only if the subdivision complies with the Subdivision Map Act and local ordinances [*9] enacted pursuant to the act. (*64 Ops.Cal.Atty.Gen. 762, at *18 (1981)*; ⁵ § 872.040; *Pratt v. Adams (1964) 229 Cal. App. 2d 602, 605-606, 40 Cal. Rptr. 505.*) The Subdivision Map Act includes grandfather clauses that validate parcels that were legally created before enactment of the act and its various revisions and amendments. (*Gov. Code, §§ 66412.6, subd. (a); 66451.10, subd. (a); 66499.30, subd. (d).*)

5 Attorney General opinions are entitled to great weight but are not controlling as to the meaning of a statute. (*Unger v. Superior Court (1980) 102 Cal. App. 3d 681, 688, 162 Cal. Rptr. 611, disapproved on other grounds by Unger v. Superior Court (1984) 37 Cal.3d 612, 618, 209 Cal. Rptr. 474.*)

As relevant to the instant appeal, a property owner may obtain legal recognition of historical parcels by applying for a certificate of compliance, which is then recorded. "If a local agency determines that the real property complies, [*10] 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." (*Gov. Code, § 66499.35, subd. (a)*, emphasis added.) A certificate of compliance permits the sale, leasing or financing of the parcels; it does not authorize development or use of the parcels. (*74 Ops.Cal.Atty.Gen. 149 at *13 (1991).*) The local agency's ruling on an application for a certificate of compliance is subject to judicial review. (See *Findleton v. Board of Supervisors (1993) 12 Cal.App.4th 709, 711; Stell v. Jay Hales De-*

velopment Co. (1992) 11 Cal.App.4th 1214, 1228 (Stell), overruled on other grounds by *Citizens for Covenant Compliance v. Anderson (1995) 12 Cal.4th 345, 359, 366.*)

II. Validity of the Injunction

We review an order granting a preliminary injunction for abuse of discretion. (*People ex rel. Gallo v. Acuna (1997) 14 Cal.4th 1090, 1109.*) The burden rests with the party challenging the injunction to make a clear showing of an abuse of discretion. (*IT Corp. v. County of Imperial (1983) 35 Cal.3d 63, 69, 196 Cal. Rptr. 715.*) [*11]

A. Preliminary Injunction

This process was turned upside down by the issuance of the preliminary injunction before an interlocutory judgment in the partition action. Before any fact-finding, the trial court granted a preliminary injunction compelling Bordessa to withdraw her objections to the processing of the applications. Ruling from the bench, the court explained, "[I]t's a most unusual request to ask a Court to issue what amounts to a mandatory injunction and most courts really are loathe to do that. But broad relief is permitted in partition suits. It's a suit in equity. The Court does have broad powers. The Court generally likes more, not less, information . . . [I]t will save time because it will do no good for some judge sitting in a courtroom to make these pronouncements on high that a county is not a party to. The county is not part of this lawsuit. [P] . . . [P] . . . [County officials] have their own interests, their own legitimate concerns and they need to express those earlier [rather] than later . . . [P] . . . [P] . . . I do think that the parties would all best be served by letting the county proceed with the ACC process."

A preliminary injunction [*12] is an order providing temporary relief pending full adjudication of the merits of a claim. (*White v. Davis (2003) 30 Cal.4th 528, 554.*) The general purpose of a preliminary injunction is to preserve the status quo pending a determination on the merits of the underlying claims. (*Continental Baking Co. v. Katz (1968) 68 Cal.2d 512, 528, 67 Cal. Rptr. 761.*) "The ultimate goal of any test to be used in deciding whether a preliminary injunction should issue is to minimize the harm which an erroneous interim decision may cause. [Citation.] [Citation.]" (*White, at p. 554.*)

The party moving for a preliminary injunction is required to present evidence of the irreparable injury or interim harm that it will suffer if an injunction is not issued pending adjudication on the merits. (*White v. Davis, supra, 30 Cal.4th at p. 554.*) The trial court must consider two factors: the likelihood the plaintiff will prevail on the merits; and the relative balance of harms that is likely

to result from the granting or denial of interim relief. (*Ibid.*) The greater the showing on one, the less must be shown on the other to support an injunction. [*13] (*Butt v. State of California* (1992) 4 Cal.4th 668, 678.)

The injunction issued by the trial court did not satisfy these legal standards. First, it did not provide interim relief. It was not temporary in duration or subject to being lifted based on the outcome of the partition claim. Once the applications were granted or denied, the county's determination was binding on Bordessa, subject only to administrative and judicial appeals. (See *Stell, supra*, 11 Cal.App.4th at pp. 1227-1229.)

Second, the injunction did not preserve the status quo pending trial on the merits of the underlying claims. It set in motion an administrative process that changes the recorded legal status of the property. (*Gov. Code*, § 66499.35, subd. (a) ["If a local agency determines that the real property complies, the [local agency] shall cause a certificate of compliance to be [recorded.]," italics added.])

Third, the injunction was not designed to minimize harm to the parties pending adjudication of the merits of the action or to protect any party's interests pending trial. The court did not make any finding that Lanker was likely to prevail [*14] in its request for a partition in kind. The court did not find that Lanker would suffer irreparable harm, or any harm, if the administrative proceeding was suspended.

A preliminary *mandatory* injunction is rarely granted and is subject to stricter review on appeal. (*Teachers Ins. & Annuity Assn. v. Furlotti* (1999) 70 Cal.App.4th 1487, 1493.) The granting of a mandatory injunction pending trial is not permitted except in extreme cases where the right thereto is clearly established. (*Ibid.*; *Slatkin v. White* (2002) 102 Cal.App.4th 963, 972; *Davenport v. Blue Cross of California* (1997) 52 Cal.App.4th 435, 448.) Here, the court ordered Bordessa to withdraw her objections to applications for certificates of compliance, an affirmative act. There was no evidence of extreme circumstances clearly establishing Lanker's right to a mandatory injunction.

Applying stricter review because of the mandatory nature of the injunction, we conclude that the trial court abused its discretion in issuing the preliminary injunction.

B. Equitable Powers

Lanker argues that the injunction was a proper exercise of the court's broad equitable powers in [*15] a partition action, an equitable proceeding. (*Elbert, Ltd. v. Federated Income Properties* (1953) 120 Cal. App. 2d 194, 200 (*Elbert*)). Courts hearing partition actions are

specifically authorized to issue "temporary restraining orders and injunctions, with or without bond, for the purpose of: [P] (a) Preventing waste. [P] (b) Protecting the property or title thereto. [P] (c) Restraining unlawful interference with a partition of the property ordered by the court." (§ 872.130.) The trial court did not make any of these findings.

Lanker argues that authority conferred by the partition statute was broad enough to encompass the challenged injunction. "In the conduct of the action, the court may . . . make any decrees and orders necessary or incidental to carrying out the purposes of this title and to effectuating its decrees and orders." (§ 872.120.) Lanker relies on authority that is critically distinguished by the procedural posture of the cases. In each, the trial court first entered an interlocutory judgment and then fashioned injunctive relief. (*Elbert, supra*, 120 Cal. App. 2d at pp. 198-200; *Richmond v. Dofflemeyer* (1980) 105 Cal. App. 3d 745, 766, 164 Cal. Rptr. 727.) [*16]

Had the trial court ruled on the cross-claims for partition and determined that partition in kind would be more equitable, it may very well have had the power to require Bordessa to withdraw her objection to the applications for certificates of compliance, in order to carry out its judgment that the property be physically divided. (See 64 Ops. Cal. Atty. Gen. 762 at *16-17.) However, the court had not heard the evidence and made findings of fact when it issued the injunction. The court did not have the power to issue an injunction as equitable relief for a cause of action it had not yet adjudicated.

C. Orders Pursuant to Court's Inherent Power to Manage Trial Court Proceedings

Because we uphold a trial court decision if it is correct on any basis, we briefly consider whether the injunction at issue is within the inherent power of the court to manage trial court proceedings. (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 967.) In managing a trial, courts may not issue orders that conflict with any statute or are inconsistent with law. (*Ibid.*) We review a court's exercise of its inherent powers for abuse of discretion. (*Constance K. v. Superior Court* (1998) 61 Cal.App.4th 689, 705.) [*17]

Lanker argues the injunction was necessary to the management of the partition action because *Government Code section 66499.35* "expressly made it the province of the local agency . . . and not the court, to determine the number of legally recognizable parcels." We disagree. *Government Code section 66499.35* gives property owners a right to initiate an administrative proceeding to determine the validity of historical parcels. It does not prohibit a trial court from determining the validity of historical parcels in the context of a partition action. It is

a strictly factual and legal determination, requiring interpretation of laws and ordinances governing subdivisions at particular historical times and application of those laws to evidence of how certain property has been held, conveyed and recorded. (See *Gardner v. County of Sonoma*, *supra*, 29 Cal.4th at pp. 996-1006.)

The determination of the number of legally recognized parcels is directly relevant to issues committed to the trial court in partition actions. (§§ 872.810-840, 873.910-930.) In order to choose the manner of partition, the court must consider whether [*18] it is possible to partition the property in kind under applicable subdivision laws. (§ 872.040.) Where that issue turns on whether there are legally established historical parcels on the property, the court must determine whether the historical parcels are valid. Where the determination has been made in an administrative proceeding for certificates of compliance and has become final, the court may rely on the administrative determination. (See, e.g., *Stell*, *supra*, 11 Cal.App.4th at pp. 1228-1229.) Here, there is no final administrative determination, and there will not be one because the county itself suspended the process; therefore, the court must decide the issues.

Our conclusion is strengthened by concern that the injunction interfered with Bordessa's property and First Amendment rights. The certification process commences with a voluntary request by a property owner. (*Gov. Code*, § 66499.35, *subd. (a)*.) In the absence of a request, there is no proceeding. At the time the injunction was issued, Bordessa wanted the property to remain one legally recognized parcel. Yet the trial court compelled Bordessa to withdraw her objections to a [*19] request for the certificates, which would in effect subdivide the property. ⁶ The injunction required Bordessa to take a legal position and arguably to express a viewpoint with which she did not agree. (Cf. *Smith v. Silvey* (1983) 149 Cal. App. 3d 400, 406-407, 197 Cal. Rptr. 15.) We need not decide whether the injunction violated Bordessa's constitutional rights. The fact that the injunction raises serious constitutional concerns supports our conclusion that the trial court abused its discretion in issuing it. (Cf. *Gann v. Williams Brothers Realty, Inc.* (1991) 231 Cal. App. 3d 1698, 1703-1704, 283 Cal. Rptr. 128.)

6 Lanker argued that Bordessa would suffer no prejudice from approval of the applications because the total value of the ranch would increase if three parcels were recognized. Bordessa, on the other hand, argued the property might be more valuable undivided because local and state land use laws, including California Coastal Commission regulations, might bar development of one or more of the three historical parcels. Bordessa asserted a potentially significant property interest in maintaining the property as a single parcel.

[*20] We recognize that the trial court was searching for a practical resolution of a trial issue. But the administrative proceeding would ultimately be required only if the court ordered partition in kind. In order to determine the manner of partition, the court needed to consider much more than whether there were valid historical parcels on the property. It had to consider whether the property would be more valuable as a single parcel or as separate parcels; whether the separate parcels would be roughly equivalent in value, thus allowing an equal partition by way of compensatory payments; and whether the costs, delays and uncertainties involved in dividing the property would render a partition in kind less equitable. On the issue of whether the parcels would be roughly equivalent in value, the court needed to consider whether each parcel would have access to water and a septic system and would otherwise be subject to development under governing state and local land use laws. Only after all of these issues had been considered and weighed could the court decide whether to order partition in kind or partition by sale. Only if it decided to order partition in kind would it be appropriate [*21] to order the parties to submit an application for certificates of compliance for the separate parcels on the property.

Disposition

The order granting the preliminary injunction is reversed.

GEMELLO, J.

We concur.

JONES, P.J.

SIMONS, J.