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500 SOUTH SECOND STREET

SPRINGFIELD

62706

May 5, 1975

FILE NO. S-896

**REAL PROPERTY:  
Subdivision Plats:  
Partitions**

Honorable Frank X. Yackley  
State's Attorney  
LaSalle County  
Ottawa, Illinois 61350

Dear Mr. Yackley:

This is to acknowledge receipt of your predecessor's letter in which it was stated:

"I have your opinion S-768 of May 28, 1974, concerning our questions on the Plat Act. However, there is one more clarification needed on House Bill 238 referred to in our previous letter.

The further question is this: If two or more persons purchase a tract of ground that falls under exception 9, as joint tenants or tenants in common and then voluntary partition the same (in reality, subdividing it) must there be compliance with the Subdivision regulation in paragraph A of the Plat Act?

Honorable Frank X. Yackley - 2.

We note the Plat Act, Chapter 106, I.R.S., allows the partition of the premises involuntary and so the question might arise under that circumstance. For example: Four people purchase four acres as joint tenants under the exception 9 and then a month later partition it so that each has a one acre tract, thus apparently creating a violation of the Plat Act. What affect does the Partition Statute have as far as involuntary partitions?"

There are two issues raised for consideration by your request. First, whether a subdivision plat must be recorded under subsection (a) of section 1 of "AN ACT to revise the law in relation to plats", hereafter referred to as the Plat Act (Ill. Rev. Stat. 1973, ch. 109, par. 1(a).) where there has been a partition and secondly, if recordation of the plat is necessary when there has been a partition, does the partition fall within exception 9 of section 1(b) of the Plat Act. Ill. Rev. Stat. 1973, ch. 109, par. 1(b)(9).

With regard to the first issue presented, section 1(a) of the Plat Act provides in part:

"Except as otherwise provided in subparagraph (b) of this Section, whenever the owner of land subdivides it into two or more parts, any of which is less than 5 acres, he must have it surveyed and a plat thereof made by a Registered Land Surveyor, which plat must particularly describe and set forth all public streets, alleys, ways

Honorable Frank X. Yackley - 3.

for public service facilities, parks, playgrounds, school grounds or other public grounds, and all the tracts, parcels, lots or blocks, and numbering all such lots, blocks or parcels by progressive numbers, giving their precise dimensions. \* \* \* The plat must show all angular and linear data along the exterior boundaries of the tract of land divided or subdivided. \* \* \*. References must also be made upon the plat to known and permanent monuments from which future survey may be made and the surveyor must, at the time of making his survey, set in such manner that they will not be moved by frost, good and sufficient monuments marking the external boundaries of the tract to be divided or subdivided \* \* \*." (Emphasis added.)

Webster's Third New International Dictionary, Unabridged, defines the word "subdivided" as "to further divide; to divide into several parts; esp.: to divide (a tract of land) into building lots; to separate or become separated into subdivisions". The word "divided" is defined by Webster's, supra, as "to separate into two or more parts; to separate into parts or portions and give out in shares; distribute".

A partition is a division of legal title which severs the individual interests in a tract of land. (Regas v. Danigeles, 54 Ill. App. 2d 571; Ylonen v. Ylonen, 2 Ill. 2d 11.) A partition involving an actual division of land may be voluntary (i.e., by act of the parties), or it may be involuntary (i.e., by court

Honorable Frank X. Yackley - 4.

decree). If voluntary, it may be, for example, by parol agreement (Tanner v. Tanner, 326 Ill. 302), (if so it remains enforceable only in equity, upon a theory of estoppel) but will usually be by deed. If involuntary, a court may order the commissioners, appointed in the partition proceeding, to draw up a map or plat pursuant to section 1 of "AN ACT to authorize courts, in certain cases, to order lands to be subdivided and platted" (Ill. Rev. Stat. 1973, ch. 109, par. 11), or the court may order, under section 8 of "AN ACT in relation to the partition of real estate, and to repeal an Act herein named", hereafter referred to as the "Partition Act" (Ill. Rev. Stat. 1973, ch. 106, par. 57), that the land be divided pursuant to the metes and bounds description contained in the report of the commissioners.

Whether the partition is voluntary or compulsory, each cotenant transfers or releases the interest which he had in the whole for an exclusive and fixed possession in a part. By execution of a deed upon partition each cotenant receiving a fixed possession in a part may convey such part to a stranger in severalty. This fact establishes, contrary to those mistaken cases which hold that the only effect of partition is to end the unity

Honorable Frank X. Yackley - 5.

of possession, that partition deeds convey to each tenant the estate and interest of his cotenants in that part of the property which he receives. (II American Law of Property, sec. 6.20 (Little Brown and Co. 1952).) As the Court of Appeals stated in Barry v. Seawall, 65 Fed. Supp. 742 at 746:

"When voluntary partition takes place, \* \* \* clear that there is a mutual transfer by each tenant to the other of his previous right of possession in the part assigned to the other. This is an interest in land, and is within the letter of the statute of frauds. It is, moreover, within the spirit of that statute. The danger that fraud and perjury would unsettle the ownership of lands in disputes over the terms of a partition was not materially less than in those over the terms of a sale or exchange of lands in severalty."

It is, consequently, my opinion that where there has been a voluntary partition, and a division of the land, by deed, according to the respective interests of the coparceners, joint tenants, or tenants in common, that there has been a division or subdivision of land by an act of the owners within the meaning of section 1(a) of the Plat Act.

This conclusion is further supported by an examination of the objects and purposes of the Plat Act. It has been held

Honorable Frank X. Yackley - 6.

that the primary concern of statutory construction is to ascertain and give effect to the intent of the legislature, and consideration should be given to the reason and necessity for the enactment, contemporaneous conditions, existing circumstances, and objects sought to be attained by the statute. (People ex rel. Krapf v. Hayes, 13 Ill. 2d 143.) The purpose to be served in requiring the submission of plats to governmental approval is to insure that adequate provision has been made for streets, alleys, parks and other public facilities indispensable to the particular community affected. Weber v. The Village of Skokie, Cook County, 92 Ill. App. 2d 355; Gricius v. Lambert, 7 Ill. App. 3d 716.

To hold that a voluntary partition is not a subdivision of land within section 1(a) would be to thwart this legislative purpose. The beneficial objects and purposes of the Plat Act could be circumvented by developers and others through a process of acquisition of land in cotenancy followed by a series of voluntary partitions. (cf. Pratt v. Adams, 40 Cal. Rptr. 505.) It is, therefore, my opinion that a voluntary partition of land is a subdivision of land within the meaning of section 1(a) of the Plat Act.

Honorable Frank X. Yackley - 7.

It should be noted also that where a parol partition has occurred a different problem is presented. While parol partitions have been recognized to a limited extent by Illinois courts (cf. Cole v. Cole, 292 Ill. 154; Castevens v. Castevens, 227 Ill. 547) they remain primarily a legal fiction designed to protect the equitable interest in reliance. As such they will be found to exist by courts only where a theory of promissory estoppel is applicable. (II American Law Property, p. 87.) It is, therefore, my opinion that the interest of the people of Illinois in receiving the full benefit of the policies sought to be achieved by the Plat Act is sufficient to require that upon a judicial determination that a parol partition exists a plat must be submitted as provided by section 1(a) of the Act.

Turning to the second issue raised by your inquiry, whether a partition falls under exception 9 in subsection 1(b) (Ill. Rev. Stat. 1973, ch. 109, par. 1(b)(9)) so that no subdivision plat is required, section 1(b)(9) provides:

"(b) The provisions of this Act do not apply and no plat is required in any of the following instances:

\* \* \*

Honorable Frank X. Yackley - 8.

9. The sale of a single lot of less than 5 acres from a larger tract when a survey is made by a registered surveyor; provided, however, that this exemption shall not apply to the sale of any subsequent lots from the same larger tract of land, as determined by the dimensions and configuration of the larger tract on the effective date of this amendatory Act of 1973."

A voluntary partition is at common law a subdivision and separation, between joint owners or tenants in common, of their respective interests in the land, and a setting apart of such interests so that they may enjoy and possess the same in severalty. (Meacham v. Meacham, 91 Tenn. 532, 19 S.W. 757.) It is well established that a partition will not be viewed as a sale, even though a partition deed will convey to a cotenant the estate and intent of other cotenants in that part of the property which he receives. (Tyson v. Spearman, 190 La. 871, 183 So. 201; Stone v. Jefferson, 196 La. 1057, 200 So. 461; Craven County v. First Citizens Bank & Trust Co., 237 N.C. 502, 75 S.E. 2d 620.) As there has been no sale the exception of par. 1(b)(9) does not apply.

It is, therefore, my conclusion that a plat must be filed under section 1(a) where partition has occurred before the



Honorable Frank X. Yackley - 9.

Recorder of Deeds may record a deed upon partition and upon subsequent conveyance of the partition land to a purchaser. Section 5a of the Plat Act (Ill. Rev. Stat. 1973, ch. 109, par. 5a), provides that the recorder of deeds shall not record deeds or leases which attempt to convey property contrary to the provisions of the Plat Act. Thus, a deed in partition cannot be recorded unless there has been compliance with the "Plat Act". Where no deed is executed or none recorded, any sale by a party to a partition in severalty to a subsequent purchaser would be in violation of the "Plat Act" if no plat has been recorded. Therefore, a deed to subsequent purchasers could not be recorded under section 5a.

(See, Maros v. Jones, 6 Ill. App. 3d 950.)

Very truly yours,

A T T O R N E Y G E N E R A L