IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

CRESCENT TRUST, Plaintiff and Appellant, vs. CITY OF OAKLAND, Defendant and Respondent.	)	Supreme Court Case No. **S280234** Court of Appeal, First District Case No. A162465 Alameda County Superior Court Case No. RG20068131

[PROPOSED] BRIEF OF AMICI CURIAE CALIFORNIA STATE ASSOCIATION OF COUNTIES AND LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF DEFENDANT AND RESPONDENT CITY OF OAKLAND

(Cal. Rules of Court, rule 8.520(f))

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Amici curiae, to the best of their knowledge, are unaware of any entities or persons who have a financial or other interest in the outcome of this proceeding that would be relevant to the question of disqualification under Canon 3E of the Code of Judicial Ethics.

Dated:

Respectfully submitted,

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I. EXPOSITION: INTRODUCTION AND SUMMARY OF ARGUMENT

The best litmus test for whether an historic property transaction may have caused a "division" for purposes of Government Code section 66412.6[1] is disarmingly simple:

Would the transaction trigger the Subdivision Map Act if occurring today?

The presumption set forth in Section 66412.6 has several other elements, but as the parties correctly recognize, the threshold question of what "divides" is dispositive here – and as will appear, "division" has the same meaning in the Map Act's central definitional provision (Section 66424); in the 1971 legislation that Section 66412.6 was enacted to ameliorate (Stats. 1971, ch. 1446, effective March 4, 1972); and in Section 66412.6 itself.

Under well-established principles, "division of land" under the Map Act occurs when one party "receive[s] an *exclusive right to occupy a particular area or part of the property*."[2] Describing contiguous land conveyed by a single deed as one lot, or four, or ten lots does not give the grantee (or anyone else) distinct occupancy rights in any "particular area or part of the property" different from any other. Rather, the grantee receives the same absolute, undifferentiated, and undivided fee in the entirety of the property conveyed, regardless of the legal description used. That was true in 1885 and 1944, and remains true today.

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[1] All further undesignated references are to the Government Code.

[2] 38 Ops.Cal. Atty.Gen. 125 (1961).

Perhaps just as importantly, a grantor in 1885 or 1944 would have no reason to expect (or intend) that the particular wording of their legal description would have any such effects – just as the same grantor today would not think themselves hazarding a Map Act violation. There is thus no "division" within the meaning of the Map Act – either for purposes of triggering its regulatory requirements, nor, as suggested here, for purposes of applying the exception to those requirements set forth in Government Code section 66412.6.

Respondent City has done an excellent job explaining how the existing caselaw, from *John Taft Corp. v. Advisory Agency* (1984) 161 Cal.App.3d 749 to *Gardner v. County of Sonoma* (2003) 29 Cal.4th 990 and its progeny, compels the conclusion that the "use of lot numbers to describe a parcel for transfer in grant deeds—without more—does not divide a parcel into those lots." (Op. Br. at p. 12.) This brief will supplement those arguments by demonstrating how an analysis proceeding from the first principles of the Map Act and underlying law of real property reaches the same result here.

II. DO NOT PRESUME TOO MUCH:[3] ANY PRESUMPTION DEPENDS UPON PROOF OF THE PREDICATE

Appellant's claims rest entirely upon Section 66412, subdivision (a), which provides as follows:

> "For purposes of this division or of a local ordinance enacted pursuant thereto, any parcel created prior to March 4, 1972, shall be conclusively presumed to have been *lawfully* created if the parcel resulted from a division of land in which fewer than five parcels were created and if at the time of the creation of the

[3] Shakespeare, Julius Caesar, act IV, scene 3, line 72.

parcel, there was no local ordinance in effect which regulated divisions of land creating fewer than five parcels."

"A presumption is an assumption of fact that the law requires to be made *from another fact or group of facts found or otherwise established in the action*." (Evid. Code, § 600, subd. (a), emphasis added.) For the presumption to come into being, the trier of fact "must first find the facts upon which it is based." (*Gall v. Union Ice Co.* (1951) 108 Cal.App.2d 303, 319.) In this case, application of the presumption – that a parcel was *lawfully* created – depends upon proof of "another fact or group of facts," namely that the parcel was "created" and "resulted from a division." The presumption is one of *legality* for parcels created under certain circumstances – not a presumption of *creation*. These are "two separate concepts." (See *Save Mount Diablo v. Contra Costa County* (2015) 240 Cal.App.4th 1368, 1382.)

Phrased differently, "creat[ion]" and "division" are the predicate facts from which "lawful[ness]" is presumed – and as such they must be independently "found or otherwise established" before the presumption may operate. [4] Thus, Appellant bears the burden of demonstrating that "Lot 18" – the putative parcel for which they seek

[4] It is critically important throughout to distinguish parcel *division* from parcel *merger* – indeed, failure to adequately appreciate this distinction is the root of the Court of Appeal's error. A single deed can indeed convey multiple preexisting parcels, and such conveyance will not cause those parcels to merge. (See Civ. Code, § 1093.) However, the fact that "an individual listing of the legal descriptions in a subsequent single instrument of conveyance" will not merge *preexisting* parcels does *not* necessarily imply the converse, that such listing will divide and create *new* parcels that have never previously existed.

recognition – was "created" by a "division" occurring prior to March 4, 1972, otherwise Section 66412.6 cannot apply.[5]

III. READ, AND DECLARE THE MEANING:[6] "DIVISION" UNDER THE MAP ACT

Appellant nearly waxes poetic in their far-flung search to understand what the term "division" might possibly mean as used in Section 66412.6. (See Ans. Br., pp. 22-23 ["a ship dividing the waves," "divide history into epochs," etc.].) The truth is both more mundane and closer at hand.

Section 66412.6 was enacted with the explicit purpose of ameliorating the effects of a prior piece of legislation, Statutes 1971, chapter 1446 ("Assembly Bill 1301").

> "Prior to the enactment of Assembly Bill 1301 in 1971, if the division did not come within the definition of 'subdivision,' the Act required no filing of a map or local government approval whatever, and property owners were free to split their land into four parcels or fewer...simply by deeding the parcels to other people or by recording a parcel map...To remedy the situation, Business and Professions Code Section 11535(d) was amended by Assembly Bill 1301 in 1971 to require the submission of parcel maps for all divisions of land not coming within the definition of 'subdivision.'" (Comment, *Land Development and the Environment: The Subdivision Map Act* (1974) 5 Pacific L.J. 55, 59-60. See also *Review of Selected 1980 California Legislation* (1980) 12 Pacific L.J. 556.)

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[5] Under current law, "division" and "subdivision" are effectively synonymous (see § 66424); however, this was not always so. As discussed in greater detail below, prior to 1974 (Stats. 1974, ch. 1536), "subdivision" was a subset of "division," occurring when "real property... is divided...into five or more parcels." (Former Bus. & Prof. code, § 11535, subd. (a).)

[6] Shakespeare, Cymbeline, act V, scene 5, line 3904.

Assembly Bill 1301 went into effect March 4, 1972. (*Fishback v. County of Ventura* (2005) 133 Cal.App.4th 896, 904.) This watershed development in the Map Act, which subjected to regulation a vast number of previously unregulated minor property transactions, inaugurated over a decade of confusion. Numerous questions arose regarding both what transactions constituted a regulated "division," and whether previously divided parcels would merge (such that future separate conveyance might constitute a division). These were addressed in an interlocking series of Attorney General's opinions and statutory revisions, one central aim of which was "to protect developers who have detrimentally relied on an earlier state of the law." (See *Hays v. Vanek* (1989) 217 Cal.App.3d 271, 289.)[7]

Section 66412.6 was enacted in 1980 (Stats. 1980, ch. 403, § 1) as part of this legislative response:

> "Prior to the enactment...of provisions dealing with parcel maps (subdivisions of less than five parcels), it was possible to legally divide land without going through the Subdivision Map Act...[While] parcel maps were not required [by the Act]...local ordinance could provide for such a requirement. Confusion has arisen over the legality of parcels created prior to March 4, 1972, where there was no local ordinance." (Assem. Floor Analysis, Assem. Bill No. 978 (1979–1980 Reg. Sess.) as amended May 22, 1980, p. 2.)

Addressing this confusion, "Section 66412.6, subdivision (a), simply clarifie[d] that parcels legally created without a parcel map are legal even after the parcel map

[7] The "tortuous history" of the merger aspects of this confusion is detailed in *van't Rood v. County of Santa Clara* (2003) 113 Cal.App.4th 549, 566-569; *Gomes v. County of Mendocino* (1995) 37 Cal.App.4th 977, 987-989; and *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 751-755. The opinions addressing the "division" aspects are discussed in Section IV, *infra*.

requirement was added to the SMA." (*Fishback, supra,* 133 Cal.App.4th at pp. 904-905.)[8]

From this history, it is readily apparent that the pre-March 4, 1972 "division[s] of land" presumed legal under Section 66412.6 are the very same "divisions" that would require filing a parcel map after that date – no more or less. In addition to the usual need to read the various provisions of the Map Act *in pari materia* (see *Kalway v. City of Berkeley* (2007) 151 Cal.App.4th 827, 833; *Morehart, supra,* 7 Cal.4th at p. 752), here the Legislature has removed all possible doubt about the interaction by explicitly making the trigger date for Section 66412.6 identical to the effective date of Assembly Bill 1301.

Assembly Bill 1301 also evinces a further point: "Division" requiring a parcel map after March 4, 1972 (and thus legalized by Section 66412.6, if prior to that date) has the same meaning as "division" requiring a subdivision map – the only difference being the number of parcels involved. Then, as now, the Map Act required a subdivision map whenever real property "is divided *for the purpose of sale, lease, or financing*, whether immediate or future…into five or more parcels." (Stats. 1971, ch. 1446, § 5; Former Bus. & Prof. code, § 11535, subd. (a).) Assembly Bill 1301 imposed a new requirement that whenever "land...is divided into four or less parcels" a parcel map must be approved and filed "prior to the *sale, lease, or financing* of such parcels."

[8] Chapter 403 also contained provisions addressing merger issues (§ 2) – and was one of several statutes that year addressing the still ongoing fallout from Assembly Bill 1301. (See, e.g., Stats. 1980, ch. 479; Stats. 1980, ch. 1217.)

(*Ibid*.; Former Bus. & Prof. Code, § 11535, subds. (b), (d).) The identical terminology and transactional focus were not coincidental, but rather reflect an obvious legislative intent that "division" have the same meaning in both contexts.[9]

Simply put, "division" under the Map Act has but a single meaning – and, as detailed in the next section, that meaning is well-established, and does not include simply listing multiple lot numbers in a single deed.[10]

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[9] This intent was further underscored in 1974, when the central definition of "subdivision" was amended to erase any distinction based upon the number of parcels involved, in what is now Section 66424. (Stats. 1974, ch. 1536. See also *van't Rood, supra,* 113 Cal. App. 4th at p. 565 ["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"].)

[10] Appellant cites *La Fe, Inc. v. County of Los Angeles* (1999) 73 Cal. App. 4th 231 as support for "an expansive definition of 'division of land'" (Ans. Br. at pp. 23-24.) This reliance is curious, as *La Fe* involved a provision of the Coastal Act (Pub. Resources Code, § 30106) that *explicitly* swept more broadly than the Map Act – which broader sweep was *specifically noted and relied upon* both by *La Fe* and by the earlier caselaw it cited. (*Id.* at p. 241; *California Coastal Com. v. Quanta Investment Corp.* (1980) 113 Cal.App.3d 579, 608-609.) *La Fe* consequently provides no assistance to Appellant in this *Map Act* case. The other authority relied upon by Appellant for this purpose, 86 Ops.Cal.Atty.Gen. 70 (2003), is equally ill-suited. That opinion involved a situation in which one portion of a formerly contiguous property had *actually been conveyed* to another party (by eminent domain), thus rendering the other portions discontiguous. This was not, as Appellant posits, "a physical separation that does not affect ownership," but rather the consequence of *conveyance* of *one portion* of a formerly integral property *to another party* – in other words, a conventional division. (*Ibid.* ["There can be no question but that *condemnation of a part of a parcel* results in a 'division' of land"].)

IV. DIVIDES ONE THING ENTIRE TO MANY OBJECTS:[11] EXCLUSIVE OCCUPANCY OF A PORTION "DIVIDES" THE WHOLE

Recognition that Section 66412.6 does not refer to "divisions" in the abstract, but instead encompasses those same "divisions" now regulated by the Map Act, effectively disposes of Appellant's claim on textual grounds. In 1972 and today, the Map Act's regulatory reach covers divisions "for the purpose of sale, lease, or financing, whether immediate or future." (§ 66424; Former Bus. & Prof. Code, § 11535, subd. (a).) Even if separately identifying lots within a single deed could constitute "division" in some metaphysical sense, such purely verbal dismemberment of the property has no legal effect (immediate or future) on its sale, lease, or financing.[12] The analysis could end there – but review of the relevant authorities further bolsters this conclusion.

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[11] Shakespeare, Richard II, act II, scene 2, line 1010.

[12] Appellant's argument that Section 66412.6''s use of the singular phrasing "a division of land" necessarily "anticipates a scenario whereby four or fewer parcels were created in a single act" (Ans. Br. at p. 34) gravely misunderstands the Map Act. Both current Section 66424 and former Business and Professions Code section 11535 (as reflected in Assembly Bill 1301) likewise use singular phrasing to describe regulated "divisions" ("the division" and "is divided," respectively) – but the courts have had little difficulty concluding that multiple conveyances "as a whole" can collectively constitute such a division. (See, e.g., *Fishback, supra,* 133 Cal.App.4th at p. 902; *Pratt v. Adams* (1964) 229 Cal.App.2d 602, 605.) Moreover, as noted above, the manifest purpose of Section 66412.6 is to protect those historic divisions that would today require filing a parcel map, not create a new category of division by "single act." (In addition to the foregoing – full and complete – legal answer, Appellant also ignores the factual prospect of "single acts" that convey separate portions of a tract *to distinct grantees*, such as the initial partition judgment in *Pratt, supra,* 229 Cal.App.2d at pp. 603-604.)

Efforts to interpret – or evade – "division" under the Map Act (and its companion consumer protection statute, the Subdivided Lands Act[13]) are nearly as old as the statute itself. The courts (and Attorney General) have consequently had the opportunity to consider this question under a variety of factual scenarios, yielding clear principles that are dispositive here.

In *Cowell v. Clark* (1940) 37 Cal.App.2d 255, 257-258, the owner of a large oil and gas lease "propos[ed] to assign rights to others in units of forty acres." The Court of Appeal concluded that this constituted a division, focusing pragmatically upon the separate legal interests being granted to multiple parties:

> "Here the plaintiff was about to divide the lands, described in the lease to him, into eleven parcels and assign his lease *pro tanto* to each parcel. That act would be in direct violation of [the Subdivided Lands Act]. Webster's New International Dictionary, second edition, defines 'subdivide': 'To divide a tract of land into lots to sell before developing or improving them.' Such was the act of this plaintiff. (See, also, 60 C. J. 670; *Gill v. Saunders*, 182 Ark. 453 [31 S.W.2d 748, 749]; *Kansas City v. Neal*, 122 Mo. 232 [26 S.W. 695, 696].) As said in the case last cited: ''Subdivision' means to divide into smaller parts the same thing or subject matter...' So here, the plaintiff was about to subdivide into eleven leases the subject-matter of the lease he holds."

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[13] Business and Professions Code sections 11000 et seq. The exact scope of regulated "subdivisions" under these two Acts has never been precisely identical, and the level of overlap between the two has waxed and waned over the years as the statutes have been variously amended (sometimes separately, sometimes together). (Compare *People v. Embassy Realty Associates* (1946) 73 Cal.App.2d 901, 906 [treating the definition of "subdivision" in the Subdivision Map Act, as it then read, as being *in pari materia* with the Subdivided Lands Law] with 56 Ops.Cal.Atty.Gen. 496 (1973) and *Quanta Investment Corp., supra,* 113 Cal.App.3d at pp. 590-593 [detailing the history of disparate revisions to these laws].) However, both Acts' definitions of "subdivision" (currently § 66424 and Bus. & Prof. Code, § 11000, subd. (a)) hinge upon the "division" of "land," and it is therefore common for authorities evaluating putative "divisions" under the Map Act to look to Subdivided Lands Act precedents for guidance. (See, e.g., *Gardner, supra,* 29 Cal.4th at pp. 1001-1002; *John Taft Corp., supra,* 161 Cal.App.3d at p. 757; 58 Ops.Cal.Atty.Gen. 408 (1975).)

The Attorney General further elaborated upon this reasoning in 17 Ops.Cal.Atty. Gen. 79 (1951), concluding that "a community apartment house in which each grantee receives an undivided interest in the property plus exclusive occupancy of an apartment" constituted a division of land under the Subdivided Lands Act:

> "[T]he vendee here receives an exclusive right to occupy *a particular area or part of the property*. He buys, in other words, something in addition to an undivided interest in the whole…The present case turns upon whether the right to exclusive possession of part of a premises is an estate or interest in property, thus falling within the category of a parcel…One who buys exclusive occupancy of a particular apartment in community apartment building occupies a *special position with relation to that portion of the premise*s...the grantee of the deed in question therefore receives a lot or parcel within the meaning of [the Subdivided Lands Act]."

The A.G. applied similar reasoning to the Map Act in a series of opinions beginning in 1961. 38 Ops.Cal.Atty.Gen. 125 (1961) concerned transactions "conveying an undivided interest in an entire tract together with an exclusive right to occupy a unit or parcel." Noting its prior opinions under the Subdivided Lands Act, the A.G. found that the granting of exclusive occupancy rights was likewise the touchstone for "division" under the Map Act:

> "In our opinion there is no legal distinction between such an interest in a community apartment house and the undivided interest of a grantee in an entire tract together with an exclusive right to occupy a unit or parcel therein. Nor is there any distinction between a parcel as defined for purposes of the Subdivision Act and a parcel as defined for purposes of the Subdivision Map Act...Thus, the grantee of an interest under the situations posed by this inquiry receives a parcel within the meaning of section 11535 and the conveyance thereof is, in legal effect, the sale of a divided interest in real property, and is therefore subject to the requirements of the Subdivision Map Act."

The A.G. further reinforced this point when distinguishing transactions simply conveying undivided interests:

> "In Opinion 9020, dated November 13, 1933, this office ruled that the subdivision law did not apply to an offering of undivided interests in a single tract of land. Nothing contained herein is inconsistent with that ruling since the earlier opinion has already been limited to instances where the vendee receives only an undivided interest in a tract of land and does not, as in the present situations, also receive *an exclusive right to occupy a particular area or part of the property*."

39 Ops.Cal.Atty. Gen. 82 (1962) extended this reasoning to "horizontal condominiums," opining that "[s]ince ownership in fee encompasses the 'right of exclusive occupancy,' it follows from the reasoning of these two prior opinions that the division of a parcel of real property into 'parcels' of air space to be owned in fee constitutes a 'subdivision' which if not specifically excepted, is subject to the provisions of both the Subdivision Law and the Subdivision Map Act." Similarly, 57 Ops.Cal.Atty.Gen. 556 (1974) addressed a fraternal organization's proposal to grant "permits" to its members entitling them to "the sole and exclusive use and occupancy of specified lots" on the organization's property. The A.G. had little difficulty concluding that this constituted a division "for the purpose of...lease," finding critical the fact that the permits each granted the exclusive right to occupy a specific lot. Summing up prior authority, the A.G. concluded that "[t]he *exclusive right to occupy was the determining factor in holding the offering to be a subdivision*."

58 Ops.Cal.Atty.Gen. 408 (1975) found that "[t]he act of creating several deeds of trust upon different portions of a parcel or unit of land constitutes a division of land within the meaning of a subdivision under the Subdivision Map Act." In reaching this

conclusion, the A.G. focused both upon the instruments' immediate creation of separate legal interests – and the potential ripening into occupancy interests upon future foreclosure:

> "The conveyance of legal title to a lot or parcel by means of a deed of trust, as security for an obligation therefor, is the conveyance of an estate or interest in such real property...When deeds of trust are placed on large numbers of different portions of a unit of land, the potential and often direct result is the same as if all the portions were separately sold without regard to the land use planning requirements of the Map Act and local regulations."

By the same token, transactions *not* involving the grant of exclusive occupancy rights (immediate or future) to "discrete units" (see *Pescosolido v. Smith* (1983) 142 Cal.App.3d 964, 969) have *not* been found to constitute "division." *Robinson v. City of Alameda* (1987) 194 Cal.App.3d 1286 concerned an agreement allowing certain property owners to use a portion of an adjoining lot. Finding that this use agreement lacked either the legal effect or duration to transfer an ownership or leasehold interest, the court held that this did not constitute "divi[sion] for the purpose of sale or lease." (*Id.* at pp. 1288-1289. See also *Blackmore v. Powell* (2007) 150 Cal.App.4th 1593, 1603-1605 [exclusive easement not a division]; *Adler v. Elphick* (1986) 184 Cal.App.3d 642, 644-647 [subdivision of a "community apartment project" occurs only when "the right to exclusive occupancy of a particular unit [is] specified on the deed itself"].)

90 Ops.Cal.Atty.Gen. 69 (2007) considered this point at length, in the context of a proposed conservation easement encumbering one portion of a larger property:

> "[A] 'subdivision' is intended to result in the creation of one or more new or additional, separate parcels of property...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...The grant of an easement is not a 'sale' because ownership does not change hands...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*...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...,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 Map Act's central focus on transactions granting "a right to exclusive occupancy of the portion of the land conveyed" has likewise been noted by the leading treatises. (See, e.g., Curtin et al., Cal. Subdivision Map Act and the Development Process (Cont.Ed.Bar 2d ed. 2016) Conveyance Creating Exclusive Right of Occupancy May Be a "Division", § 2.5; 2 Longtin, Cal. Land Use (2d ed. 1987) Land Divisions Subject to the Act, § 6.10 ["The right to exclusive occupancy is considered to be a principal legal feature of a subdivision"]); Curtin & Merritt, Subdivision Map Act Manual (2003 ed.) p. 5.)

From the foregoing, it is apparent that an historic transaction will have "divided" land for purposes of Section 66412.6 if – and only if – that transaction conveyed an exclusive right to occupy "a particular area or part of the property" or "discrete unit"

(either immediate or future).[14] The question thus becomes whether merely identifying separate lot numbers in a single deed would have that effect for each of the lots thus identified. As will appear, it would not.

V. UNDIVIDABLE, INCORPORATE:[15] THE GRANTEE'S OCCUPANCY RIGHTS AT COMMON LAW

It would seem axiomatic that the grantee of a contiguous tract of land obtains no right to occupy any one portion of that property separately from any other, *to the exclusion of themselves* – i.e., that the ownership and occupancy rights they receive are equal throughout the property. However, the common law of real property demonstrates this through more than just axiom.

The most obvious example of the unity of an owner's rights throughout their land comes from the law of easements. An owner may use one portion of their land to benefit another, but "[n]o easement exists, so long as there is a unity of ownership, because the owner of the whole may, at any time, rearrange the qualities of the several parts." (*Rosebrook v. Utz* (1941) 45 Cal.App.2d 726, 729. See also 2 Devlin, The Law of Real Property and Deeds (3rd. ed. 1911), §841, p. 1527.)

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[14] While a grant of exclusive occupancy is *necessary* for a "division," it is not always *sufficient*. The Map Act has long excluded certain such grants from its scope (e.g., "leasing of apartments," see § 66412, subd. (a); Stats. 1955, ch. 1013, § 3), and exempted others from certain regulatory requirements (e.g., "Land conveyed to or from a governmental agency," see § 66428, subd. (a)(2); Stats. 1968, ch. 331, § 4). Whether historic transactions in any of these categories would satisfy the conclusive presumption of Section 66412.6 is beyond the scope of the question presented.

[15] Shakespeare, Comedy of Errors, act II, scene 2, line 499.

Conversely, a previously existing easement may be extinguished when the dominant and servient tenements come under common ownership, as the owner's rights throughout their property are unitary. (Civ. Code, § 811, subd. (1).) "When an estate in fee and an easement in the estate are acquired by the same person, the easement is extinguished, for the reason that the owner having the *jus disponendi* – the full and unlimited right and power to make any and every possible use of the land – all subordinate and inferior derivative rights are necessarily merged and lost in his higher right. So long as a tract remains in one ownership, there can be no dominant and servient tenements as between different portions, and the owner may rearrange the quality of any possible servitude." (*Leggio v. Haggerty* (1965) 231 Cal.App.2d 873, 883.)

In other words, the common law treated the property of a common owner as a single integral unit, and did not recognize any distinction of rights within and between its various portions.

Similar expressions are found in the law co-tenancy. The holders of undivided interests in land collectively share the owner's unitary rights to the entire property, and thus each have no exclusive right to any particular portion. "Each tenant in common equally is entitled to share in the possession of the entire property and neither may exclude the other from any part of it." (*Zaslow v. Kroenert* (1946) 29 Cal.2d 541, 548.) "The dominant attribute of a tenancy in common is that the cotenants hold the common land by unity of possession, for which reason there can be no specific or determinate

portion of the common land which any one of such tenants can claim as his in severalty." (*Wood v. Henley* (1928) 88 Cal.App.441, 452.)

Like the co-tenant, a single owner has no separate "severalty" within any specific or determinate portion of their property, and possesses equal and undifferentiated occupancy of the entire tract. The deed by which a co-tenant receives an undivided interest grants no right to exclusive occupancy of any portion – that's precisely why the A.G. concluded that such conveyances are not a "division." (38 Ops.Cal.Atty.Gen. 125, *supra*.) The result is no different for a single grantee, who likewise receives no distinct rights to any specific portion of their land.

Phrased differently, a deed conveying "Lots 1 and 2" grants no exclusive right to occupy Lot 1 to the exclusion of the owner of Lot 2, or vice versa, nor contemplates any such exclusivity – present or future – for either lot. Rather, the grantee receives a single unit with a single set of occupancy rights. This is and always has been the law. Such a deed therefore effects no "division" of those lots for purposes of the Map Act.

Appellant's arguments founder on a more fundamental point. The law of real property places little stress upon the manner in which property is described, so long as its outer bounds can be located. "[I]f a surveyor by applying the rules of surveying can locate the land, the description is sufficient." (*McCullough v. Olds* (1895) 108 Cal. 529, 532.) "[A] land description is good if it identified the land or affords a means for its identification." (*Podd v. Anderson* (1963) 215 Cal.App.2d 660, 665.) No particular form of description is required and property may even be identified by a descriptive name. (*Murray v. Tulare Irrigation Co.* (1898) 120 Cal. 311, 315.) Appellant's efforts

to minutely parse their legal descriptions would consequently attach meaning to the precise word choices used to describe the "physical objects on the surface of the earth" (*Powers v. Jackson* (1875) 50 Cal. 429, 432) conveyed by these deeds that was entirely alien to the law of the day, and that the actual grantors could not possibly have foreseen.

In the end, Appellant's many references to "common law property division" and "common law method of dividing property" (see e.g., Ans. Br. at pp. 9, 25) ultimately prove too much. The common law did not recognize "divisions" within a single owner's contiguous property – at least not for any purpose relating to sale, lease, or financing – and actively denied any separate nature for the various portions of such property. Rather, as under the Map Act, division – in any legally meaningful sense – occurred only when the owner granted some estate in a specific portion to another party. *That* was the act that could create easements, imply covenants, and sever co-tenancies – and the act that could generate those detrimental reliance interests that the Map Act's grandfather provisions were designed to protect.

The analysis thus ends where it began. A deed listing multiple lots did not give the grantee exclusive occupancy of any particular lot vis-à-vis the others, or otherwise distinct from the tract as a whole. Such listing therefore caused no "division" – under the common law then, or under the Map Act now.

VI. MAY THEY PERCEIVE'S INTENT:[16] WHAT AN HISTORIC GRANTOR *ACTUALLY* INTENDED TO ACCOMPLISH

Appellant liberally invokes the "the intent of the grantor," asserting that "the intent of the grantor determined the number of parcels transferred in a Pre-SMA or Pre-Reg deed." (Ans. Br. p. 27-33.) But this begs the real question: *Intent to do what?* Appellant would simply answer "intent to transfer separate parcels" (with such intent supposedly being obvious from mere reference to multiple lot numbers). However, any effort to divine the intent of a grantor in the 1880's or 1940's simply by reference to today's subdivision laws is inherently flawed. They were not operating under today's laws. Instead, the grantor's intent must be assessed in context of their own contemporary law, and the consequences their deed would have *under that law*.

"In the construction of boundaries, the intention of the parties is the controlling consideration. Whenever possible, a court should place itself *in the position of the parties* and ascertain their intent, as in the case of any contract." (*People ex rel. Brown v. Tehama County Bd. of Supervisors* (2007) 149 Cal.App.4th 422, 437.) The question thus cannot simply be whether the grantor "intended" to convey what we would, *today*, recognize as separate parcels. Actual grantors acting prior to modern subdivision regulation could not possibly have known that, nor formed any relevant intent.

"Separate parcels" in the modern sense was a meaningless concept before 1929, and was wholly irrelevant to minor property transactions until 1972. Appellant's predecessors in 1885 and 1944 had no reason to care whether their deed included one

[16] Shakespeare, Coriolanus, act II, scene 2, line 1417.

parcel or three – and no way to foresee that this would ever become meaningful. Attempting to impute an "intent" to them in these terms would be an exercise in artificiality entirely at odds with any effort to understand what the grantor *actually meant* to accomplish through their conveyance.

Rather, the correct inquiry is this: *Did the grantor intend legal consequences under contemporary law, which today's law would recognize as a division?* As discussed above, the gravamen of a "division" under the Map Act is the grant of exclusive occupancy rights (present or future) to some discrete portion of contiguous property. If an historic grantor intended to convey such rights, that transaction is recognizable as a "division" today, regardless of its label (or lack thereof) at the time – but absent an intent to convey such rights, there was no division. Importantly, mere contemplation of potential future division by the grantee will not suffice (*Hagge v. Drew* (1945) 27 Cal.2d 368, 373); rather, for division to occur, the transaction must itself have conveyed immediate or future occupancy rights to some discrete portion of the property. (See also *Adler, supra,* 184 Cal.App.3d at p. 644.)

The foregoing resolves the question presented here. Simply listing multiple lots within a single deed did not, at any time, convey rights to any one lot distinct from the others. Indeed, any such distinction within a single ownership was contrary to the common law. We simply have no reason to believe that a grantor in 1885 or 1944

would have conceived or intended such a result based merely on the wording of their legal description.[17]

Even separate metes and bounds delineations (i.e., within contiguous conveyed property) would not, by themselves, necessarily demonstrate an intent to grant exclusive occupancy rights to any delineated piece. (See 90 Ops.Cal.Atty.Gen. 69, *supra*.) There is not, and never has been, any legal reason for a grantor to presume that simply redescribing the property in this manner would have such effect.[18] The fact that

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[17] Appellant and the Court of Appeal below both approached the question of intent from the opposite perspective, demanding proof of the negative – i.e., that the grantor "did *not* intend to convey separate lots," or that "the multiple separately described lots *merged* into a single whole." (See, e.g., Slip Op. at p. 3; Ans. Br. at p. 10.) This compounds error upon error. As noted above, parcel *creation* and parcel *merger* are not the same thing. While the presence of explicit merger language might signify an intent to merge *preexisting* parcels, the *absence* of such language does not imply an intent to *create new parcels* where none previously existed. Why would it? There is no reason to "merge" parcels that have no legal existence when the conveyance is executed, or to address such non-existent parcels with explicit language. More fundamentally, this line of reasoning falls into the trap of assessing the intent of historic grantors in modern terms, and asking whether they "intended" consequences under laws not yet in existence or applicable to their transaction. Instead, the absence of explicit merger language must be given the effect it would have had under the law of the grantor's day – i.e., none at all.

[18] Appellant asserts that prior to 1972, "each seller or owner had the power to set the borders of deeded parcels, *even if the deed did not transfer ownership*," citing *Gardner*. (Ans. Br. at p. 21.) However, *Gardner* does not support the latter caveat. The language quoted by Appellant ("Here, in fact, the Greene family later acted to reconfigure its land by deed without regard to the lot lines shown on the 1865 map") plainly refers to the transactions noted by the Supreme Court earlier in its opinion. (*Id.* at p. 995 ["Over the years, numerous parts of the Greene property were conveyed to different parties"].) Contrary to Appellant's assertions, the common law very much *does* "distinguish between a conveyance that changed the boundaries of a parcel and one that did not." (See Ans. Br. at p. 32.)

the grantor went to the trouble and expense of creating such separate descriptions might prompt further inquiry – and *in combination with other facts* might prove the existence of a "division…of...land...for the purpose of sale, lease, or financing, whether immediate or future." (Was there – for example – and unrecorded contract of sale for one of the delineated portions? See 58 Ops.Cal.Atty.Gen. 393 (1975).) However, by itself, the particular wording in the legal description of contiguous land does not carry the burden of demonstrating that a division has occurred – even if framed in metes and bounds.[19]

The foregoing is doubly true for legal descriptions made by reference to a recorded map. "[A]ntiquated maps served to facilitate land conveyances involving the properties they depicted." (*Gardner, supra,* 29 Cal.4th at p. 1002.) In other words, their very purpose was to spare landowners the burden and expense of creating metes and bounds descriptions for subsequent conveyances. The fact that a grantor described the property conveyed by its lot numbers on a recorded map signifies nothing more than their wish to use the map for its intended purpose, and avoid the entirely unnecessary

[19] See also *Tiburon v. Northwestern P. R. Co.* (1970) 4 Cal.App.3d 160, 181, which concerned a complex transaction involving multiple metes and bounds descriptions within a single lease, *followed up by multiple deeds*, and accompanied by copious other evidence of intent to separately develop each portion. Even then, the court merely found a triable issue as to whether a division under the Map Act had occurred, and directed that "the true intention of the parties should be determined from the documents used and such other evidence as may be offered on that subject."

expense of resurveying the property. Any *post hoc* effort to read more into it than that would be mere fiction.[20]

In sum, "intent of the grantor" is indeed relevant to the occurrence of a "division," but that intent must be measured under the law of the grantor's day, and is not demonstrated merely by references to multiple lot numbers in a single deed.[21]

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[20] The Court of Appeal below asserted that the fact "that commencing in 1885 grantors *chose* to convey the property as four separately identified lots, rather than, for example, a single lot described by a general metes and bounds description, had, *at the time*, legal significance." (Slip. Op. at p. 26.) The legal significance perceived by the court is not entirely clear (since the cases it cited, such as *Farquharson v. Scoble* (1918) 38 Cal.App. 680, if anything stand for the proposition that conveyance by reference to a recorded map is *not* legally significant) – but appears to have meant merely that the grantor was *not legally obligated* to have referenced the mapped lots, and could instead permissibly have created a new metes and bounds description. This is true enough, but, as noted, the obvious convenience of utilizing an existing map supplies a complete reason for that choice without need to resort to speculation divorced from common sense.

[21] For the reasons set forth above, merely referencing multiple lot numbers does not establish "intent to transfer multiple parcels" *as a matter of law*. However, even if this were not the case, Appellant would still not be entitled to their requested writ. "[I]ntention of the grantor is a question of fact" (*Mushroom Tunnel Farms, Inc. v. Friedeberg* (1965) 238 Cal.App.2d 727, 733) to be reviewed by the higher courts for substantial evidence. (Where the local agency provides a hearing process for issuance of certificates of compliance, such decisions are reviewed under Code Civ. Proc. § 1094.5. In that case, *the agency* makes any necessary factual determinations regarding intent, which are reviewed by courts at all levels for substantial evidence. *Pescosolido, supra,* 142 Cal.App.3d at p. 970.) Even if lot number references *could* signify intent to "divide" property within the meaning of the Map Act, the most Appellant would be entitled to is a remand to the factfinder for consideration of this fact in light of any other evidence – not to immediate issuance of a certificate of compliance.

VII. O BITTER CONSEQUENCE:[22] THE REAL WORLD IMPACTS OF UNREGULATED DIVISION

Appellant attempts to downplay the immense public policy concerns that acceptance of their arguments would generate, asserting that their interpretation of Section 66412.6 applies only in "a very narrow and specific set of circumstances." (Ans. Br. at p. 36.)[23] None of this is accurate – especially with respect to suburban and rural areas, where the risks and consequences or uncontrolled development are most potent.[24]

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[22] Shakespeare, Richard III, act IV, scene 2, line 2598.

[23] The plain error in Appellant's analysis is further demonstrated by the selectivity with which they must apply it. They posit that "descriptively referenc[ing] an antiquated map qualifies as a 'division of land'" (Ans. Br. at p. 10) – but would apply this logic *only* when the deed in question conveyed four or fewer lots. However, if separately listing mapped lots truly divided those lots – conveying to the grantee not a single parcel, but as many parcels as there were lots listed – that should presumably apply to deeds listing five or more lots as well, in which case any such deed after 1929 will have violated the then-applicable provisions of the Map Act. Appellant attempts to elide this result by suggesting that "[b]efore the SMA or a local ordinance regulated divisions of land, each division 're-created' the parcels" (Ans. Br. at p. 19, fn. 9) – apparently meaning that any prior (potentially illegal) "divisions" of these "parcels" should be disregarded. But that simply is not the law. *Fishback* rejected a nearly identical argument "that four legal parcels can be created by dividing an illegal parcel." (*Fishback, supra,* 133 Cal.App.4th at p. 904.) Prior divisions – if such they were – are emphatically *not* disregarded when applying Section 66412.6. Thus, if a grantee whose deed listed five lots truly received not one, but five illegal parcels, any future division of any of those "parcels" (whether through real severance, or notional listing of lots) would *not* be protected by Section 66412.6, but would instead itself be illegal. Such a result is clearly chaotic, and would be greatly harmful to many property owners statewide (for whom there is a deed listing five or more lots lurking somewhere in their chain of title) – but Appellant can avoid it only by ignoring their own rationale when it doesn't suit. That is quite clearly not the right answer.

[24] Assembly Bill 1301 was specifically motivated by concerns over "premature subdivisions" in rural areas of the state. (See Catalano & DiMento, *Mandating*

To begin with, few rural counties had local subdivision ordinances prior to 1972 (*Land Development and the Environment, supra,* 5 Pacific L.J. at p. 60) – the impact in rural areas would thus be endemic. Moreover, the sheer number of potential new parcels is daunting. There are thousands of antiquated maps recorded throughout California, depicting "more than 400,000 vacant parcels" by one count.[25] As noted, these "antiquated maps served to facilitate land conveyances involving the properties they depicted" – and *landowners actually used them that way* prior to 1972, routinely conveying property by reference to such maps and commonly listing multiple lots.

The Legislature has specifically acknowledged that recognition of antiquated lots may lead to a host of negative consequences contrary to public policy, including "health and safety conflicts," "conflicts with prior public rights," "conflicts with resource production," "conflict with natural resource protection," "remote subdivisions located far from major public works facilities and growth areas," and "limited carrying

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Consistency between General Plans and Zoning Ordinances: The California Experience (1975) 8 Nat. Res. Law. 455, 456; Comment, *Birth Control for Premature Subdivisions – A Legislative Pill* (1972) 12 Santa Clara Law. 523.)

[25] Sen. Com. on Local Government, *Summary Rep. from the Interim Hearing of the Subcommittee on the Redevelopment of Antiquated Subdivisions* (Dec. 2, 1986) p. 13. "A 1984 statewide survey found antiquated subdivisions in all 50 responding counties. Based on these responses, there are between 133,000 and 424,000 lots in antiquated subdivisions throughout California." (*Id.* at p. 19.) See also Paul Shigley, *Local Government Wins Old Map Fight*, California Planning & Development Report (Mar. 1, 2003), https://www.cp-dr.com/articles/node-791 ["Daniel Curtin Jr., author of Curtin's California Land Use and Planning Law, said, 'There are hundreds of thousands of these lots out there, and more of them are being discovered...' 'These lots exist in almost every corner of the state,' said Peter Detwiler, a consultant to the Senate Local Government Committee. 'They are a nightmare to planners.'"])

capacity" of local water, wastewater, and road infrastructure to serve the antiquated lots, etc. (*Summary Rep. from the Interim Hearing of the Subcommittee on the Redevelopment of Antiquated Subdivisions, supra*, at pp. 17-18.) These adverse consequences obviously do not depend upon whether the historic lots are recognized based solely on the antiquated map depicting them, or based on mere references to those lots in subsequent conveyances.

Where those lots themselves have "never been sold in subdivided form" – only as part of a larger parcel – the purchasers and current owners cannot be said to have placed any reliance on their separate existence. (*Witt Home Ranch, Inc. v. County of Sonoma* (2008) 165 Cal.App.4th 543, 563-564.) By contrast, recognizing each of these lots multiplies – up to a factor of four – the number of unregulated and often substandard parcels that will, forever, stand as an obstacle to the "orderly community development" envisioned by the Subdivision Map Act.

Moreover, while some antiquated subdivisions, like the one at issue in this case, are located in heavily developed urban areas, a great many are not. Such subdivisions are commonly found – like those in *Gardner*, *Witt Home Ranch*, and *Abernathy Valley, Inc. v. County of Solano* (2009) 173 Cal.App.4th 42 – in exurban and rural areas with minimal infrastructure and public services. These are frequently areas devoted to agriculture and resource production, which are planned and zoned for large parcels (as necessary to those activities), and in which fragmentation and sprawl are antithetical to orderly development. While California has many public policies promoting housing

production, none of these favors substandard and underserved development or unregulated sprawl of this nature.

"The provisions of the Map Act are to be broadly interpreted so as to prevent circumvention of its goals and purposes." (73 Ops.Cal.Atty.Gen. 312 (1990).) The Court should heed this admonition, and forestall the harms that Appellant's position would inevitably cause.

VIII. PARTING IS SUCH SWEET SORROW:[26] CONCLUSION

One striking fact is how neatly the established authorities addressing historic parcel creation hew to the foregoing principles. *Gardner*, *Witt Home Ranch*, and *Abernathy* all addressed antiquated maps, the filing of which conveyed no rights (of exclusive occupancy or otherwise) to any of the depicted lots (*Gardner, supra,* 29 Cal.4th at p. 1002) – and thus did not divide those lots for purposes of the Map Act. *John Taft Corp.* and 81 Ops.Cal.Atty.Gen. 144 (1998) involved federal survey maps that likewise granted no occupancy rights to the depicted lots, and reached the same result. By contrast, in *Lakeview Meadows Ranch v. County of Santa Clara* (1994) 27 Cal.App.4th 593, a division had occurred by virtue of deeds conveying individual parcels to separate parties, thereby creating exclusive occupancy rights in each.

The decision below is the only outlier. Its conclusion that simply listing separate lot numbers in a single deed "divided" those lots for purposes of Section 66412.6 was

[26] Shakespeare, Romeo and Juliet, act II, scene 2, line 1047.

wrong as a matter of law, and the judgment of the Court of Appeal should therefore be REVERSED.

Dated:

Respectfully submitted,

ARTHUR J. WYLENE
RCRC General Counsel

/S/
Attorneys for *Amici Curiae*

CERTIFICATION OF COMPLIANCE WITH WORD LIMIT

Pursuant to California Rule of Court 8.204(c)(1), I certify that this Brief of *Amici Curiae* contains 8,049 words, not counting the tables, and this attachment, as determined by the word count function of Microsoft Word for Microsoft 365.

Dated:

Respectfully submitted,

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Attorneys for *Amici Curiae*

Crescent Trust. v. City of Oakland.
Supreme Court Case No. S280234
Court Of Appeal, First District, Case No. A162465
Alameda County Superior Court Case No. RG20068131

DECLARATION OF SERVICE

I am a citizen of the United States and a resident of El Dorado County, California. I am over the age of eighteen years and not a party to the within above-entitled action. My business address is 1215 K St., Suite 1650, Sacramento, California.

On the date indicated below, I served the following:

[PROPOSED] BRIEF OF AMICI CURIAE CALIFORNIA STATE ASSOCIATION OF COUNTIES AND LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF DEFENDANT AND RESPONDENT CITY OF OAKLAND

_X__BY TRUEFILING. I caused a copy of the document to be filed with truefiling.com Submitted via e-submission through the court's electronic filing system.

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury that the foregoing is true and correct. Executed at Sacramento, California on March 20, 2024.

_____/s/_____
Signature

_____Brian P. Briggs____
Printed Name

SERVICE LIST

On the parties as follows:
Counsel for Crescent Trust: Chandler and Shechett, LLP, Aaron Nathan Shechett, Leigh Anne Chandler

Counsel for The City of Oakland: Barbara Parker, Allison Ehlert, Christine Crowl, Brian Mulry, Rick Jarvis Katherine Carr James, Jennifer Dent, Luke Edwards

Counsel for Solano County: James Laughlin