IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JACK A. GARDNER, JOCELYN GARDNER, Trustees of the GARDNER FAMILY TRUST, LINDSAY L. GARDNER and HILARY A. GARDNER

Plaintiffs and Appellants,

v.

COUNTY OF SONOMA, et al.,

Defendants and Respondents.

Supreme Court No.S102249

Civil Appeal No. A093139

Sonoma County Superior Court No. SCV-219103

BRIEF OF *AMICI CURIAE* AMERICAN PLANNING ASSOCIATION, CALIFORNIA CHAPTER OF THE AMERICAN PLANNING ASSOCIATION, AND GRANADA SANITARY DISTRICT IN SUPPORT OF DEFENDANTS-RESPONDENTS COUNTY OF SONOMA

M. Thomas Jacobson (SBN 129963)
1441 Montgomery Street, Suite 6
San Francisco, CA 94133
Telephone: 415.397.5061

Attorney for *Amicus Curiae*
AMERICAN PLANNING ASSOCIATION

Jonathan Wittwer
Wittwer & Parker LLP
147 S River Street, # 221
Santa Cruz, CA 95060
Telephone: 831.429.4055

Attorneys for *Amicus Curiae*
GRANADA SANITARY DISTRICT

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INTRODUCTION

California, along with many other states in the country, has an army of ghosts biding their time amid the paperwork of numerous county recorders' offices. Subdivision maps recorded years, decades, and sometimes a century earlier (as in this case) are lying dormant, waiting to challenge local and state officials. The ghosts merely await the beckoning of the right developer at an opportune time before rising to life to haunt the best-laid plans of California communities. Why? Because if these maps are recognized as legal subdivisions in the 21st Century, unsuspecting government officials and the community-at-large will suddenly have lots of every shape and size, usually for which inadequate infrastructure has been provided and often in geologically hazardous or environmentally sensitive locations.

The problem is complex and there is no single legislative 'fix' that will fit each state's statutory scheme. However, in the present case, the solution is relatively simple. The map in question was created prior to any state law regulating the creation, design, and improvement of subdivisions.[1] There is no persuasive legal argument for breathing life into maps drawn before California even recognized the necessity for reviewing and regulating the subdivision of land; and there are many strong public policy

[1] 1893 Subdivision Map Act, Stats. 1893, ch. 80

reasons why this Court should not open that Pandora's box.

STATEMENT OF INTEREST

The American Planning Association ("APA") is a nonprofit public interest and research organization representing 30,000 practicing planners, officials, and citizens involved with urban and rural planning issues. More than 4,000 are members of the California Chapter of APA (CCAPA). Sixty-five percent of APA's members work for state and local government agencies. These members are involved, on a day-to-day basis, in formulating planning policies and preparing land-use regulations. APA's objective is to encourage planning that will meet the needs of people and society more effectively.

APA resulted from a merger between the American Institute of Planners founded in 1917, and the American Society of Planning Officials, established in 1934. The organization has 46 regional chapters and 17 divisions devoted to specialized planning interests. The American Institute of Certified Planners (AICP) is APA's professional and educational institute, certifying planners who have met specific educational and work criteria and passed the certification exam.

One of APA's fundamental concerns is that communities must have

the legal authority to effectively address land division and the creation of new parcels in order to achieve the community's goals of orderly development, community vitality, and environmental protection. In an effort to educate and inform its members and the public-at-large, APA frequently writes about important issues that impact community planning, such as antiquated subdivisions. See, eg., Jim Schwab, "The Problem of Antiquated Subdivisions", Zoning News, APA (April 1997); Jim Schwab, "Vacating and Replatting Platted Lands", Zoning News, APA (May 1997); Marya Morris, *Subdivision Design in Flood Hazard Areas*, Planning Advisory Service Report Number 473, APA (September 1997); Robert H. Freilich and Michael M. Shultz, *Model Subdivision Regulations*, Second Edition, APA Planners Press (1995).

APA has participated as Amicus Curiae in a number of important land use cases that originated from California, including: Agins v. Tiburon, 100 S.Ct. 2138 (1980); First English Evangelical Lutheran Church of Glendale, Inc. v. County of Los Angeles, 107 S.Ct. 2378 (1987); Yee v. City of Escondido, 112 S.Ct. 1522 (1992); Suitum v. Tahoe Reg'l Planning Agency, 117 S.Ct. 1659 (1997); City of Monterey v. Del Monte Dunes at Monterey, Ltd., 119 S.Ct. 1624 (1999); and most recently Tahoe Regional Planning Association v. Tahoe-Sierra Preservation Council, Inc., No. 00-

1167, 535 U.S. __ (2002). APA has also participated as Amicus Curiae in a number of cases before the California courts, including most recently East Bay Asian Local Development Corporation v. State of California, 24 Cal.4th 693, 13 P.3d 1122, 102 Cal. Rptr. 2d 280 (2000); and San Remo Hotel, L.P. v. City and County of San Francisco (No. S091757) which was decided March 2, 2002 by this Court.

The Granada Sanitary District is an example of a small public infrastructure district whose property owners and residents bear the real, practical burden of dealing with wastewater generating parcels if they are recognized without having to go through the normal subdivision process which every other parcel must go through to be created. The normal subdivision process includes a determination of the subdivision infrastructure "improvements" required and the fair contribution of the subdivision parcels to those improvements. This includes off-site improvements made necessary by the subdivision, such as enhancements to the wastewater transmission pipes and pumps to carry sewage and other wastewater to the treatment plant.

Granada Sanitary District has obtained a study comparing the number of parcels it is expected to serve if it serves those parcels utilized in the calculation of buildout adopted by the County of San Mateo with the

number of parcels it would have to serve if antiquated nonconforming parcels have to be served in addition. The result would be approximately a 25 percent increase in the number of parcels to be served. Even if the increase were much smaller, any increase in service requirements created by recognition of antiquated subdivisions is a serious problem for the District because its wastewater transmission system (composed of older pipes and pumps) is sized to just meet the County buildout calculations. In fact since 1997, the Joint Powers Sewer Authority, of which the District is a member, has focused significant resources on defining the system improvements necessary to prevent wet weather sewage overflow problems in the future. The District Engineer has stated that there is a significant wet weather overflow problem and that the Regional Water Quality Control Board has applied pressure to the Joint Powers Authority and member agencies to take actions to assure reduction of overflows. An Engineering Study has detailed nearly $9 Million of potentially necessary improvements to address the wet weather overflow problem.

Unless those additional parcels are required to go through the normal subdivision process and pay their fair share of the infrastructure costs needed, the result of the increased wastewater transmission infrastructure needs would be a tremendous financial burden on the property owners and

residents of the District. That is because there is no other realistic mechanism for obtaining funding for the share of the costs of the enhanced wastewater transmission improvements necessitated by the recognition of the antiquated subdivisions.

STATEMENT OF FACTS

Amici APA, CCAPA, and Granada Sanitary District adopt the Statement of Facts presented by Sonoma County (Defendants-Respondents) in its Brief on the Merits (Respondents' Brief on the Merits, p. 4-12) filed with this Court. The following facts are worth emphasizing because they make the remedy so much easier to address than is often the case in more difficult antiquated subdivision scenarios.

1. The map in question was filed in 1865, prior to the existence of any state or local subdivision laws. This case does not involve a map created pursuant to an earlier version of the Subdivision Map Act.

2. No state or local official ever reviewed or approved the original map either at the time of filing or since, until the Gardners requested Sonoma County to issue twelve certificates of compliance pursuant to Government Code § 66499.35.

3. The property that is the subject of this appeal has remained intact under single ownership throughout its history.

SUMMARY OF ARGUMENT

The division of land has a direct influence on the adequacy of water supply, sewage disposal, fire and emergency vehicle access, traffic safety, fiscal stability, and other aspects critical to the quality of life in our communities. The California Legislature, and every other state legislature in the country, has adopted enabling laws that require municipalities and counties to regulate the division of land within their communities. (Subdivision Map Act, Government Code §§ 66410 et seq.) Without this authority, local governments would be unable to mitigate the inevitable impacts that result from the division of land and to implement the community's goals expressed in the community's general plan.

Antiquated subdivisions are ubiquitous, presenting some of the biggest challenges to local governments and planners. Although the issue is complex, the facts presented in this case provide a very simple solution. Why? Because the Gardner's map was recorded prior to any state law even requiring recordation of subdivision maps, prior to any state law authorizing local review and approval of subdivisions, and the lots in question have remained in common ownership all these years. The Court of Appeal's decision on October 11, 2001, confirming the trial court's ruling, was correct for the reasons cited in Sonoma County's brief, and also

correct for important public policy reasons. The Court of Appeal stated:

> Given the manifest purposes and language of the applicable statutes in the Map Act, we conclude that the Legislature did not intend that antiquated subdivision maps create legal parcels in the twenty-first century. (Gardner v. County of Sonoma (2001) 92 Cal.App.4th 1055, 1067).

Affirming the Court of Appeal's decision will not leave the Gardners without a remedy. As every other property owner in Sonoma County is required to do if they desire to divide their property, the Gardners can submit an application that conforms to the state and local subdivision regulations in effect today.

ARGUMENT

I. ANTIQUATED SUBDIVISIONS ARE A NATIONAL PROBLEM

It has been called California's "hidden land use problem"[2] - a problem shared with many states across the country, from New Mexico[3] to

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[2] "California's Hidden Land Use Problem: The Redevelopment of Antiquated Subdivisions," California Senate Committee on Local Government Summary Report from the Interim Hearing of the Subcommittee on the Redevelopment of Antiquated Subdivisions (December 2, 1986).

[3] New Mexico has over three million acres of undeveloped, antiquated parcels. Land Use Committee, Report to the Forty-Fifth Legislature, First Session, December 2000, Legislative Council Service, File number 205.190-00

Florida[4] and New York to Colorado.[5] Aptly referred to as antiquated, obsolete, anachronistic, premature or paper subdivisions[6], they have one thing in common - they do not conform to the community's current general plan, zoning ordinance, or other land use regulations.

Speculation in raw land dates back to the colonial era and involved leading citizens like Presidents Washington and Jefferson.[7] In the early years, land speculators were dividing vast tracts into farmlands for settlers moving west. In the 20th Century, tracts were largely subdivided for future residential lots. The process accelerated after World War II in a real estate boom that attracted millions of Americans to the Sunbelt. That boom

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4 Frank Schnidman and R. Lisle Baker studied three Florida counties - Charlotte, Lee, and Sarasota - where almost 900,000 subdivision lots were platted between the late 1950s and the early 1970s. These empty lands were crisscrossed with roads and canals, producing "an astonishing vista of treeless blocks of land stretching to the horizon, marked off by hundreds of miles of roads, often without a house in sight." (Schnidman and Baker, "Planning for Platted Lands: Land Use Remedies for Lot Sale Subdivisions," Florida State University Law Review, Fall 1983).

5 A 1986 survey by the Lincoln Institute of Land Policy found that between 20,000 and 100,000 lots in Colorado could be classified as obsolete. Elliott, Donald L., "Obsolete Subdivisions and What to Do About Them," Technical Service Report No. 12 (Denver: Rocky Mountain Land Use Institute, College of Law, University of Denver, 1997).

6 For the purpose of this brief, the term "antiquated subdivision" will be used throughout.

7 Schwab, Jim, "The Problem of Antiquated Subdivisions", Zoning News, APA (April 1997).

produced significant concentrations of subdivisions in the west and south where population swelled, including Arizona, New Mexico, Colorado, and Utah. However, the premature platting often exceeded demand, even under the rosiest population projections. Flying over parts of the western United States today, one can still see evidence of the wishful dreams of these land speculators - raw, undeveloped land with dirt roads bladed in anticipation of future pavement, houses, people and neighborhoods.

California shares the problem. A survey conducted in California in the mid-1980s, to which 50 of 58 counties responded, found that each county believed antiquated subdivisions were a problem within its jurisdiction.[8] There are an estimated 133,000 to 424,000 lots in these antiquated subdivisions, including 10,000 in the Santa Monica Mountains, and another 10,000 in the Lake Tahoe area. Santa Barbara County identified twelve different subdivisions with over 7,000 lots, all created prior to 1893. Some have been developed, while others remain undeveloped. The California Coastal Conservancy identified fifty-nine antiquated subdivisions containing about 40,000 vacant lots along the

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[8] "California's Hidden Land Use Problem" at 19. For purposes of this survey, "antiquated subdivisions" were characterized by 1) being approved some time ago; 2) no longer meeting today's planning policies, zoning requirements or building standards; 3) having been sold into individual lot ownerships of one acres or less; 4) being only partially developed or vacant.

California coast. One, near Cambria in San Luis Obispo County, totaled 6,000 vacant lots, each about one-quarter acre in size.

The original lines drawn on these antiquated maps were, in most cases, drawn without consideration of the topography, or of the sensitive or critical habitats in the area. The lines provided good reference points for future surveys and legal descriptions for purposes of conveyance, but there was no thought about natural resource protection, the carrying-capacity of the land, the community infrastructure (such as roads and sewers) needed to support the development that might result from the division of land, and the basic facilities (such as schools, fire protection, and libraries) that we take for granted today.

II. MODERN SUBDIVISION REGULATIONS ARE EXTREMELY IMPORTANT

The evolution of California's subdivision enabling laws mirror the evolution of subdivision laws around the country generally. As our understanding about the benefits and impacts associated with subdivisions grew, the regulatory structure matured to address these new concerns. The history of subdivision regulations can be divided into four periods.[9]

"Prior to 1928, the purpose behind subdivision regulations was to

[9] A description of the evolution of subdivision regulations can be found in *Model Subdivision Regulations*, by Robert H. Freilich and Michael M. Shultz, APA Planners Press (1995).

provide a more efficient method for selling land, permitting a seller to record a plat of land by dividing it into blocks and lots, laid out and sequentially numbered."[10] This facilitated the sale of land because the description could reference the plat, rather than have to utilize a more cumbersome and expensive surveyed metes and bounds description. It also prevented conflicting deeds. Uniformity was established in survey methods and real property taxes became easier to assess.

The second period of subdivision regulations began in 1928 with the publication of the Standard City Planning Enabling Act (SCPEA) by the U.S. Department of Commerce. This was a partial answer to the problems created by land speculation and premature subdivisions.[11] The emphasis was on internal (on-site) improvements needed to support the demands created by the new subdivision, such as roads, sidewalks, and drainage facilities. In addition to serving important purposes for recording and conveying property, communities recognized the importance of subdivision regulations as a tool to control urban development. This period of subdivision regulation continued through the end of World War II, when the concern shifted to the off-site impacts communities felt from subdivision activity, particularly in the suburbs.

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[10] Id. at p. 1.

[11] Id. at p. 2.

The third period was marked by an increasing appreciation for the impacts that subdivisions have on community facilities off-site, such as the sewage treatment plant, the water supply and treatment plant, roads, parks, libraries, fire stations, and other shared facilities which we take for granted today.[12] Subdivision regulations began to address different types of subdivision activity, in addition to residential subdivisions. New tools were added to subdivision regulations, such as mandatory dedication requirements for parks and school sites and in-lieu fees.[13]

With the landmark decision in Golden v. Planning Board of the Town of Ramapo[14], the fourth phase of subdivision regulations began. In 1972, the New York high court upheld the constitutionality of timing and sequential controls of residential subdivision activity for the life of a comprehensive plan (18 years). Communities began to address off-site improvements, the timing and phasing of development, and the fiscal issues

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12 See eg., "Subdivision Design - Some New Developments", Information Report No. 102, American Society of Planning Officials (September 1957); "Subdivision Regulations for Industry", Information Report No. 162, American Society of Planning Officials (September 1962).

13 See generally, Smith, *From Subdivision Improvement Requirements to Community Benefit Assessments and Linkage Payments: A Brief History of Land Development Exactions*, 50 L. & CONTEMP. PROBS. 5, 14 (Winter 1987).

14 Golden v. Planning Bd. of Town of Ramapo, 285 N.E.2d 291 (N.Y. 1972).

associated with new subdivisions. Recognizing the importance of using local subdivision controls in conjunction with the community's zoning regulations and other land use regulations, communities made the important link between subdivision development and the goals of the community.

III. STRONG PUBLIC POLICY REASONS ARGUE AGAINST RESURRECTING ANTIQUATED MAPS

There are at least four important public policy reasons for not breathing life into relics created before California passed its first subdivision recordation law.

A. The issue of fairness - Appellants argue that equity supports their position. (Appellants' Brief at p.6). They neglect the question of fairness to others in the community, and the community as a whole. Subdivision regulations are designed to protect the general public, taxpayers, the immediate neighbors of the potential subdivision development, and the future purchasers of the new parcels. Ultimately, each is at risk (either directly or indirectly) for paying the price associated with parcels of land that escape local subdivision review. And the general public is often asked to pick up the tab for unregulated subdivisions, as explained further below.

In John Taft Corp. v. Advisory Agency, 161 Cal. App. 3d 749 (1984), the court held that a U.S. Government Survey Map is insufficient to create legal parcels and said the Subdivision Map Act "is to be liberally construed to implement high standards for orderly community development

and to bring under its umbrella as many transfers or conveyances of land as possible in order to facilitate local regulation of design and improvement of subdivisions." Id. at p. 755 (Emphasis added). "Among the Act's purposes are to encourage and facilitate orderly community development, coordinate planning with the community pattern established by local authorities, and assure proper improvements are made so that the area does not become an undue burden on the taxpayer." Gomes v. County of Mendocino 37 Cal. App.4th 977, 985 (1995); Kirk v. County of San Luis Obispo, 156 Cal. App.3d 453, 458 (1984).

The California Legislature delegated subdivision review and approval authority to locally-elected officials in order that everyone's interests in the subdivision process be protected. Appellants seek to circumvent that review process by resurrecting a map created before anyone in present-day Sonoma County was even born. In the interest of fairness, the community's goals and plans should not be undermined in this way and the public should not be shut out of the process.

B. Basic health and safety issues - Many antiquated subdivisions were platted with inadequate attention to environmental constraints, such as water supplies, sewage disposal, the steepness of the terrain, slope stability, soil quality (particularly if septic tanks are anticipated), the presence of

wetlands or flood hazard areas[15], and natural hazards such as earthquake faults or susceptibility to wildfires. Furthermore, simple issues such as access for fire and other emergency vehicles, need to be considered during the subdivision review process.

The Gardner's map, laid out, as it is, in a simple grid, does not address these issues. But whether it does or not, is not the issue. Since no state or local officials have ever had the opportunity to review the map in conjunction with these basic health and safety issues in mind, the record is silent about how this particular map might impact the community. If appellants are permitted to dodge the review process, the serious public health and safety questions will not be addressed effectively.

The county might anticipate that an argument could be made that such basic health and safety concerns can be postponed until a development application is presented. This misconstrues the important distinction between subdivision review authority and development review authority and clearly just passes the buck to future property owners and the public agencies (including Sonoma County and the Granada Sanitary District). Although both subdivision and development review authority flow from the general police power, they serve very different purposes. "The Map Act's

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[15] See eg., Marya Morris, *Subdivision Design in Flood Hazard Areas*, Planning Advisory Service Report No. 473, APA (September 1997)

primary goals are: 1) to encourage orderly community development by providing for the regulation and control of the design and improvement of the subdivision, with a proper consideration of its relation to adjoining areas; 2) to ensure that the areas within the subdivision that are dedicated for public purposes will be properly improved by the subdivider so that they will not become an undue burden on the community; and 3) to protect the public and individual transferees from fraud and exploitation." 61 Ops. Cal. Atty. Gen. 299, 301 (1978); 77 Ops. Cal. Atty. Gen. 185 (1994).[16] Development review, on the other hand, focuses on the structural and architectural design of the buildings on the lot and the use to which those buildings may be put. At the development review stage, it's difficult (if not impossible) to address the important issues mentioned above, which should have been addressed during the subdivision review process.

C. Fiscal health of a community - As described above in Part II, local officials today are much more attuned, than anyone in the 19th Century might have been, to the fiscal impacts associated with subdivision activity in their community (both revenues generated by the new development as well as costs associated with providing necessary infrastructure and services). An important component of the subdivision

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[16] Curtin, Daniel J. and Cecily T. Talbert, *Curtin's California Land Use and Planning Law*, 22nd Edition, Solano Press Books (2002) at p. 69.

review and approval process is deciding how to equitably share the costs associated with the new subdivision.

In some cases, the fiscal impacts can be reduced through subdivision design standards. It is usually much cheaper, from the public sector perspective, to design a new subdivision, than to try to retrofit more expensive "fixes" onto an antiquated subdivision that is not designed to current standards (i.e., street widths, slopes and compaction that accommodate fire and other emergency access vehicles). In other cases, local government must distribute the financial burdens of subdivision development equitably among existing residents in the community, new purchasers in the subdivision, and the subdivider. If the antiquated map avoids local subdivision review, these issues can not be addressed effectively. The end result is that most, if not all, of the fiscal burden is placed on the local taxpayers.

Pacific Legal Foundation argues that the public sector's "fear of adverse consequences from the recognition of antiquated subdivisions is unfounded ....because a lot that is too small or that is located on unfavorably steep topography may be inherently worthless because it could not be developed without creating a nuisance-like condition." (Brief Amicus Curiae of Pacific Legal Foundation, p. 14) Future property

owners, having purchased these lots, can certainly be expected to argue that there is some inherent value in their property, claiming a takings violation under the Fifth Amendment. Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992). The legal recognition of antiquated parcels would likely spawn extensive future litigation on such claims.

D. Timing and location of growth and development - Local subdivision controls are the best and most effective means for the community to responsibly phase-in development consistent with the community's ability to absorb the new growth. California has adopted an extensive statutory framework requiring municipalities and counties to plan for their future growth and development, to draft land-use regulations consistent with their plan, to implement their plans through a public involvement process that encourages the community to think about the future when they are making development decisions today. Nothing can undermine all of this more effectively than the 18th Century ghosts appearing in the form of antiquated subdivision maps, claiming a right to direct Sonoma County's growth and development in the 21st Century.

CONCLUSION

This case is simple because the facts do not implicate any of the issues that oftentimes accompany antiquated subdivisions, such as what to do about those maps recorded under an earlier version of the state subdivision law? Or what to do when some parcels have been developed in the intervening years and others have not? Or what to do when there are hundreds of different owners (many out-of-state) who may never have seen their property purchased decades earlier as an investment? In the present case, there is a single map recorded prior to the time that the state or local community had enacted laws and regulations concerning the design and improvement of subdivisions, and before any state or local official was authorized to review the map. The lands at issue have remained under common ownership throughout their history. The Gardners are not left without a remedy if this Court affirms the decision below. They can submit a subdivision application in accordance with the requirements of the Map Act and Sonoma County's subdivision regulations.

The Amici American Planning Association, CCAPA, and the Granada Sanitary District respectfully requests that the decision of the Court of Appeal be affirmed.

Dated: May 6, 2002 M. Thomas Jacobson

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Attorney for *Amicus Curiae*
AMERICAN PLANNING ASSOCIATION

Dated: May 6, 2002 Jonathan Wittwer

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Attorneys for *Amicus Curiae*
GRANADA SANITARY DISTRICT