FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PEYMAN PAKDEL; SIMA CHEGINI, *Plaintiffs-Appellants*, v. CITY AND COUNTY OF SAN FRANCISCO; SAN FRANCISCO BOARD OF SUPERVISORS; SAN FRANCISCO DEPARTMENT OF PUBLIC WORKS, *Defendants-Appellees*.	No. 17-17504 D.C. No. 3:17-cv-03638-RS OPINION

Appeal from the United States District Court
for the Northern District of California
Richard Seeborg, District Judge, Presiding

Argued and Submitted September 13, 2019
San Francisco, California

Filed March 17, 2020

Before: Ronald M. Gould, Carlos T. Bea, and Michelle T. Friedland, Circuit Judges.

Opinion by Judge Friedland;
Dissent by Judge Bea

SUMMARY*

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* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Civil Rights

The panel affirmed the district court's dismissal of an action brought pursuant to 42 U.S.C. § 1983 against the City and County of San Francisco asserting an as-applied challenge to the Expedited Conversion Program, which allows property owners to convert their tenancy-in-common properties into condominium properties on the condition that the owners agree to offer any existing tenants lifetime leases in units within the converted property.

Plaintiffs purchased an interest in a tenancy-in-common property in 2009 and soon thereafter rented their portion of the property to a tenant. When the Expedited Conversion Program began, plaintiffs and their co-owners applied to convert their property and plaintiffs agreed to offer their tenant a lifetime lease as a condition of converting and duly received final approval from the City to convert. During the process, plaintiffs had several opportunities to request an exemption from the lifetime lease requirement but did not do so. Indeed, toward the end of the process, they expressly waived their right to seek such an exemption. But after securing final approval, plaintiffs requested that the City not require them to execute and record the lifetime lease or, in the alternative, that the City compensate them. Consistent with plaintiffs' previous lack of objection and their prior express agreements not to seek an exemption, the City refused plaintiffs' requests. Plaintiffs sued the City, contending under various theories that the lifetime lease requirement violated the Takings Clause of the Fifth Amendment. The district court dismissed plaintiffs' takings claims because they had not sought compensation for the

alleged taking in state court, which then was required by *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985).

The panel first acknowledged that the state-litigation requirement has since been eliminated by *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019), so it was no longer a proper basis for dismissal. Nevertheless, the panel held that because plaintiffs did not timely ask the City for an exemption from the lifetime lease requirement, they failed to satisfy *Williamson County*'s separate finality requirement, which survived *Knick* and thus continued to be a requirement for bringing regulatory takings claims such as plaintiffs' in federal court. The panel stated that plaintiffs' belated attempts to request an exemption were untimely and expressly waived. The panel therefore affirmed the dismissal of plaintiffs' takings claim as unripe.

The panel rejected plaintiffs' argument that they were exempt from the *Williamson County* ripeness requirements because the Expedited Conversion Program effects a "private" taking, benefitting private individuals rather than the public. The panel held that plaintiffs' characterization of their claim as a "private" takings claim was foreclosed by *Rancho de Calistoga v. City of Calistoga*, 800 F.3d 1083 (9th Cir. 2015). The panel also rejected plaintiffs' request that the panel exercise its discretion to excuse plaintiffs from the finality requirement. The panel concluded that none of the cases plaintiffs used to argue that they should be excused from the finality requirement presented circumstances analogous to those here, and

the panel saw no reason to invent a new rationale for exercising such discretion.

Dissenting, Judge Bea stated that because the City had reached a final decision which denied plaintiffs' request to be excused from executing and recording a lifetime lease to their unit, he would vacate the district court's order dismissing the takings claim and remand the case for further proceedings.

COUNSEL

Jeffrey W. McCoy (argued), James S. Burling, and Erin E. Wilcox, Pacific Legal Foundation, Sacramento, California; Paul F. Utrecht, Utrecht & Lenvin, LLP, San Francisco, California; Thomas W. Connors, Black McCuskey Souers & Arbaugh, LPA, Canton, Ohio; for Plaintiffs-Appellants.

Kristen A. Jensen (argued) and Christopher T. Tom, Deputy City Attorneys; Dennis J. Herrera, City Attorney; City Attorney's Office, City and County of San Francisco, San Francisco, California; for Defendants-Appellees.

OPINION

FRIEDLAND, Circuit Judge:

In the City and County of San Francisco (the "City"), ownership of multi-unit buildings is often shared by different people through a form of property ownership known as a tenancy in common. For years, those in the City who sought to convert their tenancy-in-common property into individually owned

condominium property had to apply for permission to do so through a lottery system. Because conversion rights were granted through the lottery to only a very limited number of properties each year, a backlog developed. To clear that backlog, the City temporarily suspended the lottery in 2013 and replaced it with the Expedited Conversion Program ("ECP"), which allowed a tenancy-in-common property to be converted into a condominium property on the condition that its owner agreed to offer any existing tenants lifetime leases in units within the converted property.

Peyman Pakdel and Sima Chegini (collectively, "Plaintiffs") purchased an interest in a tenancy-in-common property in 2009 and soon thereafter rented their portion of the property to a tenant. When the ECP began, Plaintiffs and their co-owners applied to convert their property. Plaintiffs initially advanced through the application process without a hitch: They agreed to offer their tenant a lifetime lease as a condition of converting and duly received final approval from the City to convert. During this process, they had several opportunities to request an exemption from the lifetime lease requirement but did not do so. Nevertheless, at the eleventh hour, they balked. Refusing to execute the lifetime lease they had offered to their tenant, Plaintiffs instead sued the City, contending under various theories that the lifetime lease requirement violates the Takings Clause of the Fifth Amendment.

The district court dismissed Plaintiffs' takings claims because they had not sought compensation for the alleged taking in state court, which was required by *Williamson County Regional Planning Commission*

v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985). That state-litigation requirement has since been eliminated by *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019), so it is no longer a proper basis for dismissal. But because Plaintiffs did not ask the City for an exemption from the lifetime lease requirement, they failed to satisfy *Williamson County*'s separate finality requirement, which survived *Knick* and thus continues to be a requirement for bringing regulatory takings claims such as Plaintiffs' in federal court. We therefore hold that their takings challenge is unripe, and accordingly affirm.[1]

I.

A.

Tenancy in common is a form of shared property ownership in which "each owner has an equal right to possession and use of the entire property." Marcia Rosen & Wendy Sullivan, *From Urban Renewal and Displacement to Economic Inclusion: San Francisco Affordable Housing Policy 1978-2014*, 25 Stan. L. & Pol'y Rev. 121, 134 n.57 (2014). In San Francisco, many multi-unit buildings are co-owned as tenancies in common. *See* Carolyn Said, *Strangers Sharing Mortgages*, SFGate (Aug. 25, 2005), https://www.sfgate.com/realestate/article/Strangers-sharing-mortgages-Many-would-be-2645563.php. Co-owners of such properties can "make agreements among themselves[]to give each owner an exclusive

[1] Plaintiffs asserted other constitutional claims as well, which the district court dismissed with prejudice. We address Plaintiffs' appeal of the dismissal of those claims in a concurrently filed memorandum disposition. Plaintiffs also asserted state law claims, which the district court dismissed as procedurally barred. Plaintiffs have not appealed the dismissal of those claims.

right" to occupy or use a particular unit within the building. *Tom v. City & County of San Francisco*, 16 Cal. Rptr. 3d 13, 16 (Ct. App. 2004). In a condominium, by contrast, "each owner has exclusive ownership and possession of a single unit and common ownership only for the common areas." Rosen & Sullivan, *supra*, at 134 n.57.

Owners of tenancy-in-common units may hope to convert those units into condominiums in order to attain superior title and improved credit opportunities. Condominium owners in San Francisco may also derive significant economic value from selling their properties after conversion because, in contrast to most tenancy-in-common properties, condominiums are not subject to the City's rent control laws once sold by the converting owner.

In 2009, Plaintiffs purchased a tenancy-in-common interest in a six-unit San Francisco building (the "Building"), which, by agreement with their co-owners, afforded Plaintiffs the right to exclusively use one unit (the "Unit"). They rented the Unit to a tenant, intending to move in themselves when they retired. Plaintiffs also contracted with their co-owners to take all steps available to convert the Building into condominiums, which would allow them to gain independent title to their respective units.

At the time Plaintiffs purchased and rented out the Unit, the City granted condominium conversion rights using a lottery system. Under the lottery system, only 200 units were granted permission to convert each year, and a considerable backlog of conversion applications accumulated. In 2013, the San Francisco Board of Supervisors acted to clear this backlog by enacting Ordinance 117-13 (the

"Ordinance"), which suspended the conversion lottery until 2024 and replaced it with the ECP. The ECP allowed property owners to convert their tenancy-in-common properties into condominium properties subject to an application fee and certain conditions. Most notably, the ECP required owners who did not occupy their units themselves and instead rented to tenants to furnish incumbent tenants with "a written offer to enter into a lifetime lease" for the converting unit (the "Lifetime Lease Requirement"). S.F. Subdivision Code § 1396.4(g)(1).[2] Owners who extended a lifetime lease were entitled to a partial refund of the ECP application fee. *See* S.F. Subdivision Code § 1396.4(h). The Lifetime Lease Requirement was designed to mitigate an adverse effect that the City feared would result from the accelerated conversion of tenancy-in-common properties into condominium properties under the ECP—"a large number of tenants [displaced] into a very expensive rental housing market." In other words, the ECP sought to achieve the City's objective of temporarily allowing more condominium conversions while also limiting the displacing effects of such conversions.

In 2015, Plaintiffs and their fellow Building owners submitted an ECP application to the San Francisco Department of Public Works (the "Department"). Following a public hearing, the Department approved their tentative conversion map

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[2] A similar, but narrower, requirement existed under the lottery system. Converting owners were required to offer lifetime leases to tenants aged 62 or older and to permanently disabled tenants. *See* S.F. Subdivision Code § 1391(c). There were also some limits on rental rates and increases for units occupied by such tenants. *See id.*

in January 2016.[3] In November 2016, Plaintiffs signed an agreement with the City committing to offer a lifetime lease to their tenant, and in fact offered their tenant such a lease. In that agreement, Plaintiffs specifically "covenant[ed] and agree[d] that [they] w[ould] not seek a waiver of the provisions of the [ECP] applicable to the Lifetime Lease Units" after that stage of the approval process. In exchange for offering the lifetime lease, Plaintiffs sought and received a partial refund of the ECP application fee. *See* S.F. Subdivision Code § 1396.4(h). Their final conversion map was approved in December 2016.

Until that point, Plaintiffs had given the City no indication that they objected to the Lifetime Lease Requirement. But on June 9 and again on June 13, 2017—six months after they secured final approval to convert—Plaintiffs "requested that the City not require them to execute and record the lifetime lease," or "in the alternative to compensate them for transferring a lifetime lease interest in their property." Consistent with Plaintiffs' previous lack of objection to the Lifetime Lease Requirement and their prior express agreement not to seek a waiver of ECP requirements after November 2016, the City refused both requests.

B.

Instead of executing and recording the lifetime lease, Plaintiffs sued the City in federal district court, asserting an as-applied challenge to the Ordinance under 42 U.S.C. § 1983. The Complaint alleged that

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[3] A "tentative map" is "a map made for the purpose of showing the design of a proposed subdivision." S.F. Subdivision Code § 1309(k).

the Lifetime Lease Requirement effects a regulatory taking of Plaintiffs' property without just compensation in violation of the Takings Clause.[4] Because the Ordinance contains a clause providing that the filing of any legal challenge to the Lifetime Lease Requirement triggers a suspension of the entire ECP with respect to tenant-occupied units for the duration of the litigation, this lawsuit has halted the City's processing of ECP applications for properties with tenant-occupied units since June 2017.

The district court granted the City's motion to dismiss Plaintiffs' Complaint because Plaintiffs had

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[4] Plaintiffs alleged in the alternative that the Lifetime Lease Requirement effects an exaction, a physical taking, and a private taking. But because these alternative theories plainly fail as a matter of law, we analyze Plaintiffs' takings challenge as a regulatory takings claim. The Lifetime Lease Requirement is not an exaction under *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), because it is "a general requirement imposed through legislation," rather than "an individualized" requirement to grant property rights to the public imposed as a condition for approving a specific property development. *McClung v. City of Sumner*, 548 F.3d 1219, 1227–29 (9th Cir. 2008), *abrogated on other grounds by Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013). And the Lifetime Lease Requirement does not amount to a physical taking because Plaintiffs voluntarily applied for conversion under the ECP. *See Yee v. City of Escondido*, 503 U.S. 519, 527 (1992) ("The government effects a physical taking only where it requires the landowner to submit to the physical occupation of his land."); *FCC v. Fla. Power Corp.*, 480 U.S. 245, 252 (1987) (law limiting the rent that utility companies could charge for leasing space on utility poles to cable television operators was not a physical taking because the utility companies "voluntarily entered into [the] leases with [the] cable company tenants"). Finally, as explained below, Plaintiffs' private takings claim is simply a reframing of their regulatory takings claim.

not sought compensation for the alleged taking of their property through a state court proceeding. Plaintiffs timely appealed.

II.

We review de novo grants of motions to dismiss. *Naruto v. Slater*, 888 F.3d 418, 421 (9th Cir. 2018). "We may affirm the district court's dismissal on any grounds supported by the record." *Tritz v. U.S. Postal Serv.*, 721 F.3d 1133, 1136 (9th Cir. 2013).

III.

"Constitutional challenges to local land use regulations are not considered by federal courts until the posture of the challenges makes them 'ripe' for federal adjudication." *S. Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 502 (9th Cir. 1990). In *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), the Supreme Court articulated two independent ripeness requirements for regulatory takings claims. First, under the finality requirement, a takings claim challenging the application of land-use regulations was "not ripe until the government entity charged with implementing the regulations ha[d] reached a final decision regarding the application of the regulations to the property at issue." *Id.* at 186. Second, under the state-litigation requirement, a claim was not ripe if the plaintiff "did not seek compensation [for the alleged taking] through the procedures the State ha[d] provided for doing so." *Id.* at 194.

A.

The district court dismissed Plaintiffs' takings challenge under the state-litigation requirement.

While this appeal was pending, however, the Supreme Court in *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019), eliminated that requirement. The Court held in *Knick* that "[t]he Fifth Amendment right to full compensation arises at the time of the taking, regardless of post-taking remedies that may be available to the property owner." *Id.* at 2170. Accordingly, a plaintiff need not seek compensation in state court to ripen a federal takings claim. *Id.*

In light of *Knick*, Plaintiffs' failure to seek just compensation in state court no longer bars them from bringing their takings claim in federal court in the first instance.

B.

The City nevertheless maintains that Plaintiffs' takings claim is unripe under the first *Williamson County* requirement, which prohibits a plaintiff from filing suit "until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." 473 U.S. at 186. *Knick* left this finality requirement untouched, so that aspect of *Williamson County* remains good law. *Knick*, 139 S. Ct. at 2169 ("Knick does not question the validity of this finality requirement, which is not at issue here."); *see also id.* at 2174 (noting that *Williamson County* "could have been resolved solely on the . . . ground that no taking had occurred because the zoning board had not yet come to a final decision"); *Campbell v. United States*, 932 F.3d 1331, 1340 & n.5 (Fed. Cir. 2019) (recognizing that the finality requirement "remains good law under *Knick*"). Plaintiffs do not contend otherwise; they instead argue that they satisfied the finality requirement. We agree with the City,

however, that Plaintiffs' takings claim remains unripe because they never obtained a final decision regarding the application of the Lifetime Lease Requirement to their Unit.

1.

Williamson County illuminates the rationale for and scope of the finality requirement. There, a county planning commission disapproved a landowner's proposed plat for developing a tract of land after determining that the plat violated various zoning regulations. 473 U.S. at 181. Local government entities "had the power to grant certain variances" from the zoning regulations that would have resolved many of the commission's objections to the plat. *Id.* at 188. Yet the landowner did not seek such variances. *Id.* Instead, the landowner brought suit in federal court alleging that the commission's application of the zoning regulations amounted to a taking of the property. *Id.* at 182. The Supreme Court held that the takings claim was not ripe in part because factors central to determining whether a regulatory taking occurred—such as "the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations"—"simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." *Id.* at 191. *Williamson County* thus made clear that the finality requirement "is compelled by the very nature of the inquiry" required in a takings case. *Id.* at 190.

The Court has further emphasized that the finality requirement "responds to the high degree of discretion characteristically possessed by land-use

boards" in granting variances from their general regulations with respect to individual properties. *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 738 (1997). In light of "such flexibility or discretion," courts cannot make "a sound judgment about what use will be allowed" by local land-use authorities merely by asking whether a development proposal "facially conform[s] to the terms of the general use regulations." *Id.* at 738–39; *see also MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348 (1986) (explaining that "[a] court cannot determine whether a regulation has gone 'too far' until it knows how far the regulation goes," which requires "a final and authoritative determination" of how the regulation will be applied to the property in question). And "[b]y requiring [a plaintiff] to seek recourse at the local level" before bringing a federal takings claim, the finality requirement "enable[s] us to respect principles of federalism which counsel in favor of resolving land use disputes locally." *Guatay Christian Fellowship v. County of San Diego*, 670 F.3d 957, 979 (9th Cir. 2011).

Accordingly, under *Williamson County*, "a final decision exists when (1) a decision has been made 'about how a plaintiff's own land may be used' and (2) the local land-use board has exercised its judgment regarding a particular use of a specific parcel of land, eliminating the possibility that it may 'soften[] the strictures of the general regulations [it] administer[s].'" *Adam Bros. Farming, Inc. v. County of Santa Barbara*, 604 F.3d 1142, 1147 (9th Cir. 2010) (alterations in original) (quoting *Suitum*, 520 U.S. at 738–39). This rule means that a plaintiff must "meaningful[ly]" request and be denied a variance from the challenged regulation before bringing a

regulatory takings claim. *S. Pac. Transp. Co.*, 922 F.2d at 503. But "[t]he term 'variance' is not definitive or talismanic; if other types of permits or actions are available and could provide similar relief, they must be sought." *Id.*; *see also, e.g.*, *McMillan v. Goleta Water Dist.*, 792 F.2d 1453, 1455, 1457 (9th Cir. 1986) (holding that a takings claim became ripe when the plaintiffs' request for an exemption from a moratorium on new water connections was denied by the water district). Plaintiffs who "have foregone an opportunity to bring their proposal" to use their property in a manner that diverges from the regulation alleged to effect a taking "before a decisionmaking body with broad authority to grant different forms of relief" therefore "cannot claim to have obtained a 'final' decision." *S. Pac. Transp. Co.*, 922 F.2d at 503.

2.

The San Francisco Department of Public Works is a decisionmaking body with broad authority over condominium conversions in the City, including discretion to grant relief from conversion requirements. *See* S.F. Subdivision Code § 1312(a) (vesting discretion in the Director of Public Works to "authorize exceptions to any of the substantive requirements set forth in [the Subdivision] Code and in the Subdivision Regulations" upon "application by the subdivider"); Cal. Gov't Code § 66473.5. Plaintiffs, however, did not ask the Department for an exemption from the Lifetime Lease Requirement during the ECP approval process, even though they concededly had opportunities to do so.

Plaintiffs could have sought an exemption at or leading up to the January 7, 2016 public hearing held

on their conversion application. Before that hearing, as required by local and state law, Plaintiffs and their Building co-owners submitted a tentative conversion map for the City's approval. *See* S.F. Subdivision Code § 1303(c); Cal. Gov't Code § 66473.5. The tentative conversion map included a promise to extend lifetime leases to existing tenants, without noting any objection from Plaintiffs to that condition of conversion.

The City notified Plaintiffs and the public that in the twenty days before the Department's proposed decision on the tentative map, any interested party could raise objections. *See* S.F. Subdivision Code § 1396.4(c)(2) (providing that "any interested party may file a written objection to [a conversion] application" before the Department rules on a tentative map); Cal. Gov't Code § 65009(b)(1) (providing that interested parties may challenge a map application at "the public hearing or in written correspondence delivered to the public agency prior to, or at, the public hearing"). Again, Plaintiffs did not object to the requirement that their proposed plan include an offer of a lifetime lease.

It appears that Plaintiffs could also have objected to the Lifetime Lease Requirement by appealing the Department's approval of the tentative map. *See* S.F. Subdivision Code § 1314(a) ("The proposed subdivider[ ] or any interested party may appeal to the Board [of Supervisors] from a final decision of the Director [of Public Works] approving, conditionally approving, or disapproving a Tentative Map."). The notice of tentative approval sent to Plaintiffs informed them of their right to appeal, stating: "This notification letter is to inform you of your right to

appeal this tentative approval. IF YOU WOULD LIKE TO FILE AN APPEAL OF THE TENTATIVE APROVAL: You must do so in writing with the Clerk of the Board of Supervisors within ten (10) days of the date of this letter." Plaintiffs, however, did not even attempt to appeal.

Plaintiffs do not dispute that they gave no indication of any reservations about the Lifetime Lease Requirement despite having had these opportunities to request an exemption. To the contrary, after allowing each objection period to lapse, they forged ahead with the conversion process and entered into a written agreement with the City to provide a lifetime lease to their tenant, in which they expressly waived their right to thereafter seek an exemption from the Lifetime Lease Requirement. Plaintiffs also applied for and received from the City a partial refund of the ECP application fee—a refund only available to property owners who offered lifetime leases to their tenants. *See* S.F. Subdivision Code § 1396.4(h). It was not until six months after Plaintiffs had obtained final approval of their conversion map, and seven months after they had committed to offering a lifetime lease in exchange for the benefits of conversion, that they finally asked "the City not [to] require them to execute and record the lifetime lease."

The dissent asserts that Plaintiffs' belated attempts to request an exemption satisfied the finality requirement.[5] Dissent at 26. But by that point,

[5] We note that Plaintiffs themselves did not even advance this argument until their supplemental reply brief, where it was mentioned in passing in a footnote. In the same footnote, Plaintiffs suggested that any request for an exemption would have been futile because "the City had no discretion to waive the

Plaintiffs' request was untimely and expressly waived. Takings plaintiffs cannot make an end run around the finality requirement by sitting on their hands until every applicable deadline has expired before lodging a token exemption request that they know the relevant agency can no longer grant. In *Williamson County*, the Supreme Court expressly rejected the landowner's position that it could satisfy the finality requirement by "request[ing] variances from the Commission . . . *after* the Commission approved the proposed plat," which would have been too late under the commission's regulations. 473 U.S. at 190. That the commission would still theoretically have had the power to grant a variance after plat approval was apparently immaterial to the Court's analysis. The Court explained that the landowner's "refusal to follow the procedures for requesting a variance" was fatal to its contention that "the

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lifetime lease requirement." They offered no argument or evidence to substantiate this assertion; they cited only section 1396.4(g) of the Ordinance, which says nothing about depriving the City of discretion to waive the Lifetime Lease Requirement. In light of the City's open-ended solicitation of objections to the conversion application, we cannot assume that an exemption request would have been futile.

We have no examples before us of exemptions from the Lifetime Lease Requirement, but that does not mean exemptions would have been unavailable. Because Plaintiffs' lawsuit halted the ECP for all tenant-occupied properties, the City has not had any opportunities to consider exemption requests. Moreover, given that the Lifetime Lease Requirement was animated by concerns of widespread displacement of tenants, it is possible that the City would have been more amenable to exemption requests from individual owners, like Plaintiffs, who were seeking to convert a single unit that they planned to move into themselves, than from landlords who sought to convert multiple properties.

Commission's disapproval of the preliminary plat was equivalent to a final decision that no variances would be granted." *Id.*

Moreover, we have held in the analogous context of the then-binding state-litigation requirement that when a plaintiff missed deadlines or failed to comply with other requirements for ripening a federal takings claim, the claim must be dismissed. *See Daniel v. County of Santa Barbara*, 288 F.3d 375, 381 (9th Cir. 2002) ("[T]he failure of [the plaintiffs] to seek just compensation meant that they never created ripe federal takings claims," and such failure "cannot now be cured because the applicable state limitation periods have long since expired."); *see also Pascoag Reservoir & Dam, LLC v. Rhode Island*, 337 F.3d 87, 96 (1st Cir. 2003) ("[A takings] claimant cannot be permitted to let the time for seeking a state remedy pass without doing anything to obtain it and then proceed in federal court on the basis that no state remedies are open." (quoting *Gamble v. Eau Claire County*, 5 F.3d 285, 286 (7th Cir. 1993))). Other courts of appeals have reached similar conclusions. *See Liberty Mut. Ins. Co. v. Brown*, 380 F.3d 793, 799 (5th Cir. 2004) ("By failing to utilize available state remedies for obtaining compensation, [the plaintiff] has prevented itself from meeting the second ripeness requirement of *Williamson County*. Further, because the three-year prescriptive period for an inverse condemnation action [under state law] has now expired, . . . [the plaintiff] has permanently prevented the claim from ever ripening."); *Pascoag Reservoir*, 337 F.3d at 94 (similar); *Vandor, Inc. v. Militello*, 301 F.3d 37, 39 (2d Cir. 2002) (similar); *Gamble*, 5 F.3d at 286 (similar); *Harris v. Mo. Conservation Comm'n*, 790 F.2d 678, 681 (8th Cir. 1986) (similar).

The rationale for such a rule was straightforward: If a plaintiff could have bypassed the (then-existing) state-litigation requirement and "obtain[ed] jurisdiction in the federal courts simply by waiting until the statute of limitation bars the state remedies," the state-litigation requirement would have been meaningless. *Pascoag Reservoir*, 337 F.3d at 95 (quoting *Harris*, 790 F.2d at 681). This rationale applies with equal force to the finality requirement. Allowing a takings claim to proceed when a variance or exemption was not requested at the proper junctures would undermine the purposes of the finality requirement by eliminating local officials' opportunities to exercise discretion and by presenting federal courts with ill-defined controversies. *See Guatay Christian Fellowship*, 670 F.3d at 977 ("[T]he final decision requirement . . . is the sole means by which a court can know precisely how the regulation at issue would finally be applied to the property" in question, and "accords with principles of federalism . . . by encouraging resolution of land use disputes at the local level."); *see also FERC v. Mississippi*, 456 U.S. 742, 767 n.30 (1982) ("[R]egulation of land use is perhaps the quintessential state activity."). The dissent does not explain how the finality requirement can retain any force if a takings claim brought by a plaintiff who made no attempt to follow the prescribed procedures for obtaining a final decision can be considered ripe. By allowing property owners to bypass state and local governments' processes for making land use decisions, the dissent's approach would subvert principles of comity and federalism. *Williamson County* prohibits us from going down that path. *See* 473 U.S. at 186–91.

Plaintiffs protest that requiring them to have sought an exemption through the prescribed procedures amounts to imposing an administrative exhaustion requirement in the guise of a finality requirement. It is true that, in general, "there is no requirement that a plaintiff exhaust administrative remedies before bringing a § 1983 action." *Williamson County*, 473 U.S. at 192. But the Court in *Williamson County* nevertheless held that, in the takings context, a property owner's failure to seek a variance through procedures made available by the local land-use authority meant that the authority had not reached a final decision. *See id.* at 193. The Court explained that the finality requirement would have been satisfied only by a "conclusive determination" by the local land-use authority "whether it would allow [the property owner] to develop the [parcel of land] in the manner [the owner] proposed." *Id.* at 193. Here, Plaintiffs never "proposed" that the City exempt them from the Lifetime Lease Requirement. They gave the City no inkling that they wanted an exemption, and therefore gave it no opportunity to exercise its "flexibility or discretion" to grant such an exemption. *See Suitum*, 520 U.S. at 738. At bottom, Plaintiffs' argument is that because they ignored the finality requirement for long enough, it no longer applies to them. As *Williamson County* made clear, that is not correct. 473 U.S. at 190 ("[I]n the face of [the property owner's] refusal to follow the procedures for requesting a variance, . . . [the owner] hardly can maintain that the Commission's disapproval of the preliminary plat was equivalent to a final decision that no variances would be granted.").

Instead of attempting to ripen their claim during the proper course, Plaintiffs knowingly waived their

right to seek an exemption. We therefore affirm the dismissal of Plaintiffs' takings claim as unripe.[6]

3.

Plaintiffs offer two further arguments in an attempt to save their takings claim from dismissal, neither of which is persuasive.

a.

Plaintiffs first argue that, even if their regulatory takings claim is unripe, their first cause of action—which alleges that the ECP effects a "private" taking because it benefits private individuals rather than the public—is exempt from the *Williamson County* ripeness requirements. We disagree.

Even if some category of "private" takings claims could be exempt from the finality requirement, which

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[6] The dissent contends that dismissing Plaintiffs' takings claim on the ground that they have foregone their opportunity to ripen it "is a merits ruling rather than one about ripeness." Dissent at 27. Certainly, the contingent nature of Plaintiffs' interest in condominium conversion would tend to undermine their claim that the conversion effected a taking. *See Bowers v. Whitman*, 671 F.3d 905, 913 (9th Cir. 2012) (explaining that there is no taking "if the property interest [at issue] is contingent and uncertain or the receipt of the interest is . . . discretionary" (quotation marks omitted)). But as cases like *Daniel* and *Pascoag Reservoir* illustrate, the consequence of the failure to timely ripen a takings claim is that the claim must be dismissed before its merits can be evaluated. *See Pascoag Reservoir*, 337 F.3d at 96 (affirming dismissal of takings claim with prejudice because the plaintiff's "failure to bring a timely suit for compensation under state law has led to the forfeiture of its federal taking claim."); *Daniel*, 288 F.3d at 381 (affirming dismissal of takings claim with prejudice because "the failure of [the plaintiffs] to seek just compensation meant that they never created ripe federal takings claims").

is a question we need not decide,[7] Plaintiffs' characterization of their claim as a "private" takings claim is foreclosed by *Rancho de Calistoga v. City of Calistoga*, 800 F.3d 1083 (9th Cir. 2015). In that case, a mobile home park (Rancho) alleged that the City of Calistoga's mobile home rent-control ordinance, which limited the magnitude of annual rent increases, effected "an unconstitutional private taking because any purported 'public use' [was] pretextual." *Id.* at 1092. Rancho insisted that the "real purpose" behind the ordinance was to provide rent subsidies to mobile home tenants, which violated the Supreme Court's admonishment in *Kelo v. City of New London*, 545 U.S. 469 (2005), that "the sovereign may not take the property of A for the sole purpose of transferring it to another private party B." *Rancho de Calistoga*, 800 F.3d at 1092–93 (quoting *Kelo*, 545 U.S. at 477). We explained, however, that, where no physical seizure such as that in *Kelo* had occurred, a private takings claim alleging "public takings motivated by a 'private purpose'" was "simply a renaming of [a] regulatory takings claim." *Id.* at 1092 (citation omitted). That is, Rancho's argument was an attempt to "reframe" its challenge to an alleged regulatory taking as a private takings claim "through an attack on the stated purposes of the rent-control scheme." *Id.* at 1092–93.

Plaintiffs' private takings theory fails for the same reason. Like Rancho, they allege that the

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[7] Plaintiffs cite only precedent holding that "a plaintiff alleging [a private] taking would not need to seek compensation in state proceedings before filing a federal takings claim" under the state-litigation requirement of *Williamson County*. *Armendariz v. Penman*, 75 F.3d 1311, 1320 n.5 (9th Cir. 1996) (en banc), *overruled in part on other grounds as recognized in Crown Point Dev., Inc. v. City of Sun Valley*, 506 F.3d 851 (9th Cir. 2007).

Lifetime Lease Requirement is "intended to favor a particular private party with only incidental or pretextual public benefits." Also like Rancho, Plaintiffs argue that "the City has taken their property for the sole purpose of benefiting another private party" in violation of *Kelo*. Where, as here, full possession of the property has not been seized, such a challenge is at bottom a regulatory takings claim subject to *Williamson County*'s finality requirement—which, as explained above, Plaintiffs cannot satisfy.

b.

As a last resort, Plaintiffs urge us to excuse them from the finality requirement in this instance as an exercise of our discretion. Because *Williamson County*'s ripeness requirements are prudential, not jurisdictional, we do have some discretion whether to impose them. *See Guggenheim v. City of Goleta*, 638 F.3d 1111, 1118 (9th Cir. 2010) (en banc). But none of the circumstances that prompted the exercise of discretion in the cases Plaintiffs rely on for this argument are present here.

First, there are no concerns in this case about different claims proceeding simultaneously in state and federal court, as in *Town of Nags Head v. Toloczko*, 728 F.3d 391 (4th Cir. 2013).[8] *See id.* at 399. Second, the City here raised the ripeness issue at the first opportunity, in contrast to the defendant city in *Yamagiwa v. City of Half Moon Bay*, 523 F. Supp. 2d 1036 (N.D. Cal. 2007), which acted in bad faith by not

[8] Plaintiffs' non-takings claims will not generate piecemeal litigation. As discussed in the concurrently filed memorandum disposition, Plaintiffs' unreasonable seizure, due process, and equal protection claims incurably fail as a matter of law on the merits and so were properly dismissed without leave to amend.

asserting ripeness as a defense until more than two years into the case, following the completion of trial. *See id.* at 1108. Third, this case is unlike *Guggenheim*, in which we opted not to impose the state-litigation requirement on the plaintiffs because we concluded that their takings claim failed on the merits, "so it would [have been] a waste of the parties' and the courts' resources to bounce the case through more rounds of litigation." 638 F.3d at 1118. Plaintiffs here have urged us *not* to reach the merits of their takings claim in the first instance, because "the parties have [not had] an opportunity to develop a factual record that would allow this Court to properly analyze" the claim. The rationale of *Guggenheim* thus has no applicability in this case.

In sum, none of the cases Plaintiffs use to argue that they should be excused from the finality requirement presented circumstances analogous to those here, and we see no reason to invent a new rationale for exercising such discretion.

IV.

For the foregoing reasons, we affirm the district court's dismissal of Plaintiffs' takings claim.

AFFIRMED.

BEA, Circuit Judge, dissenting:

The majority is correct about the state of the law on the "ripeness" of takings claims brought under 42 U.S.C. § 1983, in the wake of *Knick*. It remains the case that a plaintiff may not bring suit for an unconstitutional regulatory taking until "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186 (1985); *see Knick v. Township of Scott, Pa.*, 139 S. Ct. 2162, 2169 (2019). However, because the City here has indeed reached such a final decision, I would vacate the district court's order dismissing the takings claim and remand the case for further proceedings.[1]

Williamson County's "finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury," not whether a request for "variances" followed the decisionmaker's administrative procedures. *Williamson County*, 473 U.S. at 193. A takings claim is ripe if, at the moment a suit is filed, it is possible for the court to know "how far the regulation goes," that is, whether and to what degree a regulation or ordinance will be enforced against the plaintiff. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 622 (2001) (citation omitted). If the record is clear that "no variances will be granted," then the court knows the scope of the regulation, it will be enforced as written, and the claim is ripe.

[1] I concur in the memorandum disposition filed concurrently that affirms the district court's dismissal of the Plaintiffs' other constitutional claims.

Williamson County, 473 U.S. at 191. Requiring plaintiffs to adhere to specific administrative procedures for requesting "variances" from a regulation, rather than simply evaluating whether a decision about the application of a regulation is final, is not mandated by *Williamson County* and risks "establish[ing] an exhaustion requirement for § 1983 takings claims," something the law does not allow. *See Knick*, 139 S. Ct. at 2173; *see also McGuire v. United States*, 550 F.3d 903, 909–10 (9th Cir. 2008).

The majority's description of the Plaintiffs as never having "obtained a final decision regarding the application of the Lifetime Lease Requirement to their Unit," is belied by the facts. Majority Op. at 12. On June 9 and 13, 2017, the Plaintiffs specifically requested that the City excuse them from executing and recording a lifetime lease to their Unit. The City refused these requests on June 12 and 13, 2017. At least by June 13, 2017, the City's position was final. The Plaintiffs were required to execute and record the lifetime lease; there would be no variance. The majority correctly notes that the Plaintiffs made their requests to the City after several notable events had occurred: (1) they had missed the official window for appealing the tentative approval of their subdivision map; (2) they had entered into a contract with the City to offer the tenant a lifetime lease; (3) they had offered the lifetime lease to the tenant; (4) they had received a refund of $8,000 from the City in exchange for offering the tenant a lifetime lease; and (5) they had their final subdivision map approved. But none of this bears on the question whether the City had reached a final decision that required the Plaintiffs to comply

with the lifetime lease requirement.[2] The City's rejections of the Plaintiffs' belated requests were clear and final. Accordingly, the Plaintiffs' claim was ripe.

The majority dismisses the City's rejection of the Plaintiffs' requests to be excused from the lifetime lease requirement and the unavoidable conclusion that this was a final decision by the City, because the majority finds the Plaintiffs' requests were "untimely and expressly waived." Majority Op. at 17. But such a holding is a merits ruling, rather than one about ripeness. The proper venue for evaluating, in the first instance, whether the Plaintiffs' claim may be defeated by waiver, equitable estoppel, or any other defense is in the district court on remand. *Cf. Dodd v. Hood River County*, 59 F.3d 852, 863 (9th Cir. 1995) (reversing the district court's holding that a takings claim was not ripe but remanding to consider whether the defense of collateral estoppel applied).

The majority supports its conclusion that the Plaintiffs lost their ability to ripen their claim because they did not follow the City's administrative procedures and object earlier in the process, by citing to cases that applied the now-defunct state-litigation requirement from *Williamson County*.[3] *See* Majority

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[2] This is not to say that these are irrelevant considerations in evaluating the *merits* of the Plaintiffs' claims. But the limited question here is whether the merits of the claims were ripe for review in the district court.

[3] The only Ninth Circuit case the majority references for this holding is *Daniel v. County of Santa Barbara*, 288 F.3d 375, 381 (9th Cir. 2002), which it cites for the proposition that if "a plaintiff missed deadlines or failed to comply with other requirements for ripening the claim, the claim must be dismissed." Majority Op. at 18. The majority is overreading the case. *Daniel*, beyond being about the *Williamson County* state-

Op. at 18–19. Though *Williamson County* mentioned the failure of the plaintiff to comply with regulations for requesting variances, *see* 473 U.S. at 190, it did so in a context where, unlike here, the plaintiff had requested no variance, or other relief, whatsoever. The majority has no direct authority for its holding

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litigation requirement and not the finality requirement, did not involve generic "missed deadlines"; it involved the failure of plaintiffs to commence an action for compensation within the applicable state statute of limitations. The difference is significant. Before *Knick*, failure to seek compensation through state proceedings for an alleged taking of property not only deprived a plaintiff of potential payment, it also meant that no cognizable constitutional violation had occurred. This was because a taking was not without just compensation, and thus the Fifth Amendment was not violated, until the state had denied a request to compensate a plaintiff for property taken. *See Williamson County*, 473 U.S. at 194–95, *overruled Knick*, 139 S. Ct. at 2172. Therefore, a failure to file a claim for compensation within the state limitations period was conclusive that there was no cognizable constitutional violation.

But even after *Knick*, a failure to file a takings claim in the district court within the timeframe of the state's statute of limitations bars relief, since claims brought under 42 U.S.C. § 1983 are subject to a state's statute of limitations for personal injury claims. *See Wilson v. Garcia*, 471 U.S. 261, 276 (1985). Seeking a variance from a land-use restriction beyond the deadline outlined in a city regulation or ordinance does not have the same consequence. Statutes of limitations, unlike local land-use ordinances, are not "subject to the decision[s] of a regulatory body invested with great discretion," to issue waivers or exemptions. *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 739 (1997). The only hope for a plaintiff who fails to commence an action within the period of the state's statute of limitations is that a future state legislative act will amend the statute and extend the limitations period. Whereas a plaintiff seeking a variance from a land-use ordinance after the deadline may petition a local board, possessed with great discretion, simply to consider his untimely request and grant him relief.

that a request for a variance or exemption to a land-use ordinance, made and denied after the administrative deadline for filing objections, cannot satisfy *Williamson County*'s requirement that "the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." *Id.* at 191.

Moreover, the very City ordinance that allows the majority to assume that any request to be excused from the lifetime lease requirement may not have been futile, despite all practical indications to the contrary, allows the Director of Public Works to "authorize exceptions to *any* of the substantive requirements" in the City Subdivision Code or regulations. *See* S.F. Subdivision Code § 1312(a) (emphasis added). Surely the same discretion that would have allowed the Director to excuse the Plaintiffs from the lifetime lease requirement would have also allowed the Director to treat the Plaintiffs' waiver requests as timely. At worst, it seems the Plaintiffs missed a deadline imposed by an ordinance that the City, through the Director of Public Works, had broad authority to waive. The City denied these requests for variances when they were made and has confirmed in the proceedings before us that there is nothing more that the Plaintiffs may now do to be excused from the lifetime lease requirement. By any common understanding of the word, the City's decision is final.

In sum, the Plaintiffs twice requested to be excused from the lifetime lease requirement. The City denied these requests in a final decision, and the Plaintiffs' takings claim is ripe for adjudication. The

majority ignores the Plaintiffs' requests for variances from the lifetime lease requirement because of when they were made, and elevates adherence to administrative procedure above the question of whether the City has reached a final decision. Because of this error in the majority's opinion, I respectfully dissent.

Filed 3/17/2020

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PEYMAN PAKDEL; SIMA CHEGINI, Plaintiffs-Appellants, v. CITY AND COUNTY OF SAN FRANCISCO; et al., Defendants-Appellees.	No. 17-17504 D.C. No. 3:17-cv-03638-RS MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Richard Seeborg, District Judge, Presiding

Argued and Submitted September 13, 2019
San Francisco, California

Before: GOULD, BEA, and FRIEDLAND, Circuit Judges.

Plaintiffs-Appellants ("Plaintiffs") challenge the City of San Francisco's Expedited Conversion Program ("ECP"), which allows property owners to

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

convert a tenancy-in-common property into a condominium property on the condition that they offer any existing tenants lifetime leases in units within the converted property. Plaintiffs allege that this "Lifetime Lease Requirement" effectuates an unreasonable seizure of their property in violation of the Fourth Amendment and abridges their constitutional right to privacy in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The district court held that these contentions failed to state a claim and thus dismissed them under Federal Rule of Civil Procedure 12(b)(6). Reviewing the district court's dismissal of Plaintiffs' claims de novo, *Gant v. County of Los Angeles*, 772 F.3d 608, 614 (9th Cir. 2014), we affirm.[1]

1. The district court did not err in dismissing with prejudice Plaintiffs' Fourth Amendment unreasonable seizure claim. There is no seizure of property when an individual "voluntarily transfer[s] any possessory interest he may have had in the [property]." *Maryland v. Macon*, 472 U.S. 463, 469 (1985); *see United States v. Sherwin*, 539 F.2d 1, 7 (9th Cir. 1976). Plaintiffs made the choice to offer their tenant a lifetime lease in exchange for the benefits of expedited condominium conversion under the ECP. That a preexisting private agreement between Plaintiffs and the other co-owners of their building obligated Plaintiffs to apply for conversion does not transform this voluntary exchange into a seizure by the City. The Fourth Amendment reaches only state action, *United States v. Jacobsen*, 466 U.S. 109, 113 (1984), and the City had no involvement in the

[1] We resolve Plaintiffs' other claims in a concurrently filed opinion.

formation of this agreement between the tenants in common, *see Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982).

2. Nor did the district court err in dismissing Plaintiffs' substantive due process and equal protection claims with prejudice. A regulation challenged as violating substantive due process or equal protection is reviewed for a rational basis so long as it does not implicate a suspect class or impinge on fundamental rights. *See Bowers v. Whitman*, 671 F.3d 905, 917 (9th Cir. 2012); *Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1234 (9th Cir. 1994). The Lifetime Lease Requirement does not implicate a suspect class. And Plaintiffs do not have a fundamental right under California's Ellis Act to exclude people from their home once it has been converted into a condominium. The Ellis Act prohibits the government from forcing property owners to offer accommodations for rent. Cal. Gov't Code § 7060(a). But the Ellis Act does not apply to condominiums. *See Valnes v. Santa Monica Rent Control Bd.*, 270 Cal. Rptr. 636, 638-39 (Ct. App. 1990). Nor does it apply, per its express terms, when the government is enforcing an "agreement by which an owner of residential real property has agreed to offer the accommodations for rent or lease in consideration for a direct financial contribution." Cal. Gov't Code § 7060.1(a). Here, Plaintiffs acknowledged in a written agreement with the City that they were offering their tenant a lifetime lease in consideration for the financial benefits of expedited condominium conversion. We thus review the Lifetime Lease Requirement for a rational basis.

The Lifetime Lease Requirement is rationally related to the legitimate government goal of preventing existing tenants from being displaced by widespread condominium conversions under the ECP. It therefore does not violate substantive due process or equal protection.

AFFIRMED.

Filed 11/20/2017

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

PEYMAN PAKDEL, et al., Plaintiffs, v. CITY AND COUNTY OF SAN FRANCISCO, et al., Defendants.	Case No. 17-cv-03638-RS **ORDER GRANTING MOTION TO DISMISS**

I. INTRODUCTION

Defendant City and County of San Francisco ("City") moves to dismiss this action brought by plaintiffs Peyman Pakdel and Sima Chegini. The City argues that this Court lacks jurisdiction to hear some or all of the claims set forth in the complaint, the complaint fails to state a claim for which relief can be granted, and some or all of the claims set forth in the complaint are not ripe for review. For the reasons explained below, plaintiffs' non-takings constitutional claims are dismissed for failure to state a claim and their state law claims are dismissed as procedurally barred. Because the remaining takings claims are not ripe, they are dismissed without prejudice.

II. BACKGROUND[1]

Plaintiffs are residents of Akron, Ohio. In 2009, they purchased a tenancy-in-common ("TIC") interest in a six-unit apartment building in San Francisco. Their TIC interest gave them ownership rights to a single unit in the building ("Unit"). Plaintiffs do not occupy the Unit, but instead rent it out to a residential tenant. They represent that they do not intend to use the Unit as their home until after they retire. At the time plaintiffs signed the TIC agreement, plaintiffs believed that if they entered and won the condominium conversion lottery they would be entitled to raise rents to market level under the Costa Hawkins Act. They also believed they had the option to perform an "Owner Move In" eviction under the S.F. Rent Ordinance, and to quit the rental business under the Ellis Act. The TIC agreement provides that plaintiffs agree to take all steps necessary to convert the building to condominiums and to share the expenses of such conversion equally with the other co-tenants.

In 2013, the City enacted Ordinance 117-13 ("Ordinance"), which put a moratorium on the condominium conversion lottery and created the Expedited Conversion Program, San Francisco Subdivision Code sections 1396.4, 1396.5 ("ECP"). As a condition of approval under the ECP, an applicant for conversion must offer a lifetime lease to any existing non-owning tenants. In 2015, plaintiffs and their fellow TIC owners sought and obtained permission under San Francisco law to subdivide

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[1] The factual background is based on the averments in the complaint, which must be taken as true for purposes of this motion.

their property from a TIC into six condominiums under the ECP. As a condition of conversion under the ECP, plaintiffs submitted to the San Francisco Department of Public Works lease documents relating to the Unit and an agreement with the City to offer a lifetime lease of the Unit to the tenant residing there at the time of conversion.

The condominium deeds for the building including the Unit were recorded on March 25, 2017. The plaintiffs' tenant in the Unit submitted an executed lifetime lease to the plaintiffs on or about May 5, 2017. On June 9, 2017, and June 13, 2017, plaintiffs requested that the City not require them to execute and record the lifetime lease under the Ordinance, or in the alternative to compensate them for transferring a lifetime lease interest in their property. The City refused both requests and indicated that failure to execute the lifetime lease would be a violation of the Ordinance and subject plaintiffs to enforcement action. Plaintiffs have not executed and recorded the lifetime lease but intend to do so by the Ordinance's March 2019 deadline unless the lifetime lease requirement is enjoined by this Court. On June 26, 2017, plaintiffs filed this action seeking that remedy.

III. LEGAL STANDARD

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). While "detailed factual allegations are not required," a complaint must have sufficient factual allegations to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 566 U.S. 662, 678 (2009) (citing *Bell Atlantic v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible "when the pleaded factual

content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* This standard asks for "more than a sheer possibility that a defendant acted unlawfully." *Id.* The determination is a context-specific task requiring the court "to draw on its judicial experience and common sense." *Id.* at 679.

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) challenges the court's subject matter jurisdiction over the asserted claims. It is the plaintiff's burden to prove jurisdiction at the time the action is commenced. *Tosco Corp. v. Communities for Better Environment*, 236 F.3d 495, 499 (9th Cir. 2001); *Morongo Band of Mission Indians v. Cal. State Bd. of Equalization*, 858 F.2d 1376, 1380 (9th Cir. 1988). A court considering a 12(b)(1) motion to dismiss is not limited to the pleadings, *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988), but may rely on extrinsic evidence to resolve factual disputes relating to jurisdiction. *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989). Once a challenge has been raised to the court's subject matter jurisdiction, the party opposing dismissal must "present affidavits or any other evidence necessary to satisfy its burden of establishing that the court, in fact, possesses subject matter jurisdiction." *St. Clair*, 880 F.2d at 201; *Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1039 n.2 (9th Cir. 2003).

A motion to dismiss a complaint under Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the claims alleged in the complaint. *See Parks Sch. of Bus., Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). Dismissal under Rule 12(b)(6) may be based on either the "lack of a cognizable legal

theory" or on "the absence of sufficient facts alleged under a cognizable legal theory." *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1014 (9th Cir. 2013). When evaluating such a motion, the Court must "accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party." *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005). When a plaintiff has failed to state a claim upon which relief can be granted, leave to amend should be granted unless "the complaint could not be saved by any amendment." *Gompper v. VISX, Inc.*, 298 F.3d 893, 898 (9th Cir. 2002) (citation and internal quotation marks omitted).

IV. DISCUSSION

A. Whether Plaintiffs' Takings Claims Are Ripe?

The City seeks dismissal of the first through fourth claims for relief, which each allege that San Francisco's application of the ECP to the Unit resulted in an unconstitutional taking of plaintiffs' property without compensation. According to the City, none of these claims is ripe and therefore the Court lacks jurisdiction to adjudicate any of them.

"The Fifth Amendment does not proscribe the taking of property, it proscribes taking without just compensation." *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985). The Fifth Amendment does not require "that just compensation be paid in advance of, or contemporaneously with, the taking; all that is required is that a 'reasonable, certain and adequate provision for obtaining compensation' exist at the time

of the taking." *Id.* Accordingly, where a state provides an adequate procedure, a property owner cannot make a claim for just compensation until he has used the procedure and been denied compensation. *Id.* at 173. There is no constitutional injury until plaintiffs have availed themselves of the state's procedures for obtaining compensation for the injury, and been denied compensation. *San Remo Hotel v. City and County of San Francisco*, 145 F.3d 1095, 1102 (9th Cir. 1998). Invoking *Williamson County,* the City asserts that plaintiffs' claims are not ripe because they did not file a state court judicial challenge to the ECP.

Plaintiffs respond that subsequent Supreme Court and Ninth Circuit decisions have clarified that *Williamson County* is a prudential standing rule, not a jurisdictional bar. *See Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prat.*, 560 U.S. 702 (2010) (finding that defendants had waived nonjurisdictional ripeness argument); *Horne v. Department of Agriculture*, 569 U.S 513, 133 S. Ct. 2053, 2062 (2013) (recognizing that the *Williamson County* inquiry "is not, strictly speaking, jurisdictional."); *Guggenheim v. City of Goleta*, 638 F.3d 1111 (9th Cir. 2010) (exercising discretion not to impose *Williamson County*'s prudential requirement). While plaintiffs correctly characterize *Williamson County* as establishing "prudential ripeness principles" rather than a jurisdictional bar, *see Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 733-34 (1997), the distinction is not critical here because, unlike the defendants in *Stop the Beach*, the City has not waived its ripeness argument. As-applied takings claims, such as those advanced in the complaint, require *Williamson County* exhaustion, and the authorities on which plaintiffs rely do not

stand for the proposition that their claims fall outside its prudential ripeness principles. In *Horne*, the Supreme Court declined to find that the petitioner's claim was not ripe on the grounds that there was no alternative remedy. *See* 133 S. Ct. at 2055 ("The Government argues that petitioners' takings claim is premature because the Tucker Act affords a remedy, but, in fact, the AMAA provides a comprehensive remedial scheme that withdraws Tucker Act jurisdiction over a handler's takings claim. As a result, there is no alternative remedy."). Plaintiffs here do not claim that a state court judicial remedy is similarly unavailable. In *Guggenheim*, the Ninth Circuit declined to impose the prudential state court exhaustion requirement because it rejected the plaintiff's claim on the merits and because the parties had already litigated in state court. No such factors counsel deviation from *Williamson County*'s requirements here.

Still, plaintiffs advance several arguments against application of *Williamson County*. First, plaintiffs assert that the Ordinance's poison pill provision, which halts the conversion process for non-resident TIC owners upon the filing of a lawsuit challenging the Ordinance, applies equally whether the suit is filed in state or federal court. They do not, however, explain how this fact relates to the advisability of deferring to state court jurisdiction as a prudential matter.

Second, plaintiffs argue that because their first claim for relief alleges a private taking, that claim is exempt from the *Williamson County* ripeness doctrine. Because a "private taking" is in essence an illegal government action that cannot be justified with

any amount of compensation, such a claim becomes ripe regardless of whether the plaintiff has sought compensation. *See Armendariz v. Penman*, 75 F.3d 1311, n.5 (9th Cir. 1996). That being said, at least one Ninth Circuit decision has rejected the characterization of claims as "private takings," and dismissed such claims as merely part of a standard regulatory takings claim. *See Rancho de Calistoga v. City of Calistoga*, 800 F.3d 1083, 1093 (9th Cir. 2015). The Ninth Circuit's holding is instructive in this case, as it is unclear how plaintiffs can state on the face of their complaint that the Ordinance violates the Public Use Clause of the Fifth Amendment. In *Kelo v. City of New London*, the Supreme Court interpreted the Fifth Amendment's "public use" requirement broadly, and asked only whether the government's exercise of eminent power served a "public purpose." *See* 545 U.S. 469, 480 (2005). This approach reflects the judiciary's "longstanding policy of deference to legislative judgments in this field." *Id.* Plaintiffs' view that the lifetime lease requirement has no conceivable public purpose is plainly contradicted by the Ordinance's text, which articulates a government purpose of controlling displacement of renters into an expensive rental market. To look beyond the plain language of the Ordinance's stated purpose would entail an unwarranted second-guess of the policy decisions of San Francisco's elected officials. Therefore, plaintiffs' "private taking" claim must be construed as an element of the regulatory takings claim, which is subject to the ripeness requirement.

Finally, plaintiffs argue that *Williamson County* does not apply to facial takings claims seeking only injunctive or declaratory relief *See Levin v. City and County of San Francisco*, 71 F. Supp. 3d 1072, 1079

(N.D. Cal. 2014). Accordingly, plaintiffs reason that claim 10, which seeks declaratory relief for constitutional violations alleged in the complaint, and claim 11, which seeks corresponding injunctive relief, cannot be dismissed on ripeness grounds. As a technical matter, those are not "separate claims" for pleading purposes, but rather requests for alternative forms of relief. Plaintiffs styled their first through fourth claims for relief as "as-applied" takings claims, and the thrust of their complaint is that a particular provision of the Ordinance has effected an unconstitutional taking of their property. Thus, it is not clear from the face of the complaint that plaintiffs are bringing a facial challenge to the Ordinance. In any case, plaintiffs believe they have incurred a $500,000 loss in property value as a result of the lifetime lease provision, which suggests that damages is a central aspect of their claim, even if it may not be their preferred remedy.

In short, plaintiffs' takings claims are properly characterized as as-applied challenges and subject to the *Williamson County* ripeness requirements. Because plaintiffs have not sought compensation for the alleged taking of their property through a state court inverse condemnation proceeding, they have not exhausted state remedies and their takings claims must be dismissed, without prejudice.[2]

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[2] The City asserts that because plaintiffs' state law claims are procedurally barred for reasons discussed in greater detail below, dismissal of plaintiffs' takings claims with prejudice is warranted. Although the Ninth Circuit has yet to address this particular scenario, at least three circuits have concluded that dismissal is appropriate under similar circumstances. *See Holliday Amusement Co. of Charleston, Inc. v. South Carolina*, 493 F.3d 404, 408 (4th Cir. 2007); *Pascoag Reservoir & Dam, LLC*

B. Whether Plaintiffs' Section 1983 Claims Are Precluded?

The City also argues that plaintiffs' remaining Section 1983 claims are each precluded by their failure to seek writ relief in state court. Under the "full faith and credit" provision of 28 U.S.C. § 1738, state administrative proceedings are given the same preclusive effect as state court judicial proceedings if they possess the "requisite judicial character." *See White v. City of Pasadena*, 671 F.3d 918, 927 (9th Cir. 2012). The City argues that San Francisco's approval of the Tentative Map was an adjudicative decision by an administrative agency, *Arnel Development Co. v. City of Costa Mesa*, 28 Cal. 3d 511, 518 (1980), and therefore plaintiffs' failure to seek review through an administrative writ precludes federal court review of their Section 1983 claims. In determining the preclusive effect of a state administrative decision or a state court judgment, federal courts look to the state's rules of preclusion. *See White*, 671 F.3d at 926. *White* sets out several factors that a court considers in deciding whether a state agency is acting in a judicial capacity:

> (1) the administrative hearing was conducted in a judicial-like adversary proceeding; (2) the proceeding required witnesses to testify under oath; (3) the

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v. Rhode Island, 337 F.3d 87, 94 (1st Cir. 2003); *Harbours Pointe of Nashotah, LLC v. Vill. of Nashotah*, 278 F.3d 701, 706 (7th Cir. 2002). While the state law claims asserted in the complaint may be procedurally barred, it is not clear from the face of the complaint that those procedural hurdles necessarily preclude plaintiffs from seeking compensation on their takings theory in state court. Therefore, dismissal without prejudice is appropriate.

> agency determination involved the adjudicatory application of rules to a single set of facts; (4) the proceedings were conducted before an impartial hearing officer; (5) the parties had the right to subpoena witnesses and present documentary evidence; and (6) the administrative agency maintained a verbatim record of the proceedings.

Id. at 928.

The City contends that California courts have weighed these factors and concluded that the City's subdivision decision became *res judicata* when plaintiffs failed to appeal the Tentative Map decision, and its preclusive effect now bars any collateral challenge. None of the authorities relied upon by the City, however, cast light on whether Tentative Map approval was quasi-judicial in character. *Mola Development Co. v. City of Seal Beach*, 57 Cal. App. 4th 405 (1997), assumed that the defendants' disapproval of a tentative map was quasi-judicial without explaining its reasoning, whereas *Miller v. County of Santa Cruz*, 39 F.3d 1030 (9th Cir. 1994), merely stated that an administrative decision may have preclusive effect without satisfying every provision of the California APA. The City's only authority that explicitly discusses the *White* factors similarly fails to support its position. *See McQuiston v. City of Los Angeles*, 564 Fed. App'x 303 (9th Cir. 2014). In that case, the administrative proceeding in question involved fact development through the taking of testimony and admission of evidence, clearly satisfying the *White* elements. *Id.* at 307-08. By contrast, nothing in plaintiffs' complaint suggests that

the Tentative Map approval decision satisfied any of the elements of a quasi-judicial proceeding. Therefore, plaintiffs' Section 1983 claims are not subject to dismissal on grounds of preclusion.

C. Whether Plaintiffs Fail to State a Claim Under 42 U.S.C. § 1983?

To state a claim under Section 1983, a plaintiff must show that defendants, acting under color of state law, deprived him or her of federal rights, privileges, or immunities, and caused damages. *See Thornton v. City of St. Helens*, 425 F.3d 1158, 1164 (9th Cir. 2005). Because Section 1983 is not itself a source of substantive rights, plaintiffs must establish that the City's alleged actions deprived them of some right, privilege, or immunity protected by the Constitution or the laws of the United States.

1. Equal Protection

The City argues that plaintiffs fail to state a claim under the Equal Protection Clause of the Fourteenth Amendment because they have not alleged membership in a protected class and do not seek protection of a fundamental right. As a general rule, unless a classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification further a legitimate state interest. *See, e.g.*, *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439-41 (1985); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

Here, plaintiffs do not claim to belong to a suspect class. Rather, they contend that the lifetime lease

requirement infringes upon the fundamental right to privacy in the use of their home. *See Tom v. City & Cty of San Francisco*, 120 Cal. App. 4th 674, 686 (2004) ("We agree with the trial court that there is an 'autonomy privacy' interest in choosing the persons with whom a person will reside, and in excluding others from one's private residence."). This argument is unavailing for the principal reason that plaintiffs have already in some sense opened their home to the possession and use by their existing tenant. *Tom* involved a challenge to an ordinance that prohibited TIC owners from executing agreements that gave each owner exclusive access to their own unit. The court in that case held that the ordinance violated the plaintiffs' privacy interest in choosing persons with whom they reside. This case is different. Here, what plaintiffs seek is the ability to remove an existing tenant from their home at whichever point in time they desire to occupy the home. Although plaintiffs may feel they should be entitled to pursue that course, it is not a fundamental right in the constitutional sense. Because the lifetime lease requirement does not implicate a fundamental right, plaintiffs do not state a claim subject to strict scrutiny.

Under the more deferential rational basis review, the City argues that the constitutionality of the lifetime lease requirement is presumed unless plaintiffs can show that the City's disparate treatment of TIC owners with existing tenants has no rational relationship to a legitimate state interest. Rational basis review in Equal Protection analysis "is not a license for courts to judge the wisdom, fairness, or logic of legislative decisions." *Heller v. Doe*, 509 U.S. 312, 319 (1993). The City's objectives in imposing the lifetime lease requirement are expressly articulated

in the Ordinance and pass rational basis review. Mindful that permitting large-scale conversion of apartments into condominiums could result in widespread displacement of existing tenants, the Ordinance sought to balance this impact by requiring that applicants for the ECP offer existing tenants a lifetime lease. This requirement is not applied to TIC owners without existing tenants because conversion of their units to condominiums is not projected to result in displacement. While reasonable minds may question the Board of Supervisors' reasoning in making this distinction, plaintiffs have alleged no facts warranting a second-guess of that legislative decision. Accordingly, plaintiffs' seventh claim for relief under the Equal Protection Clause must also be dismissed.

2. Due Process

As explained above, plaintiffs fail to show that the lifetime lease requirement infringes upon a fundamental right. Because plaintiffs also cannot show that the lifetime lease requirement is devoid of a legitimate government purpose, their substantive due process claim fails as well. The bar for demonstrating governmental arbitrariness is high, requiring an "abuse of power lacking any reasonable justification in the service of a legitimate governmental objective." *Shanks v. Dressel*, 540 F.3d 1082, 1088 (9th Cir. 2008) (internal quotations omitted). Plaintiffs have alleged no governmental conduct that gives rise to a constitutional violation. Therefore, plaintiffs' sixth claim for relief is also dismissed.

3. Unreasonable Seizure

The City seeks dismissal of plaintiffs' fifth claim for relief, which asserts that the lifetime lease requirement amounts to an unreasonable seizure in violation of the Fourth Amendment to the United States Constitution. Under the Fourth Amendment, a seizure occurs when "there is some meaningful interference with an individual's possessory interests" in the property seized. *Maryland v. Macon*, 472 U.S. 463, 469 (1985). According to the City, plaintiffs were not compelled by the government to convert their TIC into condominiums. Once they voluntarily chose to do so, they accepted a valuable property right from the City in exchange for offering a lifetime lease to their existing tenant. The nature of this exchange is not a "seizure" for purposes of the Fourth Amendment. *Maryland v. Macon*, 472 U.S. at 469.

Plaintiffs not surprisingly disagree, arguing that their contractual obligation to take all steps necessary to convert their TIC into condominiums rendered the lifetime lease offer "involuntary". They allege that the TIC agreement they signed bound them to participate in condominium conversion. When the other TIC co-owners applied for condominium conversion, plaintiffs assert they were contractually required to cooperate or compensate their co-tenants for potentially significant damages. After conversion was complete, plaintiffs requested that the City not enforce the execution of the lifetime lease offer they had extended as a condition of condominium conversion. Because the City refused to release them from this obligation, plaintiffs believe they did not voluntarily consent to the seizure of their property within the meaning of the Fourth Amendment.

Although events outside of their control may have frustrated plaintiffs' expectations with respect to future use of the Unit they purchased in 2009, they fail to identify any basis for alleging that the City was responsible for coercing them into doing anything. That the TIC agreement compelled plaintiffs to make concessions they found disagreeable is a risk that all tenants-in-common bear when entering into that type of legal relationship. A subsequent change in the law that affected plaintiffs' obligations under the TIC agreement might have been cause for plaintiffs to contest the TIC agreement itself, but the City did not force plaintiffs to initiate the ECP application process. Because plaintiffs extended the lifetime lease offer in order to obtain a property right granted by the City, they do not allege an involuntary seizure within the meaning of the Fourth Amendment. Therefore, plaintiffs' fifth claim for relief must be dismissed.

D. Whether Plaintiffs' State Law Claims Are Procedurally Barred?

1. Statute of Limitations

The City asserts that each of plaintiffs' state law claims is time-barred under California Government Code Section 66499.37. Section 66499.37 states:

> Any action or proceeding to attack, review, set aside, void, or annul the decision of an advisory agency, appeal board, or legislative body concerning a subdivision, or of any of the proceedings, acts, or determinations taken, done, or made prior to the decision, or to determine the reasonableness, legality, or validity of any condition attached thereto, including, but not limited to, the approval of

> a tentative map or final map, shall not be maintained by any person unless the action or proceeding is commenced and service of summons effected within 90 days after the date of the decision.

The 90-day limitations period is expressly applicable to any action "to determine the reasonableness, legality, or validity" of any subdivision condition "including, but not limited to, the approval of a tentative map or final map . . . ." *Aiuto v. City and County of San Francisco*, 201 Cal. App. 4th 1347, 1357 (2011). The limitations period to challenge a condition of approval of the Tentative Map begins to run from the time the City issues its Tentative Map decision. *See, e.g.*, *Griffis v. County of Mono,* 163 Cal. App. 3d 414, 423 (1985). Accordingly, the City argues that plaintiffs were required to bring a mandamus action challenging the conditions of approval no later than 90 days after the date of approval of the Tentative Map – in April 2016. Because this lawsuit was not filed until June 26, 2017, the City insists plaintiffs' claims are barred by the statute of limitations.

Plaintiffs disagree with the City's view of when the limitations period began to run. They argue that they could not have challenged the City's decision in April 2016 because the condition placed on the Tentative Map approval required them only to extend a lifetime lease *offer* to their tenant. Until the tenant accepted, they reason, there was no basis to challenge the City's decision as an unconstitutional taking. Instead, they propose that the clock started on either (1) the date the tenant signed the lifetime lease form; or (2) the date the City denied relief from the unfair taking. In other words, according to plaintiffs, they

could not have challenged the City's decision until a takings claim had ripened, which was either when the tenant signed the lifetime lease offer, which established the amount of compensation to which plaintiffs believed they were entitled, or when the City denied relief from the allegedly improper taking by refusing to exempt plaintiffs from the lifetime lease or to pay compensation. Because the dates of these events were May 5, 2017, and June 2017, respectively, plaintiffs contend that their lawsuit is timely.

The City appears to have the better of the argument. Plaintiffs cite no authority supporting their view that the decision referenced in Section 66499.37 refers to any date other than when the relevant condition is placed on approval of a tentative plan. Furthermore, the ripeness of plaintiffs' takings claims, which are brought under federal law, is irrelevant to the question of when the statute of limitations began to run on their state law claims. Plaintiffs have given no indication that their challenges to the Ordinance under the Ellis Act and Costa Hawkins Act, and under the California Constitution, could not have been brought within the 90-day limitations period following Tentative Map approval. Accordingly, the eighth and ninth claims for relief are time-barred and will be dismissed.

2. Forfeiture

The City also argues that plaintiffs forfeited their state law claims by accepting the significant benefits of the Tentative and Final Subdivision Maps when they converted the Unit from a TIC to a condominium. "In the land use context, a landowner may not challenge a permit condition if he has acquiesced to it either by specific agreement, or by failure to challenge

the condition while accepting the benefits afforded by the permit." *Lynch v. California Coastal Commission*, 3 Cal. 5th 470 (2017). In the City's view, because plaintiffs completed the conversion into condominiums and realized its associated financial advantages (such as an increase in the value of the property and ability to sell, lease, and finance the Unit separately from the other units in the property), they forfeited the right to seek a judicial determination on their objections to the conditions of Tentative Map approval.

Plaintiffs argue that the Mitigation Fee Act creates an exception to the forfeiture rule, allowing landowners to comply with an improper condition under protest if that condition is related to a possessory interest in the property. Government Code § 66000 *et seq.*, *Sterling Park LP v. City of Palo Alto*, 57 Cal. 4th 1193, 1206-1207 (2013). That may be so, but plaintiffs have alleged no facts showing that the Mitigation Fee Act, rather than Section 66499.37, is applicable here. Plaintiffs are not developers seeking to challenge "fees, dedications, reservations, or other exactions imposed on a development project." Government Code § 66020. Because nothing in the complaint reflects that the Mitigation Fee Act governs this case, plaintiffs must comply with the general requirements of Section 66499.37. Plaintiffs also argue, without citation to authority, that the forfeiture doctrine in *Lynch* only applies to *discretionary* conditions placed on government approval. Because the lifetime lease offer is a mandatory requirement for approval under the ECP, plaintiffs believe *Lynch* is inapplicable to the facts of this case. Unfortunately for plaintiffs, nothing in

Lynch itself suggests that its holding is limited by the nature of conditions attached to land use permits.

The facts of *Lynch* do appear to be analogous to this case in important respects. There, beachfront homeowners sought to obtain a permit to build a seawall. While litigation over certain conditions attached to the seawall permit was pending, the homeowners satisfied the permit's other conditions and built the seawall. The Supreme Court of California subsequently held that the homeowners, by accepting the benefits of the permit, had forfeited the right to challenge conditions attached to it. Because plaintiffs have successfully converted their property from a TIC into a condominium under the ECP, they have arguably accepted the projected benefits of the conversion and therefore forfeited the right to challenge a condition of conversion. That the actual value of conversion may have been affected by the condition does not necessarily impact the analysis. The homeowners in *Lynch* challenged a condition that placed a 20-year expiration on the seawall's permit, which likely reduced the projected benefit of the seawall to the homeowners. Nonetheless, once the seawall was built, the homeowners were held to have accepted the benefits of the seawall permit. Accordingly, because plaintiffs did not sue until condominium conversion was complete, they forfeited the right to challenge conditions attached to conversion approval. The eighth and ninth claims for relief are dismissed for that reason.[3]

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[3] The City also contends that similar principles can be applied to plaintiffs' federal claims under federal law, which the City believes are equitably estopped. *See Kaneb Services, Inc. v. Federal Sav. And Loan Ins. Corp.*, 650 F.2d 78, 81 (C.A.5, 1981).

3. Exhaustion

The City asserts that plaintiffs' failure to bring timely administrative and judicial challenges to the Tentative Map approval also bars their state law claims under the doctrines of exhaustion of administrative remedies and *res judicata.* In order to bring a judicial challenge to a decision of an administrative agency, a party must demonstrate that it has exhausted all available administrative procedures, including all available appeals of the agency's decision. *See Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd.*, 35 Cal. 4th 1072, 1080 (2005). Furthermore, a party who does not seek timely judicial review of an administrative decision is precluded from later litigating the issue, under the doctrines of *res judicata* and collateral estoppel. *See Johnson v. City of Loma Linda*, 24 Cal. 4th at 70; *City and County of San Francisco v. Ang*, 97 Cal. App. 3d at 677-79. Therefore, because plaintiffs cannot demonstrate that they appealed the conditions of the Tentative Map approval to the Board of Supervisors as required by the San Francisco Subdivision Code, *see* S.F. Subd. § 1314, the City argues, they cannot now challenge those conditions.

As articulated in their objections to the City's statute of limitations argument, discussed in Part IV.C.1, plaintiffs respond that exhaustion is not required because their takings claims did not ripen within the limitations period for raising

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The single case relied upon by the City is not instructive on this matter. Therefore, the City's forfeiture arguments will be construed as applying only to plaintiffs' state law claims, which are forfeited under California law.

administrative and judicial challenges to the lifetime lease requirement. Once again, it is unclear why the ripeness analysis of plaintiffs' federal takings claims are dispositive with respect to exhaustion of their state law claims. Because there is no indication that those state law claims would not have ripened within the limitations period, the eighth and ninth claims for relief are dismissed for failure to exhaust administrative remedies.

V. CONCLUSION[4]

In summary, claims for relief 5 through 7 are dismissed for failure to state a claim for which relief can be granted. Claims for relief 8 and 9 are dismissed as procedurally barred by the statute of limitations, forfeiture, and the doctrine of administrative exhaustion. Because the defects in these claims

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[4] In the event plaintiffs' claims are not dismissed with prejudice, the City asks this Court to abstain from entertaining this action under the *Pullman* doctrine. The *Pullman* doctrine is an equitable doctrine that allows a federal court to avoid deciding federal constitutional questions where resolution of state law issues could obviate the need for a ruling under federal law, and the state law issues would be more properly decided by a state court. *See Railroad Commission of Tex. v. Pullman Co.*, 312 U.S. 496 (1941); *San Remo Hotel*, 145 F.3d 1095, 1104 (9th Cir. 1998). While a close question, *Pullman* abstention is not warranted in this case, particularly where there is no indication that a legal challenge is already in place for adjudication in state court. This is not a case involving a complicated state administrative or regulatory scheme that a federal court is poorly situated to evaluate. Plaintiffs challenge only the lifetime lease requirement aspect of the ECP scheme, and their complaint does not present legal and factual issues so complex that it is beyond the power of a federal court to adjudicate. Because the City has not provided adequate grounds for this Court to refrain from the deciding the issues of this case, the complaint will not be dismissed on abstention grounds.

cannot be cured by amendment, dismissal is without leave to amend.

Claims for relief 1 through 4 are dismissed as not ripe. Dismissal is without prejudice, as plaintiffs are not precluded from seeking compensation for their alleged takings in state court.

Claims for relief 10 through 12 are construed as requests for alternative forms of relief, as opposed to free-standing claims, and are dismissed in accordance with the underlying claims for relief articulated in the complaint.

IT IS SO ORDERED.

Dated: November 20, 2017

s/ Richard Seeborg
RICHARD SEEBORG
United States District Judge

Filed 10/19/2020

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PEYMAN PAKDEL; SIMA CHEGINI, Plaintiffs-Appellants, v. CITY AND COUNTY OF SAN FRANCISCO; et al., Defendants-Appellees.	No. 17-17504 D.C. No. 3:17-cv-03638-RS Northern District of California, San Francisco ORDER

Before: GOULD, BEA, and FRIEDLAND, Circuit Judges.

Appellants' motion to stay issuance of the mandate pending the filing of a petition for a writ of certiorari is granted. Fed. R. App. P. 41(d). The mandate is stayed for 150 days pending the filing of a petition for a writ of certiorari in the Supreme Court. If a petition for a writ of certiorari is filed before the stay expires, the stay shall continue until final disposition of the matter by the Supreme Court. While the mandate remains stayed, Appellants shall immediately inform this Court when Appellants have either filed, or decided not to file, a petition for writ of certiorari.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PEYMAN PAKDEL; SIMA CHEGINI, *Plaintiffs-Appellants*, v. CITY AND COUNTY OF SAN FRANCISCO; SAN FRANCISCO BOARD OF SUPERVISORS; SAN FRANCISCO DEPARTMENT OF PUBLIC WORKS, *Defendants-Appellees*.	No. 17-17504 D.C. No. 3:17-cv-03638-RS ORDER

Filed October 13, 2020

Before: Ronald M. Gould, Carlos T. Bea, and Michelle T. Friedland, Circuit Judges.

Order;
Dissent by Judge Collins

SUMMARY*

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* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Civil Rights

The panel denied on behalf of the court a petition for rehearing en banc in an action brought pursuant to 42 U.S.C. § 1983 against the City and County of San Francisco asserting a Takings Clause challenge to the City's Expedited Conversion Program, which allows property owners to convert their tenancy-in-common properties into condominium properties on the condition that the owners agree to offer any existing tenants lifetime leases in units within the converted property.

Dissenting from the denial of rehearing en banc, Judge Collins, joined by Judges Callahan, M. Smith, Ikuta, R. Nelson, Bade, Bress, Bumatay, and VanDyke, stated that the panel's unprecedented decision sharply departed from settled law and directly contravened the Supreme Court's decision in *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019), which held that a plaintiff asserting a Takings Clause claim under § 1983 is not required to exhaust state remedies.

COUNSEL

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Kristen A. Jensen (argued) and Christopher T. Tom, Deputy City Attorneys; Dennis J. Herrera, City Attorney; Office of the City Attorney, San Francisco, California; for Defendants-Appellees.

Sarah Harbison, Pelican Institute for Public Policy, New Orleans, Louisiana; for Amicus Curiae Pelican Institute for Public Policy.

Kimberly S. Hermann, Southeastern Legal Foundation, Roswell, Georgia; for Amici Curiae Southeastern Legal Foundation, National Federation of Independent Business Small Business Legal Center, and Beacon Center of Tennessee.

ORDER

Judge Gould and Judge Friedland have voted to deny the petition for rehearing en banc. Judge Bea has voted to grant the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc. A judge of the court requested a vote on en banc rehearing. The matter failed to receive a majority of votes of non-recused active judges in favor of en banc consideration. Fed. R. App. P. 35(f).

The petition for rehearing en banc is **DENIED**. Judge Collins's dissent from the denial of en banc rehearing is filed concurrently herewith.

COLLINS, Circuit Judge, with whom CALLAHAN, M. SMITH, IKUTA, R. NELSON, BADE, BRESS, BUMATAY, and VANDYKE, Circuit Judges, join, dissenting from the denial of rehearing en banc:

Less than one year after the Supreme Court squarely held that a plaintiff asserting a Takings Clause claim under § 1983 is not required to exhaust state remedies, *see Knick v. Township of Scott*, 139 S. Ct. 2162, 2167 (2019), the panel majority in this case effectively imposed such a requirement by holding

that a plaintiff who commits a procedural default during the local administrative process forfeits any right to thereafter assert a takings claim. Because the panel's unprecedented decision sharply departs from settled law and directly contravenes the Supreme Court's decision in *Knick*, I respectfully dissent from our denial of rehearing en banc.

I

Prior to 2013, the City and County of San Francisco ("City") had a program whereby the multiple property owners who hold interests in multi-unit properties as tenants in common could convert their jointly owned buildings to individually owned condominiums. *Pakdel v. City & Cnty. of San Francisco*, 952 F.3d 1157, 1161 (9th Cir. 2020). Conversion rights were granted based on an annual lottery, and demand for conversion far outstripped the program's limited allotment. *Id.* In 2013, in an attempt to clear the backlog of conversion applications, the City replaced the conversion lottery with the Expedited Conversion Program ("ECP"). *Id.* The ECP allows all owners to convert their properties to condominiums, subject to an application fee and certain conditions, among which was the requirement that, if an owner was renting his or her unit to a tenant, the owner had to offer that tenant a lifetime lease—*i.e.*, the "Lifetime Lease Requirement." *Id.* An owner who offered a lifetime lease to a tenant received a partial refund of the ECP application fee. *Id.* The City's program notably contained a program-wide poison pill: any legal challenge to the Lifetime Lease Requirement would trigger a suspension of the *entire* ECP for all owners of tenant-occupied units for the duration of the litigation. *Id.* at 1162.

Peyman Pakdel and Sima Chegini ("Plaintiffs") purchased an interest in a tenancy-in-common property in San Francisco in 2009. 952 F.3d at 1161. The couple had hoped to move into their unit of the building when they retired. *Id.* In the meantime, they rented their unit to a tenant. *Id.* Plaintiffs' "Tenancy in Common Agreement" obligated them to cooperate with the other owners by taking all steps necessary to convert their building to condominiums. At the time Plaintiffs purchased their interest and executed the Tenancy in Common Agreement, the City was still operating the conversion lottery, under which there was no Lifetime Lease Requirement.

In 2015, pursuant to their contractual obligations, Plaintiffs—along with the other joint owners of their building—submitted an ECP application to the San Francisco Department of Public Works ("the Department"). 952 F.3d at 1161. In January 2016, after a public hearing, the Department approved their "tentative conversion map." *Id.* Subsequently, Plaintiffs signed an agreement with the City to offer a lifetime lease to their tenant and then did offer their tenant such a lease. *Id.* at 1161–62. Because they had done so, the couple received a partial refund of their application fee. *Id.* at 1162. In December 2016, the Department approved their "final conversion map." *Id.*

Instead of executing the lease, however, Plaintiffs twice requested, on June 9 and 13, 2017, that the City grant them an exemption from the Lifetime Lease Requirement or else compensate them for offering the lease. 952 F.3d at 1162. As the panel majority notes, "the City refused both requests." *Id.* Plaintiffs then sued in federal court under Revised Statutes § 1979,

42 U.S.C. § 1983, claiming, *inter alia*, that the City had taken their property without just compensation, in violation of the Fifth Amendment's Takings Clause. The district court granted the City's motion to dismiss, finding that Plaintiffs' suit was not ripe because they had not sought compensation for the alleged taking in state court, as required under the Supreme Court's decision in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). *See Pakdel v. City & Cnty. of San Francisco*, 2017 WL 6403074, at *4 (N.D. Cal. Nov. 20, 2017).

While the district court's order was on appeal before this court, the Supreme Court issued its decision in *Knick*, which overruled the portion of *Williamson County* on which the district court had relied. Specifically, the Court eliminated the requirement that § 1983 takings plaintiffs must first seek compensation in state court. 139 S. Ct. at 2169–70. As the Court explained, this aspect of "*Williamson County* effectively established an exhaustion requirement for § 1983 takings claims," contrary to the "'general rule'" governing all other "constitutional claims under § 1983." *Id.* at 2172–73.

Rather than remand the case, however, the panel majority affirmed the district court's decision on the alternative ground that Plaintiffs failed to meet *Williamson County*'s separate "ripeness" requirement that Plaintiffs secure a "final decision" from the relevant decisionmaker. *Pakdel*, 952 F.3d at 1163. The majority reached this conclusion even though there are concededly no further avenues of administrative relief open to Plaintiffs to avoid the City's definitive imposition of the Lifetime Lease Requirement on

Plaintiffs' unit. In the majority's view, the City's now-unalterable decision to extract a lifetime lease from Plaintiffs should nonetheless be *deemed* to be non-final for takings purposes because Plaintiffs "bypassed" *previously* available administrative procedures that might have avoided the lease. *Id.* at 1167.

Judge Bea dissented, concluding that "the City here has indeed reached . . . a final decision," and that *Williamson County* required nothing more. 952 F.3d at 1170. Judge Bea noted that, by making the finality of the City's decision turn on whether Plaintiffs had committed a procedural default during the administrative process, "rather than simply evaluating whether a decision about the application of a regulation is final," the majority's approach had departed from *Williamson County* and had effectively "'establish[ed] an exhaustion requirement for § 1983 takings claims,' something the law does not allow." *Id.*

II

The Supreme Court has long held that suits under § 1983 are not subject to exhaustion. *See Knick*, 139 S. Ct. at 2167 ("[T]he settled rule is that exhaustion of state remedies is *not* a prerequisite to an action under 42 U.S.C. § 1983." (simplified)); *see also Patsy v. Board of Regents*, 457 U.S. 496, 504 (1982) (§ 1983 provides "immediate access to the federal courts"). In *Knick*, the Supreme Court affirmed that takings claims are no exception and that exhaustion of state remedies is not required for such claims—indeed, that point was one of the bases on which the Supreme Court rested its partial overruling of *Williamson County*. The Court held that, in requiring property owners to first pursue just compensation in state court, *Williamson County*

had "effectively established an exhaustion requirement for § 1983 takings claims" and that, had *Williamson County* expressed its holding "in those terms[,] . . . its error would have been clear." 139 S. Ct. at 2173. Thus, under *Knick*, exhaustion of state remedies is not required for § 1983 takings claims.

Knick left undisturbed *Williamson County*'s second holding, which is that, before bringing a takings claim, a property owner must obtain a "final decision regarding the application of the regulations to the property at issue." *See Williamson Cnty.*, 473 U.S. at 186. This ripeness requirement is driven by the "very nature" of the Takings Clause inquiry, which depends on fact-intensive considerations that "simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." *Id.* at 190–91. Thus, in order to ensure that a local land-use authority, such as a zoning board, has arrived at a definitive position regarding a specific dispute, a property owner must invoke available administrative procedures, including seeking exemptions from otherwise applicable requirements. *Id.* at 188. In the absence of such a definitive application of the regulations to the property at issue, the federal court would be "unable to discern how a grant of a variance . . . would have affected the profitability of the development," thereby rendering the takings inquiry "impossible." *Id.* at 191; *see also Southern Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 504 (9th Cir. 1990) ("It is precisely this type of speculation that the ripeness doctrine is intended to avoid.").

The Court in *Williamson County*, however, carefully distinguished this finality requirement from an exhaustion requirement, noting that the "question whether administrative remedies must be exhausted is conceptually distinct . . . from the question whether an administrative action must be final before it is judicially reviewable." 473 U.S. at 192. The purpose of a finality requirement, the Court explained, is simply to ensure that "the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury," whereas an exhaustion requirement focuses on whether the claimant has complied with "administrative and judicial procedures" for seeking relief. *Id.* at 193.

Under the facts of this case, the application of *Williamson County*'s finality requirement is straightforward. The City has definitively imposed the Lifetime Lease Requirement on Plaintiffs' property, and there is no further avenue open to them under local law to avoid that. Indeed, Plaintiffs twice requested an exemption from the requirement, and the City rejected both requests. Neither the City nor the panel majority contend that any route of administrative appeal remains available to Plaintiffs. There is therefore no danger that a federal court would have to speculate as to how the City would apply the Lifetime Lease Requirement here. The City's decision is final, the Lifetime Lease Requirement applies, and Plaintiffs' suit is ripe. The panel therefore should have remanded the case to the district court for consideration of the merits of Plaintiffs' claim.[1]

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[1] I express no view as to whether Plaintiffs' takings claim has any merit.

III

The panel majority nonetheless holds that, because Plaintiffs *previously* "could have sought an exemption" from the City and failed to do so, the City's now-unalterable imposition of the Lifetime Lease Requirement is deemed to be forever "unripe" for review. 952 F.3d at 1163, 1165. The majority reaches this conclusion even though it concedes that, as matters now stand, there are no longer any administrative procedures available to Plaintiffs to forestall the challenged action of the City. *Id.* at 1167–68. The panel majority's decision thus saddles Plaintiffs with a plainly final decision that will nonetheless be *deemed* (forever) to be "non-final" for takings purposes simply because, earlier during the administrative process, Plaintiffs failed to pursue possible administrative measures that the City now denies to them. This is not the finality requirement described in *Williamson County* and it bears no relation to any conventional notion of "ripeness" doctrine. On the contrary, it is an exhaustion requirement pure and simple, backed up (as exhaustion requirements are) by procedural-default rules. The panel has thus defied Supreme Court authority by converting *Williamson County*'s finality requirement into precisely the sort of exhaustion requirement disavowed in that case and explicitly rejected as a "clear" error in *Knick*.

We know that the panel majority's rule is an "exhaustion" requirement, because the Supreme Court has told us that it is: under familiar principles of administrative law governing exhaustion, a plaintiff "must complete the administrative review process in accordance with the applicable procedural

rules, including deadlines, as a *precondition* to bringing suit in federal court." *Woodford v. Ngo*, 548 U.S. 81, 88 (2006) (emphasis added); *see also id.* at 90.[2] As the *Woodford* Court noted, the concept of "proper exhaustion" in the administrative-law context is analogous to the exhaustion requirement in habeas law, where "the sanction for failing to exhaust properly (preclusion of review in federal court) is given the separate name of procedural default." *Id.* at 92. Under that procedural-default doctrine, a prisoner must "comply with the deadline for seeking state-court review" of federal claims or else be "barred from asserting those claims in a federal habeas proceeding." *Id.* at 92–93. *Woodford*'s description of this concept of exhaustion exactly fits the rule that the panel majority applied here—because Plaintiffs did not invoke previously available administrative procedures in a timely manner, their claims are now barred and will never be considered on their merits. The panel majority's holding that Plaintiffs' failure to pursue an earlier administrative process bars their takings claim *is* an exhaustion requirement, and it is flatly precluded by *Knick* (which expressly bars

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[2] The decision in *Woodford* involved the Prison Litigation Reform Act ("PLRA"), in which Congress created an explicit statutory exception to the general rule that § 1983 claims need not be exhausted. *See* 42 U.S.C. § 1997e(a) ("No action shall be brought with respect to prison conditions under section 1983 . . . until such administrative remedies as are available are exhausted."). Because the *Woodford* Court held that the PLRA "uses the term 'exhausted' to mean what the term means in administrative law," 548 U.S. at 93, its general description of ordinary exhaustion principles extends beyond the PLRA context and thereby identifies the type of exhaustion rules that generally do not apply to § 1983 claims, including (after *Knick*) takings claims.

requiring exhaustion for takings claims) and by *Williamson County* (which affirmed that its ripeness requirement was not an exhaustion requirement).

The panel majority's illicit imposition of an exhaustion requirement is further confirmed by the fact that the panel majority expressly borrows its rule from caselaw interpreting the very state-litigation requirement from *Williamson County* that *Knick* expressly overruled as constituting an improper exhaustion requirement. The majority notes that courts interpreting the now-overruled requirement to exhaust state litigation remedies had rejected claims by plaintiffs who "missed deadlines or failed to comply with other requirements" when pursuing compensation in state proceedings. *See Pakdel*, 952 F.3d at 1166–67 (collecting cases). Such an outcome is exactly what one would expect from an exhaustion or procedural default regime, and *Knick* overruled the state-litigation requirement for the very reason that it was an exhaustion regime. The fact that the majority's holding relies on the now-overruled state-litigation cases confirms that it is clearly wrong: the state-litigation requirement and the majority's interpretation of the finality requirement both create exhaustion requirements where none should exist.

IV

The panel majority's attempt to ground its new exhaustion requirement in existing case authority fails.

The panel majority remarkably suggests that *Williamson County* itself actually endorsed the view that missed deadlines produce the sort of oxymoronic perpetual unripeness that the majority adopted here.

952 F.3d at 1166. The panel majority's cryptic discussion of *Williamson County* is somewhat hard to follow, but the majority appears to suggest that the Court considered and rejected the view that the applicant there could satisfy the finality requirement by defaulting on available remedies until the point that any further hope of obtaining variances "would have been too late under the commission's regulations." *Id.* *Williamson County* says nothing of the sort. There was no hint in that case that remedies would expire or become forever unavailable through procedural default. Rather, the claimant in *Williamson County* argued that it should not have to invoke *available* variance procedures before challenging, as a taking, the local government's disapproval of its proposed development plat. 473 U.S. at 192. The Court rejected this argument, because resorting to the available "procedure for obtaining variances would result in a conclusive determination by the Commission whether it would allow respondent to develop the subdivision in the manner respondent proposed." *Id.* at 193. Given that, under the Commission's regulations, "any condition shown on the plat which would require a variance *will* constitute grounds for disapproval of the plat," *id.* at 190 (emphasis added), it followed that the Commission's disapproval of the plat merely "prevent[ed] respondent from developing its subdivision *without obtaining the necessary variances*, but leaves open the possibility that respondent may develop the subdivision according to its plat *after obtaining the variances*," *id.* at 193–94 (emphasis added). *Williamson County* was thus relying on the continued availability of variances; it said nothing at all about procedural default.

The majority is likewise wrong in suggesting that our decision in *Southern Pacific Transportation Co.* endorsed its view. *See* 952 F.3d at 1165. In that case, the appellants opposed the rezoning of land that they owned, but they had never proposed an alternative plan for use of the land or requested variances from the new zoning requirements. 922 F.2d at 504. We held that their takings claim was not ripe because, without an actual plan, "federal courts would be required to guess what possible proposals appellants might have filed with the City, and how the City might have responded to these imaginary applications." *Id.* The clear premise of our holding was that the opportunity to submit a plan was still *available*.

Beyond these inapposite citations, the panel majority points to no case in which we have ever applied ripeness or finality doctrine in the peculiar way the panel majority did here. On the contrary, we have repeatedly held that when a takings plaintiff has "no further procedures available to [it] to challenge that decision," the finality requirement of *Williamson County* is satisfied. *See Hacienda Valley Mobile Estates v. City of Morgan Hill*, 353 F.3d 651, 657 (9th Cir. 2003); *see also Hall v. City of Santa Barbara*, 833 F.2d 1270, 1281 n.28 (9th Cir. 1986) (to the extent that *Williamson County*'s finality requirement applied, it was satisfied, because the plaintiffs "have no further administrative recourse available"), *overruled on other grounds by Yee v. City of Escondido*, 503 U.S. 519 (1992).

* * *

By applying procedural-default rules to bar a takings claim concerning an unquestionably final decision, the panel majority's decision imposes an

impermissible exhaustion requirement, not a finality requirement. The result is to put takings claims back into a second-class status, less than one year after the Supreme Court had squarely put them on the same footing as other constitutional claims. I respectfully dissent from our failure to rehear this case en banc.

AMENDED IN BOARD
6/11/2013

FILE NO. 120669 ORDINANCE NO. 117-13

[Subdivision Code – Condominium Conversion ~~Impact~~ Fee]

Ordinance amending the Subdivision Code, by adding Section 1396.4, to adopt a condominium conversion ~~impact~~ fee applicable to certain buildings ~~qualifying for participating but not being selected or participating in the 2013 or 2012 condominium conversion lottery only~~ that would be permitted to convert during a ~~six~~seven year period, and subject to specified requirements, including lifetime leases for non-purchasing tenants; adding Section 1396.5, to suspend the annual condominium conversion lottery until 2024 and resume said lottery under specified circumstances tied to permanently affordable rental housing production; amending Section 1396, to restrict future condominium lotteries to buildings of no more than four units with a specified number of owner occupied units for three years prior to the lottery and provide an exception for certain five- and six-unit buildings to participate in the lottery; and adopting environmental findings.

NOTE: Additions are *single-underline italics Times New Roman*; deletions are ~~*strike through italics Times New Roman*~~. Board amendment additions are double-underlined; Board amendment deletions are ~~strikethrough normal~~.

Be it ordained by the People of the City and County of San Francisco:

Section 1. Findings. (a) The Planning Department has determined that the actions contemplated in this Ordinance are in compliance with the California Environmental Quality Act (California Public Resources Code sections 21000 et seq.). Said determination is on file with the Clerk of the Board of Supervisors in File No. 120669 and is incorporated herein by reference.

(b) This Board finds that the condominium conversion ~~impact~~ fee as set forth in this legislation is an appropriate charge imposed as a condition of property development, which in this case is the City's approval of a condominium conversion subdivision, a discretionary development approval pursuant to the San Francisco Subdivision Code and the California Subdivision Map Act. Based on data, information, and analysis in a Condominium Conversion Nexus Analysis report prepared by Keyser Marston Associates, Inc., dated January 2011, and the findings of Planning Code Section 415.1 concerning the City's inclusionary affordable housing program, this Board finds and determines that there is ample evidentiary support to charge the ~~impact~~ fee set forth herein as it relates to a subdivision map approval that allows the conversion of existing dwelling units into condominiums. Said ~~impact fee~~charge also is lower than the fee amount supported in the abovementioned Nexus Analysis report. As a consequence the Board finds that the amount of this charge is no more than necessary to cover the reasonable costs of the governmental activity and programs related to condominium conversion. The Board further finds and

determines, that based on this evidence, the manner in which ~~these fees are~~this charge is allocated and assessed on a per unit cost for each unit converted to a condominium bears a reasonable relationship to the subdivision applicants' burdens on the City that result from the change in use and ownership status from a dwelling unit within an unsubdivided property to a separate interest in a condominium unit. A copy of the report on the ~~fees~~charge identified herein is in Clerk of the Board of Supervisors File No. 120669 and is incorporated herein by reference. The City Controller's Office has independently confirmed that the fee amounts identified in said report remain valid. This determination is on file with the Clerk of the Board of Supervisors File No. 120669 and is incorporated herein by reference.

(c)(1) The Board further finds that the present backlog of existing applications for condominium conversion under the existing 200-unit annual condominium conversion lottery process in Subdivision Code Article 9 (Conversions) extends well over a decade. Indicative of this backlog, approximately 700 tenancy-in-common (TIC) and other owner-occupied buildings, containing 2,269 dwelling units, registered for the 2013 lottery condominium conversion lottery in an effort to be selected for the 200 units that were available. The proposed expedited approval process for condominium conversions (the "Expedited Conversion program") is intended as a one time adjustment to the backlog in applications for conversions given the specific needs of existing owners of tenancy-in-common units. Therefore, the e~~E~~xpedited e~~C~~onversion program set forth in this legislation's proposed Section 1396.4 is intended as the exclusive method for allocating

approvals for conversions of apartments and tenancy-in-common buildings into condominiums for the entire period that is established in the proposed Section 1396.5.

(2) The Expedited Conversion program that this Ordinance creates will bring significant economic value to owners who utilize it. According to the City Controller's April 2, 2013 Economic Impact Report, condominium conversion "creates clear financial advantages for owners of tenancies-in-common (TIC) buildings." In addition to the estimated 15% premium gained by converting a TIC to a condominium, as projected in the Keyser Marston Associates 2011 Nexus Analysis, the Controller's report notes that because State law does not otherwise allow rent limitations on condominiums after the subdivider sells them, future owners of these converted condominiums after the rental limitation period terminates "have the opportunity for greater rental income than owners of TIC units, the vast majority of which are subject to rent control."

(3) Due to the present backlog of existing applications, the Office of the Controller estimates that owners of 1,730 of the units not selected in the 2013 lottery would pay the ~~impact fee~~condominium conversion charge and avail themselves of the seven-year ~~e~~Expedited ~~e~~Conversion program. The program also permits TICs that did not enter the 2012 and 2013 lottery to convert, which could result in more than 1,730 dwelling units taking advantage of the ~~e~~Expedited ~~e~~Conversion program. The number of conversions is therefore anticipated to be well in excess of the 200 unit per year allotment in the existing lottery. The Ordinance balances the number

of units converted under this program in a relatively short period of time by suspending the lottery until the City's affordable housing production replaces the number of units converted under the ~~e~~Expedited ~~e~~Conversion program. The maximum number of years of suspension of the lottery will be the number of converted units divided by 200. Therefore, under the suspension, there will be no net loss of the number of converted units over time as compared to the existing lottery. Conversions of apartments to condominiums also results in the eviction of existing tenants in the converted buildings because many tenants cannot afford to purchase their units. A large number of conversions under the ~~e~~Expedited ~~e~~Conversion program would magnify this impact and result in a large number of tenants evicted into a very expensive rental housing market. The Office of the Controller estimates that tenants of these converted properties would likely spend between $0.8 and $1.1 million annually in higher rent alone due to displacement and/or rent decontrol. Therefore, the Ordinance balances this impact on existing tenants and the effects of tenant displacement on the City in general by requiring that applicants for the Expedited Conversion program offer existing tenants a lifetime lease. The abovementioned Controller's report is on file with the Clerk of the Board of Supervisors in File No. 120669 and is incorporated herein by reference.

~~(3)~~(4) In addition, this legislation attempts to integrate this process with the adoption of additional controls on future conversions. This legislation does not intend to affect in any way the conversion of 100% owner-occupied two-unit buildings in accordance with the terms of Subdivision Code Section 1359.

(d) As set forth in the Housing Element of the General Plan, in particular Objective 3, it is the City's policy to preserve the existing supply of rent controlled housing and to increase the production of new affordable rental units. Policy 3.1 states that is the City's policy to "[p]reserve rental units, especially rent controlled units, to meet the City's affordable housing needs." Policy 4.4 states it is the City's policy to "[e]ncourage sufficient and suitable rental housing opportunities, emphasizing permanently affordable rental units wherever possible." And, Policy 9.2 provides that it is city policy to "[c]ontinue prioritization of preservation of existing affordable housing as the most effective means of providing affordable housing." Therefore, the conversion of rental housing into condominiums, without replacement, results in the loss of existing rent controlled housing contrary to public policy.

(e) In 2012, the voters of the City of San Francisco approved Proposition C that proposed in part to fund and produce ~~9~~30,000 affordable rental housing units over thirty years, establishing an annual baseline production of approximately 300 net new affordable housing units. The Board determines that this legislation is compatible with the goals of Proposition C and resumption of the condominium conversion lottery is properly benchmarked in relationship to new affordable housing production as contemplated in Proposition C. Further, the Board finds that Proposition C's limitations on new affordable housing fees were intended to apply to fees on new residential construction projects and not to the condominium conversion charges set forth in this Ordinance which would be imposed only on existing residential

buildings that obtain a condominium subdivision and involve no net increase in new housing units.

(f) It is the further intent of this legislation to suspend future conversions of rental housing pending the one for one replacement of units converted through the ~~e~~Expedited ~~e~~Conversion program beyond the City's net new annual baseline production and to provide additional protections to tenants in buildings to be converted as specified above.

(g) The Board finds that the rate of TIC creation and demand for condominium conversions to date has far exceeded the rate of allowable conversions under existing law. The Board also finds that the unsustainable growth of the TIC form of ownership poses challenges and adverse consequences for which many consumers are unprepared and that those challenges are greater for larger building sizes. However, increasing the number of allowable conversions would impose a burden on the City's capacity to develop sufficient replacement rental housing units and to assist displaced tenants. Therefore, it is the intent of this legislation to re-establish the condominium lottery conversion process on a more sustainable basis following the restart of the lottery and to encourage long-term ownership in smaller buildings.

Section 2. The San Francisco Subdivision Code is hereby amended by adding Section<u>s</u> 1396.4 <u>and 1396.5</u>, to read as follows:

SEC. 1396.4. CONDOMINIUM CONVERSION ~~IMPACT~~ *FEE* AND EXPEDITED CONVERSION PROGRAM.

(a) Findings. The findings of Planning Code Section 415.1 concerning the City's inclusionary affordable housing program are incorporated herein by reference and support the basis for charging the fee set forth herein as it relates to the conversion of dwelling units into condominiums.

(b) Any building ~~that: (1) participated in the 2013 or 2012 condominium conversion lottery, but was not selected for conversion or (2) could have participated in the 2013 condominium conversion lottery, but elected not to do so~~, *may* ~~bypass~~ be exempted from *the* annual lottery *provisions of Section 1396* ~~(the annual lottery conversion limitation)~~ *if the building owners for said building comply with Section 1396.3(g)(1) and* ~~pay the condominium conversion impact fee subject to the~~ all the *requirements of this Section* 1396.4. ~~In addition~~Notwithstanding the foregoing, no property or applicant subject to any of the prohibition on conversions set forth in Section 1396.2~~(c)~~, in particular a property with the eviction(s) set forth in Section 1396.2(b), is eligible for ~~said bypass~~ the ~~e~~Expedited ~~e~~Conversion ~~process~~program under this Section 1396.4. Eligible buildings as set forth in this Section (b) may exercise their option to participate in this ~~fee~~ program according to the following requirements:

~~(c) Eligible buildings as set forth in Subsection (b) may exercise their option to participate in this fee program according to the following requirements:~~

~~(1) The applicant(s) for the subject building shall pay the fee specified in Subsection (c) no later than January 24, 2014 for the entire building.~~

~~(2) No later than the last business day before July 25, 2014:~~

~~(i) DPW shall determined that the applicant's condominium conversion subdivision application is complete, or~~

~~(ii) The application is deemed complete by operation of law.~~

~~(3) The applicant shall obtain final and effective tentative approval of the condominium subdivision or parcel map no later than December 31, 2014.~~

~~(4) Any map application subject to a required public hearing on the subdivision or a subdivision appeal shall have the time limit set forth in Subsection (c)(3) suspended until March 13, 2015.~~

~~(5) The Director of the Department of Public Works is authorized to waive the time limit set forth in Subsection (c)(3) as it applies to a particular building due to extenuating or unique circumstances. Such waiver may be granted only after a public hearing and in no case shall the time limit extend beyond July 24, 2015.~~

(1) Any building that participated in but was not selected for the 2012 or 2013 condominium conversion lottery consisting of (a) four units or less in which one unit has been ~~continuously~~ occupied continuously by one of the applicant owners of record for no less than five years prior to April 15, 2013, or (b) buildings consisting of five or six units in which 50 percent or

more of the units have been ~~continuously~~ occupied continuously by the applicant owners of record for no less than five years as of April 15, 2013, is eligible for conversion under this Subsection. The applicant(s) for the subject building seeking to convert under this Subsection shall pay the fee specified in Subsection (e) no later than ~~January 24~~April 14, 2014 for the entire building along with additional information as the Department may require including certification of continued eligibility; however, the deadline for an applicant to pay the fee may be extended pursuant to (i)(3) of this Section.

(2) Any building that participated in but was not selected for the 2012 or 2013 condominium conversion lottery consisting of (a) four units or less in which one unit has been ~~continuously~~ occupied continuously by one of the applicant owners of record for no less than three years prior to April 15, 2014, or (b) buildings consisting of five or six units in which 50 percent or more of the units have been ~~continuously~~ occupied continuously by the applicant owners of record for no less than three years as of April 15, 2014, is eligible for conversion under this Subsection. The applicant(s) for the subject building may apply for conversion under this Subsection on or after April 15, 2014 and shall pay the fee specified in Subsection (e) no later than January 23, 2015 along with additional information as the Department may require including certification of continued eligibility; however, the deadline for an applicant to pay the fee may be extended pursuant to (i)(3) of this Section.

(3) For Additionally Qualified Buildings consisting of (a) four units or less in which one unit has been ~~continuously~~ occupied continuously by one ~~of~~

~~the applicant~~ owner~~s~~ of record for no less than six years as of April 15, 2015 or (b) buildings consisting of five or six units in which 50 percent or more of the units have been ~~continuously~~ occupied continuously by ~~the applicant~~ owners of record for no less than six years as of April 15, 2015, the applicant(s) for the subject building may apply for conversion under this Subsection on or after April 15, 2015 and shall pay the fee specified in Subsection (e) no later than January 22, 2016 along with additional information as the Department may require including certification of continued eligibility.

(4) For Additionally Qualified Buildings consisting of (a) four units or less in which one unit has been ~~continuously~~ occupied continuously by one ~~of the applicant~~ owners of record for no less than six years as of April 15, 2016, or (b) buildings consisting of five or six units in which 50 percent or more of the units have been ~~continuously~~ occupied continuously by ~~the applicant~~ owners of record for no less than six years as of April 15, 2016, the applicant(s) for the subject building may apply for conversion under this Subsection on or after April 15, 2016 and shall pay the fee specified in Subsection (e) no later than January 20, 2017 along with additional information as the Department may require including certification of continued eligibility.

(5) For Additionally Qualified Buildings consisting of (a) four units or less in which one unit has been ~~continuously~~ occupied continuously by one ~~of the applicant~~ owners of record for no less than six years as of April 15, 2017, or (b) buildings consisting of five or six units in which 50 percent or more of the units have been ~~continuously~~ occupied continuously

by ~~the applicant~~ owners of record for no less than six years as of April 15, 2017, the applicant(s) for the subject building may apply for conversion under this Subsection on or after April 15, 2017 and shall pay the fee specified in Subsection (e) no later than January 19, 2018 along with additional information as the Department may require including certification of continued eligibility.

(6) For Additionally Qualified Buildings consisting of (a) four units or less in which one unit has been ~~continuously~~ occupied continuously by one ~~of the applicant~~ owners of record for no less than six years prior to April 15, 2018, or (b) buildings consisting of five or six units in which 50 percent or more of the units have been ~~continuously~~ occupied continuously by ~~the applicant~~ owners of record for no less than six years as of April 15, 2018, the applicant(s) for the subject building may apply for conversion under this Subsection on or after April 15, 2018 and shall pay the fee specified in Subsection (e) no later than January 25, 2019 along with additional information as the Department may require including certification of continued eligibility.

(7) For Additionally Qualified Buildings consisting of (a) four units or less in which one unit has been occupied continuously by one owner of record for no less than six years prior to April 15, 2019, or (b) buildings consisting of five or six units in which 50 percent or more of the units have been occupied continuously by owners of record for no less than six years as of April 15, 2019, the applicant(s) for the subject building may apply for conversion under this Subsection on or after April 15, 2019 and shall pay the fee specified in Subsection (e) no later than

January 24, 2020 along with additional information as the Department may require including certification of continued eligibility. An Additionally Qualified Building subject to Subsection 9(A) shall be eligible to convert pursuant to this Subsection as long as there is fully executed written agreement in which the owners each have an exclusive right of occupancy to individual units in the building to the exclusion of the owners of the other units and 50 percent or more of the units have been occupied continuously by owners of record for no less than six years as of January 24, 2020.

(8) For applications for conversion pursuant to Subsections (3)-(7) only, a unit that is "occupied continuously" shall be defined as a unit occupied continuously by an owner of record for the six year period without an interruption of occupancy and so long as the applicant owner(s) occupied the subject unit as his/her principal place of residence for no less than one year prior to the time of application. Notwithstanding the occupancy requirements set forth above, each building may have one unit where there is an interruption in occupancy for no more than a three month period that is incident to the sale or transfer to a subsequent owner of record who occupied the same unit. For any unit with an interruption of occupancy, the applicant shall provide evidence to establish to the satisfaction of the Department that the period did not exceed three months.

(9) An "Additionally Qualified Building" within the meaning of this Section is defined as a building in which the initially eligible applicant owners of record have a fully executed written agreement as of April 15, 2013 in which the owners each have an

exclusive right of occupancy to individual units in the building to the exclusion of the owners of the other units; provided, however, that said agreement can be amended to include new applicant owner(s) of record as long as the new owner(s) satisfy the requirements of Subsection (8) above. In addition to the requirements listed in this Subsection (8), an Additionally Qualified Building also includes a five or six unit building that: (A) on April 15, 2013, had 50 percent or more of the units in escrow for sale as a tenancy-in-common where each buyer shall have an exclusive right of occupancy to an individual unit in the building to the exclusion of the owners of other units or (B) is subject to the requirements of Section 1396.2(f) and 50 percent or more of the units have been occupied continuously by owners of record for no less than ten years prior to the date of application as set forth in Subsections (3)-(7).

~~(6)~~ ~~(7) (8)~~(10) ~~The~~ In addition to all other provisions of this Section, the applicant(s) must meet the following requirements applicable to Subdivision Code Article 9, Conversions: Sections 1381, 1382, 1383, 1386, 1387, 1388, 1389, 1390, 1391(a) and (b), 1392, 1393, 1394, and 1395. ~~In addition~~Also, the applicant(s) must certify that to the extent any tenant vacates his or her unit after March 31, 2013 and before recordation of the final parcel or subdivision map, such tenant did so voluntarily or if an eviction or eviction notice occurred it was not pursuant to Administrative Code Sections 37.9(a)(8)-(14). If an eviction has taken placed under 37.9(a)(11) or 37.9(a)(14) then the applicant(s) shall certify that the original tenant reoccupied the unit after the temporary eviction.

(11) If the Department finds that a violation of this Section occurred prior to recordation of the final map or final parcel map, the Department shall disapprove the application or subject map. If the Department finds that a violation of this Section occurred after recordation of the final map or parcel map, the Department shall take such actions as are available and within its authority to address the violation.

(c) Decisions and Hearing on the Application.

(1) The applicant shall obtain a final and effective tentative map or tentative parcel map approval for the condominium subdivision or parcel map within one (1) year of paying the fee specified in Subsection (e).

(2) No less than twenty (20) days prior to the Department's proposed decision on a tentative map or tentative parcel map, the Department shall publish the addresses of building being considered for approval and post such information on its website. During this time, any interested party may file a written objection to an application and submit information to ~~DPW~~the Department contesting the eligibility of a building. In addition, the Department may elect to hold a public hearing on said tentative map or tentative parcel map to consider the information presented by the public, other City department, or an applicant. If the Department elects to hold such a hearing it shall post notice of such hearing and provide written notice to the applicant, all tenants of such building, any member of the public who submitted information to the Department, and any interested party who has requested such notice. In the event that an objection to the conversion

application is filed in accordance with this Subsection, and based upon all the facts available to the Department, the Department shall approve, conditionally approve, or disapprove an application and state the reasons in support of that decision.

(3) Any map application subject to a Departmental public hearing on the subdivision or a subdivision appeal shall have the time limit set forth in this Subsection (c)(1) extended for another six (6) months.

(4) The Director of the Department of Public Works is authorized to waive the time limits set forth in this Subsection (c)(1) as it applies to a particular building due to extenuating or unique circumstances. Such waiver may be granted only after a public hearing and in no case shall the time limit extend beyond two (2) years after submission of the application.

(d) Should the subdivision application be denied or be rejected as untimely in accordance with the dates specified above, or the tentative subdivision map or tentative parcel map disapproved, ~~DPW~~ the City *shall refund the entirety of the applicant's fee specified in Subsection (e).*

(e) The fee amount is $20,000.00 per unit for all buildings that ~~participated in the lottery for the first time in 2013 or~~ seek to convert under Subsection (b)(1) ~~(6)~~(7). Said fee shall be adjusted annually in accordance with the terms of Section 1315(f). *Said fee is reduced for each year the building has participated in the condominium conversion lottery up to and including the 2013 lottery in accordance with the following formula:*

(1) 2 years of participation, 20% fee reduction per unit;

(2) 3 years of participation, 40% fee reduction per unit;

(3) 4 years of participation, 60% fee reduction per unit; and

(4) 5 or more years of participation, 80% fee reduction per unit.

(f) For purposes of Section (e), a building's owner(s) *shall get credit only for those years that* ~~it~~ he or she *participated in the lottery even though such building could have qualified for and participated in other condominium conversion lotteries.*

(g) Life Time Lease for Non-purchasing Tenants.

(1) ~~No subdivider or subsequent condominium unit owner shall refuse to renew a lease or extend a rental agreement to any~~Any application for conversion under this Section shall include a certification under penalty of perjury by the applicants that ~~all~~any *non-purchasing tenant*(s) in the building ~~have been offerred~~has been given a written offer to enter into a life time lease in the form and with the provisions published and prescribed by ~~DPW~~the Department in consultation with the Rent Board. Such written offer for a life time lease shall be executed by the owners of the building(s) and recorded prior to ~~at~~ *the time of Final Map or Parcel Map approval.* ~~Any extended~~ Any life time *leases* ~~or rental agreements~~ *made pursuant hereto shall expire only upon the death or demise of* the last *such* life-*tenant* residing in the unit *or the last surviving member of the* life-*tenant's household, provided such surviving member is related to the* life-*tenant by blood, marriage,*

or domestic partnership, and is either disabled, catastrophically ill, or *aged 62 or older at the time of death or demise of* any *such* life-*tenant, or at such time as the* life-*tenant*(s) in the unit *voluntarily vacates the unit after giving due notice of such intent to vacate.*

(2) (A) *Each lease shall contain a provision allowing the tenant to terminate the lease and vacate the unit upon 30 days' notice*~~. Rent~~ and a provision that rent *charged during the term of* ~~any extended~~the *lease* ~~or rental agreement pursuant to the provisions of this Section~~ *shall not exceed the rent charged at the time of filing of the application for conversion, plus any increases proportionate to the increases in the residential rent component of the "Bay Area Cost of Living Index, U.S. Dept. of Labor," provided that the rental increase provisions of this Section shall be operative only in the absence of other applicable rent increase or arbitration laws.* ~~This Section~~

(B) The lease also *shall* state that it shall *not alter or abridge the rights or obligations of the parties in performance of their covenants, including but not limited to the provision of services, payment of rent or the obligations imposed by Sections 1941, 1941.1,* ~~and~~ *1941.2,* 1941.3, and 1941.4 *of the California Civil Code*~~. There~~ and that there *shall be no decrease in dwelling unit maintenance or other services historically provided to such units and such* life-*tenants.* ~~A binding and recorded agreement The provision of a lifetime lease pursuant to this Subsection shall be a condition imposed on each tentative parcel or tentative subdivision map subject to this Subsection 1396.4(g). Binding and recorded agreements between the tenant(s) and the property owner(s) and between the City and the property~~

~~owner(s) concerning this requirement shall be a tentative map condition imposed on each parcel or subdivision map subject to this Subsection 1396.4(g).~~

(C) The lease shall ~~also~~ include the following language:

Tenant agrees that this Lease shall be subject and subordinate at all times to (i) all ground leases or underlying leases that may now exist or hereafter be executed affecting the Real Property or any portion thereof; (ii) the lien of any mortgage, deed of trust, assignment of rents and leases or other security instrument (and any advances thereunder) that may now exist or hereafter be executed in any amount for which the Real Property or any portion thereof, any ground leases or underlying leases or Landlord's interest or estate therein, is specified as security; and (iii) all modifications, renewals, supplements, consolidations and replacements thereof, provided in all cases the mortgagees or beneficiaries named in mortgages or deeds of trust hereafter executed or the assignee of any assignment of rents and leases hereafter executed to recognize the interest and not disturb the possession, use and enjoyment of Tenant under this Lease, and, in the event of foreclosure or default, the lease will continue in full force and effect by operation of San Francisco Administrative Code Chapter 37, Section 37.9D, and the conditions imposed on each parcel or subdivision map pursuant to Section 1396.4(g), as long as Tenant is not in default under the terms and conditions of this Lease. Tenant agrees to execute and deliver, upon demand by Landlord and in the form requested by Landlord, any additional reasonable documents evidencing the priority or subordination of this Lease with respect to

any such ground leases, underlying leases, mortgages, deeds of trust, assignment of rents and leases or other security instruments. Subject to the foregoing, Tenant agrees that Tenant shall be bound by, and required to comply with. the provisions of any assignment of rents and leases with respect to the Building.

(3) The Department shall impose the following tentative map conditions on each parcel and subdivision map subject to this Subsection 1396.4(g) and require that the conditions be satisfied prior to Final Subdivision Map or Parcel Map approval: (A) the property owner(s) of the building provide a written offer for a life time lease pursuant to this Subsection to the tenant(s) in the building and record such offer against the building's title, (B) at the time the tenant(s) accepts the life time lease offer, and even if such acceptance occurs after map approval, a binding agreement between the tenant(s) and the property owner(s) shall be executed and recorded against the property's title, and (C) a binding agreement between the City and the property owner(s) concerning the requirements of this Subsection be recorded against the property's title. For purposes of this Subsection, the Board of Supervisors delegates authority to the DPW Director, in consultation with the Mayor's Office of Housing, to enter in said agreement on behalf of the City and County of San Francisco.

~~(2)~~(4) If the owner(s) of a building subject to the life time lease provisions of this Section 1396.4(g) enters into any contract or option to sell or transfer any unit that would be subject to the lifetime lease requirements or any interest in any unit in the building that would be subject to the lifetime lease

requirements at any time between the initial application and recording of the final subdivision map or parcel map. said contract or option shall be subject to the following conditions: (a) the contract or option shall include written notice that the unit shall be subject to the life time lease requirements of Subdivision Code Section 1396.4(g), (b) prior to final execution of any such contract or option, the owner(s) shall record a notice of restrictions against the property that specifically identifies the unit potentially subject to the life time lease requirements and specifies the requirements of the life time lease as set forth in Section 1396.4(g)(1), and (c) the recorded notice of restrictions shall be included as a note on the final subdivision map or parcel map. Prior to approval of a final subdivision map or parcel map, the applicant(s) shall certify under penalty of perjury to the Department that he, she, or they have complied with the terms of this Subsection as it applies to a building. Failure to provide this certification from every current owner of a building shall result in disapproval of the map. The content of the notices and certifications required by this Subsection shall comply with the instructions and procedures developed by the Department.

(h) In recognition of the rental requirements of Section (g), the fee for each unit in which a non-purchasing tenant resides at the time specified in Section (g) who is offered a life time lease and is unrelated by blood, marriage, or domestic partnership to any owner of the building *shall be refunded to the subdivider under the following formula:*

(1) One unit, 10% fee reduction for such unit;

(2) Two units, 20% fee reduction for each unit;

(3) Three units, 30% fee reduction for each unit.

(i) Upon confirmation of compliance with the rental requirement, DPW or the City department in possession of the fee revenue *shall refund the amount specified in Section (h) to the subdivider and have all remaining fee revenues transferred*, in the following percentage allocations: 25% *to the* ~~Citywide Affordable Housing Fund Mayor's Office Home Ownership Assistance Loan Fund City's Housing Stabilization~~Mayor's Office of Housing's program for small site acquisition to purchase market rate housing and convert it to affordable housing and 75% to the Citywide Affordable Housing Fund for the purpose of ~~creating or preserving~~ expanding affordable housing opportunities for ~~affordable to~~ low or moderate income households in San Francisco, including, but not limited to, expanding public housing opportunities.

(j) Waiver or reduction of fee based on absence of reasonable relationship or deferred payment based upon limited means.

(1) A project applicant of any project subject to the requirements in this Section may appeal to the Board of Supervisors for a reduction, adjustment, or waiver of the requirements based upon the absence of any reasonable relationship or nexus between the impact of development and the amount of the fee charged or for the reasons set forth in Subsection (2) below, a project applicant may request a waiver from the Board of Supervisors.

(2) Any appeal of ~~waiver~~ *requests under this clause shall be made in writing and filed with the Clerk of the Board no later than 15 days after the date the sponsor is required to pay and has paid to the Treasurer the fee*

as required in this Section. The appeal shall set forth in detail the factual and legal basis for the claim of waiver, reduction, or adjustment. The Board of Supervisors shall consider the appeal at the hearing within 60 days after the filing of the appeal. The appellant shall bear the burden of presenting substantial evidence to support the appeal, including comparable technical information to support appellant's position. If a reduction, adjustment, or waiver is granted, any change of use or scope of the project shall invalidate the waiver, adjustment or reduction of the fee. If the Board grants a reduction, adjustment or waiver, the Clerk of the Board shall promptly transmit the nature and extent of the reduction, adjustment or waiver to the Treasurer and Department of Public Works.

(3) A project applicant may apply to the Department of Public Works for a deferral of payment of the fee described in Subsection (e) for the period that the Department completes its review and until the application for expedited conversion is approved, provided that ~~the applicant satisfies each of the following requirements: (i) the applicant resided in his or her unit in the subject property as his or her principle place of residence for not less than three years and (ii) that~~ for the twelve months prior to the application, the applicant resided in his or her unit in the subject property as his or her principle place of residence and the applicant's household income was less than 120% of median income of the City and County of San Francisco as determined by the Mayor's office of Housing.

(k) ~~Any building that participates in the fee program set forth herein shall automatically be~~

~~ineligible to participate in the 2014 condominium conversion lottery. DPW The City shall refund to the applicant any fees paid to participate in the 2014 lottery and shall remove any lottery tickets associated with the subject building from the lottery drawing.~~

~~(l)~~ *Buildings that convert pursuant to this Section shall have no effect on the terms and conditions of Section 1341A, 1385A, or 1396 of this Code.*

SEC. 1396.5. SUSPENSION OF THE LOTTERY PENDING PRODUCTION OF REPLACEMENT UNITS FOR EXPEDITED CONVERSION UNITS.

(a) Within twelve months after issuing tentative or tentative parcel map approval for the last conversion under Section 1396.4 or December 29, 2023, whichever is earlier, the Department shall publish a report stating the total number of units converted under the Expedited Conversion program and every twelve months thereafter until the Expedited Conversion program is completed.

(b) No later than April 15 of each year until the termination of the suspension period, the Mayor's Office of Housing shall publish a report stating the total number of permanently, affordable rental housing produced in San Francisco and the "Conversion Replacement Units" produced in the previous calendar year and a cumulative total of such housing produced in preceding years during the tracking period. For purposes of this Subsection, the Mayor's Office of Housing shall have the authority to determine what type and form of housing constitutes permanently affordable rental housing that has been produced.

(c) The Department shall not accept an application for the conversion of residential units under Section 1396 nor conduct a lottery under this Article prior to January 1. 2024. Thereafter, the lottery shall resume upon the earlier of the following: (1) ~~until~~ the first February following the Mayor's Office of Housing report pursuant to Subsection (b) showing that the total number of Conversion Replacement Units produced in the City of San Francisco exceed~~s~~ed the total number of units converted as identified in the Department's report prepared pursuant to Subsection (a); ~~under Section 1396.4(b)(1) (6) and in no event shall it conduct a lottery prior to January 1 , 2024; provided however, that the total period of suspension of the lottery shall not exceed~~or (2) completion of the "Maximum Suspension Period" as defined below.

(d) "Conversion Replacement Units" in any year shall be determined by subtracting 300 from the total number of permanently affordable rental units that the City produced in that year starting on January 1, 2014.

(e) The "Maximum Suspension Period" shall be the number of years calculated by dividing the total number of units approved for conversion under Section 1396.4(b)(1)-~~(6)~~(7) (the Expedited Conversion program) divided by 200 and rounded to the nearest whole number with the year 2014 as the starting point. For example, if 2400 units have been converted under Section 1396.4(b)(1)-~~(6)~~(7), then the maximum suspension period would be 12 years and ~~run until 2026~~expire on December 31, 2025.

Section 3. The San Francisco Subdivision Code is hereby amended by amending Section 1396, to read as follows:

SEC. 1396. ANNUAL CONVERSION LIMITATION.

(a) This Section governing annual limitation shall apply only to conversation of residential units. This Section also is subject to the limitations established by Section 1396.5's suspension of the lottery.

(b) Applications for conversion of residential units, whether vacant or occupied, shall not be accepted by the Department of Public Works, except that a maximum of 200 units as selected yearly by lottery by the Department of Public Works from all eligible applicants, may be approved for conversion per year for the following categories of buildings:

~~(a)~~ (1) Buildings consisting of four units ~~or less~~ in which ~~one~~ at least three of the units ~~has~~ have been occupied continuously by one of the applicant owners of record as their principle place of residence for three years prior to the date of registration for the lottery as selected by the Director~~.~~;

(2) Buildings consisting of three units in which at least two of the units have been occupied continuously by the applicant owners of record as their principle place of residence for three years prior to the date of registration for the lottery as selected by the Director;

(3) Buildings consisting of two units in which at least one unit has been occupied continuously by the applicant owner of record as his or her principle place of residence for three years prior to the date of

registration for the lottery as selected by the Director; ~~or~~

~~(b) Buildings consisting of six units or less in which 50 percent or more of the units have been occupied continuously by the applicant owners of record for three years prior to the date of registration for the lottery as selected by the Director; or~~

~~(c)~~ (4) Buildings consisting of five or six units that were subject to the requirements of Section 1396.2(f) on or before April 15. 2013 where (A) no further evictions as set forth in Section 1396.2 have occurred in the building after April 15, 2013, (B) the building and all applicants first satisfied all the requirements for conversion under Section 1396.2(f) after January 24, 2020 and before resumption of the lottery under in accordance with the terms of Section 1396.5; and (C) 50 percent or more of the units have been occupied continuously by owners of record as their principle place of residence for ten years prior to the date of registration for the lottery as selected by the Director. Applicants for such buildings must apply for the lottery within five years of the resumption of the lottery under Section 1396.5(c) and remain eligible until selected;

(5) If the Expedited Conversion program under Section 1396.4 has been suspended until 2024 as a result of a successful lawsuit against the City and County of San Francisco challenging Section 1396.4(g) or 1396.5: (A) buildings consisting of five or six units that participated in but were not selected for the 2012 or 2013 condominium conversion lottery in which 50 percent or more of the units have been occupied continuously by the applicant owners of record for no less than six years prior to the date of registration for

the lottery as selected by the Director or (B) buildings consisting of five or six units in which: (i) 50 percent or more of the units have been occupied continuously by the applicant owners of record for no less than six years prior to the date of registration for the lottery as selected by the Director and (ii) the eligible applicant owners of record have a fully executed written agreement as of April 15, 2013 in which the owners each have an exclusive right of occupancy to individual units in the building to the exclusion of the owners of the other units. Applicants for buildings identified in this Subsection must first apply for the lottery within five years of the resumption of the lottery under Section 1396.5(c) and remain eligible until selected: or

~~(5)~~(6) Community apartments as defined in Section 1308 of this Code, which, on or before December 31, 1982, met the criteria for community apartments in Section 1308 of this Code and which were approved as a subdivision by the Department of Public Works on or before December 31, 1982, and where 75 percent of the units have been occupied continuously by the applicant owners of record for three years prior to the date of registration for the lottery as selected by the Director.

(c) The conversion of a stock cooperative as defined in Section 1308 of this Code to condominiums shall be exempt from the annual limitation imposed on the number of conversions in this Section and from the requirement to be selected by lottery where 75 percent of the units have been occupied for the lottery as selected by the Director.

(d) No application for conversion of a residential building submitted by a registrant shall be approved

by the Department of Public Works to fill the unused portion of the 200-unit annual limitation for the previous year.

(e)~~(f)~~ (1) Any ~~applicant~~application for a condominium conversion submitted after being selected in the lottery must meet the following requirements applicable to Subdivision Code Article 9, Conversions: Sections 1381, 1382, 1383, 1386, 1387, 1388, 1389, 1390, 1391(a) and (b), 1392, 1393, 1394, and 1395.

(2) Any building subject to Section 1396.2 shall have all applicant(s) satisfy all the requirements for conversion under Section 1396.2(f) in order be eligible to convert pursuant to this Section 1396; provided, however, that any building subject to the prohibition on conversion under Section 1396.2, in particular a property with the eviction(s) set forth in Section 1396.2(b), is ineligible for conversion.

(3)(A) In addition, the applicant(s) ~~must~~shall certify that to the extent any tenant vacated his or her unit ~~after March 31, 2013~~within the seven years prior to the date of ~~selection in~~registration for the lottery as selected by the Director and before recordation of the final parcel or subdivision map, such tenant did so voluntarily or if an eviction or eviction notice occurred it was not pursuant to Administrative Code Sections 37.9(a)(8)-(14) unless such eviction or eviction notice complied with the requirements of Subsections (B)-(D) below.

(B) If ~~an eviction has taken placed~~the evicting owner(s) recovered possession of the unit under Administrative Code Sections 37.9(a)(11) or 37.9(a)(14), then the applicant(s) shall certify that the

original tenant reoccupied or was given an opportunity to reoccupy the unit after the temporary eviction.

(C) If the evicting owner(s) recovered possession of the unit under Administrative Code Section 37.9(a)(10), then the applicant(s) shall certify that the Department of Building Inspection required the unit be demolished or permanently removed from housing use pursuant to a Notice of Violation or Emergency Order or similar notice, order, or act; all the necessary permits for demolition or removal were obtained; that the evicting owner(s) complied in full with Administrative Code Section 37.9(a)(10) and (c); and that an additional unit or replacement unit was not constructed in the building after the demolition or removal of the unit previously occupied by the evicted tenant.

(D) If the evicting owner(s) recovered possession of a unit under Administrative Code Section 37.9(a)(8), then the applicants shall certify that: (i) only one unit in the building was the subject of such eviction during the seven year period, (ii) any surviving owner or relative named as the intended resident of the unit in the Section 37.9(a)(8) eviction notice also is presently an owner applying for the conversion of the same unit, and (iii) the subject applicant owner has occupied the unit continuously as his or her principle residence for three years prior to the date of registration for the lottery as selected by the Director.

(f) The Department shall review all available records, including eviction notices and records maintained by the Rent Board for compliance with Subsection (e). If the Department finds that a

violation of Subsection (e) occurred prior to recordation of the final map or final parcel map, the Department shall disapprove the application or subject map. If the Department finds that a violation of Subsection (e) occurred after recordation of the final map or parcel map, the Department shall take such actions as are available and within its authority to address the violation.

Section 4. Uncodified. Notwithstanding the condominium conversion lottery selection provisions of Subdivision Code Section 1396 and 1396.3 or the other terms of this legislation, the most senior class of buildings participating but not being selected in the 2013 condominium lottery may apply for a condominium conversion subdivision on or after January 1, 2014 but before December 31, 2014 subject to the following: (1) the buildings and applicants shall satisfy all of the eligibility requirements necessary to participate in the lottery as set forth in Sections 1396 and 1396.3 in effect immediately prior to the effective date of this legislation and (2) the applicants shall satisfy all other applicable terms of Subdivision Code Article 9 (Conversions). Any buildings that apply under the process set forth in this uncodified Section are explicitly exempt from the requirements of Sections 1396.4, 1396.5, and 1396 as set forth in this legislation. Any building eligible to convert to condominiums: (a) under this Section 4, (b) after being selected for conversion in the 2013 condominium conversion lottery, or (c) that satisfies the requirements of Section 1359, is excluded from any of the terms of Section 7 below, specifically any limitation or prohibition of any kind concerning application submission, review, and approval for a parcel or subdivision map.

Section 5. Effective Date. This ordinance shall become effective 30 days from the date of passage.

Section 4~~5~~6. This section is uncodified. In enacting this Ordinance, the Board intends to amend only those words, phrases, paragraphs, subsections, sections, articles, numbers, punctuation, charts, diagrams, or any other constituent part of the Subdivision Code that are explicitly shown in this legislation as additions, deletions, Board amendment additions, and Board amendment deletions in accordance with the "Note" that appears under the official title of the legislation.

Section ~~6~~7. ~~Suspension of this Ordinance~~Effect of Litigation. (a) In the event that there is a lawsuit against the City and County of San Francisco filed in any court challenging any part of ~~this legislation or the validity of any lifetime lease entered into pursuant to this legislation Subsection 1396.4(g) or~~ Section 1396.5 or any obligation on the part of any property owner under Section 1396.4(g), then upon the service of such lawsuit upon the City and County of San Francisco, the Expedited Conversion program described in Section 1396.4 will be suspended as set forth below unless and until either (1) there is a final judgment in the lawsuit in all courts and the validity of ~~this legislation in its entirety~~the challenged provision(s) specified above is upheld or (2) the suspension of the lottery through January 1. 2024 as mandated by Section 1396.5 is completed.

(b) Legal Challenge to Section 1396.5 During ~~any such~~ suspension of the Expedited Conversion program pursuant to this Subsection based on a legal challenge to Section 1396.5, ~~any~~the Department, upon service of the lawsuit, shall not accept or approve any

application for conversion under the program. After 180 days following service of the lawsuit, the Department shall not issue any tentative parcel map or tentative map approval for conversion and shall deny any application that has not obtained such approval. If an owner(s) obtained a final and effective tentative parcel map or tentative map approval on or prior to the 180th day following service of the lawsuit, then that applicant may proceed to final parcel map or final subdivision map approval and recordation of the subdivision map. At any time during a suspension of the Expedited Conversion program, any applicant may seek a refund of the condominium conversion application and condominium conversion ~~impact~~ fees ~~and the provisions of Section 1396 in effect on April 15, 2015 shall be operative~~. Upon a request for an application fee refund, the reviewing City Departments shall deduct incurred costs based on time and materials expended and shall refund any remaining portion of the application fee(s).

(c) Legal Challenge to Section 1396.4(g)'s Property Owner Obligations. During a suspension of the Expedited Conversion program pursuant to this Subsection based on a legal challenge to any obligation on the part of any property owner under Section 1396.4(g), the Department, upon service of the lawsuit, shall not accept or approve any application for conversion under the program for a building with a unit occupied by a non-owning tenant(s). If an owner(s) obtained a final and effective tentative parcel map or tentative map approval on or prior to the service of the lawsuit, then that applicant may proceed to final parcel map or final subdivision map approval and recordation of the subdivision map. Notwithstanding the effects of a suspension of the

Expedited Conversion program pursuant to this Subsection described above and the terms of Subsection (e), the Department shall continue to accept, tentatively approve, and finally approve any application for a conversion pursuant to the requirements of the Expedited Conversion program for any building that has no units occupied by a non-owning tenant(s). At any time during a suspension of the Expedited Conversion program, any applicant may seek a refund of the condominium conversion application and condominium conversion ~~impact~~ fees and the provisions of Section 1396 in effect on April 15, 2015 shall be operative. Upon a request for an application fee refund, the reviewing City Departments shall deduct incurred costs based on time and materials expended and shall refund any remaining portion of the application fee(s).

(d) Legal Challenge to both Section 1396.5 and Section 1396.4(g)'s Property Owner Obligations. During a suspension of the Expedited Conversion program pursuant to this Subsection based on a legal challenge as identified in both Subsection (b) and (c), the Department, upon service of the lawsuit. shall not accept or approve any application for conversion under the program. If an owner(s) obtained a final and effective tentative parcel map or tentative map approval on or prior to service of the lawsuit, then that applicant may proceed to final parcel map or final subdivision map approval and recordation of the subdivision map. At any time during a suspension of the Expedited Conversion program, any applicant may seek a refund of the condominium conversion application and condominium conversion fees. Upon a request for an application fee refund, the reviewing City Departments shall deduct incurred costs based

on time and materials expended and shall refund any remaining portion of the application fee(s).

(e) Upon the completion of the suspension of the Expedited Conversion period the suspended Expedited Conversion program described in Section 1396.4 shall resume as if no suspension had occurred. Applicants with suspended applications may resubmit their applications along with all required fees and shall be considered in the same position as they had at the time of the suspension. The Department shall treat the time periods described in Section 1396.4(b)(1)-(7) as having been tolled during the time of suspension of the Expedited Conversion program.

(f) Effect of Successful Lawsuit against the City, Board of Supervisors hearing. If there is a final judgment in the lawsuit in all courts and the challenged provision(s) specified in this Section are deemed invalid in whole or in part, the Expedited Conversion program set forth in Section 1396.4 shall terminate except for those particular buildings authorized to convert pursuant to Subsection (b), (c), or (d) and the condominium conversion lottery shall be suspended in its entirety until its resumption after January 1, 2024. Upon a court's final judgment in the lawsuit in all courts that the challenged provision(s) specified in this Section are deemed invalid in whole or in part, the City Attorney shall promptly notify the Clerk of the Board of Supervisors of such judgment. Upon receipt of this notice, the Clerk shall schedule a public hearing(s) before the full Board or an appropriate committee of the Board, based on consultation with the President of the Board of Supervisors. The purpose of such hearing(s) shall be to provide a forum for public dialogue and shall

address, but not be limited to, consideration of revisions to the condominium conversion process consistent with the court's findings, exploration of alternative condominium conversion policies that seek to balance the often competing interests of the City, property owners, prospective owners, and tenants; discussion of the benefits and burdens as well as the distributive impacts of a citywide condominium conversion process and affordable housing production and opportunities; and concepts that support and balance the goal of homeownership with protection of rental properties and their tenants.

APPROVED AS TO FORM:
DENNIS J. HERRERA, City Attorney

By: s/ John D. Malamut
John D. Malamut
Deputy City Attorney

City and County of San Francisco

Tails

Ordinance

File Number: 120669 **Date Passed:** June 18, 2013

Ordinance amending the Subdivision Code, by adding Section 1396.4, to adopt a condominium conversion fee applicable to certain buildings that would be permitted to convert during a seven year period, and subject to specified requirements, including lifetime leases for non-purchasing tenants; adding Section 1396.5, to suspend the annual condominium conversion lottery until 2024 and resume said lottery under specified circumstances tied to permanently affordable rental housing production; amending Section 1396, to restrict future condominium lotteries to buildings of no more than four units with a specified number of owner occupied units for three years prior to the lottery and provide an exception for certain five- and six-unit buildings to participate in the lottery; and adopting environmental findings.

January 28, 2013 Land Use and Economic Development Committee – AMENDED, AN AMENDMENT OF THE WHOLE BEARING NEW TITLE

January 28, 2013 Land Use and Economic Development Committee – CONTINUED AS AMENDED

February 25, 2013 Land Use and Economic Development Committee – CONTINUED

March 11, 2013 Land Use and Economic Development Committee – CONTINUED

March 25, 2013 Land Use and Economic Development Committee – CONTINUED

April 15, 2013 Land Use and Economic Development Committee – AMENDED, AN AMENDMENT OF THE WHOLE BEARING NEW TITLE

April 15, 2013 Land Use and Economic Development Committee – CONTINUED AS AMENDED

April 22, 2013 Land Use and Economic Development Committee – RECOMMENDED

May 07, 2013 Board of Supervisors – RE-REFERRED

Ayes: 11 – Avalos, Breed, Campos, Chiu, Cohen, Farrell, Kim, Mar, Tang, Wiener and Yee

May 13, 2013 Land Use and Economic Development Committee – CONTINUED

May 20, 2013 Land Use and Economic Development Committee – AMENDED, AN AMENDMENT OF THE WHOLE BEARING NEW TITLE

May 20, 2013 Land Use and Economic Development Committee – DUPLICATED AS AMENDED

May 20, 2013 Land Use and Economic Development Committee – CONTINUED AS AMENDED

June 03, 2013 Land Use and Economic Development Committee – RECOMMENDED

June 11, 2013 Board of Supervisors – AMENDED, AN AMENDMENT OF THE WHOLE BEARING NEW TITLE

Ayes: 8 – Avalos, Breed, Campos, Chiu, Cohen, Kim, Mar and Yee

Noes: 3 – Farrell, Tang and Wiener

June 11, 2013 Board of Supervisors – PASSED ON FIRST READING AS AMENDED

Ayes: 8 – Avalos, Breed, Campos, Chiu, Cohen, Kim, Mar and Yee

Noes: 3 – Farrell, Tang and Wiener

June 18, 2013 Board of Supervisors – FINALLY PASSED

Ayes: 8 – Avalos, Breed, Campos, Chiu, Cohen, Kim, Mar and Yee

Noes: 3 – Farrell, Tang and Wiener

File No. 120669

I hereby certify that the foregoing Unsigned Mayor Ordinance was FINALLY PASSED on 6/18/2013 by the Board of Supervisors of the City and County of San Francisco.

s/ Angela Calvillo
Angela Calvillo
Clerk of the Board

Unsigned
Mayor

June 28, 2013
Date Approved

I hereby certify that the foregoing ordinance, not being signed by the Mayor within the time limit as set forth in Section 3.103 of the Charter, or time waived pursuant to Board Rule 2.14.2, became effective without his approval in accordance with the provision of said Section 3.103 of the Charter or Board Rule 2.14.2.

s/ Angela Calvillo
Angela Calvillo
Clerk of the Board

Paul F. Utrecht (CA Bar No. 118658)
Utrecht & Lenvin, LLP
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San Francisco, CA 94105
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Attorney for Plaintiffs
Peyman Pakdel and Sima Chgini

Filed 6/26/2017

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

PEYMAN PAKDEL and SIMA CHEGINI, Plaintiffs, v. CITY AND COUNTY OF SAN FRANCISCO, a Chartered California City and County; SAN FRANCISCO BOARD OF SUPERVISORS; an elected body of the City and County of San Francisco; SAN FRANCISCO DEPARTMENT OF PUBLIC WORKS, a department of the City and County of San	Case No.: 3:17-cv-03638 **COMPLAINT FOR VIOLATION OF FEDERAL CIVIL RIGHTS UNDER 42 U.S.C. §1983 AND CALIFORNIA STATE LAW (CAL. GOV'T CODE §7060 – 7060.7, CAL. CIVIL CODE §1954.52, CAL. CONST. ART. I, §1)**

Francisco; and DOES 1-25 inclusive,

Defendants.

INTRODUCTION

1. Plaintiffs Peyman Pakdel and Sima Chegini bring this complaint for relief against the City and County of San Francisco due to its enactment of legislation that illegally and unconstitutionally requires them to enter into a lifetime lease with their tenant after conversion of their property into a condominium.

2. The Fifth Amendment to the United States Constitution prohibits local governments from compelling property owners, like plaintiffs, to offer or continue to offer residential real property for lease when the owners or their immediate family wish to use it as their home. In the present case, plaintiffs chose to rent their home temporarily because of their out-of-state residence, but expected to regain possession of their home when they retired. Yet, the City has recently enacted Ordinance 117-13 (the "Ordinance") that punishes those who lawfully seek to convert property into a condominium by forcing them to give their non-owning tenants lifetime leases, thereby eliminating their fundamental right to reside in their own homes.

3. There is no income requirement to be eligible for a lifetime lease. Under the Ordinance, rich tenants as well as low-income ones, are entitled to a lifetime lease. The Ordinance thus effects a blatant transfer of wealth from some private citizens to others, without regard to whether there is a need. As such, the

Ordinance does not advance the purpose of providing housing to low-and moderate-income households, which the Ordinance cites as its basis. In fact, the lifetime lease provisions of the Ordinance often have an effect opposite to providing affordable housing for low and moderate income households. Many tenancy-in-common owners affected by the Ordinance are single unit owners whose business is not renting. As reported in the San Francisco Chronicle, Nevius, *Law Change Means Owners of Mission Unit Can't Move Back Home* (February 4, 2015), the Ordinance can protect those with means, while barring those in need, from returning to their homes.

4. As applied to plaintiffs, the lifetime lease mandated by the Ordinance takes property for a private purpose. To the extent the Ordinance serves a public purpose, the provisions unconstitutionally take property, unconstitutionally function as a condition that is unrelated and Violation of California State Law disproportionate to any impact arising from the potential withdrawal of rental units, unreasonably seize property and impose an impermissible burden on the plaintiffs' Ellis Act, privacy and common law property rights. Consequently, the Ordinance violates the Public Use Clause, Takings Clause, Equal Protection Clause, Due Process Clause and Fourth Amendment of the United States Constitution, the unconstitutional conditions doctrine, the Ellis Act and Art. 1, § 1 of the California constitution. The plaintiffs are therefore entitled to damages and/or equitable relief under 42 U.S.C. § 1983, the Declaratory Judgment Act and California law, including a preliminary injunction.

THE PARTIES

5. Plaintiffs Peyman Pakdel and Sima Chegini are citizens of the State of Ohio. They owned a tenancy in common interest providing for occupancy of one unit in a 6-unit building located at 1170-1180 Green Street, San Francisco, California (the "Property"), which was recently converted into condominiums. The Property is subject to the Ordinance.

6. Defendant City and County of San Francisco is a political subdivision of the State of California, and the local governing authority in San Francisco. The City enacted the Ordinance challenged by this lawsuit. The City is entitled to sue and be sued, and is constrained by the laws of the United States and the State of California, including the United States Constitution, 42 U.S.C. § 1983, the Ellis Act and the California Constitution.

7. Plaintiffs are informed and believe, respondents and defendants CITY AND COUNTY OF SAN FRANCISCO, a Chartered California City and County, SAN FRANCISCO BOARD OF SUPERVISORS, an elected body of the City and County of San Francisco, SAN FRANCISCO DEPARTMENT OF PUBLIC WORKS, a department of the City and County of San Francisco (the "DPW") and DOES 1-25, inclusive (collectively the "City"), are now, and at all times herein mentioned in this petition and complaint have been, organized and existing under the Constitution and Laws of the State of California and under the City of San Francisco's charter. At all times herein mentioned, each of the respondents were agents of the other and were acting within the course and scope of that agency.

JURISDICTION AND VENUE

8. This Court has jurisdiction based on federal question jurisdiction because this Complaint is based on claims under the United States Constitution and federal law, including 42 U.S.C. § 1983, as well as pendent jurisdiction over the state law claims. In addition, this Court has jurisdiction over all of the claims because of diversity of citizenship and the fact that the amount in controversy exceeds $75,000. Therefore, there is jurisdiction under 28 U.S.C. §§ 1331 and 1332. Venue is proper in this District under 28 U.S.C. § 1391 because the claims arose in this District, defendants are located in this District, and the property at issue is located in this District.

FACTS

9. In 2009, plaintiffs purchased a tenancy-in-common interest ("TIC interest") in real property in the City and County of San Francisco commonly known as 1170-1180 Green Street (the "Property") and entered into a Tenancy in Common Agreement ("TICA") with the other tenancy-in-common interest owners of the Property. The Property contains six dwelling units. The TIC interest purchased by plaintiffs includes the right to exclusively occupy one of the units in the Property, with the address of 1180 Green Street (the "Unit"). Plaintiffs temporarily leased their Unit to a tenant in 2010, because they reside out-of-state and did not intend to use the Unit as their home until after they retire.

10. The TICA provides that plaintiffs agree to take all steps necessary to convert the Property to condominiums and to share the expenses of the conversion to condominiums equally with the other co-

tenants. This clause commonly exists in San Francisco TICAs because one of the main objectives of such agreements is to convert to condominiums so the co-tenants can gain title to their respective properties. At the time that the TICA was adopted, the rules governing condominium conversion did not require lifetime leases and respected owners' rights under state and local law to obtain possession of their property for purposes such as living in the condominium themselves, as Plaintiffs intend to do when they retire.

11. On June 28, 2013, the San Francisco Board of Supervisors enacted Ordinance 117-13 (the "Ordinance"), amending its Subdivision Code by adding Section 1396.4 to permit certain buildings, including the Property, to convert to condominiums. The Board was fully aware that San Francisco TICAs typically have a provision requiring participation in condominium conversion and designed the Ordinance to take advantage of that provision.

12. The Ordinance (Section 1396.4(g)(1) and (3)) requires as a condition of a condominium conversion, that a written offer to enter into a lifetime lease with non-owning tenants, in the form prescribed by the San Francisco Department of Public Works ("DPW"), be executed and recorded prior to the time of final map approval for the condominium conversion.

13. The Ordinance (Section 1396.4(g)(3)) also requires, as a condition of a condominium conversion, that an agreement between the City and the property owner(s) regarding the requirements of Section 1396.4, be executed and recorded prior to the time of final map approval for the condominium conversion.

14. However, the Ordinance (Section 1396.4(g)(3)(B)) does not require that a binding lifetime lease agreement between the property owner(s) and non-owning tenant be executed and recorded as a condition of the condominium conversion. Instead, the Ordinance (Section 1396.4(c)(3)(B)) provides that a non-owning tenant may accept a lifetime lease offer after the condominium conversion in which event a binding lifetime lease must then be executed and recorded. The Ordinance (Section 1396.4(b)(11)) provides that if this requirement is violated after the condominium conversion, the DPW "shall take such actions as are available and within its authority to address the violation".

15. The Ordinance (Uncodified, Section 7) further provides that if a lawsuit is filed against the City challenging Section 1396.4(g), the condominium conversion program allowed by Section 1396.4(g) will be suspended for properties with units occupied by non-owning tenants.

16. Given the cooperation clause in the TICA, plaintiffs are subject to a legally binding obligation to take all steps necessary to convert the Property to condominiums or compensate their co-tenants for potentially significant damages.

17. The Property owners applied to the DPW for a condominium conversion pursuant to the Ordinance on March 13, 2015. The Property owners submitted to the DPW an offer of lifetime lease documents relating to the Unit to the DPW on November 3, 2016 and an agreement with the City on November 10, 2016 to provide a lifetime lease of the Unit (the "Agreement") on or about November 10, 2016. The submission of

both of these documents was required as a condition of the condominium conversion under the Ordinance.

18. The Agreement, contrary to California law, purported to waive plaintiffs' rights under the Ellis Act and the Costa-Hawkins Act as a condition of the condominium conversion under the Ordinance.

19. The Agreement also purports to fall within an exception to the Ellis Act and the Costa-Hawkins Act for certain programs promoting low-income housing. The Ordinance's lifetime lease provisions are not focused on providing low-income housing and therefore do not fall within this exception.

20. Under the Fifth Amendment, specific performance of the Agreement and the offer of a lifetime lease, cannot be enforced against plaintiffs because they are not just and reasonable as to plaintiffs and because plaintiffs have not received adequate consideration.

21. The Agreement purports to provide consideration in the form of a $4,000 rebate in the conversion application fee and reduction of financing costs. Plaintiffs have no financing costs for the Unit and the $4,000 is grossly inadequate given the lost property value of more than $500,000 that will be caused by the transfer of the lifetime lease interest.

22. The condominium deeds for the Property, including the Unit were recorded on March 25, 2017.

23. The plaintiffs' tenant in the Unit submitted an executed lifetime lease to the plaintiffs on or about May 5, 2017.

24. On June 9, 2017 and June 13, 2017 plaintiffs requested that the City not require them to execute

and record the lifetime lease under the Ordinance, or in the alternative to compensate them for transferring a lifetime lease interest in their property.

25. On June 12 and 13, 2017, the City stated that failure to execute the lifetime lease would be a violation of the Ordinance (which would subject the plaintiffs to enforcement action) and that the City would not compensate plaintiffs for transferring a lifetime lease interest in their property.

26. Plaintiffs have not executed and recorded a lifetime lease in connection with the Unit, but will do so by the Ordinance's deadline in March 2019 unless the lifetime lease requirement is enjoined by this court.

FIRST CAUSE OF ACTION

Taking of Private Property for a Private Purpose—

As Applied Claim Under 42 U.S.C. § 1983

27. Plaintiffs hereby realleges each and every allegation contained in paragraphs 1 through 26 as though fully set forth herein.

28. It is well established that, under the Public Use Clause of the Fifth Amendment to the Constitution, local governments may not take private property for a private purpose.

29. The Ordinance requires plaintiffs to transfer a lifetime lease interest in his Unit to a private person, namely, his tenant, when plaintiffs' co-tenants in the Property exercise their right to convert the Property to condominiums.

30. The Ordinance benefits private persons, not the general public. The private benefit accruing to tenants from the Ordinance's lifetime lease provisions far outweighs any conceivable incidental public benefit.

31. The lifetime lease from plaintiffs to their tenant in this case in intended to favor a particular private party with only incidental or pretextual public benefits and therefore violates the Public Use Clause.

32. The Ordinance was intended to benefit private parties.

33. The Ordinance serves a private purpose and use and therefore violates the Public Use Clause of the Takings Clause of the Fifth Amendment.

34. Plaintiffs have been harmed in the amount of the reduced market value of the Unit unless Defendants are enjoined.

35. The City's failures are a substantial factor, in fact the only factor, in causing plaintiffs' harm.

36. The Public Use Clause violation arising from the Ordinance is occurring under color of state law and violates 42 U.S.C. § 1983.

SECOND CAUSE OF ACTION

Unconstitutional Physical Taking of Private Property—

As Applied Claim Under 42 U.S.C. § 1983

37. Plaintiffs hereby realleges each and every allegation contained in paragraphs 1 through 36 as though fully set forth herein.

38. The Ordinance functions as a straight-out governmental demand that plaintiffs give a lifetime lease to their tenant. It forces plaintiffs to submit to the physical occupation of their property.

39. Therefore, to the extent the Ordinance serves a public purpose, it effects an unconstitutional physical taking of plaintiffs' property.

40. The Ordinance requirement that plaintiffs enter into a lifetime lease with their tenant, takes private property without providing a mechanism for compensation and therefore violates the Public Takings Clause.

41. Plaintiffs have been harmed in the amount of the reduced market value of the Unit unless Defendants are enjoined.

42. The City's failures are a substantial factor, in fact the only factor, in causing plaintiffs' harm.

43. The violation of plaintiffs' constitutional rights effected by the Ordinance is occurring under color of state law and violates 42 U.S.C. § 1983.

THIRD CAUSE OF ACTION

Unconstitutional Exaction/Condition and Taking of Private Property—

As Applied Claim Under 42 U.S.C. § 1983

44. Plaintiffs hereby realleges each and every allegation contained in paragraphs 1 through 43 as fully set forth herein.

45. The Ordinance obligates plaintiffs to transfer a lifetime lease interest to their tenant under the circumstances of the present case.

46. Real property is constitutionally protected property.

47. If the City had simply demanded that plaintiffs hand over a lifetime lease interest to their tenant, it would be liable for a per se unconstitutional physical taking of property.

48. Under *Nollan v. California Coastal Commission (Nollan)*, 483 U.S. 825 (1987), *Dolan v. City of Tigard (Dolan)*, 512 U.S. 374 (1994), and *Koontz v. St. Johns River Water Management District (Koontz)*, 133 S. Ct. 2586 (2013), the government may constitutionally exact property from property owners, such as plaintiffs, as a condition of allowing the Property owners to exercise a property right only if:

a. The exaction directly mitigates a public impact directly arising from the property owners' exercise of their property right;

b. The exaction is roughly proportionate in both nature and degree to the public impact arising from the property owners' exercise of the property right.

49. The Ordinance provides for lifetime leases for existing tenants in certain buildings converting to condominiums to protect the tenants form increased rents. The differential between market rents and regulated rents arises from two variables, neither of which is attributable to plaintiff.

50. The first variable, the market rent, is caused by entrenched market forces and structural decisions made by the City long ago in the management of its housing stock. The market effect of a potential withdrawal of plaintiffs' Unit, or even annual withdrawals from the rental market of units in the

City because of condominium conversions, is infinitesimally small. Such withdrawals do not cause high market prices.

51. The regulated rent that plaintiffs' tenant currently enjoys is a creature of regulation that the City imposes on the property owner as rent control. It is the City's rent control scheme that results in lower-than-market rates, not plaintiffs' actions.

52. As a result, the Ordinance does not share an essential nexus with and is not roughly proportional to any impact of the condominium conversion in this case.

53. In requiring property owners such as plaintiffs to offer a lifetime lease to their tenant as a condition of them and their co-tenants exercising their state law property right to convert the Property to condominiums, the Ordinance imposes an unconstitutional condition and unconstitutionally exacts and takes private property.

54. The lifetime lease requirement imposed by the Ordinance violates the constitutional principles articulated in *Nollan*, *Dolan*, and *Koontz*.

55. Plaintiffs have been harmed in the amount of the reduced market value of the Unit unless Defendants are enjoined.

56. The City's failures are a substantial factor, in fact the only factor, in causing plaintiffs' harm.

57. The unconstitutional exaction arising from the Ordinance is occurring under color of state law and violates 42 U.S.C. §1983.

FOURTH CAUSE OF ACTION

Unconstitutional Regulatory Taking—As Applied

Claim Under 42 U.S.C. § 1983

58. Plaintiffs hereby realleges each and every allegation contained in paragraphs 1 through 57 as though fully set forth herein.

59. If the Ordinance does not amount to a physical taking or an unconstitutional exaction/ condition as applied to plaintiffs, it causes a regulatory taking as applied to plaintiffs.

60. The Ordinance's demand that plaintiffs transfer a lifetime lease interest to their tenant has a severe economic impact on plaintiffs.

61. The Ordinance interferes with the plaintiffs' distinct expectations of using their Unit as their home, including their reasonable expectation that they would not be subject to a lifetime lease obligation not in effect when they purchased their property. The Ordinance substantially lessens the market value of plaintiffs' Unit.

62. The Ordinance requires plaintiffs to submit to the physical occupation of their property, and has the character of a taking as applied to plaintiffs.

63. The Ordinance causes a taking of plaintiffs' property under *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978).

64. Plaintiffs have been harmed in the amount of the reduced market value of the Unit unless Defendants are enjoined.

65. The City's failures are a substantial factor, in fact the only factor, in causing plaintiffs' harm.

66. The unconstitutional taking of plaintiffs' property arising from the Ordinance is occurring under color of state law and violates 42 U.S.C. § 1983.

FIFTH CAUSE OF ACTION

Unreasonable Seizure in Violation of the Fourth Amendment—

As Applied Claim Under 42 U.S.C. § 1983

67. Plaintiffs hereby realleges each and every allegation contained in paragraphs 1 through 66 as though fully set forth herein.

68. The Fourth Amendment applies in the civil context.

69. Real property is protected from unreasonable seizure by the Fourth Amendment.

70. The Ordinance meaningfully interferes with plaintiffs' possessory interests in their real property.

71. The City's enforcement of the Ordinance's lifetime lease provisions unreasonably seizes plaintiffs' property.

72. Plaintiffs have been harmed in the amount of the reduced market value of the Unit unless Defendants are enjoined.

73. The City's failures are a substantial factor, in fact the only factor, in causing plaintiffs' harm.

74. The unreasonable seizure arising from the Ordinance is occurring under color of state law and violates 42 U.S.C. § 1983.

SIXTH CAUSE OF ACTION

Violation of Due Process—As Applied

Claim Under 42 U.S.C. § 1983

75. Plaintiffs hereby realleges each and every allegation contained in paragraphs 1 through 74 as though fully set forth herein.

76. Plaintiffs have a property right, under state law, consistent with the Ellis Act and the Costa-Hawkins Act, to use and enjoy their Unit as their home.

77. The Ordinance eviscerates plaintiffs' vested right to use their Unit as their home, under the provisions of the Ellis Act and the Costa-Hawkins Act, which were both enacted prior to the Ordinance's enactment.

78. The Ordinance requirement that plaintiffs enter into a lifetime lease with their tenant under the circumstances of this case, deprive plaintiffs of a protected property right by arbitrary and unreasonable action bearing no substantial relation to the public health, safety, merits, or general welfare; or interferes with rights implicit in the concept of ordered liberty. As a result, the Ordinance as applied to plaintiffs, violates the Due Process Clause.

79. Plaintiffs have been harmed in the amount of the reduced market value of the Unit unless Defendants are enjoined.

80. The City's failures are a substantial factor, in fact the only factor, in causing plaintiffs' harm.

81. The violation of plaintiffs' due process rights occurring under the Ordinance arises under color of state law and violates 42 U.S.C. § 1983.

SEVENTH CAUSE OF ACTION

Violation of Equal Protection – As Applied

Claim Under 42 U.S.C. § 1983

82. Plaintiffs hereby realleges each and every allegation contained in paragraphs 1 through 81 as though fully set forth herein.

83. Plaintiffs are similarly situated with the other tenants-in-common in the Property, which was converted into a condominium. As tenants-in-common, plaintiffs have the right, consistent with the Ellis Act and the Costa-Hawkins Act, to use the Unit as their home. The Ordinance establishes a classification providing that tenants-in-common with existing tenants must offer and enter lifetime leases with tenants, while those who do not have existing tenants have no obligation to offer and enter into a lifetime lease.

84. This classification injures a particular class of private parties, with only incidental or pretextual public justifications and therefore violates the Equal Protection Clause.

85. The City was acting or purporting to act in the performance of their official duties.

86. The City's conduct violated plaintiffs' rights to equal protection of the law.

87. As a result, plaintiffs have been harmed in the amount of the reduced market value of the Unit unless Defendants are enjoined.

88. The City's actions are a substantial factor, in fact the only factor, in causing plaintiffs' harm.

89. The violation of plaintiffs' equal protection rights occurring under the Ordinance arises under color of state law and violates 42 U.S.C. § 1983.

EIGHTH CAUSE OF ACTION

Violation of the Ellis Act and the Costa-Hawkins Act –

As Applied Claim Under

California Government Code § 7060-7060.7,

California Civil Code § 1954.52

90. Plaintiffs hereby realleges each and every allegation contained in paragraphs 1 through 89 as though fully set forth herein.

91. California Government Code Section 7060(a) of the Ellis Act prohibits local governments from compelling a property owner of residential real property to offer or continue to offer their property for lease.

92. Under California state law, a local government violates the Ellis Act, when it burdens the right to withdraw a rental unit from the rental market with unreasonable and excessive conditions.

93. The Ordinance's lifetime lease provisions constitute an unreasonable, excessive, and impermissible burden on the plaintiffs' Ellis Act right to withdraw their Unit from the rental market, and effectively prevents them from withdrawing their Unit, in violation of the Ellis Act.

94. California Civil Code § 1954.52 of the Costa-Hawkins Act, provides that a residential real property owner may establish rental terms at the commencement of a tenancy.

95. The Ordinance's lifetime lease provision prevent plaintiffs from establishing rental terms at the commencement of the tenancy for the Unit after the condominium conversion in violation of the Costa-Hawkins Act.

96. The Ordinance is not in accordance with California law as applied to plaintiffs.

NINTH CAUSE OF ACTION

Violation of Privacy Right – As Applied

Claim Under Cal. Const. Art. I., § 1

97. Plaintiffs hereby realleges each and every allegation contained in paragraphs 1 through 96 as though fully set forth herein.

98. Plaintiffs have an autonomy privacy interest in excluding persons from their private residence.

99. Plaintiffs have a reasonable expectation of using their Unit, as their home, and excluding his tenant by terminating the lease of their Unit in accordance with the Ellis Act and the Costa-Hawkins Act.

100. The Ordinance constitutes a serious invasion of plaintiffs' privacy by requiring them to enter a lifetime lease with their tenant, thereby preventing them from withdrawing their home from the rental market and excluding their tenant from their private residence.

101. The Ordinance prevents plaintiffs from exercising their right to go out of the business of renting in accordance with the Ellis Act and the Costa-Hawkins Act. It also forces plaintiffs to share their home with others who are unwelcome. As a result, the Ordinance violates plaintiffs' rights to privacy under the California constitution, Art. 1, § 1, with no strong countervailing interest since it employs a means legally forbidden to the City by state law.

TENTH CAUSE OF ACTION

Declaratory Relief

102. Plaintiffs hereby realleges each and every allegation contained in paragraphs 1 through 101 as though fully set forth herein.

103. Under the Fourth, Fifth and Fourteenth Amendment to the United States Constitution, plaintiffs have a federal right to be free from a taking of their private property for a private purpose, and from laws that take or seize property for a public purpose, but on an unreasonable ground and without any mechanism for compensation. Under the Due Process Clause of the Fourteenth Amendment, plaintiffs have a right to be free from an irrational and illegitimate deprivation of their property. Under the Equal Protection Clause, plaintiffs have a right to equal protection of the law.

104. Under state common law, the Ellis Act and the Costa-Hawkins Act, plaintiffs have a right to withdraw their property from the rental market, and to be free of any law that unreasonably and impermissibly burdens their state law property right so as to effectively force them to remain landlords.

105. Under the California constitution, plaintiffs have an autonomy privacy interest in excluding persons from their private residence.

106. Under California law, specific performance of the Agreement and the offer of a lifetime lease, cannot be enforced against plaintiffs because they are not just and reasonable as to plaintiffs and because plaintiffs have not received adequate consideration.

107. Defendants have enacted, and are charged with enforcing, an Ordinance that retroactively and immediately takes private property for a private purpose and without a rational or a reasonable basis. To the extent the Ordinance serves a public purpose, it takes private property without providing a mechanism for compensation.

108. There is a justiciable controversy in this case as to whether the Ordinance violates the Fourth, Fifth and Fourteenth Amendments, the California constitution's privacy right as applied to plaintiffs, the Ellis Act and the Costa-Hawkins Act, and whether specific performance of the Agreement and the offer of lifetime lease may be enforced against plaintiffs.

109. A declaratory judgment as to whether the Ordinance unconstitutionally takes property, seizes property, deprives plaintiffs of their property, deprives plaintiffs of equal protection of law, violates their privacy rights under the California constitution, and violates the Ellis Act and the Costa-Hawkins Act, and whether specific performance of the Agreement and the offer of a lifetime lease may be enforced against plaintiffs, will clarify the legal relations between plaintiffs and defendants, with respect to enforcement of the Ordinance.

110. A declaratory judgment as to the constitutionality and legality of the Ordinance will give the parties relief from the uncertainty and insecurity giving rise to this controversy.

ELEVENTH CAUSE OF ACTION

Injunctive Relief

111. Plaintiffs hereby realleges each and every allegation contained in paragraphs 1 through 110 as though fully set forth herein.

112. Plaintiffs have no adequate remedy at law to address the unlawful and unconstitutional taking and deprivation of their property effected by the Ordinance and under color of state law.

113. There is a substantial likelihood that plaintiffs will succeed on the merits of their claims that the Ordinance unconstitutionally takes private property, unconstitutionally deprives plaintiffs of their property, unconstitutionally deprives plaintiffs of equal protection of the law, violates the Ellis Act and violates the California constitution, the Ellis Act and the Costa-Hawkins Act.

114. Plaintiffs are immediately required to transfer a lifetime lease interest in their Unit to their tenant or suffer defendants' enforcement action. They cannot avoid those events without judicial relief, and will suffer irreparable injury absent a preliminary injunction restraining defendants from enforcing the Ordinance pending a final adjudication in this case.

115. Plaintiffs will suffer irreparable injury absent a permanent injunction restraining defendants from enforcing the Ordinance.

116. Plaintiffs' injury—the immediate, unconstitutional, and illegal taking of property for the private use of tenants—outweighs any harm the injunction might cause defendants.

117. An injunction restraining defendants from enforcing the confiscatory, unconstitutional and illegal Ordinance as applied to plaintiffs will not impair, but rather enhance, the public interest.

TWELFTH CAUSE OF ACTION

Writ of Mandate –

Cal. Civ. Proc. Code § 1085 –
or Other Appropriate Relief

118. Plaintiffs hereby realleges each and every allegation contained in paragraphs 1 through 117 as though fully set forth herein.

119. The Ordinance is invalid as applied to plaintiffs because of the constitutional and state law violations described above.

120. Plaintiffs have a beneficial interest in insuring that the lifetime lease provisions of the Ordinance are found invalid and void as applied to them, and that respondents are ordered not to apply them to them, so that their constitutional and state law rights are not infringed or limited.

121. Plaintiffs do not have a plain, speedy or adequate remedy in the ordinary course of law, and therefore writ relief is necessary.

RELIEF SOUGHT

WHEREFORE, plaintiffs pray for judgment from this court as follows:

1. Damages in excess of $500,000 resulting from the diminished value of Plaintiffs' property;

2. A declaratory judgment that the Ordinance's lifetime lease requirement violates the Public Use Clause of the Fifth Amendment as applied to plaintiffs and is therefore invalid and unenforceable against plaintiffs;

3. A declaratory judgment that the Ordinance's lifetime lease requirement violates the Takings Clause as applied to plaintiffs, and is therefore invalid and unenforceable against plaintiffs;

4. A declaratory judgment that the Ordinance's lifetime lease requirement violates *Nollan*, *Dolan*, and *Koontz* and the Unconstitutional Conditions doctrine as applied to plaintiffs, and is therefore invalid and unenforceable against plaintiffs;

5. A declaratory judgment that the Ordinance's lifetime lease requirement violates the Due Process Clause of the Fourteenth Amendment as applied to plaintiffs and is therefore invalid and unenforceable against plaintiffs;

6. A declaratory judgment that the Ordinance's lifetime lease requirement violates the Fourth Amendment as applied to plaintiffs and is therefore invalid and unenforceable against plaintiffs;

7. A declaratory judgment that the Ordinance's lifetime lease requirement violates the Equal Protection Clause as applied to plaintiffs and is therefore invalid and unenforceable against plaintiffs;

8. A declaratory judgment that the Ordinance's lifetime lease requirement violates the Ellis Act and the Costa-Hawkins Act as applied to plaintiffs, and is therefore invalid and unenforceable against plaintiffs;

9. A declaratory judgment that the Ordinance's lifetime lease requirement violates Cal. Const. Art. 1., § 1 as applied to plaintiffs, and is therefore invalid and unenforceable against plaintiffs;

10. A declaratory judgment that specific performance of the Agreement and the lifetime lease requirement is not enforceable against plaintiffs;

11. A preliminary and permanent injunction preventing defendants from enforcing or taking further action to enforce the Ordinance's lifetime lease requirement as applied to plaintiffs;

12. For a writ of mandate or other appropriate relief, including a mandatory injunction, directing and commanding respondents to rescind the lifetime lease provisions of the Ordinance;

13. For an alternative writ against respondents commanding them to file a response to this petition and to appear before this court on a date to be determined and show cause why a writ of mandate should not issue invalidating the lifetime lease provisions of the Ordinance;

14. For an immediate stay of enforcement of the lifetime lease provisions of the Ordinance;

15. For reasonable attorney's fees and expert fees for bringing and maintaining this action, including under 42 U.S.C. § 1988;

16. For costs of suit and attorney's fees pursuant to the California Code of Civil Procedure § 1021.5 and California Government Code § 800;

16. For such other and further relief that the court deems just and proper under the circumstances of this case.

DATED: June 26, 2017

Respectfully submitted,

/s/ Paul F. Utrecht

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City and County of San Francisco
San Francisco Public Works – Bureau of Street Use and Mapping

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Subdivision.Mapping@sfpw.org

August 15, 2017

Re: Suspension of Portion of Expedited Condominium Conversion Program Due to Legal Challenge

To whom it may concern:

Please be advised that a recent legal challenge to the City and County of San Francisco's Expedited Condominium Program ("ECP") has required the City and County of San Francisco ("City") to suspend the ECP with respect to certain ECP applications for buildings with non-owning tenants. This letter describes the scope and applicability of this suspension. We encourage you to consult your legal counsel regarding the applicability of the suspension to your property and the status of any associated ECP application.

On June 26, 2017, a complaint was filed in the United States District Court to challenge provisions in the ECP requiring property owners seeking to convert a building into a condominium to offer any non-purchasing, non-owning tenant a written offer to enter into a "life time lease," as set forth in the San

Francisco Subdivision Code. (*See* Attachment A [S.F. Subd. § 1396.4(g)]; *see also* Attachment B [Complaint, *Pakdel v. City and County of San Francisco et al.*, Case No.: 3:17-cv-03638 (U.S. District Court, N.D. Cal.)].) According to Board of Supervisors Ordinance No. 117-13 (effective July 28, 2013), the service of the complaint upon the City on June 27, 2017, triggered the suspension of the ECP with respect to buildings with a unit occupied by a non-owning tenant. (*See* Attachment C [Ordinance No. 117-13].) Please note that ECP applications for buildings without any units occupied by a non-owning tenant shall continue to be accepted and processed.

The scope and effects of the suspension for various categories of ECP applications are described below.

- *ECP Applications With Final and Effective Tentative Parcel Map or Tentative Map Approval On or Before June 27, 2017.*
  Applicants that obtained final and effective Tentative Parcel Map or Tentative Map approval on or before June 27, 2017 (for buildings with or without non-owning tenants) may proceed to final Parcel Map or Final Subdivision Map approval and recordation of such maps, subject to the Public Works' authority and discretion under the Subdivision Code.

- *ECP Applications for Buildings Without Non-Owning Tenants.*
  ECP applications for buildings without any non-owning tenants may be accepted, tentatively approved, and finally approved.
- *ECP Applications for Buildings With Non-Owning Tenants (Submitted After June 27, 2017).*
  ECP applications submitted after June 27, 2017 for buildings with any non-owning tenants will not be accepted or approved until further notice from the City and County Surveyor.
- *ECP Applications for Buildings With Non-Owning Tenants (Without Tentative Parcel Map or Tentative Map Approval as of June 27, 2017).*
  ECP applications for buildings with non-owning tenants that lack Tentative Parcel Map or Tentative Map approval as of June 27, 2017 will be suspended until further notice from the City and County Surveyor.

ECP applications that have not been approved, or for which final and effective Tentative Parcel Maps or Tentative Maps have not been approved, by June 27, 2017 shall remain suspended until final judgment (or dismissal) in all courts with respect to the above-referenced lawsuit or January 1, 2024, whichever occurs first. During the suspension of a portion of the ECP, any applicant may seek a refund of any previously paid ECP application fee or condominium conversion fee. Upon receiving an applicant's request for an application fee refund, Public Works and any other reviewing City Departments will deduct costs

incurred by the City, based on time and materials expended, and will refund any remaining portion of the application fee.

If you have any questions, please do not hesitate to contact my office at (415) 554-5827.

Sincerely,

s/ Bruce R. Storrs
Bruce R. Storrs, P.L.S.
City and County Surveyor

Enclosures:

Attachment A. Subdivision Code Section 1396.4(g)

Attachment B. Complaint, *Pakdel v. City and County of San Francisco et al.*, Case No.: 3:17-cv-03638 (U.S. District Court, N.D. Cal.)

Attachment C. San Francisco Board of Supervisors Ordinance No. 117-13