APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NICHOLAS HONCHARIW, Trustee, Honchariw Family Trust, Plaintiff-Appellant, v. COUNTY OF STANISLAUS; BOARD OF SUPERVISORS OF COUNTY OF STANISLAUS, Defendants-Appellees.	No. 21-15801 D.C. No. 1:16-cv-01183-DAD-BAM MEMORANDUM* (Filed Feb. 22, 2022)

Appeal from the United States District Court
for the Eastern District of California
Dale A. Drozd, District Judge, Presiding

Submitted February 17, 2022**
San Francisco, California

Before: McKEOWN and W. FLETCHER, Circuit Judges, and BENNETT,*** District Judge.

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

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Richard D. Bennett, United States District Judge for the District of Maryland, sitting by designation.

Plaintiff Nicholas Honchariw appeals from the district court's grant of judgment on the pleadings to Defendants County of Stanislaus ("County") and Board of Supervisors of County of Stanislaus ("Board"). Plaintiff claims that the Board effected a taking of his property and denied him due process in violation of the Fifth Amendment when it denied his application to subdivide his property in 2009.

Following the denial of his application, Plaintiff successfully obtained relief in a state court mandamus action in 2011. *See Honchariw v. Cty. of Stanislaus*, 200 Cal. App. 4th 1066 (2011). He obtained administrative approval of his application in 2012 and filed a new state court action for inverse condemnation that the California Court of Appeal held was time barred. *See Honchariw v. Cty. of Stanislaus*, 238 Cal. App. 4th 1, 15 (2015). He then brought the instant takings and due process claims in federal court on August 10, 2016.

We previously held that Plaintiff's takings claim is unripe and that his due process claim is time barred. *Honchariw v. Cty. of Stanislaus*, 715 Fed. Appx. 760 (9th Cir. 2019). Plaintiff petitioned for a writ of certiorari and, while the petition was pending, the Supreme Court decided *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019). The Court subsequently granted Plaintiff's petition, vacated our judgment, and remanded the case for further consideration in light of *Knick*. *Honchariw v. Cty. of Stanislaus*, 139 S. Ct. 2772 (2019). We remanded to the district court. *Honchariw v. Cty. of Stanislaus*, 774 Fed. Appx. 411 (9th Cir. 2019). The district court held that Plaintiff's takings claim is time

barred, and again held that his due process claimed is time barred. We have jurisdiction under 28 U.S.C. § 1291 and affirm.

We review de novo a district court's grant of judgment on the pleadings. *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1053 (9th Cir. 2011). "A judgment on the pleadings is properly granted when, taking all the allegations in the non-moving party's pleadings as true, the moving party is entitled to judgment as a matter of law." *Marshall Naify Revocable Tr. v. United States*, 672 F.3d 620, 623 (9th Cir. 2012) (quoting *Fajardo v. Cnty of Los Angeles*, 179 F.3d 698, 699 (9th Cir. 1999)). We "need not accept conclusory allegations of law or unwarranted inferences." *Perfect 10, Inc. v. Visa Intern. Service Ass'n*, 494 F.3d 788, 794 (9th Cir. 2007). We "may affirm on any ground supported by the record, even if it differs from the reasoning of the district court." *Garcia v. Bunnell*, 33 F.3d 1193, 1195 (9th Cir. 1994).

Plaintiff argues that neither claim ripened until the approval of his application in 2012 because the approval was the Board's final decision concerning his property. With respect to Plaintiff's takings claim, the challenged deprivation of the use of his property occurred when the Board denied his application, not when the Board subsequently approved it. In *Knick v. Township of Scott*, the Supreme Court reaffirmed that a takings claim accrues immediately upon a taking and held that it is ripe for federal review at that time. 139 S. Ct. 2162, 2172-73 (2019). The Court more recently reiterated that a decision is final for purposes of

accrual when "[Plaintiff] has actually 'been injured by the Government's action' and is not prematurely suing over a hypothetical harm." *Padkel v. City and Cty. of San Francisco, California*, 141 S. Ct. 2226, 2230 (2021) (quoting *Horne v. Dep't of Agriculture*, 569 U.S. 513, 525 (2013)).

The decision that allegedly injured Plaintiff was the 2009 denial and not the subsequent 2012 approval that remedied the alleged injury. The same analysis applies to Plaintiff's due process claim, which also accrued when his application was denied in 2009, and not when the 2012 approval eliminated the purported violation.

Because Plaintiff's claims accrued when the Board denied his application on March 24, 2009, his federal suit, filed August 10, 2016, was untimely under the applicable two-year statute of limitations. *Action Apartment Ass'n, Inc. v. Santa Monica Rent Control Bd.*, 509 F.3d 1020, 1026 (9th Cir. 2007) ("[C]laims brought under § 1983 borrow the forum state's statute of limitations for personal injury claims, and in California, that limitations period is two years."). While the district court erred in holding that the claims accrued when the Board approved his application on May 22, 2012, it correctly held that the claims are time barred.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

NICHOLAS HONCHARIW,

v.

COUNTY OF STANISLAUS, ET AL.

JUDGMENT IN A CIVIL CASE

CASE NO: **1:16-CV-01183-DAD-BAM**

(Filed Apr. 1, 2021)

Decision by the Court. This action came before the Court. The issues have been tried, heard or decided by the judge as follows:

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER FILED ON 3/31/21

Keith Holland
Clerk of Court

ENTERED: **April 1, 2021**

by: /s/ R. Gonzalez
Deputy Clerk

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

NICHOLAS HONCHARIW, Trustee, Honchariw Family Trust, Plaintiff, v. COUNTY OF STANISLAUS; BOARD OF SUPERVISORS OF COUNTY OF STANISLAUS, Defendants.	No. 1:16-cv-01183-NONE-BAM ORDER GRANTING DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS (Doc. No. 27) (Filed Mar. 31, 2021)

Pursuant to a Ninth Circuit's order remanding this case in light of the Supreme Court's decision in this matter, the court set a dispositive motion schedule in order to facilitate reconsideration of the previously assigned district judge's November 14, 2016 order dismissing this case with prejudice. (Doc. No. 21.) Plaintiff Nicholas Honchariw, as trustee for the Honchariw Family Trust, brought this action against defendants County of Stanislaus (the "County") and the Board of Supervisors of the County of Stanislaus (the "Board") seeking just compensation for temporary regulatory takings under the Fifth Amendment and denial of due process under 42 U.S.C. § 1983 ("§ 1983"). (Doc. No. 1 ¶¶ 1, 9.) In this court's November 14, 2016 order granting defendants' motion to the dismiss, the court found

that plaintiff's takings claim[1] was not ripe for federal adjudication under the decision in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), *overruled in part by Knick v. Township of Scott, Pennsylvania*, ___ U.S. ___, 139 S. Ct. 2162 (2019), and that his due process claim was time-barred. (Doc. No. 13 at 8–11.) Accordingly, the court entered judgment in defendants' favor and dismissed this action on November 14, 2016. (Doc. No. 14.) Plaintiff appealed the judgment. (Doc. No. 15.) After the Ninth Circuit affirmed this court's judgment (Doc. No. 18), plaintiff sought review in the Supreme Court (Doc. No. 28-1). Following its decision in *Knick*, in which *Williamson County* was partially overruled, the Supreme Court remanded this case back to the Ninth Circuit for reconsideration. *See Honchariw v. Cty. of Stanislaus*, Cal., ___ U.S. ___, 139 S. Ct. 2772 (2019). The Ninth Circuit in turn remanded this case to this court for reconsideration in light of the decision in *Knick*. (Doc. No. 21).

Rather than reconsidering its decision without the benefit of further input from the parties, the court instructed them to file a new round of briefing. (Doc. No. 25.) Thereafter, on September 27, 2019, defendants

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[1] The Takings Clause of the Fifth Amendment, "which constrains municipalities through its incorporation by the Fourteenth Amendment, states 'nor shall private property be taken for public use, without just compensation.' " *Weinberg v. Whatcom Cty.*, 241 F.3d 746, 752 (9th Cir. 2001) (quoting U.S. Const. amend. V). "[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

filed a motion for judgment on the pleadings arguing that the court should still enter judgment in their favor, notwithstanding the decision in *Knick*. (Doc. No. 27 at 1–3.) Plaintiff opposed defendants' motion on October 18, 2019 (Doc. No. 31), and defendants replied thereto six days later (Doc. No. 32).

BACKGROUND[2]

In 1992, plaintiff was named as the trustee to 33 acres of real property, also known as the Honchariw Family Trust, located along the Stanislaus River. (Doc.

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[2] Defendants ask the court to take judicial notice of (1) plaintiff's petition for writ of certiorari of this case to the Supreme Court, (2) the Supreme Court's judgment in this case, and (3) a graph of the house price index for Stanislaus County from the Federal Housing Finance Agency's website. (Doc. No. 28.) Defendants' request is partially granted pursuant to Federal Rules of Evidence 201. The court hereby takes judicial notice of the graph on the County's webpage because it is made "publicly available" by a government entity, and "neither party disputes the authenticity of the web sites or the accuracy of the information displayed therein." *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998–99 (9th Cir. 2010) (citations omitted). It is unnecessary for the court to take judicial notice of plaintiff's petition and the Supreme Court's judgment as they are part of the current proceeding, but the court takes judicial notice of the facts and proceedings in *Honchariw v. Cty. of Stanislaus*, 200 Cal. App. 4th 1066 (2011) and *Honchariw v. Cty. of Stanislaus*, 238 Cal. App. 4th 1 (2015). *See United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992) ("[W]e may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue."). As it will become apparent below, the two California appellate court decisions that this court is taking judicial notice of are directly related to this case.

No. 1 ¶¶ 9, 14, 16.) The controversy in this case sprung from defendants' alleged temporary regulatory taking of plaintiff's real property. It all began in June 2006, when plaintiff proposed to the County that his real property be subdivided into ten lots. (*Id.* ¶¶ 1, 17, 20.) The Stanislaus County Planning Commission rejected his proposal and plaintiff appealed that decision to the Board, which in turn affirmed the Commission's rejection on March 24, 2009, without making any findings. (*Id.* ¶¶ 26, 28.) In response, on June 22, 2009, plaintiff filed a writ of administrative mandamus against defendants in the Stanislaus County Superior Court challenging the Board's decision. (*Id.* ¶ 36.) Although the state trial court initially affirmed the Board's decision, the California Court of Appeal later reversed that determination. (*Id.* ¶¶ 45–47). The state appellate court found that the Board's rejection of plaintiff's proposal *without* making any findings was inconsistent with California law, and it ordered the trial court to direct the Board to reconsider its decision and, if the Board were to disapprove of plaintiff's proposal again, it must do so with "written findings." *Honchariw v. Cty. of Stanislaus*, 200 Cal. App. 4th 1066, 1081–82 (2011) ("*Honchariw I*"). Following these instructions, the state trial court issued the prescribed order to the Board. (Doc. No. 1 ¶ 47.) On reconsideration, the Board changed course and approved plaintiff's application to subdivide his real property on May 22, 2012. (*Id.* ¶ 49.)

On December 12, 2012, plaintiff brought another suit against defendants in state court, this time seeking damages for (1) temporary taking of his property

by inverse condemnation under California and federal constitutions, and (2) the denial of his substantive due process rights under the Fifth and Fourteenth Amendments. (*Id.* ¶ 61; Doc. No. 7-2 ¶¶ 41, 47.) The state trial court ultimately dismissed plaintiff's claims as untimely under the California Subdivision Map Act, and the state appellate court affirmed that dismissal order in June 2015. (Doc. No. 1 ¶ 65); *Honchariw v. Cty. of Stanislaus*, 238 Cal. App. 4th 1, 4 (2015) ("*Honchariw II*"). Plaintiff then petitioned the California Supreme Court for review, but that petition was denied on August 19, 2015.[3] (Doc. Nos. 1 ¶ 71; 7-4.)

After waiting approximately a year, plaintiff brought his takings and due process claims here in federal court on August 10, 2016. (Doc. No. 1 ¶¶ 77–90.) Plaintiff claims that he was deprived of substantially viable economic use of his property from March 2009—when defendants rejected his application to subdivide his property—to May 2012—when defendants finally approved his application to subdivide the property. (*Id.* ¶¶ 78, 80–85.)

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[3] Plaintiff alleges that his petition for review was denied on August 10, 2015 (Doc. No. 1 ¶ 71), *but* the judgment issued by the California Supreme Court shows that the petition was denied on August 19, 2015 (*see* Doc. No. 7-4). This discrepancy in the date of denial, however, is not material to the disposition of defendants' pending motion, although the court will use the correct date for purposes of addressing the motion.

LEGAL STANDARD

Rule 12(c) of the Federal Rules of Civil Procedure states that "[a]fter the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." Fed. R. Civ. P. 12. The standard of review on a 12(c) motion is "functionally identical" to its counterpart, a motion to dismiss under Rule 12(b)(6), with timing being the "principal difference" between them. *Dworkin v. Hustler Magazine Inc.*, 867 F.2d 1188, 1192 (1989). "On a 12(c) motion, the court considers 'the complaint, the answer, any written documents attached to them, and any matter of which the court can take judicial notice for the factual background of the case.'" *L-7 Designs, Inc. v. Old Navy, LLC*, 647 F.3d 419, 422 (2d Cir. 2011) (citation omitted). In resolving a motion for judgment on the pleadings, the court "must accept all factual allegations in the complaint as true and construe them in the light most favorable to the nonmoving party." *Fleming v. Pickard*, 581 F.3d 922, 925 (9th Cir. 2009); *see also Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1550 (9th Cir. 1989) (noting that "the allegations of the moving party which have been denied [by the non-moving party] are assumed to be false."). To survive a 12(c) motion, "a plaintiff must allege 'enough facts to state a claim to relief that is plausible on its face.'" *Lowden v. T-Mobile USA Inc.*, 378 F. App'x 693, 694 (9th Cir.

2010)[4] (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

"A judgment on the pleadings is properly granted when, taking all the allegations in the non-moving party's pleadings as true, the moving party is entitled to judgment as a matter of law." *Marshall Naify Revocable Tr. v. United States*, 672 F.3d 620, 623 (9th Cir. 2012) (quoting *Fajardo v. Cty. of Los Angeles*, 179 F.3d 698, 699 (9th Cir. 1999)); *see also Fleming*, 581 F.3d at 925 (noting that "judgment on the pleadings is properly granted when there is no issue of material fact in dispute, and the moving party is entitled to judgment as a matter of law").

ANALYSIS

Defendants move for judgment on the pleadings as to plaintiff's takings and due process claims based on the statute of limitations under California law. (Doc. Nos. 27 at 6–8, 18–19; 32 at 2–4, 9–10; *see also* Doc. No. 13 at 10–11.) While plaintiff's claims are based on different legal theories, both are based on the *same* alleged misconduct: defendants' "arbitrary and capricious" delay in approving plaintiff's application to subdivide his real property. (Doc. No. 1 ¶ 3.) For the reasons explained below, the court concludes that both of plaintiff's claims are time-barred and must be

[4] Citation to this unpublished Ninth Circuit opinion is appropriate pursuant to Ninth Circuit Rule 36-3(b).

dismissed. The court turns first to plaintiff's takings claim.

A. Plaintiff's Takings Claim is Time-Barred

Defendants contend that plaintiff's takings claim is time-barred. (Doc. No. 27 at 6–8.) Plaintiff opposes the pending motion on the ground that his takings claim is *not* subject to any statute of limitations. (Doc. No. 31 at 8). As a preliminary matter, the court must therefore decide whether there is an applicable statute of limitations governing the initiation of plaintiff's takings claim. To determine this, the court must first identify the nature of that claim.

Plaintiff does not bring his takings claim in this court pursuant to 42 U.S.C. § 1983, arguing that reliance on § 1983 is unnecessary because his takings claim "is rooted in the Constitution itself" and is "self-executing"—though, plaintiff cites no authority in support of this interpretation of the Constitution and § 1983. (*See* Doc. Nos. 1 ¶¶ 77–85; 31 at 8.) More importantly, the Ninth Circuit has held that "[t]aking claims *must* be brought under § 1983." *Hacienda Valley Mobile Estates v. City of Morgan Hill*, 353 F.3d 651, 655 (9th Cir. 2003) (emphasis added) (citation omitted); *see also Azul-Pacifico, Inc. v. City of Los Angeles*, 973 F.2d 704, 705 (9th Cir. 1992) ("Plaintiff has no cause of action directly under the United States Constitution. We have previously held that a litigant complaining of a violation of a constitutional right must utilize 42 U.S.C. § 1983." (citations omitted)). Since plaintiff's takings

claim is not cognizable as a claim brought under the Constitution itself, the court liberally construes plaintiff's takings claim as one brought pursuant to § 1983 for violation of the Takings Clause. *See Fleming*, 581 F.3d at 925 (holding that the complaint should be construed "in the light most favorable to the nonmoving party."); *see also Foman v. Davis*, 371 U.S. 178, 181 (1962) (holding the Federal Rules of Civil Procedure favors "decisions on the merits" and disfavors dismissal of claims based on "mere technicalities"). In so doing, the court notes that "[i]t is well-established that claims brought under § 1983 borrow the forum state's statute of limitations for personal injury claims, and in California, that limitations period is two years." *Action Apartment Ass'n, Inc. v. Santa Monica Rent Control Bd.*, 509 F.3d 1020, 1026–27 (9th Cir. 2007) (citing Cal. Civ. Proc. Code § 335.1)[5]. Thus, there is a prescribed period of time after a takings claim accrues following which such a claim cannot be brought, and that period of time in California is two years from the date of accrual. *See Lukovsky v. City & Cty. of San Francisco*, 535 F.3d 1044, 1048 (9th Cir. 2008) ("Accrual is the date on which the statute of limitations begins to run. . . ." (citation omitted)).

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[5] California Code of Civil Procedure § 335.1 states in pertinent part, "Within two years: An action for assault, battery, or injury to, or for the death of, an individual caused by the wrongful act or neglect of another." *See also CTS Corp. v. Waldburger*, 573 U.S. 1, 8–9 (2014) ("Statutes of limitations 'promote justice by preventing surprises through [plaintiffs'] revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.' ").

The parties dispute *when* plaintiff's takings claim accrued as well as *whether* plaintiff is entitled to equitable tolling of the applicable statute of limitations.[6] Defendants argue that the two-year time limitations accrued when the Board denied plaintiff's appeal of his proposal to subdivide his property on March 24, 2009. (Doc. Nos. 27 at 7; 32 at 2.) Under this theory, plaintiff had until March 24, 2011 to timely file his takings claim. (Doc. No. 27 at 7.) Since plaintiff did not initiate this action until August 10, 2016, his takings claim would clearly be time-barred and, according to defendants, he is *not* entitled to any tolling. (*Id.*; Doc. No. 32 at 3–4.) Plaintiff disagrees, arguing first that his takings claim did not accrue until May 22, 2012 when the Board finally approved his application for subdivision. (Doc. No. 31 at 3–4.) Moreover, plaintiff contends, he is entitled to equitable tolling of the limitations period while his takings claim was being litigated in state court from December 12, 2012 until August 19, 2015—when the California Supreme Court denied plaintiff's petition for review. (*Id.* at 7.) Under plaintiff's theory, his takings claim filed on August 10, 2016, was timely brought because, with tolling accounted for, it was filed within two years of May 22, 2012.[7] These accrual date

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[6] *See also Lozano v. Montoya Alvarez*, 572 U.S. 1, 10 (2014) ("As a general matter, *equitable tolling* pauses the running of, or 'tolls,' a statute of limitations when a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action." (citation omitted)).

[7] There are 2,696 days from March 24, 2009 to August 10, 2016. If the accrual date is May 22, 2012, 1155 days may be subcontracted from 2,696, which equal 1,541 days. If plaintiff entitled to equitable tolling from December 12, 2012 to August 19, 2015,

and tolling issues are legal, as opposed to factual, since the parties disagree only with respect to the legal significance of the facts and not the facts themselves. It appears that in order for his claim to be timely filed, plaintiff must prevail as a matter of law both on his contention that his claim did not accrue until May 22, 2012 and on his contention that the statute of limitations for the bringing of that claim was equitably tolled from December 12, 2012 until August 19, 2015. Below the court will address the controlling legal standard governing when a takings claim accrues.

1. Plaintiff's Takings Claim Accrued When It was Ripe

"Although state law determines the statute of limitations for § 1983 claims, federal law governs *when* a claim accrues." *Soto v. Sweetman*, 882 F.3d 865, 870 (9th Cir. 2018) (emphasis added) (citation omitted). Under federal law, the statute of limitations on a takings claim cannot begin to run until it has ripened. *See Norco Constr., Inc. v. King Cnty.*, 801 F.2d 1143, 1145–46 (9th Cir. 1986); *see also Wallace v. Kato*, 549 U.S. 384, 388, 127 S.Ct. 1091, 166 L.Ed.2d 973 (2007) ("[I]t is 'the standard rule that [accrual occurs] when the plaintiff has 'a complete and present cause of action. . . ."); *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 687 (9th Cir. 1993) ("A claim under section 1983 is not ripe—and a cause of action under section 1983 does not

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then another 980 days may be subcontracted from 1,541, which equal 561 days. That is less than two years, or 730 days.

accrue—until that point."). More specifically, "[c]onstitutional challenges to local land use regulations are not considered by federal courts until the posture of the challenges makes them 'ripe' for federal adjudication."[8] *S. Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 502 (9th Cir. 1990). Thus, to determine when plaintiff's § 1983 claim accrued, the court must first determine when plaintiff's takings claim was ripe for federal adjudication. *See Ventura Mobilehome Communities Owners Ass'n v. City of San Buenaventura*, 371 F.3d 1046, 1051–52 (9th Cir. 2004) ("In determining whether takings claims are properly before the court, we *first* determine whether the claim is ripe and *then* determine whether the claim is barred by a statute of limitations.")

Prior to the Supreme Court's recent decision in *Knick*, pursuant to *Williamson County*, a takings claim was deemed to be ripe when (1) "'the government entity charged with implementing the regulations has

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[8] The Supreme court has "noted that ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 734 n.7 (1997) (quoting *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 58 n.18 (1993)); *see also McClung v. City of Sumner*, 548 F.3d 1219, 1224 (9th Cir. 2008), *abrogated on other grounds by Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013) ("We need not determine the exact contours of when takings claim ripeness is merely prudential and not jurisdictional"). The basic rationale of ripeness is "to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements." *Thomas v. Union Carbide Agr. Prod. Co.*, 473 U.S. 568, 580 (1985).

reached a final decision regarding the application of the [challenged] regulations to the property at issue,'" and the plaintiff has (2) "sought 'compensation through the procedures the State has provided.'" *Adam Bros. Farming v. Cty. of Santa Barbara*, 604 F.3d 1142, 1146–47 (9th Cir. 2010) (alteration in original) (quoting *Williamson Cty.*, 473 U.S. at 194). In *Knick*, however, the Supreme Court overruled the second requirement, also known as the state-litigation requirement, but left the first requirement referred to as the "finality requirement untouched, so that aspect of *Williamson County* remains good law." *Pakdel v. City & Cty. of San Francisco*, 952 F.3d 1157, 1163 (9th Cir. 2020). Thus, under the holding in *Knick*, plaintiff's takings claim was ripe for federal adjudication when the finality requirement is satisfied.[9] "[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].'" *Id.* at 1164 (citation omitted). Specific to the present circumstance, where the "takings or due process claims are based on a permitting authority's unreasonable delay or failure to act within

[9] The Supreme Court has held "that this Court's application of a rule of federal law to the parties before the Court requires every court to give retroactive effect to that decision." *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 90 (1993). Pursuant the Supreme Court's instructions remanding this case, there is no question *Knick* is retroactively applicable here. (*See* Doc. No. 28-2, Ex. B.)

mandated time periods," "a permit approval constitutes a final decision for ripeness purposes." *Woods View II, LLC v. Kitsap Cty.*, 484 F. App'x 160, 161 (9th Cir. 2012)[10] (citing *Norco*, 801 F.2d at 1145–46) (holding that when a takings claim is based on an unlawful delay in the processing of a land-use application, "[t]he *duration* of the wrongful taking may be relevant to determining whether a wrong has occurred, as well as the extent of the damage suffered."); *accord New Port Largo, Inc. v. Monroe Cty.*, 985 F.2d 1488, 1493 (11th Cir. 1993) (citing *Norco*, 801 F.2d 1143); *Biddison v. City of Chicago*, 921 F.2d 724, 728 (7th Cir. 1991) (same); *see also Palazzolo v. Rhode Island*, 533 U.S. 606, 620–21 (2001) ("As a general rule, until these ordinary processes have been followed the extent of the restriction on property is not known and a regulatory taking has not yet been established."); *Oblates of St. Joseph v. Nichols*, No. CIV. S-01-2349 LKK DAD, 2002 WL 34938200, at *3 (E.D. Cal. Apr. 26, 2002) (" 'Excessive delay' may, however, supply the requisite finality."). In effect, *if* the plaintiff's takings claim brought in this action is based on the permitting authority's alleged unreasonable delay in approving the land-use application, both elements of the finality requirement are satisfied when the permitting authority *approves* the plaintiff's application.

Here, plaintiff's takings claim is based on defendants' alleged unlawful delay in approving plaintiff's

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[10] *See* note 4 and accompanying text.

application to subdivide his real property. In his complaint plaintiff alleges as follows:

> The gravamen of this Complaint is that the *delay* was not a normal incident of the regulatory process but that the Board's disapproval and course of conduct in opposing Plaintiffs subdivision application and mandamus action were arbitrary and capricious and / or willful and deliberate obstruction of his constitutionally-protected property rights upending his reasonable investment backed expectations and causing significant economic loss.

(Doc. No. 1 ¶ 3.) Given plaintiff's theory of liability, his takings claim became ripe under *Knick* and accrued when the Board finally approved his application for subdivision of the real property on May 22, 2012. *See MacDonald, Sommer & Frates v. Yolo Cty.*, 477 U.S. 340, 348 (1986) ("A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes."); *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 864 F.2d 1475, 1481 (9th Cir. 1989) ("Regardless of the type of claim, it is generally impossible to determine the extent of the infringement absent a final determination by the relevant governmental body.").

2. Plaintiff's Takings Claim is Nonetheless Time-Barred

Given the accrual date of May 22, 2012, plaintiff had until May 22, 2014—or two years later under California Code of Civil Procedure § 335.1—to timely file

his takings claim in federal court. Because plaintiff did not file this action until August 10, 2016, it is untimely absent tolling of the limitations period. *See California Pub. Employees' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2050–51 (2017) ("The classic example [of tolling] is the doctrine of equitable tolling, which permits a court to pause a statutory time limit 'when a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action.'" (citation omitted)). Plaintiff does not dispute the fact that his takings claim is untimely absent tolling, even if his date of May 22, 2012 is used as the accrual date. (Doc. No. 31 at 7.)

3. Plaintiff Has Failed to Establish that He is Entitled to Equitable Tolling

Plaintiff insists that he is entitled to equitable tolling of the applicable statute of limitations for the period of time during which he was litigating his takings claim in state court from December 12, 2012 to August 19, 2015, thus rendering this action timely brought. (*Id.*) Defendants counter that plaintiff is not entitled to equitable tolling because his state action was itself dismissed as untimely. (Doc. No. 32 at 2–4.) Defendants' argument is well-taken.

The Supreme Court has "indicated that state law doctrines allowing for tolling may be applicable to section 1983 actions," "unless they are inconsistent with federal policy underlying the cause of action under consideration." *Donoghue v. Orange Cty.*, 848 F.2d 926, 930

(9th Cir. 1987) (citing *Board of Regents v. Tomanio*, 446 U.S. 478, 486–87, 100 S.Ct. 1790, 64 L.Ed.2d 440 (1980)); *see also Young v. United States*, 535 U.S. 43, 49 (2002) ("It is hornbook law that limitations periods are customarily subject to 'equitable tolling'. . . ." (citations omitted)). The parties agree that California's equitable tolling doctrine should apply here (*see* Doc. Nos. 31 at 7; 32 at 3–4) and the court will therefore apply that doctrine in this case.

In California, equitable tolling is a "judicially created, nonstatutory doctrine" that, where applicable, will "suspend or extend a statute of limitations as necessary to ensure fundamental practicality and fairness." *McDonald v. Antelope Valley Cmty. Coll. Dist.*, 45 Cal. 4th 88, 99 (2008). "Broadly speaking, the doctrine applies '[w]hen an injured person has several legal remedies and, reasonably and in good faith, pursues one.'"[11] *Id.* at 100. "To determine whether equitable

[11] The California Supreme Court has recognized three circumstances in which equitable tolling has been applied in California. When (1) "some flexibility from the statute of limitations" is called for because "a plaintiff was already involved in one lawsuit, and filed a subsequent case that could lessen the damage or harm that would otherwise have to be remedied through a separate case"; (2) "where a plaintiff was required to pursue, and did indeed pursue, an administrative remedy before filing a civil action"; *or* (3) where tolling would "serve the ends of justice [because] technical forfeitures would unjustifiably prevent a trial on the merits." *Saint Francis Mem'l Hosp. v. State Dep't of Pub. Health*, 9 Cal. 5th 710, 724 (2020) (citation omitted). Here, plaintiff does not explain which circumstance fits his case (Doc. No. 31 at 7), but such an explanation is not necessary. Regardless of which circumstance is applicable, the elements of equitable tolling are the same.

tolling may extend a statute of limitations, courts must analyze whether a plaintiff has established the doctrine's three elements: [(1)] timely notice to the defendant, [(2)] lack of prejudice to the defendant, and [(3)] reasonable and good faith conduct by the plaintiff." *Saint Francis Mem'l Hosp. v. State Dep't of Pub. Health*, 9 Cal. 5th 710, 725–26 (2020) (alteration in original) (citation omitted). The plaintiff "bears the burden of proving the applicability of equitable tolling." *In re Marriage of Zimmerman*, 183 Cal. App. 4th 900, 912 (2010) (citations omitted); *see also Hinton v. Pac. Enterprises*, 5 F.3d 391, 395 (9th Cir. 1993) ("The burden of alleging facts which would give rise to tolling falls upon the plaintiff."). The court will address only the first element of timely notice in the context of this case.

"The timely notice requirement essentially means that the first claim must have been filed within the statutory period," *and* that "the filing of the first claim must alert the defendant in the second claim of the need to begin investigating the facts which form the basis for the second claim." *McDonald*, 45 Cal. 4th at 102 n.2. The element of timely notice "ought to be interpreted literally." *Saint Francis*, 9 Cal. 5th at 727. Here, plaintiff argues that "the County had explicit notice of a possible future suit" when he litigated his takings claim in state court from December 12, 2012 to August 19, 2015. (Doc. No. 31 at 7.) This argument, however, is unpersuasive because it overlooks the fact that the state trial court dismissed plaintiff's takings claim as "untimely" under limitations period provided for in the California Subdivision Map Act. (Doc. No. 1

¶ 65.) In other words, plaintiff failed to bring his takings claim in state court "within the statutory period" as required by the timely notice element. *McDonald*, 45 Cal. 4th at 102 n.2. The California Court of Appeal later affirmed the state trial court's dismissal of plaintiff's action for lack of timeliness. *See Honchariw II*, 238 Cal. App. 4th 1. Moreover, even though plaintiff petitioned the California Supreme Court for review, his petition was denied in August 2015. (Doc. Nos. 1 ¶ 71; 7-4.) Indeed, plaintiff concedes these facts in the allegations of his complaint. (Doc. No. 1 ¶¶ 65, 68–71.)

Federal and California courts have uniformly held, as the court does so here, that the element of timely notice is *not* satisfied when the same claim brought previously in another proceeding was deemed to be untimely.[12] *See*, *e.g.*, *Wade v. Ratella*, 407 F. Supp. 2d 1196, 1205–06 (S.D. Cal. 2005) (finding that the timely notice element is not satisfied because plaintiff unduly delayed in bringing his inmate claims to the prison tribunal to completion); *Diggs v. Williams*, No. CIV S-05-1168 DFL GGH P, 2006 WL 1627887, at *3–4 (E.D. Cal. June 8, 2006), *report and recommendation adopted*, No. CIV S-05-1168 DFLGGH P, 2006 WL 2527949 (E.D. Cal. Aug. 31, 2006) (finding that the plaintiff was not entitled to equitable tolling because his previous actions in state court were dismissed on statute of limitations grounds); *Willis v. City of Carlsbad*, 48 Cal.

[12] Plaintiff has failed to cite to any authority holding that the element of timely notice can ever be satisfied when the previous claim or action was dismissed on statute of limitations grounds, nor has the undersigned located any such authority.

App. 5th 1104, 1123 (2020) (declining to apply equitable tolling because the plaintiff had failed to timely file its government claim); *J.M. v. Huntington Beach Union High Sch. Dist.*, 2 Cal. 5th 648, 658 (2017) (affirming the denial of equitable tolling because the plaintiff "simply failed to comply with the claims statutes, missing an easily ascertainable deadline that has been in place for over 50 years."); *Aguilera v. Heiman*, 174 Cal. App. 4th 590, 600 (2009) (finding that timely notice was not satisfied where the defendants "were not named within the limitations period" in a previous proceeding). *But see*, *e.g.*, *Tarkington v. California Unemployment Ins. Appeals Bd.*, 172 Cal. App. 4th 1494, 1499–500, 1503–04 (2009) (finding that there was timely notice because the plaintiffs timely brought their joint petition for writ of administrative mandate "within the six-month statutory period"). Because plaintiff failed to timely pursue his takings claim in state court, the element of timely notice cannot now be satisfied. It must follow that plaintiff is *not* entitled to equitable tolling of the applicable statute of limitations based upon his untimely pursuit of claims in state court and his takings claim brought in this federal court action is therefore time-barred.

B. Plaintiff's Due Process Claim is Also Precluded

The court now turns to defendants' request for judgment on the pleadings as to plaintiff's due process claim. (Doc. No. 27 at 18–19.) In its November 14, 2016 order, the court found that plaintiff's due process

claim—which was also predicated on the Board's denial of his application to subdivide his property—was time-barred under California Civil Procedure Code § 335.1, and that plaintiff had failed to state a cognizable claim. (Doc. No. 13 at 10–11.) As a result, the court dismissed plaintiff's due process claim with prejudice.[13] (*Id.*) Defendants now urge the court to follow the law of case doctrine and again dismiss plaintiff's due process claim for the same reasons stated in the November 14, 2016 order. (Doc. No. 27 at 18–19.) In opposition, plaintiff asks the court to reconsider its previous ruling and allow his due process claim to proceed "for the same reasons that the takings claim is timely." (Doc. No. 31 at 22.) However, above the court has concluded that plaintiff's takings claim is time-barred in light of the decision in *Knick*. In any event, the law of the case doctrine—where "a court is ordinarily precluded from reexamining an issue previously decided by the same court, or a higher court, in the same case," *United States v. Smith*, 389 F.3d 944, 948 (9th Cir. 2004)—is appropriately followed here. For the same reasons set forth above and in the court's November 14, 2016 order (*see* Doc. No. 13 at 10–11), the undersigned concludes that plaintiff's due process claim

[13] The Ninth Circuit initially affirmed the court's judgment dismissing plaintiff's action (Doc. No. 18), but later modified its judgment and remanded this case for reconsideration in light of the decision in *Knick* (Doc. No. 21). Although the court's judgment as a whole was remanded, the court's reasoning in dismissing plaintiff's due process claim on November 14, 2016 did not rely on the decision in *Williamson County*. Thus, the change in law brought about by *Knick* does not implicate the court's previous rationale for dismissing plaintiff's due process claim.

is time-barred and insufficiently pled. Accordingly, plaintiff's second claim asserting violation of his due process rights must also be dismissed.

C. Granting Leave to Amend Would be Futile

"Although, under Federal Rule of Civil Procedure 15(a)(2), leave to amend should be 'freely' given, that liberality does not apply when amendment would be futile." *Ebner v. Fresh, Inc.*, 838 F.3d 958, 968 (9th Cir. 2016). Here, the court finds that amendment of the complaint would be futile because plaintiff's claims are clearly time-barred based on the allegations of the complaint and the undisputed facts regarding the history of plaintiff's pursuit of his previous case in state court. Under these circumstances, plaintiff cannot cure the noted deficiencies nor establish that he is entitled to equitable tolling of the applicable statute of limitations by way of amendment. Thus, granting leave to amend here is not justified.

CONCLUSION

In light of the foregoing, defendants' motion for judgment on the pleadings (Doc. No. 27) is GRANTED. The complaint is hereby DISMISSED with prejudice. The Clerk of Court is directed to CLOSE this case.

IT IS SO ORDERED.

Dated: March 31, 2021 /s/ [Illegible]
UNITED STATES
DISTRICT JUDGE

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NICHOLAS HONCHARIW, Trustee, Honchariw Family Trust, Plaintiff-Appellant, v. COUNTY OF STANISLAUS; BOARD OF SUPERVISORS OF COUNTY OF STANISLAUS, Defendants-Appellees.	No. 16-17256 D.C. No. 1:16-cv-01183-LJO-BAM **ORDER*** (Filed Aug. 8, 2019)

On Remand from the United States Supreme Court

Before: SCHROEDER, TORRUELLA,** and FRIEDLAND, Circuit Judges.

Pursuant to the Supreme Court's decision in this matter, *Honchariw v. Cty. of Stanislaus, Cal.*, No. 18-294, 2019 WL 2649780, at *1 (U.S. June 28, 2019), the case is remanded to the district court for reconsideration in light of *Knick v. Twp. of Scott, Pennsylvania*, 139 S. Ct. 2162 (2019).

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

** The Honorable Juan R. Torruella, United States Circuit Judge for the First Circuit, sitting by designation.

APPENDIX D

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

June 28, 2019

Mr. Nicholas James Honchariw
3 Via Paraiso West
Tiburon, CA 94920

Re: Nicholas Honchariw
v. County of Stanislaus, California, et al.
No. 18-294

Dear Mr. Honchariw:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *Knick v. Township of Scott*, 588 U. S. ___ (2019).

The judgment or mandate of this Court will not issue for at least twenty-five days pursuant to Rule 45. Should a petition for rehearing be filed timely, the

judgment or mandate will be further stayed pending this Court's action on the petition for rehearing.

Sincerely,

/s/ Scott S. Harris
Scott S. Harris, Clerk

APPENDIX E

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Tiburon CA 94920
(415) 225 3048
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Attorney for Plaintiff
Nicholas Honchariw, Trustee
Honchariw Family Trust

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

NICHOLAS HONCHARIW, TRUSTEE, HONCHARIW FAMILY TRUST,	**Civ. No.**
Plaintiff	**COMPLAINT**
v.	**JURY TRIAL DEMANDED**
COUNTY OF STANISLAUS; BOARD OF SUPERVISORS OF COUNTY OF STANISLAUS,	
Defendants	

THE NATURE OF THIS ACTION

1. Plaintiff seeks just compensation for a temporary regulatory taking and/or damages for denial of due process under 42 U.S.C. §1983 arising from the Board of Supervisors' 2009 disapproval of his small residential subdivision in the face of NIMBY ("not in

my back yard") opposition in disregard and violation of California's "Anti-NIMBY Law". The Anti-NIMBY Law expressly directs that proposed residential subdivisions which comply with objective general plan and zoning requirements can only be disapproved upon written findings of a specific, adverse effect upon public health or safety that cannot be avoided or satisfactorily mitigated. Although the County planning staff found, and the Board did not question, that the subdivision complied with general plan and zoning requirements, the Board refused to apply the law and disapproved Plaintiff's application without any such findings.

2. Plaintiff timely filed a petition for writ of mandate to set aside the disapproval as unlawful within the 90-day limitations period of the Subdivision Map Act and ultimately succeeded in securing a unanimous court of appeal decision ordering issuance of a writ directing the Board to set aside its disapproval and reconsider the application under the Anti-NIMBY Law. Doing so, the Board was unable to find any basis to disapprove the subdivision under the Anti-NIMBY Law and approved the application.

3. However, the approval only came in May 2012, more than 3 years after disapproval and 5 years after submission of the application. The gravamen of this Complaint is that the delay was not a normal incident of the regulatory process but that the Board's disapproval and course of conduct in opposing Plaintiff's subdivision application and mandamus action were arbitrary and capricious and/or willful and deliberate

obstruction of his constitutionally-protected property rights upending his reasonable investment-backed expectations and causing significant economic loss. The character of the regulatory action, its economic impact, and the effect upon reasonable investment-backed expectations are the primary factors to be weighed in the *Penn Central* test to determine whether a taking has occurred and the character of the regulatory action and nature of the affected interest central to determine whether there has been a denial of due process.

4. Specifically Plaintiff alleges, *inter alia*, that the disapproval itself was in flagrant disregard and violation of the express language of the Anti-NIMBY Law, its stated purpose and legislative history, and case authorities, and further that repeated arbitrary and capricious conduct and/or willful and deliberate obstruction by the Board in opposing Plaintiff's mandamus action caused prolonged and inexcusable delay. Allegations include an unlawful delay of almost 6 months beyond the 30-day statutory allowance in producing the administrative record, contrived misrepresentation to the trial court that the proposed lots did not connect with a public water and sewer system in violation of general plan and zoning requirements and thus did not qualify for the Anti-NIMBY Law, and a delay of a month in complying with the court's writ. Although no such claim had been made at the time of disapproval, the misrepresentation was accepted by the trial court and became the sole basis for the trial court's denial of Plaintiff's petition. The court of appeal found "nothing in the record" to support the

misrepresentation and reversed, expressly recognizing that lots cannot be connected until they exist. However, the misrepresentation resulted in a setback of almost 2 years. Plaintiff alleges that these delays imposed severe costs upon the project during a historic downturn in the California real estate market.

5. Following approval in May 2012, Plaintiff in December 2012 filed an action for damages in inverse condemnation and denial of due process in superior court. The Board demurred across-the-board, attacking the complaint as meritless and untimely under the 90-day Subdivision Map Act statute of limitations for challenging the disapproval. The court overruled the demurrer except as to untimeliness. It ultimately dismissed the action and entered judgment for the Defendants on the basis of untimeliness.

6. Plaintiff appealed to the court of appeal, which affirmed the trial court's ruling in June 2015. The court of appeal recognized that the California Supreme Court had sanctioned a 2-step procedure for claiming damages arising from administrative action in the face of such very short limitations periods, allowing an action for damages to follow a timely set aside of administrative action, but held that the initial mandamus action had to result in "a final judgment establishing that there has been a compensable taking of plaintiff's land". It was insufficient to set aside the action. Since Plaintiff had not alleged a taking or denial of due process in his petition for writ, or otherwise, within 90 days of disapproval in 2009, his complaint was held untimely.

7. Plaintiff requested review by the California Supreme Court but the request was denied August 10, 2015.

8. Plaintiff contends that he has thus satisfied the two-prong *Williamson* requirement to bring this action: (1) the Board made a final, definitive decision regarding permitted development in May 2012 and (2) Plaintiff sought but was denied compensation through the applicable state procedures. While Plaintiff took an *England* reservation in the state proceedings to reserve his federal claims, the lynchpin of this action is that the state procedures for compensation were unavailable and inadequate under *Williamson* because the requirement framed by the court of appeal for a final judgment establishing a compensable taking in the initial mandamus action was infeasible and could not have been met by Plaintiff. Both California and federal law are well-settled that there is no taking or due process claim until one becomes ripe with a final, definitive decision on permitted development. Until then the *Penn Central* factors remain inchoate and cannot be weighed to determine whether there has been a taking. Here that came only upon approval of the subdivision in May 2012. Filing an action for a taking or denial of due process before then would have been premature and unwarranted by existing law, subject to dismissal, and could not have sustained a final judgment establishing a compensable taking.

THE PARTIES

9. Plaintiff is the duly appointed, qualified, and acting trustee of the Honchariw Family Trust ("Trust") created by settlor Rev. Iwan Honchariw by written declaration dated March 8, 1991, as amended. He has no beneficial interest in the Trust.

10. Defendant Board of Supervisors ("Board") of the County of Stanislaus ("County") is the board of supervisors for Defendant County. The Board has final authority to approve or disapprove subdivision applications for real property in Stanislaus County.

JURISDICTION AND VENUE

11. This court has federal question and supplemental jurisdiction pursuant to 28 U.S.C. §1331 and under 28 U.S.C. §1367 because (i) Plaintiff states claims arising under the Constitution and laws of the United States and (ii) any state law claims are so closely related to the federal law claims as to form the same case or controversy under Article III of the Constitution.

12. This Court has personal jurisdiction over the County and the Board on the grounds that they are considered to exist and reside and are conducting business within the state of California.

13. Venue for the action properly lies in the district pursuant to 28 U.S.C. §1391 because the property and the County are in the district, the Board is considered to reside in this district, and a substantial part of

the events or omissions giving rise to the claims occurred in this district.

FACTUAL ALLEGATIONS COMMON TO CLAIMS

Background

14. Plaintiff owns over 33 acres of real property in the County consisting of two adjacent parcels in and adjoining the small community of Knights Ferry with over 1000' of frontage along the Stanislaus River. The inner parcel of 13+ acres is within the Knights Ferry Historical District and zoned "H-S" ("Historical Site") and the outer parcel of 20 acres is outside the district and zoned "A-2-5".

15. Trust settlor Rev. Iwan Honchariw purchased the property in October 1973 as a long-term investment which he could operate and develop while residing in a small historic house on the river. The river frontage had been operated as a family resort for decades. The County's master rezoning of the Knights Ferry community in 1972 had affirmed the H-S zoning of the 13+ acre parcel. Under the County general plan, historical zones were designated for development with building intensity "normally . . . from one to seven units per net acre". The Community Plan adopted by the Board for Knights Ferry in 1976 reaffirmed that the H-S property was designated for development.

16. Trust settlor Rev. Iwan Honchariw created the Trust in 1991 with himself as trustee for the benefit of children of his extended family and transferred

the property into the Trust. In 1992 Plaintiff became the successor trustee of the Trust upon the death of Rev. Iwan Honchariw and determined to continue to hold the property as a long-term investment for development.

Subdivision

17. In March 2001, Plaintiff met with County planning staff and confirmed that H-S zoning allowed residential development of the inner 13+ acre parcel with no minimum zoning and A-2-5 zoning allowed residential development of the outer 20-acre parcel with 5-acre minimum zoning. Minimum lot sizes in H-S zoning were generally determined by the availability of water and sewer connections. Knights Ferry has no public sewer system. Without a sewer hook-up, lots generally had to be just under ½ acre. There is a public water system operated by the Knights Ferry Community Services District ("KFCSD"). Lots which also lacked a water hook-up generally had to be 1 acre. Plaintiff retained a civil engineering firm to prepare a preliminary subdivision map for residential development of the property with very modest density for the inner 13+ acre H-S parcel of 4 unimproved 1-acre lots, one ½-acre lot already improved with the historic residence, and a large remainder of 8 ½ acres, and 3 unimproved 5-acre lots and a 5-acre remainder for the outer 20-acre lot.

18. In October 2004 Plaintiff made a conceptual presentation of his proposed residential development

to the Knights Ferry Municipal Advisory Council ("MAC"), a public entity organized and existing by resolution of the Board #83-1744 pursuant to Govt. Code §31010 which is empowered to advise the Board, *inter alia*, on local planning and conducts design review for projects within the Knights Ferry Historical District. MAC expressed no objections.

19. In November 2004 Plaintiff presented the preliminary map to the County planning director and staff. They expressed informal approval and advised Plaintiff to retain biological and archeological consultants to prepare reports. Plaintiff did so and presented an environmental report to the planning department in April 2005 and an archaeological report in September 2005. The reports confirmed the feasibility of development.

20. On June 16, 2006, Plaintiff filed Subdivision Application 2006-06 with the County to subdivide the property in accordance with the preliminary map. A copy of the proposed "vesting tentative map" for "Knights Ferry Overlook" is attached as Exhibit A and incorporated by this reference. The application complied with all general plan and zoning standards and criteria and requested no zoning variance or general or specific plan amendments.

21. Proposed subdivisions are normally reviewed under Title 20, "Subdivision", of the Stanislaus County Code, promulgated under the Subdivision Map Act, which allows significant discretion to make findings and approve or disapprove a proposed subdivision.

Because the project was a housing development project which complied with all applicable, objective general plan and zoning standards and criteria, it qualified for the anti-NIMBY protections of Govt. Code §65589.5 (the "Anti-NIMBY Law"). Under subd. (j), a "housing development project" which complies with "applicable, objective general plan and zoning standards and criteria. . . ." can be disapproved only upon specific written findings supported by substantial evidence on the record that both of the following conditions exist: (1) "a specific, adverse impact", defined as a "significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions", and (2) "[t]here is no feasible method to satisfactorily mitigate or avoid the adverse impact".

22. Because subd. (j) substantially limited the Board's discretion to disapprove Plaintiff's housing development project, Plaintiff enjoyed a constitutionally-protected property interest under well-established federal and California case law.

23. Since the 13+ acre H-S parcel was within the KFCSD service district, Plaintiff requested water service for the H-S lots. The H-S parcel was already served by one connection providing water to the historic residence on the proposed 1/2-acre lot, caretaker's quarters, various outbuildings, and the campground. Nevertheless, after a delay of many months, the KFCSD issued a "will not serve" letter refusing any new water service. Each of the proposed new lots in the H-S zone would have to rely upon its own new well like

the 5-acre lots in the outer parcel. Even with wells the subdivision complied with all applicable, objective general plan and zoning standards.

24. Since the 4 new 1-acre lots would not have water service, the planning staff directed Plaintiff to prepare an exception application from the water connection requirements of County Code section 20.52.210. Plaintiff filed Exception Application 2008-02 in April 2008 as a stand-alone application. If the application were denied, Plaintiff would remain subject to all County water connection requirements whether or not water service were provided.

25. The planning staff found that the subdivision application complied with all applicable general plan and zoning standards and criteria and, moreover, found that all of the findings necessary or appropriate for subdivision under the usual County standards could be made. The planning staff prepared a favorable staff report recommending approval of the subdivision application and the exception application. As customary the planning staff proposed a series of approval conditions for the project.

Disapproval of Subdivision

26. In a hearing on February 5, 2009, the County planning commission overrode the recommendation of its planning staff and disapproved both the subdivision and exception applications in the face of concerted NIMBY opposition to the 1-acre lots in the H-S zone. Protestors voiced such concerns as nighttime glare

from houses, impact upon wildlife, additional traffic, and changes to the character of the historic district. Some objected that Plaintiff was not a resident of Knights Ferry, and one commissioner asked Plaintiff whether he was. The planning commission failed to apply the requirements of subd. (j). Instead it reviewed the subdivision application under the usual Title 20 subdivision standards and disapproved the application after declining to make the findings recommended by the planning staff.

27. MAC members fueled opposition with several misrepresentations, including a critical misrepresentation by Sally Goering, who identified herself as a local resident and MAC member, that Cemetery Road, fronting much of the property, was only a substandard 13 ½ feet wide and could not safely handle additional traffic. This was cited as an "overwhelming" factor by one commissioner and noted by others. In fact, as she knew from her own measurements, the road is generally 25' wide. The MAC chairman, Eric Feichter, insisted that the zoning maps were in error and that some of the proposed 1-acre lots shown in the H-S zone belonged in the A-2-5 zone.

28. Plaintiff appealed to the Board. The planning staff continued to recommend approval of both the subdivision and exception applications, but in a hearing on March 24, 2009, the Board also overrode its recommendation and disapproved both applications in the face of continuing NIMBY opposition. Some neighbors continued to protest that Plaintiff was trying to create 1-acre lots in a 5-acre zone. Over Plaintiff's objection,

the Board refused to apply the strict disapproval requirements of subd. (j). The Board did not question that the project was a housing development project under the Anti-NIMBY Law and that, as determined by the planning staff, it complied with all applicable general plan and zoning standards and criteria and otherwise qualified for subd. (j). Its sole stated reason was that the subd. (j) only applied if and when the Board first found that the application met all of the usual County subdivision standards of Title 20. The Board disapproved the subdivision application under the usual County standards of Title 20 with the subjective, discretionary finding – not made by any local agency reviewing the application – that the site was "physically unsuitable" for the project. It did not make, nor purport to make, the findings required by subd. (j).

29. Plaintiff advised the Board that the Anti-NIMBY Law conferred a constitutionally-protected property right for residential development of the property in compliance with general plan and zoning standards.

30. The Board's sole stated rationale for refusing to apply the plain language of subd. (j) was arbitrary and capricious and/or willful and deliberate obstruction of Plaintiff's property right to subdivide his property for a housing development in compliance with general plan and zoning requirements. No supporting authority was offered. In fact it stood subd. (j) on its head. The legislative history makes clear that the very purpose of subd. (j) is to bar local agencies from succumbing to NIMBY opposition and disapproving sound

housing developments under their usual broad discretionary powers, a practice denounced by the Legislature for limiting access to housing and raising the cost of housing for all Californians. Under the Board's interpretation, access to subd. (j) would be denied exactly in the circumstance where it was intended to apply.

31. The necessary subd. (j) findings for disapproval could not be made on the record. The County's own agencies had reviewed the project without finding any significant adverse effect upon public health or safety that could not be satisfactorily mitigated or avoided and had – except for MAC – approved the applications. Opponents offered no expert testimony to challenge these findings. Defendants in the ensuing litigation conceded that the opposition was NIMBY-based and that the project presented no public health or safety concerns.

32. Upon disapproval the Board declined to grant Plaintiff's request for waiver of the County's 1-year prohibition on re-submission.

33. After disapproval, Plaintiff asked by letter of April 6, 2009 to meet to resolve the impasse but did not receive any response from the County.

Mandamus Action to Set Aside Disapproval

34. With the disapproval, Plaintiff exhausted his administrative remedies to secure approval of his Subdivision Application 2006-06.

35. By letter dated April 24, 2009 Plaintiff requested the administrative record from the County. The County failed to comply with the directives of Govt. Code §65589.5(m) & (n) of the Anti-NIMBY Law to provide the record "as expeditiously as possible", within 30 days of service, and at its expense. It demanded, and Plaintiff was compelled to pay, $2000 before it would commence preparation of the record. It only produced the record on or about October 30, 2009, almost 190 days after Plaintiff's request.

36. As expressly required by Gov. Code §65589.5(m) for an action to enforce the provisions of the Anti-NIMBY Law, on June 22, 2009 Plaintiff timely filed a Petition for Writ of Mandate in the Superior Court for the County of Stanislaus pursuant to Code of Civ. Proc. §1094.5 within the 90-day limitations period of the Subdivision Map Act to set aside the disapproval on the grounds, *inter alia*, that the Board's disapproval of the project was an unlawful and invalid abuse of its discretion under Code of Civ. Proc. §1094.5(b) because the Board did not make the written findings required by subd. (j).

37. Because the only stated reason for the Board's refusal to apply the Anti-NIMBY Law lacked any support, Plaintiff expected a prompt resolution of his mandamus action. He had no reasonable basis to expect that the action would drag on for 3 years until approval of the subdivision.

38. Defendants County and the Board filed their Answer in August 2009 without specifically challenging the applicability of subd. (j).

39. After receiving the administrative record, on or about December 9, 2009, Plaintiff filed a Notice of Motion and Motion for Writ of Administrative Mandate with a Supporting Memorandum of Points and Authorities setting forth the applicability of subd. (j) and refuting the sole reason stated by the Board in declining to apply subd. (j).

40. In their Memorandum in Opposition filed on or about December 23, 2009. Defendants offered no defense for the sole rationale stated by the Board for declining to apply subd. (j). No defense of that rationale was ever offered.

41. Instead Defendants asserted – for the first time – that the project did not qualify for subd. (j) because subd. (j) was limited to so-called "affordable" housing, or limited in any event to "density" reductions, and, moreover, that the application did not qualify for subd. (j) because the project did not comply with County sewer and water connection requirements which were part of its general plan and zoning requirements. The Board had not questioned the project's qualification under subd. (j) upon disapproval. On the contrary, it had been acknowledged that subd. (j) would be applicable if the Board wanted to deny the application after first clearing the application under the usual County subdivision standards of Title 20.

42. This after-the-fact defense was arbitrary and capricious and/or willful and deliberate obstruction of the proposed subdivision.

43. Defendants offered no authority for the proposition that subd. (j) was limited to "affordable" housing, or to density transfers. In contrast legislative history and clear long-standing case law confirmed the plain language of subd. (j) that it applied to all housing development projects, not just "affordable" housing.

44. Defendants misrepresented that the proposed 1-acre lots did not connect with the local public water and sewer systems in violation of County Code section 20.52.210, which required that "[a]ll lots of a subdivision shall be connected to a public water system . . . whenever available", allegedly disqualifying the project from subd. (j). As Defendants were aware, there is no local public sewer system, but even more basic, there were no lots yet. They were only proposed. A water connection was not required, and indeed was not feasible, until proposed lots came into existence upon approval of a tentative subdivision map and the satisfaction of additional conditions. The proposed 1-acre lots were hundreds of feet uphill beyond the end of the KFCSD water main at the foot of the property. Plaintiff would extend the water main line and make the required connections in normal course after approval of the tentative subdivision map, when lots were identified, typically as a condition of approval necessary for recordation of a final map or housing construction. These misrepresentations were contrived. The Board could not and had not made such "findings".

45. The court rejected Defendants' assertion that subd. (j) was limited to "affordable" housing, or density reductions, but accepted at face value Defendants' representation that the "proposed lots do not meet" the water connection requirements and that such failure disqualified the project from subd. (j). The court denied Plaintiff's petition by ruling filed March 16, 2010. Plaintiff requested a new hearing but the request was denied.

46. Plaintiff appealed, and in *Honchariw, Ttee v. County of Stanislaus* (2011) 200 Cal.App.4th 1066, the Court of Appeal for the Fifth District held in a unanimous opinion that the disapproval was an unlawful abuse of discretion since the Board had not made the findings required for disapproval by subd. (j) (or found that the project did not qualify for subd. (j)) and ordered the trial court to issue a writ directing the Board to vacate the disapproval and reconsider the application with instructions to apply subd. (j). The court of appeal found the language of the statute "clear and unambiguous", with "nothing in the legislative history to support" Defendants' contention that the section was limited to "affordable housing". It noted that "[c]ase law addressing that contention has rejected it, as we do." That case authority had been cited by Plaintiff to Defendants before the Board hearing. Moreover the court of appeal saw "nothing in this record which would support a conclusion that" Plaintiff's project did not comply with the requirement of County Code section 20.52.210 that "lots of a subdivision shall be connected to a public water system . . . ", recognizing that

"[l]ots of a subdivision cannot be connected to a public water system until those 'lots of a subdivision' exist." No lots existed until lots were approved and additional steps completed. To the contrary, the court of appeal recognized that "[Plaintiff] has consistently asserted that if the project were approved, even without the granting of the exception application, [Plaintiff] would connect the lots as required by the County ordinance".

47. Upon Remittitur filed January 12, 2012, the superior court issued and served its Writ of Mandate on January 24, 2012 ordering that the Board "immediately" vacate its disapproval and reconsider Plaintiff's subdivision application. It further ordered that a return be filed within 90 days.

48. The Board did not comply with the Writ in a timely manner. By Return to Writ of Mandate filed April 19, 2012, the Board stated that it had vacated the disapproval but had not yet reconsidered the application.

Approval Finally

49. The Board reconsidered the application in hearing on May 22, 2012. Unable to make any findings necessary to disapprove the project under subd. (j), the Board approved the project. The Board filed a Supplemental Return with the court June 28, 2012 stating that it had reconsidered and approved the application.

50. One condition of approval was that Plaintiff extend the KFCSD water main to connect the proposed

1-acre lots before recordation of a final map (or post a satisfactory bond to assure completion). This is how the construction of such required improvements is normally handled and what the Board would in normal course have done if it had not denied the application in 2009.

51. A series of conditions of approval were included at the request and on behalf of Oakdale Irrigation District ("OID"), which flowed water seasonally through an irrigation ditch traversing a portion of the property. This was a carryover from 2009. In addition to an easement to flow water, OID had then claimed ownership of approximately 2 acres of land underlying and adjacent to the ditch, and proposed these conditions. Although the County surveyor disagreed, the County had required Plaintiff to modify his proposed tentative map to exclude the land from his subdivision. Plaintiff had filed a declaratory judgment action in 2009 to declare his ownership of the land and void the restrictions, but the action was still pending.

52. The Board added new conditions of approval over and above the conditions originally proposed by planning staff in 2009, adding new costs to the project. One such condition was to widen the County roads fronting the property, including the roadway fronting the remainder parcel, before recordation of a final map (or post a satisfactory bond to assure completion). Plaintiff was later informed and believes that the condition that he widen the road fronting the remainder as well as the new lots was unprecedented for the County.

Impact of Delay

53. The delays in securing approval of the tentative map imposed very substantial costs upon the project. Plaintiff had expended well over $50,000 to prepare, submit, and process the tentative map, including governmental fees and costs, survey and civil engineering fees and costs, and biological, archeological, and other consultants' fees and costs. Plaintiff had to carry these costs plus the carrying costs of the property itself. The proposed lots generated no income. They had insignificant value except for development.

54. California real estate values suffered a historic drop during the delays. Originally the 1-acre lots could be listed and expected to sell from $250,000 to $300,000 each, while the 5-acre lots could be listed and expected to sell from $400,000 to $500,000 each. By early 2012, values had dropped by 50% or more. The 1-acre lots might be listed and sell for $100,000, while the 5-acre lots might be listed and sell at $250,000.

55. At these prices the economics of the approved tentative map were in question because the cost of improvements linked to the new 1-acre lots threatened to exceed their value. The improvements required as conditions of approval were almost fully attributable to the H-S lots. If Plaintiff had limited the map to subdivision of the A-2-5 parcel into 3 5-acre parcels and a remainder, he could have processed the map as a parcel map, with few improvement costs. No water line extension would be required, and even if roadway widening were required, it would cover only a fraction

of the widening required for the approved tentative map. Now cost of the improvements triggered by subdivision of the H-S lot could approach and even exceed the values of the 4 1-acre lots. Instead of expected sales revenues of $1,000,000 or more, with costs under $200,000, sales revenues might be $400,000 while, with the increased costs from the new road widening requirement, costs could now exceed $300,000. Adding sales and carrying costs, the prospects were unfavorable.

56. Moreover, Plaintiff's ability to carry the property and fund these improvements was endangered. The economic losses during the delay had drained financial resources, and the ability to secure further financing on the property was in jeopardy.

57. With the hope that values would rise, Plaintiff paid the necessary fees to accept the approval and acquiesced in the conditions. He did not file any challenge to the approval and conditions of approval within the 90-day limitations period of the Subdivision Map Act. Because a tentative map expires in two years under the Subdivision Map Act, with no assurance of renewal, Plaintiff had a 2-year window to submit a final map in substantial compliance with the tentative map and either complete or bond required improvements.

58. A material consideration in going forward was that the required improvements would facilitate further development of the property. The water main extension would pass along the remainder parcel, allowing future direct connection for any development of

the remainder, and since road widening was required along the remainder as well as along the new lots, the roadway would be ready for any future development of the remainder. Sandwiched between the new unimproved lots and Knights Ferry itself, the remainder was a natural candidate for "filling-in" development under the favorable H-S zoning. Also, since the KFCSD had now indicated a willingness to provide a "will serve" letter to provide water to the new 1-acre lots, they could be subdivided into ½-acre lots under H-S zoning.

59. Plaintiff proceeded slowly to finalize the subdivision, deferring improvements until economic conditions improved. When he received a commitment from the KFCSD in 2012 for the issuance of a "will serve" letter, he let it expire without assurance of reissue to avoid a commitment to extend the water line while the fate of the project was unclear.

60. Plaintiff has received no compensation for his losses.

State Inverse Condemnation Action

61. On December 12, 2012 Plaintiff filed an action for damages in the Superior Court for the County of Stanislaus for a temporary taking by inverse condemnation and a denial of due process. Since the approval marked the final, definitive action by the Board establishing what development of the subdivision property would be permitted, the case finally became ripe for adjudication of claims of taking and denial of

due process. Until final, definitive action was taken, a claim for taking or denial of due process was premature and unwarranted under well-settled California and federal law. The primary factors to be weighed under the *Penn Central* test for a taking, including the character of the regulatory action, the economic impact of the action, and the impact upon reasonable investment-backed expectations, were inchoate and could not be weighed until then.

62. Defendants threatened Plaintiff with sanctions under Code of Civ. Proc. §128.7 on the basis that the complaint was unwarranted by existing law and not supported by any nonfrivolous argument for extending, modifying, or reversing existing law or establishing new law unless Plaintiff withdrew his suit. Plaintiff declined.

63. Defendants filed a demurrer on a variety of grounds, including failure to state a cause of action on the merits and untimeliness under the 90-day limitations period of the Subdivision Map Act. Defendants argued that the complaint had to be filed within 90 days of the disapproval in 2009. The court overruled the demurrer as to all objections except for untimeliness under the Subdivision Map Act. It gave Plaintiff leave to file an amended complaint.

64. Plaintiff filed a First Amended Complaint on June 20, 2013. Defendants demurred again on the grounds of untimeliness. The court allowed Plaintiff to amend his complaint once more.

65. Plaintiff filed a Second Amended Complaint served on Defendants October 22 2013. Defendants demurred again on the grounds of untimeliness. Again the court sustained the demurrer, now without leave to amend and dismissed the action. In its Minute Order the court ruled that the 90-day limitations period of the Subdivision Map Act barred the action. Although Plaintiff and Defendants agreed in their pleadings that Plaintiff's claims were rooted in the Board's disapproval in March 2009, the court ruled that the claims accrued upon approval of the subdivision on May 22, 2012. The court had earlier dismissed Defendants' contention that the claims accrued upon disapproval in 2009 as "inequitable".

66. As noted in the court's Minute Order, the Second Amended Complaint included an *England* reservation of Plaintiff's federal claims.

67. Upon dismissal of the action, Defendants filed a motion for sanctions under Code of Civ. Proc. §128.7 and sought attorneys' fees of $77,610. The court denied the motion.

68. Plaintiff filed a timely appeal of the dismissal to the Fifth District Court of Appeal on March 20, 2014, and Defendants cross-appealed the denial of their motion for sanctions on April 11, 2014,

69. On June 3, 2015 the court of appeal affirmed the dismissal of the trial court. In *Honchariw, Ttee v. County of Stanislaus* (2015) 238 Cal.App.4th 1, the court of appeal recognized that the California Supreme Court had sanctioned a 2-step procedure for claiming

damages arising from administrative action in the face of very short limitations periods to challenge administrative action, allowing an action for damages to follow a timely set aside of the administrative action, but held that the initial mandamus action must result in "a final judgment establishing that there has been a compensable taking of the plaintiff's land". While Plaintiff's mandamus action had set aside the disapproval of his subdivision, it had not resulted in a final judgment establishing a compensable taking, so he was held not to qualify for the 2-step procedure. The court of appeal denied Defendants' cross-appeal.

70. Plaintiff filed a Petition for Rehearing. The court of appeal modified its opinion on June 24, 2015 but denied the request for rehearing.

71. Plaintiff filed a Petition for Review with the California Supreme Court on July 14, 2015 but the court denied the request on August 10, 2015. With the denial Plaintiff's state court remedies were exhausted.

Subdivision Post-Approval

72. In 2013 the California Legislature extended the expiration period for unexpired tentative maps, so his deadline was extended until May 2016.

73. In Spring 2014, the Board spot rezoned the H-S parcel through a rarely used procedure to require 5-acre minimum lot sizes. While the parcel remained in the H-S zone, it was singled out with a few other parcels for discriminatory zoning. Because Plaintiff's

approved tentative map was a "vesting" map, he could finalize his approved lots as approved, but further subdivision of the new 1-acre lots and the 8 ½-acre remainder parcel was foreclosed. Plaintiff could not amortize the required cost of improvements with further development.

74. In early 2015 Plaintiff settled his declaratory judgment action with OID. OID disclaimed fee ownership of any portion of the property, acknowledged that its interest in the irrigation ditch was not more than an easement to flow water, and waived all of its conditions of approval for the subdivision.

75. California real estate values had been rising by 2015, and Plaintiff picked up efforts to finalize the approved tentative map. He resumed discussions with KFCSD and in early 2016 received and accepted a KFCSD commitment for the issue of a new "will serve" letter for water service. His civil engineers revised the approved tentative map to prepare a final map in accordance with the OID settlement agreement to rationalize the skewed boundary lines which had been necessitated by OID's original claims.

76. Plaintiff filed a final map with the County in substantial compliance with the approved tentative map in April 2016. The map is now under review by the County.

FIRST CAUSE OF ACTION
TAKING WITHOUT JUST COMPENSATION

77. Plaintiff refers to and herein incorporates Paragraphs 1 through 76.

78. The Board's disapproval of Plaintiff's subdivision application in March 2009 and related course of conduct effected a temporary taking of Plaintiff's constitutionally-protected property rights requiring compensation under the Fifth and Fourteenth Amendments.

79. Under the Anti-NIMBY Law, Plaintiff enjoyed a constitutionally protected right to develop his property as a residential housing development in compliance with general plan and zoning requirements.

80. Plaintiff has exhausted all of his administrative remedies and all of his state court remedies for compensation but has been denied just compensation. The state court procedures for providing compensation were unavailable or inadequate because they required Plaintiff to obtain a final judgment establishing a right to compensation in an action filed within the 90-day limitations period of the Subdivision Map Act. This was infeasible because there was no claim for a taking or denial of due process until Plaintiff had a ripe claim upon the final, definitive action of the Board of approval of the subdivision in May 2012. Until then, any such claim was premature and unwarranted by existing law.

81. The disapproval deprived him of substantially all viable economic use of the property for an extended period of time, causing substantial economic loss.

82. The disapproval deprived him of his investment-backed expectations for development of the property. The H-S parcel was expressly zoned for development when acquired by the settlor of the Trust, and Plaintiff had expended substantial time, money, and effort to subdivide the property.

83. The character of the Board's disapproval, prolonged opposition in litigation, and other steps to obstruct was not that of a public program simply adjusting the benefits and burdens of economic life broadly to promote the public good but directly, unreasonably, and disproportionately penalized Plaintiff. It did so in a manner inimical to the public good codified in the Anti-NIMBY Law in the face of NIMBY opposition.

84. The extended delay for approval was not a normal regulatory delay but resulted directly, foreseeably, and purposefully from Defendants' arbitrary and capricious and/or willful and deliberate efforts to defeat the project.

85. Accordingly Plaintiff is entitled to just compensation.

SECOND CAUSE OF ACTION
DENIAL OF DUE PROCESS

86. Plaintiff refers to and incorporates Paragraphs 1 through 76.

87. Defendants' disapproval of his subdivision and related course of conduct denied Plaintiff due process under the Fifth and Fourteenth Amendments.

88. Defendants had no basis to disapprove Plaintiff's project without compliance with the requirement of subd. (j) that disapproval could only be based upon written findings of a serious, adverse impact upon public health or safety which could not be satisfactorily mitigated or avoided. No such finding had or could be made. The disapproval was arbitrary and capricious and/or was willful and deliberate obstruction of Plaintiff's constitutionally-protected property rights.

89. Defendants' disapproval did not substantially advance legitimate state interests. The paramount interests were codified in the anti-NIMBY Law, and Defendants obstructed the realization of those interests.

90. Accordingly Plaintiff is entitled to compensation for his losses under 42 U.S.C. §1983.

WHEREFORE Plaintiff prays judgment against Defendants as follows:

On the FIRST CAUSE OF ACTION:

i. For just compensation in an amount to be determined at trial, with appropriate interest thereon at the legal rate;

ii. For reasonable attorney's fees, appraisal, and engineering fees;

iii. For costs of suit; and

iv. For such other and further relief as the Court may deem proper.

On the SECOND CAUSE OF ACTION:

i. For compensatory damages, in an amount to be determined at trial;

ii. For reasonable attorney's fees, pursuant to 42 U.S.C. §1988;

iii. For costs of suit;

iv. For such other and further relief as the Court may deem proper.

Dated: August 9 2016

Respectfully submitted,

/s/ Nicholas Honchariw
Nicholas Honchariw,
Counsel for Plaintiff

Plaintiff Honchariw, Ttee, hereby demands a trial jury for all triable issues. August 9, 2016

Respectfully submitted,

/s/ Nicholas Honchariw
Nicholas Honchariw,
Counsel for Plaintiff

[Exhibit A Omitted]