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Filed Nov. 10, 2022

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID KAGAN; et al., Plaintiffs-Appellants, v. CITY OF LOS ANGELES; CITY OF LOS ANGELES HOUSING AND COMMUNITY INVESTMENT DEPARTMENT, Defendants-Appellees.	No. 21-55233 D.C. No. 2:20-cv-00515-DMG-ADS MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Dolly M. Gee, District Judge, Presiding

Argued and Submitted June 15, 2022
Pasadena, California

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

Before: RAWLINSON and CHRISTEN, Circuit Judges, and BENNETT,** Senior District Judge.

In this case, the district court dismissed with prejudice constitutional claims by Plaintiffs-Appellants Frank and Rachel Revere and David and Judith Kagan (collectively, the "Owners"), private landlords who were prohibited from evicting a "protected status" tenant from one half of a Los Angeles duplex to regain the unit for family use. As the parties are familiar with the facts, we decline to recite them. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

Takings Clause: "The Takings Clause of the Fifth Amendment provides that 'private property' shall not 'be taken for public use, without just compensation.'" *Ballinger v. City of Oakland*, 24 F.4th 1287, 1292 (9th Cir. 2022) (quoting U.S. Const., amend. V). The Takings Clause applies to regulations that are "functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 539 (2005). As relevant here, the government effects a *per se* taking whenever a regulation "requires an owner to suffer a permanent physical invasion of her property"—whatever the purpose of the invasion, and however minor its impact. *Id.* at 538 (citing *Loretto v.*

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

Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)).[1]

The Owners contend that the City of Los Angeles effected a permanent physical occupation when it "granted the Tenant the permanent physical occupation of the Property in perpetuity" by affording him protective status pursuant to the City's Rent Stabilization Ordinance ("RSO") and prohibiting them from reclaiming the Duplex for personal use. This claim is foreclosed by Supreme Court precedent. *See Yee v. City of Escondido*, 503 U.S. 519, 528–30 (1992) (holding that similar laws "merely regulate petitioners' *use* of their land by regulating the relationship between landlord and tenant," and "do[] not require petitioners to submit to the physical occupation of their land"). Here, as in *Yee*, the Owners "voluntarily rented their land," and were not required to submit to physical occupation by another. *Id.* at 527. Moreover, the RSO allows at-fault evictions, such as evictions for creating a nuisance, breaking the law, or failing to pay rent, L.A. Mun. Code § 151.09(A), and grants landlords the right to end a protected tenancy by removing the entire property from the rental market with one year's notice, *id.* § 151.23(B). Accordingly, the Owners' claim that the City has compelled them to "refrain in perpetuity from terminating" this tenancy is unavailing, *Yee*, 503 U.S. at 528, and we affirm the dismissal of their takings claim with prejudice.

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[1] As the Owners do not argue that a taking has occurred under the three-factor inquiry outlined in *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978), we do not address this form of taking here.

Substantive Due Process: "Substantive due process cases typically apply strict scrutiny in the case of a fundamental right and rational basis review in all other cases." *Witt v. Dep't of Air Force*, 527 F.3d 806, 817 (9th Cir. 2008). As appellants cite no authority for their contention that their right "to use and occupy their own property" is a fundamental right, they can only sustain a substantive due process claim if they can allege that the RSO is "arbitrary, irrational, or lacking any reasonable justification in the service of a legitimate government interest." *Colony Cove Props., LLC v. City of Carson*, 640 F.3d 948, 962 (9th Cir. 2011). The RSO's stated purpose is to protect tenants who are "displaced as a result of their inability to pay increased rents" and left "unable to find decent, safe and sanitary housing at affordable rent levels." L.A. Mun. Code § 151.01. Tenant protection is a legitimate state interest. *See, e.g.*, *Schnuck v. City of Santa Monica,* 935 F.2d 171, 175 (9th Cir. 1991) (upholding legitimate interest in "[c]ontrolling rents to a reasonable level and limiting evictions [to] substantially alleviate hardships to Santa Monica tenants"). Accordingly, we affirm the dismissal of Appellants' substantive due process claim with prejudice.

Procedural Due Process: "A procedural due process claim has two elements: '(1) a deprivation of a constitutionally protected liberty or property interest, and (2) a denial of adequate procedural protections.'" *Miranda v. City of Casa Grande*, 15 F.4th 1219, 1224 (9th Cir. 2021) (quoting *Franceschi v. Yee*, 887 F.3d 927, 935 (9th Cir. 2018)).[2] Only the second element is

[2] The City argues that Appellants have waived this claim, as their opening brief refers to their procedural due process claim

at issue: Appellants claim that they "were expressly denied a constitutionally adequate hearing on their Application to obtain possession of the Property for family purposes."

"Notice and [a meaningful] opportunity to be heard are the hallmarks of procedural due process." *Ludwig v. Astrue*, 681 F.3d 1047, 1053 (9th Cir. 2012) (quoting *Guenther v. C.I.R.*, 889 F.2d 882, 884 (9th Cir. 1989)) (alteration in original). However, a plaintiff alleging a constitutional due process claim must plead the inadequacy of the available state remedies. *See, e.g.*, *Lake Nacimiento Ranch Co. v. Cnty. of San Luis Obispo*, 841 F.2d 872, 878 (9th Cir. 1987). Although Appellants insist on appeal that "there is no basis for contending that the appellants are obligated to pursue either unlawful detainer proceedings or a petition for a writ of mandate," the procedural due process inquiry turns on whether the City has denied them a constitutionally adequate remedy. Pursuant to the Los Angeles Municipal Code, the RSO is intended to be enforced by way of an unlawful detainer action. *See* L.A. Mun. Code § 151.01 ("In order to assure compliance with the provisions of this chapter violations of any of the provisions of this chapter may be raised as affirmative defenses in unlawful detainer proceedings."). As the Appellants

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only in a "cursory" fashion. However, the district court considered this claim on the merits, and the opening brief highlights the City's alleged failure to provide a hearing before making a determination as to the tenant's protected status. Moreover, "[w]e may choose to review an issue notwithstanding waiver," among other circumstances, where the appellee's brief addresses the issue. *Freedom from Religious Foundation, Inc. v. Chino Valley Unified Sch. Dist. Bd.*, 896 F.3d 1132, 1152 n.22 (9th Cir. 2018). Such is the case here.

have not shown that they would be unable to challenge the tenant's protected status through an unlawful detainer proceeding, we affirm the dismissal of their procedural due process claim with prejudice.

AFFIRMED.

Filed Feb. 11, 2021

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No. **CV 20-5515 -DMG (ADSx)** Date February 11, 2021

Title ***David Kagan, et al. v. City of Los Angeles, et al.***

Present: The Honorable DOLLY M. GEE, UNITED STATES DISTRICT JUDGE

KANE TIEN	NOT REPORTED
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiff(s) None Present	Attorneys Present for Defendant(s) None Present

Proceedings: IN CHAMBERS—ORDER RE DEFENDANTS' MOTION TO DISMISS [16]

On June 22, 2020, Plaintiffs David Kagan, Judith Kagan, Frank Revere, and Rachel K. Revere filed a Complaint against Defendants the City of Los Angeles and the City of Los Angeles Housing and Community Investment Department (collectively, the "City") asserting two causes of action under 42 U.S.C. section 1983 for violations of (1) the Takings Clause of the Fifth Amendment of the United States Constitution and (2) the Due Process Clause of the Fourteenth Amendment. [Doc. # l.] On August 12, 2020, the City filed its motion to dismiss ("MTD"). [Doc. # 16.] The motion has been fully briefed. [Doc. ## 22, 24.] Having duly considered the parties' written submissions, the Court **GRANTS** the City's MTD.

I.
FACTUAL BACKGROUND

Since 2015, Plaintiffs have owned a duplex located in Los Angeles, California ("the Property"). Compl. at ¶ 1. The Property is subject to rent control under the City's Rent Stabilization Ordinance ("RSO"). *Id.*; *see also* Defs.' Request for Judicial Notice ("RJN"), Ex. A (RSO) [Doc. # 18-1].[1] The City passed the RSO to address its "shortage of decent, safe and sanitary housing in the City of Los Angeles resulting in a critically low vacancy factor" and "to safeguard tenants from excessive rent increases." RSO at 7–8.[2] The RSO provides that a landlord "may not recover possession of a rental unit" if the tenant is classified as having "protected tenant" status. The section defines a "protected tenant" as any tenant in the unit who has continuously resided there for over ten years and is either at least 62 years old or is disabled or handicapped, as defined by 42 U.S.C. section 423 or California Health and Safety Code section 50072. *Id.* at 81. Notwithstanding this provision, the RSO also allows a landlord to withdraw a property from the rental market when occupied by a tenant for one year or more who is either at least 62 years old or disabled,

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[1] The Court **GRANTS** the City's RJN as to the RSO. A municipal ordinance is a proper subject of judicial notice because it is not subject to reasonable dispute. *Tallis, Inc. v. County of San Diego*, 505 F.3d 935, 938 n. 1 (9th Cir. 2007). The Court **DENIES as moot** the City's RJN as to the other documents it requests, as well as the documents contained in Plaintiffs' RJN [Doc. # 23]. These documents would not affect the Court's analysis, even if they were considered.

[2] All page references herein are to page numbers inserted in the header of the document by the CM/ECF filing system.

so long as the landlord provides one year's notice. *Id.* at 68–69.

The Property is currently occupied by a tenant ("Tenant"), who has resided there since June 2008. In September 2019, Plaintiffs decided they wanted Frank and Rachel Revere's child, daughter-in-law, and grandchildren to occupy the Property. On September 23, 2019, Plaintiffs filed a Declaration of Intent to Evict Tenant for Landlord Occupancy ("Application") with the Los Angeles Housing Department. Compl. at ¶ 1. The Tenant filed objections claiming his residence for more than ten years and disability protected him from eviction. *Id.* at ¶ 11. On October 28, 2019, the Housing Department denied the Application, determining that the Tenant has "protective status" as defined by the RSO. *Id.*

III.
LEGAL STANDARD

Pursuant to Federal Rule of Civil Procedure 12(b)(6), a party may seek dismissal for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). To survive a Rule l2(b)(6) motion, a pleading must articulate "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Although a pleading need not contain "detailed factual allegations," it must contain "more than labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Id.* at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

In evaluating the sufficiency of a complaint, courts must accept all factual allegations as true. *Id.* (citing *Twombly*, 550 U.S. at 555). Legal conclusions, in contrast, are not entitled to the assumption of truth. *Id.*

IV.
DISCUSSION

A. Physical Takings Claim Under the Fifth Amendment

Plaintiffs' first cause of action claims that the City's enforcement of the RSO, resulting in their inability to evict the Tenant, effected a physical taking in violation of the Takings Clause. Compl. at ¶¶ 1, 11–12. Plaintiffs do not plead or argue that the RSO provisions amount to a regulatory taking. *See* Opp. at 16.[3] Instead, Plaintiffs assert that the challenged provisions, as applied to their Property, constituted a physical taking by transferring their right to possession to a third party, effectively granting the Tenant a life estate in the Property. *Id.* at 6.[4]

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[3] Plaintiffs' failure to respond to the merits of the City's argument relating to the regulatory takings doctrine constitutes a concession of that argument. *Ramirez v. Ghilotti Bros. Inc.*, 941 F. Supp. 2d 1197, 1210 (N.D. Cal. 2013) (deeming failure to oppose an argument as concession of the issue).

[4] The parties spill considerable ink arguing whether the takings claim is ripe under the doctrine of *Williamson County Regional Planning Commission v. Hamilton Bank*, which states that "a claim that the application of government regulations effects a taking of a property interest is not ripe 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. 172, 186 (1985), *overruled on other grounds by Knick v. Township of Scott*, 139 S. Ct. 2162 (2019). In the City's MTD, it argues that the claim is not ripe under

The Takings Clause forbids government entities from appropriating private property unless it is "for public use" and the government provides "just compensation." *See* U.S. Const. amend. V; *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 231–32 (2003). When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner. A physical taking "is a direct government appropriation or physical invasion of private property." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005). "The government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land." *Yee v. City of Escondido*, 503 U.S. 519 (1992); *see also Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982) ("[A] permanent physical occupation of property is a taking.").

Plaintiffs argue that the relevant RSO sections "compel a landowner over objection to rent his property" and provide that "the landowner refrain in perpetuity from terminating a tenancy to obtain possession." Opp. at 13. But Plaintiffs are not compelled to rent the Property against their will. They acquired the Property knowing that the Tenant lived there and knowing that it was subject to the RSO. *See*

Williamson County only "[t]o the extent Plaintiffs claim a regulatory taking has occurred." MTD at 20. After Plaintiffs concede they are not asserting a regulatory taking in their Opposition, the City then continues to argue for the *Williamson County* rule in its Reply. Reply at 6–9. *Williamson County* plainly relates to regulatory takings, and the City does not provide any argument or authority for applying it to physical takings. Accordingly, the Court will assume for the purpose of this MTD that the physical takings claim is ripe.

Harmon v. Markus, 412 F. App'x 420, 422 (2d Cir. 2011) (landlords who purchased rent-controlled property "acquiesced in its continued use as rental housing"). And Plaintiffs have the option to withdraw the Property from rental housing use, provided they give the Tenant one year's notice.

In *Yee v. City of Escondido*, the Supreme Court held that a rent control ordinance did not require landowners to submit to the physical occupation of their property because they had "voluntarily rented their land." 503 U.S. at 528. Since the landowners invited the tenants onto the property, the government had not forced the tenants upon the owners. *Id.* Moreover, the ordinance in *Yee* still allowed the landlord to evict tenants, albeit with six- or 12-months' notice. *Id.* at 527–28. The situation is exactly the same here. Even if Plaintiffs were required to rent to the Tenant for the rest of his life, which they are not, they are not required to lease the Property *permanently*. *See Troy Ltd. v. Renna*, 727 F.2d 287, 301 (3d Cir. 1984) (senior-citizen and disability tenancy protections that prevent eviction for as many as 48 years do not amount to taking because "[i]t is fanciful to imagine that these tenants will occupy their units 'permanently.'").

Accordingly, the Court **GRANTS** the City's motion to dismiss Plaintiffs' takings claim.

B. Due Process Claims Under the Fourteenth Amendment

1. Substantive Due Process

Plaintiffs assert a violation of their substantive due process rights based on the City's alleged physical taking of their property. Compl. at ¶ 19. "To state a

substantive due process claim, the plaintiff must show as a threshold matter that a state actor deprived it of a constitutionally protected life, liberty or property interest." *Shanks v. Dressel*, 540 F.3d 1082, 1087 (9th Cir. 2008). The Ninth Circuit has noted that the Fifth Amendment does not automatically preempt a substantive due process claim that alleges a defendant's land use action lacked any substantial relation to public health, safety, or general welfare. *Colony Cove Properties, LLC v. City of Carson*, 640 F.3d 948, 960 (9th Cir. 2011). Accordingly, to maintain a substantive due process claim, a plaintiff must allege: (1) the government's action was "arbitrary, irrational, or lacking any reasonable justification in the service of a legitimate government interest"; and (2) the government's actions deprived them of a protected property interest. *Id.* at 962; *see also Halverson v. Skagit Cnty.*, 42 F.3d 1257, 1262 (9th Cir. 1994).

Plaintiffs do not offer any arbitrary or illegitimate reasons behind the RSO or the denial of Plaintiffs' eviction Application that would constitute "irrational" or "conscience shocking" conduct. *United States v. Salerno*, 481 U.S. 739, 746 (1987). In fact, Plaintiffs' own allegations show the City enacted the RSO for the public purpose of addressing a housing shortage. Compl. at ¶ 15. The ordinance and the City's application of it were rationally related to the legitimate government interest of protecting vulnerable tenants during a housing shortage. *See Guggenheim v. City of Goleta*, 638 F.3d 1111, 1123 (9th Cir. 2010) (holding that rent control ordinance was rationally related to the legitimate government purpose of addressing housing shortages and protecting renters from abusively high rent).

Plaintiffs' allegations are therefore insufficient to state a substantive due process claim.

2. Procedural Due Process

A procedural due process claim is based on "an expectation that the system is fair and has provided an adequate forum for the aggrieved to air his grievance." *Weinberg v. Whatcom County*, 241 F.3d 746, 752 (9th Cir. 2001). To state a claim for violation of procedural due process, a plaintiff must allege (1) the existence of a constitutionally protected liberty or property interest and (2) deprivation of that interest by the government without due process. *See Bd. of Regents of State Coils. v. Roth*, 408 U.S. 564, 569–70 (1972).

Even assuming Plaintiffs have been deprived of a liberty or property interest, Plaintiffs have multiple available post-deprivation remedies from which to seek repossession of the Property or question the validity of the City's application of the RSO. While the RSO provides substantive grounds upon which a property owner may or may not evict a tenant, the City's denial of Plaintiffs' Application for an eviction declaration does not prohibit them from nonetheless pursuing an unlawful detainer action. *See Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 151 (1976) (holding that certificates of eviction are not required to initiate unlawful detainer proceedings). ln this forum, Plaintiffs could challenge the application or validity of the Tenant's defense based on his purported protected status.

Plaintiffs can also challenge the validity of the City's decision through California Code of Civil Procedure section 1094.5. In California, the remedy of

"administrative mandamus," or writ of mandate, is available to inquire into the validity of an administrative agency's quasi-judicial actions where the agency has been called upon to make a factual determination. *Gong v. City of Fremont*, 250 Cal. App. 2d 568, 572–73 (1967). Section 1094.5 provides that administrative actions are subject to review only when the issue involves "want or excess of jurisdiction, whether there was a fair trial, and whether there was prejudicial abuse of discretion." *Id.* (citing Cal. Civ. Proc. Code § 1094.5). Plaintiffs argue that this is not a viable option because the City would be more than likely to prevail on the sole issue of abuse of discretion. Opp. at 14. Plaintiffs' likelihood of success in redressing their loss through available state remedies, however, is immaterial. "[I]t is the *existence* of these alternate remedies that bars a plaintiff from pursuing a Section 1983 due process claim based upon the deprivation of property." *Jordan v. Diaz*, No. CY 20-00574-MWF (JCx), 2020 WL 5167738, at *4 (C.D. Cal. Apr. 25, 2020) (emphasis added).

Because California provides Plaintiffs with adequate post-deprivation remedies, Plaintiffs' procedural due process claim is not cognizable. The Court **GRANTS** the City's motion to dismiss Plaintiffs' due process claim.

* * *

Given that the Court has made the above determinations as a matter of law, Plaintiffs' pleadings "could not possibly be cured by the allegation of other facts.'" *Knappenberger v. City of Phoenix*, 566 F.3d 936, 942 (9th Cir. 2009) (quoting *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000)

(*en banc*)). The Court therefore declines to grant leave to amend.

V.
CONCLUSION

In light of the foregoing, the Court **GRANTS** the City's MTD **with prejudice.**

IT IS SO ORDERED.

Los Angeles Municipal Code

SEC. 151.30. EVICTIONS FOR OWNER, FAMILY, OR RESIDENT MANAGER OCCUPANCY.

(Added by Ord. No. 180,747, Eff. 8/1/09.)

Notwithstanding any provision of this Chapter to the contrary, if a landlord seeks to recover possession of a rental unit pursuant to the provisions of Subdivision 8. of Subsection A. of Section 151.09 of this Code, the following provisions shall apply:

A. **Ownership Requirement.** A landlord may recover possession of a rental unit pursuant to the provisions of Paragraph a of Subdivision 8. of Subsection A. of Section 151.09 only if the landlord is a natural person who possesses legal title to at least 25 percent of the property containing the rental unit, or is a beneficiary with an interest of at least 25 percent in a trust that owns the property. A landlord may recover possession of a rental unit pursuant to the provisions of Paragraph b. of Subdivision 8. of Subsection A. of Section 151.09 only if the landlord is a natural person who possesses legal title to at least 50 percent of the property containing the rental unit, or is a beneficiary with an interest of at least 50 percent in a trust that owns the property. A landlord may recover possession of a rental unit pursuant to the provisions of Subdivision 8. of Subsection A. of Section 151.09 for use and occupancy by the landlord, landlord's spouse, grandchild, child, parent, or grandparent only once for that person in each rental complex of the landlord.

B. **Residency Requirements for Replacement Occupant.** The landlord must in good faith intend that the owner, eligible relative, or a resident

manager will occupy the rental unit within three months after the existing tenant vacates the rental unit, and that the owner, eligible relative, or a resident manager will occupy the rental unit as a primary residence for a period of two consecutive years. Failure of the owner, eligible relative, or a resident manager to occupy the rental unit within three months after the existing tenant vacates the unit, or failure of the owner, eligible relative, or a resident manager to occupy the rental unit as a primary residence for a period of two consecutive years, may be evidence that the landlord acted in bad faith in recovering possession of a rental unit pursuant to the provisions of Subdivision 8. of Subsection A. of Section 151.09. It will not be evidence of bad faith if a landlord recovers possession of a rental unit for use and occupancy by a resident manager, and during the next two years replaces the resident manager with a different resident manager.

C. **Comparable Rental Unit.** A landlord may not recover possession of a rental unit pursuant to the provisions of Subdivision 8. of Subsection A. of Section 151.09 if there is a comparable rental unit in the building that is vacant, except that where a building has an existing resident manager, the landlord may evict the existing resident manager in order to replace the existing resident manager with a new manager. **(Amended by Ord. No. 184,822, Eff. 4/30/17.)**

D. **Tenants Eligible for Termination of Tenancy.**

1. **Protected tenants.** A landlord may not recover possession of a rental unit pursuant to the

provisions of Subdivision 8. of Subsection A. of Section 151.09 if:

(a) any tenant in the rental unit has continuously resided in the rental unit for at least ten years, and is either: (i) 62 years of age or older; or (ii) disabled as defined in Title 42 United States Code Section 423 or handicapped as defined in Section 50072 of the California Health and Safety Code; or

(b) any tenant in the rental unit is terminally ill as certified by a treating physician licensed to practice in the State of California.

2. Application to most recent tenant. A landlord may recover possession of a rental unit pursuant to the provisions of Subdivision 8. of Subsection A. of Section 151.09 only from a tenant who is the most recent tenant, not protected from termination of tenancy pursuant to the provisions of Subdivision (1) of this Subsection, to occupy a rental unit in the building with the same number of bedrooms needed by the landlord, the landlord's eligible relative or the resident manager, except that a landlord may recover possession from a different tenant if a different unit is required because of medical necessity, as certified by a treating physician licensed to practice in the State of California.

E. **Relocation Fees.** A landlord who terminates a tenancy pursuant to the provisions of Subdivision 8. of Subsection A. of Section 151.09 shall pay a relocation fee pursuant to the provisions of Subsection G. of Section 151.09, except in the following circumstance:

If the termination of tenancy is based on the grounds set forth in Paragraphs (a) or (b) of

Subdivision 8. of Subsection A. of Section 151.09, and all of the following conditions exist: (1) the building containing the rental unit contains four or fewer rental units; (2) within the previous three years the landlord has not paid the fee authorized by this Subsection to any tenant who resided in the building; (3) the landlord owns, in the City of Los Angeles, no more than four units of residential property and a single-family home on a separate lot; and (4) any eligible relative for whom the landlord is recovering possession of the rental unit does not own any residential property in the City of Los Angeles; then the landlord shall pay a relocation fee of $14,000 to qualified tenants and a fee of $7,000 to all other tenants. If more than one fee applies to a rental unit, the landlord shall pay the highest of the applicable fees. For the year beginning July 1, 2009, and all subsequent years, the fee amounts shall be adjusted on an annual basis pursuant to the formula set forth in Section 151.06 D. of this Code. The adjusted amount shall be rounded to the nearest $50 increment. The fee payment shall be made in accordance with the provisions of Subdivisions 1., 2., and 3. of Subsection G. of Section 151.09, and the provisions of Subdivision 4. of Subsection G. of Section 151.09 apply to determine whether a relocation fee is owed.

F. **Post-Tenancy Termination Filing Requirements.**

(1) **Three month filing requirement.** Within three months of a tenant's vacation of a rental unit, a landlord who recovered possession of a rental unit pursuant to the provisions of Subdivision 8. of Subsection A. of Section 151.09 shall file with the

Department a statement under penalty of perjury that the rental unit is occupied by the landlord, eligible relative, or resident manager for whom the landlord terminated the tenancy, or an explanation why the rental unit is not occupied by the landlord, eligible relative, or resident manager for whom the landlord terminated the tenancy.

(2) **Annual filing requirements.** A landlord who recovers possession of a rental unit pursuant to the provisions of Subdivision 8. of Subsection A. of Section 151.09 must, within thirty days preceding the first and second year anniversary of the tenant's vacation of the rental unit, file with the Department a statement under penalty of perjury regarding the continued occupancy of the rental unit by the landlord, eligible relative, or a resident manager. The statement must confirm the continued occupancy by the landlord, eligible relative, or a resident manager, or if the occupancy did not continue, the statement must explain why the rental unit is not occupied by such person.

G. **Tenant Re-Rental Rights.** A landlord who offers a rental unit that was the subject of a tenancy termination pursuant to the provisions of Subdivision 8. of Subsection A. of Section 151.09 for rent or lease within two years after the tenant vacated the rental unit shall first offer to rent the rental unit to the displaced tenant or tenants, provided that the tenant or tenants advised the landlord in writing within 30 days of displacement of the tenant's desire to consider an offer to renew the tenancy and provided the landlord and Department with an address to which to direct the offer. The tenant or tenants may advise the landlord and Department any time during

the two year period of eligibility of a change of address to which to direct the offer.

A landlord who offers to rent or lease a rental unit to a previously displaced tenant pursuant to the provisions of this Subsection shall deposit the offer in the United States mail, by registered or certified mail with postage prepaid, addressed to the displaced tenant or tenants at the address furnished to the landlord as provided in this Subsection, and shall describe the terms of the offer. The displaced tenant or tenants shall have 30 days from the deposit of the offer in the mail to accept the offer by personal delivery of that acceptance or by deposit of the acceptance in the United States mail by registered or certified mail with postage prepaid.

H. **Notice of Re-Rental.** If a landlord desires to offer for rent or lease a rental unit that was the subject of a tenancy termination pursuant to the provisions of Subdivision 8. of Subsection A. of Section 151.09, the landlord must file with the Department a Notice of Intention to Re-Rent Rental Unit on a form prescribed by the Department. The form must be filed before renting or leasing the rental unit.

I. **Penalties.** In addition to all other penalties authorized by law, the following penalties apply for violations of the provisions of Subdivision 8. of Subsection A. of Section 151.09, and of this Section:

(1) If a landlord acts in bad faith in recovering possession of a rental unit pursuant to the provisions of Subdivision 8. of Subsection A. of Section 151.09, the landlord shall be liable to any tenant who was displaced from the property for three times the amount of actual damages, exemplary damages,

equitable relief, and attorneys' fees. The City may institute a civil proceeding for equitable relief and exemplary damages for displacement of tenants. Nothing in this paragraph precludes a tenant or the City from pursuing any other remedy available under the law.

(2) A landlord who fails to file a statement under penalty of perjury as required by the provisions of Subsection F. of this Section, or a notice as required by the provisions of Subsection H. of this Section, shall pay a fine in the amount of $250 per day for each day that the statement or notice is delinquent.

Filed June 22, 2020

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DAVID KAGAN, JUDITH KAGAN, FRANK REVERE, and RACHEL K. REVERE, Plaintiffs, v. CITY OF LOS ANGELES, AND CITY OF LOS ANGELES HOUSING + COMMUNITY INVESTMENT DEPARTMENT, Defendants.	CASE NO: 2:20-cv-05515-DMG-ADS **COMPLAINT FOR VIOLATIONS OF THE CIVIL RIGHTS ACT, 42 U.S.C. SECTION 1983 (DE FACTO PHYSICAL TAKINGS WITHOUT COMPENSATION AND DENIAL OF DUE PROCESS) AND CLAIM FOR ATTORNEY'S FEES UNDER 42 U.S.C. 1988(b)** Demand for Jury

Plaintiffs David Kagan, Judith Kagan, Frank Revere and Rachel K. Revere (Plaintiffs) bring the following Complaint against Defendants, City of Los Angeles (City), and the City of Los Angeles Housing + Community Investment Department (Housing Department) (collectively City), and allege as follows:

INTRODUCTION

1. Plaintiffs are the fee owners of improved real property consisting of a duplex which includes 103

North Orange Drive, Los Angeles, California 90036 (the Property). The Property is rented to Hamid Mossanen (Tenant), a single man, born October 23, 1958, who first occupied the Property during June, 2008. The Property is subject to rent control under the Los Angeles Municipal Code (LAMC). During September 2019, Plaintiffs determined they wished the Property to be occupied by a child, daughter-in-law, and two grandchildren of Frank Revere and Rachel K. Revere and on September 23, 2019, filed the required Declaration to Evict with the Housing Department as required by the LAMC (Application). A true and correct copy of the Application is attached hereto marked "Exhibit A" and is incorporated herein by reference. On October 28, 2019, the Housing Department, without a hearing and without any opportunity for the Plaintiffs to be heard, and solely based on that Tenant's representations, oral and written, declared in writing (the "Determination") that the Application filed by the Plaintiffs did not meet the requirements of the LAMC and as such the Tenant has *protective status* which prohibits Plaintiffs from seeking to obtain possession of the Property owned by them in fee. A true and correct copy of the Determination is attached hereto as "Exhibit B" and is incorporated herein by reference. City has thereby granted the Tenant the permanent physical occupation of the Property in perpetuity without compensation of any kind to Plaintiffs. This is a physical occupation case where the Defendant has physically intruded upon Plaintiffs' private property by granting authority to another person to do so. *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 421; 102 S.Ct. 3164, 3166 (1982). By this suit, Plaintiffs seek to recover just compensation for

the de facto physical taking of possession of the Property in perpetuity; for the denial of their Fifth and Fourteenth Amendment rights, and for attorney's fees.

PARTIES

2. Plaintiffs are individuals residing in the City of Los Angeles, County of Los Angeles, in the Central District of California, and are the owners in fee of the Property which is located in said City and County also designated as Los Angeles County Assessor's Parcel Number 5513-004-015.

3. Defendant, City is a political sub-division of the State of California organized and existing in accordance with its charter and the laws of the State of California as a Municipal Corporation which has adopted provisions for rent control as appears in the LAMC.

4. Defendant, Housing Department, is a local public agency with Regulatory authority over rental properties in the City of Los Angeles further to provisions of the LAMC.

JURISDICTION AND VENUE

5. This case arises under the Fifth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. sections 1983 and 1988. This court has subject matter jurisdiction pursuant to 28 U.S.C. 1331 and 1343.

6. This court is the appropriate venue for this case pursuant to 28 U.S.C. sections 1391(b)(2). Plaintiffs' property is located in this judicial district, the actions complained of took place in this judicial district, documents and records relevant to the

allegations are maintained in this judicial district, and the Defendants are present and conduct their affairs in this Judicial District.

7. The Plaintiffs' claim is ripe for the reason the LAMC provides no procedure nor opportunity by which Plaintiffs may seek a review, reversal or a variance from the Determination of the Housing Department of October 28, 2019. Additionally, Plaintiffs are not now obligated to seek compensation through the procedures established by the State of California for seeking just compensation for the inverse condemnation of the Property and now may proceed to assert their claims in this Court. *Knick v. Township of Scott*, 139 S.Ct. 2162, 2167 (2019)

The elements of the Plaintiffs' claims for relief are (1) Did the Defendants actions amount to a taking?; (2) Did the taking advance a legitimate governmental interest?; and, (3)Was just compensation paid? *Hall v. City of Santa Barbara*, 797 F.2d 1493, 1497 (9th Cir. 1986).

8. Standing

Plaintiffs have established the constitutional minimum for standing in that the Plaintiffs have alleged (1) injury in fact; (2) traceable to the conduct of the City; and, (3) the likelihood of being redressed by a favorable Determination. *Lujan v. Defenders of Wildlife*, 504 U.S. 555; 112 S. Ct. 2130 (1992); *Washington Environmental Council v. Bellon*, 732 F.3d 1131, 1139 (9th Cir. 2013).

STATEMENT OF FACTS

9. The Property

The Property which is owned by the Plaintiffs consists of an upstairs duplex unit comprising 2,400 square feet divided into living room, dining room, three bedrooms, two baths, garage, storeroom, one parking space, and a private yard area all of which is being occupied solely by an unemployed single man who currently pays a monthly rent of $4,545. The Property is legally described as Lot 213 of Tract No. 8498, in the City of Los Angeles, County of Los Angeles, State of California, as per Map recorded in Book 95, Pages 53 to 55 inclusive of Maps, in the Office of the County Recorder of said County. Except therefrom all oil, gas, minerals and other hydrocarbon substances, lying below a depth of 500 feet, without the right of surface entry. Plaintiffs purchased the Property on June 23, 2015 for the sum of $2,163,320.00.

10. The Ordinance

Effective September 16, 1990, the City adopted a Rent Stabilization Ordinance based on the following Declaration of Purpose:

> *"There is a shortage of decent, safe and sanitary housing in the City of Los Angeles resulting in a critically low vacancy factor. Tenants displaced as a result of their inability to pay increased rents must relocate but as a result of such housing shortage are unable to find decent, safe and sanitary housing at affordable rent levels. Aware of the difficulty in finding decent housing, some tenants attempt to pay requested rent*

increases, but as a consequence must expend less on other necessities of life. This situation has had a detrimental effect on substantial numbers of renters in the City, especially creating hardships on senior citizens, persons on fixed incomes and low and moderate income households. This problem reached crisis level in the summer of 1978 following the passage of Proposition 13. At that time, the Council of the City of Los Angeles conducted hearings and caused studies to be made on the feasibility and desirability of various measures designed to address the problems created by the housing shortage. In August, 1978, pending development and adoption of measures designed to alleviate the City's housing crisis, Council adopted Ordinance No. 151,415 which temporarily rolled back recently imposed rent increases, and prohibited most rent increases on residential rental properties for six months. Ordinance No. 151,415 expires on April 30, 1979. This ordinance has successfully reduced the rate of rent increases in the City, along with the concomitant hardships and displacements. However, a housing shortage still exists within the City of Los Angeles and total deregulation of rents at this time would immediately lead to widespread exorbitant rent increases, and recurrence of the crisis, problems and hardships which existed prior to the adoption of the moratorium measure. Therefore, it is necessary and reasonable to regulate rents so as to safeguard tenants from excessive rent increases, while at the same

time providing landlords with just and reasonable returns from their rental units. In order to assure compliance with the provisions of this chapter violations of any of the provisions of this chapter may be raised as affirmative defenses in unlawful detainer proceedings. (Amended by Ord. No. 166,130, Eff. 9/16/90.)"

11. The Takings

On or about September 23, 2019, Plaintiffs, Frank Revere and Rachel K. Revere, with the consent of the remaining Plaintiffs and in compliance with the Ordinance, filed a Declaration of Intent to Evict Tenant for Landlord Occupancy (the Application – Exhibit A). The Tenant who had resided on the Property for more than ten years as of this time and who was then under 62 years of age, filed objections claiming residence for more than ten years and disability. On October 28, 2019, City advised counsel for Plaintiffs in writing (the Determination Exhibit B) that the Application was denied as the Tenant has protective status as defined by the Ordinance, section 151.30.D.1. Said section provides:

"*Tenants Eligible for Termination of Tenancy.*

1. Protected tenants. A landlord may not recover possession of a rental unit pursuant to the provisions of Subdivision 8. of Subsection A. of Section 151.09 if:

(a) any tenant in the rental unit has continuously resided in the rental unit for at least ten years, and is either: (i) 62 years of age or older; or (ii) disabled as defined in

Title 42 United States Code Section 423 or handicapped as defined in Section 50072 of the California Health and Safety Code; or

(b) any tenant in the rental unit is terminally ill as certified by a treating physician licensed to practice in the State of California."

12. The Determination was made without a hearing being conducted, without any notice to the Plaintiffs, without giving Plaintiffs an opportunity to be heard and was based on the existence of a ten year tenancy and a claim of disability which facts evidence the City's intent to take the Property without regard to Plaintiffs wishes or objections. As a result, there has been a permanent physical occupation resulting in a taking of the Plaintiffs' Property for a public purpose without compensation in violation of the Takings Clause set forth in the Fifth Amendment to the U.S. Constitution.

13. The Claim

On January 8, 2020, Plaintiffs, further to California Government Code section 915 *et seq*., electronically presented a claim (Claim) to City demanding compensation for the taking of the Property. A true and correct copy of the Claim is attached hereto as Exhibit C and is incorporated herein by reference. On January 13, 2010, the City electronically acknowledged receipt of the Claim and advised it had assigned claim number C20-03548 to it. The Claim has not acted timely and is deemed rejected.

FIRST CLAIM FOR RELIEF

(VIOLATION OF THE TAKINGS CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION/42 U.S.C. §1983)

(BY PLAINTIFFS AGAINST ALL DEFENDANTS)

14. Plaintiffs incorporate by reference each and every allegation contained in the preceding paragraphs of this Complaint as though fully set forth herein.

15. By awarding exclusive possession to Tenant for his life if he so wishes without deference to Plaintiffs' fee title and right to possession, City has taken Plaintiffs' Property for the public purpose of addressing the housing shortage without paying Plaintiffs any compensation. In particular, as the U.S. Supreme Court explained in a June 2019 opinion "a taking without compensation violates the self-executing Fifth Amendment at the time of the taking," and thus the constitutional violation takes place when property is taken without compensation, not after the exhaustion of state court remedies. (*Knick v. Township of Scott*, 139 S. Ct. 2162, 2172 (2019)) The Takings Clause Provisions of the Fifth Amendment state:

> *"No person shall be deprived of property without due process of law nor shall private property be taken for public use, without just compensation."* U.S. Constitution, Fifth Amendment.

16. The purpose of the Takings Clause is to "bar [] Government from forcing some people alone to bear the public burdens which, in all fairness and justice

should be borne by the public as a whole." *Lingle v. Chevron Corp.*, 544 U.S. 528, 537 (2005) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

17. By virtue of the takings alleged herein, Plaintiffs have been damaged in an amount not yet ascertained, but in excess of $1,250,000. In addition, Plaintiffs have incurred and will continue to incur attorney's fees, appraisal, and other expert fees for the prosecution of this action.

SECOND CLAIM FOR RELIEF

(VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION/42 U.S.C. §1983)

(BY PLAINTIFFS AGAINST ALL DEFENDANTS)

18. Plaintiffs incorporate by reference each and every allegation contained in the preceding paragraphs of this Complaint as though fully set forth herein.

19. The enforcement of the Ordinance and the rendering of the Determination violated Plaintiffs substantive due process rights secured by the Fourteenth Amendment to the U.S. Constitution. Under the Due Process Clause of the Fourteenth Amendment, no State shall "deprive any person of life, liberty, or property without due process of law."

20. As Plaintiffs were expressly denied a constitutionally adequate hearing on their Application to obtain possession of the Property for family purposes, they have been unjustifiably prevented from the use and occupation of the Property

without the required due process in violation of the Fourteenth Amendment of the United States Constitution.

REQUESTED RELIEF

WHEREFORE, Plaintiffs, pray for judgment against the Defendants, and each of them, as follows:

1. For a determination that the actions of the City have resulted in Civil Rights Act violations in that the City has de facto physically taken Plaintiffs' right to possession of the Property without compensation;

2. For compensation and damages against City in an amount according to proof, with interest on that amount at the appropriate legal rate from October 28, 2019;

3. For costs, including but not limited to reasonable attorney's fees incurred in this action pursuant to 42 U.S.C. §1988 and other applicable law; and,

4. For any and all other relief as the Court deems just and proper.

DATED: June 22, 2020 REVERE & WALLACE

/S/_____
Frank Revere
Attorney for Plaintiffs

DEMAND FOR JURY TRIAL

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Plaintiffs demand a jury trial in this action on all issues so triable.

DATED: June 22, 2020 REVERE & WALLACE

/S/_____
Frank Revere
Attorney for Plaintiffs