PACIFIC LEGAL FOUNDATION

January 9, 2023

Supreme Court of the United States
1 First Street, N.E.
Washington, DC 20543

Re: Unopposed Request for Extension of Time to File Petition for Writ of Certiorari
Evans Creek, LLC v. City of Reno

To the Honorable Elena Kagan, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Ninth Circuit,

I am counsel of record for Petitioner Evans Creek, LLC, in the above-referenced case. Per Supreme Court Rule 13.1, the petition for writ of certiorari is due on January 24, 2023. *See* attached Ninth Circuit Memorandum Opinion entered October 26, 2022. Pursuant to Rule 30.3, Petitioner respectfully requests that the time for filing the petition be extended by 35 days to and including February 28, 2023.

This is Petitioner's first request for an extension of time. Good cause exists for the requested extension. I did not represent Petitioner in this case in the district court or court of appeals, and thus require sufficient time to familiarize myself with the relevant legal issues and record. In addition to working on this case, I am obligated to prepare a petition for certiorari in *Kagan v. City of Los Angeles*, 2022 WL 16849064 (9th Cir. Nov. 10, 2022), which is currently due in this Court on February 8, 2023. I am also in the middle of discovery processess in *Wall v. Ainsworth*, Central District of California No. 2:22-cv-04668-FMO-SK, and *Knight v. Richardson Bay Regional Agency*, Northern District of California No. 3:22-cv-06347-WHO.

Accordingly, Petitioner respectfully requests that the time for filing a petition for writ of certiorari be extended by 35 days to and including February 28, 2023. Counsel for Respondent has informed me by email that the City of Reno does not object to this request.

Sincerely,

J. David Breemer
Counsel of Record for Petitioner

cc: All Counsel

FILED

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EVANS CREEK, LLC, Plaintiff-Appellant, v. CITY OF RENO, Defendant-Appellee.	No. 21-16620 D.C. No. 3:20-cv-00724-MMD-WGC MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Miranda M. Du, Chief District Judge, Presiding

Argued and Submitted October 20, 2022
San Francisco, California

Before: S.R. THOMAS and M. SMITH, Circuit Judges, and McSHANE,** District Judge.

Evans Creek, LLC ("Evans Creek") appeals from the district court's dismissal of its claim brought under 42 U.S.C. § 1983 alleging violations of the Takings Clause and the Equal Protection Clause against the City of Reno ("the

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

** The Honorable Michael J. McShane, United States District Judge for the District of Oregon, sitting by designation.

City"). We have jurisdiction pursuant to 28 U.S.C. § 1291. We review a district court's decision to grant or deny a motion to dismiss under Rule 12(b)(6) for failure to state a claim de novo. *See Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 15 F.4th 885, 889 (9th Cir. 2021). We affirm.

Because the parties are familiar with the factual and procedural history of the case, we need not recount it here.

I

The district court properly dismissed Evan Creek's Takings claim. To survive a motion to dismiss, a complaint must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "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." *Iqbal*, 556 U.S. at 678. Conclusory statements that are unsupported by factual allegations are "not entitled to the assumption of truth." *Id.* at 679.

Assuming, without deciding, that Evans Creek has plausibly pleaded that denying its 2020 application for annexation ("2020 Application") effectively forecloses any feasible development on the property, Evans Creek has failed to

plausibly plead a regulatory taking. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), set forth three factors for determining whether government action constitutes a regulatory taking: (1) "[t]he economic impact of the regulation on the claimant," (2) "the extent to which the regulation has interfered with distinct investment-backed expectations," and (3) "the character of the governmental action." *Id.* at 124. The first and second *Penn Central* factors are the primary factors. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538–39 (2005).

Evans Creek's complaint fails to sufficiently plead the first *Penn Central* factor. "In considering the economic impact of an alleged taking, we 'compare the value that has been taken from the property with the value that remains in the property.'" *Colony Cove Props., LLC v. City of Carson*, 888 F.3d 445, 450 (9th Cir. 2018) (quoting *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987)). As pleaded, the complaint lacks any information about the value of the property when the 2020 Application was submitted or its value after the 2020 Application was denied. Accordingly, it is not possible for this Court to determine what the economic impact to the property is, even taking the allegations in the complaint as true.

Evans Creek's takings claim also fails prong two of the *Penn Central* analysis. As the Court in *Penn Central* noted, an appellant cannot "establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development." 438 U.S. at 130. Instead, "a purported distinct investment-backed expectation must be objectively reasonable." *Colony Cove*, 888 F.3d at 452.

Here, the principals' expectations that Evans Creek would be able to develop the property into a master planned community may well have been "hardly unconventional." But Evans Creek's "[u]nilateral expectations" about the mere possibility for future development were no more than speculative desires that cannot form the basis of a takings claim. *Bridge Aina Le'a*, 950 F.3d at 633–34. Additionally, the City's decision to annex property is subject to the City's discretion based on multiple statutorily prescribed factors. *See* Reno Mun. Code § 18.04.301(d).[1] Nevada law grants cities discretion to annex property when a property owner requests it. *See* Nev. Rev. Stat. § 268.670. Therefore, Evans Creek knew or should have known—especially after several failed requests for annexation—that the 2020 Application might be denied.

[1] In the current version of the Reno Municipal Code, this provision was moved to section 18.04.401(c)(4) of the Code, but is otherwise identical.

Thus, the district court properly granted the motion to dismiss the regulatory-taking claim.

II

Evans Creek has also failed to plausibly plead an Equal Protection class-of-one claim. The Supreme Court has held that "an equal protection claim can in some circumstances be sustained even if the plaintiff has not alleged class-based discrimination, but instead claims that she has been irrationally singled out as a so-called 'class of one.'" *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 601 (2008). For Evans Creek to succeed on its class-of-one claim, it must demonstrate that the City "(1) intentionally (2) treated [Evans Creek] differently than other similarly situated property owners, (3) without a rational basis." *Gerhart v. Lake Cnty.*, 367 F.3d 1013, 1022 (9th Cir. 2011).

To determine whether a plaintiff is "similarly situated" to others in the class-of-one context, this Court has held that "a class-of-one plaintiff must be similarly situated to the proposed comparator in *all material respects*." *SmileDirectClub, LLC v. Tippins*, 31 F.4th 1110, 1123 (9th Cir. 2022) (emphasis added). Because Evans Creek's complaint provides virtually none of the material facts on which this determination must be made, it falls far short of plausibly pleading the demanding "similarly situated" requirement articulated in *SmileDirectClub*. The complaint

alleges no facts about the other annexation applications or the land at issue in those applications. Nor does it offer support regarding how the City's decision to approve the other annexation applications differed from its decision to deny the 2020 Application. Evans Creek also makes the conclusory allegation that the City routinely grants annexation applications "irrespective of the characteristics of the subject properties," but the complaint is devoid of any facts supporting this assertion. Accordingly, because Evans Creek has not plausibly pleaded the "similarly situated" element of its class-of-one claim, its equal-protection claim as a whole fails, *see SmileDirectClub*, 31 F.4th at 1123, and we need not reach the question of whether the distinction made by the City was rationally related to legitimate government interests. The district court correctly dismissed the "class of one" Equal Protection claim.

AFFIRMED.[2]

[2] Appellants' motion to take judicial notice (**Dkt. 25**) is granted.

Proof of Service

I, J. David Breemer, certify that on January 9, 2023, I caused a true copy of the foregoing Request for an Extension of Time to File Petition for Writ of Certioari to be served via email to the following counsel:

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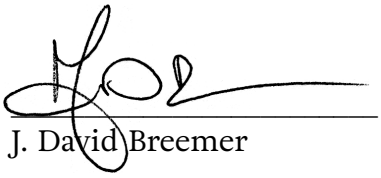

J. David Breemer