No. _____

IN THE

Supreme Court of the United States

Otto Haselhoff, individually and as trustee of the Otto and Lara Haselhoff Family Trust dated July 27, 2006, and assignee of Greg Briles individually and/or partner/trustee,

Petitioner,

v.

City of Santa Monica, California

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California Second Appellate District, Division Two

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The City of Santa Monica placed a "historic" designation on a home owned by Petitioner's predecessor without ever providing notice of either the hearing or the outcome of the hearing. Proceeding without notice raises serious due process issues, both procedural and substantive, as well as a taking of property without just compensation.

The California courts exacerbated the situation by taking "judicial notice" of "facts" contrary to the complaint and precluding discovery or trial on the merits, thus denying Petitioner the opportunity to expose the errors in those judicially noticed "facts." Those courts then applied an extremely stringent statute of limitations that, in defiance of the Supremacy Clause (U.S. Const., Art. VI, cl. 2), purported to eliminate federal constitutional claims.

Question 1: When government acts without notice in a way that seriously impacts the rights of citizens, does the lack of statutory and constitutionally required notice deprive the victim of property without due process of law?

Question 2: When a government agency seeks to declare property "historic" and then purports to rule on its own request, has it violated the property owner's Seventh Amendment right to a jury trial?

Question 3: Is certiorari necessary because California has (a) conflicted with this Court's recent

Seventh Amendment analysis in *SEC v. Jarkesy*, 144 S.Ct. 2117 (2024) and *Chrysafis v. Marks*, 141 S.Ct. 2482 (2021) that people cannot be the judge in their own case; (b) conflicted with this Court's recent decision in *Corner Post, Inc. v. Board of Governors*, 144 S.Ct. 2440 (2024) regarding the accrual of causes of action and consequent application of statutes of limitation; (c) decided a case based on judicially noticed "facts" while denying either discovery or trial on the merits, conflicting with *Garner v. Louisiana*, 368 U.S. 157 (1961); and (d) continues to ignore this Court's line of regulatory takings decisions, based on *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978) and *Lucas v. South Carolina Coastal Council* 505 U.S. 1003 (1992), while charting its own more restrictive course on this federal constitutional issue for which this Court's decisions provide a floor?

PARTIES TO THE PROCEEDING

Petitioner Otto Haselhoff, acting individually and as trustee of the Otto and Lara Haselhoff Family Trust dated July 27, 2006, and as assignee of Greg Briles individually and as partner and/or trustee, is a resident of Santa Monica, California and the current owner of the property that is the subject of this litigation.

The City of Santa Monica, California, is a California municipal corporation.

RELATED CASES

Otto Haselhoff, individually and as trustee, etc., no. 19SMCV00850. Los Angeles Superior Ct. Judgment entered May 27, 2022.

Otto Haselhoff, individually and as trustee, etc., no. B322168. California Court of Appeal, Second District, Div. Two. Opinion filed May 7, 2024.

Otto Haselhoff, individually and as trustee, etc., no. S285475, California Supreme Court. Order entered July 24, 2024.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully seek a writ of certiorari to review a judgment of the California Court of Appeal, Second Appellate District, Division Two.

INTRODUCTION

The treatment meted out below to Petitioner Haselhoff and his predecessor, Greg Briles, demonstrates California's continued refusal to adhere to constitutional precepts laid down by this Court.

As the law of regulatory takings began to develop, this Court had to repeatedly reprimand California for ignoring both settled law and the Constitution. (See *First English Evangelical Lutheran Church v. County of Los Angeles,* 482 U.S. 304, 310-11 (1987) (California decisions are "inconsistent[] with the requirements of the Fifth Amendment"); *Nollan v. California Coastal Commn.*, 483 U.S. 827, 839 (1987) (California inconsistent with *all other state courts* and this Court).) From these early cases down through the present day decisions in *Sheetz v. County of El Dorado*, 601 U.S. 267 (2024) and *Cedar Point Nursery v. Hasid*, 141 S.Ct. 2063 (2021), California has continued to require correction to bring it in line with paramount federal constitutional law.

This case continues California's cavalier attitude toward the rights of its property owning citizens. It has denied due process of law in manifold ways, including the deprivation of property without notice (*Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313

(1950)), "proof" of facts by judicial notice while denying discovery and trial on the merits (*Garner v. Louisiana*, 368 U.S. 157 (1961)), allowing municipalities to sit as judges in their own matters while denying the Seventh Amendment right to a jury trial (*SEC v. Jarkesy*, 144 S.Ct. 2117 (2024)), imposing a radically short statute of limitations (*Corner Post, Inc. v. Board of Governors*, 144 S.Ct. 2440 (2024)), and continuing to impose its own truncated view of regulatory takings law (*Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1015 (1992); *Cedar Point Nursery v. Hassid,* 141 S.Ct. 2063, 2071 (2021)). Each of these issues is presented here for this Court's review.

This case involves intertwined issues of both notice and substance.

Notice. Much in the case depends on when (and whether) notice was given to the owner of property that the City (1) intended to consider declaring his property a "landmark," (2) held a hearing at which such landmarking was considered, (3) reported the results of that hearing to the owner, and (4) recorded the results of that hearing. Such notice is mandated by City ordinances (Santa Monica Municipal Code §§ 9.56.120(D), 9.56.120(H), 9.56.120(I), 9.56.260 (see App. 72.)) as well as fundamental requirements of due process of law under both the California (Art. 1, § 7) and United States (14th Amendment) Constitutions.

Notice is critical for interrelated reasons. *First*, both lower courts applied the stringent statute of limitations in Cal. Gov. Code § 65009,

dismissing the action for the supposed failure of the property owner to sue the City within 90 days of its alleged landmarking action. However, the 90 days could not begin to run without proper notice being served in the manner required by statute and local ordinance. *Second*, the California courts also held that the property owner had waived his right to sue because he failed to take an administrative appeal from the Landmarks Commission to the City Council. But waiver is contingent on the injured party receiving properly served notice of the offending action. Here, it was repeatedly alleged that there was no notice and hence no deadline for that administrative appeal.

Substance. The upshot of the City's landmarking actions was to deprive the owner of property rights guaranteed by both the 5th Amendment to the United States Constitution and Article I, § 19 of the California Constitution. The Court of Appeal's analysis of these issues is contrary to controlling law laid down by this Court. Moreover, the Court of Appeal's decision is based on improperly taking "judicial notice" not only of the *existence* of extra-record documents but of the *truth* of statements in those extra-record documents to contradict allegations in the complaint, thus denying Haselhoff due process of law.

OPINIONS BELOW

The California Court of Appeal's unpublished opinion is reproduced at App. 1. The unpublished Order denying rehearing is reproduced at App. 69. The California Supreme Court's unpublished Order denying review is reproduced at App. 70. The trial court's judgment and order dismissing the case is reproduced at App. 35.)

JURISDICTION

The California Court of Appeal filed its opinion on May 7, 2024. A timely petition for rehearing was denied on May 28, 2024. A timely petition to the California Supreme Court was denied on July 24, 2024. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides: "... nor shall private property be taken for public use without just compensation."

The Fourteenth Amendment to the United States Constitution provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Seventh Amendment to the United States Constitution provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved …."

Local ordinances are reproduced at App. 72-74.

STATEMENT OF THE CASE

A. Petitioner Owns a Home in Santa Monica.

The property in question was, for many years, the home of singer/actress Kathryn Grayson. When she died, her passing was covered by all major news outlets as well as social media.[1] The fact of her death was widely known. Thereafter, her estate sold the property to Greg Briles. Briles later sold the home and its surrounding grounds to Petitioner Haselhoff.

B. Santa Monica Decides to "Landmark" the Property, but Violates All Rules (Local, State, and Constitutional) Regarding Notice to the Property Owner.

The City of Santa Monica's Landmarks Commission decided that it wanted to preserve the property and—seven months after her death—had

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[1] See, e.g., https://www.latimes.com/local/obituaries/la-me-kathryn-grayson19-2010feb19-story.html; https://www.nytimes.com/2010/02/19/movies/19grayson.html; https://www.youtube.com/watch?v=2wMSr-ohbC4.

one of its staff people submit a request to itself to declare the property a historic landmark.

Although neither Grayson nor her estate owned the property any longer, the City claims that it sent notices to her (either individually or as trustee, although she had been deceased for months) that a hearing regarding the possible landmarking of the property would occur. Why notice would have been "sent" to a person whose passing had been widely publicized was never explained. No notice was ever sent to Briles, although the Grayson Estate had sold him the property.

A "hearing" was held at which the Commission decided to authorize declaring the property a landmark. It is noteworthy that the request to declare a landmark and the allegedly sent notices referred only to the home, and not the surrounding parcel. Nonetheless, the landmark declaration covered both the home and the lots. That is important because, under Santa Monica law, the landmark designation froze the ability to develop other areas of the large lot (or even plant on them) without Landmarks Commission approval.

C. Trial Court Proceedings.

Years after the landmarking, Briles sold the property to Haselhoff and assigned any claims he might have against Santa Monica for actions it had taken against his property.

Haselhoff sued the City seeking, among other things, mandate to set aside the landmarking, a declaration that the landmarking was invalid, and compensation for a taking of property without

compensation (both under the Constitution and 42 U.S.C. § 1983), noting total non-compliance with all ordinances regarding notice as well as the total ignorance of his assignor (Briles) as to anything to do with the "hearing". Although he timely asked the City to prepare an Administrative Record (AR), the City was tardy in doing so and the original complaint was prepared without it. After receipt of the AR, Haselhoff filed a First Amended Complaint (FAC).

The FAC demonstrated how Santa Monica's own ordinances required that notice be given to the owner of property slated for landmarking, as well as the process and the hearing and the outcome of the hearing. (See App. 72-74.) The FAC also showed how none of those requirements was met by the City.

The City demurred to the FAC, largely on timeliness grounds. The City's position was that no one appealed the Landmarks Commission determination to the City Council within 10 days, as required by ordinance and then no one filed suit within 90 days as required by Cal. Gov. Code § 65009. After many pleadings were exchanged (described in some detail at App. 12-15), including a proposed Second Amended Complaint (SAC), the trial court sustained the demurrer without leave to amend. (App. 64.)

Overlooked by the California courts was the fact that Briles, the owner of the property and the one who would have an interest in challenging the result of the Landmarks Commission's hearing, was never provided either notice of the hearing or

of the result of the hearing, as alleged in both the FAC and SAC.

While all that law and motion practice was going on, the trial court precluded discovery.

Judgment was entered based on the demurrer, followed by an appeal.

D. Proceedings on Appeal.

The Court of Appeal affirmed (App. 1) in an opinion with manifold problems described in the Petition for Rehearing. Prime among the constitutional problems with that opinion was the Court of Appeal's extensive use of "judicial notice" to heavily augment the "facts" used to analyze the FAC and SAC. As discussed herein, that was improper and denied Haselhoff due process of law.

Moreover, in deciding that suit was brought too late, both lower courts misunderstood the duties and obligations of the parties. Of the two primary parties—the City and Briles—one had clear, mandatory duties. The City had an obligation imposed both as a matter of constitutional due process of law and the Santa Monica Municipal Code (App. 72) to provide notice of the filing of the application, notice of the hearing, and notice of the determination. It did none of these things.

Instead of holding the City to its obligations and the consequences of ignoring them, the lower courts held that Briles had been at fault for neither taking an administrative appeal to the city council within 10 days of the Landmarks Commission action or filing suit within 90 days. Ignored by the courts was that Briles was provided no notice of the city's acts

and thus could not have complied with those stringent deadlines.

The case presented below (as here) involves serious questions of constitutional import. The issues were either ignored or improperly dealt with, as shown in the Petition for Rehearing, which was almost immediately denied. (App. 69.) So powerful was the Court of Appeal's antipathy to Petitioner that it accused him of raising issues belatedly at oral argument, when (as the Petition for Rehearing extensively showed) they had been argued expressly in the appellate briefs. (See App. 3, fn. 2.)

Haselhoff then filed a Petition for Review in the California Supreme Court, raising the constitutional issues brought here. That petition was denied without opinion. (App. 70.)

This Petition followed.

REASONS FOR GRANTING CERTIORARI

I.
TAKING JUDICIAL NOTICE OF CONTESTED FACTS AND THEN DECIDING THE CASE ON THOSE "FACTS" WITHOUT EITHER DISCOVERY OR TRIAL IS A DENIAL OF DUE PROCESS.

Judicial notice is only proper when the facts so noticed are ***not*** subject to dispute. (Fed. Rules of Evid., Rule 201; Cal. Evid. Code § 452.) The trial court understood this. Thus, when agreeing to take judicial notice of the existence of some *documents*, the trial court said:

> "The court's decision to judicially notice the existence and filing of these documents is

> *not judicial notice of the truth* of the documents, the interpretation of any of these documents or any findings of fact contained therein." (App. 42)

Nonetheless, the Court of Appeal augmented the pool of facts it considered in reviewing this dismissal via demurrer to "judicially notice" numerous "facts" that were seriously disputed. (See App. 3.) Indeed, they were used by the Court of Appeal to counter allegations made in the FAC and SAC and "resolve" such disputes in favor of the defendant, thus essentially ignoring the complaint. (See App. 3, fn. 2.)

Some things that the Court of Appeal "judicially noticed" defied common sense. For example, the Court of Appeal took judicial notice that the Estate of Kathryn Grayson, the prior owner of the property, supposedly sent a letter to the City requesting a delay in the landmark hearing and then later sent a representative (one Ms. Bartolo) to the hearing. The Court of Appeal then purported to discuss Bartolo's "testimony" at the hearing, including a comment that the Grayson Trust had a "potential buyer" for the property who was "supportive" of the landmarking. (App. 6.) All this happened more than *four months after the Grayson Estate's trustees had already sold the property to Mr. Briles*. Briles, the *actual* owner of the property, knew nothing of the hearing, as the complaints consistently alleged. A Petition for Rehearing was filed, seeking to correct the factual misstatements by the Court of Appeal, but it was denied without comment. (App. 69.)

Such appellate judicial notice of facts which were *not* judicially noticed by the trial court has been repeatedly condemned by this Court as a violation of due process of law. *E.g.*, *Ohio Bell Tel. Co. v. Pub. Util. Commn.*, 301 U.S. 292 (1937); *Garner v. Louisiana*, 368 U.S. 157 (1961).

In *Garner*, this Court disallowed the very practice used by the Court of Appeal in this case, i.e., permitting one party to "prove" its case by judcial notice in the reviewing court without allowing a trial court the opportunity to review the evidence or even to consider the "evidence" proffered by judicial notice:

> "To extend the doctrine of judicial notice to the length pressed by the respondent would require us to allow the prosecution to do through argument to this Court what it is required by due process to do at the trial, and would be to turn the doctrine into a pretext for dispensing with a trial." 368 U.S. at 173 (cleaned up).

In *Ohio Bell*, this Court described the proper function of judicial notice:

> "… notice, even when taken, has no other effect than to relieve one of the parties to a controversy of the burden of resorting to the usual forms of evidence." 301 U.S. at 301.

To go further, and use the judicially noticed material to *prove* the facts, as was done here, is a denial of due process. *Ohio Bell*, 301 U.S. at 300, 302. The type of judicial notice employed by the Court of Appeal permits the decision maker to

"wander afield" and make decisions "without reference to any evidence, upon proofs drawn from the clouds." *Id*. at 307.

In another case the Court of Claims put it aptly in denying the use of "judicial notice" on appeal:

> "Assuming *arguendo* that it would be proper to take judicial notice of these documents, the Government's *effort to inject them at this [appellate] stage comes too late.* Judicial notice is merely a way of introducing evidence without resort to the ordinary formalities; it does not circumvent the requirements of orderly judicial procedure, and one of those requirements is that appellate tribunals should ordinarily consider only what has been properly presented to the trier of fact below." *Turtle Mountain Band of Chippewa Indians v. United States*, 490 F.2d 935, 945 (Ct. Cl. 1974) (cleaned up).

Due process of law recoils at what happened below:

> "Many controversies have raged about the cryptic and abstract words of the Due Process Clause, but there can be no doubt that, at a minimum, they require that deprivation of life, liberty or property by adjudication be ***preceded by notice and opportunity for hearing*** appropriate to the nature of the case …. The fundamental requisite of due process of law is the opportunity to be heard. This right to be heard has little reality or worth ***unless one is informed that the***

> ***matter is pending*** and can choose for himself whether to appear or default, acquiesce or contest." *Mullane v. Central Hanover Bank & Trust Co*., 339 U.S. 306, 313 (1950) (cleaned up; emphasis added).

Haselhoff was subjected to a cascading series of due process denials. They began when the City held hearings that dealt with the subject property but failed repeatedly to provide notice to Haselhoff's assignor (Briles) of what was going on. The trial court magnified that deprivation when it refused to allow discovery so that a full record could be created. And the Court of Appeal capped off the problem by accepting without question the purported statements of Bartolo and Culotti and using them to avoid dealing with the consistent—and contrary—allegations in the FAC and SAC about the events leading to this litigation. Certiorari is needed to elevate due process of law to its rightful place while lowering judicial notice to the procedural rung on which it belongs.

II.
GOVERNMENT ACTION DONE WITHOUT NOTICE DENIES DUE PROCESS, IS VOID, AND IS SUBJECT TO ATTACK AT ANY TIME.

A. Notice Is The Key To Due Process.

Put simply, "notice must be such as is reasonably calculated to reach interested parties." *Mullane,* 339 U.S. at 318. Thus, the key to due process is reaching interested parties so they may be heard. "It is a purpose of the ancient institution

of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims." *Board of Regents v. Roth,* 408 U.S. 564, 577 (1972).

There is no question that Briles (the actual owner of the property at the time of the "landmarking") was not sent notice. If nothing else, the complaint (in all its versions) so alleged, and that is surely enough at the hearing on a demurrer.

All of the issues regarding notice—who gave notice (including when and how), who received notice (including when and how)—are contested fact issues that require trial to determine. The complaints allege that no notice was ever given. The City asserts otherwise. Resolution requires trial.

B. The City's Failure To Provide Notice Made Its Actions Void And Subject To Attack At Any Time, Without Regard To Statutes Of Limitation.

It is settled law that a judicial body failing to obtain jurisdiction over either the subject of the action or the parties thereto will simply render a void judgment that is open to attack *at any time*:

> "A void judgment is a legal nullity. *See* Black's Law Dictionary 1822 (3d ed.1933); *see also id.*, at 1709 (9th ed. 2009). Although the term 'void' describes a result, rather than the conditions that render a judgment unenforceable, it suffices to say that a void

> judgment is one so affected by a fundamental infirmity that the infirmity may be raised even after the judgment becomes final. See Restatement (Second) of Judgments 22 (1980); see generally id., § 12." *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 270 (2010).

See also Elliott v. Peirsol's Lessee, 26 U.S. 328, 329 (1828) (if a court acts "without authority, its judgments and orders are nullities").

The same is true of an administrative body acting in a quasi-judicial manner:

> "Administrative orders are void when rendered without fundamental jurisdiction (or in excess of the agency's statutory powers, also referred to as in excess of its jurisdiction.)" *Miller v. Board of Medical Quality Assurance,* 193 Cal.App.3d 1371, 1379 (1987).

Here, the city's Landmarks Commission failed to obtain jurisdiction over either the property or its owner by failing to notify the property owner of the proceedings. The Commission failed in its mandatory duty to notify the property owner and thus failed to obtain jurisdiction to declare his property a "landmark." The Commission's action was thus void and subject to attack at any time. The California courts ignored this fundamental rule.

C. Serendipitous Acquisition of Knowledge is Not the Legal Equivalent of the Government Providing Formal Notice That Satisfies Due Process.

A number of the "facts" noted by the Court of Appeal appear to be aimed at showing that Briles or Haselhoff or both somehow "knew" that the City had landmarked the property. But that is not the issue. Nor was there any proof of either notice or knowledge, as the case never went to trial. The real issue here is *whether the City provided the* ***formal notice*** *that it was required to do* by both state and municipal law (i.e., Cal. Code Civ. Proc. §1094.6; Santa Monica Mun. Code §§9.25.020, 9.56.120, and 9.56.260), as well as state and federal due process requirements. As this Court explained:

> "[T]he common knowledge that property may become subject to government taking when taxes are not paid ***does not excuse the government from complying with its constitutional obligation of notice before taking private property***. We have previously stated the opposite: An interested party's ***knowledge*** of delinquency in the payment of taxes ***is not equivalent to notice*** that a tax sale is pending. It is at least as widely known that arrestees have the right to remain silent, and that anything they say may be used against them, but that knowledge ***does not excuse a police failure to provide*** **Miranda** ***warnings***."

Jones v. Flowers, 547 U.S. 220, 232-33 (2006) (cleaned up; emphasis added.)[2]

The opinion also incorrectly states that "there is no contention that either the Grayson Trust or the Briles–Culotti Partnership did not have notice." (App. 26.) This too incorrectly conflates "notice" with "knowledge." It also assumes there is something important about two entities that had no interest in the property (the Grayson Trust having sold it to Briles more than four months earlier). Moreover, both the FAC and the SAC clearly alleged that *no one* was given *notice* of anything. That was a major failing by the City: failure to give formal notice of what it was doing and what it had done, as required by law. (See App. 72.) Moreover, anyone in the chain of title after the so-called landmarking of the property would have no way of actually verifying the "landmarking" because the City *failed to record* that action, even though its own ordinance requires that to be done. (See Santa Monica Municipal Code § 9.56.260.) Recording, of course, would have provided notice. But here there was none. Thus, magnifying the general failure to

[2] Assume, for example, that a nationally noted constitutional scholar like Alan Dershowitz was arrested and then questioned without being given his *Miranda* warning. Any "evidence" obtained through that questioning—and any fruits of that questioning—would surely be excluded, notwithstanding his obvious knowledge of constitutional law. In similar fashion, one who is named as a defendant in a complaint, *but not served with summons*, is not required to respond to the complaint even if he "knows" about it. The difference between knowledge and notice is clear and has palpable consequences.

provide notice, the failure to record the action precludes the City from relying on any sort of presumed notice. Thus, who got notice, and when and how, was a contested factual issue that required trial.

The opinion does not confront the difference between knowledge and notice. The difference between knowledge and notice is a distinction that matters because the law calls for following statutory norms, not ascribing knowledge, which is both questionable, unproved, and truly not the point. That difference is legally critical. Without proper, formal notice—expressly including Santa Monica's own municipal requirements (see App. 72)—being served in the required manner on the proper parties entitled to be served, deadlines do not begin to run.

When notice is constitutionally required and is not provided, then the governmental action is ***void***. If it is void, then ***no limitation period applies***. *See, e.g.*, *County of San Diego v. Gorham,* 186 Cal.App.4th 1215, 1225 (2010) (ensuing judgment is void, and thus vulnerable to direct or collateral attack "***at any time***." (emphasis added)); *Miller v. Bd. of Med. Quality Assurance,* 193 Cal.App.3d 1371, 1379 (1987) (same as to administrative proceeding). Thus, whether any court has recognized tolling in the context of Government Code § 65009 (App. 50) is irrelevant. If the government action is void, then it is subject to ***unlimited challenge***.

Nothing in the opinion below changes the fact that the City *knew* Grayson was dead, *knew* she was

not the owner (either personally or as trustee), *knew* there was a new owner, *knew* Bartolo was not an attorney for the new owner, but nevertheless filed a *false application* saying that Grayson Trust was the owner, and that Grayson—by that time long dead—*knew* of the application. Nothing in the opinion changes the fact that the FAC, proposed SAC, and all the allegations therein allege that the City *never* gave the owner of the property *notice of anything*.

In fact, the failure to give notice continues to this day and as alleged in the FAC, the SAC and the briefing below, Haselhoff, who sues as Briles's assignee following his purchase of the property, *still* has not been provided *official notice of anything* and that, too, was alleged.

III.
THE COURT OF APPEAL'S TAKINGS ANALYSIS CONFLICTS WITH THIS COURT.

Regularly, in the modern era of takings law, this Court has repeated that, if a regulation deprives property owners of the "economically viable use" or "economically beneficial or productive use" of their property, a taking has occurred. (The first formulation appeared in *Agins v. City of Tiburon,* 447 U.S. 255, 260 (1981); the latter refinement appeared in *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1015 (1992).) In *Lucas*, the Court was so focused on the impact of government action on the *use* remaining to private property owners, that it used the word "use" 37 times (generally in conjunction with the words "economically productive" or "economically

beneficial"). *See* 505 U.S. at 1016-19, 1027-30. Thus, contrary to the impression given in the Court of Appeal's opinion (App. 31), the allowance of "some" use is not constitutionally sufficient, it must be economically productive. And that is a question of fact that cannot be resolved without evidence.

By focusing on "productive" or "beneficial" use, *Lucas* clearly expressed the idea that the Constitution protects more than the ability to simply hold property in some theoretical manner. Indeed, Mr. Lucas himself was said to be able to minimal (though noneconomic) use of his property, but that was not sufficient to satisfy the Fifth Amendment. *See Lucas*, 505 U.S. at 1044 (Blackmun, J., dissenting).

So, here, the City's action—mandated by its ordinance—in freezing the ability of Briles to use or improve or remodel or repair his property in any way took (at least temporarily) his property, and did so as soon as the application was filed, without either a hearing or just compensation.

"Property" consists of many things. Indeed, the concept is so complex that this Court has repeatedly used the law professors' "bundle of sticks" analogy to illustrate it, concluding that either the taking of an entire "stick" (or right) from the "bundle" or the taking of a slice through all the "sticks" violates the Fifth Amendment's Just Compensation Clause. Indeed, it is hard to pick up a property decision by this Court and not find some reference to the bundle of sticks as an explanation for the holding. *E.g.*, *Hodel v. Irving,* 481 U.S. 704, 716 (1987); *Nollan v. California Coastal Commn.*, 483 U.S. 825, 831

(1987); *Dolan v. City of Tigard,* 512 U.S. 374, 393 (1994); *Murr v. Wisconsin,* 137 S.Ct. 1933, 1952 (2017) (Roberts, C.J., dissenting); *Cedar Point Nursery v. Hassid,* 141 S.Ct. 2063, 2071 (2021). Freezing the use of Briles's property was a temporary taking of his right of use. See *First English*, 482 U.S. 304. The extent of the impairment, and the compensation due, is an issue of fact for trial. *Penn Central Transp. Co. v. City of New York,* 438 U.S. 104 (1978).

The decision here needs to blend with the Court's decisions generally protecting the rights of private property owners. The Court recently summarized that history this way:

> "As John Adams tersely put it, '[p]roperty must be secured, or liberty cannot exist.' Discourses on Davila, in 6 Works of John Adams 280 (C. Adams ed. 1851). This Court agrees, having noted that protection of property rights is 'necessary to preserve freedom' and 'empowers persons to shape and to plan their own destiny in a world where governments are always eager to do so for them.'" *Cedar Point*, 594 U.S. at 147.

For many decades, California has acted on the belief that it is free to set its own parameters for how it treats its property owning citizens. It has consistently disregarded this Court's clear holdings, even to the point that (until this Court corrected the situation in *First English*), property rights cases were routinely filed in federal court because the California state courts provided no

compensation remedy. See, e.g., *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999). It is time to return California to the American constitutional fold. Indeed, it is long past time.

IV.
THE CALIFORNIA COURTS IGNORED THE FEDERAL CIVIL RIGHTS ACT (42 U.S.C. § 1983).

Pursuant to the Fourteenth Amendment, Congress acted to provide protection for rights guaranteed by the U.S. Constitution when it enacted 42 U.S.C. § 1983. Petitioner invoked this statutory remedy when Santa Monica ignored its constitutional obligation to compensate him for property taken for public use. He asked the courts to compel Santa Monica to abide by the federal constitutional guarantee of prompt payment of just compensation for property acquired by eminent domain. The California courts refused.

Section 1983 was intended to provide "a uniquely federal remedy" (*Mitchum v. Foster*, 407 U.S. 225, 239 (1972)) with "broad and sweeping protection" (*Lynch v. Household Fin. Corp.*, 405 U.S. 538, 543 (1972) (quoting with approval)) so that individuals in a wide variety of factual situations are able to obtain a federal remedy when their federally protected rights are abridged (*Burnett v. Grattan*, 468 U.S. 42, 50, 55 (1984)).

Contrary to the decision below, there is no strict exhaustion requirement under Section 1983, merely a need for the government position to be clear. (*Pakdel v. City & County of San Francisco*

(2021) 141 S.Ct. 2226. See also *Williams v. Washington*, no. 23-191, argued Oct. 7, 2024.)

California simply ignored this key federal statute designed to compel local governmental compliance with the federal Constitution. Ignoring a directly applicable federal statute is reason enough for this Court to review this errant decision.

V.
THE COURT SHOULD GRANT CERTIORARI TO ENSURE THAT THE CONSTITUTION PREVAILS OVER STATUTES.

Under our system of government, the Constitution is preeminent. It cannot be undercut by statutes. The issue here is whether a constitutional provision held by this Court to be "self-executing," i.e., requiring no Congressional action to enliven it, can be restricted or eliminated by a mere statute—particularly, as here, a *state* statute. In brief, it cannot.

Our Constitution provides a baseline of minimal protection to all the rights of all citizens, with individual states having the discretion to provide more, but never less protection. *Simmons v. South Carolina*, 512 U.S. 154, 174 (1994); see *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638 (1943). Justice Kavanaugh explained it this way: "the Constitution sets a floor for the protection of individual rights. The constitutional floor is sturdy and often high, but it is a floor. Other . . . government entities generally possess authority to safeguard individual rights above and beyond the rights secured by the U.S. Constitution." *American*

Legion v. American Humanist Assn., 139 S.Ct. 2067, 2094 (2019) (Kavanaugh, J., concurring).

Thus, if there is a role for state courts and state laws, this is it: providing *more* protection than the U.S. Constitution mandates. As Professor Akhil Amar summarized it, "the federal constitution stands as a secure political safety net—a floor below which state law may not fall."[3] As this Court plainly expressed it, "The American people have declared their Constitution and the laws made in pursuance thereof to be supreme." *McCulloch*, 17 U.S. at 432.) Beyond that, as the Court classically held in *Marbury v. Madison*, 5 U.S. [1 Cr.] 137, 177 (1803), it is the Court's job to see that other levels of government remain true to the Constitution. That would include protecting the rights of property owners from the depredations of state and local government. Here, that is done by providing protection against state agencies and officials, regardless of what state law might otherwise say. U.S. Const., art. VI, cl. 2. "It is basic to this constitutional command that all conflicting state provisions be without effect." *Maryland v.*

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[3] Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. Chi. L. Rev. 1043, 1100 (1988) (emphasis added). See *Bracy v. Gramley*, 520 U.S. 899, 904 (1997) ("the Due Process Clause . . . establishes a constitutional floor"); see also Gideon Kanner, *Just How Just is Just Compensation?* 48 Notre Dame L. Rev. 786, 784 (1973): "it seems safe to say that the Constitution—or at least the Bill of Rights—was the product of the framers' fear of an overreaching government, and their desire to protect individual citizens from governmental excesses. . . . [T]he purpose of the . . . Bill of Rights [] was to protect the people from the government, not vice versa."

Louisiana, 451 U.S. 725, 746 (1981); *Mutual Pharmaceutical Co., Inc. v. Bartlett*, 570 U.S. 472, 480 (2013).

Because the right to just compensation arises directly from the Constitution, neither Congress nor local legislators can abrogate this right. As the Court put it in *Jacobs v. United States*, 290 U.S. 13, 17 (1933), "the right to just compensation could not be taken away by statute or be qualified …." In *Jacobs*, the question was whether the failure of Congress to provide for interest on awards of just compensation could override the general Constitutional command for payment of compensation for takings, as interest is part of just compensation. The Court answered curtly that it could not, because the Constitution prevailed in protecting the rights it guarantees. In other words, "acts of Congress are to be construed and applied in harmony with and not to thwart the purpose of the Constitution." *Phelps v. United States*, 274 U.S. 341, 344 (1927). The same must be true of state and local legislation.

A. The Constitution is paramount.

The Constitution is our paramount authority. *Marbury v. Madison*, 5 U.S. 137, 176-77 (1803):

> "The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. [¶] …. Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every

> such government must be, that *an act of the legislature, repugnant to the constitution, is void*." (Emphasis added).

The founders of this republic understood history—particularly the problems that arose because of the amorphous nature of the national governmental structure. Early on, this Court concluded that the Supremacy Clause was adopted in order to ensure that the central government did not suffer from the weaknesses that undercut the earlier attempt at union under the Articles of Confederation, acknowledging that "the conflicting powers of the General and State Governments must be brought into view, and the supremacy of their respective laws, when they are in opposition, must be settled" (*McCulloch*, 17 U.S. at 405):

> "The American States, as well as the American people, have believed a close and firm Union to be essential to their liberty and to their happiness. They have been taught by experience that this Union cannot exist without a government for the whole, and they have been taught by the same experience that this government would be a mere shadow, that must disappoint all their hopes, unless invested with large portions of that sovereignty which belongs to independent States. Under the influence of this opinion, and thus instructed by experience, the American people, in the conventions of their respective States, adopted the present

Constitution." *Cohens*, 19 U.S. at 380-81.[4]

The Constitution—in this case, particularly the Fifth and Fourteenth Amendments—is thus supreme against legislative reduction or evasion. The California courts permitted a statute to eliminate the right to sue to vindicate the Fifth Amendment right to compensation for property taken. To the extent that any legislation can be read as restricting or eliminating the rights under constitutional guarantees, that legislation is "repugnant to the constitution [and] void."

The Constitution itself lays down this rule, in the section commonly referred to as the "Supremacy Clause":

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, … shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, *any Thing in the Constitution or Laws of any State to the Contrary notwithstanding*." (U.S. Const., art. VI, cl. 2, emphasis added.)

McCulloch was both clear and forceful about how the Supremacy Clause permeated all provisions of the Constitution. It referred to that provision as:

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[4] This Court was keenly aware of the deficiencies of the Articles of Confederation, noting pointedly how national directives "were habitually disregarded [as being] a fact of universal notoriety. With the knowledge of this fact, and under its full pressure, a convention was assembled to change the system." *Id.* at 388. A key part of that change was the Supremacy Clause. *Id.* at 381.

> "a principle which so entirely *pervades* the Constitution, is so *intermixed* with the materials which compose it, so *interwoven* with its web, so *blended* with its texture, as to be incapable of being separated from it without rending it into shreds." *McCulloch*, 17 U.S. at 426 (emphasis added).

The unifying principle is that "the Constitution and the laws made in pursuance thereof are supreme; that ***they control the Constitution and laws of the respective States***, and cannot be controlled by them." *McCulloch*, 17 U.S. at 426, emphasis added.

Indeed, when individual rights are incorporated into the Constitution (through the Bill of Rights), they become part of the Constitution and thus are "supreme" over any state provision. *See Barnette*, 319 U.S. at 638-39.

As Chief Justice Marshall put it, "If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply." *Marbury*, 5 U.S. at 177-78; *see also* 1 Charles Warren, The United States Supreme Court in United States History 14-15 (rev. ed. 1932) (noting that "a supremacy of the Constitution and laws of the Union 'without a supremacy in the exposition and execution of them would be as much a mockery as a scabbard put into the hands of a soldier without a sword in it.'" (quoting James Madison)).

The Supremacy Clause stands as a barrier to all state laws that trench on the rights of private

property owners, like the rigid state statute of limitations applied here.

B. The Just Compensation Clause is a Constitutional Guarantee that This Court has held to be both Self-Executing and Irrevocable. It Does Not Depend Upon Legislative Grace.

Owners' rights to be secure in their property is one of the primary objects for which the national government was formed. In *United States v. Jones*, 565 U.S. 400, 405 (2012), the Court recalled Lord Camden's holding in *Entick v. Carrington*, 95 Eng. Rep. 807 (C.P. 1765), "The great end for which men entered into society was to secure their property." This Court explained, "In any society the fullness and sufficiency of the securities which surround the individual in use and enjoyment of his property constitute one of the most certain tests of the character and value of government." *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 324 (1893) (followed by *Olson v. United States*, 292 U.S. 246, 254 (1934)).

This Court held the Fifth Amendment guarantee of compensation does not "depend on the good graces of Congress," explaining:

> "[A] landowner is entitled to bring an action in inverse condemnation as a result of the 'self-executing character of the constitutional provision with respect to compensation'…. As noted in Justice Brennan's dissent in *San Diego Gas*, it has been established at least since *Jacobs* [*v.*

> *United States*, 290 U.S. 13 (1933)] that claims for just compensation are grounded in the Constitution itself." *First English Evangelical Lutheran Church v. Los Angeles*, 482 U.S. 304, 315-16 (1987).

The Court reiterated recently that the Just Compensation Clause is "self-executing." *Knick v. Township of Scott*, 588 U.S. 180, 192 (2019).

In *First English*, the Solicitor General (as amicus curiae) urged that the Fifth Amendment was merely "a limitation on the power of the Government to act, not a remedial provision." *See* 482 U.S. at 316, n.9. The Court rejected that argument, concluding that it was the Constitution itself that both established the right and dictated the remedy. *Id.*

Indeed, even before *San Diego Gas* and *First English*, this Court found:

> "whether the theory … be that there was a taking under the Fifth Amendment, and that therefore the Tucker Act may be invoked because it is a claim founded upon the Constitution, or that there was an implied promise by the Government to pay for it, is immaterial. In either event, the claim traces back to the prohibition of the Fifth Amendment …." *United States v. Dickinson*, 331 U.S. 745, 748 (1947).

The Fifth Amendment "prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more

and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him." *Monongahela*, 148 U.S. at 325. In other words, cash may not heal all wounds, but it is a constitutionally acceptable remedy for unconstitutional government action.

When the government takes an owner's property the government has a "categorical duty" to comply with the Fifth Amendment. *See Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 31 (2012); *Horne v. Dept. of Agriculture*, 576 U.S. 350, 362 (2015). The government may not escape this "categorical duty" by creating a statutory scheme that truncates the Constitutionally guaranteed compensation when property is taken. Thus, in *First English*, this Court held that California had "truncated" the Fifth Amendment's rule by refusing compensation for any part of the time that the regulation precluded use of the property. 482 U.S. at 317. So, here, California is up to its old tricks. The California Court of Appeal "truncated" the compensation rule by a short, but ironclad, deadline to file suit for this constitutional violation.

More than that, this Court recently held that the duty to pay just compensation when government takes private property is "irrevocable." *Knick*, 588 U.S. at 192. A right that is both "self-executing" and "irrevocable" cannot be eliminated by a state statute purporting to place a time restriction on claiming that remedy.

In a somewhat different context, the Court had no trouble in explaining the priority of the Constitution over lower forms of regulation, noting

that "[t]he protections afforded by the Commerce Clause cannot be made to depend on the good grace of a state agency." *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 583 (1986). Governmental "grace" cannot overcome the Constitution.

To be sure, statutes of limitation are valid—when confined to their proper spaces. However, such statutory limitations would be, as *Marbury* put it, "repugnant to the constitution [and] void" to the extent that they purported to interdict constitutionally protected rights. 5 U.S. at 176-77.

As this Court put it bluntly in a more recent regulatory taking case, the law cannot "put an expiration date on the Takings Clause." *Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001). *Palazzolo* dealt with the ability of a property owner to sue for a regulatory taking when the challenged regulation was enacted before the plaintiff acquired title to the property. The Court held that it would violate the Constitution to hold that such a happenstance of timing could prevent an injured property owner from filing suit. Hence, "no expiration date" on the Takings Clause.

The same is true here, where Santa Monica's violation of settled requirements of notice—including those required by the City's own ordinances (App. 72)—prevented the property owner from timely asserting his rights under local law. As in *Palazzolo,* he retained the right to sue. See also *United States v. Lee*, 106 U.S. 196 (1882), where property wrongfully taken in 1862 was restored to its rightful owners by this Court in

1882—twenty years later.

VI
THE CALIFORNIA SYSTEM DENIES THE SEVENTH AMENDMENT RIGHT TO JURY TRIAL. THE SEVENTH AMENDMENT SHOULD BIND THE STATES.

In its most recent Term, the Court emphasized the importance of the Seventh Amendment right to a jury trial in civil matters:

> "In the Revolution's aftermath, perhaps the 'most success[ful]' critique leveled against the proposed Constitution was its 'want of a ... provision for the trial by jury in civil cases.' The Federalist No. 83. The Framers promptly adopted the Seventh Amendment to fix that flaw. In so doing, they ***embedded the right in the Constitution, securing it against the passing demands of expediency or convenience***. Since then, every encroachment upon it has been watched with great jealousy." *SEC v. Jarkesy*, 144 S.Ct. 2117, 2128 (2024) (emphasis added; cleaned up).[5]

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[5] *See also West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624, 636-37 (1943) ("Without promise of a limiting Bill of Rights it is doubtful if our Constitution could have mustered enough strength to enable its ratification."); Charles W. Wolfram, *The Constitutional History of the Seventh Amendment,* 57 Minn. L. Rev. 639, 745 (1973). "No civil provision was more highly cherished in the European and American dominions of George III than jury trial." 1 John P. Reid, Constitutional History of the American Revolution: The Authority of Rights 4 (1986).

So saying, the Court invalidated an SEC practice that mirrors the administrative practice used by Santa Monica here. In *Jarkesy*, the Court held that an administrative agency cannot be both prosecutor and judge in the same proceeding. In the Court's words, "to concentrate the roles of prosecutor, judge, and jury in the hands of the Executive Branch ... is the very opposite of the separation of powers that the Constitution demands." (144 S.Ct. at 2139.)[6] That is precisely what Santa Monica did here, when its Landmarks Commission "nominated" the home then owned by Briles (now by Haselhoff) for a historic landmark designation and then sat in judgment on that "nomination" and approved its own request.

Santa Monica violated the *Jarkesy* precept that a single administrative agency cannot both prosecute and judge the same matter, a settled precept that the Court recently summarized this way:

> "ordinarily 'no man can be a judge in his own case' consistent with the Due Process Clause." *Chrysafis v. Marks* (2021) 141 S.Ct. 2482, 2482.[7]

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[6] "Or, as Alexander Hamilton wrote in The Federalist Papers, 'there is no liberty if the power of judging be not separated from the legislative and executive powers.' The Federalist No. 78, at 466 (quoting 1 Montesquieu, The Spirit of Laws 181 (10th ed. 1773))." (144 S.Ct. at 2131-32.)

[7] The concept was remarked upon before the founding of our republic. *See, e.g.*, Edward Coke, Institutes of the Laws of England § 212 (1628). Lord Coke explained that this rule declared "a natural right so inflexible that an act of

Contrary to the Court of Appeal's belief, "bias" is not necessarily evil (see App, 32); it simply connotes a "natural inclination for or against an idea, object, group, or individual." (See, e.g., https://help.uchicago.edu/.) When the city's Landmarks Commission placed the question of landmarking this home on its agenda, it did so out of a natural inclination toward that belief. And then it ruled on its own idea. That is bias. And it shows the wisdom in this Court's insistence on separating the proponent from the decision maker.

Virtually all of the Bill of Rights protections have been incorporated into the Fourteenth Amendment, as the Court explained:

> "With only a handful of exceptions, this Court has held that the Fourteenth Amendment's Due Process Clause incorporates the protections contained in the Bill of Rights, rendering them applicable to the States. A Bill of Rights protection is incorporated, we have explained, if it is *fundamental* to our scheme of ordered liberty, or *deeply rooted* in this Nation's history and tradition." *Timbs v. Indiana*, 586 U.S. 146, 150 (2019) (cleaned up; emphasis added).

The Court has not yet incorporated the Seventh Amendment jury trial right into the Fourteenth

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parliament seeking to subvert it would be declared void." *Meyer v. City of San Diego* (1898) 121 Cal. 102, 104. The point appears in the most simplistic of texts. *See* https://en.wikipedia.org/wiki/Nemo_iudex_in_causa_sua.

Amendment, although it has never given an explanation for leaving this core principle of our system dangling.[8] As noted above, the lack of the right to a civil jury was a key to adoption of the Bill of Rights and specifically the Seventh Amendment.

In *Malloy v. Hogan*, 378 U.S. 1, 5 (1964) this Court explained its process for incorporation, noting the many provisions of the Bill of Rights that have been incorporated into the due process clause of the Fourteenth Amendment, and explaining:

> "The Court has not hesitated to re-examine past decisions according the Fourteenth Amendment a less central role in the preservation of basic liberties than that which was contemplated by its Framers when they added the Amendment to our constitutional scheme."

The Seventh Amendment right to a jury trial in civil cases is clearly a core American value, deeply embedded in our system since its inception. It is time for states to be held to the same jury trial requirements as the federal government.

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[8] *See, e.g.*, *Livingston v. Moore*, 7 Pet. [32 U.S.] 469, 552 (1833); *Walker v. Sauvinet*, 92 U.S. 90, 92 (1875); *Missouri v. Lewis*, 101 U. S. 22, 31 (1879); *Twining v. New Jersey*, 211 U.S. 78, 110, 111 (1908); *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211, 217 (1916). *See also Duncan v. Louisiana*, 391 U.S. 145, 180-81 (1968) (dissenting opinion), explaining how the right to a civil jury trial is not incorporated but the Court has not explained why.

VII.
CALIFORNIA LAW CONFLICTS WITH THIS COURT'S DECISIONS REGARDING THE ACCRUAL OF STATUTES OF LIMITATION.

The law regarding statutes of limitation is in disarray. This is due in large part to a series of old opinions routinely treating such statutes as "jurisdictional." That was taken to mean that failure to file suit within the stated period would deprive the courts of jurisdiction to consider the suit. Many of those older decisions were made with little thought or consideration. Indeed, this Court has referred to them as "*drive-by jurisdictional rulings* that should be accorded *no precedential effect* on the question whether the federal court had authority to adjudicate the claim in suit." *Wilkins v. United States*, 598 U.S. 152, 160-61 (2023) (quoting *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 511 (2006) (emphasis added)).

The Court probably thought it had settled the issue when it concluded "that most time bars are *not jurisdictional*." *United States v. Wong*, 575 U.S. 402, 410 (2015) (emphasis added).

But lower courts like those in California apparently refuse to accept that. In this case, for example, the California Court of Appeal applied a "strict" construction to the statute of limitations that, in effect, applied it as a jurisdictional statute through the back door.

Worse than that, the California courts used a strictly applied state statute of limitations to eviscerate a federal constitutional cause of action.

In its most recent Term, this Court again dealt with statutes of limitations in *Corner Post, Inc. v. Board of Governors*, 144 S.Ct. 2440 (2024). There, the lower courts had applied an unduly crabbed limitation on the right to sue. This Court corrected that error. As needs to be done here.

Certiorari is needed to clarify the proper application of statutes of limitation and their impact on federal constitutional claims.

CONCLUSION

The California courts once again ignored Constitutional dictates designed to protect private property owners. The brief opinion below found multiple ways to violate the Fifth Amendment. This must stop. The petition for certiorari should be granted.

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APPENDIX

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APPENDIX A — OPINION OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION TWO, FILED MAY 7, 2024

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

B322168
(Los Angeles County Super. Ct. No. 19SMCV00850)

OTTO L. HASELHOFF, INDIVIDUALLY
AND AS TRUSTEE, ETC.,

Plaintiff and Appellant,

v.

CITY OF SANTA MONICA,

Defendant and Respondent.

May 7, 2024, Opinion Filed

APPEAL from a judgment of the Superior Court of Los Angeles County, No. 19SMCV00850, H. Jay Ford III, Judge. Affirmed.

In 2010, defendant and respondent City of Santa Monica (the City) designated a historic estate as a City landmark. In 2019, plaintiff and appellant Otto L.

Haselhoff (Haselhoff), individually and as trustee of the Otto and Lara Haselhoff Family Trust dated July 27, 2006, and as assignee of Greg W. Briles (Briles), brought this action to invalidate the landmarking of the property. The City demurred on the grounds that Haselhoff's action was time-barred by Government Code section 65009.[1] The trial court sustained the demurrer without leave to amend and entered a judgment of dismissal in favor of the City. Haselhoff appeals.

We affirm.

1. All further statutory references are to the Government Code unless otherwise indicated.

Appendix A

FACTUAL[2] AND PROCEDURAL BACKGROUND

The City's general plan and landmarking ordinance

The City's general plan includes a historic preservation element, which provides that the City "is strongly committed to historic preservation" as "reflected in the programs and policies of the City including a Landmarks and Historic Districts Ordinance." The City's landmark designation procedure is outlined in Santa Monica Municipal Code section 9.56.120. It provides that a property may be nominated for designation by "any person" that files an application, or "the [Landmarks] Commission may file an application for the designation of a Landmark on its own motion." (Santa Monica Mun. Code, § 9.56.120(A).)

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2. "Because this matter comes to us on demurrer, we take the facts from [Haselhoff's operative pleading], the allegations of which are deemed true for the limited purpose of determining whether [he] has stated a viable cause of action. [Citation.]" (*Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 885, 66 Cal. Rptr. 2d 888, 941 P.2d 1157.) We also take "judicial notice of . . . each matter properly noticed by the trial court." (Evid. Code, § 459.) We disregard allegations of fact contrary to facts that are judicially noticed. (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604, 176 Cal. Rptr. 824.) In his reply brief, Haselhoff argues that the trial court erred in granting the City's request for judicial notice. And, at oral argument, appellate counsel repeatedly asserted that this matter should not have been resolved on demurrer; rather, any and all factual matters should have been resolved at trial. We reject his belated argument. (*Rubinstein v. Fakheri* (2020) 49 Cal.App.5th 797, 809, 263 Cal. Rptr. 3d 344.)

Appendix A

Following nomination, a public hearing is scheduled "within 100 days of the determination that the application is complete" to evaluate the proposed designation. (Santa Monica Mun. Code, § 9.56.120(C).) "Not more than 20 days and not less than 10 days prior to the date scheduled for a public hearing, notice of the date, time, place and purpose thereof shall be given by at least one publication in a daily newspaper of general circulation, and shall be mailed to the applicant, the owner of the improvement, all owners and residential and commercial tenants of all real property within 300 feet of the exterior boundaries of the lot or lots on which a proposed Landmark is situated, and to residential and commercial tenants of the subject property, using for this purpose the names and addresses of such owners as are shown on the records of the Los Angeles County Assessor."[3] (Santa Monica Mun. Code, § 9.56.120(D).) "The failure to send notice by mail to any such real property owner where the address of such owner is not a matter of public record shall not invalidate any proceedings in connection with the proposed designation. The [Landmarks] Commission may also give such other notice as it may deem desirable and practicable." (*Ibid.*)

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3. See also section 65091, subdivision (a)(1), which provides, in relevant part, that when notice of a public hearing is required, "[n]otice of the hearing shall be mailed or delivered at least 10 days prior to the hearing to the owner of the subject real property as shown on the latest equalized assessment roll. Instead of using the assessment roll, the local agency may use records of the county assessor or tax collector if those records contain more recent information than the information contained on the assessment roll."

Appendix A

At the designated public hearing, the Landmarks Commission receives and evaluates the evidence submitted, including public comment, and then issues a final decision on the application at the conclusion of the public hearing. (Santa Monica Mun. Code, § 9.56.120(E).) The decision is final and in "full force and effect from and after the date of the rendering of such decision by the [Landmarks] Commission." (Santa Monica Mun. Code, § 9.56.120(G).)

The subject property

Actress and singer Kathryn Grayson (Grayson) lived at 2009 La Mesa Drive (the property) from 1945 until her death on February 17, 2010. City records reflect that the property was owned by the Kathryn Z. Grayson Trust (the Grayson Trust).

First transfer of title/grant deed

On July 9, 2010, title of the property was transferred from the Grayson Trust to Briles.[4]

Landmarks Commission meeting (Aug. 9, 2010)

During an open session of its regularly scheduled August 9, 2010, meeting, the Landmarks Commission adjourned an item to discuss whether to file an application to designate the property as a landmark based on "a letter [received] from the owner of 2009 La Mesa Drive." The property owner was not identified by name.

4. The grant deed was not recorded until October 22, 2010.

Appendix A

Landmarks Commission meeting (Sept. 13, 2010)

At its September 13, 2010, meeting, the Landmarks Commission considered whether it should file an application to designate the property as a City landmark.

The Grayson Trust, the property owner of record at this time, hired Kate Bartolo (Bartolo), a consultant with historical preservation experience, to be its representative at the September 13, 2010, meeting. She stated that the Grayson Trust did not have a position regarding a landmark designation of the property. She noted that there was a "potential buyer who does not have plans to demolish or alter the facade of the building." When asked "if the potential buyer/representative had knowledge that the property was listed on the Historic Resource Inventory[5] and was aware of possible designation, . . . Bartolo responded in the positive." Likewise, when asked "if she was stating the position of the potential owner during [that] meeting,. . . . Bartolo responded in the positive."

A motion was made to file a landmark designation for the property, and the motion was approved.[6] At some point

5. An "inventory list" refers to the City's historic resources inventory, which is "a database containing building descriptions and evaluations of potential historic resources in Santa Monica." (https://www.smgov.net/departments/pcd/historic-resources-inventory.)

6. At least one commissioner stated that the Landmarks Commission was "pleased that the property owner [was] supportive of the application."

thereafter, Scott Albright (Albright), the "Landmarks [liaison]," submitted the landmark designation application for the property. The property owner is identified as "Kathryn Grayson TR."

Briles-Culotti partnership to purchase and sell the property

After a decade of successful real estate partnerships, Briles and Elaine F. Culotti[7] (Culotti) entered into a written partnership agreement, effective October 21, 2010, to purchase and sell the property. As is relevant to the issues in this appeal, section 4.1 of the partnership agreement provides: "At the time of entering into this Agreement, the Partners are uncertain as to how title will be [held]. Regardless, if it is in the name of the Partnership, business entity, Gary Culotti, or another individual, it shall be an asset of the Partnership for all purposes."

Notice of Landmarks Commission hearing

On October 29, 2010, notice of the Landmarks Commission public hearing regarding the property was published in the Santa Monica Daily Press.

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7. Curiously, Haselhoff's opening brief contains no mention of Culotti or the Briles-Culotti partnership. (Cal. Rules of Court, rule 8.204(a)(2)(A).) In his reply brief, Haselhoff contends that any mention of Culotti is a red herring. As discussed throughout this opinion, we disagree.

On that same date, a notice of public hearing was served. The applicant is identified as the Landmarks Commission, and the property owner is identified as "Kathryn Z. Grayson TR," which was served at the property address.

Landmarks Commission meeting (Nov. 8, 2010)

The staff report for the November 8, 2010, meeting provides: "Notice of the public hearing was provided as follows: Pursuant to SMMC Section 9.36.120, notice of the public hearing was mailed to all owners and residential and commercial tenants of property within a 300-foot radius of the project and was published in the *Santa Monica Daily Press* at least ten consecutive calendar days prior to the hearing." The notice referenced section 65009, subdivision (b), and warned that the failure to present evidence at or before the hearing could bar it from being considered later.

At the meeting, the Landmarks Commission considered the application to designate the property as a City landmark. Based upon a detailed review of the property and its historical significance, "it [was] recommended that the Landmarks Commission designate the [property] as a Landmark and Landmark Parcel."

Briles-Culotti partnership receives four certificates of appropriateness to renovate the property as a City landmark

Over several years, the Briles-Culotti partnership completed an expansive multi-million dollar renovation

of the property. Significant alterations to a landmarked property require a certificate of appropriateness from the Landmarks Commission or City staff before building permits are issued. (Santa Monica Mun. Code, §§ 9.56.070, 9.56.140.)

From 2011 through 2012, the Briles-Culotti partnership applied for and received several certificates of appropriateness. Also during this time, Culotti attended multiple public certificate of appropriateness hearings before the Landmarks Commission.

Briles-Culotti partnership applies for a Mills Act[8] *contract*

On July 17, 2012, the Briles-Culotti partnership applied for a Mills Act contract with the City. City staff supported the proposed Mills Act contract, estimating a large tax reduction that would constitute a "significant marketing feature for the property in terms of future sales."

On November 27, 2012, the City Council held a public hearing on the Briles-Culotti partnership's request for a Mills Act contract.

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8. The Mills Act (§ 50280 et seq.) authorizes contracts between a historic property owner and local governments. These contracts may provide property tax reductions in exchange for maintaining a historic property. (*Prentiss v. City of South Pasadena* (1993) 15 Cal.App.4th 85, 93, 18 Cal. Rptr. 2d 641; Rev. & Tax. Code, §§ 439-439.4.)

Appendix A

Briles transfers title to the Briles-Culotti partnership

Meanwhile, a grant deed dated October 4, 2012, transferring title of the property from Briles to the Briles-Culotti partnership was recorded on October 10, 2012.

Relationship between Briles and Culotti breaks down and prompts litigation

In or around 2014, the relationship between Briles and Culotti began to break down. On June 26, 2014, Briles transferred title to the property from the Briles-Culotti partnership to a family trust he controlled.

On August 24, 2014, Culotti filed a notice of lis pendens against the property. Shortly thereafter, on October 15, 2014, Culotti filed a demand for arbitration. She alleged that Briles committed fraud and fraudulent conveyance. Briles did not defend her claim by asserting that he alone owned the property. Rather, he argued that the change in title did not affect the partnership's ownership of the property at all times.

For example, in a joint stipulation as to undisputed facts dated August 23, 2015, Briles stipulated that he loaned the partnership money so that it could purchase the property. He also testified at the proceeding that the property was "owned by the partnership."

Furthermore, at multiple times during the arbitration proceeding, the parties acknowledged the property's landmarked status. For example, during Culotti's

opening statement, counsel indicated that the property is a designated City landmark. In his opening, Briles's attorney blamed Culotti for the partnership's inability to get a valuable Mills Act property tax reduction.

During her testimony at the arbitration proceeding, Culotti stated multiple times that she knew the property was going to be landmarked.

The arbitration concluded with a $1.1 million damage award in favor of Culotti.[9] Title to the property was ordered to remain in Briles's family trust.

Meanwhile, on November 4, 2014, Briles filed a motion to expunge the lis pendens. In his supporting declaration, he confirmed that the property was "owned exclusively by the Partnership regardless of whose name is on the title[,] [a]ccording to paragraph 4.1 of the Agreement."

On October 7, 2015, the trial court granted Briles's motion and expunged the lis pendens.

Transfer of property to Haselhoff

A grant deed dated June 25, 2018, and recorded October 29, 2018, indicates that Briles transferred title to the property to Haselhoff.

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9. That arbitration award was confirmed, and a judgment was issued on July 15, 2016. Briles appealed, and the Court of Appeal affirmed the judgment. (*Culotti v. Briles* (June 6, 2018), B279508 [nonpub. opn.].) That judgment is final.

Appendix A

First amended complaint (FAC)

Haselhoff initiated this litigation on May 7, 2019.[10] The FAC[11] sets forth five causes of action: (1) petition for writ of administrative mandamus, (2) constitutional damages claims, (3) slander of title damages claims, (4) claims under the Ralph M. Brown Act (§ 54950 et seq.), and (5) declaratory relief. According to the FAC, various irregularities in the landmark designation process rendered the application invalid. Furthermore, the City failed to give proper notice of the "'landmarking hearing'" to Briles, the owner of the property at the relevant time.

The City's demurrer and motion to strike

On February 20, 2020, the City filed a demurrer and motion to strike portions of the FAC. In the demurrer, the City argued, inter alia, that the first two causes of action were untimely under either section 65009[12] or

10. The trial court expressly addressed with Haselhoff "the defects and verbosity of the original complaint (41 pages). In response, [Haselhoff] agreed to amend the complaint to avoid a demurrer."

11. Like the original pleading, the FAC is lengthy (57 pages) and filled with numerous statutory and case citations and quotations, inappropriate legal argument, and unnecessary flippant remarks, such as accusing Albright as being the "rogue planner that inspired, in part, 'Parks & Recreation' a television comedy that highlights the abuses of local government officials". Such allegations are not in line with the mandates of Code of Civil Procedure section 425.10, subdivision (a)(1).

12. Section 65009 governs actions challenging local government decisions. Subdivision (c)(1) provides that "no action

Code of Civil Procedure section 338, subdivision (a).[13] The City also argued that Briles's failure to challenge the 2010 landmarking decision was binding on Haselhoff as a subsequent purchaser.

In its motion to strike, the City argued that the trial court should disregard allegations that Briles purchased the property because: (1) the doctrine of truthful pleading allows the trial court to disregard allegations inconsistent with prior pleadings and other judicially noticeable facts, and (2) these allegations were precluded by the doctrine of judicial estoppel.

In support, the City requested judicial notice of a host of documents pertaining to the Landmarks Commission hearings, the arbitration between Briles and Culotti, and Culotti's lis pendens.

Haselhoff's opposition

Haselhoff opposed both the demurrer and motion to strike. As is relevant to the issues raised in this appeal, Haselhoff argued that because the "City failed to give notice under its own [statutes] of the hearing, the intent

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or proceeding shall be maintained [in specified cases] unless the action or proceeding is commenced and service is made on the legislative body within 90 days after the legislative body's decision."

13. Code of Civil Procedure section 338, subdivision (a), provides that "[an] action upon a liability created by statute" must be filed within three years.

to landmark the parcel and ultimately the determination to adjudicate the structure and parcel at 2009 La Mesa as a landmark[, it could not] invoke *any* statutory timing as a defense to its unconstitutional and otherwise improper actions without offending well established principles of due process."

Regarding section 65009, Haselhoff argued that it "does not relate to landmarking. Its concern is actually the opposite: *A housing crisis means that development projects must not be delayed*." In fact, section 65009 does not mention landmarks; the statute only pertains to a city's general or specific plan, zoning ordinances, and development agreements.

Furthermore, because the City did not direct any notice to Briles, it did not provide proper notice of the Landmarks Commission hearing concerning the property.

Haselhoff objected to the City's request for judicial notice and, in support of his opposition, requested judicial notice of various documents pertaining to the Landmarks Commission.

Reply papers

The City submitted a reply brief. In response, Haselhoff submitted an objection to the City's reply, along with supporting declarations. Haselhoff declared: "I feel that the Opposition was more than sufficient. I hope the Court agrees. But of course, I could state more if the Court wanted more, and I was given the opportunity."

He then set forth 10 additional facts he would include in an amended pleading.

The City responded with a reply to Haselhoff's surreply and accompanying objections.

Initial hearing on the City's demurrer and motion to strike (Aug. 11, 2020)

The trial court's tentative was to sustain the demurrer to the FAC without leave to amend as to the first cause of action (petition for writ of mandate) and overrule it as to all remaining causes of action. The trial court initially determined that the claim was time-barred by section 65009. The trial court also indicated its intent to grant portions of the City's motion to strike.

Following oral argument, Haselhoff was directed to submit a "supplemental opposition . . . to the Demurrer and a proposed Amended Complaint with paragraphs stricken pursuant to the granting of the Motion to Strike." The supplemental opposition was "to focus on the additional unalleged facts that [Haselhoff] claims support [his] position that: . . . [his] 2019 challenge to the 2010 Landmarking Decision is not time barred by [section] 65009's 90-day limitations period."

In so ruling, the trial court granted the City's request for judicial notice as to all exhibits except the transcripts of the Landmarks Commission hearings and certain newspaper articles. "The Court's decision to judicially notice the existence and filing of these documents is

not judicial notice of the truth of the documents, the interpretation of any of these documents or any findings of facts contained therein."

Supplemental briefs

Haselhoff's supplemental opposition

On November 10, 2020, Haselhoff submitted his supplemental opposition to the City's demurrer and a proposed second amended complaint (SAC). In the supplemental opposition, he argued that the City's failure to provide notice of the Landmarks Commission hearing tolled all statutory timing as a defense to this action.

In support, Haselhoff submitted another request for judicial notice.

The proposed SAC is 73 pages long and riddled with improper legal citations, argument, and conclusions.

The City's supplemental reply

The City filed a reply to Haselhoff's supplemental opposition, arguing that (1) section 65009's 90-day limitations period cannot be tolled, and (2) the proposed SAC failed to allege any facts that warranted modifying the original tentative ruling to sustain the demurrer without leave to amend.

The City objected to Haselhoff's request for judicial notice. In support of its objection, the City submitted a declaration from its counsel, which included a declaration from Robert Isozaki (Isozaki), the custodian of records for the Los Angeles County Office of the Assessor.

Haselhoff's purported objection to the reply

Haselhoff submitted a "response" to the City's "new evidence," "styled" as an objection to Haselhoff's most recent request for judicial notice. Specifically, Haselhoff objected to the Isozaki declaration. Within that objection, Haselhoff offered further argument on the applicability of section 65009 and the City's failure to give proper notice of the Landmarks Commission hearing. And, Haselhoff submitted four additional exhibits.

The City's response

In response to Haselhoff's self-styled objection to evidence, the City submitted a reply to Haselhoff's "sur-reply . . . in response to purported 'new evidence' submitted" by the City.

Trial court order (Dec. 15, 2020)

The trial court sustained the City's demurrer to the petition for a writ of mandate (first cause of action), finding that Haselhoff could not show that equitable tolling would overcome the time limitation set forth in section 65009. Furthermore, the FAC admits that Briles and Haselhoff

knew that the property was landmarked more than 90 days before their lawsuit was filed.

The trial court denied Haselhoff leave to file his proposed SAC, reasoning: "Plaintiff was given an extraordinary amount of time to identify and allege all the possible facts to overcome the defects of the first amended complaint. Despite that time, Plaintiff's proposed Second Amended Complaint fails to state any claim, other than slander of title. Similarly, the Court finds the additional proposed amendments orally raised at the hearing do not overcome the defects of the first amended complaint. The Court finds Plaintiff cannot allege any further facts that would change the legal effect of Plaintiff's claims."

Only the slander of title claim (third cause of action) survived.

Settlement and joint stipulated judgment

The parties engaged in mediation and entered into a 2022 settlement agreement to resolve the slander of title claim. The parties then prepared a joint stipulated judgment, which the trial court executed on May 27, 2022.

Appeal

This timely appeal ensued.

Appendix A

DISCUSSION

I. *Standard of review*

"Our Supreme Court has set forth the standard of review for ruling on a demurrer dismissal as follows: 'On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the standard of review is well settled. The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. [Citations.] The court does not, however, assume the truth of contentions, deductions or conclusions of law. [Citation.] The judgment must be affirmed "if any one of the several grounds of demurrer is well taken. [Citations.]" [Citation.] However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. [Citation.] And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment. [Citation.]' [Citations.]" (*Payne v. National Collection Systems, Inc.* (2001) 91 Cal.App.4th 1037, 1043-1044, 111 Cal. Rptr. 2d 260.)

A demurrer may be supported by matters that are subject to judicial notice. (Code Civ. Proc., § 430.30, subd. (a); *Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6, 40 Cal. Rptr. 3d 205, 129 P.3d 394.) Appellate courts should judicially notice any fact of which the trial court took proper judicial notice. (Evid. Code, § 459, subd. (a).)

II. *Relevant law*

At issue in this appeal is whether Haselhoff's action is time-barred by section 65009, subdivision (c).[14] "A demurrer based on a statute of limitations is appropriate if the ground appears on the face of the complaint or from matters of which the court may or must take judicial notice." (*Aaronoff v. Martinez-Senftner* (2006) 136 Cal. App.4th 910, 918, 39 Cal. Rptr. 3d 137.)

Section 65009, subdivision (c)(1), provides, in relevant part, that "no action or proceeding shall be maintained in any of the following cases by any person unless the action or proceeding is commenced and service is made on the legislative body within 90 days after the legislative body's decision: [¶] . . . [¶] (B) To attack, review, set aside, void, or annul the decision of a legislative body to adopt or amend a zoning ordinance. [¶] . . . [¶] (E) To attack review, set aside, void, or annul any decision on the matters listed in Sections 65901 and 65903, or to determine the reasonableness, legality, or validity of any condition attached to a variance, conditional use permit, or any other permit." (§ 65009, subds. (c)(1)(B) & (E).) Subdivision (e) adds: "Upon the expiration of the time limits provided for in this section, all persons are barred from any further action or proceeding."

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14. The parties also raise the question of whether Haselhoff's action is time-barred by Code of Civil Procedure section 338, subdivision (a). For the same reasons Haselhoff's action is barred by section 65009, subdivision (c), his claims are barred by this three-year statute of limitations.

Appendix A

Section 65009 falls within Title 7 (Planning and Land Use), Division 1 (Planning and Zoning), of the Government Code. Division 1 is the Planning and Zoning Law. (§ 65000.) "The planning and zoning law establishes the authority of most local government entities to regulate the use of land. [Citation.] Under the planning and zoning law, each county and city must 'adopt a comprehensive, long-term general plan for the physical development of the county or city. . . . ' [Citation.] The general plan consists of a 'statement of development policies . . . setting forth objectives, principles, standards, and plan proposals.' [Citation.] 'Subordinate to a general plan are zoning laws, which regulate the geographic allocation and allowed uses of land. [Citation.] . . . ' [Citation.] To provide certainty for property owners and local governments regarding decisions by local agencies made pursuant to the planning and zoning law, the Legislature enacted 'a short, 90-day statute of limitations, applicable to both the filing and service of challenges to a broad range of local zoning and planning decisions.'" [Citation.] (*Save Lafayette Trees v. City of Lafayette* (2019) 32 Cal.App.5th 148, 155, 243 Cal. Rptr. 3d 636 (*Lafayette*); see § 65009, subds. (a)(3), (c); see also *Travis v. County of Santa Cruz* (2004) 33 Cal.4th 757, 774, 775, 16 Cal. Rptr. 3d 404, 94 P.3d 538 (*Travis*) ["[t] he legislative policy of requiring a prompt challenge . . . remains clear in section 65009"].)

"[C]ourts have interpreted [section 65009] as applying to challenges to a broad range of local zoning and planning decisions." (*Lafayette, supra*, 32 Cal.App.5th at pp. 156-157; see § 65850, subd. (a) ["The legislative body of any county or city may, pursuant to this chapter, adopt

ordinances that do any of the following: [¶] (a) Regulate the use of buildings, structures, and land as between industry, business, residences, open space, including agriculture, recreation, enjoyment of scenic beauty, use of natural resources, and other purposes"].)

III. *Analysis*

Applying these legal principles, we conclude that the trial court did not err in sustaining the City's demurrer to Haselhoff's FAC on the grounds that his action is time-barred pursuant to section 65009, subdivisions (c)(1)(B) and (e).

In accordance with section 65300, the City enacted a general plan and, in accordance with section 65302, subdivisions (a) and (b), that general plan includes a "'land use and circulation element,'" which contains a chapter on "historic preservation." The City's general plan also includes a historic preservation element, which provides that the City "is strongly committed to historic preservation" as "reflected in the programs and policies of the City including a Landmarks and Historic Districts Ordinance." It follows that the City's landmark ordinance (Santa Monica Mun. Code, § 9.56.020), which is located within Division 6 (Land Use and Zoning Related Regulations) of Article 9 (Planning and Zoning) of the Santa Monica Municipal Code, constitutes a zoning-related land use regulation that advances the City's general plan. (See *Lafayette, supra*, 32 Cal.App.5th at p. 157; see also *Weiss v. City of Del Mar* (2019) 39 Cal.App.5th 609, 621-622, 252 Cal. Rptr. 3d 424 [a public entity decision involving

the regulation and management of property is a land use and zoning determination].) Thus, the time limitations set forth in section 65009, subdivision (c)(1), apply.

The challenged Landmarks Commission decision was made on November 8, 2010, and officially approved on February 14, 2011. Because Haselhoff did not file this action within 90 days of either of those dates, all of his claims are untimely. (§ 65009, subd. (c)(1) ["no action or proceeding shall be maintained" after the 90-day period has expired]; *Freeman v. City of Beverly Hills* (1994) 27 Cal.App.4th 892, 897, 32 Cal. Rptr. 2d 731 [§ 65009 applies to claims for monetary damages as well as those for declaratory and injunctive relief]; *Travis, supra*, 33 Cal.4th at p. 767.) Accordingly, the FAC was properly dismissed.[15]

A. *Section 65009, subdivision (a)(1)*

Urging us to conclude otherwise, Haselhoff argues that section 65009 is inapplicable because this dispute concerns a landmark designation, not a decision related to housing. Admittedly, section 65009, subdivision (a)(1), provides: "The Legislature finds and declares that there

15. Code of Civil Procedure section 1094.6 does not compel a different result. Haselhoff does not fall within the scope of persons covered by that statute. (See Code Civ. Proc., § 1094.6, subd. (f) [defining a party as a person who has been impacted by (1) an employment suspension, demotion, or dismissal, (2) a revoked, suspended, or denied permit, license, or other entitlement, or applications relating thereto, and (3) a denial of retirement benefits].)

currently is a housing crisis in California and it is essential to reduce delays and restraints upon expeditiously completing housing projects." But courts have rejected the notion that section 65009, subdivision (c)(1), "restricts its application to decisions involving housing." (*Lafayette, supra*, 32 Cal.App.5th at p. 156.) Rather, as set forth above, "courts have interpreted the statute as applying to challenges to a broad range of local zoning and planning decisions." (*Id.* at pp. 156-157.) We adopt the same analysis.

B. *Section 65009, subdivision (b)*

Haselhoff further argues that section 65009, subdivision (c), requires a properly noticed hearing as mandated by section 65009, subdivision (b). But subdivision (c) does not refer to subdivision (b) or contain any language regarding a "properly noticed" hearing. If the Legislature had intended to add these conditions to subdivision (c), it could have done so. (*Artus v. Gramercy Towers Condominium Assn.* (2018) 19 Cal.App.5th 923, 945, 228 Cal. Rptr. 3d 496 ["It is not the role of the courts to add statutory provisions the Legislature could have included, but did not"].)

Regardless, as the trial court aptly found, section 65009, subdivision (b)(1), is simply a procedural rule that limits a party's ability to introduce evidence beyond what was raised at the hearing. The statute provides, in relevant part: "In an action or proceeding to attack, review, set aside, void, or annul a finding, determination, or decision of a public agency made pursuant to this title at a

properly noticed public hearing, the issues raised shall be limited to those raised in the public hearing or in written correspondence delivered to the public agency prior to, or at, the public hearing, except where the court finds either of the following: [¶] (A) The issue could not have been raised at the public hearing by persons exercising reasonable diligence. [¶] (B) The body conducting the public hearing prevented the issue from being raised at the public hearing." (§ 65009, subd. (b)(1).) Subdivision (b)(2) continues: "If a public agency desires the provisions of this subdivision to apply to a matter, it shall include in any public notice" certain language. (§ 65009, subd. (b)(2).) Nothing in this language supports Haselhoff's argument.

C. *No notice*

Haselhoff further contends that Briles had no notice of the landmarking application, hearing, or decision. In other words, because the City never *specifically* gave Briles notice of the potential landmark decision, Haselhoff could not have known about the landmarking. Thus, Haselhoff claims that his lawsuit cannot be time-barred.

The problem with Haselhoff's contention is that there is no requirement that Briles should have been given notice.[16] He was not the property owner. Rather, pursuant to exhibits of which the trial court properly took judicial

16. For this reason, Haselhoff's argument that Briles did not know that the Landmarks Commission was considering the entire parcel and not just the house on the property is irrelevant.

notice, at all relevant times, either the Grayson Trust[17] or the Briles-Culotti partnership owned the property. And there is no contention that either of those two entities did not have notice.

Culotti certainly knew about the Landmarks Commission hearing and decision. Her knowledge is binding on the Briles-Culotti partnership, which owned the property. (Corp. Code, § 16301, subd. (1) ["Each partner is an agent of the partnership" and "[a]n act of a partner . . . for apparently carrying on in the ordinary course the partnership business or business of the kind carried on by the partnership binds the partnership"]; *J&A Mash & Barrel, LLC v. Superior Court* (2022) 74 Cal.App.5th 1, 28, 289 Cal. Rptr. 3d 110 [notice to a partner is notice to the partnership]; *GHK Associates v. Mayer Group, Inc.* (1990) 224 Cal.App.3d 856, 881, 274 Cal. Rptr. 168 [knowledge of general partner imputed to partnership].) That knowledge ran to Briles, as the successor holder of title. And his knowledge is binding on

17. Nowhere does any of the City's paperwork related to the landmarking decision indicate that Grayson was the property owner. Rather, the paperwork refers to "TR," which either means "trustee" or the Grayson Trust. Thus, we have disregarded all ridiculous comments that the City erroneously sent notice to a deceased person. In any event, at the risk of sounding redundant, while technically the owner no longer was the Grayson Trust, Haselhoff has not explained how the alleged error in the documentation (identifying either the Grayson Trust or the trustee as the property owner) renders the landmark designation void given that the actual property owner had notice.

Haselhoff as a subsequent purchaser.[18] (*Serra Canyon Co. v. California Coastal Com.* (2004) 120 Cal.App.4th 663, 668, 16 Cal. Rptr. 3d 110 [successor owner of property is bound by prior owner's waiver of right to seek review].)

We recognize that Haselhoff alleges in the FAC that he was entitled to notice because he was the property owner. (See, e.g., 1AA 96; see also AOB 46) But that allegation is belied by Briles's own admissions in the joint stipulation as to undisputed facts in the Briles-Culotti arbitration, in his testimony during the arbitration proceeding, and in his declaration filed in support of the motion to expunge the lis pendens filed by Culotti, all of which the trial court took judicial notice.

"As a general rule in testing a pleading against a demurrer the facts alleged in the pleading are deemed to be true, however improbable they may be. [Citation.] The courts, however, will not close their eyes to situations where a complaint contains allegations of fact inconsistent with attached documents, or allegations contrary to facts which are judicially noticed. [Citations.] Thus, a pleading valid on its face may nevertheless be subject to demurrer

18. Because we conclude that the City was not required to give Briles notice of the landmarking hearing and decision, we need not address whether his purported lack of notice tolled the 90-day statutory period. For the sake of completeness, we note that (1) Haselhoff offers no legal authority that section 65009's 90-day time period can be tolled, and (2) case law has expressly held otherwise. (See, e.g., *Royalty Carpet Mills, Inc. v. City of Irvine* (2005) 125 Cal.App.4th 1110, 1125, 23 Cal. Rptr. 3d 282 [§ 65009 "requires dismissal of any proceeding that is not filed and served by an absolute time limit"].)

when matters judicially noticed by the court render the complaint meritless." (*Del E. Webb Corp. v. Structural Materials Co., supra*, 123 Cal.App.3d at p. 604.)

D. *Alleged errors after the November 8, 2010, hearing*

Haselhoff further argues that alleged violations by the City of its own Municipal Code after the November 8, 2010, hearing invalidate the landmark designation. But he offers no legal authority in support of his contention that the City's alleged post-decision errors invalidate the landmark designation a fortiori, particularly given the fact that Haselhoff is deemed to have had notice of the designation as set forth above. (Cal. Rules of Court, rule 8.204(a)(1)(B); *Fettig v. Hilton Garden Inns Management LLC* (2022) 78 Cal.App.5th 264, 269, 293 Cal. Rptr. 3d 404.)

To the extent Haselhoff argues that the City failed to make a timely decision on the landmarks application, he is mistaken. As set forth above, Santa Monica Municipal Code section 9.56.120(C), mandates that a "public hearing to determine whether the improvement merits designation shall be scheduled before the Landmarks Commission within 100 days of the determination that the application is complete." Here, at the September 13, 2010, hearing, the Landmarks Commission made and approved a motion to submit an application to designate the property a landmark. The application appears to have been submitted the same day. Assuming without deciding that the application was deemed "complete" on that date, a public hearing had to be scheduled within 100 days. It

was—the hearing on the subject landmarks application was held on November 8, 2010.

Santa Monica Municipal Code section 9.56.120(E) has no bearing on this case. That provision applies only to continued public hearings, which "must be completed within 35 days from the date set for the initial public hearing." (Santa Monica Mun. Code, § 9.56.120(E).) But the hearing on the subject landmarks application was never continued. Thus, this provision does not apply.

Admittedly, there was a hearing on August 9, 2010. But at that hearing, the Landmarks Commission intended to discuss *whether* to file an application. That hearing was continued, but no application was filed until after the September 13, 2010, hearing. Thus, Santa Monica Municipal Code section 9.56.120(E) is inapplicable.[19]

E. *Landmarks ordinance is constitutional*

Haselhoff argues that the City's landmarks ordinance is unconstitutional.

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19. We decline Haselhoff's request to expand Santa Monica Municipal Code section 9.56.120(E) and "deem[] [the application] disapproved" for the alleged post-decision errors. The plain language of the provision is limited to continuances of public hearings, and that language controls. (*Tsasu LLC v. U.S. Bank Trust, N.A.* (2021) 62 Cal.App.5th 704, 718, 277 Cal. Rptr. 3d 76.)

Appendix A

1. *Facial challenge*

"'Facial challenges to statutes and [local enactments] are disfavored.'" (*Beach & Bluff Conservancy v. City of Solana Beach* (2018) 28 Cal.App.5th 244, 263, 239 Cal. Rptr. 3d 86 (*Beach & Bluff*).)

"A facial challenge to the constitutional validity of an ordinance considers only the text of the ordinance, not its application to the plaintiffs' particular circumstances. [Citation.] Our analysis begins with the strong presumption that the ordinance is constitutionally valid. [Citations.] We resolve all doubts in favor of the validity of the ordinance. [Citation.] Unless conflict with a provision of the state or federal Constitution is clear and unmistakable, we must uphold the ordinance. [Citations.] Plaintiffs bear the burden of demonstrating that the ordinance is unconstitutional in all or most cases. [Citation.]" (*Allen v. City of Sacramento* (2015) 234 Cal.App.4th 41, 54, 183 Cal. Rptr. 3d 654 (*Allen*).)

a. *Alleged unconstitutional taking*

An ordinance "is not an unconstitutional regulatory taking if it (1) substantially advances a legitimate government interest, and (2) does not deprive [the property owners] of all economically viable use of their property." (*Montclair Parkowners Assn. v. City of Montclair* (1999) 76 Cal.App.4th 784, 791, 90 Cal. Rptr. 2d 598 (*Montclair*).) "The denial of the highest and best use does not constitute an unconstitutional taking of the property. [Citation.] Even where there is a very substantial diminution in the value of

land, there is no taking. [Citations.]" (*Long Beach Equities v. County of Ventura* (1991) 231 Cal.App.3d 1016, 1036, 282 Cal. Rptr. 877.) Thus, "'an ordinance is safe from a facial challenge if it preserves, through a permit procedure or otherwise, some economically viable use of the property.'" (*Beach & Bluff, supra*, 28 Cal.App.5th at p. 265.)

Haselhoff did not meet his burden of showing that the landmarks ordinance is facially unconstitutional. The ordinance does not deny a property owner of "*all* economically viable use" of his property. (*Montclair, supra*, 76 Cal.App.4th at p. 791, italics added.)

Although the filing of an application for a landmark prohibits any construction to the proposed landmark until the Landmarks Commission makes a determination (Santa Monica Mun. Code, § 9.56.120(B)), that halting of construction is for a brief period of time (Santa Monica Mun. Code, § 9.56.120(C) & (E)). "Unless a temporary moratorium is total and is unreasonable in purpose, duration or scope, the restrictions it places on development are not compensable. [Citation.]" (*Long Beach Equities v. County of Ventura, supra*, 231 Cal.App.3d at p. 1035.) Because the temporary hold on construction under the landmarks ordinance is reasonable in purpose, duration, and scope, the allegedly "unconstitutional 'temporary taking[]'" is constitutional. (*First English Evangelical Lutheran Church v. County of Los Angeles* (1989) 210 Cal.App.3d 1353, 1372, 258 Cal. Rptr. 893.)

b. *Landmarks Commission can nominate a property*

Relying upon *Woody's Group, Inc. v. City of Newport Beach* (2015) 233 Cal.App.4th 1012, 183 Cal. Rptr. 3d 318 (*Woody's*), Haselhoff asserts that the landmarks ordinance is unconstitutional because the Landmarks Commission can nominate a property itself and then decide whether to designate the property a landmark. Haselhoff claims that the Landmarks Commission's ability to nominate a property amounts to it improperly being a "judge in [its] own cause." (*Id.* at p. 1027.)

Woody's is readily distinguishable. In that case, a city councilmember who had "voiced his '[strong[]' opposition to [a restaurant's] application [for a permit] was allowed to appeal the approval of . . . [the] application to the very body on which he [sat], where he did his best to convince his colleagues to vote with him against the application." (*Woody's, supra*, 233 Cal.App.4th at p. 1016.) The Court of Appeal found that the councilmember's appeal was improper because he did not fall within the scope of persons who were eligible to appeal under the Newport Beach Municipal Code. (*Id.* at pp. 1017, 1023-1025.) Furthermore, "allowing a biased decision maker to participate in the decision is enough to invalidate the decision." (*Id.* at p. 1022.)

Here, in contrast, the City's landmarks ordinance specifically allows the Landmarks Commission to nominate a property for designation. And, all we have is Haselhoff's speculation that the Landmarks Commission's

authority to nominate a property for designation somehow renders the commission automatically and always biased.[20]

2. *As-applied challenge*

"An as-applied challenge asserts that the manner of enforcement against an individual or class of individuals or the circumstances in which the ordinance is applied is unconstitutional." (*Allen, supra*, 234 Cal.App.4th at p. 56.)

Even though Haselhoff contends, in one sentence, that the landmarks ordinance is unconstitutional as applied, he offers no substantive argument in support of this contention. (Cal. Rules of Court, rule 8.204(a)(1)(B).) As such, it has been forfeited. (*Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 545-546, 35 Cal. Rptr. 2d 574.)

F. *Leave to amend*

Finally, Haselhoff argues that the trial court abused its discretion in denying him leave to file his proposed

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20. We do not consider Haselhoff's citation to a superior court judgment. "[A]n opinion of a California Court of Appeal or superior court appellate division that is not certified for publication or ordered published must not be cited or relied on by a court or a party in any other action." (Cal. Rules of Court, rule 8.1115(a).) Certainly that rule applies to unpublished trial court judgments. Moreover, Haselhoff has not demonstrated that such a judgment can be considered here under the doctrine of collateral estoppel. (*Gikas v. Zolin* (1993) 6 Cal.4th 841, 849, 25 Cal. Rptr. 2d 500, 863 P.2d 745 [elements of collateral estoppel].) Finally, his request for judicial notice, set forth in one sentence of his appellate opening brief is insufficient. (Cal. Rules of Court, rule 8.252(a).)

SAC because it resolved the trial court's concerns. He is mistaken. The proposed SAC continues to allege that Briles was the property owner. It also alleges that the City's landmarking ordinance was unconstitutional because the property "cannot be developed to its highest best use," allegations which do not constitute an unlawful taking. And, the SAC is replete with improper legal citations and legal argument. Finally, the SAC purports to allege the same claims that we, like the trial court, have rejected. Under these circumstances, we find no abuse of discretion.

G. *All remaining issues are moot*

In light of our conclusion that Haselhoff's action is time-barred, we need not address the other arguments raised by the parties, including whether Haselhoff failed to exhaust his administrative remedies.

DISPOSITION

The judgment is affirmed. The City is entitled to costs on appeal.

_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
CHAVEZ

_____, J.
HOFFSTADT

APPENDIX B — JOINT STIPULATED JUDGMENT IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES, FILED MAY 27, 2022

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

Case No.: 19-SMCV-00850

OTTO L. HASELHOFF, INDIVIDUALLY AND AS TRUSTEE OF THE OTTO AND LARA HASELHOFF FAMILY TRUST DATED JULY 27, 2006, AND AS ASSIGNEE OF GREG BRILES INDIVIDUALLY AND AS PARTNER AND/OR TRUSTEE,

Plaintiff/Petitioner,

v.

CITY OF SANTA MONICA, A MUNICIPAL CORPORATION; DOES 1–250,

Defendants/Respondent.

Action Filed: May 7, 2019
Amended Complaint Filed: December 5, 2019
Filed May 27, 2022

Assigned to Hon. H. Jay Ford, III
Trial Date: None Dept.: O

[~~PROPOSED~~] JOINT STIPULATED JUDGMENT

Appendix B

WHEREAS, Plaintiff Otto L. Haselhoff ("Plaintiff ") commenced this action against Defendant City of Santa Monica ("Defendant" or "City") on or about May 7, 2019; and

WHEREAS, in a First Amended Petition and Complaint dated December 5, 2019, Plaintiff asserted five causes of action: First Cause of Action ("Petition for Writ of Mandate"), Second Cause of Action ("Constitutional Damages" Claims), Third Cause of Action ("Slander of Title" Claims related to the "2013 Settlement Agreement"), Fourth Cause of Action ("Brown Act Damages" Claims), and Fifth Cause of Action ("Declaratory Relief ' Claims); and

WHEREAS, on or about February 20, 2020, Defendant filed a Demurrer and Motion to Strike; and

WHEREAS, on August 10, 2020, the Court released a tentative decision (the "August 10th Tentative Decision") which expressed the Court's tentative view to sustain Defendant's Demurrer as to the Writ Claim without leave to amend. A copy of the August 10th Tentative Decision as memorialized in an August 11, 2020 Minute Order is attached as Exhibit A; and

WHEREAS, the Court's August 10th Tentative Decision overruled the Defendant's Demurrer as to the other causes of action on procedural and other grounds. The Court's August 10th Tentative Decision also granted, in part, the Defendant's Motion to Strike as to certain categories of allegations; and

WHEREAS, on August 11, 2020, the above-captioned matter came on for hearing regarding Defendant's Demurrer and Motion to Strike. All parties were represented through their respective attorneys; and

WHEREAS, at the August 11, 2020 hearing, the Court: (1) granted the Defendant's Motion to Strike in part; (2) continued the Demurrer hearing until December 15, 2020, (3) allowed Plaintiff to submit a proposed Second Amended Complaint to correct the deficiencies outlined in the August 10th Tentative Decision, (4) continued Defendant's time to answer the operative pleading to a time to be determined at the December 15, 2020 hearing; and (5) allowed the parties to submit additional briefing as to other causes of action; and

WHEREAS, at the December 15, 2020 Hearing, the Court offered the parties an opportunity to address any issues not covered by the submitted supplemental briefing and took the matter under advisement; and

WHEREAS, following the December 15, 2020 Hearing, the Court issued a further written decision that sustained the demurrer without leave to amend Plaintiff's First, Second, Fourth, and Fifth Causes of action and also overruled the City's Demurrer to the Third Cause of Action for Slander of Title and incorporated the Court's August 10, 2020 tentative decision, which was memorialized in a December 15, 2020 Minute Order which is attached as Exhibit B; and

WHEREAS, the parties mediated this dispute on April 5, 2021 and have executed a binding settlement

agreement (the "2022 Settlement Agreement") to resolve claims involving (1) the 2013 Settlement Agreement, (2) Plaintiff's Fourth Cause of Action for Brown Act Damages, and (3) Plaintiff's Third Cause of Action for Slander of Title; and

WHEREAS, the 2022 Settlement Agreement references certain Preserved Landmarking-related Claims and does not in any way compromise or otherwise impair Plaintiff's contemplated appeal of the December 15th Ruling on (1) the First Cause of Action ("Petition for Writ of Mandate"), (2) the Second Cause of Action ("Constitutional Damages" Claims), and (3) the Fifth Cause of Action Declaratory Relief as to such claims; and

WHEREAS, the 2022 Settlement Agreement provides that the parties will submit a proposed stipulated judgment for the Court's approval to permit the appeal of the December 15th ruling as to the (1) First Cause of Action ("Petitioner for Writ of Mandate"), (2) Second Cause of Action ("Constitutional Damages" Claims), and (3) Fifth Cause of Action ("Declaratory Relief " claim as to City, Federal and State Law claims), among other things.

NOW THEREFORE, IT IS ORDERED and ADJUDGED that:

1. Plaintiff's Writ Claim (First Cause of Action), Constitutional Damages Claim (Second Cause of Action), Brown Act Damages Claim (Fourth Cause of Action, and Declaratory Judgment Claim (Fifth Cause of Action) are dismissed with prejudice by the findings in the Court's

December 15th Ruling and are dismissed as of the date of the signing of this Judgment.

2. Plaintiff's Slander of Title Claim (Third Cause of Action) is dismissed with prejudice as agreed to by Plaintiff and Defendant and memorialized in the 2022 Settlement Agreement.

3. Plaintiff acknowledges that the 2022 Settlement Agreement fully and finally resolves all other claims involving (1) the 2013 Settlement Agreement, (2) the Fourth Cause of Action for the Brown Act Damages Claim, and (3) the Third Cause of Action for the Slander of Title Claim.

4. Defendant acknowledges that neither the 2013 Settlement Agreement, nor the 2022 Settlement Agreement resolves or releases any claims involving or related to Plaintiff's appeal of the December 15th Ruling on (1) the First Cause of Action ("Petition for Writ of Mandate"), (2) the Second Cause of Action ("Constitutional Damages" Claims), and (3) the Fifth Cause of Action Declaratory Relief as related to Plaintiff's claims arising out of issues of City, State and Federal Law.

5. Plaintiff and Defendant shall each bear their respective costs and attorney's fees.

6. The Parties stipulate that this judgment constitutes a final order judgment for the purposes of appeal.

Appendix B

IT IS SO ORDERED AND ADJUDGED.

Dated: May 27, 2022

/s/_____
Honorable H. Jay Ford III
Judge of the Superior Court

Appendix B

EXHIBIT A

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES
Civil Division

19SMCV00850

OTTO L. HASELHOFF, INDIVIDUALLY, AND AS TRUSTEE OF THE OTTO AND LARA HASELHOFF FAMILY TRUST DATED JULY 27, 2006, AND AS ASSIGNEE OF GREG BRILES INDIVIDUALLY AND AS PARTNER AND/OR TRUSTEE vs CITY OF SANTA MONICA, A GOVERNMENTAL ENTITY

August 11, 2020 8:30 AM

Judge: Honorable H. Jay Ford III

NATURE OF PROCEEDINGS: Hearing on Defendant City of Santa Monica's Demurrer—with Motion to Strike (CCP 430.10)—to First Amended Petition and Complaint;

The Court has posted the following tentative ruling:

TENTATIVE RULING

Defendant City's Demurrer to First Amended Petition and Complaint [FAPC] is SUSTAINED WITHOUT LEAVE TO AMEND as to the first cause of action for petition for writ of mandate and OVERRULED as to

all remaining causes of action identified in the notice of demurrer (Slander of Title, Brown Act Claim and Declaratory relief.)

Defendant's Motion to Strike is GRANTED as to the following categories of allegations identified in the Notice of Motion: allegations re: Woody's, allegations re: "2600 Wilshire," the language "including diminution in value" from ¶90, and the "irrelevant allegations." The motion to strike is DENIED in all other respects.

Defendant's request for judicial notice is DENIED as to Exhibits 24-26 (transcripts of public hearings) and Exs. 35 and 36 (newspaper articles) and GRANTED as to the remaining exhibits. The Court's decision to judicially notice the existence and filing of these documents is not judicial notice of the truth of the documents, the interpretation of any of these documents or any findings of facts contained therein. "Although the existence of a document may be judicially noticeable, the truth of statements contained in the document and its proper interpretation *are* not subject to judicial notice if those matters are reasonably disputable. . . . When judicial notice is taken of a document, however, the truthfulness and proper interpretation of the document are disputable." Fremont Indemnity Co. v. Fremont General Corp. (2007) 148 Cal.App.4th 97, 113.

Plaintiff's objection to "new evidence" on reply is overruled. The "new evidence" is actually a response to Plaintiff's objection to Defendant's RJN of three volumes of evidence submitted with the demurrer and MTS.

Appendix B

ANALYSIS

I. Demurrer to first cause of action for Petition for Writ of Mandate—SUSTAINED WITHOUT LEAVE TO AMEND.

A. Briles failed to exhaust administrative remedies and Plaintiff is bound by his failure.

The landmarking decision occurred in 2010 when Briles was allegedly the sole owner of the subject property. Plaintiff only has standing to challenge that decision based on his status as an assignee or successor-in-interest to Briles. See Ojavan Investors, Inc. v. California Coastal Com. (1994) 26 Cal.App.4th 516, 526 ("The failure to have given appellants statutory notice of the permit hearings is understandable since they did not own the property in question in 1979 and 1990, the years the permits were issued. To the extent that any predecessor in interest lacked notice, appellants have no standing to raise such a complaint.") Plaintiff must therefore either allege that Briles exhausted administrative remedies or that he was excused from doing so by virtue of a recognized exception, because Plaintiff stands in Briles shoes and has no greater rights than he would on this petition. Id. at 527 ("such predecessors in interest could not transfer or assign to appellants any legal rights greater than they themselves possessed . . . appellants obtained the property in question with the same limitations and restrictions which bound their predecessors in interest"); Serra Canyon Co. v. California Coastal Com. (2004) 120 Cal.App.4th 663, 668 (petitioner was bound by predecessor-in-interest's waiver

of right to timely challenge Coastal Commission's permit condition by writ of mandate)(citing Ojavan)

Contrary to Plaintiff's allegation, Santa Monica Municipal Code §9.56.180 imposes a mandatory time limit on any appeal of the landmarking decision. See FAPC, ¶72; Defendant's RJN, Bates No. CITY 0705. "Any person may appeal a determination or decision of the Commission by filing a notice of appeal with the Department on a form furnished by the Department. Such notice of appeal shall be filed within ten consecutive days commencing from the date that such determination or decision is made by the Commission or from the date an application is deemed approved or disapproved because of the failure to comply with any time period set forth in this Chapter." See Defendant's RJN, Bates No. CITY 0705.

Given the 10-day time limit and the undisputed fact that the landmarking decision occurred in 2010, only Briles could have appealed the decision in the manner prescribed by City of Santa Monica's Municipal Code. See e.g. Serra Canyon Co., supra, 120 Cal.App.4th at 668 ("The time to challenge the condition was back in 1981, by pursuing a petition for a writ of mandate under Code of Civil Procedure section 1094.5. Serra's 2002 lawsuit is far too late.") Briles was the owner during the permissible time to appeal, not Haselhof. The failure to appeal the decision in accordance with the procedure provided by the SMMC establishes a failure to exhaust administrative remedies and "mandamus will not lie" absent an applicable exception. See McAllister, 147 Cal.App.4th 253, 284-285; Grant, supra, 80 Cal.App.3d at 609.

B. Plaintiff fails to allege that Briles's appeal would have been futile or that Briles's failure to appeal was due to futility, as opposed to inadvertence or a conscious decision not to challenge the landmarking decision

Plaintiff fails to allege futility of the administrative remedies provided under the SMMC based on "certainty of outcome." See FAPC, ¶74. "Unless a litigant can demonstrate that the administrative agency has indicated its predetermined decision in the litigant's particular case, it does not apply even if the outcome in other similar cases is adverse to the litigant's position." Imagistics Internat., Inc. v. Department of General Services (2007) 150 Cal. App.4th 581, 590.

Plaintiff alleges, "throughout the negotiation of this case, the City, through the City Attorney's Office, has steadfastly stated that it would never, ever remove the landmark on the property unless and until the Court orders it to do so." See FAPC, ¶74. Plaintiff also alleges that other cases involving similar challenges to landmarking decisions establish the futility of Plaintiff's appeal of the decision. Id.

Plaintiff's allegations do not establish futility based on certainty of outcome for several reasons. First, because only Briles could have properly appealed the landmark decision, Plaintiff must allege that Briles did not appeal due to futility. Instead, Plaintiff alleges facts regarding why it would have been futile for him to engage in the administrative appeal process. Id. at ¶74.

Second, the statements of the City Attorney's Office after this litigation was filed do not establish the negative outcome of a proper appeal with certainty. "It is specious to contend that it would be futile to exhaust administrative remedies neither having attempted to do so nor having developed a record establishing futility before filing suit." Black v. City of Rancho Palos Verdes (2018) 26 Cal.App.5th 1077, 1090 (city's statements in record did not support a finding of futility where they were all elicited by the landowners and their counsel after the landowners had already filed suit). Moreover, the statements of the City Attorney's Office are insufficient to establish with certainty how the City Council would act on such an appeal. See La Costa Beach Homeowners Assn. v. Wayne (1979) 89 Cal. App.3d 327, 331 (staff's recommendations did not establish with certainty outcome of appeal before agency absent showing that agency followed staff recommendations mechanically); 2A Cal. Jur. 3d Administrative Law, §725.

Third, the outcome of other cases before the City does not establish with certainty the outcome of a proper appeal with respect to Plaintiff's landmarking decision, regardless of how similar the other cases are. See Imagistics Internat., Inc., supra, 150 Cal.App.4th at 590 (petitioner's use of historical data to establish futility of alternate protest procedure was unavailing). The outcome of the Levaan v. City of Santa Monica (the "2600 Wilshire Case") case before Judge Rosenberg is therefore irrelevant to the futility allegations.

Fourth, the futility exception does not apply where the failure to exhaust administrative remedies is due to the petitioner's inadvertence. See Pacific Coast Medical

Enterprises v. Department of Benefit Payments (1983) 140 Cal.App.3d 197, 215 (futility exception did not apply where petitioner admitted that failure to exhaust administrative remedies was due to its own inadvertence, not futility); 2A Cal. Jur. 3d Administrative Law, §725 ("The fact that administrative procedures may be futile does not excuse the appellant's obligation to pursue them. In particular, the futility exception does not apply . . . where the failure to exhaust remedies was in fact due to the petitioner's inadvertence.") Plaintiff does not allege any facts pertaining to Briles' failure to challenge the landmarking decision. To the extent Briles failed to appeal due to his inadvertence, Plaintiff could not argue the futility exception.

Finally, while Plaintiff alleges Defendant failed to properly provide notice of the landmarking application and the hearing thereon in accordance with the SMMC, Plaintiff does not allege that Briles was completely ignorant that his property was in the process of being landmarked or that it had been landmarked. Plaintiff fails to allege that Briles did not have actual or constructive notice of the landmark application, the hearing or the approval of landmark status for his property. In order to properly allege futility as to Briles's failure to appeal, Plaintiff was required to allege facts explaining Briles's failure to appeal, including his lack of actual or constructive notice that his property was being landmarked or had been landmarked, if that is Plaintiff's position.

Plaintiff fails to establish that he can allege the futility exception as to Briles's failure to exhaust available

administrative remedies. In fact, based on the documents submitted for judicial notice by Defendant and Defendant's arguments on demurrer, Briles purportedly knew of the potential landmark status prior to purchase, sought tax benefits based on the property's landmark status himself or through his partner Culotti and renovated the property in compliance with landmark requirements per multiple Certificates of Appropriateness. See Defendant's RJN, Exs. 19-23. Such facts would establish waiver by Briles to challenge the landmarking decision, which would bind Plaintiff and prevent him from attacking the decision by writ of mandate per Serra Construction and Ojavan. Plaintiff had to address these points for the Court to justify granting leave to amend as to the first cause of action for petition for writ of mandate. See Hendy v. Losse (1991) 54 Cal.3d 723, 742. Plaintiff fails to do so and offers no clarity in his opposition as to Briles's failure to challenge the landmarking decision in 2010 or anytime during his ownership of the property.

C. Plaintiffs Petition for Writ of Mandate is barred by the Statute of Limitations under GC §65009.

Government Code §65009(c)(1) applies a 90-day limitations period to any challenges to the governmental acts specified thereunder. "Under section 65009, subdivision (c)(E)(1), the 90-day rule applies to 'any decision on the matters listed' in section 65901, and one of the 'matters listed' in section 65901 is a zoning board or zoning administrator's decision on 'conditional uses or other permits' or variance applications, or its 'exercise [of] any other powers granted by local ordinance.'" Weiss v.

City of Del Mar (2019) 39 Cal.App.5th 609, 620 (GC §65009 applied to petition for writ of mandate challenging city's denial of petitioner's request for order requiring neighbor to trim trees interfering with petitioner's ocean view). Moreover, "section 65009 expressly incorporates the 'matters' listed in sections 65901 and 65903, regardless of the legislative body charged with making the decision. The courts have rejected the notion that the reviewing body, rather than the underlying decision being reviewed, determines the applicability of Section 65009." Save Lafayette Trees v. City of Lafayette (2019) 32 Cal.App.5th 148, 157 (GC §65009 applied to petition challenging agreement between city and PG&E that amounted to permit or variance).

Plaintiff is challenging a decision to designate the property a landmark pursuant to Article 9 ("Planning and Zoning"), Division 6, Chapter 9.56 of the Santa Monica Municipal Code. See Defendant's RJN, Exhibit 39. The landmarking decision was an exercise of the City's zoning powers granted by local ordinance and therefore qualifies as a decision on matters listed in GC §65901. As such, GC §65009(c)'s 90-day limitations period applies to Plaintiff's petition for writ of mandate. "[N]o action or proceeding shall be maintained . . . unless the action or proceeding is commenced and service is made on the legislative body within 90 days after the legislative body's decision." GC §65009(c)(1). Based on the face of the complaint, the 90-days expired nearly a decade ago.

Plaintiff alleges Defendant failed to give proper notice of the hearing or the landmarking decision to Briles as

owner of the property and argues this failure to comply excuses him from complying with the 90-day deadline. However, for the reasons stated in connection with the exhaustion of remedies issue, Plaintiff's allegations of excuse are insufficient. Nearly a decade has passed since the property was landmarked and Plaintiff fails to allege that Briles was ignorant of the landmarking hearing or the decision during that entire time, nor does Plaintiff provide any explanation for Briles's failure to bring challenge the landmarking decision earlier. Plaintiff therefore fails to sufficiently plead excuse, tolling or some other basis to avoid the statutory bar under GC §65009.

Plaintiff's argument that, based on GC §65009(b), GC §65009(c)'s limitations period only applies to decisions where there was a properly noticed hearing, which he is alleging did not occur here. However, GC §65009(b) merely limits what issues may be raised during an attack on a decision made after a properly noticed hearing: "In an action or proceeding to attack, review, set aside, void, or annul a finding, determination, or decision of a public agency made pursuant to this title at a properly noticed public hearing, the issues raised shall be limited to those raised in the public hearing or in written correspondence delivered to the public agency prior to, or at, the public hearing." GC §65009(b)(1). Subsection (b)(1) does not require a properly noticed public hearing to "trigger" subsection (c) or any part of GC §65009.

Appendix B

II. Demurrer to 3rd cause of action for slander of title—OVERRULE

A. Res Judicata does not apply based on the allegations of the complaint and judicially noticeable documents.

Defendant asserts res judicata arises from the 2015 Arbitration Award, which was confirmed and incorporated into the final judgment entered in SC123035. See Defendant's RJN, Ex. 32. Defendant fails to establish that res judicata applies to bar Plaintiff's cause of action for slander of title against it.

First, the cause of action at issue is slander of title, which involves an entirely different primary right than that asserted by Briles in SC123035. Briles was asserting violations of his rights as Culotti's partner in SC 123035. The slander of title claim does not involve violation of Briles's rights as a partner. Because the slander of title claim involves a different primary right from that asserted in SC123035, the slander of title claim is a different cause of action from that raised in SC123035 and the 2015 arbitration, and it does not qualify as a "cause of action" that "could have been raised" in those prior proceedings.

Second, Briles could not have asserted a claim for slander of title against Culotti in SC 123035, because Plaintiff alleges it was the City who recorded the allegedly invalid 2013 Settlement Agreement against the property, not Culotti. See FAPC, ¶86. As such, Defendant fails to establish that a slander of title claim "could have been

raised" in SC 123035 or the arbitration between Culotti and Briles for purposes of res judicata

Culotti was not "in privity" with the City for purposes of liability arising from slander of title. The City's alleged liability for slander of title arises from the publication of a false and unprivileged statement, not the mere creation of that false statement. Culotti's purported liability would be for invalidly executing the 2013 Settlement in violation of her partnership agreement with Briles, not the act of recording that agreement against the Property.

Moreover, res judicata requires identity of the parties to be bound. The City is not the party to be bound by res judicata. Plaintiff is the party to be bound and it is undisputed that Plaintiff is in privity with Briles.

Third, Defendant is arguing that the issue of the 2013 Settlement Agreement's validity could have been raised in the 2015 Arbitration and SC123035. Whether an issue was determined in a prior proceeding, such that a party may not relitigate it, requires application of collateral estoppel, which Defendant does not argue, nor could it, given the requirement that the issue have actually been litigated. See Murphy v. Murphy (2008) 164 Cal.App.4th 376, 401.

Finally, Defendant argues Plaintiff is judicially estopped from disputing the validity of the 2013 Settlement Agreement based on Briles's failure to dispute its validity in the 2015 Arbitration. However, Defendant fails to provide authority holding that the failure to assert the invalidity of the 2013 Settlement Agreement

is the equivalent of affirmatively asserting its validity for purposes of judicial estoppel. Defendant also fails to establish that Briles adopted and successfully asserted the position that the 2013 Settlement Agreement was valid in the 2015 Arbitration. In fact, the 2015 Arbitration Award contains no references to the 2013 Settlement Agreement. See Defendant's FUN, Ex. 32, Bates No. CITY 0624-0633.

C. Slander of title is sufficiently pled

"Slander or disparagement of title occurs when a person, without a privilege to do so, publishes a false statement that disparages title to property and causes the owner thereof " 'some special pecuniary loss or damage. The elements of the tort are (1) a publication, (2) without privilege or justification, (3) falsity, and (4) direct pecuniary loss. If the publication is reasonably understood to cast doubt upon the existence or extent of anther's interest in land, it is disparaging to the latter's title. The main thrust of the cause of action is protection from injury to the salability of property, which is ordinarily indicated by the loss of a particular sale, impaired marketability or depreciation in value." Sumner Hill Homeowners' Assn., Inc. v. Rio Mesa Holdings, LLC (2012) 205 Cal.App.4th 999, 1030.

Defendant argues factual issues that may not be raised on demurrer. Defendant argues the recordation of the 2013 Settlement Agreement is privileged under CC §47(e), which provides "[a] privileged publication or broadcast is one made: . . . the publication of the matter complained of was for the public benefit." However, accepting the facts

as true, the Court is hard pressed to find on demurrer that publication of a false statement that disparages title to property was done for the public benefit.

Defendant argues that the 2013 Settlement Agreement was not false and it was negligent in recording it. However, the Court must accept Plaintiff's allegation of falsity and scienter as true on demurrer, as well as Plaintiff's allegations that the 2013 Settlement Agreement was invalid, because it was entered into by an unauthorized person on behalf of a nonexistent entity. See FAPC, ¶¶42-49, 86. As stated above, the face of the complaint and the judicially noticeable documents do not establish the validity of the 2013 Settlement Agreement for purposes of demurrer.

D. The slander of title claim is not clearly and affirmatively time barred based on the face of the complaint and the judicially noticeable evidence

Defendant argues the three-year limitations period under CCP §338(g) bars the slander of title claim, because the 2013 Settlement Agreement was recorded on 12-24-13 and the Joint Stipulation filed in the 2015 Arbitration references the 2013 Settlement Agreement. See Defendant's Request for RJN, Ex. 27, Bates No. CITY 493-497.

Neither of these arguments justifies sustaining demurrer based on SOL. "A cause of action for slander of title accrues, and the statute begins to run, when plaintiff could reasonably be expected to discover the existence of

the claim." Stalberg v. Western Title Ins. Co. (1991) 230 Cal.App.3d 1223, 1230. As such, the date of recordation is not necessarily the date of accrual. Whether Briles should have reasonably been expected to discover the claim on the date of recordation is a question of fact. "When a plaintiff reasonably should have discovered facts for purposes of the accrual of a cause of action or application of the delayed discovery rule is generally a question of fact, properly decided as a matter of law only if the evidence (or, in this case, the allegations in the complaint and facts properly subject to judicial notice) can support only one reasonable conclusion." Stella v. Asset Management Consultants, Inc. (2017) 8 Cal.App.5th 181, 193.

In addition, the Joint Stipulation filed in the 2015 Arbitration by Briles only admits the genuineness of the copy of the 2013 Settlement Agreement thereto. See Defendant's Request for RJN, Ex. 27, Bates No. CITY 496, Item 131. The Joint Stipulation mentions nothing of the recordation of the 2013 Settlement Agreement, which is the act that forms the basis of the slander of title claim, not the execution of the agreement itself. Plaintiff also alleges that Briles stated he did not discover that the Settlement Agreement had been recorded until escrow with Plaintiff. This allegation must be accepted as true. See FAPC, ¶43.

Finally, Plaintiff argues the Defendant's refusal to remove the 2013 Settlement Agreement from the record or otherwise rectify its wrongful recordation is a continuing wrong subject to the doctrine of continuing accrual for purposes of statute of limitations. Defendant did not respond to that argument on reply.

Defendant fails to establish that the slander of title claim is clearly and affirmatively time barred. Demurrer on this ground must be overruled.

III. Demurrer to all other causes of action—OVERRULE

The notice of demurrer only identifies the first cause of action for petition for writ of mandate, 3rd cause of action for slander of title, the 4th cause of action for Brown Act Claim and the 5th cause of action for declaratory relief. No other causes of action are identified. With respect to the Brown Act Claim and the declaratory relief claim, however, no arguments are made in the memo of points and authorities in support of the demurrer thereto. Demurrer is therefore overruled as to the Brown Act Claim and the declaratory relief claim on those procedural grounds.

IV. Motion to Strike—GRANT IN PART AND DENY IN PART

"The court may, upon a motion made pursuant to Section 435, or at any time in its discretion, and upon terms it deems proper: (a) Strike out any irrelevant, false, or improper matter inserted in any pleading. (b) Strike out all or any part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court." CCP §436. The grounds to strike must appear from the face of the complaint or judicially noticeable documents. CCP §437.

Appendix B

"Motions to strike can be used to reach defects in or objections to pleadings that are not challengeable by demurrer . . . Moreover, a motion to strike can be used to attack the entire pleading, or any part thereof—i.e., even single words or phrases (unlike demurrers)." Edmon and Kernow, Civil Practice Guide: CPBT (Rutter Group 2020), ¶7:156. "The bench and bar are used to thinking of motions to strike as a way of challenging particular allegations within a pleading." Baral v. Schnitt (2016) 1 Cal.5th 376, 393-394. Case law also permits a motion to strike "sham pleadings." Ricard v. Grobstein, Goldman, Stevenson, Siegel, LeVine & Mange] (1992) 6 Cal.App.4th 157, 162 (suit "sham" because admittedly filed solely to circumvent court's adverse ruling in earlier suit).

Using the categories identified in the Defendant's Notice of Motion to Strike, the Court rules as follows:

Allegations that Briles purchase the Property as an Individual—DENY. These allegations are not irrelevant, false or improper. These allegations do not assert that Briles purchased the property "for" himself or for the Partnership. These allegations only allege that Briles was the record owner of the property when the landmarking process was underway and that the City failed to provide him notice based on that status. Thus, they are not "false" based on the judicially noticeable documents wherein Briles admitted he was holding the property as an asset of his partnership with Culotti despite the grant deed being in his name as an individual. See Defendant's RJN, Ex. 28 and Ex. 29, CITY 493-497. In fact, the Joint Stipulation filed in the 2015 Arbitration stipulates that the Grayson

Estate deeded the property to Greg Briles, a single man on 7-9-10 and that deed was recorded on 10-22-10. Id. at Ex. 29, CITY 494, Item 5.

Likewise, whether Culotti was entitled to bind the partnership in a specific instance, e.g. the 2013 Settlement Agreement, is disputed and such a dispute cannot be resolved based on the judicially noticed documents or the complaint. The Court can take judicial notice of the court records, which includes the Partnership Agreement that was filed in the prior proceedings, but it cannot take judicial notice of the truth of the contents of these documents or a particular interpretation of such documents to resolve the dispute over Culotti's authority and the validity of the 2013 Settlement Agreement. See Fremont Indemnity Co. v. Fremont General Corp. (2007) 148 Cal.App.4th 97, 113. It can only take judicial notice of the existence of these documents and that they were filed in a prior action.

Allegations re: Woody's case (identified in paragraphs 22-27 of the motion to strike)—GRANTED. These allegations are irrelevant and improper. The complaint/petition's inclusion of allegations detailing the facts and legal implications of a specific case beneficial to Plaintiff s case is improper. They are irrelevant to Plaintiff's stating a cause of action against Defendant.

Allegations re: Equal Protection—DENY. Defendant fails to establish how the equal protection allegations are false, irrelevant or improper. Defendant's argument that an equal protection claim "fails as a matter of law" is not

an argument to strike those allegations based on falsity, irrelevance, impropriety or failure to draft in conformity with the law, but a demurrer argument to a cause of action for violation of constitutional rights. Defendant cannot circumvent the page limit and procedural requirements applied to demurrers by including demurrer arguments in a motion to strike.

Allegations re: Levaan v. City of Santa Monica ("2600 Wilshire" allegations" identified in paragraphs 29-30 of the motion to strike)—GRANT. These allegations reference a prior action that was before Judge Rosenberg that also involved a landmark dispute with the City of Santa Monica. These allegations are irrelevant to the action. The outcome of that case, which never generated a published or even unpublished appellate opinion, is irrelevant to this action.

Allegations re: Partnership—DENY. These allegations pertain to the authority of Culotti to bind Briles and the partnership and the validity of the Settlement Agreement. Whether Culotti had authority to execute the Settlement Agreement and whether the Settlement Agreement was valid is not apparent from the face of the judicially noticeable documents. None of the documents address directly the issue of Culotti's authority in the specific instances challenged by Plaintiff, namely execution of the 2013 Settlement Agreement.

Allegation that Briles was Aware of the Settlement Agreement no Later than 2015 Arbitration—DENY. Plaintiff's allegation at 1143 does not claim Briles was ignorant of the "existence" of the Settlement Agreement,

only that he was ignorant of the "existence of the . . . Settlement Agreement on title," i.e. its recordation against the property. As such, 1143 is not "false" based on the face of the complaint or judicially noticeable evidence.

Brown Act allegations—GRANT as to "including diminution in value" in 1190 and DENY as to remaining (identified in paragraph nos 35-38 of the motion to strike). Plaintiff makes an improper claim for damages in ¶¶88-90. "Damages . . . are not among the remedies provided by law for a violation of the Brown Act (§§ 54960, 54960.l, 54960.5), and to the extent costs and fees are available to successful Brown Act litigants, the Brown Act specifically provides that those costs and fees will not be borne personally by government officials or employees. (§ 54960.5.)" Holbrook v. City of Santa Monica (2006) 144 Cal.App.4th 1242, 1254. 990 is the only paragraph that contains an improper reference to recovery of "damages" in the Brown Act Claim. The request for damages arising from diminution of value is therefore unsupported and the language "including diminution of value" is properly stricken.

Regarding the remaining Brown Act allegations, Defendant fails to demonstrate how these allegations are false, improper, irrelevant or not drafted in conformity with the state's laws. Defendant instead argues statute of limitations and failure to state a claim which may be raised in a demurrer but are not appropriately asserted in a motion to strike. The Court notes defendant listed its challenge to the Brown Act Claim in the notice of demurrer but did not argue in the memorandum in support of its

demurrer. Defendant cannot circumvent the procedural requirements applicable to the demurrer by arguing the merits of the demurrer in the motion to strike.

Irrelevant Allegations (identified in paragraphs 39-41 of the motion to strike—GRANT. These allegations are irrelevant to stating Plaintiff's remaining causes of action. They include allegations impugning the character of Defendant's employees and allegations regarding another completely unrelated landmark proceeding as to a completely unrelated property.

Defendant is to submit a proposed order the properly identifies all the allegations ordered stricken.

*** END OF TENTATIVE RULING ***

Pursuant to Government Code sections 68086, 70044, California Rules of Court, rule 2.956, and the stipulation of appearing parties, Julie Park, CSR #13925, certified shorthand reporter is appointed as an official Court reporter pro tempore in these proceedings, and is ordered to comply with the terms of the Court Reporter Agreement. The Order is signed and filed this date.

The matter is called for hearing and argued.

Defendant's Motion to Strike is GRANTED as to the following categories of allegations identified in the Notice of Motion: Allegations re: Woody's case (identified in paragraphs 22-27 of the motion to strike); Allegations re: Levaan v. City of Santa Monica ("2600 Wilshire"

allegations" identified in paragraphs 29-30 of the motion to strike); Brown Act allegations as to "including diminution in value" in ¶90; and Irrelevant Allegations (identified in paragraphs 3941 of the motion to strike). The motion to strike is DENIED in all other respects.

Defense counsel will file a Motion for Judgment on the Pleadings addressing any causes of action overruled in the Demurrer based on procedural grounds by October 20, 2020. Said Motion for Judgment on the Pleadings will be heard on December 15, 2020 at 8:30 a.m. in Department O at the Santa Monica Courthouse.

Plaintiff is to submit supplemental opposition (not to exceed 10 pages) to the Demurrer and a proposed Amended Complaint with paragraphs stricken pursuant to the granting of the Motion to Strike, and opposition to the Motion for Judgment on the Pleadings by November 10, 2020. Any reply to opposition is to be filed and served by December l, 2020.

The Demurrer is continued to December 15, 2020 at 8:30 a.m. in Department O at the Santa Monica Courthouse.

Attorney Ben Delfin is to give notice.

Appendix B

EXHIBIT B

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES
Civil Division

19SMCV00850

OTTO L. HASELHOFF, INDIVIDUALLY, AND AS TRUSTEE OF THE OTTO AND LARA HASELHOFF FAMILY TRUST DATED JULY 27, 2006, AND AS ASSIGNEE OF GREG BRILES INDIVIDUALLY AND AS PARTNER AND/ OR TRUSTEE vs CITY OF SANTA MONICA, A GOVERNMENTAL ENTITY

December 15, 2020 8:30 AM

Judge: Honorable H. Jay Ford III

NATURE OF PROCEEDINGS: Hearing on Motion for Judgment on the Pleadings; Hearing on Demurrer—without Motion to Strike

Pursuant to Government Code sections 68086, 70044, and California Rules of Court, rule 2.956, Kevin Roldan, CSR #13463, certified shorthand reporter is appointed as an official Court reporter pro tempore in these proceedings, and is ordered to comply with the terms of the Court Reporter Agreement. The Order is signed and filed this date.

The matters are called for hearing.

The Court takes the above said matters under submission.

Case Management Conference is scheduled for 03/19/2021 at 08:30 AM in Department O at Santa Monica Courthouse.

Later outside the presence of counsel, the Court rules as followings:

The Demurrer—with Motion to Strike (CCP 430.10) to First Amended Petition of Otto Haselhoff filed by City of Santa Monica on 02/20/2020 is Sustained in Part. Defendant City of Santa Monica's Demurrer to the Petition for Writ of Mandate (first cause of action), and to the claims for "Constitutional Damages" (second cause of action), "Brown Act Damages" (fourth cause of action), and Declaratory Relief (fifth cause of action) are SUSTAINED WITHOUT LEAVE TO AMEND. The Demurrer to the third cause of action for slander of title is OVERRULED.

Given the Court's ruling on the Demurrer, Defendants Motion for Judgment on the Pleadings is DENIED AS MOOT.

ADDITIONAL REASONING

On August 11, 2020 the Court heard Defendant's demurrer to the Petition for Writ of Mandamus and claims for damages alleged in the First Amended Complaint

(FAC). The Court distributed a written tentative ruling intending to: (1) sustain the demurrer to the petition for writ of mandamus (first cause of action) without leave to amend; (2) overrule the demurrer to the third cause of action for slander of title; and (3) overrule the demurrer to the remaining causes of action without prejudice on the procedural ground Defendant had not addressed those remaining causes of action in its memorandum of points and authorities. At the conclusion of oral argument, the Plaintiff requested an additional opportunity to show why leave to amend should be granted.

The Court previously addressed with Plaintiff the defects and verbosity of the original complaint (41 pages). In response, Plaintiff agreed to amend the complaint to avoid a demurrer. [See 11-7-2019 minute order setting a new deadline for Plaintiff to file an amended complaint.] Thereafter, Plaintiff filed his first amended complaint (57 pages). At the hearing on the demurrer the Court agreed to continue the hearing on the condition Plaintiff submit a proposed second amended complaint that would add the specific good faith factual allegations (and omitting argument) Plaintiff claimed would overcome the application of the limitation period of Government Code §69005. Plaintiff requested a lengthy continuance to submit that proposed Second Amended Complaint. Defendant, in turn, requested time to file a motion for judgment on the pleadings, with the Court's approval, to address the remaining claims in the first amended complaint with the expectation the Court would hear that motion concurrently with the continued hearing on the demurrer. The Court granted the parties' requests and

continued the hearing to December 15, 2020. In addition, the Court set the hearing on Defendant's anticipated motion for judgment on the pleadings for the same date.

Plaintiff submitted a proposed Second Amended Petition for Writ of Mandamus and Complaint for Damages (now 72 pages). [Exhibit B to "Plaintiff/Petitioner's Notice of Lodging. . . ." filed November 10, 2020). Both parties filed supplemental briefs and replies to the demurrer. Defendant filed its memorandum in support of its motion for judgment on the pleadings. Plaintiff opposed on procedural grounds and the merits of Defendant's challenge to the sufficiency of Plaintiff's claims.

The Court has considered the proposed second amended complaint and the parties' respective supplemental briefs supporting and opposing Defendant's demurrer. In addition, the Court has considered the memorandum in support of, and in opposition to, Defendant's motion for judgment on the pleadings as additional briefing in support and in opposition to Defendant's demurrer.

The Court incorporates by reference the reasoning of its prior tentative ruling to sustain the demurrer to the petition to a writ of mandate (first causes of action) and overrule the demurrer to the claim for slander of title. (See Minute order of 8-11-20.) The Court finds (1) Plaintiff cannot show equitable tolling would overcome the limitation of Government Code Section 65009; (2) Plaintiff's First Amended Complaint admits Briles and Haselhof knew the property was landmarked more than 90 days before the filing of the petition and complaint; (3)

equitable tolling cannot overcome a decade of delay; and, (4) the application of equitable estoppel in this case would contravene the Legislature's express intent to prohibit challenges to municipal actions beyond 90 days, including a challenge to the landmark decision asserted by Plaintiff:

In addition, the Court agrees with Defendant's analysis in its memorandum in support of its demurrer and its memorandum in support of judgment on the pleading showing why Plaintiff's remaining claims arising from the landmark decision lack merit as a matter of law. Defendant properly noticed its demurrer to those claims. The Court now sustains Defendant's demurrer to Plaintiff's "constitutional damages claims" (second cause of action), "Brown Act damages claims," (fourth cause of action) and Declaratory Relief (fifth cause of action).

Finally, the Court denies Plaintiff's request for leave to file the second amended complaint. Plaintiff was given an extraordinary amount of time to identify and allege all the possible facts to overcome the defects of the first amended complaint. Despite that time, Plaintiff's proposed Second Amended Complaint fails to state any claim, other than slander of title. Similarly, the Court finds the additional proposed amendments orally raised at the hearing do not overcome the defects of the first amended complaint. The Court finds Plaintiff cannot allege any further facts that would change the legal effect of Plaintiff's claims. (Titus v. Canyon Lake Property Owners Ass'n (2004) 118 Cal. App.4th 906, 918 (when plaintiff had already filed original complaint and two amended complaints without including allegations she now contended would overcome defendant's

demurrer, judge properly denied further leave to amend because plaintiff had already been given fair opportunity to correct any defect).

The clerk is to give notice to defense counsel, Ben Delfin. Thereafter, Mr. Delfin is to give notice to all other parties.

APPENDIX C — ORDER OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION TWO, FILED MAY 28, 2024

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

DIVISION 2

B322168
Los Angeles County Super. Ct. No. 19SMCV00850

OTTO L. HASELHOFF,

Plaintiff and Appellant,

v.

CITY OF SANTA MONICA,

Defendant and Respondent.

May 28, 2024, Order Filed

THE COURT:

Appellant's petition for rehearing is denied.

/s/ Ashmann-Gerst	/s/ Chavez	/s/ Hoffstadt
ASHMANN-GERST, Acting P.J.	CHAVEZ, J.	HOFFSTADT, J.

APPENDIX D — ORDER OF THE SUPREME COURT OF CALIFORNIA, FILED JULY 24, 2024

IN THE SUPREME COURT OF CALIFORNIA

En Banc

S285475

OTTO L. HASELHOFF, INDIVIDUALLY AND AS TRUSTEE, ETC.,

Plaintiff and Appellant,

v.

CITY OF SANTA MONICA,

Defendant and Respondent.

July 24, 2024, Order Filed

The petition for review is denied.

GUERRERO
Chief Justice

Appendix D

SAN FRANCISCO CA 940 [Illegible]
24 JUL 2024 PM 3L [Illegible]
[US POSTAGE STAMP]

Supreme Court of California
Clerk of the Court
350 McAllister Street
San Francisco, CA 94102-4797

S285475
Otto Haselhoff
Law Offices of otto L. Haselhoff
201 Wilshire Boulevard
Second Floor
Santa Monica, CA 90401

APPENDIX E — RELEVANT STATUTORY PROVISIONS

SANTA MONICA MUNICIPAL CODE

§ 9.56.120 Landmark Designation Procedure.

Landmarks shall be designated by the Landmarks Commission in accordance with the following procedure:

D.

Not more than 20 days and not less than 10 days prior to the date scheduled for a public hearing, notice of the date, time, place and purpose thereof shall be given by at least one publication in a daily newspaper of general circulation, and shall be mailed to the applicant, the owner of the improvement, all owners and residential and commercial tenants of all real property within 300 feet of the exterior boundaries of the lot or lots on which a proposed Landmark is situated, and to residential and commercial tenants of the subject property, using for this purpose the names and addresses of such owners as are shown on the records of the Los Angeles County Assessor. The address of the residential and commercial tenants shall be determined by visual site inspection or other reasonably accurate means. The failure to send notice by mail to any such real property owner where the address of such owner is not a matter of public record shall not invalidate any proceedings in connection with the proposed designation. The Commission may also give such other notice as it may deem desirable and practicable.

Appendix E

H.

Within 35 days after the decision has been rendered, the Commission shall approve a statement of official actions which shall include:

1. A statement of the applicable criteria and standards against which the application for designation was assessed.

2. A statement of the facts found that establish compliance or noncompliance with each applicable criteria and standards.

3. The reasons for a determination to approve or deny the application.

4. The decision to deny or to approve with or without conditions and subject to compliance with applicable standards.

I.

The official owner of the designated Landmark shall be provided a copy of the statement of official action after Commission approval using for this purpose the name and address of such owner as is shown in the records of the Los Angeles County Assessor.

§ 9.56.260 Recordation of Landmarks and Historic Districts.

All buildings or structures designated as Landmarks or

as part of a Historic District pursuant to this Chapter shall be so recorded by the City in the office of the Los Angeles County Recorder. The document to be recorded shall contain the name of the owner or owners, a legal description of the property, the date and substance of the designation, a statement explaining that the demolition, alteration, or relocation of the structure is restricted, and a reference to this Section 9.56.260 authorizing the recordation.