APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NICHOLAS HONCHARIW, Trustee, Honchariw Family Trust, Plaintiff-Appellant, v. COUNTY OF STANISLAUS and BOARD OF SUPERVISORS OF COUNTY OF STANISLAUS, Defendants-Appellees.	No. 16-17256 D.C. No. 1:16-cv-01183-LJO-BAM MEMORANDUM* (Filed Mar. 22, 2018)

Appeal from the United States District Court
for the Eastern District of California
Lawrence J. O'Neill, Chief Judge, Presiding

Argued and Submitted February 15, 2018
San Francisco, California

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

---

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

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

Plaintiff-Appellant Nicholas Honchariw appeals the district court's order dismissing his federal takings and due process claims. Our appellate jurisdiction rests on 28 U.S.C. § 1291, and we **AFFIRM**.

After unsuccessfully seeking administrative approval of his proposed subdivision in 2009, Honchariw brought a mandamus action in state court and obtained a favorable ruling from the California Court of Appeal in 2011. *See Honchariw v. Cty. of Stanislaus*, 200 Cal. App. 4th 1066 (Ct. App. 2011). He obtained administrative approval in 2012, and subsequently filed a new state court action for inverse condemnation that the Court of Appeal held was time barred. *See Honchariw v. Cty. of Stanislaus*, 238 Cal. App. 4th 1, 15 (Ct. App. 2015).

Honchariw then sought relief in federal court. He now appeals the dismissal of his federal § 1983 action claiming damages for a regulatory taking and denial of due process in connection with the original 2009 administrative denial. The district court dismissed the takings claim on the ground that Honchariw failed to exhaust state remedies by failing to timely pursue his remedies under state law, as the Court of Appeal had ruled. The district court dismissed his due process claim because it accrued upon the 2009 denial and was not filed within the two-year statute of limitations.

On appeal, the thrust of Honchariw's argument is that neither claim ripened until the 2012 approval. But the challenged deprivation of use of the property took place in 2009 with the permit denial, and thus his

grievances all stem from that action. *See TwoRivers v. Lewis*, 174 F.3d 987, 991 (9th Cir. 1999) ("[A] claim accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action.").

A regulatory takings claim is not ripe for review in federal court until the plaintiff has sought "compensation through the procedures the State has provided for doing so." *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985). A plaintiff who fails to bring his state claim in compliance with the applicable statute of limitations thus forfeits his federal claim as well. *See Daniel v. Cty. of Santa Barbara*, 288 F.3d 375, 382 (9th Cir. 2002). Because Honchariw's inverse condemnation action was untimely under state law, *Honchariw*, 238 Cal. App. 4th at 15, he is now barred from pursuing a federal takings claim.

There is a limited exception to the exhaustion requirement where state remedies are either unavailable or inadequate. *Williamson Cty.*, 473 U.S. at 196-97. Honchariw contends that applying the governing 90-day state limitations period to his takings claim foreclosed any available state court remedies because he did not have a ripe inverse condemnation action until his subdivision was approved in 2012. But, as the California Court of Appeal explained, Honchariw could have timely brought his inverse condemnation action as part of his mandamus petition within 90 days of the 2009 decision. *Honchariw*, 238 Cal. App. 4th at 14-15. The cases on which Honchariw relies recognize that claims based on regulatory denials of property use accrue when there has been a final administrative

decision under state law as to the claimed denials. *See Williamson Cty.*, 473 U.S. at 186; *Norco Constr., Inc. v. King Cty.*, 801 F.2d 1143, 1145 (9th Cir. 1986). That final decision here was the Board's 2009 denial, not its 2012 approval. Indeed if an owner had to wait for a favorable result he might never be able to challenge a denial as a violation of federal rights.

Moreover, the California Court of Appeal's 2015 decision observed that even if the inverse condemnation claim did not ripen until the Board's 2012 approval, Honchariw did not file his inverse condemnation claim until after the 90-day limitation period had expired. *See Honchariw*, 238 Cal. App. 4th at 15. The district court thus correctly held that there was a failure to exhaust state law remedies.

The district court also correctly determined that Honchariw's federal due process claim is time barred. Honchariw's claim accrued when his application was denied in 2009. Further proceedings vindicating Honchariw's rights could not have led to the due process violation – if anything, they eliminated the violation. Accordingly, Honchariw's claim was untimely under the applicable two-year statute of limitations. *See Action Apartment Ass'n, Inc. v. Santa Monica Rent Control Bd.*, 509 F.3d 1020, 1026 (9th Cir. 2007) ("It is well-established that claims brought under § 1983 borrow the forum state's statute of limitations for personal injury claims, and in California, that limitations period is two years.") (internal citations omitted).

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

NICHOLAS HONCHARIW, TRUSTEE, HONCHARIW FAMILY TRUST, **Plaintiff,** **v.** **COUNTY OF STANISLAUS AND BOARD OF SUPERVISORS OF COUNTY OF STANISLAUS,** **Defendants-Appellees.**	**1:16-cv-1183-LJO-BAM** **MEMORANDUM DECISION AND ORDER RE DEFENDANTS' MOTION TO DISMISS (Doc. 6)** **(Filed Nov. 14, 2016)**

I. INTRODUCTION

Plaintiff Nicholas Honchariw, as trustee for the Honchariw Family Trust, brings takings and due process claims against the County of Stanislaus ("the County") and the Board of Supervisors of County of Stanislaus ("the Board") (collectively, "Defendants") arising out of the County's denial of his application to subdivide his property. Doc. 1, Complaint ("Compl."). Defendants now move to dismiss the case without leave to amend under Federal Rule of Civil Procedure[1] 12(b)(6), contending that both claims are barred by res

[1] All further references to any "Rule" are to the Federal Rules of Civil Procedures unless otherwise indicated.

judicata, *Williamson County*[2], and the applicable statute of limitations, and that his due process claim nonetheless fails to state a claim. Doc. 6.[3]

The Court took the matter under submission on the papers pursuant to Local Rule 230(g). For the following reasons, the Court GRANTS Defendants' motion to dismiss without leave to amend.

II. FACTUAL AND PROCEDURAL BACKGROUND

In June 2006, Plaintiff applied to the Board for approval under California's Subdivision Map Act ("the Map Act"), Cal. Gov't Code §§ 66410 *et seq.* of his proposed development project on land he owns. Compl. at ¶¶ 1, 20. In February 2009, the County Planning Commission denied Plaintiff's application without making any findings. *Id.* at ¶ 26. Plaintiff appealed the decision to the Board, which denied the appeal in March 2009 and voted not to approve the project. *Id.* at ¶ 28. In June 2009, Plaintiff filed a petition for writ of administrative mandamus in California state court in which he argued the Board was required under California Government Code § 65589.5(j) ("§ 65589.5(j)") to

---

[2] *Williamson Cty. Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985).

[3] In support of their motion, Defendants request that the Court take judicial notice of several documents, all of which are state court filings. Doc. 7. Because these documents are undisputed matters of public record and properly subject to judicial notice under Federal Rule of Evidence 201, the Court GRANTS Defendants' request.

make written findings in support of its decision to deny the project. *Id.* at ¶ 36; *see also Honchariw v. Cty. of Stanislaus*, 200 Cal. App. 4th 1066, 1069 (2011) ("*Honchariw I*"). In March 2010, the trial court denied the petition, finding that § 65589.5(j) did not apply[4] and, accordingly, the Board was not required to make written findings. *Id.* The Court of Appeal reversed, and ordered the trial court to issue a writ of mandate directing the Board to vacate its decision and reconsider Plaintiff's application in a manner consistent with the court's opinion. *Id.* at 1081. The court specifically directed the Board to make written findings consistent with the requirements of § 65589.5(j), if it found that statute applied and Plaintiff's application should be denied. *Id.*

In May 2012, the Board approved Plaintiff's application. Compl. at ¶ 49. In December 2012, Plaintiff sued the County in state court, seeking damages for (1) a temporary taking of his property by inverse condemnation, in violation of the California constitution and the Fifth Amendment; and (2) the denial of his substantive due process rights under the Fifth and Fourteenth Amendments. *Id.* at ¶ 61. Plaintiff "reserve[d] its right to litigate its federal takings claim in federal court under the authority of *England v. Louisiana State Bd. of Med. Examiners* (1964) 375 U.S. 411." Doc. 7-1, Second Amended State Court Complaint ("SAC"), at ¶ 45; Compl. at ¶¶ 8, 66; *see also* Doc. 7-2

---

[4] The reason for this finding and its subsequent reversal by the Court of Appeal in *Hornichaw I* is not relevant to the disposition of Defendants' motion.

(state trial court noting that "Plaintiff has reserved his federal claims to bring in federal Court. What effect that may have in subsequent related actions is not now before this Court.").

Defendants demurred on numerous grounds, including that Plaintiff's claims were barred by the 90-day statute of limitations contained in Government Code § 66499.37 ("§ 66499.37"), which applies to any action challenging a government entity's decision under the Map Act. *Id.* at ¶¶ 63-65.[5] After multiple attempts at amendment, the trial court sustained Defendants' demurrer without leave to amend. *Id.* at ¶ 65. The court found that Plaintiff's claims accrued in May 2012, when the Board approved his application, and therefore agreed with Defendants that the claims, filed in December 2012, were untimely under § 66499.37's 90-day deadline. *Id.* at ¶ 65; *see also Honchariw v. Cty.*

---

[5] Section 66499.37 provides in relevant part:

> Any action or proceeding to attack, review, set aside, void, or annul the decision of an advisory agency, appeal board, or legislative body concerning a subdivision, or of any of the proceedings, acts, or determinations taken, done, or made prior to the decision, or to determine the reasonableness, legality, or validity of any condition attached thereto, including, but not limited to, the approval of a tentative map or final map, shall not be maintained by any person unless the action or proceeding is commenced and service of summons effected within 90 days after the date of the decision. Thereafter all persons are barred from any action or proceeding or any defense of invalidity or unreasonableness of the decision or of the proceedings, acts, or determinations.

of Stanislaus, 238 Cal. App. 4th 1, 4 (2015) ("*Honchariw II*").

The Court of Appeal agreed and affirmed. *Id.* at 5. Plaintiff argued, among other things, that the § 65589.5(j) 90-day statute of limitations should not bar his May 2012 case because he previously filed a mandamus petition in 2009 within the of limitations period, citing *Hensler v. City of Glendale*, 8 Cal. 4th 1 (1994), which permitted regulatory takings damages claims to be brought outside the limitations if they were preceded by a successful mandamus action (brought within the limitations period) challenging the regulation. After an extensive discussion of *Hensler* and its progeny, the Court of Appeal found that the 2009 mandamus action did not trigger *Hensler* because that mandamus action did not raise a takings-based challenge. Put another way, if Plaintiff wanted to challenge the Board's denial as an unconstitutional taking, he was required to do so within 90 days of the denial. Because no compensable taking had been established in the 2009 action, the 2012 action was time-barred.[6]

---

[6] Although the trial court apparently found the statute of limitations began to run when the Board approved Plaintiff's application in May 2012, Compl. at ¶ 65; Doc. 7-2 at 5, the Court of Appeal held that it began when the Board denied his application in March 2009. *See Honchariw II*, Cal. App. 4th at 14-15. The appellate court further held that even if, as Plaintiff asserted, the statute of limitations did not begin to run until the Board's May 2012 approval of his application, his "inverse condemnation complaint was untimely because it was filed in December 2012, well after" the 90-day statute of limitations. *Id.*

The California Supreme Court denied Plaintiff's petition for review in August 2015. Doc. 7-4. Plaintiff filed this case in August 2016, asserting claims for: (1) a taking without just compensation under the Fifth and Fourteenth Amendments; and (2) denial of his due process rights under the Fifth and Fourteenth Amendments. Compl. at 20, 21. The basis for Plaintiff's takings claim is that "the Board's disapproval of [his] subdivision application in March 2009 . . . effected a temporary taking of [his] constitutionally-protected property rights requiring compensation under the Fifth and Fourteenth Amendments." *Id.* at ¶ 78. Plaintiff alleges he

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

Id. at ¶ 80.

In his second claim, Plaintiff alleges that the Board's denial of his application also violated his due

process rights. *Id.* at ¶ 87. Specifically, Plaintiff asserts that

> Defendants had no basis to disapprove Plaintiff's project without compliance with the requirement of [§665589.5(j)] that disapproval could only be based upon written findings of a serious, adverse impact upon public health or safety which could not be satisfactorily mitigated or avoided. No such finding had or could be made. The disapproval was arbitrary and capricious and/or was willful and deliberate obstruction of Plaintiff's constitutionally-protected property rights.

Id. at ¶ 88.

Defendants move to dismiss both claims with prejudice. Doc. 6. Defendants assert both claims are barred by res judicata because the California Court of Appeal so concluded in *Honchariw II*. Defendants argue that, even if not barred by res judicata, Plaintiff's takings claim is barred by *Williamson County*, and his due process claim is barred by § 1983's two-year statute of limitations and, in any event, fails to state a claim.

III. STANDARD OF DECISION

A. Rule 12(b)(6)

A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) is a challenge to the sufficiency of the allegations set forth in the complaint. A 12(b)(6) dismissal is proper where there is either a "lack of a cognizable legal theory" or "the absence of

sufficient facts alleged under a cognizable legal theory." *Balisteri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990). In considering a motion to dismiss for failure to state a claim, the court generally accepts as true the allegations in the complaint, construes the pleading in the light most favorable to the party opposing the motion, and resolves all doubts in the pleader's favor. *Lazy Y. Ranch LTD v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008).

To survive a 12(b)(6) motion to dismiss, the plaintiff must, in accordance with Rule 8, allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the Plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Twombly*, 550 U.S. at 556). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a Plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions." *Twombly*, 550 U.S. at 555 (internal citations omitted). Thus, "bare assertions . . . amount[ing] to nothing more than a 'formulaic recitation of the elements' . . . are not entitled to be assumed true." *Iqbal*, 556 U.S. at 681. "[T]o be entitled to the presumption of truth, allegations in a complaint . . . must contain

sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively." *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011). In practice, "a complaint . . . must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory." *Twombly*, 550 U.S. at 562.

Under Rule 9(b), a plaintiff alleging fraud or mistake "must state with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b). "This means the plaintiff must allege 'the who, what, when, where, and how of the misconduct charged.'" *United States v. United Healthcare Insurance Company*, 832 F.3d 1084, 1101 (9th Cir. 2016) (internal citations omitted). "Rule 9(b) serves not only to give notice to defendants of the specific fraudulent conduct against which they must defend, but also ' . . . to protect [defendants] from the harm that comes from being subject to fraud charges, and to prohibit plaintiffs from unilaterally imposing upon the court, the parties and society enormous social and economic costs absent some factual basis.'" *Bly-Magee v. California*, 236 F.3d 1014, 1018 (9th Cir. 2001).

To the extent that the pleadings can be cured by the allegation of additional facts, a plaintiff should be afforded leave to amend. *Cook, Perkiss and Liehe, Inc. v. Northern California Collection Serv., Inc.*, 911 F.2d 242, 247 (9th Cir. 1990) (citations omitted).

B. Rule 12(b)(1)[7]

Federal Rule of Civil Procedure 12(b)(1) provides for dismissal of an action for "lack of subject-matter jurisdiction." Faced with a Rule 12(b)(1) motion, a plaintiff bears the burden of proving the existence of the court's subject matter jurisdiction. *Thompson v. McCombe*, 99 F.3d 352, 353 (9th Cir. 1996). A federal court is presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears. *Gen. Atomic Co. v. United Nuclear Corp.*, 655 F.2d 968, 968-69 (9th Cir. 1981).

A challenge to subject matter jurisdiction may be facial or factual. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). As explained in *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1038 (9th Cir. 2004):

> In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction. By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction.

In resolving a factual attack on jurisdiction, the district court may review evidence beyond the complaint without converting the motion to dismiss into a motion

---

[7] Although Defendants move to dismiss Plaintiff's claims only under Rule 12(b)(6), they effectively argue his takings claim should be dismissed for lack of jurisdiction, which is analyzed under Rule 12(b)(1). In any event, the Court has a duty to determine its jurisdiction sua sponte, if necessary. *See B.C. v. Plumas Unified School Dist.*, 192 F.3d 1260, 1264 (9th Cir. 1999).

for summary judgment. *Savage v. Glendale Union High School*, 343 F.3d 1036, 1039 n. 2 (9th Cir. 2003); *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988). "If the challenge to jurisdiction is a facial attack, i.e., the defendant contends that the allegations of jurisdiction contained in the complaint are insufficient on their face to demonstrate the existence of jurisdiction, the plaintiff is entitled to safeguards similar to those applicable when a Rule 12(b)(6) motion is made." *Cervantez v. Sullivan*, 719 F. Supp. 899, 903 (E.D. Cal. 1989), *rev'd on other grounds*, 963 F.2d 229 (9th Cir. 1992). "The factual allegations of the complaint are presumed to be true, and the motion is granted only if the plaintiff fails to allege an element necessary for subject matter jurisdiction." *Id.; see also Cassirer v. Kingdom of Spain*, 580 F.3d 1048, 1052 n. 2 (9th Cir. 2009), *rev'd on other grounds en banc*, 616 F.3d 1019 (9th Cir. 2010) (applying *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), to a facial motion to dismiss for lack of subject matter jurisdiction).

A Rule 12(b)(1) motion can be made as a speaking motion – or factual attack – when the defendant submits evidence challenging the jurisdiction along with its motion to dismiss. *Thornhill Publ'g Co. v. Gen. Tel. & Elecs. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979); *see Savage*, 343 F.3d at 1039-40 n. 2. A proper speaking motion allows the court to consider evidence outside the complaint without converting the motion into a summary judgment motion. *See Safe Air for Everyone*, 373 F.3d at 1039. "Once the moving party has converted the motion to dismiss into a factual motion by presenting affidavits or other evidence properly

brought before the court, the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction." *Savage*, 343 F.3d at 1039-40, n. 2. In a speaking motion, "[t]he court need not presume the truthfulness of the plaintiff's allegations." *Safe Air*, 373 F.3d at 1039. Few procedural limitations exist in a factual challenge to a complaint's jurisdictional allegations. *St. Clair v. City of Chico*, 880 F.2d 199, 200-202 (9th Cir. 1989). The court may permit discovery before allowing the plaintiff to demonstrate the requisite jurisdictional facts. *Id.* A court may hear evidence and make findings of fact necessary to rule on the subject matter jurisdiction question prior to trial, if the jurisdictional facts are separable from the merits. *Rosales v. United States*, 824 F.2d 799, 802-803 (9th Cir. 1987). However, if the jurisdictional issue and substantive claims are so intertwined that resolution of the jurisdictional question is dependent on factual issues going to the merits, the court should dismiss for lack of jurisdiction only if the material facts are not in dispute and the moving party is entitled to prevail as a matter of law. Otherwise, the intertwined facts must be resolved by the trier of fact. *Id.*

IV. ANALYSIS

A. Plaintiff's takings claim is not ripe.

In *Williamson County*, the Supreme Court held:

> A claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity

> charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.

473 U.S. at 186. The Ninth Circuit subsequently applied *Williamson County* to takings claims. *See Hoehne v. Cty. of San Benito*, 870 F.2d 529, 532 (9th Cir. 1989).

As the Eleventh Circuit succinctly explained, "*Williamson County* boils down to the rule that state courts always have a first shot at adjudicating a takings dispute because a federal constitutional claim is not ripe until the state has denied the would-be plaintiff's compensation for a putative taking." *Agripost, LLC v. Miami-Dade Cty., Fla.*, 525 F.3d 1049, 1052 (11th Cir. 2008). Accordingly, a plaintiff's federal takings claim is not ripe unless and until the plaintiff has finished pursuing its state law remedies. *See Rancho de Calistoga v. City of Calistoga*, 800 F.3d 1083, 1089 (9th Cir. 2015).

Though Plaintiff attempted to pursue his takings claim in state court, he failed to do so within the applicable statute of limitations and therefore the claim was time-barred. Although the Ninth Circuit has not decided the issue directly, "[a]t least three circuits have dismissed the federal claims of a plaintiff who failed to use state procedures before they were time-barred, even though the inability to file in state court meant plaintiff 'ha[d] permanently prevented the claim from ever ripening.'" *Holliday Amusement Co. of Charleston, Inc. v. South Carolina*, 493 F.3d 404, 408 (4th Cir. 2007) (quoting *Liberty Mut. Ins. Co. v. Brown*, 380 F.3d

793, 799 (5th Cir. 2004)) (citing *Pascoag Reservoir & Dam, LLC v. Rhode Island*, 337 F.3d 87, 94 (1st Cir. 2003); *Harbours Pointe of Nashotah, LLC v. Vill. of Nashotah*, 278 F.3d 701, 706 (7th Cir. 2002)).

The Ninth Circuit's decision in *Daniel v. County of Santa Barbara*, 288 F.3d 375, 380 (9th Cir. 2002), however, strongly suggests (if not establishes) that it agrees with these courts' conclusions. In that case, the plaintiffs did not bother to seek any state-court remedy for an alleged governmental taking. *Id.* at 381. The Ninth Circuit observed:

> Assuming that adequate state procedures were available to seek such compensation, the failure of [plaintiffs] to seek just compensation meant that they never created ripe federal takings claims. *The failure of [plaintiffs] to use such state procedures cannot now be cured because the applicable state limitation periods have long since expired.*

Id. (emphasis added). Accordingly, the plaintiffs could never satisfy the second *Williamson County* requirement and, accordingly, could never have a ripe federal takings claim. *See id.*

Plaintiff does not and cannot dispute that he "ignored [his state law] remedies until it was too late." *Pascoag*, 337 F.3d at 94. The Court therefore lacks jurisdiction over his takings claim because it is not ripe. *See St. Clair*, 880 F.2d at 201 (ripeness pertains to a federal court's subject matter jurisdiction). Because

that cannot be cured, the Court DISMISSES the claim without leave to amend.

B. Plaintiff's due process claim is time-barred and fails to state a claim.

The basis for Plaintiff's second claim is that Defendants violated his Fifth and Fourteenth Amendment right to due process when the Board denied his application in February 2009 without making factual findings, which the Court of Appeal subsequently held was required under § 65589.5(j). Compl. at ¶¶ 87-88.[8] The claim, brought under § 1983, is subject to a two-year statute of limitations. *Action Apartment Ass'n, Inc. v. Santa Monica Rent Control Bd.*, 509 F.3d 1020, 1027 (9th Cir. 2007) ("It is well-established that claims brought under § 1983 borrow the forum state's statute of limitations for personal injury claims . . . and in California, that limitations period is two years.") (citations omitted). Plaintiff does not dispute his claim was filed outside this statute of limitations; however, he argues

[8] Plaintiff seems to suggest in his opposition that the County's alleged failure to prepare a timely administrative record for his 2009 mandamus proceedings violated his due process rights. *See* Doc. 9 at 12. Although he alleges in his complaint that the County failed to provide the record for over 190 days after he requested it in April 2009, allegedly in violation of a provision of the Map Act, *see* Compl. at ¶ 35, he does not indicate in the complaint that this forms part of the basis for his due process claim. *See id.* at ¶¶ 86-90. But, for the reasons explained below, even if it did, the claim would remain barred by the statute of limitations and would not state a cognizable due process violation.

the statute was tolled during his state court proceedings. Doc. 9 at 16.

Plaintiff asserts his due process claim, predicated on the Board's 2009 *denial* of his application, did not accrue until the Board *approved* his application in 2012. Frankly, the Court does not follow the logic of this argument. The Court of Appeal in *Honchariw II* found that Plaintiff's due process claim in that case, which is materially indistinguishable from the one he brings in this case, accrued when the Board denied his application in 2009. The Court agrees. *See TwoRivers v. Lewis*, 174 F.3d 987, 991 (9th Cir. 1999) ("[A] claim accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action.").

Plaintiff correctly notes that he potentially could have tolled the statute of limitations pending his state court proceedings. "[I]t is well established in California that the statute of limitations is equitably tolled on claims in a second-filed action only during the pendency of identical claims in a first-filed action that was pursued in a different forum." *Mitchell v. Snowden*, No. 2:15-cv-1167-TLN-AC P, 2016 WL 5407858, at *5 (E.D. Cal. June 10, 2016) (collecting cases). Plaintiff therefore could have tolled the statute of limitations had he filed his due process claim in his 2009 mandamus action, but he did not assert any due process violation until his 2012 case. *See Honchariw II*, 238 Cal. App. 4th at 14-15. The statute therefore was not tolled and, accordingly, his due process claim remains time-barred.

Even if it were timely, his due process claim fails to state any due process violation. As noted, the only basis for the claim is Plaintiff's assertion that the Board's denial of his application without making factual findings violated his due process rights. To state a claim on that basis, the Board's action must have been so "egregious" that it amounts to an "abuse of power lacking any reasonable justification in the service of a legitimate governmental objective." *Shanks v. Dressel*, 540 F.3d 1082, 1088 (9th Cir. 2008) (citations and quotation marks omitted). This is an "exceedingly high burden." *Matsuda v. City & Cty. of Honolulu*, 512 F.3d 1148, 1156 (9th Cir. 2008). The Court cannot find – and Plaintiff does not provide – any authority that remotely supports Plaintiff's position that the Board's conduct violated his due process rights. Because amendment would be futile, the Court DISMISSES Plaintiff's due process claim without leave to amend.

V. CONCLUSION AND ORDER

For the foregoing reasons, the Court GRANTS Defendants' motion to dismiss without leave to amend. The Clerk of Court is directed to CLOSE this case.

IT IS SO ORDERED.

Dated: **November 14, 2016** **/s/ Lawrence J. O'Neill**
UNITED STATES
CHIEF DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NICHOLAS HONCHARIW, Trustee, Honchariw Family Trust, Plaintiff-Appellant, v. COUNTY OF STANISLAUS; BOARD OF SUPERVISORS OF COUNTY OF STANISLAUS, Defendants-Appellees.	No. 16-17256 D.C. No. 1:16-cv-01183-LJO-BAM Eastern District of California, Fresno ORDER (Filed Apr. 27, 2018)

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

The panel has voted to deny Plaintiff-Appellant's petition for panel rehearing. Judge Friedland has voted to deny the petition for rehearing en banc, and Judges Schroeder and Torruella have so recommended.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

---

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

APPENDIX D

Nicholas Honchariw
3 Via Paraiso West
Tiburon CA 94920
(415) 225 3048
nh@nhpart.com
SBN 55126

Attorney for Plaintiff
Nicholas Honchariw, Trustee
Honchariw Family Trust

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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

THE NATURE OF THIS ACTION

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

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

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

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

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

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

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

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

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

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

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

THE PARTIES

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

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

JURISDICTION AND VENUE

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

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

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

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

FACTUAL ALLEGATIONS COMMON TO CLAIMS

Background

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

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

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

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

Subdivision

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

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

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

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

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

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

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

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

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

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

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

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

Disapproval of Subdivision

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

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

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

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

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

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

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

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

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

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

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

Mandamus Action to Set Aside Disapproval

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Approval Finally

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

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

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

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

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

Impact of Delay

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

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

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

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

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

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

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

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

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

60. Plaintiff has received no compensation for his losses.

State Inverse Condemnation Action

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

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

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

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

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

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

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

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

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

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

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

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

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

Subdivision Post-Approval

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

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

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

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

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

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

FIRST CAUSE OF ACTION
TAKING WITHOUT JUST COMPENSATION

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

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

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

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

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

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

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

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

85. Accordingly Plaintiff is entitled to just compensation.

SECOND CAUSE OF ACTION
DENIAL OF DUE PROCESS

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

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

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

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

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

WHEREFORE Plaintiff prays judgment against Defendants as follows:

On the FIRST CAUSE OF ACTION:

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

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

iii. For costs of suit; and

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

On the SECOND CAUSE OF ACTION:

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

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

iii. For costs of suit;

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

Dated: August 9 2016

Respectfully submitted,

/s/ Nicholas Honchariw
Nicholas Honchariw,
Counsel for Plaintiff

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

Respectfully submitted,

/s/ Nicholas Honchariw
Nicholas Honchariw,
Counsel for Plaintiff

[Exhibit A Omitted]