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Appendix 1

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U.S. COURT OF APPEALS

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THOMAS GEARING; DANIEL GEARING, Plaintiffs-Appellants, v. CITY OF HALF MOON BAY, Defendant-Appellee.	No. 21-16688 D.C. No. 3:21-cv-01802-EMC OPINION

Appeal from the United States District Court for the Northern District of California Edward M. Chen, District Judge, Presiding

Argued and Submitted October 20, 2022
San Francisco, California

Before: SIDNEY R. THOMAS and MILAN D. SMITH, Jr., Circuit Judges, and MICHAEL J. McSHANE,* District Judge.

Opinion by Judge Milan D. Smith Jr.

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

Appendix 2

*****

M. SMITH, Circuit Judge:

After the City of Half Moon Bay rejected Thomas and Daniel Gearing's proposal to develop housing on their properties, they sued the City in federal court pursuant to 42 U.S.C. § 1983, alleging a regulatory taking and related claims. The City then initiated eminent domain proceedings in state court to acquire the Gearings' properties. The City filed a motion in the federal case to abstain pursuant to *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), pending resolution of the eminent domain action. The district court granted the motion, and the Gearings now appeal.

The Gearings argue that *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019) and *Pakdel v. City and County of San Francisco*, 141 S. Ct. 2226 (2021), which rejected state-forum exhaustion requirements for takings claims, preclude *Pullman* abstention in this case because abstention would force them to litigate their federal claims in state court. They alternatively assert that the requirements for *Pullman* abstention are not met. We affirm because *Knick* and *Pakdel* do not apply here, and the requirements for abstention are met.

FACTUAL AND PROCEDURAL BACKGROUND

The Gearings own six undeveloped parcels of property in the West of Railroad (WRR) area of the City of Half Moon Bay. Their properties are subject to the City's land-use restrictions. The City's Land Use Plan (LUP) zones the WRR area for public recreation and severely restricts housing development. Under LUP Section 9.3.5, a landowner seeking to build in the

WRR area is first required to submit a master plan that analyzes the impact of the proposed development on the area's conservation and recreation zones. The city council and an environmental review board must then approve the plan.

On October 1, 2020, the Gearings submitted a letter to the City, titled "Preliminary Application for Development from Thomas Gearing and Daniel Gearing Pursuant to Housing Crisis Act and Senate Bill 330," which they contend was an application to build housing on their properties pursuant to California Senate Bill 330 (SB 330). SB 330 was enacted in 2019 to increase the stock of affordable housing in the state, and it prohibits local agencies from rejecting affordable-housing proposals unless the agency makes a specific written finding that the project would have an adverse impact upon the public health or safety. Cal. Gov't Code § 65589.5(a)(1)(A), (d). The Gearings take the position that SB 330 requires the City to approve their proposed development project.

The City rejected the proposal and informed the Gearings that SB 330 did not require approval of their proposed project because a master plan for the WRR area had never been approved, as required by LUP Section 9.3.5. Three months later, the City informed the Gearings that it intended to acquire their properties through eminent domain and made an offer to purchase the properties based on their appraised values, which the Gearings rejected.

On March 15, 2021, the Gearings filed this action in the district court, claiming, among other things, that the City effected a regulatory taking in violation of the Fifth and Fourteenth Amendments by rejecting

their building proposal and enforcing LUP Section 9.3.5's restrictions on their property. On March 23, the City filed an eminent domain action in state court. The City then filed a Motion to Abstain in the federal case pending resolution of the state action, which the district court granted. The Gearings now appeal.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction pursuant to 28 U.S.C. § 1291. We review a district court's *Pullman* abstention under a modified abuse of discretion standard. *Smelt v. County of Orange*, 447 F.3d 673, 678 (9th Cir. 2006). "We first review *de novo* whether the requirements for *Pullman* abstention are satisfied." *Courthouse News Serv. v. Planet*, 750 F.3d 776, 782 (9th Cir. 2014). "If they are not, the district court has 'little or no discretion' to abstain; if they are, we review the decision to abstain for an abuse of discretion." *Id.* (quoting *Almodovar v. Reiner*, 832 F.2d 1138, 1140 (9th Cir. 1987)).

ANALYSIS

Pullman abstention is "an equitable doctrine that allows federal courts to refrain from deciding sensitive federal constitutional questions when state law issues may moot or narrow the constitutional questions." *San Remo Hotel v. City & County of San Francisco*, 145 F.3d 1095, 1104 (9th Cir. 1998) (*San Remo Hotel I*). It is appropriate where (1) the federal constitutional claim "touches a sensitive area of social policy," (2) "constitutional adjudication plainly can be avoided [or narrowed by] a definitive ruling" by a state court, and (3) a "possibly determinative issue of state law is doubtful." *Sinclair Oil Corp. v. County of Santa Barbara*, 96 F.3d 401, 409 (9th Cir. 1996) (quoting

Pearl Inv. Co. v. City & County of San Francisco, 774 F.2d 1460, 1463 (9th Cir. 1985)). Abstention serves the interests of both federalism and judicial economy. *See Pullman*, 312 U.S. at 501.

I. *Knick* and *Pakdel* Do Not Preclude *Pullman* Abstention

The Gearings first argue that the Supreme Court's recent rulings in *Knick* and *Pakdel* preclude *Pullman* abstention when abstention would subject a takings plaintiff to "effective exhaustion requirement[s]." Prior to *Knick* and *Pakdel*, a plaintiff challenging a state land-use policy under the Takings Clause of the Fifth Amendment—which provides that "private property [shall not] be taken for public use, without just compensation"—needed to overcome the exhaustion and ripeness hurdles set out in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985). *Williamson County* held that takings plaintiffs may not bring their claims in federal court until they have tried, and failed, to obtain just compensation through state channels. *Id.* at 194–95. The Court held that a takings claim was not ripe until (1) "the government entity charged with implementing the [land-use] regulations has reached a final decision regarding the application of the regulations to the property at issue," *id.* at 186, and (2) "the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State," *id.* at 95.

Knick overturned the latter, and *Pakdel* clarified the former of these ripeness requirements. In *Knick*, the Court held that a property owner "acquires an irrevocable right to just compensation *immediately* upon a taking" and is not required to seek and be

denied compensation in state court before bringing a federal claim. 139 S. Ct. at 2172 (emphasis added). The Court reasoned that requiring property owners to go first to state court would impose "an unjustifiable burden" by "effectively establish[ing] an exhaustion requirement." *Id.* at 2167, 2172.

In *Pakdel*, the Court rejected the imposition of an *administrative* exhaustion requirement on takings plaintiffs. *Pakdel* clarified that *Williamson County*'s "final decision" rule is "relatively modest" and does not require property owners to pursue every administrative channel theoretically available to them. 141 S. Ct. at 2229–31. Instead, "[a]ll a plaintiff must show is that there is no question about how the regulations at issue apply to the particular land in question." *Id.* at 2230 (cleaned up).

The Gearings argue that these cases also preclude *Pullman* abstention in certain takings actions. As an initial matter, neither *Knick* nor *Pakdel* explicitly limit abstention in takings litigation. Neither case even addresses abstention. Rather, they address ripeness, which goes to *when a claim accrues* for purposes of judicial review. *See, e.g.*, *Knick*, 139 S. Ct. at 2170 ("[A] property owner has a claim . . . *as soon as* a government takes his property for public use without paying for it." (emphasis added)); *id.* at 2168 ("[An] owner has suffered a violation . . . when the government takes his property . . . and therefore may bring his claim in federal court under § 1983 *at that time*." (emphasis added)).

Abstention, on the other hand, allows courts to stay claims that have *already* accrued. *See*, *e.g.*, *San Remo Hotel v. City & County of San Francisco*, 545 U.S. 323, 324 (2005) (*San Remo Hotel II*) ("[The court]

invoked *Pullman* abstention after determining that a ripe federal question existed as to petitioners' facial takings challenge."). Abstention doctrines do not create a condition precedent to litigation; rather, they serve federalism by allowing a state court to decide state-law issues in the first instance. *See Harman v. Forssenius*, 380 U.S. 528, 534 (1965) ("[A]bstention may be proper in order to avoid unnecessary friction in federal[-]state relations[and] interference with important state functions.").

The Gearings acknowledge this but argue that *Knick* and *Pakdel implicitly* preclude abstention in this case because it would subject them to "effective exhaustion requirement[s]"—"the same functional problem litigants faced under the now-repudiated *Williamson County*." They claim that *Knick* and *Pakdel* should be "broadly understood to [reject] any rule that poses an undue burden upon § 1983 litigants by requiring an effective exhaustion requirement."

The Gearings argue that abstention here forces them to litigate their regulatory taking claim as part of the state-court eminent domain action before they can seek federal judicial review. They assert that, because the eminent domain action requires the state court to determine the amount of compensation the City must pay for the Gearings' properties, the state court must also determine whether the City committed a prior regulatory takings by prohibiting development of the properties. They claim that "resolution of . . . the prior taking . . . is a prerequisite to the ascertainment of the scope of rights [that the City will] acquire[] in the eminent domain action and the appraisal of their worth." We understand their theory to be that, if the City's denial of the Gearings'

building proposal and enforcement of LUP Section 9.3.5 constituted a taking, then the properties are more valuable than they otherwise would be, and the City must pay more compensation in the eminent domain action.

However, even assuming *Knick* and *Pakdel* were understood (*arguendo*) to broadly reject "effective exhaustion requirements" in the takings context, abstention does not impose such requirements in this case. The state court can adjudicate the eminent domain action without reaching the regulatory taking issue because eminent domain and regulatory takings suits compensate property owners for different injuries. Eminent domain compensates property owners for the forced sale of their properties to the government; the property is transferred to the government, and the owner is paid the property's fair market value as of the date the government made a deposit on the property. Cal. Code Civ. Proc. § 1263.310. A regulatory taking action, on the other hand, compensates a property owner for "[t]he economic impact of [a] regulation . . . and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations." *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538–39 (2005) (quoting *Penn Central Transp. Co v. New York City*, 438 U.S. 104, 124 (1978)); Steven J. Eagle, *Regulatory Takings* § 8–9(a) (2021) (surveying methods of calculating compensation proportional to harm and level of interference).

In this case, even if the regulatory taking issue *could* be analyzed as part of the fair market value calculation in the eminent domain action, it need not be. The Gearings could defend the eminent domain

action without challenging the constitutionality of the City's enforcement of LUP Section 9.3.5 or other regulations, and simply recover the fair market value of the property *as restricted* by those regulations. When the eminent domain action concludes, they could then litigate their regulatory taking claim in federal court and recover damages for the economic impact of the regulation and interference with their investment-backed expectations.[1] *See Lingle*, 544 U.S. at 538–39. The Gearings have not cited, and we are not aware of, any support for their assertion that the constitutionality of the City's restrictions on their properties must be adjudicated *before* compensation can be determined for purposes of eminent domain.

Moreover, the Gearings have made an *England* reservation in the state proceedings, which prevents the state court from ruling on federal issues. Under *England v. Louisiana State Board of Medical Examiners*, a litigant can explicitly reserve the right to have any federal questions that may arise in a state action be adjudicated in federal court after resolution of the state action. 375 U.S. 411, 421 (1964); *see Los Altos El Granada Inv'rs v. City of Capitola*, 583 F.3d 674, 687 (9th Cir. 2009). This provides "a backstop for

[1] To the extent the Gearings argue that this would result in issue preclusion that would bar their federal claims, they are incorrect, because issue preclusion only applies to issues that were "*actually litigated* and decided in the prior proceedings." *Snoqualmie Indian Tribe v. Washington*, 8 F.4th 853, 864 (9th Cir. 2021) (emphasis added). As noted, the Gearings would not be required to litigate their takings claim in the eminent domain action. Thus, this case is distinct from *San Remo Hotel II*, in which the property owners were required to litigate their takings claim in state-court proceedings in order for those claims to ripen for federal review. *See* 545 U.S. at 347.

cases . . . [where] a state court might mistakenly attempt to eliminate th[e] right" to try federal claims in federal court. *Los Altos El Granada Inv'rs*, 583 F.3d at 688. The Gearings have already taken steps to insulate their federal claim from state-court adjudication, and there is no reason to believe they cannot defend the eminent domain action while keeping their takings claim intact for federal review. Accordingly, even if *Knick* and *Pakdel* were read to prohibit abstention when it would create effective exhaustion requirements for takings plaintiffs, those cases would not preclude abstention in this case.[2]

II. *Pullman*'s Requirements Are Satisfied

Alternatively, the Gearings argue that even if *Knick* and *Pakdel* do not preclude *Pullman* abstention, its requirements are not satisfied in this case. Those requirements are:

(1) The complaint touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open.

(2) Such constitutional adjudication plainly can be avoided [or narrowed] if a definitive ruling on the state issue would terminate the controversy.

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[2] Plaintiffs also argue that litigating the eminent domain action first would create the risk that they would be deprived of the right to a jury trial on their takings claims. Assuming such a jury right exists in this case, the argument fails because, as explained, Plaintiffs will not have to adjudicate their takings claims in state court. In any event, they did not raise this issue before the district court, so it is waived. *See Ramirez v. County of San Bernardino*, 806 F.3d 1002, 1008–09 (9th Cir. 2015).

(3) The possibly determinative issue of state law is doubtful.

Sinclair Oil, 96 F.3d at 409. Each requirement is satisfied here.

A. Touches sensitive area of social policy

We have long "held that land use planning is a sensitive area of social policy that meets the first requirement for *Pullman* abstention." *Id.* (cleaned up); *see Columbia Basin Apartment Ass'n v. City of Pasco*, 268 F.3d 791, 802 (9th Cir. 2001); *Kollsman v. City of Los Angeles*, 737 F.2d 830, 833 (9th Cir. 1984); *Rancho Palos Verdes Corp. v. City of Laguna Beach*, 547 F.2d 1092, 1094–95 (9th Cir. 1976). In their complaint, the Gearings challenge the City's denial of their building proposal pursuant to LUP Section 9.3.5. This pleading alone satisfies the first *Pullman* requirement.

B. Constitutional question could be narrowed by state-law ruling

The second factor requires that "the constitutional question [in the federal claim] could be mooted or narrowed by a definitive ruling on the state law issues." *San Remo Hotel I*, 145 F.3d at 1104. It is sufficient if the answers to the relevant state-law questions may "reduce the contours" of the federal litigation. *Smelt*, 447 F.3d at 679 (quoting *C–Y Dev. Co v. City of Redlands*, 703 F.2d 375, 380 (9th Cir. 1983)).

In this case, the ruling in the state eminent domain action will likely narrow the federal litigation because it will require the state court to interpret LUP Section 9.3.5 and SB 330, and the proper

interpretation of these regulations are also relevant to the federal claims. To determine compensation in the eminent domain action, the state court must ascertain the Gearings' properties' fair market values. *See* Cal. Code Civ. Proc. § 1263.310. Those values must account for any "lawful legislative and administrative restrictions on property [that] a buyer would take into consideration" in valuing the properties. *City of Perris v. Stamper*, 376 P.3d 1221, 1233 (Cal. 2016). Accordingly, the state court will be required to construe LUP Section 9.3.5, SB 330, and any other regulations that encumber or otherwise apply to the Gearings' properties to decide proper compensation in the eminent domain action.

The Gearings' federal claims also implicate LUP Section 9.3.5 and SB 330. In their complaint, the Gearings assert that the City unlawfully applied LUP Section 9.3.5 to their property by denying their development proposal and that SB 330 directs the City to approve the proposal. In turn, part of the City's justification for denying the proposal was its understanding that SB 330 did not require approval of the Gearings' proposal because they did not comply with the "specific plan" provision of LUP Section 9.3.5. As such, a district court adjudicating the Gearings' federal claims will almost certainly need to ascertain the proper interpretation of LUP Section 9.3.5 and SB 330 and how they interact as applied to the Gearings' properties. Allowing the state court to first interpret these state-law rules would streamline and simplify the federal action and may narrow the federal claims.

C. Involves unclear question of state law

Because of the localized and complex nature of land-use regulations, we generally require only a

minimal showing of uncertainty in land-use cases. *See, e.g.*, *Sinclair Oil*, 96 F.3d at 410 (third factor met when "conventional inverse condemnation claim" was not "particularly extraordinary or unique" or "raise[d] a novel claim of statutory interpretation" because the local zoning plan "had not yet been challenged in the state courts"); *San Remo Hotel I*, 145 F.3d at 1105 (third factor met when plaintiff challenged specific application of land-use ordinance to his property); *Sederquist v. City of Tiburon*, 590 F.2d 278, 282 (9th Cir. 1978) (third factor met in case challenging local permitting regulations because "of the many local and state-wide land use laws and regulations applicable to the area in question").

Here, the interaction between SB 330 and the City's LUP Section 9.3.5 is uncertain. SB 330 has not been interpreted by any California courts, and so its impact, if any, on local regulations like LUP Section 9.3.5 is unsettled. We therefore find the minimal requirement for uncertainty satisfied in this case. *See Rancho Palos Verdes*, 547 F.2d at 1095 (finding third factor met in case challenging land-use restrictions when recently enacted statutes that may provide plaintiff relief had not yet been interpreted by state courts).

CONCLUSION

For these reasons, we **AFFIRM** the district court's order granting the City's motion to abstain.

AFFIRMED.

Appendix 14

Filed Sept. 13, 2021

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

THOMAS GEARING, et al., Plaintiffs, v. CITY OF HALF MOON BAY, Defendant.	Case No. 21-cv-01802-EMC **ORDER GRANTING DEFENDANT'S MOTION TO ABSTAIN, AND STAYING CASE** Docket No. 17

Plaintiffs filed a § 1983 suit against the City of Half Moon Bay and Does 1–10, inclusive, alleging, *inter alia*, a regulatory taking of Plaintiff's undeveloped land in violation of the Fifth and Fourteenth Amendments. Complaint (Docket No. 1). Plaintiffs allege that the City unconstitutionally designated their land as a public park and stymied development through land use regulations. About one week after Plaintiffs filed suit in federal court, the City filed an eminent domain action involving the same parties and property in state court, *City of Half Moon Bay v. Gearing, San Mateo County Superior Court*, Case No. 21-CIV-01560 (filed March 23, 2021). Before the Court is the City's Motion to Abstain from adjudicating the federal action under the *Pullman* abstention doctrine. Docket No. 17. Also before the Court are Plaintiffs' Objection to Reply Evidence (Docket No. 28), Plaintiffs' two Requests for Judicial Notice (Docket No. 28-1; Docket No. 37), and the City's Request for Judicial Notice (Docket No. 41).

Appendix 15

I. BACKGROUND

A. Factual Background

In the complaint, Plaintiffs allege as follows.

Plaintiffs Thomas and Daniel Gearing are the owners of six undeveloped parcels of land in the West of Railroad area of the city of Half Moon Bay. Compl. ¶¶ 1–2. This case challenges the constitutionality of the conditions for approval that govern development within the West of Railroad area. *Id.* ¶ 9. For approximately 40 years, West of Railroad has been designated a public recreation park by the City, and the entire 32 acres (which includes Plaintiffs' properties) have been walked over regularly as a means of public access to a coastal trail along the beach. *Id.* ¶ 15. By designating West of Railroad as a regional park and unconstitutionally treating it as a park, the City's unconstitutional regulations, treatment, activities, physical invasions, and actions have constituted a taking of Plaintiffs' properties without just compensation. *Id.* ¶ 16.

In 1993, the City certified its Land Use Plan ("LUP"), Section 9.3.5 of which provides: "[n]o development shall be permitted until an opportunity for acquisition and addition to the state beach has been allowed and the State Department of Parks and Recreation has indicated no intent to acquire. Such determination by the State Department of Parks and Recreation shall be made within one year after certification of the Land Use Plan." *Id.* ¶ 18. Section 9.3.5 of the LUP also contemplates that "limited residential development" could be permitted in West of Railroad if State acquisition is not possible, provided there is a "complete replanning and re-

platting of the area." *Id.* ¶ 20. However, the City excluded Plaintiff's parcels from among those sites which it considered for development. *Id.* ¶ 28.

Plaintiff Thomas Gearing has paid his property taxes for his parcels with reasonable investment-backed expectation that he would one day be allowed to build single-family residential homes. *Id.* ¶ 25. However, the City has unconstitutionally lowered the value of the individual lots in West of Railroad through, *inter alia*, misrepresenting the existence of wetlands and sensitive habitats on Plaintiffs' parcels, physically invading the property, and clouding fee title by announcing its intent to condemn the property without initiating eminent domain proceedings. *Id.* ¶ 29.

In 2019, the state legislature enacted Senate Bill 330 ("S.B. 330"), The Housing Accountability Act, which applies to applications to build dwelling units on existing residential lots. *Id.* ¶ 32. S.B. 330 is a 2019 statute that was adopted by the California legislature to streamline local governments' evaluation of applications for proposed residential development projects. 2019 Cal. Stat. ch. 654; *see* Compl. ¶ 32. Notably, S.B. 330 prohibits a local agency from disapproving or conditioning approval in a manner that renders infeasible, a housing development project for very low, low, or moderate income households unless the local agency makes specified written findings based on a preponderance of the evidence in the record. 2019 Cal. Stat. ch. 654. On October 1, 2020, Plaintiffs submitted an application, pursuant to S.B. 330, to build dwelling units on their lots. Compl. ¶ 33. On October 13, 2020, the City informed Plaintiffs that it would not consider their application because it

did not comply with LUP Section 9.3.5, which requires adoption of a specific land use plan. *Id.* ¶ 34. Plaintiffs were told by the City Council that this decision was not appealable. *Id.* ¶ 35.

Based on the foregoing, Plaintiffs allege: (1) violations of 42 U.S.C. Section 1983 and the Fourteenth Amendment's Due Process Clause for the City's decision to impose conditions on the development of the subject lots and its refusal to prepare a specific plan for development of the West of Railroad lots; (2) a regulatory taking in violation of 42 U.S.C. Section 1983 and the Fifth and Fourteenth Amendments for the City's deprivation of any economically viable use for the subject lots and for Plaintiffs' investment-backed expectations; (3) a physical taking in violation of 42 U.S.C. Section 1983 and the Fifth and Fourteenth Amendments for the City's designation of the subject lots as a public recreation park and its physical intrusion onto the subject lots on numerous occasions; and (4) a violation of the Equal Protection Clause under the Fourteenth Amendment and 42 U.S.C. Section 1983 for the City's selective imposition of restrictions and requirements on the subject lots. *Id.* ¶¶ 40–50.

B. Procedural Background

In 2020, the City Council approved an update to the Land Use Plan ("LUP"), which allows residential development in the West of Railroad area but prioritizes public acquisition with the intent of preserving the surrounding blufftop area for its significant habitat, coastal access and recreation, and scenic value. Defendant's Mot. to Abstain ("Mot.") at 4–5. The City wishes to address the runoff and erosion concerns along this blufftop area and ensure

continued public access for recreational opportunities. *Id.* at 5.

The City is in the process of acquiring Plaintiffs' lots to implement the 2020 LUP update. *Id.* Prior to exercising the power of eminent domain, a local jurisdiction must appraise the property it seeks to acquire, then make an offer to purchase the property based on that appraisal. *Id.* (citing Cal. Gov't Code § 7267.2). If unable to reach agreement on a purchase price with the property owner, the jurisdiction may adopt a Resolution of Necessity ("RON") which authorizes the filling of an eminent domain action in state court. *Id.* (citing Cal. Civ. Proc. Code § 1245.220). On December 22, 2020, the City delivered to Plaintiffs a Notice of Decision to Appraise, a precursor to eminent domain; prior to adopting a RON, a "public entity," pursuant to Cal. Gov't Code § 7267.2(a)(1), "shall establish an amount that it believes to be just compensation therefor, and shall make an offer to the owner or owners of record to acquire the property for the full amount so established, unless the owner cannot be located with reasonable diligence." On January 21, 2021, the City made a formal offer to purchase Plaintiffs' property for the fair market value as determined by the City's appraisal. *Id.* Plaintiffs did not accept the offer, and the City subsequently adopted an RON at a March 16 hearing, which authorized the City Attorney to acquire the property by condemnation. *Id.* On March 23, the City filed an eminent domain action in state court, and on June 22, the City filed a Motion for Immediate Possession, requesting possession of the property by October 1, or as soon thereafter as possible. *Id.* at 5–6. The City states that the state court has yet to rule on this motion.

Plaintiffs filed this suit on March 15, 2021, the day before the City Council hearing on the RON (and eight days before the eminent domain action was filed by the City in state court). Docket No. 1. In the state eminent domain proceedings, Plaintiffs moved to stay proceedings pending resolution of the instant case. Mot. at 6. On September 2, 2021, the superior court denied Plaintiffs' motion without prejudice.[1] *See* Def. Request for Judicial Notice at 1, Docket No. 41.

II. LEGAL STANDARDS

A. *Pullman* Abstention

Pullman abstention is "an equitable doctrine that allows federal courts to refrain from deciding sensitive federal constitutional questions when state law issues may moot or narrow the constitutional questions." *San Remo Hotel v. City & Cty. of S.F.*, 145 F.3d 1095,

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[1] On September 8, 2021, the City filed a judicial notice of the state superior court's minute order denying Plaintiff's motion to stay the eminent domain proceedings in this Court. Def. Request for Judicial Notice, Ex. A, Docket No. 41. The Court can properly take judicial notice of this document because it can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned and their authenticity is not disputed. *See* Fed. R. Evid. 201; *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998–99 (9th Cir. 2010) ("It is appropriate to take judicial notice of this information, as it was made publicly available by government entities . . . , and neither party disputes the authenticity . . . or the accuracy of the information displayed therein."). Accordingly, this Court grants the City's request for judicial notice. However, it does not take notice of the truth of matters stated in those documents. *In re High-Tech Employee Antitrust Litig.*, 856 F.Supp.2d 1103, 1108 (N.D.Cal.2012) ("A court may also take judicial notice of the existence of matters of public record, such as a prior order or decision, but not the truth of the facts cited therein.").

1104 (9th Cir. 1998). *Pullman* abstention is appropriate where:

> "(1) The complaint touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open.
>
> (2) Such constitutional adjudication plainly can be avoided if a definitive ruling on the state issue would terminate the controversy.
>
> (3) The possibly determinative issue of state law is doubtful."

Sinclair Oil Corp. v. Cty. of Santa Barbara, 96 F.3d 401, 409 (9th Cir. 1996). *Cf. Courthouse News Serv. v. Planet*, 750 F.3d 776, 783–84 (9th Cir. 2014) (same elements). The doctrine does not exist for the benefit of either party, but rather "for 'the rightful independence of the state governments and for the smooth working of the federal judiciary.'" *San Remo Hotel*, 145 F.3d at 1105 (quoting *R.R. Com. of Tex. v. Pullman Co.*, 312 U.S. 496, 501 (1941)).

B. Fifth Amendment Takings Jurisprudence

The Takings Clause of the Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V. Previously, a landowner could not bring a Takings Claim under the Fifth Amendment until they exhausted the administrative procedures available at the state level. *See Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186 (1985) ("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"). This came to be known as the "state-litigation requirement." In *Knick*, the Supreme Court overruled the state-litigation requirement and held that "[a] property owner has an actionable Fifth Amendment takings claim when the government takes [] property without paying for it." *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2167 (2019). Thus, a property owner "has suffered a violation of his Fifth Amendment rights when the government takes his property without just compensation, and therefore may bring his claim in federal court under § 1983 at that time." *Id.* at 2168. The property owner need not exhaust state court proceedings before suing in federal court.

However, the government's decision challenged by the property owner must be final, a requirement not disturbed by *Knick*. The Supreme Court has clarified the standard for showing the final agency action necessary to ripen an as-applied claim under the Takings Clause. *See Pakdel v. City & Cty. of S.F.*, 141 S. Ct. 2226 (2021) ("[t]he finality requirement is relatively modest. All a plaintiff must show is that 'there [is] no question . . . about how the 'regulations at issue apply to the particular land in question'") (quoting *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 739 (1997)).

III. DISCUSSION

A. The Effect of *Knick* on *Pullman*

Defendant asks this Court to abstain in favor of the state court eminent domain suit under *Pullman*. Plaintiffs argue *Pullman* abstention in cases such as this is no longer appropriate after *Knick* and *Pakdel*. Opp'n at 11–16. The Court thus examines this threshold question.

In overruling the state-litigation requirement in *Williamson Cty. Reg'l Planning Comm'n*, 473 U.S. 172, the Supreme Court in *Knick* explained that due to that exhaustion requirement a takings plaintiff faced a Catch-22: "[h]e cannot go to federal court without going to state court first; but if he goes to state court and loses, his claim will be barred in federal court" by the preclusive effect of the state court judgment under *San Remo*. *Knick*, 139 S. Ct. at 2167. Plaintiffs contend that invocation of *Pullman* abstention would implicate the same "*San Remo* trap"; permitting the state court action to proceed would lead to collateral estoppel, depriving the property owner of their rights to litigate to bring their takings claims in federal court. Plaintiffs contend that "as a prerequisite to resolution of the issue of just compensation, the federal constitutional claim will have to be resolved by the state court." Opp'n at 16–17. In short, the dilemma created by the *San Remo* trap mitigates against the state litigation requirement in *Williams*.

Plaintiffs' assertion is without merit. First, nothing in *Knick* or *Pakdel* purports to overrule or even mentions *Pullman* or any other abstention doctrine. *Knick* and *Pullman* operate in different

spheres. *Knick* concerns the *ripeness* of a takings claim. *See Knick*, 139 S. Ct. at 2172 (holding, with respect to ripeness, that "a taking without compensation violates the self-executing Fifth Amendment *at the time of the taking*, [and] the property owner *can bring a federal suit* at that time") (emphasis added). The *Pullman* doctrine, on the other hand, does not concern the ripeness and timing of when a federal suit may be filed, nor does it impact *Knick*'s defining when a takings claim accrues. Instead, it addresses the circumstances when an otherwise ripe and properly filed suit may temporarily be held in abeyance in favor of a related state suit where warranted by the principles of comity and federalism. *See Pearl Inv. Co. v. San Francisco*, 774 F.2d 1460, 1462 (9th Cir. 1985) (holding that abstention is appropriate "where principles of comity and federalism justify *postponing the exercise of jurisdiction* that Congress conferred upon federal courts") (emphasis added). As the district court recently noted, "*Knick* did not abrogate the abstention doctrines or affect the applicable *Pullman* abstention factors" because the fact "[t]hat a case is properly before a federal court does not deprive the court from abstaining in appropriate circumstances." *Thinh Tran v. Dep't of Planning*, No. 19-00654 JAO-RT, 2020 U.S. Dist. LEXIS 103461, at *18 (D. Haw. June 12, 2020).[2]

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[2] Plaintiffs cite *EHOF Lakeside II, LLC v. Riverside Cty. Transp. Comm'n*, 826 F. App'x 669 (9th Cir. 2020) to suggest that there is an "altered landscape in this area of the law" following *Knick*. Opp. at 3. *EHOF Lakeside II* is an unpublished Ninth Circuit opinion wherein the plaintiff first brought an inverse condemnation claim in state court and subsequently brought a Fifth Amendment Takings Claim under § 1983 in federal court. *EHOF Lakeside II*, 826 F. App'x at 669. The Ninth Circuit found

Second, *Pullman* does not impose a universal prerequisite to suit like the state litigation exhaustion requirement in *Williamson County*. *Pullman* abstention is implicated only when there happens to be coordinate suits in both state and federal courts and where the federal court finds the *Pullman* requirements are met and chooses to exercise its discretion to abstain. It does not have the sweeping and unavoidable effect of *Williamson County's* state-exhaustion requirement. *See Knick*, 139 S. Ct. at 2167 (citing *San Remo Hotel*, 145 F.3d 1095) ("a state court's resolution of a claim for just compensation under state law *generally* has preclusive effect in any subsequent federal suit.") (emphasis added).

Third, the threat of being deprived of an opportunity to litigate the due process, equal protection, and regulatory takings claims in federal court as a result of collateral estoppel is substantially mitigated by the fact that the landowner "may readily forestall any conclusion that [they have] elected not to return to the District Court" to adjudicate their federal claims by informing the state court of their intention "to return to the District Court for disposition of [their] federal contentions." *England v. La. State Bd. of Med. Exam'rs*, 375 U.S. 411, 421 (1964)). This is known as an *England* reservation. *See*

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that all three *Pullman* abstention requirements had been met, and that because the state court action had been filed before *Knick*, it need not "decide the precise scope of *Pullman* in the post-*Knick* world." *Id.* at 670. For the reasons discussed herein, there is no reason why *Knick* cannot be harmonized with the *Pullman* abstention doctrine, especially as discussed *infra*, where Plaintiffs may make an *England* reservation in the state court eminent domain proceedings to preserve their ability to adjudicate their federal takings claims in a federal court.

Los Altos El Granada Inv'rs v. City of Capitola, 583 F.3d 674, 687 (9th Cir. 2009) (holding that a party "may accomplish a reservation of federal claims by making on the state record the reservation to the disposition of the entire case by the state courts") (internal citation omitted). The *England* reservation provides "a backstop for cases . . . [where] a state court might mistakenly attempt to eliminate th[e] right" to try federal claims in federal court. *Id.* at 688. *Cf. Colony Cove Props., LLC v. City of Carson*, 220 Cal. App. 4th 840, 879 (2013) ("[t]he presence of the *England* reservation clarifies in a manner helpful to both the court and the opposing party that a litigant wishes to limit the state court action to state issues"). In this case, the eminent domain action need not resolve the federal constitutional questions as to whether Plaintiffs' rights to due process and equal protection were violated and whether there was a regulatory taking prior to the use of eminent domain. The regulatory takings claim is likely to turn on such factors as the nature and magnitude of any investment backed expectations and the extent and effect of land use regulations on permissible uses. *See Lingle v. Chevron U.S.A. Inc.* 544 U.S. 528, 538–539 (primary factors for evaluating regulatory takings claims are the economic impact of the regulation on the claimant, "particularly the extent to which the regulation has interfered with the distinct-investment-backed expectations") (quoting *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124). The eminent domain action, on the other hand, is not dependent on whether there had been a regulatory taking. Hence, an *England* reservation provides an adequate safeguard against the "*San Remo* trap." *See Allen v. McCurry*, 449 U.S. 90, 103–

04, 101 S. Ct. 411, 419–20 (1980) (holding that there "no reason to believe that Congress intended to provide a person claiming a federal right an unrestricted opportunity to relitigate an issue already decided in state court simply because the issue arose in a state proceeding in which he would rather not have been engaged at all.").

Fourth, the Supreme Court decision in *Knick* was intended to restore takings rights under the Fifth Amendment to the same constitutional status of other constitutional rights. *See Knick*, 139 S. Ct. at 2169–2170 ("Fidelity to the Takings Clause and our cases construing it requires overruling *Williamson County* and restoring takings claims to the full-fledged constitutional status the Framers envisioned when they included the Clause among the other protections in the Bill of Rights."). The Court noted that the *Williamson County* exhaustion requirement imposed a burden not applicable to other federal constitutional rights. In contrast, to categorically exempt takings claims from *Pullman* abstention, while subjecting all other constitutional rights to it, rather than *restoring* takings rights under the Fifth Amendment to the same constitutional status of other constitutional rights, *Knick*, 139 S. Ct. at 2170, would *exalt* takings claims over all others. *Pullman* abstention presumes there is a federal constitutional right at issue, yet the doctrine recognizes that the interests of comity and federalism sometimes warrant abstention in favor of state court action. *See Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 723 (1996) ("Federal courts abstain out of deference to the paramount interests of another sovereign, and the concern is with principles of comity and federalism."). Thus, *Knick* does not categorically preclude district courts from applying the *Pullman*

doctrine where the prerequisites are met, even where such rights as equal protection or due process are involved. *See e.g. Richardson v. Koshiba*, 693 F.2d 911, 912 (9th Cir. 1982) (abstention was proper where the plaintiff alleged that his constitutional right to due process was violated but "the need to decide [] federal issues could be obviated by resolution of [] state law issues presented in this case . . . [and it would be] more appropriate to have Hawaii's courts decide [] sensitive questions of state law controlling judicial appointments"]; *See Pearl Inv. Co.*, 774 F.2d at 1462–65 (affirming the district court's stay of federal proceedings and abstention under *Pullman* where the plaintiff alleged substantive and procedural due process claims, an equal protections claim, and an inverse condemnation claim). As the Supreme Court acknowledged in *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 29 (1959), it has "required district courts . . . to stay their proceedings pending submission of the state law question to state determination" where the "issue touched upon the relationship of City to State," or "involved the scope of a previously uninterpreted state statute . . . ." *Id.* at 28; *see Leiter Minerals, Inc. v. United States*, 352 U.S. 220, 229. There is no categorical exemption for eminent domain suits—the Supreme Court recognized the "considerations that prevailed in conventional equity suits for avoiding . . . disruption by federal courts of state government . . . are similarly appropriate in a state eminent domain proceeding brought in, or removed to, a federal court." *Louisiana Power & Light Co.*, 360 U.S. at 28. The Supreme Court noted that due to its "special nature," eminent domain "justifies a district judge, when his familiarity with the problems of local law so counsels him, to ascertain

the meaning of a disputed state statute from the only tribunal empowered to speak definitively—the courts of the State under whose statute eminent domain is sought to be exercised . . . ."). *Id.* at 29.

B. Application of the Pullman Abstention Doctrine

The City argues that all three requirements for application of the *Pullman* abstention doctrine are met: (1) the case touches on a sensitive area of social policy at the state level; (2) the Constitutional claims can be narrowed or avoided by a definitive ruling by the state court on the state claims; and (3) the possibly determinative issue of state law is uncertain. Mot. at 11–17.

1. Sensitive Issues of State Social Policy

The first *Pullman* requirement asks whether "[t]he complaint touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open." *Sinclair Oil Corp.*, 96 F.3d at 409. The Ninth Circuit has consistently "held that 'land use planning is a sensitive area of social policy that meets the first requirement for *Pullman* abstention.'" *Id.* (quoting *Kollsman*, 737 F.2d at 833).

In the instant case, Plaintiffs allege in the complaint that: the City unlawfully deprived them from developing the subject lots for any economically beneficial use when they were zoned for R1 single-family residential use at the time Plaintiffs acquired them (*see* Compl. ¶ 10); the City's application of Section 9.3.5 of its Land Use Plan to Plaintiffs' lots constitutes a regulatory taking and an unconstitutional restriction on development (*see* Compl. ¶¶ 18–24, 29–30); and the City's denial of

Plaintiffs' application for development of the subject lots under S.B. 330 was unlawful (*see* Compl. ¶¶ 31–35). As such, Plaintiffs' claims touch on various land use policies, namely Section 9.3.5 of the City's Land Use Plan and S.B. 330. Moreover, these land use issues appear to fit within the area of sensitive social policies recognized by the Ninth Circuit under the first *Pullman* requirement. *See Rancho Palos Verdes Corp. v. Laguna Beach*, 547 F.2d 1092, 1094–95 (9th Cir. 1976) (holding, in a case wherein the "complaint involve[d] land use planning," that the first *Pullman* requirement had been met because "California is attempting to grapple with difficult land use problems through new policies and new mechanisms of regulation" and "[f]ederal courts must be wary of intervention that will stifle innovative state efforts to find solutions to complex social problems").

Plaintiffs argue that "strict deference to local sensitivity [on land use issues] seems unwarranted today." Opp'n at 12. Because the regulation at issue, Land Use Plan Section 9.3.5, was enacted 35 years ago, Plaintiffs argue that the Court does not need to pay deference to the City's efforts to "innovate and solve complex social problems" which are no longer novel. *Id.* Plaintiffs note that the Ninth Circuit's application of the *Pullman* doctrine in *Rancho Palos Verdes* was premised on the notion that federal courts should not intrude upon novel state laws which seek to grapple with complex social problems. *Id. See Rancho Palos Verdes Corp.*, 547 F.2d at 1094–95 (finding that the first *Pullman* requirement was satisfied given the "web of [recent] statutes" which sought to provide innovative solutions to complex land use problems). As such, Plaintiffs argue that reasoning in *Rancho Palos Verdes* does not apply to

the instant case because the state and local policies at issue are no longer novel. Opp'n at 12.

Notably, Plaintiffs' complaint implicates S.B. 330, the Housing Crisis Act of 2019, which was enacted to alleviate California's housing crisis and aims to increase residential unit development and expedite permit processing. *Senate Bill 330 (Housing Crisis Act of 2019)*, City of Newport Beach, https://www.newportbeachca.gov/government/departments/communitydevelopment/planning-division/housing/senate-bill-330-housing-crisis-act-of-2019 (last visited 7/29/21). *See* Compl. ¶ 32 ("Senate Bill 330 applies to applications to build dwelling units on existing residential lots"). Plaintiffs allege that they are "intended beneficiar[ies]" of S.B. 330, and that they will be forced to leave the state and be separated from their families if they are not allowed to build on their own land due to the lack of affordable housing in California. *Id.* ¶ 31. Thus, like the web of recently enacted statutes in *Rancho Palos Verdes*, S.B. 330 is a recently enacted statute that addresses complex land use problems (i.e., low to medium residential housing development). As such, the rationale behind the first *Pullman* abstention requirement (deference to the efforts of localities to address complex land use problems through novel policies) applies here.

Because this case concerns a dispute over the City's land use planning policies and implicates S.B. 330, the first requirement for *Pullman* abstention is met.

2. Avoidance or Narrowing of Constitutional Claims

The second *Pullman* factor asks whether "the constitutional question could be mooted or narrowed by a definitive ruling on the state law issues." *San Remo Hotel*, 145 F.3d at 1104. *Cf. Bank of Am. Nat'l Tr. & Sav. Asso. v. Summerland Cty. Water Dist.*, 767 F.2d 544, 547 (9th Cir. 1985) ("the important [abstention] factor is not whether the constitutional issues are uncertain, but whether their resolution depends on state law and the extent to which they can be eliminated or simplified by state court proceedings").

The City argues that this factor is satisfied because the judgment in the state eminent domain action will largely moot the takings claims asserted in the instant case by transferring title to the City and providing just compensation to Plaintiffs for that transfer. Mot. at 14. Moreover, the City notes that the eminent domain proceeding will provide compensation for the *permanent* physical taking. *Id.* (citing Cal. Civ. Proc. Code § 1263.310) ("[c]ompensation shall be awarded for the property taken. The measure of this compensation is the fair market value of the property taken"). This could simplify but not entirely obviate the federal takings claims because, the state court proceedings will not likely address the alleged *temporary* takings claim.[3]

[3] Where there is a regulatory taking that deprives landowners of all beneficial uses of the property, landowners can bring an action for inverse condemnation and seek damages for that temporary taking. *See First English Evangelical Lutheran Church v. Cty. of L.A.*, 482 U.S. 304, 321, 107 S. Ct. 2378, 2389 (1987) ("where the government's activities have already worked

In eminent domain proceedings, landowners receive the fair market value of their home, as measured on the date on which the deposit is made. *See* Cal. Civ. Proc. Code § 1263.110(a) (in an eminent domain proceeding, "the date of valuation [of the property] is the date on which the deposit is made"). Plaintiffs allege that the City's denial of their October 13, 2020, application for development under S.B. 330 was a regulatory taking. *See* Compl. ¶¶ 33–35. The City did not make the deposit on the probable compensation for Plaintiffs' property until March 30, 2021 (five months later). *See* Reply at 4 n.2; Gonzalez Decl. ¶ 9 (Docket No. 17-1).

This narrowing of the federal constitutional claim satisfies the second *Pullman* factor. *See C-Y Dev. Co. v. Redlands*, 703 F.2d 375, 379–80 (9th Cir. 1983) (finding the second *Pullman* factor satisfied and abstention appropriate when the state court proceedings might resolve the *permanent* regulatory taking by the state, even though Plaintiff may subsequently return to federal court seeking damages for an alleged *temporary* deprivation of its property rights); *Sakatani v. City & Cty. of Honolulu*, No. 18-00331 JAO-RLP, 2019 U.S. Dist. LEXIS 32190, at *8–9 (D. Haw. Feb. 28, 2019) (finding second *Pullman* factor satisfied because adjudication of the state law claims may "transform Plaintiffs' federal takings claim from a permanent taking to a mere temporary taking").

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a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective").

3. Unresolved Questions of State Law

The third *Pullman* abstention factor asks whether "resolution of the possible determinative issue of state law is uncertain." *Courthouse News*, 750 F.3d at 783–84.

Here, the City contends that the third factor is met because the City's land use plan, zoning ordinance, and S.B. 330 have not been construed by California courts and are also at issue in the state eminent domain proceeding. Mot. at 17. The City points to a letter in which Plaintiffs acknowledge that S.B. 330 enacts "sweeping changes" to the construction of dwelling units that are "extraordinarily complex." *Id.* *See* Gonzalez Decl., Ex. E at 2 (Docket No. 17-1). In response, Plaintiffs claim that there are no relevant issues of state land use regulation yet to be considered by the state courts which would require this Court to resolve an uncertain determinative issue of state law. Opp'n at 9. Notably, the City states that "the parties dispute whether S.B. 330 preempts the City's land use controls" as Plaintiffs claim that S.B. 330 gives them "the right to immediately move forward with building dwelling units" and serves as an exception to local land use regulations. Mot. at 16. Additionally, in its opposition to Plaintiffs' motion to stay proceedings in the state eminent domain proceeding, the City notes that "resolution of the correct measure and amount of just compensation, including whether S.B. 330 applies to the Property, will moot or at least significantly narrow [Plaintiffs'] federal claims as the City will have conceded liability of the value of [Plaintiffs'] fee interest in the Property and a jury will determine the amount of just compensation." Pls. RJN, Ex.1, Opp'n to Mot. to Stay at 13, Docket No. 37-1. Hence, there is

likely an interplay between the applicability of S.B. 330 and the value of just compensation fixed by the state court in the eminent domain proceeding.

An interpretation of S.B. 330 will also likely inform the regulatory takings analysis herein. In particular, the instant complaint appears to challenge the way in which S.B. 330 operates, particularly in relation to section 9.3.5 of the City's LUP. Plaintiffs allege that they submitted "their preliminary application for development under Senate Bill 330 to build dwelling units on their lots." Compl. ¶ 33. The City informed Plaintiffs that it "refused to consider the application based upon LUP section 9.3.5 and the requirement of adoption of a specific plan, among other reasons." *Id.* ¶ 34. And when Plaintiffs sought to appeal this determination to the City Council, they were informed by the City that it had not taken any action that would constitute an appealable decision. *Id.* ¶ 35. Thus, Plaintiffs' complaint implicates (1) the procedures for building dwelling units set out in S.B. 330, a novel and complex state law, and (2) the interaction between S.B. 330 and LUP section 9.3.5, and whether the requirement that Plaintiffs adopt a specific land use plan contravenes S.B. 330.

Because the state court proceeding may resolve novel issues regarding S.B. 330, the third *Pullman* factor is met. *See Rancho Palos Verdes Corp.*, 547 F.2d at 1095 (finding the third *Pullman* requirement was satisfied because possible determinative questions of state law were uncertain since "recently enacted statutes might be authoritatively interpreted by the California courts to serve as a basis for finding that the defendants acted beyond their statutory authority"); *Sederquist v. Tiburon*, 590 F.2d 278, 282–

83 (9th Cir. 1978) (holding that the third *Pullman* factor had been met because the reasonableness of the conditions imposed by a locality on the issuance of building permits was "by nature a question turning on the peculiar facts of each case in light of the many local and state-wide land use laws and regulations applicable to the area in question"); *San Remo*, 145 F.3d at 1105 (application of local zoning ordinances to the issuance of a conditional use permit raised "uncertain issues of state law").

In sum, this case meets each of the three *Pullman* abstention requirements.

C. Prejudice to Plaintiffs

Plaintiffs argue that, even if the *Pullman* factors are met, abstention would be inappropriate because they will face delay and increased litigation expenses, as well as a diminished opportunity to recover attorneys' fees pursuant to 42 U.S.C. § 1988. Opp'n at 16–17. Additionally, Plaintiffs argue that they will have been deprived of their opportunity to have their Fifth Amendment takings claim resolved by this Court since the claim will necessarily be resolved by the state court's determination of just compensation in the eminent domain proceeding. *Id.* at 17.

Plaintiffs seem to be arguing that they have a right to have a *federal court* determine what constitutes "just compensation" for a taking of their property, and that a state court determination of the issue of just compensation would deprive them of this right. Notably, the Supreme Court has held that the Constitution does not guarantee that Plaintiffs must litigate their federal claims in federal court. *See Allen*, 449 U.S. at 103–04, 101 S. Ct. at 419–20 ("nothing in

the language or legislative history of § 1983 proves any congressional intent to deny binding effect to a state-court judgment or decision when the state court, acting within its proper jurisdiction, has given the parties a full and fair opportunity to litigate federal claims, and thereby has shown itself willing and able to protect federal rights"). Further, state law permits Plaintiffs to challenge the taking of their property on federal constitutional grounds. *See M&A Gabaee v. Cmty. Redevelopment Agency of L.A.*, 419 F.3d 1036, 1042 (9th Cir. 2005) (holding that landowners have the ability to challenge a government taking in state eminent domain proceedings "based not only on California state standards, but also on 'any other ground provided by law'") (citing Cal. Civ. P. Code § 1250.360(h)). Should the Plaintiffs not seek an adjudication of their takings claim in the eminent domain suit, they may reserve their regulatory takings claim in this court. As noted above, particularly with the *England* reservation, their substantive regulatory takings claims will not likely be fully adjudicated in the eminent domain proceeding since the government need not establish a prior regulatory taking in order to advance eminent domain. And although the value of the property found in the eminent domain case may affect the calculus of damages in the federal takings suit, it would do so primarily in regard to the permanent takings claim. Its impact, if any, on damages for any temporary takings is less clear.

Moreover, Plaintiffs seek (in addition to their takings claims) damages for a violation of the Due Process clause of the Fourteenth Amendment (the first cause of action), and damages for a violation of the Equal Protection Clause of the Fourteenth

Amendment (the fourth cause of action). Compl., Prayer for Relief ¶¶ 2–3. Because the due process and equal protection claims are not included in the state court complaint, it appears that the state court will not adjudicate Plaintiffs' due process and equal protection claims. Again, Plaintiffs may file an *England* reservation in order to preserve their federal claims. Plaintiffs also may return to federal court and seek attorneys' fees under § 1988 should they prevail on their constitutional claims herein.

Finally, Plaintiffs argue that, if the Court abstains and eminent domain proceedings continued, they would face prejudice in the form of "undue interference from the City." Opp'n at 17. Namely, Plaintiffs note that the City seeks prejudgment possession in an effort to deprive Plaintiffs of their right to conduct soil sample studies (to disprove the City's theory that the property consists of sensitive wetlands), of their right to enter the land and have it independently appraised, and of their right to have a contractor estimate the cost to install necessary infrastructure to support development of the lands. *Id.* However, Plaintiffs are not seeking prospective injunctive relief in their federal complaint, and it is unclear what relief this Court could offer that would prevent the City from interfering with the land. Plaintiffs only seek monetary relief.

Accordingly, the Court finds that *Pullman* abstention is warranted. Permitting a California court to determine the local issues may potentially narrow the issues presented in the federal constitutional litigation in this Court, and the principles of comity and federalism underlying *Pullman* support the court's decision to abstain under the circumstances of

this case. *See C-Y Dev. Co.,* 703 F.2d at 380 ("We are satisfied that the potential for . . . a narrowing of the constitutional issues and the principles of comity that will be furthered by allowing the state courts to first pass on the validity of this municipal ordinance under state law are sufficient 'countervailing interests' to justify abstention in this case," quoting *County of Allegheny v. Frank Mashuda Co.,* 360 U.S. at 188–89 (1959)).

IV. OBJECTION TO REPLY EVIDENCE

On July 29, 2021, Plaintiffs filed an Objection to Reply Evidence, arguing that the City improperly submitted new argument and evidence "as to matters which should have been foreseen and addressed in connection with [the] original filing . . . ." *See* Pls. Objection at 1:24–25, Docket No. 28. The Court does not rely on this evidence in its ruling herein. Accordingly, the Court denies Plaintiff's request for leave to file a sur-reply brief.

V. PLAINTIFFS' REQUESTS FOR JUDICIAL NOTICE

On July 29, 2021, Plaintiffs submitted a request for judicial notice of the following documents: (1) City of Half Moon Bay 1996 Local Coastal Land Use Plan; (2) City of Half Moon Bay 2020 Local Coastal Land Use Plan; (3) Complaint in Eminent Domain filed in San Mateo Superior Court Case No. 21-CIV-01560 on March 23, 2021; (4) Notice of Motion and Motion to Stay the Action filed in San Mateo Superior Court Case No. 21-CIV-01560 on June 14, 2021; (5) Defendant's Memorandum of Points and Authorities in Support of Motion to Stay the Action filed in San Mateo Superior Court Case No. 21-CIV-

01560 on June 14, 2021; (6) Declaration of Thomas J. Gearing in Support of Defendants' Motion to Stay the Action filed in San Mateo Superior Court Case No. 21-CIV-01560 on June 14, 2021; (7) Notice of Motion and Motion for Immediate Possession filed in San Mateo Superior Court Case No. 21-CIV-01560 on June 22, 2021; (8) Memorandum of Points and Authorities in Support of Motion for Immediate Possession filed in San Mateo Superior Court Case No. 21-CIV-01560 on June 22, 2021; and (9) Declaration of Jill Ekas in Support of City of Half Moon Bay's Motion for Immediate Possession filed in San Mateo Superior Court Case No. 21-CIV-01560 on June 22, 2021. *See* Pls. RJN, Docket No. 28-1.

On August 27, 2021, Plaintiffs submitted a request for judicial notice of the following filings in the state court eminent domain proceeding: (1) Opposition to Defendants' Motion to Stay; (2) Declaration of Benjamin Gonzalez in Support of Opposition to Defendants' Motion to Stay; (3) Declaration of Jill Ekas in Support of City's Opposition to Defendants' Motion to Stay; (4) Defendants' Reply to Opposition to Motion to Stay the Action; (5) Declaration of Thomas J. Gearing in Support of Defendants' Reply to Opposition to Motion to Stay the Action; (6) Defendants' Request for Judicial Notice in Support of Reply to Opposition to Motion to Stay the Action; (7) Defendant's Evidentiary Objections to Declaration of Jill Ekas Filed in Support of City's Opposition to Motion to Stay. *See* Pls. RJN, Docket No. 37.

The Court can properly take judicial notice of these documents because they can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned and their authenticity is not

disputed. *See* Fed. R. Evid. 201; *Daniels-Hall*, 629 F.3d at 998–99. Accordingly, the Court grants Plaintiffs' requests for judicial notice. However, it does not assume the truth of matters stated in those documents. *In re High-Tech Employee Antitrust Litig.*, 856 F.Supp.2d at 1108.

VI. CONCLUSION

For the forgoing reasons, the Court grants the City's Motion to Abstain and will retain jurisdiction of the federal constitutional issues pending proceedings in the state court. On the Court's own motion, the proceedings in Case No. 21-cv-01802 are stayed pending state court proceedings. The Court grants Plaintiffs' requests for judicial notice and denies Plaintiffs' request to file a sur-reply brief. The Court grants the City's request for judicial notice.

This order disposes of Docket Nos. 17, 28, 28-1, 37, and 41.

IT IS SO ORDERED.

Dated: September 13, 2021

s/ Edward Chen
EDWARD M. CHEN
United States District Judge

FILED
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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THOMAS GEARING; DANIEL GEARING, Plaintiffs-Appellants, v. CITY OF HALF MOON BAY, Defendant-Appellee.	No. 21-16688 D.C. No. 3:21-cv-01802-EMC Northern District of California, San Francisco ORDER

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

The panel has unanimously voted to deny the petition for panel rehearing; Judges S.R. Thomas and M. Smith have voted to deny the petition for rehearing en banc, and Judge McShane so recommends. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35. The petition for panel rehearing and the petition for rehearing en banc are DENIED.

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

Appendix 42

Filed Mar. 3, 2021

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

THOMAS GEARING and DANIEL GEARING, Plaintiffs, v. CITY OF HALF MOON BAY; and DOES 1-10, inclusive, Defendants.	Case No: COMPLAINT FOR DAMAGES FOR: (1) VIOLATION OF CIVIL RIGHTS-TAKING UNDER FIFTH AMENDMENT (42 U.S.C. § 1983) (2) VIOLATION OF CIVIL RIGHTS-DUE PROCESS (42 U.S.C. § 1983) (3) VIOLATION OF CIVIL RIGHTS-EQUAL PROTECTION (42 U.S.C. § 1983) **DEMAND FOR JURY TRIAL**

Plaintiffs Thomas Gearing and Daniel Gearing (collectively "Plaintiffs") allege the following:

PARTIES

1. Plaintiff Thomas Gearing is the fee owner of five undeveloped parcels of real property in the West of Railroad area of the City of Half Moon Bay, Assessor's Parcel Nos. 056-096-240; 056-096-480; 056-127-030; 056-127-040; and 056-128-090. These parcels were acquired in the early 1990's.

2. Plaintiff Daniel Gearing is the fee owner of one undeveloped parcel of real property in the West of Railroad area of the City of Half Moon Bay, Assessor's Parcel No. 056-125-210. This parcel was acquired in October, 2020, but was previously purchased by his grandfather in the early 1990's.

3. Defendant City of Half Moon Bay (City) is an incorporated city within the County of San Mateo, CA.

4. Plaintiffs are informed and believe and thereon allege that at all times relevant herein, each of the Defendant Does 1–10 were responsible in some manner for the occurrences and injuries alleged in this complaint. Their names and capacities are currently unknown to Plaintiffs. Plaintiffs will amend this Complaint to show such true names and capacities when the same have been ascertained.

JURISDICTION AND VENUE

5. This Court has jurisdiction of Plaintiffs' federal law claims pursuant to 28 U.S.C. §§ 1331 and 1343.

6. This Court has personal jurisdiction over the City because it regularly transacts business in the Northern District.

7. Pursuant to Civil L.R. 3-2(c) and (d), this case shall be assigned to the San Francisco or the Oakland Division because the action arises in San Mateo County. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 because the actions complained of took place in this judicial district, evidence is maintained in this judicial district, and the real property giving rise to the claims is situated in this judicial district.

8. This Court also has original jurisdiction pursuant to the United States Supreme Court decision in *Knick v. Township of Scott*.

FACTS COMMON TO ALL CAUSES OF ACTION

9. This action challenges the constitutionality of the conditions for approval that govern development within the West of Railroad area of the City. These conditions for approval violate the taking, due process, and equal protection provisions of the United States Constitution, both facially and as-applied. Plaintiffs have a ripe as-applied challenge as the City has denied Plaintiffs development rights.

10. Plaintiffs' properties are zoned for Planned Unit Development (PUD), which is intended to provide for a variety of land uses, such as attached and detached single-family residential development, yet is elsewhere designated as regional public recreation in the City's land use designation maps. When Plaintiff Thomas Gearing acquired his parcels they were zoned for R1 single-family residential use. Yet the City has placed arbitrary and unconstitutional barriers to development, depriving Plaintiffs of economically beneficial use, denying their reasonable investment backed expectations, and imposing conditions in violation of the United States

Supreme Court decision in *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*. The City has also collected property taxes with no allowance for beneficial use. The City has also used, entered, and publicized Plaintiffs' properties as accessible for physical use by the public. Thus the City is subject to physical as well as regulatory takings liability.

11. Plaintiffs' properties are located in the West of Railroad area of the City, a legally subdivided area of land with 145 parcels with a maximum potential build out of 130 dwelling units on 32 acres, all privately owned by various individuals and entities. The streets are named and their locations are designated on the plat map. There is no space to be designated as open space or public recreation, without the City's exercise of eminent domain. The entire area is on a bluff approximately 150' above sea level with expansive ocean views. The parcels generally range from 6000–7500 square feet.

12. The land on which Plaintiffs' properties are located is dry and flat and lightly covered in grass, in the middle of the City. There are no wetlands on or near it, no endangered species on or near it, and no environmentally sensitive habitats on or near it.

13. Plaintiffs' properties are far from the edge of the bluff. In fact the setback is one of the largest of any of the coastal communities in the City. The individual lots west of the 32 acres now serve as a public park and as a buffer from the bluff.

14. Past and present members of the Half Moon Bay City Council, Planning Commission and other City officials, and many residents of the City live in

the East of Railroad area east of the Subject Properties. Their ocean views are threatened by development of Plaintiffs' parcels.

15. For approximately 40 years the City has designated in its land use maps and publicly announced that the West of Railroad area which includes Plaintiffs' properties is a public recreation park adjoining its coastal trail recreation area. The entire 32 acres, including Plaintiffs' properties, have been walked over regularly as a means of public access to the coastal trail.

16. By designating and publicly announcing the West of Railroad area as a regional park and unconstitutionally treating it as a park by connecting it to its park system, the City's unconstitutional regulations, treatment, activities, physical invasions, and actions have taken Plaintiffs' properties without just compensation.

17. Foot trails have formed across the 32 acres, including trails on Plaintiffs' properties used as a connection to the City's park trail system. The City has taken no measures to prevent the public from accessing the 32 acres in general, and Plaintiffs' properties in particular. As a result, visitors to the City, local residents, real-estate agents, builders, title companies, escrow companies, and public and private employees believe it to be and treat it as an open-space park.

18. In 1993, the City certified its Land Use Plan (LUP). Section 9.3.5 of the LUP provides in part: "[n]o development shall be permitted until an opportunity for acquisition and addition to the state beach has been allowed and the State Department of Parks and

Recreation has indicated no intent to acquire. Such determination by the State Department of Parks and Recreation shall be made within one year after certification of the Land Use Plan." The one-year time period for State acquisition ended in 1997. The City also attempted and failed to obtain funding for the acquisition of the West of Railroad area.

19. The City did not and does not have the funds to purchase the 130 lots in the West of Railroad area, including Plaintiffs' properties. Current market prices for 6,000–7,500 square feet lots in the City range between $500,000.00 and $700,000.00. 130 lots at $500,000.00 each would cost the City $65,000,000.00. This explains the unconstitutional and pretextual restrictions on development: rather than pay for the lots, the City prefers to regulate away all development potential. Yet the lot owners should not be forced to pay for open space use; that is a price to be paid by the public as a whole, consistent with the Fifth Amendment to the United States Constitution.

20. Section 9.3.5 also provides that in the event the City does not take the West of Railroad area via eminent domain (which it did not) then a "limited residential development could be permitted under a complete replanning and re-platting of the area." This portion of section 9.3.5 provides:

> As in the case of Miramontes Terrace North, the preferred alternative, given Coastal Act priorities, is for acquisition of the subdivided area west of Railroad Avenue for State Beach expansion. Such acquisition would assure an adequate buffer between residential and recreational use in an area where the width of current public ownership is quite limited. This

> is the preferred use indicated as the primary designation on the Land Use Plan Map. In the event that State acquisition is not possible, limited residential development could be permitted under a complete replanning and re-platting of the area. Such re-planning is required to deal with unbuildable lots, to alter the mapped street system to minimize access conflicts and improve local circulation, to provide an adequate buffer between residential development and the public Beach area, to preserve views along the bluff tops, to preserve the existing cypress stands, and to eliminate the possibility of streets ending at the State Beach property.

21. Replanning and re-platting did not occur, and in any event the City cannot "replat" existing legal parcels.

22. The City also intentionally engaged in unconstitutional regulation of Plaintiffs' properties (along with the other lot owners in the West of Railroad area) by not adopting a Specific Plan, which has been used as a pretextual rationale for denying property owners the right of economic use. A property owner cannot possibly absorb the cost, time, and energy to unilaterally apply for and obtain adoption of a Specific Plan and Planned Unit Development (a legislative enactment) for the entire 32-acre site, which would require approval not just by the City but by other regulatory entities, including the California Coastal Commission, as well as an Environmental Impact Report. Plaintiff Thomas Gearing was wrongly informed by the City on more than one occasion that his lots were not buildable because the area is

designated as open space park. When he asked about the Planned Unit Development, he was told that this was a remote possibility and that he would first have to bear the time and expense of creating and submitting a Planned Unit Development plan for the West of Railroad area. Additionally, he was informed on more than one occasion that he would be bearing the time and expense of obtaining an EIR for the entire 32-acre area. The City understood at all times relevant that it had no funds to purchase the lots.

23. The LUP at section 9.3.5 states that the specific plan requirements are:

> 1) A specific plan shall be prepared for the entire area which incorporates all of the conditions listed below and conforms to all other policies of the Land Use Plan. The specific plan shall show the locations of roads and structures, and indicate the amount and location of open space, public recreation, and commercial recreation. The specific plan shall be subject to environmental review under City CEQA guidelines. The specific plan and accompanying environmental documents shall be submitted to the Planning Commission, who may recommend additional conditions for development of the site. The Planning Commission may reduce the allowable density if it is determined that Highway l and access routes to the beach are inadequate to accommodate the amount of proposed residential development in addition to public and commercial recreation. In adopting the specific plan, the

Planning Commission shall specify the number and type of housing units and open space requirements for each of the parcels which are under separate ownership or for each group of parcels which to be developed as a unit.

2) No development shall be permitted until an opportunity for acquisition and addition to the State Beach has been allowed and the State Department of Parks and Recreation has indicated no intent to acquire. Such determination by the State Department of Parks and Recreation shall be made within one year after certification of the Land Use Plan.

3) A maximum of 65 residential units may be developed on the site, clustered to preserve existing cypress stands, to ensure an adequate buffer from the public recreation area through the neighborhood.

4) Pedestrian accessways to the beach shall be dedicated and improved as a part of any development.

5) Suitable landscaping, fencing, and other means shall be used to ensure that there is a clear separation between new residential development and the public recreation area.

6) Access to the development shall orient primarily to Filbert and Poplar, rather than Kelly Avenue.

24. The LUP at section 9.3.2 state that all areas designated in the LUP for Planned Development shall be subject to the following policies:

1) The entire site shall be planned as a unit. Preparation or specific plans (Government Code Section 65450) may be required for one or more separate ownerships, individually or collectively, when parcels comprising a site designated PUD are in separate ownerships.

2) Use of flexible design concepts, including clustering of units, mixture of dwelling types, etc., shall be required to accomplish all of the following goals:

    A) Protection of the scenic qualities of the site;

    B) Protection of coastal resources, i.e. habitat areas, archaeological sites, prime agricultural lands, etc., as required by the Coastal Act;

    C) Avoidance of siting of structures in hazardous areas; and

    D) Provision of public open space, recreation, and/or beach access.

3) Permitted uses shall include:

    A) Any uses permitted and set forth in the zoning ordinance of the City of Half Moon Bay and consistent with the Local Coastal Plan.

    B) Recreational facilities, including but not limited to tennis courts, golf

courses, swimming pools, playgrounds, and parks for the private use of the prospective residents, or general public use.

C) Open space.

25. Plaintiff Thomas Gearing has paid property taxes for his parcels with the reasonable investment-backed expectation that he one day would be allowed to build single-family residential homes. Plaintiff Daniel Gearing paid the default of taxes on lot number 056-125-210 with the reasonable investment backed expectation that he one day would be allowed to build a single-family residential home.

26. The City has received and benefited from the property tax payments made by Plaintiffs and their predecessor owners based on the lots being R1 buildable lots, which tax revenues are used for the police department, fire department, schools, and other needs. The City is estopped from denying Plaintiffs the right to build.

27. In addition, Plaintiff Thomas Gearing and previous owners Juanita and Phillip Kendrick were expressly and wrongfully informed by the City that their parcel contained wetlands and environmentally-sensitive habitat and were not buildable for those reasons.

28. In the City's Housing Element 2015-2023 (one of the adopted elements of its General Plan), Plaintiffs' parcels are excluded from sites which have potential for development.

29. The City has thus lowered the value of the individual lots in the West of Railroad area by

unconstitutional treatment; unreasonable and indefinite delays now approaching ***28 years*** in initiating eminent domain proceedings (which have clouded Plaintiffs' title) despite the LUP's announcement of intent to condemn; misrepresentations regarding the existence of wetlands and sensitive habitats on the Plaintiffs' parcels; physical invasions; denial of water permits; and the other actions as set forth in this Complaint. The delay in initiating eminent domain proceedings is a *per se* delay and is inconsistent with requirement in Section 9.3.5 that City either purchase the properties or allow for economic use. The Specific Plan requirements of Section 9.3.5 are also the functional equivalent of a downzoning of Plaintiffs' parcels. The City did so in an effort to artificially deflate the value of the Properties so they can be purchased at a reduced price. This is illegal, inequitable, and unreasonable pre-condemnation conduct which cannot be used to deflate true highest and best use market value.

30. The City's conduct was pretextual and actually designed to accomplish two goals:

> 1) The regulations make it impossible or will deter anyone from developing or exercising their rights in the area, leaving it an open space park that adjoins to the existing city park; and 2) the impossibility of the regulations have caused the values of the properties to fall year over year, eventually allowing for the City to attempt to buy at a reduced price when the time is right for them.

31. Plaintiff Daniel Gearing is an intended beneficiary of California Senate Bill 330 because he

will be forced to leave the state and be separated from his family if he is not allowed to build on his own land, in particular due to the unaffordability of housing in California. Plaintiff Thomas Gearing's son Nicolas Gearing, who is 19 years old, is an intended beneficiary of Senate Bill 330 because he will be forced to leave the state and be separated from his family if Plaintiff Thomas Gearing is not allowed to build on his own land for the benefit of his son Nicolas Gearing, in particular due to the unaffordability of housing in California. Plaintiff Thomas Gearing is an intended beneficiary of Senate Bill 330 because he can provide housing to others.

32. On October 09, 2019 the state of California enacted Senate Bill 330 Housing Crisis Act of 2019, and numerous other government code sections and amendments to be effective January 1, 2020. Senate Bill 330 applies to applications to build dwelling units on existing residential lots.

33. On October 1, 2020 the Plaintiffs submitted their preliminary application for development under Senate Bill 330 to build dwelling units on their lots.

34. On October 13, 2020 the City informed Plaintiffs that it refused to consider the application based upon LUP section 9.3.5 and the requirement of adoption of a specific plan, among other reasons.

35. On October 21, 2020 Plaintiffs submitted an appeal to the City Council challenging the October 13, 2020 determination. In response, Plaintiffs were informed by the City it had not taken any action that would constitute an appealable decision.

36. On December 29, 1981, Plaintiff Thomas Gearing requested a water permit from the Coast Side

County Water District (District) to build his home at 300 Central Ave., Half Moon Bay (not a subject matter of this litigation), directly east across Railroad Avenue, from where the subject matter parcels exist. On 12/29/81 the District issued him permit number #421 (the permit also stated no charges or revocation exist until the Alsace Lorraine assessment district is built). The District held plaintiff Thomas Gearing's water priority right number 421 for 6 ½ years and installed the meter on June 26, 1987. Plaintiff paid $2,735 for the water permit.

37. Directly across Railroad Avenue, from 300 Central Ave. at the intersection of Railroad, where the subject properties are located, Plaintiff Thomas Gearing, after purchasing lots 056-127-040, 056-096-480, 056-128-090, 056-096-240, and 056-127-030, demanded on more than one occasion that the District issue him water permits for the subject lots. The District refused to honor Plaintiff Thomas Gearing's request because it was instructed and directed by the City not to issue permits as the properties were not buildable. This inequitable conduct by the City has artificially deflated the market value of Plaintiff Thomas Gearing's parcels, and the current cost of water permits on the open market is now approximately $100,000 per parcel, an economic loss of $500,000 for Plaintiff Thomas Gearing.

38. Plaintiff Thomas Gearing further demanded from the District that he be allowed to submit a written water service connection permit application for all of the subject lots and be put on priority list and given a priority number to secure his right to obtain a water permit. The District denied this request because it was instructed and directed by the City not

to issue permits or be put on the priority list and given a priority number, because the properties were not buildable.

39. The City of Half Moon Bay's regulations, unconstitutional treatments, activities, physical invasions, and actions as set forth herein have caused a permanent or temporary taking in violation of the 5th Amendment to the United States Constitution.

FIRST CAUSE OF ACTION

VIOLATION OF DUE PROCESS UNDER THE 14TH AMENDMENT AND 42 U.S.C. SECTION 1983

40. Plaintiffs incorporate by reference paragraphs 1 through 39 of this Complaint as though set forth herein in their entirety.

41. The City, acting under color of its LUP, has caused, and will continue to cause, Plaintiffs to be deprived of their property without due process of law in violation of the Due Process Clause of the Fourteenth Amendment of the Constitution.

42. Defendants have imposed unconstitutional conditions on the development of the Subject Lots, violating Plaintiffs' due process rights under the U.S. Supreme Court precedents *Nollan v. California Coastal Commission, Dolan v. City of Tigard*, *Lucas v. South Carolina Coastal Council*, and *Penn Central Trans. Company v. City of New York*.

43. Defendants' willful failure to prepare a Specific Plan for development of the West of Railroad area constitutes a further violation of Plaintiffs' due process rights.

SECOND CAUSE OF ACTION

INVERSE CONDEMNATION; FOR A REGULATORY TAKING IN VIOLATION OF THE 5TH AND 14TH AMENDMENTS AND 42 U.S.C. SECTION 1983

44. Plaintiffs incorporate by reference paragraphs 1 through 43 of this Complaint as though set forth herein in their entirety.

45. The City's regulations, unconstitutional treatments, unconstitutional conditions, and other actions as set forth above, have deprived the subject lots of any economically viable use or alternatively have deprived Plaintiffs of their reasonable, investment-backed expectations, thereby effecting a regulatory taking in violation of the Fifth and Fourteenth Amendments to the United States Constitution under the U.S. Supreme Court precedents, *Lucas v. South Carolina Coastal Council*, and *Penn Central Transportation Co. v. City of New York*. The City has also imposed unconstitutional conditions and exactions on development in violation of *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*.

46. The City's conduct, including its unreasonable pre-condemnation activity, has also resulted in a *de facto* taking.

THIRD CAUSE OF ACTION

INVERSE CONDEMNATION; FOR A PHYSICAL TAKING IN VIOLATION OF THE 5TH AND 14TH AMENDMENTS AND 42 U.S.C. SECTION 1983

47. Plaintiffs incorporate by reference paragraphs 1 through 46 of this Complaint as though set forth herein in their entirety.

48. The City, acting under color of its LUP, has caused and will continue to cause Plaintiffs to be deprived of their right to possess, use, and dispose of their real property without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution. For approximately 40 years, the City designated and publicly announced that the West of Railroad area which includes Plaintiffs' properties is a public recreation park adjoining its coastal trail recreation area. The entire 32 acres, including Plaintiffs' properties, have been walked over regularly as a means of public access to the coastal trail, and have been entered and occupied by the City for maintenance.

FOURTH CAUSE OF ACTION

FOR VIOLATION OF EQUAL PROTECTION UNDER THE 14TH AMENDMENT AND 42 U.S.C. SECTION 1983

49. Plaintiffs incorporate by reference paragraphs 1 through 48 of this Complaint as though set forth herein in their entirety.

50. The City's regulations, unconstitutional treatments, and other actions as set forth above have deprived Plaintiffs of their right to equal protection

under the Fourteenth Amendment, as the subject lots are being burdened with restrictions and requirements that are not being imposed on other property owners.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for relief as follows:

1. For just compensation for a taking of property in an amount according to proof at trial;

2. For damages for violation of due process rights in an amount according to proof at trial;

3. For damages for violation of equal protection rights in an amount according to proof at trial;

4. For additional compensatory, consequential, and other special damages in an amount according to proof at trial;

5. For reasonable attorneys' fees and costs of suit pursuant to 42 U.S.C. § 1988(b); and

6. For such other and further relief as this Court deems just and proper.

Dated: March 15, 2021

Respectfully submitted,

KASSOUNI LAW

By: /s/ Timothy V. Kassouni
TIMOTHY V. KASSOUNI
Attorney for Plaintiffs

DEMAND FOR JURY TRIAL

Plaintiffs demand a jury trial on all causes of action and claims to which they have a right to a jury trial.

Dated: March 15, 2021

Respectfully submitted,

KASSOUNI LAW
By: /s/ Timothy V. Kassouni
TIMOTHY V. KASSOUNI
Attorney for Plaintiffs

Appendix 61

FILED
San Mateo County
APR 29, 2021
Clerk of the
Superior Court

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN MATEO

CITY OF HALF MOON BAY Plaintiffs, v.	Case No: 21-CIV-01560 **Notice of Probable Compensation** APNS: 056-096-240, 056-096-480, 056- 127-030,

THOMAS GEARING; DANIEL K. GEARING; DOES 1 through 50, inclusive, and all persons unknown claiming an interest in the property, Defendants.	056-127-040, 056-128-090, and 056-125-210 Filed concurrently with Summary of the Basis for Appraisal Statement

PLEASE TAKE NOTICE that under Code of Civil Procedure section 1255.020, on March 30, 2021, Plaintiff City of Half Moon Bay ("City") deposited the probable compensation ("Deposit") for the property condemned in this action with the State Treasurer, in the sum of $91,000. The receipt from the State Treasurer is attached as Exhibit A. The Deposit is the fair market value of the property interest condemned in this action as determined by Chris Carneghi, MAI, certified General Real Estate Appraiser, as more fully set forth in the Summary of the Basis for Appraisal Statement filed concurrently herewith. The Summary of the Basis for Appraisal Statement complies with Code of Civil Procedure section 1255.010.

DATED: April 8, 2021

SHUTE, MIHALY & WEINBERGER LLP

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA,
SAN FRANCISCO DIVISION

THOMAS GEARING and DANIEL GEARING, Plaintiffs, v. CITY OF HALF MOON BAY; and DOES 1-10, inclusive, Defendants.	Case No: 3:21-cv-01802-EMC **ANSWER TO COMPLAINT** The Hon. Edward M. Chen

Defendant City of Half Moon Bay (collectively "City") answers the Complaint for Damages ("Complaint") filed in this action by Plaintiffs on March 15, 2021 as follows:

* * * * *

10. In response to Paragraph 10, the City admits that the Plaintiff's properties are zoned for Planned Unit Development under the City's 1985 Land Use Plan, which was subsequently certified by the California Coastal Commission in 1996. The City asserts that the third and sixth sentences in Paragraph 10 include only legal arguments or conclusions, which do not require a response. Except as so admitted and asserted, the City denies the allegations in Paragraph 10.

11. In response to Paragraph 11, the City admits that the West of Railroad area contains 130 vacant lots on 32 acres with a maximum of 65 residentials units that may be developed under the City's 1985 Land Use Plan. The parcels in the West of Railroad area are owned by various individuals and entities, including parcels owned by the City and the County of San Mateo. Defendants' parcels in the West of Railroad area are shown on two subdivision maps recorded on December 4, 1905: the Ocean Boulevard Tract, and the Map of Frank T. Brophy's Subdivision of the Miramontes Tract. The County of San Mateo accepted the streets shown on the maps as dedicated to public use and these paper streets later became the streets of the City by operation of law when the City incorporated in 1959. The West of Railroad area is on a bluff overlooking the ocean and the parcels generally range from 6000-7500 square feet, though there are larger and smaller parcels also. Except as so admitted, the City denies the allegations in Paragraph 11.

* * * * *

21. In response to Paragraph 21, the City admits that replanning and re-platting of the West of Railroad area, as contemplated in the LUP, has not

occurred. Except as so admitted, the City asserts that Paragraph 21 contains only legal arguments or conclusions, which do not require a response.

22. In response to Paragraph 22, the City admits that a Specific Plan for the West of Railroad area would require approval by the City and the Coastal Commission and preparation of an Environmental Impact Report. Except as so admitted, the City denies the allegations in the first, second, and sixth sentence of Paragraph 22. The City lacks sufficient knowledge or information to admit or deny the allegations in the third, fourth, and fifth sentences of Paragraph 22, and on that basis denies them.

* * * * *

26. In response to Paragraph 26, the City admits that it has received property tax payments made by Plaintiffs and their predecessors. Except as so admitted, the City denies the allegations in Paragraph 26.

* * * * *

33. In response to Paragraph 33, the City admits receiving a letter dated October 1, 2020 titled "City of Half Moon Bay Preliminary Application for Development from Thomas Gearing and Daniel Gearing Pursuant to Housing Crisis Act and Senate Bill 330." Except as so admitted, the City denies the allegations in Paragraph 33.

34. In response to Paragraph 34, the City admits that it responded to the letter dated October 1, 2020 by letter dated October 13, 2020 where it informed Thomas Gearing that the provisions of Government Code 65941.1, as added by SB 330, do not apply to

Plaintiff's parcels because of the LUP's requirements for a Specific Plan. The City's October 13, 2020 letter also explained the need for a coastal development permit, building permits, and encroachment permits at a minimum, along with environmental review. Except as so admitted, the City denies the allegations in Paragraph 34.

35. In response to Paragraph 35, the City admits that on October 21, 2020 the Plaintiffs submitted a letter and an appeal form in response to the City's October 13, 2020 letter. The City responded by letter dated October 23, 2020 stating that the City did not take any appealable action on Plaintiffs "application" and returning the appeal fee. Except as so admitted, the City denies the allegations in Paragraph 35.

* * * * *

DATED: April 27, 2021

SHUTE, MIHALY &
WEINBERGER LLP

By: s/ Matthew D. Zinn
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