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CITY OF REDONDO BEACH and CITY COUNCIL OF THE CITY OF REDONDO BEACH

SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES

LEGADO REDONDO LLC,

Petitioner and Plaintiff,

v.

CITY OF REDONDO BEACH; CITY COUNCIL OF THE CITY OF REDONDO BEACH.; and DOES 1 through 10, inclusive,

Respondents and Defendants.

Case No. BS 164373

CITY'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER TO PETITION AND COMPLAINT

Date: January 27, 2017
Time: 9:30 a.m.
Dept.: 86
Judge: Hon. Amy Hogue

Action Filed: August 10, 2016
Trial Date: None set

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INTRODUCTION

Petitioner and Plaintiff Legado Redondo LLC seeks a writ of mandate ordering the Redondo Beach City Council to approve Legado's 180 residential unit development project on the Pacific Coast Highway. The difficulty with Legado's claim is that the City Council never considered the 180-unit project in a properly noticed public hearing. Legado's petition and complaint ("Petition") is therefore unripe, and this Court is without authority to issue the writ. On the same basis, Legado's takings claim for damages for the City's failure to approve the 180-unit project is unripe. Legado's claim that the Court should issue a writ ordering that the City's approval of a 115-unit project is void is also improper because such relief is unnecessary; Legado can obtain that relief simply by not building the 115-unit project. The Court should therefore sustain the City's demurrer to the Petition without leave to amend.

ALLEGATIONS OF THE PETITION

In its Petition, Legado alleges as follows: In February 2015, Legado filed an application with the City to develop its property at the southeast corner of Pacific Coast Highway and Palos Verdes Boulevard with 180 residential units, including nine affordable units, and 37,600 square feet of commercial space ("180-unit project"). Petition ("Pet.") ¶¶ 14-15, pp. 4-5.[1] At a public hearing on March 19, 2015, the City's Planning Commission recommended that the 180-unit project be redesigned, but took no action on the 180-unit project. *Id.* ¶ 24, p. 7. Legado does not allege that it requested that the Planning Commission vote on the 180-unit project or that the Planning Commission voted on the 180-unit project at the hearing. *Id.* ¶ 26, p. 8 (Legado acknowledges that it voluntarily reduced the project density, rather than face possible denial).

After the March 19, 2015 Planning Commission hearing, Legado submitted a second application to the City for 149 residential units, 37,000 square feet of commercial space, and no affordable units ("149-unit project"). *Id.* ¶¶ 28-31, pp. 8-9. On August 20, 2015, the Planning

[1] The Petition fails to disclose that the 180-unit project and all subsequent projects proposed by Legado included development of a hotel, in addition to residential units and commercial space. *See* City's Request for Judicial Notice in Support of Demurrer ("RJN"), Ex. A (City Council Resolution No. CC-1606-052, June 15, 2016) ["Resolution"]), pp. 4, 11. Although Legado's Petition challenges the Resolution, Legado does not attach the Resolution to its Petition.

Commission held a public hearing on the 149-unit project, but took no action. *Id.* ¶ 33, p. 10.

On November 5, 2015, Legado submitted a third application for 146 residential units, 23,764 square feet of commercial space, no affordable units, and other design changes from the 149-unit project ("146-unit project"). *Id.* ¶¶ 34, 38, pp. 10-11. On November 19, 2015, the Planning Commission denied the 149-unit project application and declined to consider the 146-unit project application because it was untimely filed. *Id.* ¶¶ 39-40, p. 12. Legado does not allege that it requested that the Planning Commission vote on, or that the Planning Commission considered or voted on, the 180-unit project at either the August 20 or November 19 hearings.

On April 5, 2016, the City Council considered Legado's appeal of the Planning Commission's denial of the 149-unit project. *Id.* ¶ 41, p. 12. The City Council voted to continue the public hearing to allow the Planning Commission to consider the 146-unit project. *Id.* ¶ 43, p. 13. Legado does not allege that it requested that the City Council vote, or that the City Council considered or voted on, the 180-unit project at that hearing.

On May 19, 2016, the Planning Commission approved the 146-unit project, but reduced the number of residential units to 128 ("128-unit project"). *Id.* ¶ 44, p. 13. Legado does not allege that it requested that the Planning Commission vote on, or that the Planning Commission considered or voted on, the 180-unit project at that hearing.

On June 14, 2016, the City Council held a hearing on the 149-unit and 146-unit projects. *See* RJN, Ex. B (City Council Agenda Tuesday, June 14, 2016 ["Agenda"]), pp. 6-8. The City Council approved the 146-unit project, but reduced the 128 units approved by the Planning Commission to 115 ("115-unit project"). *Id.* ¶¶ 45, 47, pp. 13-14; Resolution, p. 4. In its Resolution approving the 115-unit project, the City Council stated:

> The City Council further finds that the 180 unit development proposal is no longer currently pending before the City, nevertheless, the City Council concludes that the findings provided above in Section 1 through 5 for the denial of the 149 and 146 unit proposal also support the denial of the 180 unit proposal from Legado.

Resolution, p. 8.

Legado filed the Petition on August 10, 2016. The Petition requests, among other remedies, that the Court void the City Council's June 14 Resolution approving the 115-unit

project and order the City Council to approve the 180-unit project. Prayer for Relief, pp. 22-23.

STANDARD OF REVIEW

A demurrer is appropriate when a complaint does not state facts sufficient to constitute a cause of action. Code Civ. Proc. § 430.10(e). In ruling on a demurrer, the court assumes the truth of "properly pleaded factual allegations, facts that reasonably can be inferred from those expressly pleaded, and matters of which judicial notice has been taken." *Las Lomas Land Co., LLC v. City of Los Angeles* (2009) 177 Cal.App.4th 837, 847. It disregards "contentions, deductions, [and] conclusions of fact or law" in the challenged pleading. *Breneric Associates v. City of Del Mar* (1998) 69 Cal.App.4th 166, 180.

If the Court sustains a demurrer, it should deny leave to amend where the facts are undisputed, the nature of the substantive law is clear, and no liability exists under substantive law. *Lawrence v. Bank of America* (1985) 163 Cal.App.3d 431, 436-37.

ARGUMENT

I. The Demurrer to Legado's First Claim for Relief Should Be Sustained Because the 180-Unit Project Was Not Pending Before the City Council.

The City's demurrer to Legado's First Claim for Relief, similar to its other causes of action, is based on a disconnect between the project considered by the City Council at the June 14, 2016 hearing, and the relief Legado seeks in its Petition. In its First Claim for Relief, Legado challenges the City Council's June 14, 2016 Resolution approving the 115-unit project. Legado contends that the City Council should not have approved the 115-unit project, but rather should have approved the 180-unit project because the 180-unit project met the requirements of the State Density Bonus Law, Government Code section 65915 et seq. ("DBL") (mandating local government approval of a density bonus for residential projects that meet certain requirements, including the provision of affordable housing). Pet. ¶¶ 51-56, pp. 15-16.

Legado's claim is misdirected because the only development proposals pending before the City Council at the June 14, 2016 hearing were the 149-unit and 146-unit projects, not the 180-unit project. Agenda, pp. 6-8; Resolution, p. 4. In the Resolution, the City Council correctly declared "that the 180 unit development proposal is no longer currently pending before the City

. . . ." Resolution, p. 8. The Petition does not allege, with respect to the June 14, 2016 hearing of the City Council, that: (1) the 180-unit project was pending before the City Council; (2) the City Council gave notice to the public that it would consider the 180-unit project in the Agenda; (3) the City Council heard testimony regarding the 180-unit project; (4) Legado requested that the City Council consider the 180-unit project; or (5) Legado requested that the City Council vote on the 180-unit project. *Id.* The City Council cannot be compelled to approve a project that was not pending before it. *Latinos Unidos del Valle de Napa y Solano v. County of Napa* (2013) 217 Cal.App.4th 1160, 1167 (under Gov. Code § 65915(b), a developer must "*seek permission* and agree to proceed with a project dedicating a portion of the development to affordable housing" for the DBL to apply (emphasis added)).

The City expects Legado to argue that the 180-unit project is merely a different version of the 146-unit project and therefore was before the City Council on June 14, 2016. *See, e.g.*, Pet. ¶ 29, p. 9. This argument has no merit. The Planning Commission decision that Legado appealed to the City Council was an approval of the 146-unit project in part, reducing the residential units to 128.[2] On appeal, the City Council approved the 146-unit project in part, further reducing the number of units to 115.[3] The 146-unit project is a different project from the 180-unit project: the 146-unit project includes no affordable housing, substantially less commercial space, reduced building massing and heights, and a different architectural style. Legado does not allege that the 180-unit project was pending before the City Council on June 14, 2016, or that the City Council heard testimony from Legado or the public regarding the 180-unit project. *See* Pet. ¶¶ 50-56, pp. 15-17. Moreover, the 146-unit project contained no affordable units, and therefore could not qualify under the DBL. *See* Gov. Code § 65915(b).

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[2] Compared with the 149-unit project, the 146-unit project contained three fewer residential units, less commercial space, reduced building massing and heights, and a different architectural style. Pet. ¶ 34, p. 10. Neither project contained affordable units. *Id.* ¶ 28, p. 8.

[3] Resolution, p. 10. Although the Resolution states that the City Council denies the 146-unit project, the approved project bears most of the elements of the 146-unit project, including the amount of commercial space proposed in the 146-unit project, but with the units reduced to 115. *See* Resolution, pp. 10-11 (approving 115 units, 23,800 square feet of commercial space, and other features of 146-unit project).

Because the 180-unit project was not pending before the City Council at the hearing where the City Council adopted the challenged Resolution, Legado's First Claim for Relief is premature. Legado's challenge can only be to the disapproval of the 180-unit project by the City Council after a duly noticed public hearing. *See Mountain View Chamber of Commerce v. City of Mountain View* (1978) 77 Cal.App.3d 82, 88 ("It is fundamental California law that before one is entitled to judicial review or relief, he must exhaust whatever administrative remedies are provided."). Legado's request that this Court essentially approve the 180-unit project thus fails.

Further supporting the City's demurrer, in its Prayer for Relief on the First Claim for Relief, Legado curiously does not request a writ of mandate compelling the City to approve the 180-unit project. Rather, Legado requests a writ voiding the City's approval of the 115-unit project. Pet., Prayer for Relief ¶ 1, p. 22. Accordingly, Legado has failed to state a case or controversy requiring mandamus relief because issuance of the requested writ would be unnecessary and an idle act; Legado can obtain all the relief it seeks in its First Claim for Relief—without this court's assistance—by simply not proceeding with the 115-unit project. Code Civ. Proc. § 1086 (writ issues only when there is no "plain, speedy, and adequate remedy"); *County of San Diego v. State of California* (2008) 164 Cal.App.4th 580, 595-96 ("courts will not issue a writ of mandate . . . where to issue the writ would be useless, unenforceable, or unavailing").

Legado should not be permitted to amend its Prayer to request a writ requiring the City Council to approve the 180-unit project because the 180-unit project was not before the City Council at the June 14, 2016 hearing. *See* Resolution, p. 8. Although acknowledging that the 180-unit project was not pending before that body, the City Council nonetheless purported to reject the 180-unit project. *Id.* ("The City Council further finds that the 180 unit development proposal is no longer currently pending before the City, nevertheless, the City Council concludes that the findings provided above in Section 1 through 5 for the denial of the 149 and 146 unit proposal also support the denial of the 180 unit proposal from Legado."). But the City Council had no authority to consider a project not pending before it. The language in the Resolution purporting to disapprove the 180-unit project is therefore of no force or effect.

Allowing Legado to request a writ ordering the City Council to approve the 180-unit project would violate the Brown Act, which requires 72 hours' notice to the public of an item of business to be discussed at a meeting, and provides that "[n]o action or discussion shall be undertaken on any item not appearing on the posted agenda." Gov. Code § 54954.2(a). Moreover, the City Council cannot be compelled to approve the 180-unit project under well-established constitutional procedural due process rights of the public to notice and a meaningful opportunity to be heard before the City can approve a development project. *See Horn v. County of Ventura* (1979) 24 Cal.3d 605, 616; *Selinger v. City Council* (1989) 216 Cal.App.3d 259, 274.

In *Horn*, the Supreme Court held that approval of a tentative subdivision map without adequate notice and a hearing violates the neighbor's procedural due process rights. 24 Cal.3d at 616 ("affected persons are entitled to a reasonable notice and an opportunity to be heard before the approval occurs"). Following *Horn*, the Court of Appeal held in *Selinger* that the Permit Streamlining Act, Government Code section 65920 et seq. ("PSA"), which at that time mandated automatic project approval where the regulatory agency failed to act in a timely fashion, likewise violated the adjacent landowner's procedural due process rights. 216 Cal.App.3d at 274 ("[W]e conclude that the Permit Streamlining Act was unconstitutional insofar as it led to approval of applications for development without provision for notice and a hearing to affected landowners.").[4] Because Legado does not allege that the City gave notice to the public that the 180-unit project would be considered by the City Council in a public hearing, where the public was permitted a meaningful opportunity to be heard, the Court is without authority to issue a writ of mandate requiring that the City Council approve the 180-unit project.

Legado is, of course, free to refile an application with the City for the 180-unit project and demand a final decision on that project at a noticed public hearing. Legado may invoke the PSA to compel public notice, a public hearing, and a decision on the application. If Legado contends that the decision is improper, Legado may challenge that decision in court. Legado's challenge to the current Resolution, however, is unripe. The City's demurrer to the First Claim

[4] Following *Selinger*, the Legislature amended the PSA to require public notice and a hearing before a land use application can be automatically approved. Gov. Code § 65956.

for Relief should accordingly be sustained with no leave to amend. *Breneric Associates*, 69 Cal.App.4th at 188 ("A demurrer may be sustained when the complaint shows on its face the claim is not ripe for adjudication.").

II. The Demurrer to Legado's Second Claim for Relief Should Be Sustained Because The Housing Accountability Act Does Not Apply to Legado's Project.

In its Second Claim for Relief, Legado appears to contend that in approving the 146-unit project but reducing the number of units to 115, the City Council violated the California Housing Accountability Act, Government Code section 65589.5 ("HAA"). Pet. ¶¶ 58-64, pp. 17-18. The HAA requires, among other things, that a regulatory agency make special findings where it reduces the number of housing units proposed in a mixed-use development application. Gov. Code § 65589.5(j). Legado claims that the City Council's reduction in the number of units from 146 to 115 is not supported by substantial evidence and does not meet the requirements of the HAA. Pet. ¶¶ 63-64, p. 18.

The City's demurrer to Legado's claim under the HAA should be sustained with no leave to amend because the HAA is not applicable to the 146-unit project. The heightened standard for findings required in the HAA applies only to a "housing development project." Gov. Code § 65589.5(j). The 146-unit project (and indeed all other versions of Legado's project) includes a hotel and therefore is not "housing development project" as defined in the HAA.

The HAA defines "housing development project" as:

> (A) Residential units only.
> (B) Mixed-use developments consisting of residential and nonresidential uses in which nonresidential uses are limited to neighborhood commercial uses and to the first floor of buildings that are two or more stories. As used in this paragraph, "neighborhood commercial" means small-scale general or specialty stores that furnish goods and services primarily to residents of the neighborhood.
> (C) Transitional housing or supportive housing.

Gov. Code § 65589.5(h)(2). Legado alleges that all versions of its project include commercial space, and does not allege that its project includes transitional or supportive housing. Accordingly, its project would not fall under (A) or (C) of section 65589.5(h)(2). Nor does any Legado project meet the definition of "mixed-use development" under section 65589.5(h)(2)(B).

Under that definition, the nonresidential uses of mixed-use developments are limited to neighborhood commercial uses and to the first floor of buildings that are two or more stories. Legado's project includes a hotel. Resolution, pp. 4, 11. A hotel does not meet the definition of neighborhood commercial use in the HAA, in that it is not a "small-scale general or specialty store[] that furnish[es] goods and services primarily to residents of the neighborhood." Gov. Code § 65589.5(h)(2)(B). Nor is a hotel a residential use under the City's zoning ordinances. *See* RJN, Ex. C (Redondo Beach Mun. Code § 10-2.910 (defining "hotel" as "Commercial Use")) .

Legado's Second Claim for Relief should also be dismissed because, similar to the Prayer for Relief on the First Claim, Legado only requests a writ voiding the City's approval of the 115-unit project. Pet., Prayer for Relief, ¶ 2, p. 22. Accordingly, Legado fails to state a case or controversy requiring mandamus relief. Legado can obtain the same relief without this Court's adjudication of its rights by simply not building the project authorized in the Resolution. *County of San Diego*, 164 Cal.App.4th at 595-96.

III. The Demurrer to Legado's Third Claim for Relief Should Be Sustained Because Mandamus is Not Necessary to Provide the Relief Legado Seeks in its Prayer.

Legado's Third Claim for Relief, alleging that the City improperly reduced the residential density of Legado's project under Government Code section 65863(b), should also be dismissed because, similar to the Prayer for Relief on the First and Second Claims, Legado only requests a writ voiding the City's approval of the 115-unit project. Pet., Prayer for Relief, ¶ 2, p. 22. Thus, Legado fails to state a case or controversy requiring mandamus relief. Legado can obtain the relief it seeks in its Prayer for Relief without this Court's action by not proceeding with the project authorized in the Resolution. *County of San Diego*, 164 Cal.App.4th at 595-96.

IV. The Demurrer to Legado's Fourth Claim for Relief Should Be Sustained.

In its Fourth Claim for Relief, Legado asserts that the City effected a regulatory taking of Legado's property by denying the 180-unit project, forcing Legado to reduce the residential density of its projects, responding to political pressure, and imposing conditions on Legado's project without a rational basis or proportionality to the project's impacts. None of these claims states a cause of action for a regulatory taking.

A. Legado's Takings Claim Based on the City's "Denial" of the 180-Unit Project Is Unripe.

Legado's takings claim based on the City's alleged denial of the 180-unit project is unripe because the 180-unit project application was never heard by the City Council. A regulatory takings claim is not ripe until the regulatory agency responsible for implementing the regulations has reached a final decision on the application of the regulations to the developer's property. *Toigo v. Town of Ross* (1998) 70 Cal.App.4th 309, 325 (citing *Williamson Planning Com. v. Hamilton Bank* (1985) 473 U.S. 172, 186). In *Shea Homes Limited Partnership v. County of Alameda*, the court dismissed a takings claim challenging a growth control initiative as unripe on facts similar to the instant case:

> A takings claim challenging the application of a land use regulation is not ripe unless the government entity charged with implementing the regulation has reached a final decision regarding the application of the regulation to the property at issue. . . . The developer . . . must establish that it has submitted at least one meaningful application for a development project which has been thoroughly rejected . . . . ¶A final determination by the responsible agency enables the court to make the constitutional determination as to whether the regulation has deprived a landowner of all economically beneficial use of the property or defeated his reasonable investment-backed expectations . . . . ¶Trafalgar has not submitted any application for development of its Canyonlands property since the adoption of Measure D, so the County has not had the opportunity to exercise its full discretion in considering Trafalgar's plans for the property in light of the measure. Consequently, Trafalgar cannot state a cause of action for an as-applied taking that is ripe for adjudication.

(2003) 110 Cal.App.4th 1246,1268-69 (citations and quotation marks omitted).

Here, the City Council did not render a final decision up or down on the 180-unit project because that project was not pending before the City Council. Resolution, p. 8. Accordingly, Legado's takings claim challenging the City's alleged denial of the 180-unit project is unripe until the public is duly noticed that the City Council will consider the 180-unit project in a public hearing, the City Council hears and considers evidence regarding the project at a public hearing, and votes to approve, disapprove, or conditionally approve the 180-unit project; i.e., "exercise[s] its full discretion in considering" the 180-unit project and "thoroughly rejects" the project. *Shea Homes*, 110 Cal.App.4th at 1268-69.

Nor do the City's requests that Legado reduce the residential density of its projects effect a taking. Legado does not allege that the City took formal action requiring Legado to reduce the

density of its project from 180 units. As Legado concedes, it could have demanded a decision up or down on the 180-unit project. Pet. ¶ 26, p. 8. If the City had adopted a resolution reducing the density of the 180-unit project, and Legado had contended that such a resolution would violate California law or effect a taking, it could have challenged that decision. But because Legado failed to obtain a final decision on the 180-unit project, its takings claim is unripe.

B. The Resolution Did Not Effect a Taking.

Insofar as Legado alleges that the Resolution approving the 115-unit project effected a taking, that claim must be rejected as a matter of well-established law. The just compensation clause in the Fifth Amendment of the U.S. Constitution was originally intended to apply only to direct condemnation, called eminent domain, where the government takes physical possession of private property. *Legal Tender Cases* (1870) 79 U.S. 457, 551-52; *Lucas v. S.C. Coastal Council* (1992) 505 U.S. 1003, 1014. The regulatory takings doctrine has evolved since the Fifth Amendment was enacted, now allowing compensation for government regulation of the *use* of property, but only in the narrowest of circumstances. Land use regulations do not effect a taking simply because landowners or businesses will be financially affected. As the U.S. Supreme Court has held, a regulatory taking can be found only where a regulation of the use of property is so extreme that it "functionally equivalent" to eminent domain. *Lingle v. Chevron, U.S.A. Inc.* (2005) 544 U.S. 528, 539.

Because few regulations are so extreme as to resemble eminent domain, regulatory takings are rare. *See Galland v. City of Clovis* (2001) 24 Cal.4th 1003, 1026 ("Police power legislation results in a confiscatory 'taking' only when the owner has been deprived of substantially all reasonable use of the property . . . . Even a significant diminution in value is insufficient to establish a confiscatory taking." (citations and quotation omitted)). Under the exacting test laid out by the Supreme Court, a regulatory taking occurs only where: (a) a regulation deprives the property owner of 100 percent of the economic value of the property, called a "categorical taking," or (b) the value of the property is severely diminished (*Penn Cent. Transp. Co. v. City of New York* (1978) 438 U.S. 104, 124), called a "*Penn Central* taking." *Lucas*, 505 U.S. at 1015.

Under the first test, the Resolution did not effect a categorical taking because it allows development of 115 residential units, 23,764 square feet of commercial space, and a hotel on Legado's property. The approved development constitutes substantial use of the property and cannot, as a matter of law, be equated with an eminent domain "taking" that allows no use of the property.[5] *Lucas*, 505 U.S. at 1015, 1018; *see also Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency* (2002) 535 U.S. 302 (emphasizing that the rule applies only in the exceptional case in which a regulation truly leaves a property with no use or value whatsoever).

Outside of "categorical takings," where the regulation erases all use of property, courts assess regulations that come close to eliminating all value under the three-factor test articulated in *Penn Central*, 438 U.S. at 124 (holding no taking occurred where regulation prohibited erection of office building over Grand Central Terminal because the owner could continue the property's existing use). Like categorical takings, however, the aim of the *Penn Central* test is to identify regulatory actions that have extreme impacts on property value, akin to the direct appropriation of property by eminent domain. *Lingle*, 544 U.S. at 539. Legado's challenge to the Resolution fares no better under the *Penn Central* test.

In applying *Penn Central*, courts consider: (1) the economic effect of the regulation, (2) the regulation's interference with reasonable investment-backed expectations, and (3) the character of the governmental action. *See Penn Central*, 438 U.S. at 124. California courts applying the test have determined that they may dispose of a takings claim on the basis of any one of these three factors. *See Allegretti & Co. v. County of Imperial* (2006) 138 Cal.App.4th 1261, 1277; *Bronco Wine Co. v. Jolly* (2005) 129 Cal.App.4th 988, 1035. Legado cannot make the requisite showing under any of the three factors. *See Long Beach Equities v. County of Ventura* (1991) 231 Cal.App.3d 1016, 1036-40 (sustaining demurrer to regulatory takings claim where regulation did not entirely deprive property of economically beneficial use or eliminate all profit from development, even if regulation severely reduced expected profit).

[5] Legado alleges that its property is "underutilized." Pet. ¶14, p. 4. In fact, the property is currently improved with several commercial buildings and is currently in use for retail. A land use regulation that does not interfere with the existing use of property, but merely denies a more intensive use of the property, is not a taking. *See Penn Central*, 438 U.S. 104, 124, 136.

1. The Economic Impact Factor Fails to Support a Takings Claim.

Even if the Resolution significantly decreased the value of Legado's property, it would not support a regulatory taking claim. The Supreme Court's takings cases "have long established that mere diminution in the value of property, however serious, is insufficient to demonstrate a taking." *Concrete Pipe & Prods. v. Construction Laborers Pension Trust* (1993) 508 U.S. 602, 645. For example, reductions of as much as 95% of the value of the property have still been found not to rise to the level of a taking. *See William C. Hass & Co. v. City and County of San Francisco* (9th Cir. 1979) 605 F.2d 1117, 1120-21 (reduction in value from $2 million to $100,000 was not a taking, even though owner could not recover initial $2 million investment). As the California Supreme Court held in *Cal. Building Industry Assn. v. City of San Jose*:

> [I]t is well established that the fact that a land use regulation may diminish the market value that the property would command in the absence of the regulation — i.e., that the regulation reduces the money that the property owner can obtain upon sale of the property — does not constitute a taking of the difference in value of the property. Most land use regulations or restrictions reduce the value of property; in this regard the affordable housing requirement at issue here is no different from limitations on density, unit size, number of bedrooms, required set-backs, or building heights.

(2015) 61 Cal.4th 435, 466.

Here, Legado has been permitted substantial development of its property. The conditions the City imposed on the development of the property are not, as a matter of law, so severe as to constitute the functional equivalent of eminent domain. Legado's takings challenge to the Resolution thus fails under *Penn Central*'s economic impact factor.

2. The Reasonable Investment-Backed Expectations Factor Further Undercuts Legado's Takings Argument.

Legado cannot show that the Resolution impermissibly interferes with its reasonable investment-backed expectations. Regulatory changes do not require compensation merely because they frustrate economic expectations. There is no guaranteed property right in "future profits." As the U.S. Supreme Court observed in *Andrus v. Allard*, "loss of future profits—unaccompanied by any physical property restriction—provides a slender reed upon which to rest a takings claim." (1979) 444 U.S. 51, 66.

Showing that the Resolution impermissibly interferes with Legado's reasonable investment-backed expectations would be especially difficult given the highly speculative nature of real estate development and the discretion accorded land use regulatory agencies in approving development of land. Given this uncertainty, the Resolution cannot be deemed to unduly interfere with Legado's reasonable expectations of profit where the City did not change the law applicable to Legado's property after Legado acquired the property, but merely exercised its discretion within existing law to reduce the residential density of Legado's project from 146 to 115 units. *See Allegretti*, 138 Cal.App.4th at 1279 ("A reasonable investment-backed expectation must be more than a unilateral expectation or an abstract need.") (internal quotations and citations omitted); *see also Palazzolo v. Rhode Island* (2001) 533 U.S. 606, 632-33 (O'Connor, J., concurring) (reasonable investment-backed expectations factor may support taking where regulatory agency changes law after claimant acquires property).

3. The Character of the Governmental Action Fails to Support a Taking.

Under the character of the governmental action factor, a regulation can be deemed a taking if it is akin to a "physical invasion by government, " as opposed to a "public program adjusting the benefits and burdens of economic life to promote the common good." *Penn Central*, 438 U.S. at 124. Regulations that do not require public possession of property, but rather prevent harm or protect public health and safety do not constitute takings. *See, e.g.*, *Appolo Fuels, Inc. v. United States* (Fed. Cir. 2004) 381 F.3d 1338, 1350-51; *Maritrans Inc. v. United States* (Fed. Cir. 2003) 342 F.3d 1344, 1356 (citing *Creppel v. United States* (Fed. Cir. 1994) 41 F.3d 627, 631). Here, the Resolution regulates the use of Legado's property only. It does not require public possession of that property. The character of the governmental action factor thus weighs heavily in favor of the City.

C. The City's Responsiveness to the Views of the Public Regarding Legado's Project Does Not State a Takings Claim.

Legado's contention that the Resolution worked a taking because the City Council took into account the testimony of the community, which Legado characterizes as "capitulating to political pressure" (Pet. ¶ 69, p. 19), fails to state a takings claim. To the contrary, the City

Council is required to take into account evidence presented by the community with regard to a quasi-adjudicatory land use entitlement proceeding. *See Horn*, 24 Cal.3d at 616; *Selinger*, 216 Cal.App.3d at 274; *Stubblefield Constr. Co. v. City of San Bernardino* (1995) 32 Cal.App.4th 687, 711 ("After all, a legislator is supposed to respond to the concerns of his or her constituents, and there is ample evidence in the record here that persons living in the vicinity of the project were concerned about it. . . . 'The opinion of area residents concerning neighborhood preservation is an appropriate factor for consideration in zoning decisions.'" (citation omitted)).

D. Rational Basis and Proportionality Are Not Valid Takings Tests.

Legado claims that the Resolution effects a taking because the Resolution imposed conditions on Legado's project "without any essential nexus, rational basis or discernable proportionality to any project impact." Pet. ¶ 69, p. 19. The rational basis test is a substantive due process test, not a takings test. *See Lingle*, 544 U.S. at 542-44 (means-ends test of regulation not a valid takings test). Legado's references to "essential nexus" and "proportionality" are to the intermediate scrutiny test under *Nollan v. Cal. Coastal Comm.* (1987) 483 U.S. 825, 837-40 and *Dolan v. City of Tigard* (1994) 512 U.S. 375, 388-95. The *Nollan*/*Dolan* test, however, applies only to exactions—conditions of land use permits that require the developer to dedicate a possessory interest in its property or pay a fee to the public agency to mitigate an impact of the development. *Cal. Building Industry Assn.*, 61 Cal.4th at 460 (The essential nexus and rough proportionality tests of *Nollan*/*Dolan* do not apply "where the government simply restricts the use of property without demanding the conveyance of some identifiable protected property interest (a dedication of property or the payment of money) as a condition of approval."). Legado does not challenge any conditions of the Resolution requiring Legado to dedicate property to the public or pay a mitigation fee. Accordingly, the *Nollan*/*Dolan* test does not apply.

V. Legado's Fifth and Seventh Claims for Relief for Declaratory and Injunctive Relief Fail to State Causes of Action.

In its Fifth and Seventh Claims for Relief, Legado asks for a declaration and an injunction that Legado is entitled to the relief it seeks in its other Claims for Relief. Both claims

must be dismissed because a writ of administrative mandamus is the exclusive remedy for challenging a development permit. *State of California v. Superior Court* (1974) 12 Cal.3d 237, 248-49; *Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110, 126-27; *City of Santee v. Superior Court* (1991) 228 Cal.App.3d 713, 719.

VI. Legado's Sixth Claim for Relief for a Writ of Mandate Commanding the City to Approve the 180-Unit Project Is Unripe.

In its Sixth Claim for Relief, Legado asks for a writ of mandate commanding the City to rescind the Resolution and adopt a new Resolution approving the 180-unit project. Because that claim is unripe—the 180-unit project was not pending before the City Council (*see* Section I above)—Legado is not entitled to such relief as a matter of law.

CONCLUSION

The City's demurrer should be sustained without leave to amend.

DATED: September 16, 2016 SHUTE, MIHALY & WEINBERGER LLP

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