Calendar Line 1
Date of Hearing: Thursday, June 20, 2024 at 9:00 a.m.
Case Name: *CBM Two Hotels LP v. Santa Clara VTA et al.*
Case No.: 23CV418248 (lead case)

I. FACTUAL AND PROCEDURAL BACKGROUND

This is a challenge to a portion of the Interstate 280/Wolfe Road Interchange Improvement Project ("Project") brought by Petitioner CBM Hotels LP ("CBM"), a long-term ground lessee of property allegedly affected by the Project. The original and still operative verified petition for writ of mandate ("Petition") was filed on June 30, 2023 and names the Santa Clara Valley Transportation Authority ("VTA"), the California Department of Transportation ("Caltrans") and the City of Cupertino ("City") as respondents. This matter has been consolidated with a related eminent domain case, 23CV425757.

The verified Petition admits that the Project was found to be categorically exempt from the California Environmental Quality Act ("CEQA," Pub. Res. Code § 21000 et seq.) and the federal National Environmental Policy Act ("NEPA") in June of 2020 and that a Notice of Exemption ("NOE") from CEQA was filed on June 29, 2020. (See Petition at ¶¶ 2, 24, 25 and 38). The Petition also admits that the Project was approved on November 2, 2020, more than two and a half years before this action was filed. (See Petition at ¶¶ 26, 37 and 38.) The Petition alleges that a Resolution of Necessity ("RON"), making findings under the eminent domain law (Code of Civ. Proc. § 1230.010 et seq.) was adopted by respondent VTA on May 4, 2023. (See Petition at ¶¶ 3, 21-22 and 45.)

The Petition states three causes of action: (1) "Writ of Mandate—CCP §§ 1094.5 and/or 1085; Pub. Res. Code § 21000 et seq." (a claim for violation of CEQA); (2) Violation of the federal Administrative Procedures Act (based on alleged violation of the NEPA), and (3) "Writ of Mandate—CCP § 1085" (challenging the RON adopted by VTA). Attached to the Petition as Exhibit A is a copy of the RON passed and adopted by VTA (and only VTA) on May 4, 2023.

Currently before the court are three separate demurrers to the Petition brought by Caltrans, VTA and the City, all filed on May 2, 2024.[1] All three demurrers assert that the Petition's first cause of action is time-barred and that the court lacks jurisdiction to hear the second cause of action. Caltrans and the City (but not VTA) also assert that the third cause of action fails to state sufficient facts as alleged against them. CBM filed a single "consolidated" opposition to all three demurrers on May 23, 2024. As the three demurrers make substantially similar arguments (and Petitioner has chosen to file a single opposition) they will be considered together.

II. REQUESTS FOR JUDICIAL NOTICE

[1] Caltrans also filed a request for joinder to VTA's demurrer on May 6, 2024.

"Judicial notice may not be taken of any matter unless authorized or required by law." (Evidence Code, § 450.) A precondition to judicial notice in either its permissive or mandatory form is that the matter to be noticed be relevant to the material issue before the Court. (*Silverado Modjeska Recreation and Park Dist. v. County of Orange* (2011) 197 Cal.App.4th 282, 307, citing *People v. Shamrock Foods Co*. (2000) 24 Cal.4th 415, 422 fn. 2; See also *Aquila, Inc. v. Superior Court* (2007) 148 Cal.App.4th 556, 569 [Since judicial notice is a substitute for proof, it is always confined to those matters that are relevant to the issue at hand.]) It is the Court, and not the parties, that determines relevance. Evidence Code section 453, subdivision (b) requires a party seeking notice to "[furnish] the court with sufficient information to enable it to take judicial notice of the matter."

A. VTA's Request for Judicial Notice

In support of its demurrer to the petition, VTA has submitted a request for judicial notice of a copy of the April 18, 2019 memorandum of understanding ("MOU") between Caltrans and the Federal Highway Administration. A copy of the MOU is attached to the request as Exhibit A. VTA contends that the MOU may be noticed under Evidence Code section 452, subdivisions (c) and (h). (See Request at p. 3:2-4.)

The MOU is relevant to the demurrer to the second cause of action as it states that Caltrans has consented "to the exclusive jurisdiction of the Federal courts for the compliance, discharge, and enforcement of any responsibilities of the USDOT Secretary assumed by Caltrans under this MOU." Caltrans is deemed to be a federal agency for purposes of the MOU. (See Ex. A at pp. 13-14.) The Petition admits the existence of the MOU. (See Petition at ¶¶ 7, 55.)

As an initial matter Evidence Code section 452, subdivision (h) has no application to this request. (See *Gould v. Md. Sound Indus*. (1995) 31 Cal.App.4th 1137, 1145 ["Judicial notice under Evidence Code section 452, subdivision (h) is intended to cover facts which are not reasonably subject to dispute and are easily verified. These include, for example, facts which are widely accepted as established by experts and specialists in the natural, physical, and social sciences which can be verified by reference to treatises, encyclopedias, almanacs and the like or by persons learned in the subject matter."].) The submitted document does not meet this definition.

Notice of the document is GRANTED under Evidence Code section 452, subdivision (c) as the MOU clearly represents an "official act" of both Caltrans and the Federal Highway Administration.

B. CBM's Request for Judicial Notice

With its "consolidated" opposition to all three demurrers CBM has submitted a request for judicial notice of a copy of the operative writ petition, attached as exhibit A to the request, pursuant to Evidence Code section 452, subdivision (d) (court records).

This request is DENIED as unnecessary as the court already considers the pleading under attack, including any attached exhibits, in ruling on a demurrer. (See *Paul v. Patton* (2015) 235 Cal.App.4th 1088, 1091, fn.1 [denying as unnecessary a request for judicial notice of pleading under review on demurrer].)

III. DEMURRERS TO THE WRIT PETITION

A. General Standards

The court treats a demurrer to both a complaint and a writ petition "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688, citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; See also 43 Cal.Jur.3d, Mandamus and Prohibition, § 55.) The various factual and legal conclusions alleged in the Petition are not accepted as true for purposes of this demurrer.

Facts appearing in exhibits attached to the complaint (part of the "face of the pleading") are given precedence over inconsistent allegations in the complaint or petition. (See *Barnett v. Fireman's Fund Ins. Co*. (2001) 90 Cal.App.4th 500, 505 ["[T]o the extent the factual allegations conflict with the content of the exhibits to the complaint, we rely on and accept as true the contents of the exhibits and treat as surplusage the pleader's allegations as to the legal effect of the exhibits."]) Here, exhibit A to the Petition establishes that VTA adopted the RON, and that the City and Caltrans played no part in that adoption. Allegations are also not accepted as true on demurrer if they contradict or are inconsistent with facts judicially noticed. (See *Cansino v. Bank of America* (2014) 224 Cal.App.4th 1462, 1474 [rejecting allegation contradicted by judicially noticed facts]. See also Witkin, *California Evidence* (4th Ed., 2000) 1 Judicial Notice §3(3) ["It has long been established in California that allegations in a pleading contrary to judicially noticed facts will be ineffectual; i.e., judicial notice operates against the pleader."])

The court cannot consider extrinsic evidence in ruling on a demurrer. Extrinsic evidence includes declarations. The court has only considered the declarations from defense counsel accompanying the demurrers to the extent they discuss or refer to the meet-and-confer discussions required by statute. The court has not considered any exhibits attached to the declarations.

The contents of the administrative record ("AR"), which was certified on March 18, 2024 but has not yet been fully filed with the court, are also extrinsic evidence. Documents in the AR are clearly not part of the "face of the pleading" and cannot be considered in ruling on these demurrers. Documents in the AR are referenced in VTA's supporting memorandum, CBM's opposition and in VTA's reply. No clear explanation for this citation to extrinsic evidence is provided, but it appears to be related to an April 17, 2024 stipulation and order in this case.[2] Neither the parties nor the court have the

[2] Which included language, at c. iv, that "[p]arties my rely on and cite to the certified administrative record for this motion practice on the demurrers or other dispositive motion."

power to change the law applicable to demurrers. The City and Caltrans, whose papers object to references to the AR, appear to have understood this while VTA and CBM have not. Notably, no party has requested judicial notice of any documents in the AR.

A plaintiff /petitioner bears the burden of proving an amendment would cure the defect in a cause of action identified on demurrer. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) Finally, "points raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before." (*Proctor v. Vishay Intertechnology, Inc*. (2013) 213 Cal.App.4th 1258, 1273; See also *REO Broadcasting Consultants v. Martin* (1999) 69 Cal.App.4th 489, 500 ["This court will not consider points raised for the first time in a reply brief for the obvious reason that opposing counsel has not been given the opportunity to address those points."].)

B. First Cause of Action (Violation of CEQA)

All three respondents argue that, based on the dates alleged in the Petition, any CEQA challenge to the Project is time-barred under the applicable statute of limitations, which here is Public Resources Code section 21167. "A complaint showing on its face the cause of action is barred by the statute of limitations is subject to general demurrer." (*Iverson, Yoakum, Papiano & Hatch v. Berwald* (1999) 76 Cal.App.4th 990, 995.) The running of the statute must appear clearly and affirmatively from the dates alleged—it is not enough that the complaint might be barred. (*Committee for Green Foothills v. Santa Clara County Board of Supervisors* (2010) 48 Cal.4th 32, 42 (*Committee for Green Foothills*).)

Public Resources Code section 21167 states in pertinent part that: "An action or proceeding to attack, review, set aside, void, or annul the following acts or decisions of a public agency on the grounds of noncompliance with this division shall be commenced as follows:

(a) An action or proceeding alleging that a public agency is carrying out or has approved a project that may have a significant effect on the environment without having determined whether the project may have a significant effect on the environment shall be commenced within 180 days from the date of the public agency's decision to carry out or approve the project, or, if a project is undertaken without a formal decision by the public agency, within 180 days from the date of commencement of the project.
(b) An action or proceeding alleging that a public agency has improperly determined whether a project may have a significant effect on the environment shall be commenced within 30 days from the date of the filing of the notice required by subdivision (a) of Section 21108 or subdivision (a) of Section 21152.
(c) An action or proceeding alleging that an environmental impact report does not comply with this division shall be commenced within 30 days from the date of the filing of the notice required by subdivision (a) of Section 21108 or subdivision (a) of Section 21152 by the lead agency.

(d) An action or proceeding alleging that a public agency has improperly determined that a project is not subject to this division pursuant to subdivision (b) of Section 21080 shall be commenced within 35 days from the date of the filing by the public agency, or person specified in subdivision (b) or (c) of Section 21065, of the notice authorized by subdivision (b) of Section 21108 or subdivision (b) of Section 21152. If the notice has not been filed, the action or proceeding shall be commenced within 180 days from the date of the public agency's decision to carry out or approve the project, or, if a project is undertaken without a formal decision by the public agency, within 180 days from the date of commencement of the project.

(e) An action or proceeding alleging that another act or omission of a public agency does not comply with this division shall be commenced within 30 days from the date of the filing of the notice required by subdivision (a) of Section 21108 or subdivision (a) of Section 21152.

"In general, challenges to governmental action under the California Environmental Quality Act (CEQA) face unusually short statutes of limitation." (*Committee for Green Foothills, supra*, 48 Cal.4th at p. 38.) "Which subdivision of section 21167 applies depends upon the nature of the CEQA violation alleged." (*Id*. at p. 44.) Here, the Petition alleges that a CEQA NOE was filed on June 29, 2020 and that the Project was approved on November 2, 2020. (See Petition at ¶¶ 2, 24 and 26.) These factual allegations are accepted as true for purposes of demurrer.

CEQA does not require public agencies to follow any specific procedure in approving activities that are exempt. An agency is not required to provide any notice to the public or other agencies that it is considering whether an activity it is going to carry out is exempt. The agency need not provide an opportunity to review or comment on the exemption, and it need not hold a hearing on its exemption determination. An agency is not required to prepare a detailed written evaluation, such as an initial study, to determine that a project is exempt. (See *Robinson v. City & County of San Francisco* (2012) 208 Cal.App.4th 950, 663; *San Lorenzo Valley Community Advocates for Responsible Educ. v. San Lorenzo Valley Unified Sch. Dist.* (2006) 139 Cal.App.4th 1356, 1385.)

Public agencies may, but are not required to, file an NOE announcing the exemption determination. The filing of an NOE normally triggers a 35-day statute of limitations under section 21167(d). This is the only practical effect of an NOE. Lack of an NOE, or a defective NOE, does not itself invalidate a finding that a project is exempt as an NOE is not required in the first place. When an NOE filed before a project approval, as alleged here, it does not trigger the 35-day limitations period. (See *Coalition for Clean Air v. City of Visalia* (2012) 209 Cal.App.4th 408; *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 962.) This means that the applicable limitations period is 180 days under section 21167(d), the longest limitation period available under CEQA. (See *Guerro v. City of Los Angeles* (2024) 98 Cal.App.5th 1087, 1100 (*Guerro*) ["The longest limitations period applicable to CEQA claims is 180 days, under section 2267, subdivision (d), which 'starts running on the date the project is approved by the public agency.'"])

"Our Supreme Court has held that when an agency has approved a project without filing either a notice of determination (NOD) as to whether the project will have a significant environmental impact or an NOE as to whether a project is statutorily exempt from CEQA, section 21167 nonetheless 'permits a legal challenge to be brought up to 180 days after the agency's decision or commencement of the project, which 'is deemed *constructive notice* for potential CEQA claims.'" (*Save Lafayette Trees v. East Bay Regional Park Dist.* (2021) 66 Cal.App.5th 21, 40 (*Save Lafayette Trees*) [citing *Committee for Green Foothills*], emphasis in original.) "Section 21167 does not establish any special notice requirements for the commencement of the 180-day limitations period from project approval. . . . Accordingly, the public was given the necessary 'constructive notice' that the 180 days started to run from March 21, 2017, the 'statutory triggering date' of project approval." (*Id*. at 40-41, internal citations omitted.)

Here the verified Petition admits that project approval occurred on November 2, 2020. This gave all members of the general public, including CBM, constructive notice that the 180 days had started to run. The 180-day limitations period ended on May 3, 2021 (by operation of Code of Civil Procedure section 12a, as May 1 was a Saturday). Any CEQA challenge to the Project, including a challenge to the exemption determination, had to be filed by that date. As the verified Petition alleges that project approval, the statutory triggering date, occurred on November 2, 2020, and the Petition was not filed until June 30, 2023, the Petition admits on its face that the first cause of action is time-barred under Public Resources Code section 21167(d).

The reference to "subsequent changes made to the Project," in paragraph 43 of the Petition does not alter this conclusion, nor do any allegations regarding the May 4, 2023 RON or the eminent domain proceedings more generally. "'The limitations period starts running on the date the project is approved by the public agency and it not retriggered on each subsequent date that the public agency takes some action toward implementing the project.'" (*American Chemistry Council v. Department of Toxic Substances Control* (2022) 86 Cal.App.5th 146, 204 [quoting *Citizens for a Green San Mateo v. San Mateo County Community College Dist.* (2014) 226 Cal.App.4th 1572, 1594-1595].)

Under CEQA, specifically Public Resource Code section 21065, a "project" is defined as "an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and which is any of the following: (a) An activity directly undertaken by any public agency. (b) An activity undertaken by a person which is supported, in whole or in part, through contracts, grants, subsidies, loans, or other forms of assistance from one or more public agencies. (c) An activity that involves the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies." CEQA Guidelines[3] section 15378(a) states that a "project" means "*the whole of an action*, which has a potential for resulting in either a direct physical change in the environment or a reasonably foreseeable indirect change." (Emphasis added.) Guidelines section 15378(c)

[3] The "CEQA Guidelines" (which are often referred to as such in court decisions) are found at 14 CCR §15000 et seq.

adds, in pertinent part, that "[t]he term 'project' refers to the activity which is being approved and which may be subject to several discretionary approvals by governmental agencies. *The term 'project' does not mean each separate governmental approval*." (Emphasis added.) Neither the "subsequent changes" alleged in paragraph 43, nor the May 4, 2023 RON can be considered as a new project under CEQA or a revision of the approved project that would start another 180-day limitations period.

Accordingly, all three demurrers to the first cause of action on the ground that it is time-barred under the applicable statute of limitations (Pub. Res. Code § 21167(d)) are SUSTAINED.

CEQA's short statute of limitations reflects a policy adopted for the benefit of the public. "To ensure finality and predictability in public land use planning decisions, statutes of limitations governing challenges to such decisions are typically short. The limitations periods set forth in CEQA adhere to this pattern . . . CEQA's purpose to ensure extremely prompt resolution of lawsuits claiming noncompliance with the Act is evidenced throughout the statute's procedural scheme. . . . Courts have often noted the Legislature's clear determination that ''the public interest is not served unless CEQA challenges are promptly filed and diligently prosecuted.'" (*Stockton Citizens for Sensible Planning v. City of Stockton* (2010) 48 Cal.4th 481, 499-500 (*Stockton Citizens*), internal citations omitted; see also *Guerro*, *supra*, 98 Cal.App.5th at 1099 ["An untimely filed challenge is to be dismissed."].)

As noted above, it is CBM's burden to demonstrate how a defect identified by a demurrer could be cured through amendment. (See *Schifando, supra*.) CBM does not meet this burden as the opposition simply includes generic requests for leave to amend if the court is "inclined to grant" any portion of the demurrers. (See Opposition at pp. 8 and 20.)[4] "The onus is on the plaintiff to articulate the 'specifi[c] ways' to cure the identified defect, and absent such an articulation, a trial or appellate court may grant leave to amend 'only if a potentially effective amendment [is] both apparent and consistent with the plaintiff's theory of the case. [Citation.]'" (*Shaeffer v. Califia Farms, LLC* (2020) 44 Cal.App.5th 1125, 1145.)

Arguments in CBM's opposition based on extrinsic evidence do not provide a basis for overruling the demurrer. The opposition's argument that the first cause of action is not time-barred because the 180-day period only began running in April 2023, based on when CBM claims it became aware of "substantial changes" to the Project (see Petition at ¶¶ 22) is not persuasive. (See Opposition at p. 7.) The verified Petition admits that the Project was approved on November 2, 2020, and this was the statutory triggering date for Public Resources Code section 21167, subdivision (d).

The opposition's citations to the decisions in *Concerned Citizens of Costa Mesa, Inc. v. 32nd District Agricultural Association* (1986) 42 Cal.3d 920 (*Concerned Citizens*) and *Ventura Foothill Neighbors v. County of Ventura* (2014) 232 Cal.App.4th 929 do not alter the conclusion that the first cause of action is time-barred. As noted in the *Save*

[4] The line numbering in the opposition is defective, preventing precise citation.

Lafayette Trees decision, "in both cases the actions were determined to be timely filed because a 'statutory triggering date never actually transpired' to start the running of the statute of limitations." (*Save Lafayette Trees, supra*, 66 Cal.App.5th at 42.) In *Communities for a Better Environment v. Bay Area Air Quality Management Dist.* (2016) 1 Cal.App.5th 715 ("*CBE*"), the First District noted that "in *Concerned Citizens*, our state Supreme Court specifically rejected 'as contrary to the Legislature's intent' the plaintiffs' position 'that their action was timely because it was filed a few days before the expiration of 180 days after the first concert was held at the theater'—that is, that the action accrued when the plaintiffs first had actual or constructive notice that the original project had changed substantially, as opposed to on one of the dates specified by statute. . . . Thus, *Concerned Citizens* did not apply the discovery rule to postpone the triggering of the limitations period, contrary to CBE's repeated claims that it did. Instead, the court determined that an action accrues on the date a plaintiff knew or reasonably should have known of the project *only if no statutory triggering date has occurred*. . . . Subsequent case law confirms a more general principle suggested by [*Concerned Citizens*] and conceded by CBE at oral argument: *a plaintiff is deemed to have constructive notice of a potential CEQA violation on all three alternative dates of accrual under section 21167(d).* . . . [W]hen no NOE is filed, 'the limitations period is longer, and its commencement may be delayed until the public has received constructive notice of the action by other means': that is, through a formal decision to approve the project or the project's commencement." (*Id.* at pp. 724-725, internal citations omitted, emphasis added.)

The Supreme Court itself has said, regarding *Concerned Citizens*, "[n]othing in that case suggested, as a general principle, that flaws in a project approval process should delay the limitations period normally applicable where, as in the instant case, *the agency gave notice of the very approval the plaintiffs seek to challenge*." (*Stockton Citizens, supra*, 48 Cal.4th at 511 [emphasis in original].)

The opposition's citation to the decision in *Committee to Relocate Marilyn v. City of Palm Springs* (2023) 88 Cal.App.5th 607, also does not support the argument that the first cause of action is not time-barred. In that decision, the City of Palm Springs argued that the 35-day limitations period (and only the 35-day period) in Public Resources Code section 21167(d) applied based on its issuance of an NOE and rendered a CEQA claim first alleged on April 22, 2021 (in an amended writ petition) time-barred. The trial court agreed. The court of appeal determined, based on the circumstances of the case, that a change to the project after the NOE was issued (to close a street for three years) rendered the 35-day period inapplicable, and that the 180-day period in section 21167(d) applied instead. Relying upon *Concerned Citizens* the court found that the 180-period ran "from the date the Committee knew or reasonably should have known the project substantially differed from the one described in the notice of exemption," which it determined was "February 4, 2021," and that the action was timely. (*Id*. at pp. 635-636.) No statutory triggering date other than the issuance of the NOE was discussed.[5]

[5] To the extent the *Committee to Relocate Marilyn* decision could be construed as establishing a spilt of authority, the court choses the follow the *CBE* and *Save Lafayette Trees* decisions. (See *The Urban*

Once again, the verified Petition here admits that project approval, a statutory triggering date, took place on November 2, 2020. This provided constructive notice to the public and began the 180-day limitations period for any CEQA challenge to the Project. The CEQA claim in CBM's Petition, filed more than 31 months after project approval, is clearly time-barred under Public Resources Code section 21167(d). That CBM asserts that it did not have actual notice until after the 180-day limitation period had run does not make the CEQA claim timely, since "the discovery rule cannot be applied to postpone the running of section 21167(d)'s limitations periods." (*CBE, supra*, 1 Cal.App.5th at 722.)

As the first cause of action is time-barred on its face by more than two years, no effective amendment is apparent to the court. The defect, the failure to file a timely CEQA challenge to the Project, cannot be cured. Leave to amend the first cause of action is therefore DENIED.

C. Second Cause of Action (Violation of NEPA)

All three respondents' demurrers to the second cause of action (alleging violations of the federal NEPA) on the basis that this court lacks jurisdiction over the cause of action (Code of Civ. Proc. § 430.10(a)) are SUSTAINED WITHOUT LEAVE TO AMEND. (See *Quantification Settlement Agreement Cases* (2011) 201 Cal.App.4th 758, 831-832 [noting that, while state courts generally have concurrent jurisdiction to determine rights and obligations under a federal statute, "[t]he question before us is whether Congress explicitly or implicitly confined jurisdiction over claims under the federal Clean Air Act and/or NEPA to the federal courts. Addressing each federal statute in turn, we conclude the answer is 'yes' in both instances."])

The Petition's second cause of action (¶¶ 47-58) depends entirely on allegations that Caltrans (and only Caltrans) violated the NEPA. This court has no jurisdiction to consider that cause of action. CBM does not dispute this, yet its consolidated opposition simply states that "without waiving any argument" CBM agrees to dismiss the NEPA claim without prejudice. (See opposition at p. 20.) A dismissal of the second cause of action was filed on May 30, 2024. As the defect in the second cause of action, the California court system's lack of jurisdiction, cannot—as a matter of law—be cured the demurrer based on lack of jurisdiction will be sustained without leave to amend.

As all three demurrers are sustained based on lack of jurisdiction it is not necessary for the court to address any other arguments regarding the second cause of action. As the demurrers to the first and second causes of action have been sustained without leave to amend it is also not necessary for the court to consider VTA's "alternative" motion for judgment.

D. Third Cause of Action

Wildlands Group, Inc. v. City of Los Angeles (2017) 10 Cal.App.5th 993, 1002 ["When there is a division in Court of Appeal opinions, a trial court chooses which line of authority to follow."])

The demurrers to the third cause of action by Caltrans and the City on the basis that it fails state sufficient facts as alleged against them (Code Civ. Proc. § 430.10(e), clearly cited in both Notices of Demurrer and Demurrer) are both SUSTAINED.

Despite being brought against "all Respondents" the third cause of action (Petition at ¶¶ 59-70) is based exclusively on VTA's efforts to obtain the subject property though eminent domain proceedings, and specifically its adoption of the RON. The third cause of action seeks a review of the RON via writ of mandate as authorized by Code of Civil Procedure section 1245.255. (See Petition at ¶¶ 64-65.) It alleges that the adoption of the RON was an abuse of discretion. (Petition at ¶¶ 3, 70.) The RON (attached as exhibit A), whose contents control over any allegations in the Petition, further makes clear that it is VTA—and only VTA—that is attempting to acquire the property through eminent domain proceedings and that VTA—and only VTA (specifically its Board of Directors)—adopted the RON. Caltrans and the City are not proper respondents for this cause of action. "'Judicial review of the resolution of necessity by ordinary mandamus on the ground of abuse of discretion is . . . to determine whether *adoption of the resolution by the governing body of the public entity* has been arbitrary, capricious, or entirely lacking in evidentiary support, and whether the *governing body* has failed to follow the procedure and give the notice required by law.'" (*Pacific Gas & Electric Co. v. Superior Court* (2023) 95 Cal.App.5th 819, 831 (PG&E [citations omitted, emphasis added].) VTA is the public entity for purposes of the third cause of action, not Caltrans or the City.

The incorporation of all prior allegations by reference (¶ 59) does not alter this conclusion. The Petition does not make <u>any</u> substantive allegations against the City, and certainly none that would support bringing the third cause of action against it. As discussed above, allegations that NEPA was violated cannot be heard in this court, and those allegations against Caltrans are unrelated to the adoption of the RON by VTA in any event. CBM has failed to make any timely CEQA challenge to the Project and even if it had that would not make Caltrans or the City part of the mandamus review of VTA's May 4, 2023 adoption of the RON. "Additionally, 'the trial court's review of the validity of the resolution of necessity under section 1245.255 is limited to a review of the agency's [here VTA's] proceedings and therefore no new evidence may be admitted.'" (*PG&E*, *supra*, 95 Cal.App.5th at 831-832 [citation omitted, brackets added].)

The only substantive argument made by CBM in opposition to Caltrans and the City's demurrers to the third cause of action is the clearly incorrect claim that they have only demurred to this cause of action on misjoinder grounds and that they have failed to demonstrate misjoinder. (See Opposition at pp. 7, 18-19.) The opposition fails to meet CBM's burden to show how the third cause of action could be alleged to state sufficient facts as alleged against Caltrans or the City.

As the defect—the failure to allege facts supporting the third cause of action as brought against the City and Caltrans—cannot be cured without contradicting the Petition's verified factual allegations and the contents of Exhibit A, leave to amend is

properly DENIED. As the demurrer has been sustained without leave to amend on the basis that the third cause of action fails to state sufficient facts against Caltrans or the City, it is not necessary for the court to consider the City's argument that it is also barred by the statute of limitations.