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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

JAMES SAMATAS, Plaintiff and Appellant, v. CITY OF LOS ANGELES, et al., Defendants and Respondents; TANAGER NK, LLC, et al.; Real Parties in Interest.	B293811 (Los Angeles County Super. Ct. No. BS173012)

APPEAL from a judgment of the Superior Court of Los Angeles County, James C. Chalfant, Judge. Affirmed.

Sheppard, Mullin, Richter & Hampton, Jack H. Rubens, and Zachary M. Norris for Plaintiff and Appellant.

Michael N. Feuer, City Attorney, Terry Kaufmann Macias, and Jennifer K. Tobkin, Deputy City Attorneys, for Respondents City of Los Angeles, City of Los Angeles Central Los Angeles Planning Commission, and City of Los Angeles Board of Building and Safety Commissioners.

Jeffer Mangels Butler & Mitchell, Benjamin M. Reznik, Matthew D. Hinks, and Daniel Freedman for Real Parties in Interest Tanager NK, LLC and 1410 Tanager, LLC.

I. INTRODUCTION

Real parties in interest Tanager NK, LLC and 1410 Tanager, LLC (collectively, Tanager) are constructing a hillside residence in West Hollywood (the Project). Petitioner James Samatas, who lives next to the Project, objects to the construction. Permits for the Project were issued by the City of Los Angeles Department of Building and Safety (LADBS) in early 2015. In 2016, after exhausting his administrative remedies, Samatas filed a petition for a writ of administrative mandate (*Samatas I*) challenging the issuance of those permits. The *Samatas I* court found LADBS erred in calculating the maximum residential square footage of the Project. The City complied with the ensuing writ and filed its return on December 19, 2017 showing that the permitted square footage was reduced.

Thereafter, in 2018, Samatas filed a second petition for a writ of mandate against various City of Los Angeles entities challenging those same building permits but on different grounds than those previously asserted (*Samatas II*). Respondents City of Los Angeles, the Central Los Angeles Area Planning Commission (Planning Commission), and the Board of Building and Safety Commissioners (Board) (collectively, the City) demurred to the

petition, arguing it was barred by the doctrine of res judicata. The trial court agreed and sustained the demurrer without leave to amend.

We agree res judicata bars Samatas's seriatim challenge to same permits on different legal theories and affirm.

II. BACKGROUND

As the matter comes to us following the sustaining of a demurrer, we take as true the following facts pled in Samatas's petition. (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43 (*Rakestraw*).)

A. Permits Are Issued for Construction of the Project

Tanager owns and is developing 1410 North Tanager Way (Property), a real estate parcel adjacent to Samatas's residence at 1424 North Tanager Way. The Property is located in the Hollywood Hills and subject to the City's Baseline Hillside Ordinance.

In April 2015, LADBS issued Tanager five building permits, allowing it to demolish the then-existing house on the Property and construct the Project, which is a single-family dwelling with an attached garage and a new pool and spa. One of the permits authorized Tanager to build one retaining wall, ten feet in height and approximately 29 feet in length, on the northeastern edge of the Project. Another allowed for grading of the Property, which was issued after Tanager submitted documentation informing LADBS that the grading would include 687 cubic yards of nonexempt grading quantities.

B. Administrative Procedure to Challenge the Project

Samatas, along with another neighbor, believed the building permits issued by LADBS were not in compliance with the Los Angeles Municipal Code (the Municipal Code). Parties like Samatas who wish to challenge actions taken by LADBS must first address their complaints administratively, and exhaust all administrative remedies, before seeking recourse in Superior Court. (*Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072., 1080.) An administrative remedy is exhausted upon " 'termination of all available, nonduplicative administrative review procedures.' " (*Ibid*.)

Parties challenging LADBS actions must first address their complaint to LADBS itself. (L.A. Mun. Code, §§ 12.26.K.1, 98.0403.2)). The Municipal Code does not provide a time limit for initiating such a complaint with LADBS. (*Ibid*.) Once LADBS has rendered a decision in writing, parties may, within 15 days, appeal LADBS's decision to one of two agencies depending on the subject matter of the action being challenged. If the decision concerns a request for modification of building ordinances, the appeal must be lodged with the Board. (L.A. Mun. Code, § 98.0403.1.) Once the Board decides the appeal, that appeal is final and administrative remedies are exhausted. For all other LADBS actions, including the issuance of building permits, appeals are lodged with the Office of Zoning Administration's Director of Planning (the Director). (L.A. Mun. Code, § 12.26.K.1-2.) The appellant must "set forth specifically how there was error or abuse of discretion in the action of [LADBS]." (L.A. Mun. Code, § 12.26.K.2.) In addition to ruling on the merits of the

appeal, the Director must decide whether the matter may or may not have a Citywide impact. (L.A. Mun. Code, § 12.26.K.4.)

If the Director finds the matter "may not have a Citywide impact," parties may appeal the Director's decision to the Planning Commission within 15 days of the Director's decision. (L.A. Mun. Code, § 12.26.K.6).[1] The "appeal shall set forth specifically the points at issue, the reasons for the appeal, and the basis upon which the appellant claims there was error or abuse of discretion by the Director." (L.A. Mun. Code, § 12.26.K.6.) Upon receipt of the appeal, the Planning Commission "shall set the matter for a hearing at which the Commission shall take evidence." (L.A. Mun. Code, § 12.26.K.7.) Once the Planning Commission decides the appeal, the decision is final, and administrative remedies are exhausted.

Once administrative remedies have been exhausted, a petition challenging the administrative decision regarding the building permit must be filed within 90 days of the administrative body's final decision. (Gov. Code, § 65009, subd. (c)(1)(E).)

C. Samatas I

1. Administrative Proceedings

On June 27, 2015, R. Guy Whitten, the owner of another parcel adjacent to the Property, filed an administrative appeal challenging the Project's building permits. He alleged LADBS

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[1] If the Director finds the matter "may have Citywide impact," the appeal must instead be lodged with the City Planning Commission. (L.A. Mun. Code, § 12.26.K.6.) That provision is not at issue here.

abused its discretion in issuing the permits because (1) no private street map process had occurred with respect to an easement adjacent to the Project (Private Street Map Claim) and (2) the residential floor area (RFA) for the Project exceeded the maximum RFA permitted under the Municipal Code (First Square Footage Claim). LADBS denied the appeal on July 30, 2015.

On August 14, 2015, Whitten appealed LADBS's determination to the Director (First Director Appeal). Samatas joined the appeal. On September 15, 2015, before the First Director Appeal was heard, Whitten withdrew his appeal, leaving Samatas as the sole challenger. On November 25, 2015, Samatas submitted a letter in support of the appeal, elaborating on the same points Whitten raised to LADBS—the Private Street Map Claim and the First Square Footage Claim—but also arguing for the first time that Tanager conducted an incorrect slope band analysis of the Property (Slope Band Claim). Essentially, the slope of a property impacts the maximum square footage of a residence built on a hillside. Samatas alleged that Tanager performed an incorrect analysis that overstated the Project's permissible RFA.

On April 16, 2016, the Director ruled in favor of Tanager on the Private Street Map Claim, but in favor of Samatas on the Slope Band Claim, concluding there was strong and compelling evidence the slope band analysis was prepared incorrectly. Accordingly, the Director determined LADBS erred in part in issuing the Project's building permits.

Both Samatas and Tanager appealed the portions of the Director's decision against them to the Planning Commission. At

a public hearing on June 28, 2016, the Planning Commission denied Samatas's appeal on the Private Street Map Claim and granted Tanager's appeal on the Slope Band Claim, concluding there was no error in LADBS's issuance of the building permits. It mailed the parties its Determination Letter stating is ruling on July 12, 2016.

2. Trial Court Proceedings

On August 16, 2016, Samatas filed a petition for a writ of mandate in Superior Court against the City, and naming Tanager as a real party in interest (*Samatas I*). Samatas alleged LADBS erred and/or abused its discretion in issuing the building permits for the Property, asserting both the Slope Band Claim and the Private Street Map Claim, and arguing the Project violated zoning requirements in the Municipal Code. Samatas requested a peremptory writ of mandate ordering the Planning Commission to set aside its determination and directing the City and Tanager to set aside and invalidate the building permits until the City and Tanager were in full compliance with the Municipal Code and other applicable laws and ordinances.

On October 11, 2017, the court denied Samatas's petition as to the Private Street Map Claim, but granted the petition for writ of mandate as to the Slope Band Claim, finding LADBS erred in granting the building permits because the slope band analysis was done incorrectly. The City complied with the ensuing writ and filed its return on December 19, 2017 showing that, because of the updated slope band analysis, the Project's maximum RFA was reduced.

D. Samatas II

1. Background of Claims

In August 2015, Tanager demolished the then-existing house on the Property. In the first part of 2016, Tanager began construction and grading on the Property. In April and May of 2016, while his administrative appeal in *Samatas I* was pending, Samatas began to suspect that both the construction and grading violated the building permits, as well as Municipal Code zoning restrictions.

(a) Claim Regarding Retaining Wall(s)

The first thing Tanager built on the Property were three walls downslope from the residential building, enclosing approximately 13,755 square feet of habitable space. The walls measured about 210 feet in length and over 20 feet in height. From his monitoring of the construction, Samatas began to suspect the three walls met the definition of "retaining walls" under the Municipal Code and were thus unlawful. Section 12.21.C.8 of the Municipal Code defines a retaining wall in a hillside area as "a freestanding continuous structure, as viewed from the top, intended to support earth, which is not attached to a building." The term "building" is defined as "[a]ny structure having a roof supported by columns or walls, for housing, shelter or enclosure of persons, animals, chattels or property of any kind." (L.A. Mun. Code, § 12.03.)

According to Samatas, the area between where the residential building was going to be built and the three walls was going to be a backyard area consisting of swimming pools and recreational decks (collectively, Backyard Improvements). Based on his observations, Samatas believed the Backyard

Improvements were going to be supported by the dirt behind the retaining walls, but that they would not actually touch the walls. Additionally, he thought the walls appeared to be wholly independent from the structural system for the residential building. If the three walls were in fact retaining walls, they would appear to violate section 12.21.C.8(a) of the Municipal Code, which provides that "[a] maximum of one free standing vertical or approximately vertical retaining wall may be built on any lot with a maximum height of 12 feet as measured from the top of the wall to the lower side of the adjacent ground elevation." Tanager, however, had constructed three walls, not one, all of which were well over 12 feet in height.

Samatas retained Gray Real Estate Advisors (Gray) to investigate the matter and confirm or dispel his suspicions. Gray studied the Project's progression throughout the summer of 2016. By September 2016, Gray formed the opinion the walls were not going to be structurally integrated with the residential building and were thus unlawful retaining walls.

(b) Grading Quantities Claim

In April and May 2016, as Tanager began grading the Property, Samatas also began to question whether Tanager was complying with its grading permit and with the Municipal Code's restrictions on nonexempt grading. Samatas believed Tanager had graded more than the 1,600 cubic yards of nonexempt grading quantities permitted by section 12.21.C.10(f) and table 12.21.C.10-6 of the Municipal Code, and certainly more than the 687 cubic yards of nonexempt grading Tanager told LADBS it would grade when it applied for its grading permit.

Because he could not actually determine what amount had been graded from personal observations alone, Samatas retained Engineering Design Group (EDG), a forensic construction expert, to conduct an analysis of the grading quantities at the Property. EDG studied the ongoing grading throughout the summer of 2016. By September 2016, it found that the actual nonexempt grading quantity for the Project was approximately 2,888 cubic yards, far in excess of the 1,600 cubic yards permissible by the Municipal Code and the 687 cubic yards provided for by the permit.

2. Administrative Appeal

On September 9, 2016, soon after filing a petition for writ of mandate as to the Slope Band Claim and the Private Street Map Claim, Samatas lodged another administrative appeal with LADBS, asserting claims regarding the retaining wall(s) and the quantity of earth being graded.

According to its internal records, LADBS initially concluded that (1) the Project's nonexempt grading quantity exceeded the maximum grading quantity allowed for the Project and (2) that the Project improperly possessed more than one retaining wall, all of which were taller than 12 feet. On September 23, 2016, LADBS drafted a letter to provide its notice of intent to stop construction and revoke the building permits. The letter, however, was never issued.

Instead, LADBS met with a consultant for Tanager to discuss the claims. As to the claim regarding the retaining wall(s), LADBS changed its initial determination and decided the three walls in question were not retaining walls because, per Tanager's consultant, as the Project progressed the walls would

support part of the residence and therefore were part of the residential building. LADBS concluded the Project would thus only have one lawful retaining wall. As to the grading claim, LADBS and Tanager's consultant agreed Tanager would submit a new, more accurate grading plan so that LADBS could update the Project's grading permit.

On November 7, 2016, Tanager submitted its new grading plans, nearly doubling the nonexempt grading quantities from 687 cubic yards to 1,333 cubic yards (which was still under the 1,600 cubic yards permitted by the Municipal Code), and acknowledging that the increase was due to Tanager's omission of nonexempt grading quantities in its initial plans. On November 22, 2016, LADBS issued a supplement to the grading permit, acknowledging the new 1,333 cubic yard figure.

On January 24, 2017, LADBS denied Samatas's appeal, concluding it had not erred or abused its discretion in issuing the building permits.[2] On February 2, 2017, Samatas appealed the LADBS determination to the Director (Second Director Appeal).

After Samatas lodged the Second Director Appeal, he had his consultant EDG conduct another assessment of Tanager's grading quantities to see how it compared to the new grading plans it submitted to LADBS. EDG concluded the Project's grading quantities were 2,865 cubic yards, more than double the

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[2] LADBS's determination is not in the record. While the trial court did not assess the merits, it did state in passing the LADBS determination was conclusory and unpersuasive. The court noted LADBS ignored the Municipal Code's definitions of "retaining wall" and "building" and merely restated the grading information provided by Tanager's consultants without critically reviewing it.

1,333-cubic yard figure Tanager had presented and LADBS had accepted. Samatas also hired Structural Focus, an engineering firm, to provide a second opinion regarding the walls Tanager had built. Structural Focus determined the three walls in question were in fact retaining walls.

In considering the appeal, the Director bifurcated the two claims. He informed Samatas the Director would hear the claim regarding the retaining wall(s), but asked that Samatas re-file his appeal as to the grading quantities with the Board. Samatas accordingly re-filed that appeal with the Board on August 15, 2017.

On August 31, 2017, the Director conducted a public hearing on the retaining wall(s) claim, and on October 30, 2017, denied the claim. The Director found the three walls supported the Backyard Improvements (including the pool and spa), which were a part of the residential building, and thus the walls were "structurally integrated" with the residential building. Samatas appealed the Director's decision to the Planning Commission on November 13, 2017.

On January 22, 2018, Samatas sent the Planning Commission the supplemental report created by Structural Focus, which explained its findings that the three walls in question were not "structurally integrated" with the residential building. The report also asserted that if the Planning Commission found that the three walls *were* structurally integrated with the residential building, like the Director found, that would make the Project and building permits otherwise unlawful. Specifically, Structural Focus contended that if the walls were structurally integrated, the area between where the

residential building was originally deemed to end and where the three walls were built (i.e., the backyard area) would need to be considered for purposes of the Project's RFA, which would lead to an RFA significantly larger than the maximum permissible RFA. Structural Focus additionally contended that if the three walls were considered the exterior basement walls of the residential building, the 7,450-square-foot basement level, which was previously excluded from the calculation of the Project's RFA, would have to be included in the calculation, again resulting in an RFA exceeding the maximum permissible RFA.

On January 23, 2018, the Planning Commission denied the claim regarding the retaining wall(s).

With regard to the grading quantities claim, the Board heard the appeal on January 9, 2018, and denied it by a vote of five to zero. It issued a written determination, which stated that LADBS had not erred or abused its discretion in issuing the Project's building permits.

3. Petition for Writ of Mandate

Samatas filed a second petition for writ of mandate on March 29, 2018, naming the City as respondent and Tanager as a real party in interest. (*Samatas II*). His request for relief was essentially identical to the request in *Samatas I*—he sought a writ of mandate ordering that the Planning Commission and the Board set aside their determinations, and that LADBS invalidate the building permits, and further ordering the City to set aside all other permits and approvals issued by the City with respect to the Project.

Besides asserting claims regarding the retaining wall(s) and grading, the *Samatas II* writ petition also raised claims

based on the Structural Focus analysis that the Project's RFA was unlawful. Specifically, Samatas contended that, because the Director concluded (and the Planning Commission endorsed) that the Backyard Improvements are part of the residential building for purposes of rejecting the retaining wall(s) claim, the Project's RFA must include the Backyard Improvements (which would mean the Project's RFA was more than double that allowed by the Municipal Code). Samatas further alleged that if the retaining walls were considered the exterior basement walls of the residential building, as the Director concluded and Planning Commission endorsed, then the 7,450 square-foot basement previously excluded from the Project's RFA must be included in the RFA calculation (which would again mean the Project's RFA would exceed that allowed by the Municipal Code).

4. City's Demurrer

The City demurred to the petition, alleging it was barred by the doctrine of res judicata as a result of the judgment in *Samatas I*. As pertinent to this appeal, Samatas replied that he was asserting different causes of action and that he could not have raised his retaining wall and grading claims when he filed *Samatas I* in August 2016 because he was not yet aware of the facts that supported them, and he had not yet exhausted his administrative remedies, when *Samatas I* was filed.[3]

After supplemental briefing and several oral arguments, the court sustained the demurrer, holding that the City's issuance of the building permits constituted one primary wrong for purposes of res judicata. The court further held that Samatas

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[3] Samatas made other arguments in opposition to the demurrer that on appeal he no longer advances.

had one corresponding primary right—the right to be free from City-issued building permits for the Project that do not comply with the City's zoning laws so that the Project interferes with the quiet enjoyment of his property. Accordingly, the court concluded that Samatas was asserting the same cause of action he had asserted in *Samatas I*. The court also noted that because Samatas first became suspicious about the retaining walls and grading in April or May of 2016, he had the ammunition to develop those legal theories before he filed the *Samatas I* writ petition in August 2016.

After entry of a judgment of dismissal, Samatas timely appealed.

III. DISCUSSION

A. Standard of Review

On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the standard of review is well settled. "[W]e review the complaint de novo to determine whether it alleges facts stating a cause of action under any legal theory." (*Tom Jones Enterprises, Ltd. v. County of Los Angeles* (2013) 212 Cal.App.4th 1283, 1290.) We also consider any attachments or incorporations by reference and matters which may be judicially noticed.[4] (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.) "We give the complaint a reasonable interpretation, reading

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[4] At the request of the City and Tanager, the trial court took judicial notice of various documents filed or lodged in *Samatas I*. Samatas raises no issue with that grant of judicial notice on appeal.

it as a whole and its parts in their context. [Citation.] Further, we treat the demurrer as admitting all material facts properly pleaded, but do not assume the truth of contentions, deductions or conclusions of law." (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865.) The judgment must be affirmed if it is correct on any ground stated in the demurrer, regardless of the trial court's stated reasons. (*Aubrey v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.)

When a demurrer is sustained without leave to amend, we look to see "whether there is a reasonable possibility that the defect can be cured by amendment." (*City of Dinuba v. County of Tulare*, *supra*, 41 Cal.4th at p. 865.) "[I]f it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff." (*Blank v. Kirwan*, *supra*, 39 Cal.3d at p. 318.) "A plaintiff may make this showing for the first time on appeal." (*Rakestraw*, *supra*, 81 Cal.App.4th at p. 43.)

B. Res Judicata

The party who asserts res judicata as a bar to further litigation bears the burden of proving that the requirements of the doctrine are satisfied. (*Hong Sang Market, Inc. v. Peng* (2018) 20 Cal.App.5th 474, 489.) "[A] demurrer based on res judicata is properly sustained only if the pleadings and judicially noticed facts conclusively establish the elements of the doctrine." (*Planning & Conservation League v. Castaic Lake Water Agency* (2009) 180 Cal.App.4th 210, 231.)

Res judicata, or claim preclusion, "prevents the relitigation of the same cause of action in a second suit between the same

parties or parties in privity with them." (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896 (*Mycogen*).) For res judicata to apply, three conditions must be met: (1) the decision in the previous proceeding must be final and on the merits, (2) the present proceeding must be on the same cause of action as the prior proceeding; and (3) the parties in the present proceeding or parties in privity with them must be the same as the parties to the prior proceeding. (*Federation of Hillside & Canyon Assns. v. City of Los Angeles* (2004) 126 Cal.App.4th 1180, 1202 (*Federation*).)

Here, there is no dispute the decision in *Samatas I* was final and on the merits, and that the parties in *Samatas II* are the same or in privity with the parties in *Samatas I*. We accordingly focus on the second element, whether the present proceeding involves the same cause of action as the prior proceeding.

"California's res judicata doctrine is based upon the primary right theory." (*Mycogen*, *supra*, 28 Cal.4th at p. 904.) Under this theory, a cause of action is comprised of three things: "the plaintiff's primary right, the defendant's corresponding primary duty, and the defendant's wrongful act in breach of that duty." (*Federation*, *supra*, 126 Cal.App.4th at p. 1202.) " ' "[T]he primary right and duty and the delict or wrong combined constitute the cause of action in the legal sense of the term . . . ." ' " (*Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 798 (*Boeken*); see also *Mycogen*, *supra*, 28 Cal.4th at p. 904.)

A plaintiff's primary right is " 'simply the plaintiff's right to be free from the particular injury suffered. [Citation.] It must therefore be distinguished from the *legal theory* on which liability

for that injury is premised: "Even where there are multiple legal theories upon which recovery might be predicated, one injury gives rise to one claim for relief." [Citation.] The primary right must also be distinguished from the *remedy* sought: "The violation of one primary right constitutes a single cause of action, though it may entitle the injured party to many forms of relief, and the relief is not to be confounded with the cause of action, one not being determinative of the other." ' " (*Mycogen*, *supra*, 28 Cal.4th at p. 904.)

Res judicata bars litigation not only of causes of action that were actually litigated in a prior proceeding, but also those that could have been litigated in the prior proceeding. (*Federation*, *supra*, 126 Cal.App.4th at p. 1202.) As we have previously stated, " ' "[i]f the matter was within the scope of the action, related to the subject-matter and relevant to the issues, so that it *could* have been raised, the [prior] judgment is conclusive on it despite the fact that it was not in fact expressly pleaded or otherwise urged. The reason for this is manifest. A party cannot by negligence or design withhold issues and litigate them in consecutive actions. Hence the rule is that the prior judgment is *res judicata* on matters which were raised or could have been raised, on matters litigated or litigable." ' [Citation.]" (*Franceschi v. Franchise Tax Board* (2016) 1 Cal.App.5th 247, 259 (*Franceschi*).)

The determination of whether a cause of action could have been brought is made as of the date the first complaint was filed; res judicata does not bar any claims that arise after that. (*Allied Fire Protection v. Diede Construction, Inc.* (2005) 127 Cal.App.4th 150, 155.)

C. The Demurrer Was Properly Sustained Without Leave to Amend

Samatas concedes, for purposes of this appeal, that his claims in *Samatas II* involve the same primary right(s) as those at issue in *Samatas I*. His sole contention is that res judicata does not bar his current causes of action because they could not have been litigated in *Samatas I*. Samatas's argument thus starts from the premise that the causes of action asserted in *Samatas II* are distinct from those at issue in *Samatas I*. Based on that premise, he argues res judicata does not apply because he did not learn the facts supporting those causes of action before *Samatas I* was filed. Samatas argues in the alternative that if a discovery rule is applied and his admitted suspicion of concerns with the retaining walls and grading before *Samatas I* was filed is problematic, he could not have brought his current causes of action in *Samatas I* because they were not yet administratively exhausted.

Samatas II seeks to rely on two categories of new facts. One category involves observations by Samatas and his consultants as construction progressed that allegedly made Samatas aware of other issues with the permits he previously challenged. The second category involves observations by Samatas and his consultants that Tanager was purportedly not complying with permits as issued.

Taking the second category first, Tanager's alleged noncompliance was not a basis on which to re-challenge the City's issuance of the building permits. While it may form the basis for a claim against Tanager (an issue not before us, and on which we express no opinion), Tanager was not a respondent in either

Samatas I or *II*, in which the relief sought was a writ of mandate directed solely at the City and its issuance of the building permits. As the trial court noted, "[i]n arguing that he had to wait to see how the construction unfolded, Samatas is confusing the City's [alleged] wrongful issuance of the Building Permits, which is at issue in this case, with [Tanager]'s non-compliance with those permits."

With regard to the first category of purported new facts, Samatas is conflating facts of which he allegedly later became aware, which provided him additional legal theories on which to invalidate the permits, with a new cause of action. But they are not the same. A cause of action for res judicata purposes consists of the petitioner's primary right, the City's corresponding primary duty, and the City's breach of that duty. (*Federation*, *supra*, 126 Cal.App.4th at p. 1202.) The same primary right/primary duty was indisputably at issue in *Samatas I* and *II*. So was the same alleged breach—that the City acted wrongfully in improperly granting the building permits. The only thing different was the legal theory or basis for claiming why those permits were invalid. Accepting the allegations of the petition as true, and that Samatas only later appreciated additional facts that provided other legal theories on which to invalidate the permits, those allegations did not create a new cause of action. (*Boeken*, *supra*, 48 Cal.4th at p. 798; *Mycogen*, *supra*, 28 Cal.4th at p. 904.)[5]

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[5] Samatas's reliance on *Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797 (*Fox*) is thus misplaced. In *Fox*, our Supreme Court addressed not res judicata, but the discovery rule for purposes of potential statute of limitations tolling. The

1. The Retaining Wall(s)

Three of the four causes of action asserted in *Samatas II* (the first, third, and fourth causes of action) related to the retaining wall(s). The *Samatas II* petition indicates the retaining wall dispute concerned whether the City properly approved plans that permitted the building of those walls, not that the developer was deviating from what was permitted. The first purported cause of action alleges the walls constructed in 2016 are unlawful retaining walls, and the third and fourth claims assert that the explanation offered by the Director and the Planning Commission for why the walls are not retaining walls would mean the Project is noncompliant with the Municipal Code in other ways.

The building permits, including those involving the retaining wall, were issued in 2015. Samatas does not contest that the walls were, at least in some capacity, shown on the plans he had access to during the *Samatas I* administrative appeal.

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complaint in *Fox* initially involved an allegation of medical malpractice. (*Id*. at p. 802.) During discovery, the plaintiff received information suggesting a medical device used during surgery may have malfunctioned and amended to add a separate products liability cause of action against a new defendant—the product's manufacturer. (*Ibid*.) The Court found the statute of limitations on the products liability claim did not begin to run until a diligent investigation would have disclosed a factual basis for that cause of action. (*Id*. at pp. 808-809.) *Fox* is not instructive here as it involved two different primary rights, and different causes of action against different defendants. Samatas, on the other hand, seeks to assert the same primary right and the same cause of action against the same respondent. The only thing different in *Samatas II* is the legal theories asserted for why the permits are invalid.

Samatas had an opportunity to review those plans while the *Samatas I* administrative appeal was ongoing, and to assert further claims in that administrative process (just as he did with the Slope Band Claim, which was raised mid-way through the administrative process). In addition, Samatas was not compelled to join the appeal filed by Whitten and could have deferred his challenge to the building permits to complete whatever investigation Samatas thought was necessary. We accordingly agree with the trial court that res judicata precluded the first, third, and fourth causes of action in *Samatas II*.

Samatas contends res judicata should not apply because the plans available to him during the *Samatas I* administrative proceedings did not include the necessary information, including structural calculations, to allow him to discover this additional challenge to the permits as part of *Samatas I*. He also asserts he was not given a meaningful opportunity to review those plans, which were available only on microfiche.

Putting aside that Samatas elsewhere asserts he had a meaningful opportunity to review the approved plans in connection with his Slope Band Claim, the record in *Samatas I* (of which the trial court took judicial notice) showed that (1) Samatas's consultant was allowed to review a hard copy of the plans, and (2) Samatas attached the plans to documents he filed throughout the *Samatas I* administrative appeal. To the extent that Samatas thought the plans lacked necessary information, or he was not afforded sufficient opportunity to review the plans, he was obligated to make those assertions as part of the *Samatas I* administrative appeal and petition for writ of mandate. He could not " ' "by negligence or design withhold issues and litigate them in consecutive actions" ' " challenging the same permits for the

same Project on a different legal basis. (*Franceschi*, supra, 1 Cal.App.5th at p. 259.) Nor can Samatas avoid res judicata by claiming the Second Director and Planning Commission determinations occurred after *Samatas I* was filed. Samatas cannot withhold issues concerning the plans and/or retaining wall(s), get an administrative response to those concerns, and then use that later administrative response to a withheld issue to bootstrap himself around res judicata.

Samatas further asserts, for the first time, that he could not have brought the claims about the retaining wall(s) in *Samatas I* because the walls were constructed at substantially different locations and in a different configuration than shown on the plans. As noted above, this argument confuses a cause of action to invalidate building permits—the relief sought in *Samatas I* and *II*—with a cause of action asserting Tanager (who is not a named respondent in *Samatas II*) acted in nonconformance with the building permits. Samatas remains free to file a separate action seeking to assert such a claim against Tanager, but as he himself has made clear, in the present action he seeks only to compel the City to invalidate the existing building permits.

2. The Grading Claim

With regard to the second cause of action concerning grading, the *Samatas II* petition identified the principal area of disagreement as an error by LADBS in issuing the original grading permit in 2015. The Municipal Code permits up to 1,600 cubic yards of nonexempt grading. (L.A. Mun. Code, § 12.21.10(f).) The cut and fill underneath the footprint of a residential building, however, is exempt from the calculation of a

project's grading quantities. (L.A. Mun. Code, § 12.21.10(f)(3)(i).) Samatas alleges that, in violation of the Municipal Code, the City permitted over 1,600 cubic yards of nonexempt grading by erroneously considering the area under the Backyard Improvements to be exempt. Put differently, Samatas contends the City categorized 1,434 cubic yards of grading as exempt, when it should have been nonexempt, thus meaning the permitted grading exceeds what is allowable under the Municipal Code.

Similar to the retaining wall(s) claim, Samatas attempts to excuse his failure to raise any concern with grading in *Samatas I* by claiming (1) an "Earthwork Quantities" document originally submitted to LADBS was insufficient for Samatas to spot the issue, (2) Samatas did not have a full-size copy of the document, and (3) the actual grading appears to have deviated substantially from what was permitted.

These arguments fail for the same reasons the retaining wall arguments fail. First, Samatas expressly alleged in the *Samatas II* petition that once he reviewed the "Earthworks Quantities" document submitted to LADBS, he was able to determine from it that, "contrary to the Developer's calculations, the grading quantities beneath . . . where the Backyard Improvements would be located was not exempt because that area is outside the footprint of the Residential Building." Even if we ignore this admission, Samatas and his consultants indisputably had access to the "Earthwork Quantities" document during the course of *Samatas I*, and to the extent that Samatas thought that document and any other associated ones lacked necessary information to support the grading permit's issuance, or that he was not afforded sufficient opportunity to review the

document, he was obligated to make those assertions as part of the *Samatas I* administrative appeal and petition for writ of mandate. He could not " ' "by negligence or design withhold issues and litigate them in consecutive actions." ' " (*Franceschi*, *supra*, 1 Cal.App.5th at p. 259.)

While Samatas did raise concerns that led to the issuance of a supplemental grading permit in November 2016 after *Samatas I* was filed, the issuance of that supplemental permit does not change the res judicata analysis. The supplemental 2016 permit did not correct the error Samatas alleges, because it still considers the 1,434 cubic yards of grading at issue to be exempt. Accordingly, the issuance of that supplemental permit after *Samatas I* was filed does not relieve Samatas of the preclusive effect of *Samatas I*, because the alleged error remained unchanged from the time it could have been challenged in *Samatas I*. (See *Federation*, *supra*, 126 Cal.App.4th at pp. 1190—1202.)

In *Federation*, petitioners successfully challenged the City's approval of a General Plan Framework and environmental impact report (EIR) under the California Environmental Quality Act (CEQA). (*Federation*, *supra*, 126 Cal.App.4th at pp. 1190—1191.) The court granted petitioners' request for writ of mandate, ordering the City to vacate its approval of the General Plan Framework and to comply with CEQA. (*Id.* at p. 1191.) The City vacated its approval of the General Plan Framework, adopted new CEQA findings, and readopted the General Plan Framework. (*Id.* at pp. 1191—1192.) Petitioners then filed a second petition for writ of mandate challenging the City's readoption of the General Plan Framework and new CEQA findings. (*Id.* at p. 1193.) The court held that res judicata barred

petitioners from challenging those CEQA findings that were substantially identical to the prior CEQA findings, since those claims were or could have been challenged in the first proceeding. (*Id.* at p. 1202.) Even though petitioners cited to evidence that became available only after the City made its original CEQA findings, the court found res judicata applied because the material facts on which the petitioners' challenges were based had not changed. (*Id.* at p. 1204.)

Here, the City's determination on whether the section at issue was exempt or nonexempt was made at the time the grading permit was initially issued in 2015, and that determination was not changed in the supplemental permit. If Samatas had a challenge to the grading calculation at issue it needed to be part of *Samatas I*. Because the supplemental grading permit made no change in the allegedly flawed analysis, Samatas failure to challenge the analysis when originally made barred a subsequent challenge in *Samatas II*.

We also reject the claim that, because the actual grading purportedly has deviated substantially from what was permitted, that later deviation provides a basis for Samatas to challenge the grading permit in *Samatas II*. As stated previously, Samatas remains free to file a separate action seeking to assert such a claim against Tanager, but those alleged facts do not provide a basis to surmount the res judicata bar to his successive challenge to the City's issuance of the existing building permits.

Res judicata is "based on the principle that a litigant is only entitled to one bite at the apple." (*Colombo v. Kinkle, Rodiger & Spriggs* (2019) 35 Cal.App.5th 407, 416.) " ' " 'It rests upon the sound policy of limiting litigation by preventing a party who has

had *one fair adversary hearing* on an issue from again drawing [that issue] into controversy and subjecting the other party to further expense in its reexamination.' " ' " (*Ibid*.) Samatas had a fair opportunity to bring his challenges the building permits in *Samatas I*, and could have delayed his initial challenge before LADBS if he was concerned he had not had sufficient time to investigate. His challenges having been adjudicated, Samatas cannot now assert different legal theories to reopen the examination of the legality of those permits. Nor do any of the additional facts he has proffered as the basis for a possible amendment suggest any basis to avoid res judicata. Leave to amend was therefore appropriately denied. (*Blank v. Kirwan*, *supra*, 39 Cal.3d at p. 318.)

DISPOSITION

The judgment is affirmed. Respondents are to recover their costs on appeal.

NOT TO BE PUBLISHED

WEINGART, J.*

We concur:

ROTHSCHILD, P. J. CHANEY, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.