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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

COLONY COVE PROPERTIES, LLC, Plaintiff and Appellant, v. CITY OF CARSON et al., Defendants and Respondents.	B234985 (Los Angeles County Super. Ct. No. BC392603)

APPEAL from a judgment of the Superior Court of Los Angeles County, Joanne O'Donnell, Judge. Reversed in part and remanded with instructions.

Gilchrist & Rutter, Richard H. Close, Thomas W. Casparian and Kevin M. Yopp for Plaintiff and Appellant.

Aleshire & Wynder, William W. Wynder, Sunny K. Soltani and Jeff M. Malawy for Defendants and Respondents.

Appellant Colony Cove Properties, LLC (Colony Cove) brought suit against respondents, City of Carson and its City Council (the City), claiming that the City's delay in approving its application to convert the Colony Cove Mobile Estates (the Park) to resident ownership resulted in a compensable temporary taking.[1] In 2008, when Colony Cove initiated the lawsuit, it blamed the delay entirely on temporary ordinances adopted to create a moratorium to allow the City to study the issue. The lawsuit was stayed while Colony Cove pursued writ proceedings challenging two ordinances: one was the most recently enacted moratorium ordinance; the other was an ordinance providing, inter alia, that if a statutorily required survey of park residents demonstrated less than 35 percent support, the conversion would be presumed not to be bona fide ("survey ordinance"). In *Colony Cove I*, we held that the latter ordinance was invalid, but reversed the trial court's order invalidating the moratorium, finding that all issues pertaining to it were moot by the time the trial court ruled. After the remittitur issued, Colony Cove amended its complaint to contend that it had been damaged by delay caused by all the ordinances as well as by other actions of the City. The City demurred, contending Colony Cove had failed to exhaust administrative and judicial remedies or obtain rulings on the validity of the City's actions that must proceed a suit for inverse condemnation. The trial court sustained the demurrer. For the reasons explained below, we reverse and remand to permit Colony Cove to amend its complaint to assert a taking claim based only on the substantive ordinance.

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[1] When a mobilehome park is converted to resident-ownership, the residents own the land underneath their units and an undivided interest in the common areas, and, thus, no longer pay rent to a landlord. (See *Colony Cove Properties, LLC v. City of Carson* (2010) 187 Cal.App.4th 1487 (*Colony Cove I*).)

FACTUAL AND PROCEDURAL BACKGROUND

A. *Colony Cove's Application Process*

In April 2006, Colony Cove purchased the Park for approximately $23 million, allegedly intending to convert it to resident ownership.[2] In November 2006, Colony Cove submitted an application for conversion to the City. In December 2006, it received a notice from the City stating that its application was incomplete.

Beginning in March 2007, while Colony Cove's application was pending, the City adopted a series of three ordinances, each imposing a moratorium which essentially prohibited consideration and approval of any mobilehome park conversion application that had not been deemed substantially complete by City staff prior to the first ordinance's effective date. The first moratorium ordinance, adopted in March 2007, imposed a 45-day moratorium on resident conversions. In May 2007, the City passed a second ordinance, extending the moratorium 10 months and 15 days. In March 2008, the City adopted a third moratorium ordinance (No. 08-1402U), extending the moratorium an additional year. Throughout this period, cities were grappling with the permissible scope of regulations governing the conversion of mobilehome parks. (See *Sequoia Park Associates v. County of Sonoma* (2009) 176 Cal.App.4th 1270, 1275 [invalidating

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[2] For purposes of reviewing an order sustaining a demurrer, we accept as true all properly pled factual allegations. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) We affirm the judgment if any one of the asserted grounds for demurrer was correct, regardless of the trial court's stated reasons. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.)

2007 ordinance governing mobilehome park conversions initially found valid by trial court].)[3]

Colony Cove did not dispute that its initial conversion application was incomplete. In October 2007, it submitted the additional information requested by the City. Shortly thereafter, Colony Cove received notice that the moratorium prohibited the City from considering or processing the application.[4] Approximately one month later, the City reversed itself and informed Colony Cove it had begun processing the application. A few weeks after that, the City notified Colony Cove that the application was still incomplete.[5] In February 2008, the City informed Colony Cove that the application could not be processed further due to the moratorium then in effect.[6]

That same month, February 2008, the City adopted the survey ordinance (No. 08-1401), addressing implementation of the statutorily mandated survey of residents of mobilehome parks facing possible conversion. (See Government

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[3] In recent years the conversion of mobilehome parks has been a fertile ground for state and local legislation, as well as litigation. As our decision in *Colony Cove I*, recognized, amendments to legislation governing mobilehome park conversions have created more uncertainty than clarity. (See *Colony Cove I*, *supra*, 187 Cal.App.4th at p. 1508, fn. 18 [noting dilemma faced by local agencies evaluating conversion applications].)

[4] The moratorium in place at that time was the result of the second moratorium ordinance, enacted in May 2007.

[5] Colony Cove denied that the application remained incomplete after submission of the additional materials in October 2007.

[6] This, too, would have been in reference to the second moratorium. The third and final moratorium ordinance, No. 08-1402U, would not be adopted for another month.

Code, § 66427.5, subd. (d).)[7] Under the ordinance, survey results indicating 50 percent or more resident support would create a presumption that the conversion was "bona fide"; results indicating less than 35 percent would create a presumption that the conversion was not bona fide; anything in between placed the burden on the party seeking conversion to establish that the conversion was bona fide.

B. *Colony Cove's Prior Writ Petitions and Original Complaint*

Colony Cove filed two petitions for writ of mandate, facially challenging two of the ordinances enacted by the City. On May 19, 2008, it filed a petition mounting a challenge to the survey ordinance, seeking a writ of mandate directing the City to vacate it. On June 13, 2008, it filed a petition seeking a writ of mandate vacating the final moratorium extension, which at the time had approximately nine months to run.

On the same day it filed the petition challenging the final moratorium, June 13, 2008, Colony Cove filed a complaint for declaratory relief, injunctive relief, and damages for inverse condemnation. The complaint focused on the three moratorium ordinances, alleging that the City enacted the ordinances after Colony Cove submitted its application for approval to convert the Park to resident ownership in order to "frustrate and delay [c]onversions within the City." The complaint further contended that Colony Cove lodged formal objections with the City when each of the moratorium ordinances was under consideration, asserting that they were violative of California law, specifically sections 66427.5 and 65858 governing mobilehome park conversions and interim ordinances, and that the City could not impose obligations on conversions beyond those set forth in section

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[7] Unless otherwise stated, all statutory references are to the Government Code.

66427.5.[8] The complaint sought a declaration that the City lacked authority to impose any interim ordinances governing mobilehome park conversions and an injunction restraining the City from enforcing "the Moratorium."[9] The complaint did not mention the survey ordinance, adopted in February 2008.

On July 24, 2008, the parties entered into a stipulation and order, subsequently approved by the court, which stayed further proceedings on the complaint. Under the stipulation, Colony Cove and the City agreed that "to resolve issues raised by the City, [Colony Cove] will file a First Amended Complaint [FAC] that contains only the takings claim without the causes of action for injunctive and declaratory relief." After the FAC was filed, the case would be stayed until the trial court ruled on the writ petition in the proceeding challenging the final moratorium ordinance. If the court granted the writ, the parties stipulated, "the City must file responsive pleadings to the [FAC] within thirty (30) days." Colony Cove did not file a FAC at that time, but the parties and the court treated the action on the complaint as stayed.

1. *Trial Court's Ruling on Colony Cove's Writ Petitions*

Colony Cove's two petitions were consolidated for hearing by the trial court. In June 2009, the court granted the petitions, entering separate judgments for each. The first judgment ordered issuance of a peremptory writ of mandate directing the City to vacate the survey ordinance. The second judgment ordered issuance of a peremptory writ of mandate directing the City to vacate the final moratorium

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[8] Section 66427.5 provides that an application for conversion or "subdivision" of a mobilehome park to resident ownership must include a proposed tentative tract map or parcel map, a resident survey of support, and a tenant impact report.

[9] Colony Cove also sought damages in excess of $78 million based on a temporary taking.

ordinance and, in the alternative, deemed the June 2008 petition an action for declaratory relief and declared the ordinance invalid.

With respect to the survey ordinance, the trial court concluded the City had only a limited "ministerial" duty to decide whether an application complied with section 66427.5 by obtaining and submitting the tenant survey and no discretion to exercise with respect to the survey. With respect to the moratorium ordinance, the court recognized that section 65858 authorizes local entities to adopt emergency zoning ordinances for up to two years to protect the public safety, health and welfare, with the purpose of "allow[ing] [a] local legislative body to adopt ordinances prohibiting land uses that may conflict with contemplated general plan amendment[s] or another land use proposal which [the] legislative body is studying or intends to study within [a] reasonable period of time," but concluded that 66427.5 superseded that provision and limited the City "to . . . determining if Colony Cove's application meets [section 66427.5's] requirements."

2. *Prior Appeal*

In *Colony Cove I*, this court affirmed in part and reversed in part the trial court's determinations. We rejected the trial court's conclusion that the City was precluded from considering the contents of the survey of resident support during the application process and was limited to the purely ministerial duty of determining whether the survey had been conducted. (*Colony Cove I*, *supra*, 187 Cal.App.4th at pp. 1505-1506.) We nonetheless concluded that the survey ordinance was invalid because it imposed additional conditions beyond the four corners of section 66427.5, including creating a presumption that a conversion was not bona fide if fewer than 35 percent of the residents supported it, thus giving residents virtual veto power over any proposed conversion. (*Colony Cove I*, *supra*, at p. 1507.) With respect to the final moratorium extension ordinance, we found

that issues pertaining to it were moot, as the moratorium had expired months before the trial court hearing and could not be renewed. (*Id.* at p. 1509.) Accordingly, we affirmed the judgment invalidating the survey ordinance and reversed the judgment invalidating the final moratorium ordinance. (*Id*. at p. 1510.)

C. *Colony Cove's FAC*

On November 10, 2010, days after the remittitur issued, Colony Cove filed its FAC. The FAC included allegations pertaining to *all* the ordinances enacted by the City, including the first two moratorium ordinances and a substantive ordinance adopted in September 2006, none of which had been the subject of prior writ petitions. Colony Cove contended that the City had illegally enacted all the ordinances, wrongfully deemed Colony Cove's conversion application incomplete, improperly informed Colony Cove the City could not consider the conversion application, and preliminarily denied Colony Cove's application in an effort "to frustrate and delay mobilehome park conversions to resident ownership within the City" and to "stall[] and illegally [delay] conversions." The FAC acknowledged that in October 2009, while the appeal from the orders granting the petitions was pending, the City Council had approved Colony Cove's conversion application, but contended the delay in issuing the approval resulted in a temporary taking entitling Colony Cove to substantial monetary damages.

The FAC included two claims: (1) a claim for inverse condemnation, contending the City's actions in delaying Colony Cove from converting the Park "were unreasonable and taken in bad faith," "denied Colony Cove all economically viable use of its property," and thus violated the takings clauses of the Fifth Amendment and article I, section 19 of the California Constitution; and (2) a claim for violation of due process under the Fourteenth Amendment and 42 U.S.C.

section 1983, contending the City "interfered with Colony Cove's property rights," "acted unreasonably [and] in an arbitrary and capricious manner," and "deliberately flouted the law." The FAC alleged that Colony Cove had filed a claim with the City pursuant to section 910 of the Government Tort Claims Act (§ 810 et seq.).

D. *Demurrer*

The City demurred to the FAC, contending that Colony Cove had not exhausted its administrative and/or judicial remedies, and that any attempt to do so would necessarily be time barred. The City argued that Colony Cove was obliged to seek review of the City's October 2009 decision approving Colony Cove's conversion application. Because Colony Cove took no action with respect to that decision within the 90 days permitted by the applicable statute of limitations, the City asserted Colony Cove was precluded from going forward with a taking claim. The City further challenged the due process claim newly asserted in the FAC, because Colony Cove had stipulated that its amended complaint would assert "only [a] takings claim."

Colony Cove responded that because it had specifically and successfully challenged both "the Moratorium" and the survey ordinance via writ petition within 90 days of the adoption of the final moratorium ordinance and the survey ordinance, it had sufficiently and timely exhausted all applicable administrative and judicial remedies necessary to assert a taking claim and a substantive due process claim. It further claimed that the City had engaged in "a unified course of conduct . . . aimed at delaying or preventing Colony Cove's subdivision," thus relieving Colony Cove of the obligation to challenge the City's individual actions.

The trial court sustained the demurrer without leave to amend. It rejected Colony Cove's unified course of conduct theory and ruled that Colony Cove had

90 days to proceed against the City for each separate action it claimed the City undertook in derogation of its rights. The court calculated that for purposes of a facial challenge, the statute of limitations ran on June 19, 2007 for the City's adoption of the first moratorium ordinance, on August 3, 2007 for the adoption of the second moratorium ordinance, on May 19, 2008 for the adoption of the survey ordinance, and on June 16, 2008 for the adoption of the final moratorium ordinance. Although Colony Cove's original June 13, 2008 complaint based on "the Moratorium" was within the limitations period with respect to the final moratorium, that claim was "barred by . . . [Colony Cove's] failure to exhaust administrative remedies as no claim was filed with the City's agency prior to filing the complaint." The court ruled that the statute of limitations barred "[t]he claims for due process violation and inverse condemnation relating to the other [City] actions" because they were "first asserted in the [FAC] filed on November 10, 2010 . . . long after the expiration of the limitation period."

E. *Colony Cove's Motion for New Trial*

Colony Cove moved for a new trial based on trial court error, contending that a property owner is permitted to file an inverse condemnation action for damages after successfully challenging a governmental action by way of a writ petition. It relied on *Kavanau v. Santa Monica Rent Control Bd.* (1997) 16 Cal.4th 761, 779 (*Kavanau*), in which the Supreme Court stated: "[I]f a property owner brings a timely action to set aside or void a regulation, he may but need not join a claim for damages. Instead, he may bring a damages claim separately after successfully challenging the regulation."[10] (Italics omitted.)

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[10] The trial court also found that Colony Cove failed to exhaust administrative remedies by failing to present a claim to the City prior to filing its complaint. On
(Fn. continued on next page.)

In opposition, the City pointed out that with respect to the three moratorium ordinances, Colony Cove had challenged only the last-enacted one, and that it had not obtained a final determination that the ordinance was invalid, as this Court had reversed the trial court's ruling to that effect. Thus, according to the City, Colony Cove had no basis to obtain damages under a regulatory taking theory for any delay attributable to the moratorium ordinances. With respect to the survey ordinance, the City continued to insist that Colony Cove had not exhausted all available avenues of administrative relief because it had not yet obtained a final decision on its conversion application when it initiated the writ petition challenging the survey ordinance or when it filed the original complaint. Once Colony Cove obtained the City's final decision in October 2009, the City contended, it was required to "exhaust . . . judicial remedies" by obtaining a judicial determination on a writ of mandamus before pursuing damages for a regulatory taking. The City further contended that the survey ordinance was never applied to Colony Cove's property.

The trial court denied the motion for new trial. With respect to the statute of limitations, the court found that a separate complaint for damages for a taking could be filed after the proceeding challenging an ordinance was final, only where there had been "'a final [prior] judgment establishing that there has been a compensable taking of the plaintiff's land.'" (Quoting *Hensler v. Glendale* (1994) 8 Cal.4th 1, 7 (*Hensler*).) The court further concluded that Colony Cove had not exhausted its administrative remedies as to each governmental act it believed was wrongful as "demanded by the law." Judgment was entered and Colony Cove appealed.

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appeal, the City does not dispute that a party seeking inverse condemnation damages need not file a claim under the Government Tort Claims Act.

DISCUSSION

Colony Cove contends it complied with all necessary prerequisites to pursuing a claim for inverse condemnation by filing the petitions challenging the survey ordinance and the final moratorium within 90 days of each ordinance's adoption and obtaining trial court judgments in its favor. As explained below, we conclude that Colony Cove met the necessary prerequisites with respect to the survey ordinance, but not with respect to any of the three moratorium ordinances. We further conclude that Colony Cove failed to exhaust its remedies with respect to any other actions by the City on which it based its taking claim, or any other action of the City that may have caused delay. Finally, we hold that Colony Cove is bound by its own express agreement to confine its complaint to a taking claim. Accordingly, we reverse the trial court's ruling in part.

A. *Moratorium Ordinances*

In *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles* (1987) 482 U.S. 304 (*First English*), the United State Supreme Court overturned a California appellate decision which had held that even where a challenged ordinance deprived a party of "'all use'" of its property, the party could not recover damages for a regulatory taking "until the ordinance is finally declared unconstitutional, and then only for any period after that declaration for which the [governmental entity or agency] seeks to enforce it." (482 U.S. at p. 312.) The Supreme Court held that "'temporary' takings which . . . deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation," and that if an ordinance "denie[s] [a party] all use of its property for a considerable period of years. . . invalidation of the ordinance without payment of fair value for the use of the property during this

period of time would be a constitutionally insufficient remedy." (482 U.S. at pp. 318, 322.)

The Supreme Court's decision in *First English* "did not address the procedural means by which a claim for inverse condemnation is asserted," and it did not follow from the opinion that the landowner need not "comply with the procedural steps required to contest the action of the [governmental entity or agency]." (*Rossco Holdings Inc. v. State of California* (1989) 212 Cal.App.3d 642, 656 (*Rossco*) italics omitted.) The plaintiff landowner in *Rossco* had obtained a conditional right to develop its property from the California Coastal Commission; rather than challenge the conditions, it built out the property and then brought suit for inverse condemnation. California courts had previously held that landowners who "'declin[ed] to avail themselves'" of the procedures available through Code of Civil Procedure section 1094.5 to obtain a judicial determination that the conditions imposed by the local entity in the permit were invalid, were unable to assert a cause of action in inverse condemnation. (*Rossco, supra,* 212 Cal.App.3d at p. 655, citing *Pfeiffer v. City of La Mesa* (1977) 69 Cal.App.3d 74, 78.) The plaintiff in *Rossco* contended that *First English* created a right under the federal Constitution, which could not be "restricted or restrained by a state rule which requires [it] first to invalidate the condition." (212 Cal.App.3d at p. 656.) The Court of Appeal disagreed, holding that *First English* did not eliminate the "longstanding rule" that prior to proceeding with a claim for inverse condemnation or regulatory taking, landowners must successfully attack the disputed actions of the governmental entity in an administrative mandamus proceeding in a timely fashion: "Regardless of whether [the plaintiff] pleads its cause of action as one for inverse condemnation or as a denial of due process, the essential underpinning of its recovery is the invalidity of the administrative action." (*Id*. at pp. 657, 660; accord, *Sierra Canyon Co. v. California Coastal Com*. (2004) 120 Cal.App.4th

663, 670 [“‘Quite clearly, a property owner seeking to recover on an inverse condemnation claim . . . must first establish the invalidity of the condition the [agency] sought to impose. . . . Once the [agency’s] permit decision becomes final, the affected property owner is estopped from relitigating the validity of the decision in a subsequent inverse condemnation action.”]; *Mola Development Corp. v. City of Seal Beach* (1997) 57 Cal.App.4th 405, 410 [“[P]roperty owners must first succeed in setting aside a city’s decision through a judicial determination on mandamus before pursuing damages for a regulatory taking.”]; accord, *Healing v. California Coastal Com*. (1994) 22 Cal.App.4th 1158, 1175-1176 [landowner alleging regulatory taking based on permit condition must first establish invalidity of the condition].)

As explained in *Patrick Media Group, Inc. v. California Coastal Com*. (1992) 9 Cal.App.4th 592, 607, 609, although inverse condemnation actions must generally be filed within three years of discovery or five years of the taking, because of the above-discussed rule, inverse condemnation claims based on a regulatory taking are subject to a greatly shortened statute of limitations: “Special procedural requirements apply where an inverse condemnation action is based upon a regulatory taking accomplished by a discretionary action of an administrative agency. In such cases, the proper procedure is to bring the inverse condemnation action in conjunction with, or after, a petition for administrative mandamus, as defined in section 1094.5 of the Code of Civil Procedure, the procedure generally required when the validity or propriety of an action or determination by an administrative agency is challenged. [Citations.] . . . . Failure to obtain judicial review of a discretionary administrative action by a petition for a writ of administrative mandate [within the applicable statute of limitations, there 60 days] renders the administrative action immune from collateral attack, either by inverse condemnation action or by any other action.”

The above-cited cases involved as-applied challenges -- claims that a taking occurred as the result of the application of an ordinance to a specific piece of property through the permitting process. In *Hensler, supra*, 8 Cal.4th 1, the Supreme Court made clear that the same essential rules apply to facial challenges. In *Hensler*, the plaintiff landowner purchased a large tract of land prior to the City of Glendale's adoption of an ordinance precluding all development on ridge lines, which represented approximately 40 percent of the plaintiff's tract. (8 Cal.4th at pp. 7-8.) A plan for construction which forbade development on the ridge lines within the tract was approved in 1986. The plaintiff filed an inverse condemnation suit in 1989, contending, as had the plaintiff in *Rossco*, he was "entitled to bring an action in inverse condemnation based on his inability to develop that portion of the property notwithstanding his failure to initiate a timely challenge to the permit condition or application of the ordinance to his property through a proceeding in mandamus." (8 Cal.4th at p. 9.) The city contended the plaintiff was barred by the applicable statute of limitations and by his failure to challenge the plan as approved in 1986. (*Id*. at p. 8.)

The Supreme Court rejected the plaintiff's contention that "he need not pursue administrative and judicial remedies as a prerequisite to a suit in inverse condemnation," reasoning that "only if the [challenged] ordinance or regulation would be invalid on its face or as applied unless compensation is paid to an affected landowner is a claim in inverse condemnation meritorious." (*Hensler, supra*, 8 Cal.4th at pp. 13, 24-25.) Accordingly, "[a] California landowner, who believes that application of a state statute or local ordinance limiting development of the owner's property works a taking, may not bypass the remedies the state has made available to avoid the taking. If he does so, the state may deem the owner to have waived the 'taking' claim." (*Id.* at p. 19.) In addition, the court confirmed that the landowner must comply with the applicable statute of limitations

applicable to challenges of ordinances and other governmental actions: "If the challenge is to the facial validity of a land-use regulation, the statute of limitations runs from the date the statute become effective. Government Code section 65009 establishes a 120-day period of limitation for such actions.[11] By contrast, if the challenge is to the application of the regulation to a specific piece of property, the statute of limitations for initiating a judicial challenge to the administrative action runs from the date of the final adjudicatory administrative decision. Government Code section 66499.37 establishes a 90-day period of limitations for these actions."[12] (*Hensler* at p. 22, fns. omitted.) Finding "no uncertainty regarding the commencement of the period" for purposes of the complaint before it, the court concluded that "[w]hether the complaint is deemed a facial challenge or an applied challenge, it is untimely." (*Ibid*.)

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11 Section 65009 was subsequently amended and now provides: "(c)(1) Except as provided in subdivision (d) [not applicable here], no action or proceeding shall be maintained in any of the following cases by any person unless the action or proceeding is commenced and service is made on the legislative body within 90 days after the legislative body's decision: . . . (B) To attack, review, set aside, void, or annul the decision of a legislative body to adopt or amend a zoning ordinance. . . . (E) to attack, review, set aside, void, or annul any decision on the matters listed in Section 65901 and 65903, or to determine the reasonableness, legality, or validity of any condition attached to a variance, conditional use permit, or any other permit."

12 Section 66499.37 of the Government Code, governing ordinances enacted pursuant to the Subdivision Map Act (Gov. Code, § 66410 et seq.), provides: "Any action or proceeding to attack, review, set aside, void or annul the decision of an advisory agency, appeal board, or legislative body concerning a subdivision, or of any of the proceedings, acts, or determinations taken, done or made prior to the decision, or to determine the reasonableness, legality, or validity of any condition attached thereto, including, but not limited to, the approval of a tentative map or final map, shall not be maintained by any person unless the action or proceeding is commenced and service of summons effected within 90 days after the date of the decision."

In analyzing the faulty course of action undertaken by the plaintiff, the court outlined the remedies available to a landowner who considers himself or herself aggrieved by a local ordinance. Under the option applicable "in most cases," he or she may "seek a variance if that relief is available and then exhaust other administrative and judicial remedies," followed by "an 'as applied' challenge to the development restrictions imposed by the administrative agency [via] a petition for writ of 'administrative' mandamus to review the final administrative decision," which "may be joined with one for inverse condemnation." (*Hensler, supra,* 8 Cal.4th at pp. 13, 14.) Alternatively, the landowner may, "where appropriate," assert a facial challenge to the ordinance, which "may be through an action for declaratory relief" and "also may be joined with an action in inverse condemnation." (*Id*. at pp. 13-14.) Only where the as-applied or facial challenge is successful may the landowner proceed with a taking claim. (*Id.* at pp. 24-25 ["[O]nly if the ordinance or regulation would be invalid on its face or as applied unless compensation is paid to an affected landowner is a claim in inverse condemnation meritorious."]; *Sierra Canyon v. California Coastal Com., supra*, 120 Cal.App.4th at pp. 669-670; *Mola Development Corp. v. City of Seal Beach, supra*, 57 Cal.App.4th at pp. 410, 418; see *First English, supra*, 482 U.S. at pp. 306, 322 [compensation must be paid for temporary deprivation of use of property caused by regulation that is invalidated by court].)

Here, there is no dispute that Colony Cove failed even to challenge the original moratorium ordinance or the first extension. It asserted facial challenges to the survey ordinance and the final extension within 90 days of each ordinance's adoption, but neither of those petitions raised any issues pertaining to the first two moratorium ordinances. Accordingly, under *Hensler*'s clear holding, any inverse condemnation or taking claim based on those ordinances must be deemed

"waived." (*Hensler, supra,* 8 Cal.4th at p. 19; accord, *Healing v. California Coastal Com., supra*, 22 Cal.App.4th at p. 1176.)[13]

While Colony Cove did challenge the final moratorium ordinance, its challenge was unsuccessful. "[T]he essential underpinning of [a plaintiff's] recovery [for inverse condemnation] is the invalidity of the administrative action." (*Rossco, supra*, 212 Cal.App.3d at p. 660.) Although the trial court ruled in Colony Cove's favor with respect to the final moratorium, that ruling did not survive appellate review. Noting that by the time of the trial court hearing, "the moratorium had expired and could not be renewed," we found the challenge to its validity moot and reversed the trial court ruling and judgment. (*Colony Cove I, supra*, 187 Cal.App.4th at p. 1509.)[14] Colony Cove's assertion that this court's reversal of the trial court ruling "does not change . . . the fact that the City's

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[13] Colony Cove contends there is no procedural bar to its assertion of temporary taking claims based on those ordinances or on other actions by the City -- including the enactment of the 2006 ordinance and its determination that Colony Cove's application was incomplete after October 2007 -- because the City "engaged in one, unified course of conduct aimed at preventing and/or delaying Colony Cove's subdivision," and, therefore, "every individual act need not be challenged by multiple, separate writ petitions." We are aware of no authority for the proposition that by claiming "unified course of conduct" a party may revive claims for taking barred by a failure to assert a timely challenge to the administrative action when it occurred. The Supreme Court rejected a "continuous wrong" argument in *Hensler*. (*Hensler, supra,* 8 Cal.4th at p. 22.) Moreover, courts have recognized that the validity of a taking claim must be measured by application of the statute of limitations to the "specific governmental act or acts" the party sought to challenge. (*County of Sonoma v. Superior Court* (2010) 190 Cal.App.4th 1312, 1324; *Avenida San Juan Partnership v. City of San Clemente* (2011) 201 Cal.App.4th 1256, 1275.)

[14] We note that in responding to the City's argument in its opening brief in *Colony Cove I* that any adjudication of the moratorium ordinance was moot, Colony Cove did not suggest in its brief that a ruling was relevant to any other pending action, much less to the underlying complaint.

Moratorium was illegal and declared to be so by the trial court" is mistaken. In fact, our decision rendered a nullity any decision of the trial court regarding the legality of the moratorium. (See Code Civ. Proc., § 1049; *McKee v. National Union Fire Ins. Co*. (1993) 15 Cal.App.4th 282, 287-288, quoting *Pacific Gas & Elec. Co. v. Nakano* (1939) 12 Cal.2d 711, ["[A] judgment does not become final so long as the action in which it was rendered is pending and an action is deemed pending until it is finally determined on appeal or until the time for appeal has passed. The determination of the issue in the case is held in abeyance until the appeal is finally decided by an appellate court and the appeal operates to '"keep alive the case . . . as it existed before the judgment was rendered."'"'].) As Colony Cove cannot meet the requirement of showing a final decision invalidating the final moratorium, it cannot assert an inverse condemnation claim based on that moratorium or assert a claim for delay until after the ordinance's expiration in March 2009.[15]

B. *Survey Ordinance*

Colony Cove mounted a timely challenge to the survey ordinance and obtained a final ruling that the ordinance was invalid on its face. Nonetheless, the City contends any taking claim based on the survey ordinance must fail because the statute of limitations required Colony Cove to assert a claim for damages for inverse condemnation based on the survey ordinance within 90 days of the adoption of the ordinance. The City further contends that because Colony Cove

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[15] We are not persuaded by Colony Cove's argument that our ruling would give cities free rein to avoid the consequences of illegal ordinances by rescinding them on the eve of final adjudications. Indeed, Colony Cove did not and could not make such a claim here, as the duration of the final moratorium ordinance was set when it was enacted and expired by its own terms.

sought no review of the City's final determination in October 2009 approving the conversion application, Colony Cove has "failed to exhaust its administrative and/or judicial remedies with respect to the survey ordinance." (Capitalization altered.) For the reasons discussed, we disagree.

1. *Statute of Limitations*

In *Hensler*, the Supreme Court repeatedly stated that when a party timely challenges an ordinance, either facially or as applied, it "may" join an action for damages for inverse condemnation. (*Hensler, supra*, 8 Cal.4th at pp. 13-14.) The use of this permissive language indicated that an action for damages "may" also be pursued later, after the issue of the validity of the entity's action is resolved. This was made clear in *Kavanau, supra*, 16 Cal.4th 761, where a property owner petitioned the superior court for a writ of administrative mandate after the local rent control board (rent board) allowed him a very limited rent increase. The trial court denied the petition, but the appellate court found that application of the rent board's 12-percent annual limit on rent increases violated due process, although it did not find that a taking had occurred. (16 Cal.4th at p. 777.) After the appeal was concluded and the rent board complied with the writ of mandate, the owner filed a complaint seeking damages for temporary application of the rent board's decision and "'just compensation'" in the form of lost rental income and interest. (*Id*. at pp. 767-768.) In determining whether the owner had asserted a valid claim for a temporary taking, the Supreme Court first resolved whether he had improperly split his claim. In this regard, the court stated: "In [*Hensler*], we held that, if a property owner brings a timely action to set aside or void a regulation, he may but need not join a claim for damages. Instead, he may bring a damages claim separately after successfully challenging the regulation." (*Id.*, citing *Hensler*, *supra*, at pp. 7, 26, italics omitted.) The court found that the owner's claim for

damages was brought "[i]n accordance with *Hensler*," although it ultimately determined that the allegations were not sufficient to establish a taking. (*Id*. at pp. 779, 780.)

In an attempt to persuade us that the Supreme Court did not mean what it said in *Kavanau*, the City quotes language found at one of the pages of *Hensler* cited in *Kavanau*, in which the court stated: "We conclude that an action in inverse condemnation whether or not joined with an action in administrative mandamus [citation] challenging the ordinance or its application to the plaintiff's property, is governed by Government Code section 66499.37 . . . *unless it alleges the existence of a final judgment establishing that there has been a compensable taking of the plaintiff's land*." (*Hensler, supra*, 8 Cal.4th at p. 7, italics added.) Focusing on the italicized language, the City contends -- and persuaded the trial court -- that because Colony Cove could not say it had obtained a prior judgment which included a finding that a compensable taking occurred, it was precluded from asserting a later damage claim following its successful challenge to the survey ordinance.

In light of *Kavanau*, we cannot read *Hensler* so narrowly. *Hensler*'s language indicates that a separate claim for damages for inverse condemnation "may" be asserted at the time of the challenge to the ordinance; inferentially, it "may" be asserted after the ordinance is found to be invalid. While the quoted language could be read to suggest the requirement that a plaintiff have obtained a prior express judicial determination of a constitutional taking, *Kavanau* makes clear that this is not the law. Indeed, in *Kavanau*, where the plaintiff had obtained no prior finding that a taking had occurred, the Supreme Court stated that the prerequisite to a taking claim was a prior finding that a regulation was *invalid*, not a prior finding that the regulation constituted a taking. (*Kavanau, supra*, 16 Cal.4th at pp. 777, 779.) The court's statement that "if a property owner brings a

timely action to set aside or void a regulation, he may but need not join a claim for damages" was not dicta, as it was critical to the court's resolution. Here, Colony Cove timely challenged the survey ordinance by way of writ petition and prevailed in its challenge. Within days of the issuance of the remittitur from our decision invalidating the ordinance, Colony Cove amended its complaint to assert a taking claim based on the newly invalidated survey ordinance. Because, under *Kavenau*, Colony Cove was not required to file its taking claim based on the survey ordinance until that ordinance was declared invalid, it was not barred from asserting the amended claim.[16]

2. *Failure to Challenge October 2009 Action*

The City contends Colony Cove's taking claim is precluded because it did not seek review of the City's October 2009 decision. As the City's decision was to approve the conversion application, it is not apparent what type of review Colony Cove could or should have sought. A petition for writ of administrative mandate generally challenges the governmental action and seeks to reverse or modify it. Colony Cove did not seek to reverse the City's decision, but to obtain temporary taking damages for the City's alleged delay in approving the application, to the extent such delay was based on an invalid ordinance. As explained in *Hensler*, the reason a taking claim cannot be allowed unless the landowner first challenges the governmental action, is to give the agency warning and an "'early opportunity'" to change a decision for which compensation may be required. (*Hensler, supra*, 8 Cal.4th at pp. 27-28.) "'If no such early opportunity were given, and instead,

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[16] The Supreme Court did not state in *Hensler* or *Kavanau* how long after a final ruling on invalidity a party has to file a complaint for damages. As Colony Cove filed within days of the remittitur and prior to final entry of judgment on the petitions, we need not resolve that issue.

persons were permitted to stand by in the face of administrative action alleged to be injurious or confiscatory, and three or five years later, claim monetary compensation on the theory that the administrative action resulted in a taking for public use, meaningful governmental fiscal planning would become impossible.'" (*Ibid*., quoting *Patrick Media Group, Inc. v. California Coastal Com*., *supra*, 9 Cal.App.4th at p. 612.) The facial challenge to the survey ordinance gave the City warning of Colony Cove's position that the City was acting in violation of California law. By facially challenging the survey ordinance and asserting an inverse condemnation claim for damages after this court's determination that the survey ordinance was invalid, Colony Cove sufficiently followed the procedures laid out in *Hensler* and *Kavanau*.

The City cites authority recognizing the rule that "under both federal and California law, before a plaintiff may establish a regulatory taking, it must first demonstrate that it has received a final decision from the land use authority regarding application of the challenged land use regulation to its property" (*County of Alameda v. Superior Court* (2005) 133 Cal.App.4th 558, 567), which in most cases requires proof of administrative decisions rejecting both a development proposal and an application for a variance. (*Id*. at pp. 567-568; see *Hensler*, 8 Cal.4th at pp. 13-14.) The City notes that Colony Cove never applied for a variance. It is true that "[g]enerally" there is no final decision for purposes of asserting a taking claim until after "(1) rejection of a formal development plan; and (2) denial of a variance, or something similar, from the controlling regulations." (*Toigo v. Town of Ross* (1998) 70 Cal.App.4th 309, 325.) However, the property owner can demonstrate sufficient finality if it sets forth facts that are "'clear, complete, and unambiguous' showing that the agency has 'drawn the line, clearly and emphatically . . . .'" (*Ibid.*, quoting *Hoehne v. County of San Benito* (9th Cir. 1989) 870 F.2d 529, 533; see *Howard v. County of San Diego* (2010) 184

Cal.App.4th 1422, 1430 ["A plaintiff need not pursue administrative remedies where the agency's decision is certain to be adverse."].)

While the moratorium was in effect, it was clear that no conversions would be approved. Whether the survey ordinance would have caused the City to deny Colony Cove's conversion application absent the court's finding of invalidity was less clear. The FAC does not contain any allegations concerning what Colony Cove did to comply with the survey ordinance or what transpired during the seven-month period between expiration of the final moratorium and the City's approval of its application. Nor does it assert that seven months represented an unusually lengthy period to process an application of the type submitted. (See *Agins v. Tiburon* (1980) 447 U.S. 255, 263, fn. 9, abrogated in part on another ground in *Lingle v. Chevron U.S.A., Inc*. (2005) 544 U.S. 528 [even if landowners' ability to sell property was limited during pendency of condemnation proceeding, "[m]ere fluctuations in value during the process of governmental decision making, absent extraordinary delay are 'incidents of ownership' and 'cannot be considered as a "taking" in the constitutional sense.'"].) However, a demurrer should not be sustained without leave to amend if there is any reasonable possibility the plaintiff can amend to allege a cause of action. (*Aubry v. Tri-City Hospital Dist., supra*, 2 Cal.4th at pp. 970-971.) Colony Cove should have been permitted to amend the FAC to assert, if possible, a claim for a temporary regulatory taking based on the effect, if any, of the survey ordinance on the actions of the City and its staff following the expiration of the moratorium.

Although we reverse and remand to permit Colony Cove to amend its complaint and pursue a taking claim based on delay allegedly caused by the survey ordinance, we note that any such delay must necessarily be limited to the seven months between March 2009, when the final moratorium expired, and October 2009, when the City Council approved the conversion application. We do not

resolve in this appeal whether such a short-term delay can give rise to a taking. (See, e.g., *Kawaoka v. City of Arroyo Grande* (9th Cir. 1994) 17 F.3d 1227, 1237 [even if moratorium delayed development of property for one year, "such a short-term delay does not rise to constitutional dimensions"].) Nor do we express any opinion concerning whether any delay was the result of the City's determination that the survey ordinance prohibited the conversion, in view of the City's denial that it ever applied the survey ordinance to Colony Cove's conversion application.

In addition, we note that our Supreme Court has made clear that a "legally erroneous decision of a government agency during the development approval process resulting in delay" does not necessarily amount to a taking "even if the error in some way diminishes the value of the subject property . . . ." (*Landgate, Inc. v. California Coastal Com*. (1998) 17 Cal.4th 1006, 1018, 1020.) Where an agency's temporary interference with property rights does not "deprive[] property of all value," a compensable taking cannot be found unless the agency's position "was so unreasonable from a legal standpoint as to lead to the conclusion that it was taken for no purpose other than to delay the development project before it." (*Id*. at pp. 1021, 1024; see also *Littoral Development Co. v. San Francisco Bay Conservation etc. Com*. (1995) 33 Cal.App. 4th 211, 221-222 ["[A] transient and impermanent interference in real property use" does not constitute a compensable temporary taking where the agency's actions "were facially valid and supported by a plausible though erroneous legal argument"; a taking does not occur "every time a land-use agency makes an erroneous decision which is ultimately overturned in part on appeal," especially where "the property's use continued during the pendency of legal proceedings."].)

In *Colony Cove I*, we did not find the survey ordinance effected a taking or otherwise violated Colony Cove's constitutional rights. We found, rather, that the ordinance exceeded the permissible -- albeit vague -- scope of section 66427.5.

We expressed dismay that section 66427.5 "requires local agencies to consider resident survey results but provides no guidance as to how the results may be used," and noted that our conclusion that section 66427.5 "permits consideration of the results of the survey of support but not the promulgation of an ordinance requiring specific levels of resident support" did not "resolve the manner in which the City and other local agencies are to approach conversion applications." (*Colony Cove I*, *supra,* 187 Cal.App.4th at p. 1508, fn. 18.) We further expressed the hope that the Legislature would "recognize the dilemma faced by local agencies . . . and act to clarify the scope of their authority and responsibilities." (*Ibid*.) At a minimum, our discussion and the recent holding in *Goldstone v. County of Santa Cruz* (2012) 207 Cal.App.4th 1038, upholding the decision of the Santa Cruz County Board of Supervisors to deny an application for a mobilehome park conversion based on survey results indicating little resident support, call into question Colony Cove's assertion that the City's actions were "unreasonable" or "clearly illegal in light of state law." In the instant appeal, however, the issue before us is the timeliness of the taking claim, not its ultimate viability.

C. *Due Process Claim*

The City contends that without regard to the statute of limitations and other procedural requirements, Colony Cove gave up its right to state a claim for violation of substantive due process when it executed the stipulation stating that its FAC would contain only a taking claim.[17] Colony Cove contends the stipulation

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[17] See *Rossco*, *supra*, 212 Cal.App.3d at p. 660, fn. 10 ["A denial of substantive due process differs from an inverse condemnation claim in that it seeks to assert failure of the restriction reasonably to relate to a legitimate governmental purpose."].

was intended merely to eliminate the causes of action for injunctive and declaratory relief, not to preclude new claims.

In interpreting a stipulation, it is "'the objective intent as evidenced by the words of the [stipulation], not the parties' subjective intent [that] governs . . . .'" (*Miles v. Speidel* (1989) 211 Cal.App.3d 879, 884, quoting *Market Ins. Corp. v. Integrity Ins. Co*. (1987) 188 Cal.App.3d 1095, 1098.) The stipulation provided that Colony Cove would file an amended complaint containing "only the takings claim." To construe such language to mean "a taking claim, along with another claim" would be to read the word "only" out of the plain language of the stipulation. We decline to do so. (See *Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc*. (2003) 109 Cal.App.4th 944, 955 [when contract is reduced to writing, parties' intention determined from writing alone whenever possible, and words used are to be understood in their ordinary and popular sense].) Accordingly, we agree that the due process claim was improperly included in the FAC and must be stricken.

DISPOSITION

The judgment is reversed. The order sustaining the demurrer is reversed in part. After remand, the court is instructed to permit Colony Cove to amend its complaint to assert a claim for inverse condemnation for a temporary taking based on delay caused by the survey ordinance. Each party is to bear its own costs.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.