Filed 2/28/18 Wormser v. Santa Monica Rent Control Bd. CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

RONALD WORMSER, as Trustee, etc., Plaintiff and Appellant, v. SANTA MONICA RENT CONTROL BOARD, Defendant and Respondent.	B279166 (Los Angeles County Super. Ct. No. SS025108)

APPEAL from a judgment of the Superior Court of Los Angeles County, Nancy L. Newman, Judge. Reversed and remanded with directions.

Rosario Perry for Plaintiff and Appellant.

Santa Monica Rent Control Board, J. Stephen Lewis, General Counsel, and Rebecca F. Sherman, Senior Litigation Attorney, for Defendant and Respondent.

INTRODUCTION

Ronald Wormser, as trustee of the Wormser Revocable Trust, filed a petition for writ of mandate and inverse condemnation against the Santa Monica Rent Control Board, seeking reversal of the Board's decision to deny Wormser's application in 2014 for an exemption from the rent control law for owner-occupied properties that contained three or fewer units on April 10, 1979, the determinative date. Wormser argued the Board's denial was an abuse of discretion, and factually and legally unsupported, because the Board had granted Wormser's property the exemption in August 1979 and October 1985. Wormser contended the Board was bound by, and precluded from contradicting, its previous decisions that there were only three residential units on the property as of April 10, 1979.

The trial court sustained the Board's demurrer to the petition without leave to amend, and Wormser appeals from the ensuing judgment of dismissal. Because Wormser's petition stated a cause of action for writ of administrative mandate, we reverse.

FACTUAL AND PROCEDURAL BACKGROUND

Ronald Wormser owns and resides in a multi-unit residential property in Santa Monica. The Board administers the Santa Monica Rent Control Charter and its regulations. In August 1979 the Board granted the previous owner of Wormser's property an owner-occupied exemption from the rent control law under Santa Monica Rent Control Charter Amendment section 1801, subdivision (c)(4), which exempts "owner-occupied

dwellings with no more than three (3) units." The exemption automatically expired when Wormser purchased the property in 1984 because the previous owner no longer owned and occupied the property.

Wormser applied for the same exemption, but in November 1984 the Board denied his application. The Board's written notice of decision stated Wormser and his co-owner "did not meet their burden of proof in establishing that the subject property consists of no more than three residential units since at least April 10, 1979, the date of adoption of the Rent Control Charter Amendment," and noted "[c]onflicting evidence as to whether the property has consisted of three or four residential units was not resolved." The notice of decision, however, did not indicate whether the Board made a finding on whether the property actually contained three or fewer units on April 10, 1979.

In August 1985 the Board issued Wormser a permit to remove an alleged fourth unit on the property. In October 1985 the Board granted Wormser's second application for an exemption. According to Wormser, the Board's October 1985 decision included a finding the property contained only three residential units as of April 10, 1979. The Board's notice of decision, however, states only that "[s]ince August 1, 1985, the property has consisted of three (3) residential rental units." Wormser's 1985 exemption lapsed when he moved from the property in the early 1990's, although Wormser moved back in 2012.

In August 2014 Wormser filed the application that is the subject of this action, again asking for an owner-occupied exemption from rent control. The Board set the matter for hearing.

The hearing officer recommended denial of the application because Wormser had failed to establish the property contained three units or fewer on April 10, 1979. Wormser appealed the hearing officer's decision to the Board.

In November 2014 the Board denied Wormser's application. The Board's written notice of decision stated the Board had considered all the evidence in the matter, "including evidence presented before its hearing officer and the written and oral presentation of its staff."

On February 13, 2015 Wormser filed this action. The Board demurred. The Board also asked the trial court to take judicial notice of the Board's 1984, 1985, and 2014 notices of decision, the hearing officer's written recommendation, the staff report on the hearing officer's 2014 recommendation, and a 1994 staff report on a proposed amendment to the rent control regulations. The trial court granted the Board's request for judicial notice in part (i.e., not for the truth of the contents of the documents) and sustained the demurrer to the petition without leave to amend. Wormser appealed, challenging the trial court's order sustaining the Board's demurrer to his cause of action for administrative mandate.[1]

DISCUSSION

A. *Standard of Review*

"In reviewing an order sustaining a demurrer, we examine the operative complaint de novo to determine whether it alleges

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[1] Wormser does not challenge the trial court's order sustaining the Board's demurrer to his second cause of action for inverse condemnation.

facts sufficient to state a cause of action under any legal theory." (*T.H. v. Novartis Pharmaceuticals Corporation* (2017) 4 Cal.5th 145, 162; accord, *Association of Irritated Residents v. Department of Conservation* (2017) 11 Cal.App.5th 1202, 1218; see *Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1162 ["we exercise our independent judgment as to whether a cause of action has been stated under any legal theory when the allegations are liberally construed"].) "The facts alleged in the pleading are deemed to be true, but contentions, deductions, and conclusions of law are not. [Citation.] In addition to the complaint, we also may consider matters subject to judicial notice." (*Daniels*, *supra*, 246 Cal.App.4th at p. 1162; see *Yvanova v. New Century Mortgage Corp*. (2016) 62 Cal.4th 919, 924; *Mendoza v. JPMorgan Chase Bank, N.A.* (2016) 6 Cal.App.5th 802, 809 ["[w]e must assume the truth of all properly pleaded facts as well as those that are judicially noticeable"].) "Whether a plaintiff will be able to prove its allegations is not relevant." (*Chavez v. Indymac Mortgage Services* (2013) 219 Cal.App.4th 1052, 1057; see *Mendoza*, at p. 809 ["[w]e are not concerned with plaintiff's ability to prove the allegations or with any possible difficulties in making such proof"].)

B. *Wormser's Appeal Is Not Moot*

The Board argues Wormser's appeal is moot because, shortly after filing his opening brief, Wormser filed with the Board a notice of intent to remove the property from the rental housing market pursuant to the Ellis Act (Gov. Code, § 7060 et seq.).[2] The Board contends that, because Wormser has

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[2] Enacted in 1985, "[t]he Ellis Act prohibits a city or county from 'compel[ling] the owner of any residential real property to

"elect[ed] to pursue relief under the Ellis Act," "it is impossible for this Court to grant him any effective relief." Wormser's action, however, has not mooted this appeal.

"'California courts will decide only justiciable controversies.'" (*Cuenca v. Cohen* (2017) 8 Cal.App.5th 200, 216; see *Lockaway Storage v. County of Alameda* (2013) 216 Cal.App.4th 161, 174.) "'The concept of justiciability is a tenet of common law jurisprudence and embodies "[t]he principle that courts will not entertain an action which is not founded on an actual controversy. . . ." [Citations.] Justiciability thus "involves the intertwined criteria of ripeness and standing. A controversy is 'ripe' when it has reached, but has not passed, the point that the facts have sufficiently congealed to permit an intelligent and useful decision to be made." [Citation.] But "ripeness is not a static state" [citation], and a case that presents a true controversy at its inception becomes moot "'if before decision it has, through act of the parties or other cause, occurring after the commencement of the action, lost that essential character."'" (*Cuenca*, at p. 216; see *Lockway Storage*, at p. 174; *DeSilva Gates Construction, LP v. Department of Transportation* (2015) 242 Cal.App.4th 1409, 1416; *Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th 1559, 1573.)

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offer, or to continue to offer, accommodations in the property for rent or lease . . . ." (*Coyne v. City and County of San Francisco* (2017) 9 Cal.App.5th 1215, 1218, quoting Gov. Code, § 7060, subd. (a).) The purpose of the legislation was "to permit landlords to go out of business," subject to a municipality's power "to mitigate any adverse impact on persons displaced by reason of the withdrawal from rent or lease of any accommodations." (Gov. Code, §§ 7060.7, 7060.1, subd. (c).)

"'The pivotal question in determining if a case is moot is . . . whether the court can grant the plaintiff any effectual relief. [Citations.] If events have made such relief impracticable, the controversy has become "overripe" and is therefore moot.'" (*Cuenca v. Cohen*, *supra*, 8 Cal.App.5th at p. 217; see *Panoche Energy Center, LLC v. Pacific Gas and Electric Company* (2016) 1 Cal.App.5th 68, 95; *Lockway Storage v. County of Alameda*, *supra*, 216 Cal.App.4th at pp. 174-175.) "An appeal is moot when a decision of 'the reviewing court "can have no practical impact or provide the parties effectual relief."'" (*DeSilva Gates Construction, LP v. Department of Transportation*, *supra*, 242 Cal.App.4th at p. 1416; accord *Santa Monica Baykeeper v. City of Malibu* (2011) 193 Cal.App.4th 1538, 1547.)

The Ellis Act allows Wormser to return the property to the rental market after two years (or earlier, but subject to certain restrictions and potential liabilities). (See Gov. Code, § 7060.2.) If Wormser decides to pursue this option, the rent control law, and its exemptions, will again apply to the property, depending on the outcome of this action. (See Santa Monica Rent Control Board Regulations, § 1630, subd. (a) ["If the accommodations are offered for rent or lease after two years of the date on they were withdrawn from rent or lease: [¶] (a) The accommodations shall be subject to the Rent Control Law in the same manner and to the same extent as if the accommodations had not been withdrawn from rent or lease."].) Moreover, according to Wormser's verified petition (and consistent with basic economics), three unit properties in Santa Monica "sell for substantially more money than do four unit properties, because of the ability to get an exemption from rent control." Therefore, the outcome of this action will have an actual and immediate effect on the property's

market value, regardless of whether Wormser at this moment has withdrawn the units from the rental market.

Thus, the circumstances in this action are very different from those in *La Mirada Avenue Neighborhood Association of Hollywood v. City of Los Angeles* (2016) 2 Cal.App.5th 586, on which the Board relies. In *La Mirada*, the trial court granted a petition by the plaintiffs, citizens groups, for a writ of mandate and invalidated certain exceptions the city had granted a retailer that allowed the retailer's new store to deviate from the city's neighborhood plan. (*Id.* at pp. 588-589.) After filing its appeal, the city, at the retailer's request, amended the neighborhood plan, which rendered the exceptions unnecessary for the retailer to build its new store. (*Id.* at p. 589.) Both the plaintiffs and the retailer agreed the amendment effectively rendered the appeal moot, but urged this court not to dismiss the appeal because the retailer anticipated additional challenges to the amended neighborhood plan, and the citizens group contended the appeal raised matters of public interest. (*Id.* at pp. 589-590.) This court nevertheless dismissed the appeal as moot, recognizing that the court "can no longer grant any effective relief" and noting the retailer had asked the city to amend the plan "for the very purpose of removing the question of the exceptions' validity from further litigation." (*Id.* at pp. 590-591.)

In contrast, Wormser's decision to remove his property from the rental market for some period of time may affect the timing and immediacy of the economic impact of the Board's decision. But that does not mean our decision will have no practical impact or fail to give Wormser any effective relief. (See *Panoche Energy Center, LLC v. Pacific Gas and Electric Company*, *supra*, 1 Cal.App.5th at p. 96 ("[a]n appeal is not

moot . . . where 'a material question remains for the court's consideration,' so long as the appellate decision can grant a party to the appeal effectual relief"].) To the contrary, even though Wormser may not currently be collecting rent, the outcome of this appeal will have a significant impact on the value of the property and his ability to collect rent. Unlike the parties in *La Mirada*, Wormser has not effectively "remov[ed] the question" of his property's exemption status "from further litigation." (*La Mirada*, *supra*, 2 Cal.App.5th at p. 591.) Indeed, this appeal may determine whether Wormser returns the rental units to the market. As Wormser notes in his reply brief, if he prevails on his petition he will be "incentivized" to do so. Wormser's appeal is not moot.

C. *Wormser Stated a Cause of Action for a Writ of Administrative Mandamus*

1. *The Trial Court Erred in Sustaining the Board's Demurrer Based on Factual Assertions in the Board's Documents*

The Board contends it is entitled to prevail in this litigation on the pleadings. We conclude otherwise.

Code of Civil Procedure section 1094.5 governs administrative mandamus. Subdivision (b) of that statute provides that judicial review of an administrative action or decision extends to "whether the respondent has proceeded without, or in excess of, jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion." The "abuse of discretion" inquiry is "broad and includes whether the agency followed the law, whether its action is supported by

its findings, and whether its findings were supported by substantial evidence." (*Friends of Outlet Creek v. Mendocino County Air Quality Management District* (2017) 11 Cal.App.5th 1235, 1244.)

"A proceeding in mandamus is generally subject to the general rules of pleading applicable to civil actions. [Citations.] 'Therefore, it is necessary for the petition to allege specific facts showing entitlement to relief. . . . If such facts are not alleged, the petition is subject to general demurrer [citation] or the court is justified in denying the petition out of hand.'" (*Chapman v. Superior Court* (2005) 130 Cal.App.4th 261, 271; see *Gong v. City of Fremont* (1967) 250 Cal.App.2d 568, 571 ["[a]lthough [section 1094.5] makes no express provision for a demurrer in a mandamus proceeding, it is settled that the sufficiency of the petition can be tested . . . by demurrer"]; see also *Carloss v. County of Alameda* (2015) 242 Cal.App.4th 116, 126 ["'against a general demurrer'" in a mandamus action, "'[a]ll that is required is that plaintiff state facts entitling him to some type of relief'"].)

Under the general rules of pleading, "a complaint ordinarily is sufficient if it alleges ultimate rather than evidentiary facts." (*Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 550; see *Mahan v. Charles W. Chan Insurance Agency, Inc.* (2017) 14 Cal.App.5th 841, 848, fn. 3 ["'to withstand a demurrer, a complaint must allege ultimate facts, not evidentiary facts or conclusions of law'"].) Thus, "the complaint should set forth the ultimate facts constituting the cause of action and need not set forth the evidence by which the plaintiff proposes to prove those facts." (*Prue v. Brady Company/San Diego, Inc.* (2015) 242 Cal.App.4th 1367, 1376.) Moreover, "'less particularity is required where the defendant may be assumed to possess

knowledge of the facts at least equal, if not superior, to that possessed by the plaintiff.'" (*Rutherford Holdings, LLC v. Plaza Del Rey* (2014) 223 Cal.App.4th 221, 236; see *Jackson v. Pasadena City School District* (1963) 59 Cal.2d 876, 879 [the "particularity required in pleading facts depends on the extent to which the defendant in fairness needs detailed information that can be conveniently provided by the plaintiff"].)

Wormser alleged the Board's 2014 decision denying him an exemption because the property "consisted of four residential units on April 10, 1979" was an abuse of discretion because "it is not supported by the findings nor is it based on the law." In particular, Wormser alleged that, because the Board's previous decisions in 1979 and 1985 "declar[ed] that the property had three units or less on April 10, 1979," the Board's decision in 2014 was invalid and unsupported in that it contravened the Board's prior decisions and factual findings. Accepting Wormser's factual allegations as true, as we must on demurrer, and putting aside any issues of proof Wormser may have in establishing what the Board previously considered and found, the allegations were sufficient to state a cause of action for administrative mandamus based on a purported abuse of discretion. (See *Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110, 125 [petition alleging a city abused its discretion in denying the plaintiff's application for a building permit was "sufficient, as against a general demurrer, to state a cause of action for mandamus, on the ground that the city abused its discretion in denying the permit," where the plaintiff alleged it "met all valid requirements for its issuance"].)

The Board argues its 2014 decision was supported by substantial evidence. The Board contends various pieces of

evidence, which are listed in the hearing officer's recommendation and the Board's decision but are not in the record, support the Board's decision and contradict Wormser's contentions. The trial court, in sustaining the demurrer, ruled Wormser had not pleaded facts showing the Board's evidence was unreasonable or not credible. Both the trial court and the Board cited to *Desmond v. County of Contra Costa* (1993) 21 Cal.App.4th 330, which held the substantial evidence test applies to judicial review of findings by an administrative agency. (*Id.* at pp. 334-335.) The substantial evidence standard, however, does not apply on demurrer, and *Desmond v. County of Contra Costa* was not a demurrer case. (*Id.* at p. 332; see *Selby Realty Co. v. City of San Buenaventura*, *supra*, 10 Cal.3d at p. 123 [in a mandamus action, "against a general demurrer the only requirement is that upon a consideration of all the facts stated it must appear plaintiff is entitled to some relief"].)

Moreover, although the Board filed a request for judicial notice of the hearing officer's recommendation, the staff report, and the Board's decision, which contain various evidentiary assertions and findings by the Board, the court on demurrer cannot take judicial notice of the truth of those assertions and findings. (See *Arce v. Kaiser Foundation Health Plan, Inc.* (2010) 181 Cal.App.4th 471, 482 ["[w]hile we may take judicial notice of court records and official acts of state agencies [citation], the truth of matters asserted in such documents is not subject to judicial notice"].) This is particularly true where, as here, the plaintiff disputes the truth of the facts in those documents, which he contends "are the same facts that [he] is seeking to overturn." (See *Yvanova v. New Century Mortgage Corp.*, *supra*, 62 Cal.4th at p. 924, fn. 1 [court may take judicial notice only of a

document's "existence and contents, though not of disputed or disputable facts stated therein"].)

2. *Whether the Doctrine of Res Judicata or Collateral Estoppel Precludes the Board from Denying Wormser's Petition Cannot Be Resolved on Demurrer*

Relying on the doctrines of res judicata and collateral estoppel to argue the Board is precluded from revisiting whether the property contained three or fewer units on April 10, 1979, Wormser contends he is entitled to prevail in this litigation on the pleadings. Again, we conclude otherwise.

Res judicata, or claim preclusion, "'provides that "a valid, final judgment on the merits precludes parties or their privies from relitigating the same 'cause of action' in a subsequent suit."'" (*Ayala v. Dawson* (2017) 13 Cal.App.5th 1319, 1326.) Res judicata requires "'"(1) the decision in the prior proceeding is final and on the merits; (2) the present proceeding is on the same cause of action as the prior proceeding; and (3) the parties in the present proceeding or parties in privity with them were parties to the prior proceeding."'" (*Association of Irritated Residents v. Department of Conservation*, *supra*, 11 Cal.App.5th at p. 1219.) Collateral estoppel, unlike res judicata, "does not require the same cause of action to be present in the two proceedings," but rather, "the issue litigated must be identical." (*Id.* at p. 1230; see *Ayala*, at p. 1325 [collateral estoppel "'precludes relitigation of *issues* argued and decided in prior proceedings"'].) Collateral estoppel applies only if all of the following conditions are met: (1) the issue is identical to an issue decided in a prior proceeding; (2) the issue was actually litigated; (3) the issue was necessarily

decided; (4) the decision in the prior proceeding is final and on the merits; and (5) the party against whom collateral estoppel is asserted was a party to the prior proceeding or in privity with a party to the prior proceeding. (*Ayala*, at p. 1326.) To determine whether the issues are identical, we consider "'whether "identical factual allegations" are at stake in the two proceedings, not whether the ultimate issues or dispositions are the same.'" (*Association of Irritated Residents*, at p. 1230.)

In the context of administrative proceedings, "the doctrine of collateral estoppel or issue preclusion is applicable to final decisions of administrative agencies acting in a judicial or quasi-judicial capacity." (*Murray v. Alaska Airlines* (2010) 50 Cal.4th 860, 867; see *People v. Sims* (1982) 32 Cal.3d 468, 479, [collateral estoppel may apply to administrative agency decisions where "'agency is *acting in a judicial capacity* and *resolves disputed issues of fact* properly before it which the parties have had an *adequate opportunity to litigate* [fn. omitted]'"], superseded by statute on another ground as stated in *Gikas v. Zolin* (1993) 6 Cal.4th 841, 851-852, fn. omitted; see also *Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 794 ["collateral estoppel . . . prevents an administrative agency from reconsidering, in the absence of new facts, its prior final decision made in a judicial or quasi-judicial capacity in the context of an adversary hearing"]; *Berg v. Davi* (2005) 130 Cal.App.4th 223, 231 ["collateral estoppel principles apply in an administrative proceeding to prevent the impeachment of a prior final judgment"].) Similarly, "res judicata applies in administrative proceedings to decisions of an administrative agency made pursuant to its judicial function." (*Pacific Coast Medical Enterprises v. Department of Benefit Payments* (1983)

140 Cal.App.3d 197, 214; see *Niles Freeman Equipment v. Joseph* (2008) 161 Cal.App.4th 765, 791 [the principle of res judicata "generally applies to administrative adjudications"].)

Whether an administrative agency acted in a "judicial capacity" depends on whether the proceeding provided "the parties . . . a fair adversary proceeding in which they could fully litigate the issue." (*People v. Sims*, *supra*, 32 Cal.3d at p. 481.) "'Indicia of [administrative] proceedings undertaken in a judicial capacity include a hearing before an impartial decision maker; testimony given under oath or affirmation; a party's ability to subpoena, call, examine, and cross-examine witnesses, to introduce documentary evidence, and to make oral and written argument; the taking of a record of the proceeding; and a written statement of reasons for the decision.'" (*Murray v. Alaska Airlines, Inc.*, *supra*, 50 Cal.4th at pp. 867-868; see *Basurto v. Imperial Irrigation District* (2012) 211 Cal.App.4th 866, 878-879.) When evaluating the preclusive effect of administrative decisions, "[u]ltimately, 'the inquiry that must be made is whether the traditional requirements and policy reasons for applying the collateral estoppel doctrine have been satisfied by the particular circumstances of this case.'" (*Murray*, at p. 868.)

Whether either claim or issue preclusion applies in this case cannot be resolved on demurrer. As Wormser concedes, whether the Board held a hearing in 1979 is a "disputed factual question," and therefore is "not resolvable upon demurrer."[3] (See

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[3] Wormser contends "[d]iscovery would have allowed [him] to investigate the matter." In most administrative mandamus proceedings, however, "the court is limited to the face of the administrative record in deciding whether the agency's decision is valid as it stands." (*Voices of the Wetlands v. State Water*

Planning and Conservation League v. Castaic Lake Water Agency (2009) 180 Cal.App.4th 210, 231 ["a demurrer based on res judicata is properly sustained only if the pleadings and judicially noticed facts conclusively establish the elements of the doctrine"].) Thus, contrary to Wormser's argument, the doctrines of res judicata and collateral estoppel do not necessarily give Wormser a victory at the pleadings stage.

Nor, as the Board argues, do the doctrines of claim and issue preclusion necessarily not apply. For the Board's 1979 decision, there is no record (yet) of the Board's written decision or findings, nor is there any indication of the parameters of the

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Resources Control Bd. (2011) 52 Cal.4th 499, 532; see *Smith v. Selma Community Hospital* (2008) 164 Cal.App.4th 1478, 1520 ["[g]enerally, when a court considers a writ for administrative mandamus, it reviews only the record of the proceeding before the administrative agency"].) Nevertheless, under Code of Civil Procedure section 1094.5, subdivision (e), the court may consider "extra-record evidence for a contrary outcome, if persuaded that such evidence was not available, or was improperly excluded, at the original agency proceeding." (*Voices of the Wetlands*, at p. 532; see *Amerco Real Estate Company v. City of West Sacramento* (2014) 224 Cal.App.4th 778, 786, fn. 1 [trial court "can receive additional evidence if that evidence was genuinely unavailable at the time of the administrative hearing"]; *Pomona Valley Hospital Medical Center v. Superior Court* (1997) 55 Cal.App.4th 93, 102 [court may allow "limited posthearing discovery" in a mandate proceeding "provided the moving party shows that such discovery is reasonably calculated to lead to evidence *admissible* under [Code of Civil Procedure] section 1094.5"].)

claims presented and adjudicated at that time.[4] The Board provides no citation to the record for its assertions that in 1979 it "did not act in a judicial capacity," "no 'former proceeding' . . . took place," "there was no opportunity to litigate," and "the issue of how many units existed on the property on April 10, 1979 was not actually litigated." The only support for the Board's description of the 1979 hearing as non-judicial is the 2014 hearing officer's recommendation, which in turn relies on documentary evidence not before the court, and of which the court cannot take judicial notice.

The same is true for the Board's 1985 decision, which the Board argues includes findings and "judicially noticeable evidence" contradicting Wormser's claim that in 1979 the Board had "declar[ed] the property had three units or less on April 10, 1979." Although the Board's 1985 notice of decision included "attached Findings of Fact and Conclusions of Law" purporting to "explain" the Board's decision, and a finding that "[s]ince August 1, 1985, the property has consisted of three (3) residential

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[4] Wormser cites *People v. Sims*, *supra*, 32 Cal.3d 468 for the assertion that res judicata and collateral estoppel apply to the Board's 1979 decision if the Board did not have an evidentiary hearing but could have had one. That is not what the Supreme Court held in *People v. Sims*. The Supreme Court in *People v. Sims* held that, for an agency's decision to have preclusive effect, the agency must hold a "fair hearing process." (*Id.* at p. 481.) The Supreme Court went on to note that one side's failure to "present evidence or otherwise participate *at the hearing* . . . does not necessarily defeat a plea of collateral estoppel," and that it was "significant" that the government agency "had notice of the hearing as well as the opportunity and incentive to present its case to the hearing officer." (*Ibid.*, italics added.)

rental units," these findings do not necessarily disprove Wormser's allegation that, in 1985, "[the Board] granted Petitioner's second application . . . finding that there were only three residential units on the property as of April 10, 1979." Rather, the 1985 notice of decision is silent on the issue whether the Board made any determination regarding the number of units as of April 10, 1979. (See *Schaefer/Karpf Productions v. CNA Ins. Companies* (1998) 64 Cal.App.4th 1306, 1314 ["[i]n determining what issues were 'actually litigated' in the underlying action the court in the subsequent action cannot rely exclusively on the findings in the underlying action but must 'carefully scrutinize' the pleadings and proof," which "includes looking behind the findings at the evidence presented to determine what was actually decided"].) As with the Board's 1979 decision, depending on the evidence of the Board's 1985 decision, Wormser may be able to argue the Board is precluded from arguing the property had more than three units on April 10, 1979.[5]

Finally, the Board argues claim and issue preclusion cannot apply because there was an "intervening change in the law" between the Board's earlier decisions and Wormser's 2014 application, and "'collateral estoppel will not be applied when there has been a material change in the law.'" (See *Sacramento*

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[5] The Board also contends claim and issue preclusion do not apply because the Board "was not a 'party' to any cause of action." But it was. Administrative agencies like the Board "often act in the dual capacity of tribunals and litigants." (*Hollywood Circle, Inc. v. Department of Alcoholic Beverage Control* (1961) 55 Cal.2d 728, 733, fn. 4.; see *People v. Sims*, *supra*, 32 Cal.3d at pp. 477-478.)

County Employees' Retirement System v. Superior Court (2011) 195 Cal.App.4th 440, 452.) The Board refers to its 1994 amendment to Regulation 12053(c)(2), which provided that the date for determining whether the property has (or had) three or fewer units is April 10, 1979. As the Board points out, however, prior to the amendment the rules did not "expressly state that date," although the Board admits its "policy had been to require proof of three or fewer units on April 10, 1979." Thus, it is unclear whether the 1994 amendment was a material change in the law or a clarification of existing law.

DISPOSITION

The judgment is reversed. The matter is remanded to the trial court with directions to vacate the order sustaining the Board's demurrer to the petition without leave to amend, and to enter a new order (1) overruling the demurrer as to the cause of action for writ of mandamus and (2) sustaining the demurrer to the cause of action for inverse condemnation without leave to amend. Wormser is to recover his costs on appeal.

SEGAL, J.

We concur:

ZELON, Acting P. J. BENSINGER, J.*

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