

1 RACHEL SOMMOVILLA (CA SBN 231529)  
Interim City Attorney  
2 Email: rachel\_sommovilla@ci.richmond.ca.us  
CITY OF RICHMOND  
3 450 Civic Center Plaza  
Richmond, California 94804  
4 Telephone: 510.620.6509  
Facsimile: 510.620.6518

5  
6 ARTURO J. GONZÁLEZ (CA SBN 121490)  
Email: AGonzalez@mofo.com  
ALEXIS A. AMEZCUA (CA SBN 247507)  
7 Email: AAmezcu@mofo.com  
MORRISON & FOERSTER LLP  
8 425 Market Street  
San Francisco, California 94105-2482  
9 Telephone: 415.268.7000  
Facsimile: 415.268.7522

10  
11 Attorneys for Respondents  
THE CITY OF RICHMOND, MAYOR TOM  
12 BUTT, AND RICHMOND CITY COUNCIL

13  
14 UNITED STATES DISTRICT COURT  
15 NORTHERN DISTRICT OF CALIFORNIA

16  
17 SPRAWLDEF, et al.,  
18 Petitioners,  
19 v.  
20 CITY OF RICHMOND, et al.,  
21 Respondents.

Case No.: 18-cv-03918-YGR

**RESPONDENTS' OPPOSITION TO  
MOTION TO AMEND PETITION**

Date: November 3, 2020

Time: 2:00 p.m.

Place: Oakland Federal District Courthouse  
1301 Clay Street  
Courtroom 1, Fourth Floor  
Oakland, CA 94612

Judge: Hon. Yvonne Gonzalez Rogers

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## I. INTRODUCTION

Despite ample opportunity for the past two years to present the Court with the merits of their case and provide a clear statement of their claims, Petitioners Sustainability, Parks, Recycling, and Wildlife Legal Defense (SPRAWLDEF), Citizens for East Shore Parks (CESP), James Hanson, Tony Sustak, Paul Carman, and Pamela Stello (collectively, “Petitioners”) have repeatedly failed to do so. Petitioners’ latest iteration of their ever-evolving allegations and theories—the present Motion for Leave to Amend Petition (Dkts. 129, 130 (“Motion”))—fares no better. Petitioners’ Brown Act claim against Respondents City of Richmond, Mayor Tom Butt, Richmond City Council, Upstream Point Molate LLC (“Upstream”), and the Guidiville Rancheria of California (“the Tribe”) (collectively, “Respondents”) is moot, given the City’s<sup>1</sup> actions to address the alleged violation in accordance with the Brown Act’s statutory safe harbor. Petitioners’ attempt to shoehorn their dissatisfaction with the public process into a brand new California Land Use and Planning Law claim fails as well. This new claim is both time-barred and moot. Amendment would thus be futile. Petitioners’ Motion should be denied.

Over two years ago, Petitioners filed a petition for writ of mandamus alleging a Brown Act claim against the City (“Petition”). Their Petition is premised on a single issue: whether the City Council’s closed-session approval of a settlement agreement in the *Guidiville* litigation<sup>2</sup> (*see Guidiville* Dkt. 361 (“Original Judgment”)) violated the Brown Act. Nearly a year ago, the City took action to address the alleged violation by approving an amended settlement agreement (*see Guidiville* Dkt. 410 (“Amended Judgment”)) in a public vote following a noticed, agendaized City Council meeting. Petitioners admitted to the Court (as they must) that they had no objection to the public proceeding that led to the adoption of the Amended Judgment.<sup>3</sup> As this Court observed in denying Petitioners’ motion for preliminary injunction and motion for a temporary restraining

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<sup>1</sup> “City” is used throughout this brief to refer collectively to the City of Richmond, Mayor Tom Butt, and the Richmond City Council.

<sup>2</sup> *Guidiville Rancheria of Cal. v. United States*, N.D. Cal. Case No. 12-cv-1326 YGR (“*Guidiville*”).

<sup>3</sup> Counsel for Petitioners: “We didn’t have any objection to that noticed hearing [at which the City Council voted to adopt the Amended Judgment].” (May 19, 2020, Hr’g on Pet’rs’ Mot. for Prelim. Inj. Tr. (“Second MPI Tr.”) at 6:11-18.)

order: “Whatever claim [P]etitioners might have brought concerning the substance of the Amended Judgment and the land use entitlements they allege it contains, the approval of the Amended Judgment in an open, noticed meeting appears to preclude [P]etitioners’ claim under the Brown Act.” (Dkt. 127 at 7 (emphasis in original).) Petitioners’ proposed amended Petition does not even *reference* the Amended Judgment. Allowing this amendment—which does not even attempt to address the fact that Petitioners’ claim is moot—would thus clearly be futile.

For the first time, after years of this pending litigation, and after the Court’s repeated requests that Petitioners identify exactly their claims and the remedies sought, Petitioners also attempt to raise a California Land Use and Planning Law claim. Amendment of the Petition to add this claim is also futile, as the claim faces at least two threshold fatal defects: it is both time-barred and moot. Although the Court can deny Petitioners’ Motion on the grounds of futility alone, other factors, including undue delay and prejudice to the City, also counsel in favor of denial. For these reasons, as detailed further below, Petitioners’ Motion should be denied.

## II. FACTUAL BACKGROUND

### A. The *Guidiville* Litigation and Initial Settlement

This litigation arises out of a settlement agreement among the City, Upstream, and the Tribe resolving six years of litigation over the outcome of a Land Disposition Agreement related to Point Molate. (See Original Judgment at 1, ¶ 4.)

### B. Procedural History

In May 2018, Petitioners filed a Petition in California Superior Court to challenge the *Guidiville* settlement. (Dkt. 1 at Ex. A.) The Petition set forth a single cause of action, alleging that the Richmond City Council approved the *Guidiville* settlement in violation of the Brown Act. (Petition ¶¶ 30–49; see Dkt. 32 ¶¶ 32–51.) The City removed the action to federal court, and the case was assigned to this Court as related to the previous *Guidiville* litigation. (Dkts. 1, 5.)

The City filed a motion to dismiss the Petition on July 20, 2018. (Dkt. 12-1.) At the hearing on the City’s motion to dismiss, the Court encouraged the City to withdraw its motion in order to allow the Court to consider the issues with a full administrative record. (Sept. 11, 2018, Hr’g on Resp’ts’ Mot. to Dismiss Tr. at 3:5-14; 4:7-11.) During the hearing, the Court asked the

1 City directly, “[W]ouldn’t it just be easier to have public hearings on the Judgment?” (*Id.* at  
 2 24:7–9.) Thereafter, the City withdrew its motion to dismiss, and the parties submitted a joint  
 3 administrative record. (Dkts. 17, 37.)

4 On October 23, 2018, following the Court’s request that the parties meet and confer  
 5 regarding whether Upstream and the Tribe should be joined as necessary parties, Petitioners  
 6 amended their original Petition to include Upstream and the Tribe.<sup>4</sup> (Dkt. 32.) Petitioners and  
 7 the City thereafter briefed the amended Petition. (*See* Dkts. 38, 43, 51.) The Tribe specially  
 8 appeared and moved to dismiss on the ground that the Tribe is entitled to sovereign immunity  
 9 from Petitioners’ claims, further arguing that, because the Tribe is a proper party that cannot be  
 10 joined, the action should be dismissed. (Dkt. 45.) On June 19, 2019, the Court denied the Tribe’s  
 11 motion to dismiss but “conclude[d] that the Tribe is a necessary party and its joinder was proper  
 12 in this action under Rule 19(a).” (Dkt. 58 at 7:18–19.) The Tribe appealed this order. (Dkt. 60.)

13 More than a month after the Tribe filed its notice of appeal, Petitioners filed their first  
 14 motion for preliminary injunction, seeking to enjoin Respondents “from making, planning or  
 15 enacting any administrative approvals, hearings, environmental analyses, studies, expenditures,  
 16 contracts, agreements, negotiations and any other action in furtherance of the *Guidiville*  
 17 settlement.” (Dkt. 68 at 4.) At the hearing on Petitioners’ motion for preliminary injunction, the  
 18 Court stated that whether “there are entitlements” granted by the Judgment is “the fundamental  
 19 issue in terms of whether or not the [Brown Act’s] litigation exception applies.” (Sept. 10, 2019  
 20 Hr’g on Pet’rs’ Mot. for Prelim. Inj. Tr. (“MPI Tr.”) at 16:19–24.)

21 At the Court’s suggestion, the parties agreed to return to Chief Magistrate Judge Spero for  
 22 further settlement discussions. (MPI Tr. at 19:25–21:2.) Petitioners withdrew their motion  
 23 without prejudice. (Dkt. 78.) The parties participated in a settlement conference on October 23,  
 24 2019, but did not settle. (Dkt. 86.) Following the settlement conference, the City, Tribe, and  
 25 Upstream agreed to an amended settlement agreement, which adds language confirming that the  
 26 agreement does not grant any entitlements and that the City retains its discretion in considering  
 27 \_\_\_\_\_

28 <sup>4</sup> The single cause of action remained the same. (Dkt. 32.)

whether to grant any entitlements in connection with Point Molate. (See Amended Judgment ¶ 16 (“Within 6 months from the Effective Date, in accordance with CEQA and other applicable law, City shall *consider* Discretionary City Approvals, as defined in Paragraph 8 of this Judgment.”), ¶ 38 (“The Parties agree that the Judgment *does not grant any entitlements* for development at Point Molate, and that the City acknowledges it is *required to comply with all laws, statutes, or regulations, including compliance with CEQA*, applicable to any future specific entitlements or development at Point Molate that the City may consider.”) (emphases added).)

Richmond City Council held a noticed, agendized public hearing during its November 5, 2019, City Council meeting to consider approval of the amended agreement. (Request for Judicial Notice (“RJN”), Ex. A at 5.) During this meeting, over 25 members of the public provided comments on this agenda item, including petitioners Pamela Stello and Tony Sustak. (*Id.*) The City Council then held an open session vote, at which time it approved the amended agreement. (*Id.*)

The *Guidiville* parties submitted the revised agreement to the Court in the form of a proposed judgment in the *Guidiville* matter. On November 21, 2019, the Court entered the revised agreement and proposed judgment without any changes. (*Guidiville* Dkt. 410.)<sup>5</sup> The City subsequently filed a motion for judgment on the pleadings arguing that Petitioners’ claim is now moot. (Dkt. 87.) Upstream joined that motion. (Dkts. 89, 90.) Following briefing from the parties, on December 11, 2019, the Court entered an order finding that “it is without jurisdiction to consider th[e] motion due to the pendency of the Tribe’s appeal,” and declining to reach the issues raised in the motion “until such time as the Ninth Circuit decides the pending appeal.” (Dkt. 97.)

While the Tribe’s appeal was pending, Petitioners filed a second motion for preliminary injunction. (Dkts. 103, 107.) Aside from statements about the COVID-19 pandemic, the motion was nearly identical to the previous motion for preliminary injunction. At the hearing on

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<sup>5</sup> No hearing was held with the Court on the proposed Amended Judgment, contrary to Petitioners’ claim that “[a] hearing before the Court on [the] Amended Judgment was held without including the SPRAWLDEF et al. Petitioners.” (Dkt. 130 at 4.)



Petitioners' second motion for preliminary injunction, the Court asked Petitioners to clarify "the relief that [they] are requesting" if the Court were to find a Brown Act violation. (May 19, 2020, Hr'g on Pet'rs' Mot. for Prelim. Inj. Tr. ("Second MPI Tr.") at 48:8-16.) Petitioners requested "additional time to provide a further response" to the Court's question. (*Id.* at 48:17-20.) The Court allowed supplemental briefing on this topic from both parties, which concluded July 21, 2020. (*See* Dkts. 119, 121, 122, 124.)

With both the Tribe's appeal and Petitioners' second motion for preliminary injunction still pending, on August 10, 2020, Petitioners filed a motion for a temporary restraining order. (Dkt. 126.) The motion sought an order to "preserve the status quo" pending decisions on the Tribe's appeal and Petitioners' motion for preliminary injunction. (*Id.* at 2.)

On August 14, 2020, the Court denied Petitioners' motion for preliminary injunction and motion for a temporary restraining order. (Dkt. 127.) The Court denied Petitioners' motion for preliminary injunction for failure to establish a likelihood of success on the merits, stating: "[T]he Brown Act specifically permits the legislative agency to cure defects in the open government process. The record here indicates that the City did so. Thus, [P]etitioners have not met their burden to show that their Brown Act claim is likely to be viable in light of the City's action to cure the defects alleged in the petition." (*Id.* at 7.) In light of this denial, the Court also denied Petitioners' motion for a temporary restraining order as moot. (*Id.* at 8.)

On September 17, 2020, the Ninth Circuit denied the Tribe's appeal. (Dkt. 128; Memorandum, *SPRAWLDEF v. Guidiville Rancheria of Cal.*, No. 19-16278 (9th Cir. Sept. 17, 2020), Dkt. 42-1.) With respect to the Tribe's argument that the underlying matter is moot, the Ninth Circuit panel stated that they "are unable to decide on the limited record before us whether SPRAWLDEF's suit is moot," and that the Tribe "is free to make this argument to the district court in the first instance." (*Id.* at 4.)

Petitioners filed the instant Motion on September 28, 2020, and a "corrected" version of the Motion the following day. (Dkts. 129, 130.)

**C. City's Efforts to Comply with the *Guidiville* Judgment and California Law**

The City has undertaken a rigorous and transparent process as it acts to comply with the terms of the Judgment<sup>6</sup> and California law. (*See Guidiville* Dkts. 400, 403, 408, 409, 411, 412, 413.) The City has provided notice to the public and opportunity for public comment for each milestone in its consideration of development at Point Molate. In the two and a half years since the Original Judgment was entered, the City has held numerous public hearings and open meetings, accepted hours' worth of spoken comments as well as voluminous written commentary, and considered other public input as it examined proposals for development of the Point Molate site. (*Id.*) When the COVID-19 pandemic struck, the City moved quickly to implement alternative means by which the public could submit comments and participate in meetings and hearings via teleconference and interactive Zoom webinars, and the City extended deadlines for public comment where necessary. (*See, e.g.*, RJN, Ex. B at 1-2, Ex. C at 1-4.)

This process culminated in additional public testimony and vote by the City Council on September 8, 2020, at a public hearing which lasted approximately six hours. (RJN, Ex. D at 1, 6.) Prior to the vote, several City representatives presented to the public about the review and consideration process to date. (*Id.* at 4-5.) These presentations included, among others: an overview of Winehaven Legacy LLC's proposed project and the proposed development agreement (Winehaven Legacy LLC is the developer selected for the project); a summary of the City's financial impact analysis for the proposed project; an overview of the project recommendations made by the City's Design Review Board, Historic Preservation Commission, and Planning Commission after noticed public meetings for those boards and commissions; and a summary of the Final Subsequent Environmental Impact Report ("SEIR") and California Environmental Quality Act ("CEQA") process for the project. (*Id.*) Forty-four members of the public provided spoken comments at the hearing, including petitioners James Hanson, Paul

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<sup>6</sup> For ease of reference, unless stated otherwise, the City refers to the "Judgment" to include both the Original and Amended Judgments.

1 Carman, and Pamela Stello, and counsel to Petitioners, Norman LaForce. (*Id.* at 5.) Following  
 2 the various presentations by City officials, public comments, and discussion among the City  
 3 Council members, the City Council voted to adopt a resolution to, among other things: (1) certify  
 4 the Final SEIR for the Point Molate Mixed-Use Development Project; (2) adopt Findings of Fact  
 5 and Statement of Overriding Considerations under CEQA; (3) approve a General Plan  
 6 Amendment, Vesting Tentative Tract Map, Major Design Review, Design Guidelines with a  
 7 Historic Conservation Plan and Master Planned Area District Plan, and a Condition Use Permit;  
 8 and (4) approve a Disposition and Development Agreement with Winehaven Legacy LLC. (*Id.*)  
 9 The City Council also voted to introduce two City Ordinances, including one rezoning the Project  
 10 Site to a Point Molate Planned Area District and another approving a statutory Development  
 11 Agreement between the City and Winehaven Legacy LLC. (*Id.*) The two ordinances were  
 12 subsequently approved by the City Council at a duly-noticed public meeting on September 15,  
 13 2020. (RJN, Ex. E at 4-5.) Again, Petitioners attended the meeting and offered public comments  
 14 in opposition to the development of Point Molate. (*Id.* at 5.)

15 The City received notice on October 6, 2020, that Petitioners intend to sue the City to  
 16 challenge the City Council’s September 8, 2020, approvals under CEQA as well as on “other  
 17 grounds” (presumably, under California Land Use and Planning Law). (RJN, Ex. G.) The suit  
 18 was filed October 9, 2020. (Pet. for Writ of Mandate, *Point Molate Alliance v. City of Richmond*,  
 19 No. CIVMSN20-1474 (Contra Costa Super. Ct., Oct. 9, 2020).)

### 20 III. LEGAL STANDARD

21 “Although Federal Rule of Civil Procedure 15(a) provides that leave to amend ‘shall be  
 22 freely given when justice so requires,’ it ‘is not to be granted automatically.’” *In re W. States*  
 23 *Wholesale Natural Gas Antitrust Litig.*, 715 F.3d 716, 738 (9th Cir. 2013) (quoting *Jackson v.*  
 24 *Bank of Hawaii*, 902 F.2d 1385, 1387 (9th Cir. 1990)). The Ninth Circuit has explained that “the  
 25 liberality in granting leave to amend is subject to several limitations.” *Ascon Props., Inc. v. Mobil*  
 26 *Oil Co.*, 866 F.2d 1149, 1160 (9th Cir. 1989) (citation omitted). The Court considers several  
 27 factors in assessing whether to allow leave to amend: (1) whether the moving party is acting in  
 28 bad faith; (2) whether the amendment is sought with undue delay; (3) prejudice to the opposing

party; (4) futility of the amendment; and (5) whether the movant has previously amended its pleadings. *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Juarez v. Jani-King of Cal., Inc.*, No. 09-cv-03495-YGR, 2019 WL 2548691, at \*3 (N.D. Cal. June 20, 2019) (citing *Foman*, 371 U.S. at 182.) “Futility alone can justify the denial of a motion for leave to amend.” *Nunes v. Ashcroft*, 375 F.3d 805, 808 (9th Cir. 2004) (citing *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir.1995)). See also *Prods. & Ventures Int’l v. Axus Stationary (Shanghai) Ltd.*, No. 16-cv-00669-YGR, 2017 WL 3334896, at \*2-3 (N.D. Cal. Aug. 2, 2017) (denying in part motion for leave to file second amended complaint on basis of futility). Additionally, “late amendments to assert new theories are not reviewed favorably when the facts and the theory have been known to the party seeking amendment since the inception of the cause of action.” *Kaplan v. Rose*, 49 F.3d 1363, 1370 (9th Cir. 1994) (citation omitted), *overruled on other grounds by City of Dearborn Heights Act 345 Police & Fire Ret. Sys. v. Align Tech., Inc.*, 856 F.3d 605 (9th Cir. 2017).

#### IV. LEGAL ARGUMENT

##### A. Petitioners’ Motion Should Be Denied Because Amendment Is Futile.

Petitioners’ proposed amended Petition attempts to revive a single claim that is clearly moot. Petitioners propose no additions which alter the allegations underlying their Brown Act claim and fail to even *mention* the Amended Judgment in the proposed petition. Petitioners’ proposed second cause of action—a claim under California Land Use and Planning Law—suffers from threshold fatal defects that also make amendment futile, in addition to being delayed and prejudicial to the City. Petitioners’ Motion should be denied.

##### 1. Petitioners’ Brown Act Claim Is Moot.

Courts regularly deny plaintiffs the opportunity to amend where the underlying claim is moot and would remain moot after amendment. See, e.g., *Obregon v. Sessions*, No. 17-cv-01463-WHO, 2017 WL 3478774, at \*6 (N.D. Cal. Aug. 14, 2017) (denying as futile motion for leave to file supplemental habeas petition where petitioner’s claim “[wa]s moot, and would be moot, even if she were to supplement [the petition],” and ordering petitioner to show cause why claims should not be dismissed). Similarly, where a statutory provision allows a

1 defendant to “cure and correct” an alleged violation, and the defendant takes such action to  
2 address the alleged violation, amendment would be futile. *Mace v. Ocwen Loan Servicing, LLC*,  
3 No. 16-cv-05840-MEJ, 2018 WL 368601, at \*4 (N.D. Cal. Jan. 11, 2018) (granting defendants’  
4 motion for judgment on the pleadings and dismissing complaint without leave to amend on  
5 grounds that amendment would be futile because plaintiffs “correct[ed] and remedie[d] the  
6 alleged violation” according to statutory safe harbor and claims were therefore moot).

7 The City disputes that there was ever any Brown Act violation: both the Original  
8 Judgment itself and the City’s subsequent actions show the Original Judgment did not grant any  
9 entitlements to any party in connection with Point Molate, and the Brown Act contains an express  
10 exception permitting the City to approve of litigation settlements in closed session. (*See* Dkt. 108  
11 at 13-15.) However, in an attempt to bring this costly and lengthy litigation to a close, the City  
12 took action to address the alleged Brown Act violation. (*Id.*)

13 If a legislative body takes action to address an alleged Brown Act violation, the Brown  
14 Act claim at issue “shall be dismissed with prejudice.” Cal. Gov’t Code § 54960.1(e). The City  
15 took such action to address the alleged violation. The parties to the *Guidiville* litigation revised  
16 their 2018 settlement agreement to clarify further that the agreement does not grant any  
17 entitlements. (*See* Dkt. 108 at 5, 11-13; Amended Judgment ¶¶ 16, 38.) The City also held a  
18 noticed public hearing to consider the revised settlement agreement and held an open session vote  
19 in which the agreement was approved. (*See* Dkt. 108 at 5-6; RJN, Ex. A at 5.) The proposed  
20 amended Petition does not allege otherwise, let alone even mention the Amended Judgment.

21 Though the City continues to dispute that any violation occurred, the two bases of  
22 Petitioners’ claim have thus both been addressed: the Amended Judgment clarifies further that  
23 there are no entitlements, and a public vote was held on whether to approve the Amended  
24 Judgment. Critically, at the last hearing in this matter, Petitioners admitted when asked by the  
25 Court that, “[w]e [Petitioners] didn’t have any objection to that noticed hearing [at which the City  
26  
27  
28

Council voted to adopt the Amended Judgment].” (Second MPI Tr. at 6:11-18.)<sup>7</sup> And this Court has already found that Petitioners are not likely to succeed on the merits of their case given the Amended Judgment: “Whatever claim petitioners might have brought concerning the substance of the *Amended* Judgment and the land use entitlements they allege it contains, the approval of the Amended Judgment in an open, noticed meeting appears to preclude petitioners’ claim under the Brown Act.” (Dkt. 127 at 7 (emphasis in original).) Petitioners’ Brown Act claim is moot, and would remain moot after amendment of the petition. Amendment is thus futile and should not be permitted.

## 2. Petitioners’ Land Use and Planning Law Claim Is Time-Barred and Moot.

Amendment of the Petition is also futile with respect to Petitioners’ proposed new California Land Use and Planning Law Claim, as the claim is both time-barred and moot.

As an initial matter, amending the Petition to add a California Land Use and Planning Law claim is futile, as Petitioners failed to bring this claim within the prescribed 90-day statute of limitations. When a plaintiff seeks to amend her complaint to add a claim for which the statute of limitations has already elapsed, amendment would be futile. *See Finkelstein v. AXA Equitable Life Ins. Co.*, 325 F. Supp. 3d 1061, 1068 (N.D. Cal. Mar. 5, 2018) (“Leave to amend would be futile because Plaintiff’s claims are barred by the statute of limitations.” (citation omitted)). *See also Dye v. Med. Bd. of Cal.*, No. 16-cv-03942-YGR, 2018 WL 3861671, at \*1 (N.D. Cal. Aug. 14, 2018) (denying motion for leave to amend complaint on futility grounds, including that “the statute of limitations provided . . . independent grounds to find the amendment would be

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<sup>7</sup> Moreover, the City has never received (nor do Petitioners allege that they ever sent) a demand letter to cure and correct any alleged Brown Act violation in connection with the City Council’s approval of the Amended Judgment. The window within which to do so has long since passed, and such a demand letter is required prior to commencing an action for a Brown Act violation to give the legislative body a chance to cure and correct the alleged defect. *See* Cal. Gov’t Code § 54960.1(b), (c)(1). Thus, even if Petitioners proposed amending their Petition to address the Amended Judgment (which they did not), and even if Petitioners did otherwise have a colorable Brown Act claim with respect to the Amended Judgment (which they do not), amendment would still be futile.

1 futile” (citation omitted)).

2 California Government Code section 65009(c) “establishes a short, 90-day statute of  
3 limitations, applicable to both the filing and service of challenges to a broad range of local zoning  
4 and planning decisions.” *AIDS Healthcare Found., Inc. v. City & County of San Francisco*, 208  
5 F. Supp. 3d 1095, 1100 (N.D. Cal. 2016). More specifically, with exceptions not applicable here,  
6 the 90-day statute of limitations applies to any action to “attack, review, set aside, void, or annul  
7 the decision of a legislative body” to adopt, amend, and/or modify (1) “a general or specific  
8 plan,” (2) “a zoning ordinance,” or (3) “a development agreement.” Cal. Gov’t  
9 Code § 65009(c)(1). The limitation also applies to actions or proceedings “[c]oncerning any of  
10 the proceedings, acts, or determinations taken, done, or made prior to any of the decisions listed  
11 [above, along with others not relevant here].” *Id.* Such actions must be commenced “within 90  
12 days after the legislative body’s decision” being challenged. *Id.* Since enactment of Section  
13 65009 of the California Government Code, numerous California courts have affirmed the  
14 Legislature’s intent to impose such short statutes of limitation precisely because there is a need  
15 for certainty in local land use decisions. *See, e.g., AIDS Healthcare Found.*, 208 F. Supp. 3d at  
16 1102 (“Here, [t]he clear legislative intent of this statute is to establish a short limitations period  
17 in order to give governmental zoning decisions certainty, permitting them to take effect quickly  
18 and giving property owners the necessary confidence to proceed with approved projects.” (citing  
19 *Ching v. S.F. Bd. of Permit Appeals*, 60 Cal. App. 4th 888, 893 (1998))).

20 Here, Petitioners allege that the City Council’s April 17, 2018, approval of the Original  
21 Judgment in closed session “amounted to a development agreement<sup>8</sup> and revisions to the City’s

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22  
23 <sup>8</sup> Neither the Original nor the Amended Judgment amounted to a “development  
24 agreement,” a point which Petitioners have previously conceded. (Dkt. 103 at 9 (“The City is  
25 *poised to enter into* a development agreement with a chosen developer. . . .”) (emphasis added);  
26 Dkt. 126 at 5 (“The Petitioners are informed and believe that the City has set the date of September 1,  
27 2020 for the City Council to approve the development proposal, certify the FSEIR, *and enter into* a  
28 Land Development Agreement with the developer SunCal [Winehaven Legacy LLC].”) (emphasis  
added).) Moreover, Petitioners’ claim is not only a misreading of the Original Judgment, it also  
misrepresents the meaning of a development agreement under California law. California’s  
Development Agreement Statute sets forth specific criteria which a contract between a city and a  
developer must satisfy to be considered a “development agreement,” thus creating a vested right



1 general plan and zoning ordinance,” “effectively approv[ing] land use decisions that . . . require  
 2 public notice, public hearings before both the planning commission and city council, and adoption  
 3 of a Development Agreement ordinance.” (Dkt. 129-1 ¶¶ 57, 58.) Petitioners state that they are  
 4 “therefore entitled to a peremptory writ of mandate commanding the City and City Council to  
 5 vacate and rescind the challenged actions.” However, if the City Council’s approval of the  
 6 Original Judgment amounted to a land use approval, the 90-day limitations period would have  
 7 expired on July 16, 2018. Likewise, the City Council approved the Amended Judgment on  
 8 November 5, 2019. The 90-day limitations period would have expired on February 3, 2020.  
 9 Petitioners are thus seeking to add this claim over two years after the original challenged action,  
 10 and over 300 days after the Council’s approval of the Amended Judgment. Petitioners’ claim is  
 11 clearly time-barred.

12 In any event, any claim under this statute is also now moot. *See Pitts v. Terrible Herbst,*  
 13 *Inc.*, 653 F.3d 1081, 1086-87 (9th Cir. 2011) (“A case becomes moot ‘when the issues presented  
 14 are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome’ of the  
 15 litigation. In other words, if events subsequent to the filing of the case resolve the parties’  
 16 dispute, we must dismiss the case as moot, because ‘[w]e do not have the constitutional authority  
 17 to decide moot cases.’” (internal citations omitted)).

18 Petitioners allege that public notice and public hearings are required in order for the City  
 19 to grant entitlements and other approvals. These steps are exactly what the City has followed  
 20 since the Original Judgment became effective. (*See* RJN, Ex. D at 5, Ex. E at 4-5, and Ex. F;  
 21 *Guidiville* Dkts. 411 at 1, 412 at 1-2, and 413 at 1-2.) Indeed, through this process, following the  
 22 City Council’s September 8 and 15 approvals, a development agreement, disposition agreement,  
 23 and other land use entitlements do now exist with respect to Point Molate. (*See* RJN, Ex. D at 5,  
 24

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25 for construction of a particular project (eliminating a future city government’s discretion to  
 26 disallow it or impose new conditions on its development). *See* Cal. Gov’t Code § 65864 *et seq.*  
 27 For example, a development agreement must specifically describe the planned development,  
 28 including maximum building densities and heights, and it must be recorded after execution. *See*  
*id.* §§ 65865.2, 65867.5, and 65868.5. Nothing in the Amended Judgment changes this analysis.



Ex. E at 5.) However, these entitlements and agreements exist wholly separate and apart from the Judgment: they are entitlements granted to, and agreements with, Winehaven Legacy LLC negotiated at arms-length following a thorough and independent process. (*See, e.g., Guidiville* Dkts. 403, 408, 409, 411, 412, 413.)<sup>9</sup> Thus, even if Petitioners' Land Use and Planning Law claim were not time-barred, the proposed amendment to add this claim would independently be futile given its mootness.

What Petitioners claim is a Land Use and Planning Law violation is once again merely reflective of Petitioners' displeasure with the results of a thorough public process. Permitting Petitioners to add this claim at this juncture would require an entirely new record (in addition to new parties), and further delay resolution of Petitioners' challenge to the Judgment. If Petitioners want to challenge the development agreement or the development plans which have now been appropriately considered and approved, they have other means to do so, as further evidenced by their notice of intent to file—and actual filing of—a new lawsuit against the City for this very purpose. (*See* RJN, Ex. G.) Petitioners' Motion requesting leave to amend the Petition should be denied as futile.

**B. Petitioners' Motion Should Also Be Denied on the Grounds of Undue Delay and Prejudice to the City.**

Although futility alone is a sufficient basis on which to deny Petitioners' Motion, other factors also counsel in favor of denial. *See Foman*, 371 U.S. at 182. Petitioners' serial attempts to recast the same claim should not be permitted, as they continue to strain the Court's and the City's resources. Petitioners have had ample opportunity to develop both the facts and legal theory for their case over the past two and a half years, as well as to present these facts and theories to the Court. This is not a situation where "petitioners had asserted an erroneous legal theory." (Dkt. 130 at 6-7 (citing *Alvarez v. Hill*, 518 F.3d 1152, 1158 (9th Cir. 2008); *Haddock v. Bd. of Dental Exam'rs of Cal.*, 777 F.2d 462, 464 (9th Cir. 1985); *McBeth v. Hines*, 598 F.3d 708,

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<sup>9</sup> In this litigation, Petitioners do not propose any claims whatsoever with respect to the Amended Judgment or the new development agreement.

1 716 (10th Cir. 2010)).) Rather, Petitioners' extensive briefing over the lifecycle of this case and  
2 the instant Motion make clear that Petitioners have no legal theory which supports a valid cause  
3 of action. The sufficiency of Petitioners' pleading has been tested repeatedly; Petitioners'  
4 displeasure with the outcome of the public process should not be grounds for seriatim litigation.

5 **V. CONCLUSION**

6 For these reasons, the City respectfully requests that the Court deny Petitioners' Motion  
7 for Leave to Amend Petition.

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9  
10 Dated: October 13, 2020

ARTURO J. GONZÁLEZ  
ALEXIS A. AMEZCUA  
MORRISON & FOERSTER LLP

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12  
13 By: /s/ Arturo J. González  
Arturo J. González

14 Attorneys for Respondents

15 THE CITY OF RICHMOND, MAYOR TOM  
16 BUTT, and RICHMOND CITY COUNCIL  
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**CERTIFICATE OF SERVICE**

I hereby certify that, on October 13, 2020, a copy of the foregoing document was filed electronically with the Clerk of the Court using the Court's CM/ECF electronic filing system, which will send an electronic copy of this filing to all counsel of record.

/s/ Arturo J. González  
Arturo J. González  
AGonzalez@mofo.com