

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

6 ARTURO J. GONZÁLEZ (CA SBN 121490)
Email: AGonzalez@mofo.com
7 ALEXIS A. AMEZCUA (CA SBN 247507)
Email: AAmezcua@mofo.com
8 MORRISON & FOERSTER LLP
425 Market Street
9 San Francisco, California 94105-2482
10 Telephone: 415.268.7000
11 Facsimile: 415.268.7522
Attorneys for Respondents
12 THE CITY OF RICHMOND, MAYOR TOM
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.
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Case No.: 18-cv-03918-YGR

**RESPONDENTS' REPLY IN SUPPORT
OF MOTION FOR JUDGMENT ON THE
PLEADINGS**

Date: November 24, 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

CASE No. 18-cv-03918-YGR
RESPONDENTS' REPLY ISO MOTION FOR JUDGMENT ON THE PLEADINGS

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I. INTRODUCTION

In their opposition (“Opposition” or “Opp.”) to the City’s Motion for Judgment on the Pleadings (“Motion”), Petitioners¹ Sustainability, Parks, Recycling, and Wildlife Legal Defense (SPRAWLDEF), Citizens for East Shore Parks (CESP), James Hanson, Tony Sustak, Paul Carman, and Pamela Stello have abandoned their claim that the Brown Act has been violated. Instead, they have chosen to rest their case on an entirely different argument—that the *Guidiville* settlement agreement “violated California’s planning laws.” (Opp. at 13:11-12.) But this vague claim has never been part of the operative Petition. (Dkts. 1 at Ex. A, 32.) Moreover, such a claim is long since time-barred. Petitioners appear to recognize this fatal flaw—that their Petition reflects only a Brown Act claim, not a claim that the *Guidiville* settlement violated California’s planning laws—but insist that while “these facts might perhaps have been more clearly pleaded, they nevertheless were pleaded.” (Opp. at 13:12.) This statement mischaracterizes the record. Petitioners’ original and amended petitions reflect one—and only one—claim for relief. That claim is for an alleged violation of the Brown Act. (See Dkt. 32 at 7.) As Petitioners now concede that their Brown Act claim concerning initial approval of the *Guidiville* settlement agreement has been rendered moot by the subsequent approval of the Amended Judgment, it is time for this matter to end.

Predictably, Petitioners filed a lawsuit in state court regarding the City’s most recent actions concerning Point Molate. That court can determine whether the City’s recent approvals were properly granted. This Court, however, is not the proper forum for Petitioners to litigate their state planning law and environmental claims regarding the recently-granted approvals at Point Molate. Petitioners’ Brown Act claim—the only claim pending before this Court—should be dismissed with prejudice.

¹ Unless otherwise noted, the defined terms in this brief carry the same meaning ascribed to them in the City’s opening brief.

II. ARGUMENT

A. Petitioners Concede That Their Brown Act Claim Is Moot

This is a Brown Act case, yet Petitioners have abandoned their Brown Act claim. By their failure to argue otherwise, Petitioners concede that the City's alleged Brown Act violation was cured with the properly noticed public meeting at which the Amended Judgment was approved. Petitioners state that the Amended Judgment "did not alter the *planning law* violations," but do not appear to contest that the Amended Judgment cured any alleged *Brown Act* violation. (Opp. at 7:15-16 (emphasis added).) They already admitted as much to the Court earlier this year. (May 19, 2020, Hr'g on Pet'rs' Mot. for Prelim. Inj. Tr. ("Second MPI Hr'g Tr.") at 6:11-18 (Counsel for Petitioners: "We didn't have any objection to that noticed hearing [at which the City Council voted to adopt the Amended Judgment].").²)

Since Petitioners do not appear to object to the City's position that their Brown Act claim is moot, the City's Motion should be granted.

B. The Petition Should Be Dismissed with Prejudice

Petitioners dedicate the bulk of their Opposition to elaborating on the California Land Use and Planning Law claims they would like to bring against the City. These claims are not before this Court. To the extent that Petitioners have complaints about the City's recent decisions and approvals regarding the project at Point Molate with Winehaven Legacy LLC ("Winehaven"), these grievances already have a forum in pending state court litigation. As to Petitioners' last-ditch efforts to convert their Brown Act claim into a grab-bag of Land Use and Planning Law claims with respect to the Original Judgment itself, these claims are time-barred and otherwise fail.

² Petitioners claim in passing that no "true public hearings before the council" were held prior to the City Council's vote to approve the Amended Judgment. (Opp. at 7:15-16.) This statement is curious, as petitioners Pamela Stello and Tony Sustak were among the over 25 members of the public who provided comments during the public hearing portion of the City Council meeting at which the Amended Judgment was considered. (See Motion at 4:9-10 (citing Dkt. 135-1, Minutes of Richmond City Council Meeting on November 5, 2019, attached as Exhibit A to the City's request for judicial notice in support of the Motion).)

1 **1. Arguments About Land Use and Planning Decisions for Point**
 2 **Molate Are Already the Subject of Suits Pending in State Court**

3 One of Petitioners' present objections is that in the more recent public meetings and
 4 decision-making processes regarding Point Molate, the City allegedly did not consider various
 5 alternatives for Point Molate. (*See, e.g.*, Opp. at 14-15.) These complaints—along with a host of
 6 other allegations about the CEQA process and planning decisions from the last several months
 7 concerning Point Molate—are not only false,³ but are also the subject of a separate lawsuit which
 8 a subset of Petitioners filed in state court last month.⁴ (Request for Judicial Notice (“RJN”), Ex.
 9 A (Pet. for Writ of Mandate, *Point Molate Alliance et al v. City of Richmond*, No. CIVMSN20-
 10 1474 (Contra Costa Super. Ct., Oct. 9, 2020)) (“State Court Petition”).)⁵ In the State Court
 11 Petition, SPRAWLDEF and its co-petitioners bring four causes of action under the California
 12 Environmental Quality Act (CEQA) and California Planning and Zoning Law against the City of
 13 Richmond, Richmond City Council, and the developer Winehaven (not named in this lawsuit).
 14 Specifically, the State Court Petition alleges that the *Guidiville* settlement “bound RICHMOND
 15 to approving a project including at least a certain minimum amount of residential development, as
 16 well as other requirements. If RICHMOND did not grant a qualifying project, the agreement

17
 18 ³ As will be shown in the state court proceedings, the merits of petitioners' claims in the
 19 new litigation (and opposition brief here) are entirely baseless, as the City Council exercised its
 20 complete discretion. The City Council and its Supplemental Environmental Impact Report
 21 considered a full range of project alternatives—including alternatives with no housing whatsoever
 22 such as the referenced Community Plan alternative—without constraints imposed by the
 23 settlement.

22 ⁴ CESP, SPRAWLDEF, Tony Sustak, and Pamela Stello are petitioners in both this action
 23 and in the state court action. Norman LaForce and Stuart Flashman represent petitioners in both
 24 actions.

24 ⁵ Different petitioners filed a second state court action with similar CEQA and planning
 25 law claims regarding Point Molate last month. (RJN, Ex. B (Pet. for Writ of Mandate, *North*
 26 *Coast Rivers Alliance et al v. City of Richmond*, No. CIVMSN20-1528 (Contra Costa Super. Ct.,
 27 Oct. 9, 2020).) This petition also references the *Guidiville* settlement, alleging that the
 28 agreement “unlawfully divests the City of police powers and land use discretion reserved to the
 City by the California Constitution and the [California Planning and Zoning Law].” (*Id.* at
 ¶¶ 4(2), 48.) These two related state court cases are both before Judge Eric Weil.

1 forced RICHMOND to sell the entire Point Molate site to the developers for a nominal sum.” (*Id.*
 2 at ¶ 39; *see also id.* at ¶ 82 (alleging that the Environmental Impact Report for the proposed
 3 project at Point Molate “failed to adequately address the Community Plan alternative”
 4 (Petitioners’ preferred alternative), which they allege “deprived decision makers and the public of
 5 information necessary to make a fully informed decision whether the Community Plan alternative
 6 was preferable to the Project.”).)

7 To the extent Petitioners take issue with the later process of considering various proposals
 8 for potential development at Point Molate and the eventual granting of entitlements to the
 9 selected developer, those claims are separate from Petitioners’ Brown Act claim and are now the
 10 subject of the pending state court litigation involving different parties (Winhaven is a party, for
 11 example; Upstream and the Tribe are not). Indeed, parallel litigation in federal court of these
 12 state law claims would raise federalism and efficiency concerns.

13 **2. Petitioners’ Land Use and Planning Law Claims Regarding the** 14 **Original and Amended Judgments Are Time-Barred and Moot**

15 To the extent Petitioners have land use arguments pertaining to the Original Judgment
 16 itself (or even the Amended Judgment), these arguments have been waived. As explained more
 17 fully in the City’s opposition to Petitioners motion for leave to amend the Petition, Petitioners’
 18 proposed amendment would be futile: the California Land Use and Planning Law claims
 19 Petitioners raise are subject to a 90-day statute of limitations, which lapsed many months ago.
 20 (*See* Dkt. 131 at 10-12.) Moreover, as discussed below, there is no “development agreement”
 21 included in the Judgment, and any such claim is also moot. The only development agreement to
 22 exist with regard to Point Molate is the development agreement with the selected developer for
 23 Point Molate, Winhaven, (negotiated over the course of many months and finalized in 2020).
 24 The only entitlements that exist with regard to Point Molate are entitlements granted to
 25 Winhaven following a thorough, multistep process of hearings and approvals.

26 Petitioners claim that the Petition “set forth within a single claim for relief that the
 27 respondent City had failed to comply with the Brown Act, Government Code §54950 et seq., as well
 28 as violating California Planning and Zoning Law.” (Opp. at 5.) Not so. The title of Petitioners’

1 “First Cause of Action” is “Violation of the Brown Act.” The allegations supporting this claim
 2 purport to articulate only a Brown Act claim. (Dkt. 32 at ¶¶ 42-51.) Hearings in this case have
 3 been about whether the City violated the Brown Act, and Petitioners never suggested that the
 4 Court was misunderstanding the “gist” (Opp. at 13:14) of Petitioners’ claims. (*See, e.g.*, Second
 5 MPI Hr’g Tr. at 45:14-48:20 (Court: “You want me to take the Amended Judgment, say there’s a
 6 *Brown Act violation* and therefore the following five provisions are hereby terminated? That’s
 7 what you’re asking?” Counsel for Petitioners: “Yes.” Court: “Okay. What provisions specifically
 8 are you asking me to strike as a matter of law because of a *Brown Act violation*?”) (emphases
 9 added).)

10 Nor do Petitioners’ new Land Use and Planning Law claims “relate back” to their Brown
 11 Act claim. (*See* Dkt. 136 at 6-7.) In order for the relation back doctrine to apply where a statute
 12 of limitations would otherwise bar a new claim, “the claims must ‘share a common core of
 13 operative facts such that the plaintiff will rely on the *same evidence* to prove each claim.’ . . .
 14 Thus, an amendment will not relate back where the amended complaint ‘had to include additional
 15 facts to support the [new] claim.’” *Echlin v. PeaceHealth*, 887 F.3d 967, 978 (9th Cir. 2018)
 16 (emphasis added) (citing *Williams v. Boeing Co.*, 517 F.3d 1120, 1133, 1133 n.9 (9th Cir. 2008)).
 17 Here, Petitioners seek to add a cause of action from an entirely different area of law involving
 18 over a half-dozen code sections, each of which requires distinct evidence and factual inquiries.
 19 The proposed second amended Petition does not “relate back” to Petitioners’ Brown Act claim,
 20 where the sole issue was whether the City provided appropriate public notice and hearing ahead
 21 of approving the Judgment, and would require new facts to support the new claims.

22 Indeed, Petitioners have previously insisted to this Court that only documents predating
 23 May 4, 2018, (the date of the City’s response to their Brown Act “cure and correct” letter) were
 24 relevant to their mandamus action. (Dkt. 34.) Now, they change course and ask this Court to
 25 consider evidence which Petitioners themselves previously characterized as “extra-record” and
 26 “not admissible” for consideration of their petition. (*Compare* Dkt. 34 at 2 with Dkt. 138 (citing
 27 to declarations and City documents after May 2018).) The Court agreed with Petitioners and
 28 limited the Administrative Record to only documents dated prior to Petitioners’ Brown Act “cure

1 and correct” letter. (Dkt. 35 at 1-2.) The Court’s decision was based on the fact that Petitioners
 2 brought only a Brown Act claim, finding:

3 The writ here challenges the propriety of the City’s approval of a
 4 settlement agreement which petitioners contend granted certain land
 5 use entitlements without an opportunity for public hearing and
 comment, *as required by the Brown Act*.

6 (*Id.* at 1 (emphasis added).)

7 Permitting Petitioners to now pursue Land Use and Planning Law claims would
 8 undoubtedly require entirely new evidence. The claims’ statute of limitations period has expired
 9 and cannot relate back.

10 **3. Petitioners Distort the Judgment and the City’s Answer**

11 Petitioners’ Land Use and Planning Law claims should be addressed in the now-pending
 12 state court litigation, not as part of their Brown Act claim. Should Petitioners be granted leave to
 13 amend their Petition, the City will address any new allegations at the appropriate time. However,
 14 to avoid any confusion at this stage, the City briefly addresses three of Petitioners’ most
 15 egregious distortions of the record below.

16 First, what Petitioners claim are “critical admissions” in the City’s amended answer to the
 17 Petition (Opp. at 7:24) are merely direct quotes from the Original Judgment and a city ordinance.
 18 Petitioners claim that the City “admitted that it needed to go through a full and open public
 19 process involving the City’s full discretionary power and authority in accordance with state
 20 planning and zoning law in determining and approving the appropriate general plan and zoning
 21 designations, through appropriate legislative actions, for the Point Molate Study Area.” (*Id.* at
 22 8:7-10.) The City did indeed go through such a process, as illustrated by the last two and a half
 23 years of public hearings, comment periods, and votes that are now the subject of the newly-filed
 24 state court lawsuits. (*See* Guidiville Dkts. 400, 403, 408, 409, 411, 412, 413.)

25 Second, the Amended Judgment made clear that the City retained its discretion in
 26 considering whether to grant any entitlements in connection with Point Molate and that the City
 27 acknowledged that it “is required to comply with all laws, statutes, or regulations, including
 28 compliance with CEQA, applicable to any future specific entitlements or development at Point

1 Molate that the City may consider.” (See Amended Judgment ¶¶ 16, 38.) As is clear in the
 2 language, the Amended Judgment only required the City to “consider” certain minimum land
 3 uses, and never actually effectuated any zone change, general plan amendment, or development
 4 agreement; the City’s zoning code and General Plan were not altered in any way by the Original
 5 or Amended Judgments. Details for a *potential* development project at Point Molate to be
 6 considered by the Council were limited and based upon a prior plan that was adopted by the City
 7 Council.⁶

8 Finally, as the City has explained before, and as Petitioners have previously conceded, the
 9 Judgment did not amount to a development agreement under California law. In their Opposition,
 10 Petitioners characterize the Judgment as a “statutorily unauthorized contractual agreement with
 11 the developers” which amounted “in everything but name, [to] a development agreement.” (Opp.
 12 at 15:16-17.) But Petitioners ignore the fact that the selected developer for the project at Point
 13 Molate, Winehaven, is *not even a party* to the Judgment. A development agreement requires
 14 specific agreements between a developer and a city. (See Dkt. 43 at 16-18.) Both the Original
 15 and Amended Judgments were clearly never a contract with a developer. On the contrary, the
 16 Judgment expressly called for selection of a developer in a manner that complies with all laws.
 17 (Original Judgment ¶ 21 (“[The] City must market the Development Areas for sale to one or more
 18 qualified developer(s) or builder(s) . . .”).) Petitioners cannot dispute that the entire process of
 19 selecting a developer—ultimately Winehaven—occurred *after* the Original Judgment was
 20 entered. Petitioners do not raise any argument in response to these points in their briefing.

24 ⁶ Even prior to Court entry of the Original Judgment, the City had previously considered
 25 and approved of potential development at Point Molate with a minimum of 670 housing units,
 26 and historic preservation and open space as reflected in the Judgment. Indeed, years before the
 27 Original Judgment, the City certified a final Environmental Impact Report, which approved of
 28 1,100 housing units. These actions by the City, following public hearings and votes, are reflected
 in the Judgment (*see* Original Judgment at 1 n.1) and the Administrative Record for this case on
 file with the Court (*see also* Dkt. 43 at 2-4).

1 In sum, Petitioners' proposed Land Use and Planning Law claims are both time-barred
2 and moot, and otherwise fail on their face. For these reasons, amending the Petition would be
3 futile. Petitioners' suit should be dismissed with prejudice.

4 **III. CONCLUSION**

5 For these reasons, the City respectfully requests that the Court grant the City's Motion for
6 Judgment on the Pleadings under Federal Rule of Civil Procedure 12(c) and dismiss Petitioners'
7 First Amended Petition for Writ of Mandate with prejudice.

8
9
10 Dated: November 6, 2020

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

11
12
13 By: /s/ Arturo J. González
14 Arturo J. González

15 Attorneys for Respondents
16 THE CITY OF RICHMOND, MAYOR TOM
17 BUTT, and RICHMOND CITY COUNCIL
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CERTIFICATE OF SERVICE

I hereby certify that, on November 6, 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