THE SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA BARBARA

TENTATIVE RULING

Judge Colleen Sterne
Department 5 SB-Anacapa
1100 Anacapa Street P.O. Box 21107 Santa Barbara, CA 93121-1107

CIVIL LAW & MOTION

Santa Barbara Association of Realtors, et al. v. City of Santa Barbara, et al.

Case No:	17CV04720
Hearing Date:	Mon Mar 19, 2018 9:30

Nature of Proceedings: Motion Strike Petition for Writ of Attachment & Complaint for Declaratory & Injunctive Relief; Demurrer 1st Amend Petition

Santa Barbara Association of Realtors and Robert D. Hart v. City of Santa Barbara, et al., Case No. 17CV04720 (Judge Sterne)

Hearing Date: March 19, 2018

Motion:

(1) Special Motion of Respondents to Strike First Amended Petition of Plaintiffs

(2) Demurrer of Respondents to First Amended Petition of Plaintiffs, or Alternatively, Motion to Strike Portions of the First Amended Petition

Attorneys:

For Petitioners and Plaintiffs Santa Barbara Association of Realtors and Robert D. Hart: Meriem L. Hubbard, Jeremy Talcott, Pacific Legal Foundation

For Respondents and Defendants City of Santa Barbara and Members of the Santa Barbara City Council: Ariel Pierre Calonne, Tom R. Shapiro, Office of the City Attorney; Thomas B. Brown, Nicholas J. Muscolino, Burke, Williams & Sorensen, LLP

Tentative Ruling:

(1) The special motion of respondents City of Santa Barbara and Members of the Santa Barbara City Council to strike the first amended petition of petitioners Santa Barbara Association of Realtors and Robert D. Hart is denied.

(2) The demurrer of respondents City of Santa Barbara and Members of the Santa Barbara City Council is sustained, with leave to amend, as to each cause of action in the first amended petition. The alternative motion to strike is denied as moot.

(3) Petitioners shall file and serve their second amended petition on or before April 3, 2018.

Background:

(1) Plaintiffs-Petitioners' First Amended Petition

This is a combined petition for writ of mandate and complaint for declaratory and injunctive relief. For simplicity of writing, plaintiffs-petitioners' original pleading will be referred to as the original petition and the operative pleading as the first amended petition (FAP). The allegations of the FAP are:

Plaintiff and petitioner Santa Barbara Association of Realtors (SBAOR) represents approximately 1,200 real estate professionals from specialties including residential and commercial sales, development, property management, and appraisals. (FAP, ¶ 1.) Plaintiff and petitioner Robert D. Hart is the Association Executive of SBAOR, is a resident of the City of Santa Barbara, and pays taxes in the City of Santa Barbara. (FAP, ¶ 2.) SBAOR and Hart are collectively referred to as petitioners. Respondents and defendants City of Santa Barbara (City) and Members of the Santa Barbara City Council, in their official capacities, are collectively referred to as respondents.

The Municipal Code of City includes section 28.87.220 (Section 28.87.220 or ZIR ordinance). (FAP, ¶¶ 10-11 & exhibit A [Section 28.87.220].) Section 28.87.220 provides in part:

"A. STATEMENT OF LEGISLATIVE INTENT.

"These regulations are intended to require a Zoning Information Report for purchasers of residential property, setting forth matters of City record pertaining to the authorized use, occupancy, zoning and the results of a physical inspection of the property. Primary purpose of the report is to provide information to the potential buyer of residential property concerning the zoning and permitted use of the property." (Section 28.87.220(A).)

"C. REPORT REQUIRED.

"1. Application. Except where a sale is exempt from the requirements of this section pursuant to Subsection G below, no later than five (5) days after entering into an 'agreement of sale' of any residential property, the owner or owner's authorized representative shall make application to the City for a Zoning Information Report to the Community Development Director on a form provided, and pay a fee as established by resolution of the City Council." (Section 28.87.220(C)(1).)

"2. Copy to Buyer. Said owner or owner's authorized representative shall provide a copy of the report to the buyer or buyer's authorized representative no later than three (3) days prior to consummation of the transfer of title. The buyer or buyer's authorized representative may waive in writing the requirement for delivery three (3) days prior to consummation of the transfer of title but in any event the report shall be provided to the buyer or buyer's authorized representative prior to the consummation of the transfer of title." (Section 28.87.220(C)(2).)

"D. CONTENTS OF ZONING INFORMATION REPORT.

"The Community Development Director shall review the applicable City records and provide the applicant the following information on the Zoning Information Report:

"1. Street address and parcel number of the property.

"2. The zone classification and permitted uses as set forth in the Zoning Ordinance of the City of Santa Barbara.

"3. Occupancy and use permitted as indicated and established by records.

"4. Variance, special use permits, conditional use permits, modifications and other administrative acts of record.

"5. Any special restrictions in use or development which are recorded in City records and may apply to the property.

"6. Any known nonconformities or violations of any ordinances or law.

"7. The results of a physical inspection for compliance with the Zoning Ordinance and for compliance with Chapter 14.46 of this Code.

"8. A statement of whether the real property has had a Building Sewer Lateral Report prepared for the real property pursuant to the requirements of Santa Barbara Municipal Code Chapter 14.46 within the five (5) year period prior to the preparation of the Zoning Information Report and, if so, that a copy of the Building Sewer Lateral Report is available from the City for the buyer's inspection. All Zoning Information Reports shall also contain an advisory statement (in bold not less than 10 point typeface) prepared by the Public Works Director which advises a purchaser of residential real property regarding the potential problems and concerns caused by an inadequate, failing, or poorly maintained Building Sewer Lateral. In addition, the standard required advisory statement shall indicate the advisability of a purchaser obtaining a recently-prepared Building Sewer Lateral Inspection Report." (Section 28.87.220(D).)

"H. EFFECT OF NONCOMPLIANCE.

"It shall be unlawful for any owner to consummate the transfer of title to any residential property without providing the transferee with a Zoning Information Report as required in this Section 28.87.220. The failure to comply with the provisions of this Section shall not invalidate the transfer or conveyance of real property to a bona fide purchaser or encumbrancer for value." (Section 28.87.220 (H).)

Section 28.87.220 was first enacted in 1976 and last amended in 2010. (Section 28.87.220 (end).)

The current fee for a Zoning Information Report (ZIR) as required by Section 28.87.220 is $475 for individual units. (FAP, ¶ 13.)

In order to determine whether a home is a single-family residence, City Municipal Code section 28.04.590 lists 14 non-exclusive elements to be inspected. (FAP, ¶ 18.) The inspection covers the inside and outside of the home, outbuildings, and yards. (*Ibid*.)

According to City's website, the ZIR inspection is required, and includes the interior of all residential units and accessory structures (e.g., garages, sheds, studios), as well as the entire grounds of a seller's residence. (FAP, ¶ 19 & exhibit C.) If all interior areas are not accessible, the "Planning Technician" is authorized to return and charge a re-inspection fee, which the City currently has set at $190. (*Ibid*.)

Petitioner Hart filed a ZIR, under protest, on March 27, 2017, at which time his family residence was to be sold and was in escrow. (FAP, ¶ 2.) The City conducted a site inspection of Hart's home on April 4, 2017, which inspection covered the single-family dwelling, the entry courtyard with a pergola, the garage, and the exterior of the property. (*Ibid*.) The ZIR included the inside and outside of the home. (FAP, ¶ 21.)

City recently revised its ZIR application form to allow a property owner to check a box indicating that he or she does not consent to the ZIR inspection, which option is not included in Section 28.87.220 or in any other City ordinances. (FAP, ¶ 22.) The ZIR on a home where the property owner refused an inspection of the interior and exterior of all structures on the site includes a handwritten note that the "Staff cannot confirm if any other violations exist based on the limited access to the site." (FAP, ¶ 23 & exhibit D.) If there is no inspection for a ZIR because the owner refuses consent to enter the home, the current fee is $355. (FAP, ¶ 36 & exhibit B.)

Anyone who violates Section 28.87.220 is deemed guilty of a misdemeanor and upon conviction punishable by a fine of up to $500, imprisonment in the Santa Barbara County Jail for up to six months, or both. (FAP, ¶ 25.) Each day a seller remains in violation of Section 28.87.220 constitutes a separate offense. (*Ibid*.)

On October 19, 2017, petitioners filed their original petition. On December 8, 2017, without a response being filed, petitioners filed their FAP. The FAP asserts two causes of action: (1) ordinary writ of mandate—conditions on the sale of residential property violate the Fourth Amendment; and, (2) declaratory relief—Section 28.87.220 is unconstitutional on its face. Petitioners seek a writ of mandate to compel City to cease enforcement of Section 28.87.220 to the extent it mandates, encourages or authorizes unwarranted and coercive administrative searches of residential properties by City personnel as a condition of sale, a permanent injunction enjoining such enforcement, and a declaration of unconstitutionality.

The FAP asserts its causes of action both against City and against the members of City's City Council in their official capacities.

(2) Special Motion to Strike and Demurrer

On January 12, 2018, respondents filed both a special motion to strike under Code of Civil Procedure section 425.16 (sometimes referred to as an anti-SLAPP motion) and a demurrer (or alternatively a motion to strike portions of the FAP) on the grounds discussed below.

The special motion to strike, the demurrer, and motion to strike are opposed by petitioners.

Analysis:

(1) Special Motion to Strike

(A) Requests for Judicial Notice

In support of its special motion to strike, City requests that the court take judicial notice of: (Request for Judicial Notice [RJN], exhibit 1) the opinion of the City Attorney of City, dated June 15, 2017; (exhibit 2) excerpts from the City's charter; and (exhibit 3) City's Municipal Code sections 28.98.001 and 28.98.002. These requests are unopposed. These requests are granted. (Evid., §§ 451, subd. (a), 452, subds. (b), (c).) With respect to exhibit 1, the court emphasizes that judicial notice is taken as to the existence of the opinion and its contents, but not as to the truth of any factual statements or the correctness of any legal analysis set forth therein.

In reply, City requests that the court take judicial notice of: (Reply Requests for Judicial Notice [Reply RJN], exhibit 1) further excerpts from the City's charter; and, (exhibit 2) City Ordinance No. 5537, adopted November 23, 2010. These requests are granted. (Evid., §§ 451, subd. (a), 452, subds. (b), (c).)

(B) Public Interest Litigation Exception

In opposition to the anti-SLAPP motion, plaintiffs argue that the anti-SLAPP motion procedure of Code of Civil Procedure section 425.16 is unavailable to the FAP because of the exception of section 425.17, subdivision (b), which provides:

"Section 425.16 does not apply to any action brought solely in the public interest or on behalf of the general public if all of the following conditions exist:

"(1) The plaintiff does not seek any relief greater than or different from the relief sought for the general public or a class of which the plaintiff is a member. A claim for attorney's fees, costs, or penalties does not constitute greater or different relief for purposes of this subdivision.

"(2) The action, if successful, would enforce an important right affecting the public interest, and would confer a significant benefit, whether pecuniary or nonpecuniary, on the general public or a large class of persons.

"(3) Private enforcement is necessary and places a disproportionate financial burden on the plaintiff in relation to the plaintiff's stake in the matter."

"To determine whether [plaintiff's] lawsuit met those definitions, 'we rely on the allegations of the complaint because the public interest exception is a threshold issue based on the nature of the allegations and scope of relief sought in the prayer.' [Citations.]" (*Tourgeman v. Nelson & Kennard* (2014) 222 Cal.App.4th 1447, 1460.) "If a plaintiff's lawsuit comes within section 425.17, subdivision (b), it is exempt from the anti-SLAPP statute, and thus, a trial court may deny the defendants' special motion to strike without determining whether the plaintiff's causes of action arise from protected activity, and if so, whether the plaintiff has established a probability of prevailing on those causes of action under section 425.16, subdivision (b)(1)." (*Ibid*.)

City argues that this action was not brought solely in the public interest because petitioners will benefit personally or financially. "Section 425.17(b)'s exception applies only to actions brought 'solely in the public interest or on behalf of the general public.' Use of the term 'solely' expressly conveys the Legislative intent that section 425.17(b) not apply to an action that seeks a more narrow advantage for a particular plaintiff. Such an action would not be brought 'solely' in the public's interest. The statutory language of 425.17(b) is unambiguous and bars a litigant seeking 'any' personal relief from relying on the section 425.17(b) exception." (*Club Members For An Honest Election v. Sierra Club* (2008) 45 Cal.4th 309, 316-317 (*Club Members*).)

"The 'public interest' referred to in section 425.17(b), does not simply describe topics that members of the public might find interesting. Instead the term 'public interest' is used to define suits brought for the public's good or on behalf of the public." (*Club Members*, *supra*, 45 Cal.4th at p. 318.)

The prayer of the FAP seeks: (1) issuance of a writ of mandate to command City to perform its duties and cease ZIR ordinance enforcement to the extent that the ZIR ordinance mandates, encourages, or authorizes unwarranted and coercive administrative searches of residential properties by City personnel as a condition of sale; (2) a permanent prohibitory injunction to the same effect as the writ of mandate; (3) a declaration that the ZIR ordinance is unconstitutional, invalid, and unenforceable; and (4) an order finding that parts of the ZIR ordinance are unconstitutional, invalid, and unenforceable and severing those parts from the ZIR ordinance.

Nothing in the prayer of the FAP is unique to petitioners. Petitioners seek to invalidate what they assert are unconstitutionally coercive features of the ZIR ordinance as it affects every person to whom the ZIR ordinance applies. Although petitioner Hart's situation is used as an example, Hart seeks no relief specific to his experience with the enforcement of the ZIR ordinance. City argues, however, that SBAOR, as a trade association, has a financial interest in the outcome of the litigation

and consequently is not bringing this action "solely" in the public interest, citing, for example, *California Redevelopment Association v. Matosantos* (2013) 212 Cal.App.4th 1457, 1479, which stated that "none of the cases cited by the CRA Respondents supports their assertion that the court may ignore the financial stake of an organization's members in deciding whether the financial burden on the plaintiffs was out of proportion to their individual stake in the litigation."

City reasons that because petitioners include real estate professionals who may be professionally affected by the ZIR ordinance, petitioners are not bringing this action solely in the public interest. This construction of "solely" is beyond the Supreme Court's explanation that "[u]se of the term 'solely' expressly conveys the Legislative intent that section 425.17(b) not apply to an action that seeks a more narrow advantage for a particular plaintiff." (*Club Members*, *supra*, 45 Cal.4th at pp. 316-317.) Here, there is no private relief sought and none would be obtained by success unique to real estate professionals. The only benefit to petitioners is the incidental effect that success would have on the entire marketplace for real estate either by eliminating the allegedly coercive effects on their customers to waive constitutional rights or by discouraging customers from selling homes by having potential sellers be subject to unconstitutional coercion.

The situation here is different from that in *Edna Valley Watch v. County of San Luis Obispo* (2011) 197 Cal.App.4th 1312, where the plaintiff had a particular and potentially significant financial interest in taking legal action to stop a development project through a CEQA challenge. (*Id*. at pp. 1320-1321.) Real estate professionals have an institutional interest in a marketplace for real estate not tainted by unconstitutional municipal actions. That institutional interest, as applied to this case, does not rise to the level of a "more narrow advantage for a particular plaintiff" in addition to the public interest in the success of the litigation. Indeed, if City's argument were correct, no trade association would ever be protected by section 425.17 in litigation if the litigation had any effect on the trade association's industry. (See Code Civ. Proc., § 425.17, subd. (a) ["The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process or Section 425.16."].)

City also argues that petitioners are not claiming to protect an important right affecting the public interest. City argues that because, in their view, petitioners do not allege any Fourth Amendment violation, petitioners are not claiming to protect an important right, and thus the protection of section 425.17 does not apply. As argued by petitioners, their claim is different from the claim as characterized by City. Petitioners characterize their claims as placing unconstitutional conditions upon a mandatory ZIR process. The harm of which petitioners complain is that if sellers stand on their Fourth Amendment rights and opt not to allow an intrusive inspection, the sellers are punished by the implication that sellers are hiding zoning or other violations which may affect the value of the home to a buyer. Petitioners assert a claim in the public interest within the meaning of section 425.17, subdivision (b).

While the discussion above has been in the context of the words "solely" and "in the public interest," the same discussion resolves the issues presented by section 425.17, subdivision (b)(1) and (2). The remaining element of section 425.17 is subdivision

(b)(3) as to the need for private enforcement. City argues that private enforcement is not necessary because the City is not unconstitutionally enforcing the ZIR ordinance. Again, this argument misconstrues petitioners' claims and assumes its own success on the merits. Plaintiffs' claims, if successful, would eliminate unconstitutionally coercive elements plaintiffs assert exist in City's enforcement of the ZIR ordinance. City is steadfastly refusing to alter its enforcement practices, which is consistent with its assertion that City's enforcement practices are legally appropriate. The third prong of the section 425.17, subdivision (b), test, however, is not about resolving the merits first in order to determine whether the anti-SLAPP statute applies. The test for the third element has been stated as:

" 'It has been said about this element that "the less direct or concrete a personal interest someone has, the more likely he or she will satisfy the element...." [Citation.] [¶] Courts first focus on what sort of financial stake the plaintiff had in the outcome [citation], i.e., what the plaintiff hoped to gain financially from the litigation in comparison to what it cost. [Citation] ... The relevant inquiry is whether "the ' "cost of the [plaintiffs'] legal victory transcends [their] personal interest." '
" [Citation.]'" (*Tourgeman v. Nelson & Kennard*, *supra*, 222 Cal.App.4th at p. 1465, quoting *Blanchard v. DIRECTV, Inc.* (2004) 123 Cal.App.4th 903, 915-916.)

For the same reasons discussed above, petitioners do not have a direct or personal interest in the outcome of this litigation beyond the interest in the public generally. The marketplace effect of the unconstitutional coercion asserted by SBAOR is difficult to quantify so that whatever incidental financial benefits may ultimately accrue to SBAOR members are highly speculative and of little to no present value. Moreover, where a specific customer is affected, the timing of the requirement to obtain the ZIR, its cost, and the nature of the constitutional interest at stake relative to the need to close escrow promptly all demonstrate that any personal interest of a customer strongly discourages litigation and strongly encourages acceptance of an allegedly unconstitutional practice by that customer based upon the cost of such litigation. Petitioners meet the third element of the section 425.17, subdivision (b), test.

Accordingly, the court finds that petitioners have met all of the elements of Code of Civil Procedure section 425.17, subdivision (b), and therefore section 425.16 does not apply to this action. The special motion to strike of respondents will be denied on that ground.

(2) Demurrer

"We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed. [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.]" (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6, internal quotation marks omitted.)

(A) Requests for Judicial Notice

In support of its demurrer and alternative motion to strike, City requests that the court take judicial notice of: (Respondents' Request for Judicial Notice [RRJN], exhibit 1) the opinion of the City Attorney of City, dated June 15, 2017; (exhibit 2) excepts from the City's charter; and (exhibit 3) City's Municipal Code sections 28.98.001 and 28.98.002. These requests are unopposed. These requests are granted. (Evid., §§ 451, subd. (a), 452, subds. (b), (c).) With respect to exhibit 1, the court emphasizes that judicial notice is taken as to the existence of the opinion and its contents, but not as to the truth of any factual statements or the correctness of any legal analysis set forth therein.

In opposition to the demurrer and alternative motion to strike, petitioners request that the court take judicial notice of: (Petitioners' Request for Judicial Notice [PRJN], exhibit A) portions of the Municipal Code of Novato, California; (exhibit B) portions of the Municipal Code of Carpinteria, California; and, (exhibit C) portions of the Municipal Code of Pasadena, California. (Note: The PRJN does not comply with the requirements of Rules of Court, rule 3.1110(f)(4) by failing to include electronic bookmarks.) These requests are granted. (Evid., § 452, subds. (b), (c).)

(B) Statute of Limitations

"A general demurrer based on the statute of limitations is only permissible where the dates alleged in the complaint show that the action is barred by the statute of limitations. [Citation.] The running of the statute must appear 'clearly and affirmatively' from the dates alleged. It is not sufficient that the complaint might be barred. [Citation.] If the dates establishing the running of the statute of limitations do not clearly appear in the complaint, there is no ground for general demurrer. The proper remedy 'is to ascertain the factual basis of the contention through discovery and, if necessary, file a motion for summary judgment ….' [Citation.]" (*Roman v. County of Los Angeles* (2000) 85 Cal.App.4th 316, 324-325.)

(i) What Statute of Limitations Apply

City argues that all claims asserted in the FAP are barred by the 90-day statute of limitations of Government Code section 65009, subdivision (c)(1)(B) and (c)(1)(E). Government Code section 65009, subdivision (c)(1)(B) provides:

"Except as provided in subdivision (d), 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."

The parties dispute whether Section 28.87.220 is a "zoning ordinance" within the meaning of Government Code section 65009, subdivision (c)(1)(B). City argues that Section 28.87.220 is part of the City's "Zoning Ordinance," that its purpose is to ensure compliance with the Zoning Ordinance, and that the City's power to zone

includes the power to ensure compliance with the Zoning Ordinance. Petitioners argue that the inclusion of Section 28.87.220 within the zoning title of City's municipal code is not dispositive (see *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1097, fn. 2 ["Of course, a provision's title 'is never allowed to enlarge or control the language in the body of the [provision].' [Citations.]"]), other cities have parallel ordinances placed in different parts of their respective municipal codes (PRJN, exhibits A-C), and the subject of Section 28.87.220 is different from zoning ordinances.

The term "zoning ordinance" is not defined by Government Code section 65009 nor by the definitions section of Government Code section 65007. However, Government Code section 65800 provides: "It is the purpose of this chapter to provide for the adoption and administration of zoning laws, ordinances, rules and regulations by counties and cities, as well as to implement such general plan as may be in effect in any such county or city. Except as provided in Article 4 (commencing with Section 65910) and in Section 65913.1, the Legislature declares that in enacting this chapter it is its intention to provide only a minimum of limitation in order that counties and cities may exercise the maximum degree of control over local zoning matters."

Government Code section 65850 identifies the scope of ordinances that are permitted pursuant to the Government Code chapter on zoning regulations:

"The legislative body of any county or city may, pursuant to this chapter, adopt ordinances that do any of the following:

"(a) Regulate the use of buildings, structures, and land as between industry, business, residences, open space, including agriculture, recreation, enjoyment of scenic beauty, use of natural resources, and other purposes.

"(b) Regulate signs and billboards.

"(c) Regulate all of the following:

"(1) The location, height, bulk, number of stories, and size of buildings and structures.

"(2) The size and use of lots, yards, courts, and other open spaces.

"(3) The percentage of a lot which may be occupied by a building or structure.

"(4) The intensity of land use.

"(d) Establish requirements for offstreet parking and loading.

"(e) Establish and maintain building setback lines.

"(f) Create civic districts around civic centers, public parks, public buildings, or public grounds, and establish regulations for those civic districts.

"(g) Require, as a condition of the development of residential rental units, that the development include a certain percentage of residential rental units affordable to, and occupied by, households with incomes that do not exceed the limits for moderate-income, lower income, very low income, or extremely low income households specified in Sections 50079.5, 50093, 50105, and 50106 of the Health and Safety Code. The ordinance shall provide alternative means of compliance that may

include, but are not limited to, in-lieu fees, land dedication, off-site construction, or acquisition and rehabilitation of existing units."

Although section 65850 does not apply to charter cities such as City (Gov. Code, § 65803), section 65850 provides guidance as to the meaning of the term "zoning ordinance" in section 65009, subdivision (c)(1)(B), which applies both to general law cities and to charter cities (Gov. Code, § 65009, subd. (f)). All of the items identified in 65850 involve land use regulations. (See *Travis v. County of Santa Cruz* (2004) 33 Cal.4th 757, 772, fn. 8 [rent control ordinance considered a zoning ordinance under subdivision (c)(1)(B) noting both that it is included within the county code chapter for zoning regulations and that it regulates land use]; *CAT Partnership v. County of Santa Cruz* (1998) 63 Cal.App.4th 1071, 1085 ["Rent control is a restriction on property as certainly as a zoning ordinance is a restriction, and it must be recognized." (Italics omitted)].) The meaning of "zoning ordinance" in section 65009, subdivision (c)(1)(B) as pertaining to land use regulations is consistent with the other subparts of subdivision (c)(1) which also address land use regulations at different levels of abstraction: general or specific plan (subd. (c)(1)(A)), regulation attached to a specific plan (subd. (c)(1)(C)), development plan (subd. (c)(1)(D)), and conditions attached to a variance, conditional use permit, or other permit (subd. (c)(1)(E)) (discussed further below).

With this meaning of "zoning ordinance" in mind, City's argument that Section 28.87.220 is a "zoning ordinance" is misplaced. The codification of Section 28.87.220 within the title of the Municipal Code relating to zoning makes sense insofar as Section 28.87.220 involves subject matter generally related to zoning. But the obligations required of Section 28.87.220 is to obtain a report, to pay a fee, and to provide a copy of the report to the property's buyer. (Section 28.87.220(C).) The contents of the report only involves reporting information from applicable City records (whether generated specifically for the report or otherwise). (Section 28.87.220(D).) The text of Section 28.87.220(D)(7) requires that the ZIR include information about the results of a physical inspection for compliance with the Zoning Ordinance, but does not expressly require that the City undertake any physical inspection. Section 28.87.220(E) expressly states that "Any report issued pursuant to this section shall not constitute authorization to violate any ordinance or law, regardless of whether the report issued pursuant to this section purports to authorize such violation or not." In any case, no use of land violates Section 28.87.220—only the failure to obtain from the City a ZIR or to transmit a ZIR to a buyer violates Section 28.87.220.

City argues the applicability of Government Code section 65009, subdivision (c)(1)(B), based upon its assertion that the purpose of Section 28.87.220 is to enforce its zoning ordinance. This assertion is contrary to Section 28.87.220's own express purpose: "These regulations are intended to require a Zoning Information Report for purchasers of residential property, setting forth matters of City record pertaining to the authorized use, occupancy, zoning and the results of a physical inspection of the property. Primary purpose of the report is to provide information to the potential buyer of residential property concerning the zoning and permitted use of the property." (Section 28.87.220(A).) The self-described purpose of Section 28.87.220 is informational and not enforcement.

Based on the foregoing, the court concludes that Section 28.87.220 is not a "zoning ordinance" within the meaning of Government Code section 65009, subdivision (c)(1)(B). Consequently, on the facts and claims alleged in the FAP, the limitations period of subdivision (c)(1)(B) does not apply to this action.

City alternatively argues that the City Administrator's decision to accept, interpret, and apply the City Attorney's interpretation and apply Section 28.87.220 is governed by Government Code section 65009, subdivision (c)(1)(E). "Except as provided in subdivision (d), 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: [¶] … [¶] (E) To attack, review, set aside, void, or annul any decision on the matters listed in Sections 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."

Government Code section 65901, subdivision (a), provides: "The board of zoning adjustment or zoning administrator shall hear and decide applications for conditional uses or other permits when the zoning ordinance provides therefor and establishes criteria for determining those matters, and applications for variances from the terms of the zoning ordinance. The board of zoning adjustment or the zoning administrator may also exercise any other powers granted by local ordinance, and may adopt all rules and procedures necessary or convenient for the conduct of the board's or administrator's business."

City argues that the decision to follow the interpretation of Section 28.87.220 as specified by the City Attorney constitutes a decision within the "other powers" granted pursuant to Government Code section 65901, subdivision (a). (See *Stockton Citizens for Sensible Planning v. City of Stockton* (2012) 210 Cal.App.4th 1484, 1487.)

In opposition, petitioners argue that Government Code section 65900 does not apply to existing homes. This argument is based upon the Legislature's stated purpose for section 65009 that "it is essential to reduce delays and restraints upon expeditiously completing housing projects" (Gov. Code, § 65009, subd. (a)(1)) and that legal actions to attack decisions pursuant to division 1 of title 7 of the Government Code (entitled "Planning and Zoning") "can prevent the completion of needed developments" (subd. (a)(2)). (Opposition, pp. 9-10.) Petitioners distinguish *Stockton Citizens for Sensible Planning v. City of Stockton*, *supra*, 210 Cal.App.4th 1484 and *California Building Industry Association v. City of San Jose* (2015) 61 Cal.4th 435, but do not provide any support for their argument that provisions, including Government Code section 65901, are limited to existing homes. The text of section 65009 does not support such a limitation.

Unlike section 65009, subdivision (c)(1)(B) which is expressly limited to zoning ordinances, subdivision (c)(1)(E) applies to decisions by zoning administrators authorized by ordinance. (*Stockton Citizens for Sensible Planning v. City of Stockton*, *supra*, 210 Cal.App.4th at pp. 1495-1496.) City has authorized its Zoning Administrator to provide the ZIR. (Section 28.87.220(D).) The authorization here is

reasonably related to zoning matters by providing zoning information to buyers of real estate. So, section 65009, subdivision (c)(1)(E) is reasonably understood to apply to apply to "decisions" on matters for which the Zoning Administrator authorized with respect to Section 28.87.220.

As noted above, Government Code section 65009, subdivision (c)(1)(B) does not apply to the claims here. Section 65009, subdivision (c)(1)(E) does apply to "decisions" on subject matters. Where section 65009, subdivision (c)(1)(E) does not apply, the three-year limitations period of Code of Civil Procedure section 338, subdivision (a), applies. (*Travis v. County of Santa Cruz*, *supra*, 33 Cal.4th at p. 772 [challenge to ordinance as preempted by later enacted statute].)

(ii) Application of Statute of Limitations to Claims

A useful discussion of the application of the statute of limitations in this context is set forth in *Travis v. County of Santa Cruz*, *supra*, 33 Cal.4th 757 (*Travis*). In *Travis*, the plaintiffs were owners of residential properties in Santa Cruz County. (*Id*. at p. 764.) The plaintiffs applied for a permit to construct a second unit on their property, which was granted subject to conditions imposed by a Santa Cruz County ordinance regarding occupancy restrictions and rent levels. (*Id*. at pp. 763-764.) Plaintiffs filed a petition for writ of mandate asserting that the ordinance conditions were preempted by state law. (*Id*. at p. 764.) The trial court concluded that all of plaintiffs' "facial" claims were untimely under Government Code section 65009 because they were not brought within 90 days of the ordinance's enactment or of the enactment of the preemptive statues. (*Id*. at p. 765.) The trial court also held that the "as applied" challenge of one plaintiff was untimely because it was not brought within 90 days of the final decision on the permit application. (*Ibid*.) The Court of Appeal affirmed on the grounds that all claims were facial challenges and not brought within 90 days of the last substantive amendment of the ordinance. (*Ibid*.)

The California Supreme Court in *Travis* affirmed in part and reversed in part. (*Travis*, *supra*, 33 Cal.4th at p. 776.) The court first noted that plaintiffs' action was in one part to determine the validity of conditions imposed on their permits and in one part to void or annul the decisions imposing those conditions. (*Id*. at p. 766.) The court found that one plaintiff's action was brought within 90 days of final administrative action on the permit and so the action was timely as to the claim that the conditions imposed were invalid. (*Id*. at p. 767.) The court rejected the argument that a facial claim was necessarily untimely:

"True, plaintiffs' legal challenge to the Ordinance is properly characterized as facial in that it 'considers only the text of the measure itself, not its application to the particular circumstances of an individual.' [Citation.] Yet plaintiffs object not only to the Ordinance's enactment and continued existence, but also to its application to their second dwelling unit permits. Plaintiffs' claim of unconstitutionality, for example, is not 'a facial challenge to the ... ordinance predicated on a theory that the mere enactment of the ... ordinance worked a taking' [citation], but, rather, a claim that the County effected a taking by demanding invalid exactions as a condition of issuing them second unit permits. Plaintiffs' preemption arguments, to be sure, go solely to the Ordinance's facial validity, but their complaint, as we have seen, is aimed not

only at the Ordinance's enactment or existence but also at the County's enforcement of the Ordinance against plaintiffs' own property." (*Travis*, *supra*, 33 Cal.4th at p. 767, italics omitted.) "A plaintiff, therefore, may not avoid the short 90-day limit of section 65009 by claiming that the permit or condition is 'void' and thus subject to challenge at any time. [Citations.] By the same token, an action is not removed from the purview of section 65009, subdivision (c)(1)(E) merely because the plaintiff claims the permit or condition was imposed under a facially unconstitutional or preempted law." (*Id*. at p. 768.)

So, the *Travis* court held that "[h]aving brought his action in a timely way after application of the Ordinance to him, [the plaintiff] may raise in that action a facial attack on the Ordinance's validity." (*Travis*, *supra*, 33 Cal.4th at p. 769.) "We hold … that the statute nonetheless provides a property owner full opportunity to challenge the validity of a zoning ordinance, as pertinent to the validity of permit conditions, when it is applied to him or her—the earliest time such conditions can be challenged." (*Id*. at p. 774.) However, "[i]n a facial challenge to a zoning ordinance based on preexisting statutes or the Constitution, plaintiffs are limited, under section 65009, subdivision (c)(1)(B), to 90 days from the ordinance's adoption*,* which is the first time such a challenge could be brought. When the challenge is instead based on a later enacted state statute, the limitations period [citation] also runs … from the first time the challenge could be brought, i.e., the initial accrual of the cause of action." (*Ibid*.)

Applying the reasoning of *Travis* to the instant action requires a separation of the bases for petitioners' different claims. The petition is organized by the type of relief sought (writ of mandate, injunction, judicial declaration) rather than by the basis for the relief. Petitioners appear to make three, or perhaps four, similar, but analytically distinct claims, the first three of which are: (1) Section 28.87.220 is unconstitutional as written because it can be interpreted to require an administrative search in violation of the Fourth Amendment; (2) Section 28.87.220 is unconstitutional as applied to Hart's home sale as effectively requiring an administrative search in violation of the Fourth Amendment; and (3) Section 28.87.220 is unconstitutional as applied to Hart's home as imposing unconstitutional conditions, that is, effectively imposing a penalty, for exercising Hart's Fourth Amendment right not to consent to a search. There is also a suggestion of a fourth type of claim relating to enforcement which is discussed below.

As in *Travis*, to the extent that the first claim of facial unconstitutionality is separate from its application to any seller of real estate, it is barred by any applicable statute of limitations. Section 28.87.220 was last amended in 2010. This action was filed on October 19, 2017. A claim based upon Section 28.87.220's impropriety as enacted is well beyond the longest possible applicable statute of limitations.

The second type of claim is based on Section 28.87.220's unconstitutionality as coercing a search in violation of the Fourth Amendment. In categorizing these claims, the court distinguishes this second type of claim, which is based on the search, from the third type of claim, which is based on the coercion. The reason for the distinction is that petitioners' opposition argues a "facial" challenge that is based upon parsing the meaning of "physical inspection" in the statute. (Opposition, pp. 11-13.) As in *Travis*, this type of claim includes a facial challenge, but is brought in the context of

an “as applied” challenge with respect to Hart’s home. (Opposition, p. 8.) However, petitioners allege that residents may refuse to consent to a search (albeit, then subject to disclosure of that fact) although the absence of consent is not included in the text of Section 28.87.220. (FAP, ¶¶ 22-24, 36, 47.) With these allegations, petitioners assert a claim that City’s enforcement of Section 28.87.220 in accord with its own interpretation of Section 28.87.220 is improper because the ability to refuse to consent to an interior search is not explicitly in the statute, and without the ability to refuse Section 28.87.220 requires an unconstitutional search. Putting aside the coercion aspect (which is categorized as the next type of claim), the essence of this claim is a challenge to City’s decision to enforce Section 28.87.220 consistent with its interpretation of Section 28.87.220.

As a challenge to City’s enforcement policy, the challenge is untimely under Government Code section 65009, subdivision (c)(1)(E) because the decision was made and communicated to petitioners as of June 21, 2017. (FAP, exhibit E.) Under the reasoning of *Travis*, the 90-day period would then commence and this action filed in October 2017 is untimely as to that challenge.

The third claim is an “as applied” challenge based upon coercion. The basis of this claim is that the procedures of Section 28.87.220 unconstitutionally coerce sellers to consent to administrative searches of their property. The nature of the alleged coercion is not present in the text of Section 28.87.220, and so the challenge is based upon the application of Section 28.87.220 in particular circumstances.

It is important to point out that the challenge made by the FAP does not assert that City may not issue truthful ZIR’s in general or that City may not require sellers to obtain ZIR’s so long as the process of obtaining information reported in the ZIR complies with law. Thus, if City had knowledge of a zoning violation from legally compliant sources there is nothing in the FAP to challenge the propriety of City reporting that knowledge to a potential buyer of the affected property. For purposes of this analysis, the court assumes the propriety of such reporting.

The coercive element as alleged in the FAP is the reporting on lack of consent. Assuming for the present that reporting lack of consent constitutes improper coercion, the challenge as applied to petitioner Hart is that the decision to threaten the reporting of his lack of consent in the ZIR was in violation of law. This, too, is a decision within the scope of Government Code section 65009, subdivision (c)(1)(E). The FAP alleges the last date of Hart’s interaction with City as being April 4, 2017 (FAP, ¶ 2), at which time the coercive effect had been fully exercised because Hart consented to the inspection of the interior of his home (FAP, ¶ 21). This action was commenced more than 90 days after April 4, 2017, so this claim is also outside of the limitations period.

As noted above, there is a fourth claim suggested by the FAP. Exhibit D to the FAP is a ZIR, apparently not for Hart’s home (FAP, ¶ 23), that is dated August 31, 2017. To the extent that the FAP makes an “as applied” challenge based upon exhibit D from August 31, 2017, it would be within 90 days of filing of the FAP and hence timely under Government Code section 65009, subdivision (c)(1)(E). The nature of such a challenge, however, is difficult to ascertain. Exhibit D includes the bold, large,

red capitalized words at the front: "Notice: Be advised that the property owner or authorized agent refused [circled] / consented to [not circled] to an inspection of the interior and exterior of all structures on the site." Exhibit D also includes a handwritten comment in colored ink on page 2: "Staff cannot confirm if any other violations exist based on the limited access to the site."

Petitioners must allege "specific facts to show that a facially valid enactment is being, or has been, applied in a constitutionally impermissible manner." (*Alfaro v. Terhune* (2002) 98 Cal.App.4th 492, 510.) The allegations regarding the red bolded language and the handwritten note, given sufficient context, may or may not be sufficient to allege improper coercion—the court is not in a position to provide a definitive ruling given the very limited briefing by the parties on this issue. However, there is insufficient context alleged as to whether, or to what extent, this language, or something like it, is authorized or required and as to the nature of the coercive effect. Simply put, more facts are needed to explain the nature of this claim than merely attaching a single ZIR.

Accordingly, the court will sustain the demurrer to each cause of action of the FAP on the grounds that the only claim not barred by the applicable statute of limitations is insufficiently pleaded. The court will grant leave to amend as to all aspects of the FAP discussed herein.

(3) Motion to Strike

Because the court sustains the demurrer of respondents to the FAP, the motion to strike is moot.

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