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7
8 SUPERIOR COURT OF CALIFORNIA

9 COUNTY OF SANTA BARBARA

10
11 SANTA BARBARA ASSOCIATION OF
REALTORS and ROBERT D. HART,

12 Petitioners/Plaintiffs,

13 v.

14 CITY OF SANTA BARBARA and MEMBERS
15 OF THE SANTA BARBARA CITY COUNCIL,
in their official capacities,

16 Respondents/Defendants.
17
18
19
20

No. 17CV04720

**OPPOSITION TO DEMURRER
TO SECOND AMENDED VERIFIED
PETITION AND COMPLAINT
FOR DECLARATORY AND
INJUNCTIVE RELIEF
(Code Civ. Proc. §§1085,
1060, and 526(a))**

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1 that implicates Gov't Code § 65009(c)(1)(E), only ministerial information communication. Further,
2 Code of Civ. Proc. § 338(b), which concerns the basis of Petitioners' Fourth Amendment claims
3 (trespass to real property) is applicable to those claims, not Code of Civ. Proc. § 338(a), thus
4 negating any related statute of limitations concerns.

5 Finally, Defendants' demurrer to the taxpayer standing of the SBAOR goes to show just
6 how far they are willing to go to protect the ZIR Ordinance from the judicial review of this court.
7 When a lack of standing does not appear on the face of a complaint, a summary judgment motion,
8 not demurrer, is appropriate. Both Robert D. Hart (Hart) and SBAOR sufficiently pay taxes to the
9 City of Santa Barbara as established in their complaint, establishing their taxpayer standing to
10 challenge the ZIR Ordinance.

11 For these reasons, Petitioners SBAOR and Hart respectfully request that the Court deny
12 Defendants' demurrer in its entirety, and allow Petitioners' civil rights lawsuit to proceed.

13 STANDARD OF REVIEW

14 The purpose of a demurrer is to test the sufficiency of the factual allegations in a complaint.
15 *City of Los Angeles v. City of Los Angeles Employee Relations Bd.*, 7 Cal. App. 5th 150, 158 (2016),
16 *not* to test the truth or accuracy of the facts alleged in the complaint. *See Sheehan v. San Francisco*
17 *49ers, Ltd.*, 45 Cal. 4th 992, 998 (2009). A judge may sustain a demurrer on a statute of limitations
18 ground only when the facts in the complaint or judicial noticed matters disclose clearly and
19 affirmatively that the cause of action is barred. *Mitchell v. Cal. Dep't of Pub. Health*, 1 Cal. App.
20 5th 1000, 1007 (2016). When a lack of standing does not appear on the face of the complaint, a
21 summary judgment motion, not demurrer, is appropriate. *See Qualified Patients Ass'n v. City of*
22 *Anaheim*, 187 Cal. App. 4th 734, 752 (2010).

23 ARGUMENT

24 1. **Petitioners' Complaint Pleads Sufficient Facts To Maintain All** 25 **Fourth Amendment and Vagueness Challenges to the ZIR Ordinance**

26 In order to withstand a demurrer based on an alleged failure to state a cause of action, a
27 complaint need only meet fact-pleading requirements: it must only contain a statement of the facts
28 constituting the cause of action, in ordinary and concise language. Code of Civ. Proc.

1 §§ 425.10(a)(1), 430.10(e). Petitioners’ Fourth Amendment and Void-for-Vagueness claims more
2 than meet this permissive threshold pleading requirement, and thus overcome Defendants’
3 demurrer.

4 **A. Fourth Amendment Claims**

5 A property-based Fourth Amendment claim has three requirements:

6 First, the item/area allegedly searched without a warrant, *see United States v. Jones*, 565
7 U.S. 400, 404 (2012), or authorized to be searched, *see Camara v. Mun. Court of City & Cty. of*
8 *San Francisco*, 387 U.S. 523, 534 (1967), must fall within a category protected by the Fourth
9 Amendment, *see* U.S. Const. amend. IV (“persons, *houses*, papers, and effects”) (emphasis added).
10 Petitioners’ complaint includes well-pleaded facts alleging that the challenged ZIR Ordinance
11 authorizes the warrantless search of private homes, *see e.g.*, SAP ¶ 18 (“The ZIR Ordinance
12 requires that sellers of residential property allow a City employee to search the premises without a
13 warrant.”), and in Hart’s case the City authorized (and continues to authorize) the warrantless
14 search of his private property, *see e.g.*, SAP ¶ 2 (“The City conducted a warrantless search, pursuant
15 to the ZIR Ordinance, of Hart’s home on April 4, 2017.”); ¶ 38 (“Hart seeks to avoid another
16 violation and waiver of his Fourth Amendment rights to be free from warrantless searches of his
17 private property as a condition of selling this second residential property.”). *See also* SAP ¶¶ 21,
18 27, 33, 35, 39.

19 Next, a warrantless trespassory search by the government to collect information must occur,
20 *see Florida v. Jardines*, 569 U.S. 1, 11 (2013), or be authorized to occur, *see Camara*, 387 U.S.
21 at 534. Petitioners’ complaint includes well-pleaded facts alleging that the challenged ZIR
22 Ordinance authorizes the unconstitutional search of private homes, *see e.g.*, SAP ¶ 18 (“The ZIR
23 Ordinance requires that sellers of residential property allow a City employee to search the premises
24 without a warrant for any known or discovered nonconformities or violation of any ordinances or
25 law.”), and in the case of Hart did authorize (and continues to authorize) the search of his private
26 property for information collection, *see e.g.*, SAP ¶ 2 (“The City conducted a warrantless search,
27 pursuant to the ZIR Ordinance, of Hart’s home on April 4, 2017.”); ¶ 38 (“Hart seeks to avoid
28 another violation and waiver of his Fourth Amendment rights to be free from warrantless searches

1 of his private property as a condition of selling this second residential property.”). *See also* SAP
2 ¶¶ 9, 17, 23, 27, 33, 35, 39.

3 Lastly, no exception to the Fourth Amendment’s warrant requirement can be present that
4 would render said search reasonable, *see e.g.*, *Collins v. Virginia*, 138 S. Ct. 1663, 1669 (2018)
5 (discussing Automobile Exception to the Fourth Amendment’s warrant requirement). Again,
6 Petitioners’ complaint includes well-pleaded facts alleging plainly and unequivocally that no such
7 exception is present in this case. *See, e.g.*, SAP ¶ 62 (“While there are several narrowly defined
8 exceptions to the Fourth Amendment’s warrant requirement, such as the administrative search
9 exception, none are present here.”); SAP ¶ 65 (“The ZIR Ordinance authorizes warrantless searches
10 of private property that violate the Fourth Amendment’s warrant requirement, and qualify for no
11 exception to this requirement.”). *See also* SAP ¶¶ 66, 67, 68.

12 Petitioners’ unconstitutional conditions claim under the Fourth Amendment is equally well-
13 pleaded. An unconstitutional conditions claim consists in alleging that a government or government
14 agency has conditioned the receipt of a public benefit on waiver of a constitutional right. *Perry v.*
15 *Sindermann*, 408 U.S. 593, 597 (1972). Petitioners’ complaint includes well-pleaded facts alleging
16 that Defendants have imposed just such an unconstitutional condition on all property owners in
17 Santa Barbara, *see, e.g.*, SAP ¶ 27 (“The sale of residential property in Santa Barbara, without being
18 made subject to criminal and civil penalties, is conditioned on obtaining a ZIR, which depends on
19 agreeing to a warrantless search of private property.”), and in the case of Hart did impose (and
20 continues to impose) this same condition on his ability to sell his property free from civil and
21 criminal penalties, *see, e.g.*, SAP ¶ 33 (“Without other options, Hart allowed the ZIR process to
22 proceed, including a warrantless search of his private property.”); SAP ¶ 38 (“Hart seeks to avoid
23 another violation and waiver of his Fourth Amendment rights to be free from warrantless searches
24 of his private property as a condition of selling this second residential property.”). *See also* SAP
25 ¶¶ 80, 81, 83, 116, 125, 128, 131.

26 Given the clear sufficiency of Petitioners’ complaint to maintain their Fourth Amendment
27 claims, Defendants instead resort to attacking *the merits* of said claims. But this attempt is
28 procedurally inappropriate at the demurrer stage. For example, Defendants do not claim that the

1 facts included in Petitioners' Fourth Amendment claims are insufficient to meet minimal pleading
2 standards, but instead argue for an alternative theory. *See* Dem. at 6:15-17 (“[T]he ZIR Ordinance
3 does not require warrantless searches of properties as a matter of law.”). But the function of a
4 demurrer is *not* to test the truth or accuracy of the facts alleged in the complaint. *See Sheehan*, 45
5 Cal. App. 4th at 998. Yet calling into question the truth and accuracy of the facts contained in
6 Petitioners' complaint appears to be the entire basis of Defendants' demurrer to Petitioners' Fourth
7 Amendment claims. *See, e.g.*, Dem. at 6-7 (arguing that the ZIR Ordinance allows for property
8 owner consent); at 7 (arguing that City's alleged interpretation of the ZIR Ordinance should receive
9 deference); at 7-8 (arguing regarding California's history of construing local “inspection”
10 ordinances as constitutional). Instead of crediting these extraneous allegations, in ruling on
11 Defendants' demurrer this Court must accept all allegations of fact contained in Petitioners'
12 complaint as true. *Id.* This includes ignoring contrary allegations, *Childs v. California*, 144 Cal.
13 App. 3d 155, 159 (1983), and drawing all inferences in Petitioners' favor. *See Perez v. Golden*
14 *Empire Transit Dist.*, 209 Cal. App. 4th 1228, 1238-1239 (2012). Contrary to Defendants'
15 demurrer, the function of a demurrer is *not* to test the truth or accuracy of the facts alleged in the
16 complaint, *Sheehan*, 45 Cal. App. 4th at 998, and rendering its decision this court is not concerned
17 with whether the Petitioners will be able to prove the facts alleged in their complaint, *Beckwith v.*
18 *Dahl*, 205 Cal. App. 4th 1039, 1061 (2012).

19 **B. Void for Vagueness Claims**

20 Like Petitioners' Fourth Amendment claims, their complaint more than meets the
21 permissive threshold pleading requirements to sustain the claim. The Fifth Amendment to the
22 United States Constitution provides, in relevant part: “No person...be deprived of life, liberty, or
23 property, without *due process of law*.” U.S. Const. amend. V (emphasis added). It is a basic
24 principle of due process that an enactment is void for vagueness if its prohibitions are not clearly
25 defined. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). The justification for this doctrine
26 is that “[v]ague laws may trap the innocent by not providing fair warning.” *Id.* Ergo, “laws [must]
27 give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so
28 that he may act accordingly.” *Sewell v. Georgia*, 435 U.S. 982, 986 (1978).

1 As with their Fourth Amendment claims, Petitioners' complaint includes well-pleaded facts
2 unequivocally establishing their claims for vagueness. Petitioners allege that the prohibitions of the
3 ZIR Ordinance are not clearly defined. *See, e.g.*, SAP ¶¶ 55, 95 ("While the ZIR Ordinance may be
4 clear that selling residential property without a ZIR is purportedly illegal, it is patently unclear as
5 to the definition of "physical inspection."). Petitioners also allege facts showing that the ZIR
6 Ordinance, particularly the vague and ambiguous "physical inspection" requirement, threaten to
7 "trap the innocent by not providing fair warning." *See, e.g.*, SAP ¶¶ 56, 97 ("A person of ordinary
8 intelligence is not on notice as to what he or she was required to do under the ZIR Ordinance as
9 applicable to warrantless searches."). Finally, Petitioners' complaint successfully pleads facts
10 showing that the ZIR Ordinance is facially unconstitutionally vague. *See, e.g.*, SAP ¶ 103 ("The
11 ZIR Ordinance is void for vagueness on its face, because the ZIR Ordinance does not provide
12 adequate notice as to the legal obligations and legal rights of anyone to which it is applicable."),
13 and as-applied to Hart's previous and current residential properties; *see, e.g.*, SAP ¶ 100 ("The ZIR
14 Ordinance was void for vagueness as applied to Hart's previous residential property, because the
15 ZIR Ordinance did not provide adequate notice as to his legal obligations and legal rights."); SAP
16 ¶ 101 ("The ZIR Ordinance is void for vagueness as applied to Hart's current for sale residential
17 property, because the ZIR Ordinance does not provide adequate notice as to his legal obligations
18 and legal rights.").

19 As they did with Petitioners' Fourth Amendment claims, Defendants focus their attention
20 on attacking *the merits* of Petitioners' vagueness claims, and thus fail for the same reasons. *See,*
21 *e.g.*, Dem. at 10 ("[T]he term 'physical inspection' is far clearer than the terms upheld in the above
22 cases."); Defendants dispute Petitioners' allegation that "physical inspection" is impermissibly
23 vague, Dem. at 8:12-18, but they do not argue based on the face of the complaint. Defendants
24 question Petitioners' contention that the "physical inspection" standard functions in a vague
25 manner, Dem. at 8-9, but they do not argue under the standard for demurrer. Instead as they
26 attempted with Petitioners' Fourth Amendment arguments, Defendants' entire demurrer to
27 Petitioners' vagueness claim is an attempt to impermissibly test the truth or accuracy of the included
28 facts. *See Sheehan*, 45 Cal. App. 4th at 998.

1 **C. Hart’s As-Applied Challenge Based on His Current Home**

2 Defendants’ argument that Hart’s as-applied challenge to the ZIR Ordinance based upon
3 his current property fails on the merits, or in the alternative is unripe, and is no less erroneous than
4 their attempted demurrer to Petitioners’ Fourth Amendment and vagueness claims. Defendants’
5 argument that Hart’s as-applied challenge fails on the merits is nothing more than a rehashing of
6 their procedurally inappropriate attack on the merits of Petitioners’ Fourth Amendment and
7 vagueness claims. In fact, Defendants offer *no original analysis* on this question, instead opting to
8 merely cite to their previous extraneous contentions. *See* Dem. at 13:14-15 (“[Petitioners’] theory
9 fails on the merits for the reasons discussed as the beginning of this brief.”). And as noted above
10 by Petitioners in their refutation of that argument: the function of a demurrer is *not* to test the truth
11 or accuracy of the facts alleged in the complaint, *see Sheehan*, 45 Cal. App. 4th at 998, to which
12 this court is bound to draw all inferences, *see Perez*, 209 Cal. App. 4th at 1238-1239, and ignore
13 all contrary allegations, *see Childs*, 144 Cal. App. 3d at 159.

14 Defendants’ claims regarding ripeness are equally fruitless. “[A] claim is not ripe for
15 adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed
16 may not occur at all.” *Texas v. United States*, 523 U.S. 296, 300 (1998). “[Ripeness Doctrine’s]
17 basic rationale is to prevent the courts, through premature adjudication, from entangling themselves
18 in abstract disagreements.” *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967). Finally, “the fitness
19 of the issues for judicial decision” and “hardship to the parties of withholding court consideration”
20 must inform any analysis of ripeness. *Id.* at 149. Hart’s as-applied challenge to the ZIR Ordinance
21 related to his current property is clearly ripe for adjudication. There are no “contingent future events
22 that may not occur as anticipated, or indeed may not occur at all” in this case. Hart is currently in
23 the process of selling his home. *See* SAP ¶¶ 36 (“Hart now seeks to sell another single-family home
24 in the City of Santa Barbara.”). In order to successfully do so without being exposed to civil and
25 criminal penalties, SAP ¶ 24-26, under the ZIR Ordinance Hart will be forced to allow a warrantless
26 search of the property, SAP ¶ 27 (“The sale of residential property in Santa Barbara, without being
27 made subject to criminal and civil penalties, is conditioned on obtaining a ZIR, which depends on
28 agreeing to a warrantless search of private property.”), through a waiver of his Fourth Amendment

1 rights, SAP ¶ 38 (“Hart seeks to avoid another violation and waiver of his Fourth Amendment rights
2 to be free from warrantless searches of his private property as a condition of selling this second
3 residential property without being subject to criminal and civil penalties.”). Hart’s as-applied
4 challenge related to his current property will not entangle this Court in an “abstract disagreement,”
5 *Abbott*, 387 U.S. at 148, but instead will raise an issue fit for judicial decision with the potential to
6 alleviate Hart’s hardship to proceed, *see id.*

7 Hart brings his declaratory relief claim to determine his rights and obligations under the
8 law. *See* Code of Civ. Proc. § 1060. A declaratory relief action operates prospectively, “serving to
9 set controversies at rest before . . . rights are invaded or wrongs are committed.” *Cal. Pub. Records*
10 *Research, Inc. v. Cty. of Yolo*, 4 Cal. App. 5th 150, 185 (2016). The interpretation of a law is “a
11 particularly suitable subject for judicial declaration.” It is also a proper remedy to determine
12 whether a law is constitutional. *Id.* The posture of this case is markedly different than *Pac. Legal*
13 *Found. v. Cal. Coastal Comm’n*, 33 Cal. 3d 158, 169 (1982), because in that case the court was
14 asked to “speculate as to the type of developments for which access conditions might be imposed,
15 and then to express an opinion on the validity and proper scope of such hypothetical exactions,” *id.*
16 at 172. Equally inapposite is *Shelter Creek Dev. Corp. v. City of Oxnard*, 838 F.2d 375, 379 (1988).
17 Because the plaintiffs in that case did not seek a special use permit, the city did not reach a final
18 and authoritative determination as to how the ordinance may have been applied to the property, *id.*
19 at 379-80, unlike the ZIR process, which is described in the Ordinance and applied uniformly to all
20 home sales.

21 **2. Neither Statutes of Limitations, Government Code § 65009(c)(1)(E) Nor**
22 **Code of Civil Procedure § 338(a), are Applicable to Petitioners’ Complaint**

23 A judge may sustain a demurrer on a statute of limitations ground *only* when the facts in the
24 complaint or judicial noticed matters disclose clearly and affirmatively that the cause of action is
25 barred. *Mitchell*, 1 Cal. App. 5th at 1007. It is not enough that the complaint shows that the action
26 *could be* barred. *Id.* In such a case, the demurrer should be overruled and the defense permitted to
27 be raised by answer. *Roman v. Cty. of Los Angeles*, 85 Cal. App. 4th 316, 324-325 (2000). Any
28 ambiguity or uncertainty regarding the date of the alleged wrong, which triggers the statute, is a

1 question of fact that may be resolved on a motion for summary judgement or trial, but *not* on
2 demurrer. *Childs*, 144 Cal. App. 3d at 160-163.

3 **A. Government Code § 65009(c)(1)(E)**

4 Government Code § 65009(c)(1)(E) is inapplicable to this case for three reasons: (1) statutes
5 of limitations cannot prevent a plaintiff from challenging enforcement of an unconstitutional
6 statute; (2) the ZIR Ordinance is not a zoning ordinance and thus even decisions under it are not
7 “decisions” reasonably related to zoning; and (3) the Zoning Administrator’s role under the ZIR
8 Ordinance is purely ministerial in nature.

9 First, statutes of limitations cannot prevent a plaintiff from challenging enforcement of an
10 unconstitutional statute. *See Kuhnle Bros., Inc. v. Cty. of Geauga*, 103 F.3d 516, 522 (6th Cir. 1997)
11 (“The continued enforcement of an unconstitutional statute cannot be insulated by the statute of
12 limitations.”). Every day the Ordinance remains enforced creates a new harm to Hart, because he
13 is threatened with an unconstitutional search of his property if he ever contemplates selling it.
14 *Kuhnle Bros.*, 103 F.3d at 522. *See also Calvary Chapel Bible Fellowship v. Cty. of Riverside*,
15 No. 5:16-cv-00259 PSG (DTB), 2017 U.S. Dist. LEXIS 217331, at *14 (C.D. Cal. Dec. 5, 2017).

16 Next, the ZIR Ordinance is not a zoning ordinance and thus even decisions under it are not
17 “decisions” reasonably related to zoning. After thorough analysis, this Court found that the ZIR
18 Ordinance is not a zoning ordinance under Gov’t Code § 65009(c)(1)(B). Ruling on Demurrer at 13.
19 The fact that the City has authorized its zoning administrator to provide the ZIR, § 28.87.220(D)
20 does not render it “reasonably related” to zoning matters. While Gov’t Code § 65009 is not limited
21 to up-or-down action on variances and permits, any exercise of power must be pursuant to an
22 ordinance granting that power. *See Stockton Citizens for Sensible Planning v. City of Stockton*, 210
23 Cal. App. 4th 1484, 1493-94 (2012). No ordinance cited by the City, including the ZIR Ordinance,
24 grants the zoning administrator authority to amend, disregard, or unilaterally adopt interpretations
25 of the terms of ordinances under which he functions. Such a power is typically beyond the scope
26 of those held by a zoning administrator. *See Terminal Plaza Corp. v. City & Cty. of San Francisco*,
27 186 Cal. App. 3d 814, 834 (1986).

28 ///

1 A zoning administrator may “choose among various enforcement mechanisms to secure
2 compliance with the code,” but “[t]here is no room for the zoning administrator to interpret the
3 resolution contrary to its express terms.” *Id.* Moreover, the ZIR Ordinance is simply aimed at
4 “provid[ing] information” to buyers of residential property. (Section 28.87.220(A).) The
5 Ordinance does not concern “the community’s zoning business,” as *E.W.A.P., Inc. v. City of L.A.*,
6 56 Cal. App. 4th 310, 320 (1997) explains is the subject of § 65901’s grant of power. The “other
7 powers” granted pursuant to § 65901 are zoning powers, and the zoning administrator’s decision
8 to adopt an interpretation of the Ordinance’s language contrary to its express terms and nearly
9 41 years of enforcement policy was not an exercise of zoning power. *See Terminal Plaza Corp.*,
10 186 Cal. App. 3d at 831 (quoting *Great Western Sav. & Loan Ass’n v. City of Los Angeles*, 31 Cal.
11 App. 3d 403, 413 (1973)) (“Where a statute or ordinance clearly defines the specific duties or
12 course of conduct that a governing body must take, that course of conduct becomes mandatory and
13 eliminates any element of discretion.”).

14 Even if the zoning administrator’s decision to adopt the City Attorney’s interpretation of
15 the Ordinance could constitute a “decision” pursuant to “other powers granted by local ordinance”
16 for the purposes of Gov’t Code § 65009(c)(1)(E), such decision would not be one regarding the
17 manner of applying the Ordinance, but regarding amending the Ordinance itself. *See Terminal*
18 *Plaza Corp.*, 186 Cal. App. 3d at 829-30. The decision to adopt an interpretation of an ordinance’s
19 language that produces a materially different course of conduct is a decision to alter or amend the
20 ordinance. *Id.* at 836. The zoning administrator’s decision to adopt or amend the Ordinance would
21 compel a return to analysis under Gov’t Code § 65009(c)(1)(B). Since this Court has already found
22 that the Ordinance is not a zoning ordinance, the City’s argument must fail. Tentative Ruling at 13.

23 Finally, the Zoning Administrator’s role under the ZIR Ordinance is purely ministerial in
24 nature, not discretionary. In *Stockton Citizens for Sensible Planning*, 210 Cal. App. 4th at 1484,
25 *Stockton Citizens for Sensible Planning*, and others, sought to vacate the approval of a Wal-Mart
26 supercenter. *Id.* at 1487. Plaintiffs in that case argued that Gov’t Code § 65009, subdivision
27 (c)(1)(E), did not apply because the project was not approved by a legislative body, but rather by a
28 letter from the City’s Community Development Director. *Id.* The court disagreed because the

1 Director was acting as the zoning administrator and was exercising powers granted by the local
2 ordinance when he sent a letter approving the construction of the supercenter. *Id.* This case is
3 patently different. Section 28.87.220(A) states as follows: “These regulations are intended to
4 require a Zoning Information Report for purchasers of residential property, setting forth from the
5 City record . . . and the results of a physical inspection of the property.” Section (B)(2) defines
6 residential property as “any real property . . . for any residential purpose, situated in the City and
7 shall include the building or structures located on said improved real property.” (emphasis added).
8 Finally, section (D) is entitled “Contents of Zoning Information Report.” This section lists the City
9 records that must be gathered and provided to the seller ((D)(1-6), including the results of a physical
10 inspection (D-7), and finally, a statement regarding whether there has been a Building Sewer
11 Lateral Report prepared for the real property (D-8)).

12 None of the tasks outlined in the ZIR Ordinance could be classified in the traditional
13 definition of “zoning.” The ZIR Ordinance does nothing more than list a collection of documents
14 to be culled from the City files—purely a ministerial duty involving no discretion. The ZIR
15 inspector is not a building inspector or a licensed surveyor. SAP, Exh. C. Even the “Effect of
16 Noncompliance” addressed in section H, merely requires that a seller transfer a Zoning Information
17 Report. It does not invalidate the transfer or conveyance of the property. Nor does the fact that the
18 ZIR reports are required to be given to the buyer of real estate involve any “decision on subject
19 matters” by zoning administrators, as described in Gov’t Code § 65009(c)(1)(E). Those
20 requirements were adopted by the City Council, and incorporated into § 28.87,220, as described
21 above. The zoning administrator has no discretion to revise the law.

22 SBAOR and Hart can raise both as-applied challenges to the application of the Ordinance
23 to them, as well as an additional facial attack on the Ordinance’s validity. *See Travis v. Cty. of*
24 *Santa Cruz*, 33 Cal. 4th 757, 769 (2004). This leeway is granted because facial challenges “are best
25 conceptualized as incidents or outgrowths of as-applied litigation.” Richard A. Fallon Jr., *As-*
26 *Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1324 (2000).
27 Plaintiffs’ facial challenge to the Ordinance is not separate from its application to any seller of real
28 estate, but is an outgrowth of the invalidity of the Ordinance’s application to Plaintiff’s property.

1 *See Travis*, 33 Cal. 4th 757 at 768 (“Section 65009, section (c)(1)(E), in setting a time limit for
2 actions challenging permit conditions, does not purport to restrict the legal theories or claims that
3 may be made in such an action.”); Timothy Sandefur, *The Timing of Facial Challenges*, 43 Akron
4 L. Rev. 51, 52-53, 57-58 (2010) (“The facial/as-applied distinction is simply not related to accrual
5 and, thus has nothing to do with the statute of limitations.”).

6 **B. Code of Civil Procedure § 338(a)**

7 Neither is Code of Civil Procedure § 338(a) of any avail to Defendants. Petitioners’ action
8 is not based upon a “liability created by statute,” Code of Civ. Proc. § 338(a), but arises under a
9 theory of physical trespass to real property under the Fourth Amendment, SAP ¶ 65 (“The ZIR
10 Ordinance authorizes warrantless searches of private property that violate the Fourth Amendment’s
11 warrant requirement.”). *See also Jones*, 565 U.S. at 411-13 (the attachment of a GPS tracking
12 device to a vehicle by government agents constituted a Fourth Amendment violation because it was
13 a warrantless physical trespass on private property for the purpose of gathering information). Thus,
14 Hart’s Fourth Amendment claim actually falls under Code of Civil Procedure § 338(b) (“An action
15 for trespass upon or injury to real property.”) (emphasis added). Given that the warrantless physical
16 trespass on Hart’s previous home occurred in 2017, *see* SAP ¶¶ 30-35, his claim is well within the
17 three-year statute of limitations under Code of Civ. Proc. § 338(b). Furthermore, Hart’s claim does
18 not fall within Code of Civ. Proc. § 338(a) because the liability at issue in this case is the City’s
19 and arises under the Fourth Amendment to the U.S. Constitution; it is not “created” by the ZIR
20 Ordinance.

21 Defendants in this case attempt to have it both ways. Claiming the power to unilaterally
22 modify the law, Defendants claim that “the City’s interpretation” of the ZIR Ordinance renders it
23 constitutional, Dem. at 8:6-8, but simultaneously claim that this alleged unilateral modification is
24 not an amendment for the purposes of Code of Civil Procedure § 338(a)’s three-year statute of
25 limitations. This Court should reject this attempted sleight of hand and allow Petitioners’ claims
26 for constitutional injuries and remedy to proceed.

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1 **3. SBOAR and Hart Have Taxpayer Standing**
2 **To Maintain an As-Applied Challenge**

3 When a lack of standing does not appear on the face of the complaint, a summary judgment
4 motion, not demurrer, is appropriate. *See Qualified Patients Ass’n*, 187 Cal. App. 4th at 752. Both
5 Hart and SBAOR, as sufficiently alleged in their complaint, *see, e.g.*, SAP ¶¶ 2, 7, 40, 68, 82, 102,
6 each pay taxes to the City of Santa Barbara, and thus have taxpayer standing to challenge the
7 Defendants’ ZIR program pursuant to Code of Civil Procedure § 526a. In *Weatherford v. City of*
8 *San Rafael*, 2 Cal. 5th 1241, 1249 (2017), our state Supreme Court held that individuals and
9 corporations that have paid a general assessed tax to a defendant locality may pursue actions to
10 enjoin “illegal, injurious, or wasteful actions by [government] officials.” Prior to *Weatherford*,
11 § 526a standing required the payment of a property tax. *Id.* at 1245.

12 Section 526a provides a “broad basis of relief,” (*id.* at 1251) (citation omitted), and is
13 available when the alleged injury does not satisfy the general standing required under § 367 [or
14 1086] (*id.* at 1249). Section 526a allows a lawsuit to be filed when, (1) a citizen or corporation is
15 assessed for and liable to pay, or (2) a tax was paid within one year before commencement of a
16 lawsuit. *Id.* at 1251. *See Chiatello v. City & Cty. of San Francisco*, 189 Cal. App. 4th 472, 496-499
17 (2011). Plaintiffs suing under § 526a have never been required to have a personal interest in the
18 litigation. *Blair v. Pitchess*, 5 Cal. 3d 258, 267-69 (1971); *see Reynolds v. City of Calistoga*, 223
19 Cal. App. 4th 865, 872 (2014). After *Weatherford*, a property tax or any other tax assessed by the
20 City is sufficient to establish taxpayer standing. The tax need not be used to implement a particular
21 City program—such as the ZIR inspections—because the exception to the beneficial interest
22 requirement allows citizens “to seek relief where the question is one of public right and the object
23 of the mandamus is to procure the enforcement of a public duty.” *Weatherford*, 2 Cal. 5th at 1248
24 (internal quotes omitted). SBAOR and Hart allege that the inspections of single-family homes for
25 sale are unconstitutional and illegal. The ZIR Ordinance is supported by local taxes.¹

26 ¹ Each version of the Petition and Complaint alleges that SBAOR and Hart have paid assessed taxes to the Defendant
27 locality. *See* Petition and Complaint (Introduction and paragraphs 4, 5); First Amended Complaint (Introduction and
28 paragraphs 2, 5-6); Second Amended Complaint (Introduction and paragraphs. But, even if SBAOR did not pay taxes
in its own right, it can bring a taxpayer action if at least one of its members qualifies as a taxpayer. *Gilbane Bldg. Co.*
v. Superior Court, 223 Cal. App. 4th 1527, 1531 (2014); *Taxpayers for Accountable School Bond Spending v.*

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CONCLUSION

For these reasons, Petitioners SBAOR and Robert D. Hart respectfully request that the Court deny Defendants' demurrer in its entirety.

DATED: August 14, 2018.

Respectfully submitted,

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By 
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Attorneys for Petitioners/Plaintiffs

San Diego Unified Sch. Dist., 215 Cal. App. 4th 1013, 1032 (2013).

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DECLARATION OF SERVICE BY MAIL

I, Meriem L. Hubbard, declare as follows:

I am a resident of the State of California, employed in Sacramento, California. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 930 G Street, Sacramento, California 95814.

On, August 14, 2018, true copies of **OPPOSITION TO DEMURRER TO SECOND AMENDED VERIFIED PETITION AND COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF** were placed in FedEx envelopes addressed to:

THOMAS B. BROWN
MARK J. AUSTIN
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1901 Harrison Street, Suite 900
Oakland, CA 94612-3501
(510) 273-8780

ARIEL CALONNE
TOM R. SHAPIRO
City of Santa Barbara
740 State Street, Suite 201
Santa Barbara, CA 93101
(805) 564-5326

which envelopes, with postage thereon fully prepaid, were then sealed and deposited with a FedEx Courier for overnight delivery in Sacramento, California.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 14th day of August, 2018, at Sacramento, California.


MERIEM L. HUBBARD