No. 23-15494

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FELIX MENDELSON, as trustee for
THE SHTAIMAN FAMILY TRUST,

Plaintiff - Appellant,

v.

COUNTY OF SAN MATEO,

Defendant – Appellee.

On Appeal from the United States District Court
for the Northern District of California
No. 3:20-cv-05696-AGT
Honorable Alex G. Tse, District Judge

PLAINTIFF – APPELLANT'S OPENING BRIEF

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JURISDICTIONAL STATEMENT

This Court remanded a prior appeal (9th Cir. No. 20-17389) to the District Court for consideration in light of *Pakdel v. City & County of San Francisco*, 141 S.Ct. 2226 (2021). *See* ER-125–126. The district court had subject-matter jurisdiction over the action under 28 U.S.C. § 1331. The district court's Order Granting the Defendant-Appellee's Motion to Dismiss Following Remand was entered on March 7, 2023.[1] ER-5–10.

Plaintiff-Appellant Felix Mendelson ("Mendelson") filed a notice of appeal on March 31, 2023. ER-11–13. The appeal is timely under Federal Rule of Appellate Procedure 4(a)(1)(A). This Court has jurisdiction under 28 U.S.C. § 1291.

[1] The district court's March 7, 2023, Order dismissed the complaint and ordered that "[t]he Clerk shall close the case file." However, it appears that the court has never entered a separate final judgment. *Harris v. McCarthy*, 790 F.2d 753, 756–57 (9th Cir. 1986) ("Where 'nothing but delay would flow' from requiring the district court to enter a judgment 'from which a timely appeal would then be taken,' the court should exercise its discretion to hear the appeal. Here, defendants make no claim that they will be prejudiced by the district court's failure to enter a separate judgment. . . . We proceed to the merits of this dispute.") (cleaned up); *Whitaker v. City of Houston*, 963 F.2d 831, 833-34 (5th Cir 1992) (finding an appellate court could elect to take jurisdiction over an appeal even though there was never a separate Rule 58 judgment entered below, provided the order of dismissal was a final decision and the appellee did not object to the taking of the appeal).

This is a comeback appeal governed by Ninth Circuit General Order 3.6(d)[2] and involves the same issue which the panel in the prior appeal (9th Cir. No. 20-17389) considered. Mendelson requests the same panel—comprised of Circuit Judges Bade and Bumatay and District Judge Sessions (District of Vermont)—be reconvened (9th Cir. No. 23-15494).

STATEMENT OF ISSUES

This appeal asks whether a regulatory takings claim is ripe for judicial review because San Mateo County ("County") has taken a

[2] Pursuant to Ninth Circuit General Order 3.6(d),

> "[w]hen a new appeal is taken to this Court from a district court or agency decision following a remand or other decision by an argument panel, the Clerk's Office will notify the panel that previously heard the case that the new appeal or petition is pending, and will provide a brief description of the issues presented. The prior panel is encouraged to accept a case that predominately involves the interpretation and application of the prior panel decision, except when it is impossible to reconstitute the prior panel. Any motion to assign a new appeal to a prior panel will be referred to the prior panel for decision. A new appeal will be assigned to the prior panel if two of the judges on the prior panel agree to accept the case. If the third judge on the prior panel is unavailable, the Clerk shall draw a replacement, utilizing a list of active judges randomly drawn by lots as provided in [General Order 3.2.h.]."

"definitive position" on the allowable uses of Mendelson's land. Two *de novo* questions of law are presented:

1. When the County's official government website tells property owners they "must" ask the County's Community Development Director and County Counsel whether the County will override the County's environmental restrictions and allow a home to be built, does the property owner's compliance with the County's publicized procedure qualify as a "meaningful application" for ripeness purposes?

2. When the County's zoning laws flatly prohibit residential development, and County officials refuse to respond for over a year to a property owner's request that these restrictions be overridden, has the County taken a "definitive position" on what uses are allowed?

INTRODUCTION

1. Government shouldn't mislead property owners by telling them to do meaningless things

The County claims that section 30010 of the California Coastal Act authorizes it to "override" any restrictions in the County's Local Coastal Plan (LCP) that would, in the County's opinion, result in an uncompensated taking. The County's website instructs owners who want to build a home on residentially-zoned property in an area which the

County's coastal plan prohibits residential uses, that they "must" ask the County's Community Development Director and County Counsel whether the County would override the homebuilding ban: "[a]ny intention to proceed with an application for development that would run counter to those policies [the LCP residential ban] must first be thoroughly reviewed by the Community Development Director and County Counsel." ER-206–207; *see also*, County of San Mateo Planning and Building Website, *San Mateo County – Montecito Riparian Corridor.*[3] This is known as a "takings analysis." Mendelson complied with the County's command (sometimes referred to as a request for a "takings analysis") and did as instructed. ER-207–210; Complaint (Compl.), ¶ 29–30.

Today, however, the County points the finger of blame at Mendelson for doing exactly what it told property owners to do. ER-40–46, 120–123. It now says that an application for a Coastal Development Permit (CDP) is the sole means by which property owners can ask for an override, and that the County has no obligation at all to

[3] https://www.smcgov.org/planning/san-mateo-county-montecito-riparian-corridor.

what it characterizes as Mendelson's "informal" request. *Id.* But until Mendelson sued, the County kept this information about its procedures to itself. ER-207–210. Nothing in its LCP, or its other published ordinances, rules, or regulations lets owners know that they should ignore the County website's instructions to allow the Planning Director and County Counsel to "thoroughly review" a request for a section 30010 override, and that a CDP application is the only way to request it. *Id.* Only in litigation did the County bother to tell Mendelson that he was barking up the wrong procedural tree when he asked for an override, and that he should have filed a CDP application, and that asking the County's chief planning officer and the County's chief legal officer as directed by the County's website was illusory (ER-153):

> Plaintiff's allegation that he submitted a request to the County that it undertake a "takings analysis," presumably pursuant to the Coastal Act provision that he claims does not apply, but the County has not yet done so does not demonstrate that it is futile to apply for a permit or submit a development proposal for consideration. Even if the County could possibly undertake a takings analysis without a reasonable development proposal, and without specific information about the property, a delay in responding to such a request does not establish the futility of applying for a permit[.]

Telling the public they "must" do something, and then only disclaiming its validity in litigation isn't the "turning of square corners" we expect when dealing with our own government. *See Niz-Chavez v. Garland*, 141 S.Ct. 1474, 1486 (2021) ("If men must turn square corners when they deal with the government, it cannot be too much to expect the government to turn square corners when it deals with them."); *Dep't of Homeland Security v. Regents of the Univ. of Cal.*, 140 S.Ct. 1891, 1909 (2020) ("[T]he Government should turn square corners in dealing with the people.") (quoting *St. Regis Paper Co. v. United States*, 368 U.S. 208, 229 (1961) (Black, J., dissenting) ("Our Government should not, by picayunish haggling over the scope of its promise, permit one of its arms to do that which, by any fair construction, the Government has given its word that no arm will do. It is no less good morals and good law that the Government should turn square corners in dealing with the people than that the people should turn square corners in dealing with their Government.")).

When the County government speaks publicly on its official website—*especially about its own procedures*—the public it serves is entitled to take it as its word, even if that word is on the internet. This

Court should conclude that Mendelson cannot be faulted for doing what the County expressly instructs property owners to do. Thus, his application was "meaningful."

2. The County's silence was not golden

In addition to the County bait-and-switching its property owners into pursuing procedures the County now says are pointless, after inducing Mendelson to use this process the County simply clammed up. The County failed the most rudimentary requirements of good government: instead of responding to Mendelson in some way, the County went completely silent. For over a year (from Mendelson's first override request on June 3, 2019, to his filing of the Complaint on August 14, 2020), the County literally did nothing to even give Mendelson the courtesy of telling him something: for example, it didn't tell him that it would (or even that it would not) override the restrictive overlay to allow him to build a home. ER-210; Compl. ¶ 29–30. And most shockingly, the County didn't even bother telling Mendelson that he was wasting his time because the instructions on the County website are merely "advisory" and only solicited the Community Development Director and County Counsel's personal opinions, and unless and until he filed a CDP

application, the County had no obligation to respond to him in any way about an override. *Id*. Instead, it simply went silent. Leaving Mendelson hanging, even after he kept asking about the status. *Id*. ("Despite Mr. Mendelson's repeated attempts to obtain an analysis over the course of the following six months, the County never provided the takings analysis. As of the date of this Complaint, the County still has not provided the analysis.").

In any fair-minded world, a year is more than a reasonable time for the County to respond in some way. In these circumstances, the County cannot take refuge behind its lack of an express "no" to claim that it hasn't made an override decision because it has not formally rejected an application for a CDP. *See MacDonald, Sommer & Frates v. Yolo Cnty.*, 477 U.S. 340, 350 n.7 (1986) ("A property owner is of course not required to resort to piecemeal litigation or otherwise unfair procedures in order to obtain this determination."). Indeed, at oral argument in the prior appeal, the County conceded it has no intention of ever responding, because it asserts, its instructions to property owners are totally meaningless. *See* Oral Argument Recording, *Mendelson v. Cnty. of San*

Mateo, No. 20-17389 (9th Cir. Oct. 22, 2021) at 25:02–28:30.[4] In its response to Judge Bumatay who asked, "[t]he informal takings analysis process that Mr. Beard described, do you agree that it is not codified in any way and it is just an informal process and why hasn't the County responded to that?," the County's advocate, Ms. Carroll, stated:

> That's correct, Your Honor. It is an informal process. It hasn't been used often, as far as I know. Once. At most. And, um, frankly I don't know why the County has not responded to Mr. Mendelson in this takings analysis. But the fact remains that it is not part of the formal application process and so it doesn't trigger any obligation on part of the County to respond.

Id. at 25:22–25:49. We shouldn't expect that kind of treatment at the hands of our government.

The section 30010 override is a narrow and extremely rare exception to the County's general rule that no residential development is allowed in a designated riparian corridor, regardless of the underlying residential zoning. *See* Cnty. of San Mateo, Cal., *Local Coastal Program Policies* § 7.9(a)–(b), at 7.3 (2013). Having gone silent for a year about whether it will grant such an exception, the County LCP's general prohibition governs. Thus, Mendelson's Complaint plausibly alleges the

[4] ca9.uscourts.gov/media/video/?20211022/20-17389/.

County has taken a "definitive position" that its restrictive LCP laws are to be applied as written: no residential development in the Montecito Riparian Corridor zone. *See Feduniak v. Cal. Coastal Comm'n*, 148 Cal.App.4th 1346, 1362 (2007) (when there is a duty and opportunity to speak, but remains silent, conduct may be deemed to be communicative); *City of Gettysburg v. United States*, 64 Fed. Cl. 429, 449 (2005) ("silence and inaction" may be communicative). The Complaint's allegation that the County's silence and failure to expressly agree or disagree about overriding the LCP's blanket restriction, together with the LCP's restrictive riparian corridor regulation, is a "definitive position" on what uses are allowed in conformity with the residential zoning (none). Mendelson has pleaded a takings claim. ER-210; Compl. ¶ 32–41.

The district court failed to take heed of the Supreme Court's admonition in *Pakdel*, where the Court rejected the government's attempt to run a property owner through an opaque administrative maze the government had created. 141 S.Ct. at 2228–230. That case rejected the vision of the land use process as an unmapped minefield, full of traps for the unwary public. *Id*. at 2230–231. Thus, a takings claim is ripe not only when the government has made a "final decision" (for what decision

is truly ever "final?"), but when the government has merely "committed to a position" about what uses are allowed on the property. *Id.* at 2230. This standard is "relatively modest," *id.*, and only requires the government to have taken a "definitive position." *Id.*; *Williamson Cnty. Reg'l Plan. Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 193 (1985). There may be additional procedures by which the government might allow some uses, but requiring an owner pursue these would be *de facto* exhaustion. This is an objective analysis, and is not based on what the government subjectively argues it has done (or may do, because the government will nearly always argue that by availing itself of a different procedure, the owner just might be able to convince the government to allow the requested use), but on what it has actually done. *Pakdel*, 141 S.Ct. at 2231 ("Whatever policy virtues this doctrine might have, administrative 'exhaustion of state remedies' is not a prerequisite for a takings claim when the government has reached a conclusive position. To be sure, we have indicated that a plaintiff's failure to properly pursue administrative procedures may render a claim unripe if avenues still remain for the government to clarify or change its decision. . . . But . . . administrative missteps do not defeat ripeness once the government has

adopted its final position.") (citations omitted). This is an objective standard, measured by the circumstances; at the pleadings stage, by the factual allegations in the complaint. In short, this Court must not blindly accept what the County argues its process requires.

Here, when the County's ordinances and its maps say that a home cannot be built on "protected" land in an "environmentally sensitive habitat area," and the owner has asked the County to override these restrictions as instructed by the County, but the County chooses to not inform the owner that the procedure he is pursuing is meaningless, the County has taken a "definitive position" that the development-restricted Montecito Riparian Corridor overlay be applied as written. ER-109–115, 209-210; Compl. ¶ 25–30.

To conclude otherwise would allow the County to place property owners in blindfolded and in purgatory. This is not the relatively modest requirement envisioned by the Supreme Court, but a regime in which the County can establish blanket restrictive zoning zones that prohibit virtually all uses allowed by the underlying zoning, insist that owners ask the County to *ad hoc* ignore those restrictions, but also refuse to

respond, effectively preventing the County from ever having to answer any takings claim by asserting lack of a formal and final no.

The judgment should be reversed.

STATEMENT OF THE CASE

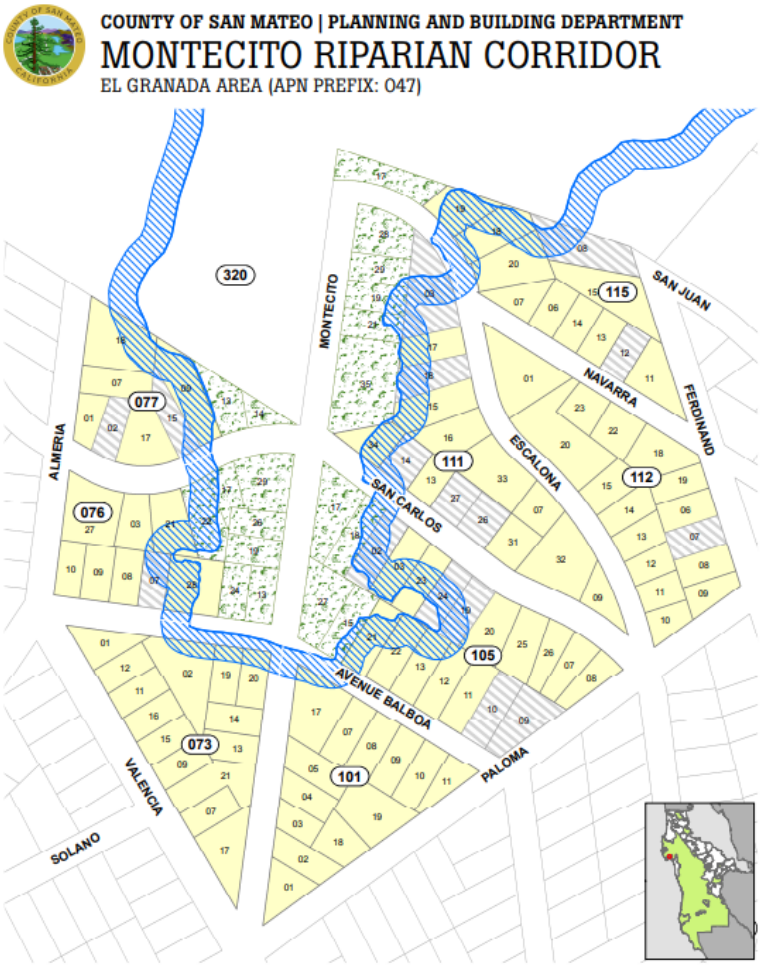
I. Mendelson's R-1 Property

Felix Mendelson, as Trustee for the Shtaiman Family Trust, owns four vacant lots in the residential area of El Granada of San Mateo County, California. *See* ER-207; Compl. ¶ 23–24. The County zoned Mendelson's property "R-1," which authorizes by right the construction of one single-family home per lot. Most of the surrounding properties and others in the area are developed with single-family homes. ER-207–208; Compl. ¶ 21.

II. Riparian Corridors: "Protected" Land Where Homes Are Prohibited

But as shown on the County's published map, Mendelson's complaint alleged his property is also overlaid with restrictive riparian corridor zoning which prohibits all uses allowed on R-1 zoned property. ER-208; Compl. ¶ 21. The complaint alleges that three of Mendelson's four lots are entirely within the "Montecito Riparian Corridor" (and the fourth is located almost entirely in the Corridor, with a small portion in

the corridor "buffer" zone). ER-208–209; Compl. ¶ 23. *See San Mateo County - Montecito Riparian Corridor*.[5]



[5] https://planning.smcgov.org/documents/san-mateo-county-montecito-riparian-corridor.

The County's LCP, adopted pursuant to the California Coastal Act, designated lands within "riparian corridors" as "environmentally sensitive habitat areas." LCP § 7.1 (2013) ("Sensitive habitat areas include, but are not limited to, riparian corridors[.]").[6] These riparian corridors are "sensitive habitats requiring protection." LCP § 7.8, at 7.2.[7] Consequently, the County "strictly regulates development within and

[6] The California Coastal Act (Cal. Pub. Res. Code § 30000, et seq.) requires local governments within the coastal zone to promulgate a Local Coastal Program to strictly regulate private uses and development within the coastal zone. These LCPs consist of "a local government's (a) land use plane, (b) zoning ordinances, (c) zoning district maps, and (d) within sensitive coastal resource areas, other implementing actions, which, when taken together, meet the requirements of, and implement the provisions and policies of [the Coastal Act]." *Id.* § 30108.6. The purpose of the LCP is to codify the Coastal Act's policies contained in Chapter 3 of the Act at the local government level to achieve "maximum responsiveness to local conditions." *Id.* § 30004(a).

The LCP must be submitted to the Coastal Commission, or the local government must request that the Coastal Commission prepare a LCP on its behalf. *Id.* § 30500(a). Once the County submits its LCPs, the Coastal Commission either certifies the LCP as consistent with the Chapter 3 policies of the Coastal Act or refuses certification and recommends modifications to the local government. *Id.* § 30512. If certified, the LCPs become local law. *See id.* § 30108.6. The County has adopted, with Coastal Commission certification, a legally binding LCP.

[7] *See also* LCP § 7.1 ("Sensitive habitat areas include, but are not limited to, riparian corridors, wetlands, marine habitats, sand dunes, sea cliffs, and habitats supporting rare endangered, and unique species.").

adjacent to such areas," and uses in a riparian corridor are severely restricted. LCP §§ 7.3–7.4.

Inclusion in the Montecito Riparian Corridor means that by law, the uses the County might allow on property so designated are very limited and do not include building a home. *See* LCP § 7.9(a)–(b) at 7.3. Section 7.9 of the County's LCP lists the five "Permitted Uses in Riparian Corridors:"

> Within corridors, [the County may] permit only the following uses: (1) *education* and research, (2) *consumptive* uses as provided for in the Fish and Game Code and Title 14 of the California Administrative Code, (3) *fish and wildlife management* activities, (4) *trails* and scenic overlooks on public land(s), and (5) necessary *water supply projects*.

Id. § 7.9(a) at 7.3 (emphasis added).

Building a home or developing such property for any other purpose is not allowed.[8] Mendelson's complaint alleged that the property is not

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[8] If "no feasible or practicable alternative exists" to the five permitted uses listed in section 7.9(a), other more limited uses may be allowed: aquaculture, flood control projects, bridges, pipelines, roadway repair, logging, and agriculture (none of which are allowable on Mendelson's property under the R-1 zoning:

> (1) stream dependent *aquaculture*, provided that non-stream dependent facilities locate outside of corridor, (2) *flood control projects*, including selective removal of riparian vegetation,

suitable for any of the uses that may be allowed in a riparian corridor under the County's LCP. ER-208–209. In short, under the County's LCP, building a home is not legally permissible in a riparian corridor. LCP § 7.9(a)–(b).

III. In Response to Mendelson's Request for a Section 30010 Override and Takings Analysis, the County Went Silent

As the complaint alleged, the County's website states that "[a]ny intention to proceed with an application for development that would run counter to [LCP] policies *must* first be thoroughly reviewed by the Community Development [aka Planning] Director and County Counsel." *San Mateo County – Montecito Riparian Corridor* (emphasis added).[9] The

> where no other method for protecting existing structures, in the floodplain is feasible and where such protection is necessary for public safety or to protect existing development, (3) *bridges* when supports are not in significant conflict with corridor resources, (4) *pipelines*, (5) *repair* or maintenance of roadways or road crossings, (6) *logging operations* which are limited to temporary skid trails, stream crossings, roads and landings in accordance with State and County timber harvesting regulations, and (7) a*gricultural* uses, provided no existing riparian vegetation is removed, and no soil is allowed to enter stream channels.

Id. § 7.9(b) at 7.3 (emphasis added).

[9] https://www.smcgov.org/planning/san-mateo-county-montecito-riparian-corridor.

County website does not state the basis for its assertion that the Community Development Director or the County Counsel may "review" (or approve) a property owner's "intention" to use her property in a way that is prohibited by the County's LCP. But it plainly refers to section 30010 of the Coastal Act, provides, in its entirety:

> The Legislature hereby finds and declares that this division [the Coastal Act] is not intended, and shall not be construed as authorizing the commission, port governing body, or local government acting pursuant to this division to exercise their power to grant or deny a permit in a manner which will take or damage private property for public use, without the payment of just compensation therefor. This section is not intended to increase or decrease the rights of any owner of property under the Constitution of the State of California or the United States.

Cal. Pub. Res. Code § 30010. The County interprets this statute as giving it the authority, standing alone, to "override" any provision in its LCP which, if applied, would take or damage private property. *See, e.g, Felkay v. City of Santa Barbara*, 62 Cal.App.5th 30, 41–42 (2021).

In compliance with the County's directive, Mendelson requested that the specified County officials (the Community Development Director and County Counsel) undertake a "takings analysis" so that the County could assess "whether and the extent to which" Mendelson's property could be developed and, if not, whether the LCP's prohibition on

residential development effected a compensable taking. ER-209–210; Compl. ¶ 29.

The County failed to respond. ER-209–210; Compl. ¶ 30. The complaint alleged that the County failed to respond for over a year, despite Mendelson's repeated prodding and attempts to obtain an analysis from the County. ER-209–210; Compl. ¶ 30.

The County did not tell Mendelson, "no, we're not going to override the Montecito Riparian Corridor restrictions," or "don't rely on our map showing your property in the Corridor because we don't really know how much of your property is in the Corridor until you submit a survey," or "we don't have enough information to determine whether we can override the residential development prohibition." Or even something as simple as, "we won't consider an informal request because the only way we will give you an answer about an override will be if you submit an application for a CDP." *See* ER-209–210; Compl. ¶ 30. Instead, the County flatly ignored Mendelson at every turn. ER-209–210; Compl. ¶ 30.

At oral argument in the prior appeal, the County reiterated that it was under no obligation to respond to Mendelson's takings analysis request. *See* Oral Argument Recording, *Mendelson*, No. 20-17389, at

25:02–28:30. Specifically, Judge Bumatay and the County's lawyer had the following colloquy:

> JUDGE BUMATAY: The informal takings analysis process that Mr. Beard described do you agree that it is not codified in anyway and it is just an informal process and why hasn't the County responded to that? If so?
>
> MS. CARROLL: That's correct, Your Honor. It is an informal process. It hasn't been used often, as far as I know. Once. At most. And, um, frankly I don't know why the County has not responded to Mr. Mendelson in this takings analysis. But the fact remains that it is not part of the formal application process and so it doesn't trigger any obligation on part of the County to respond. . . . In any case, silence should not be taken as a rejection because what Pakdel makes clear is that some sort of clear communication of this final decision or the government's adopted position is necessary for plaintiff to be able to show that their takings claim is ripe.
>
> JUDGE BUMATAY: Some point though, inaction, we've got to be able to construe inaction as a denial. Under that rule a County could just sit on an application forever and then a plaintiff would never get the ability to challenge it in court.
>
> MS. CARROLL: I think that is right, Your Honor. And caselaw has said that procedures by the County or by local agencies generally that are unduly burdensome or seem to be designed to thwart the process or avoid making a final decision those are, those would be sufficient to waive the final decision rule and find a claim ripe. But that's just not the case here because Mr. Mendelson has not engaged in the formal process by which the County generally considers whether development is possible in the riparian corridor. And so its silence in response to this informal takings claim that's not even clear by what procedures it goes through, what the rules are, what's necessary, and what the content of the response is

> going to be. That is not the kind of, that does not indicate that the County has avoided making a final decision in Mr. Mendelson's case.

Id. at 25:02–25:49, 27:00–28:39 (cleaned up).

According to the County (and to the district court) only the "formal process" counts, no matter what other procedures the County may hold out to the public.

IV. Mendelson's Lawsuit

Mendelson filed a two-count complaint in the district court against the County, alleging Fifth and Fourteenth Amendment regulatory takings without compensation, and unconstitutional seizure of property under the Fourth Amendment. ER-210–212; Compl. ¶ 32–45.

The district court granted the County's Fed. R. Civ. P. 12(b)(1) and 12(b)(6) motion to dismiss (ER-11), concluding that Mendelson had not properly sought the County's permission to override the County's prohibition on building a home in a riparian corridor. ER-182–200. The court accepted the County's argument that a CDP application is the only way for a property owner to ask for a section 30010 override. ER-133–138. Thus, the district court concluded that because Mendelson had never submitted a CDP application, the County had not had the opportunity to

make a decision to override the riparian corridor prohibition. ER-137 ("At least until Mendelson submits a meaningful development plan and the County has considered that plan, the takings claim won't be ripe.").

Mendelson appealed to this Court. ER-131. During oral argument, the panel pressed the County about why it had not responded to Mendelson's takings analysis request, which was a requirement published on the County's website. *See* Oral Argument Recording, *Mendelson*, No. 20-17389, at 25:02–25:21. The County, as part of the colloquy detailed above, responded that it was an "informal process" that wasn't used "often." *Id.* at 25:21–25:37. Counsel for the County also responded that she "didn't know" why her client had not responded, reiterating again that regardless of response (or lack thereof), the informal process was simply not a part of the County's development application procedure, and thus the County was under no obligation to respond. *Id.* at 25:35–25:45. Put simply, the County relied solely on the "meaningful" application rule to argue that the mere existence of an additional "formal" application procedure meant Mendelson had not pursued the right process, rendering his takings claim unripe. *Id.* at 25:40–27:56. Before this Court ruled, however, the Supreme Court issued

its decision in *Pakdel* and this Court remanded the case to the district court for reevaluation in light of the Supreme Court's decision. ER-125.[10]

On remand, the district court ordered supplemental briefing. ER-124. After briefing was complete but before the district court ruled on the County's motion, this case was stayed pending the outcome of another takings ripeness case being considered by another panel of this court, *Ralston v. County of San Mateo*, No. 21-16489, 2022 WL 16570800, at *1 (9th Cir. Nov. 1, 2022).[11] ER-33. Once *Ralston* was decided by this Court, the district court again granted the County's motion to dismiss, holding *Pakdel* was inapposite, because a CDP application is the sole means by which a property owner may request a section 30010 override. ER-5–6

This appeal followed. ER-11–13.

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[10] Because the Ninth Circuit's Memorandum was issued as part of a prior iteration of Mendelson's case, the corresponding case number (No. 20-17389) is different from the current case number (No. 23-15494).

[11] In *Ralston*, this Court was presented with a claim to Mendelson's. 2022 WL 16570800, at *1. Like Mendelson, Ralston owns R-1 property in the Montecito Riparian Corridor. Ralston also adhered to the County's website and submitted a "takings analysis" request for a section 30010 override. But unlike here, the County responded to Ralston with its answer than no override was forthcoming. Ralston sued for a regulatory taking. A separate panel of this court, in an unpublished memorandum, concluded that Ralston's claim was unripe because "avenues remain for the government agency to clarify or change its decision." *Id*. at *2. Ralston could only seek an override by applying for a CDP.

SUMMARY OF ARGUMENT

The Supreme Court's "relatively modest" ripeness requirement in takings claims asks whether a reviewing court understands how the challenged regulation applies to the plaintiff—what the regulations forbid, and what they permit—"to a reasonable degree of certainty." *Pakdel*, 141 S.Ct. at 2230; *Palazzolo v. Rhode Island*, 533 U.S. 606, 620 (2001). Takings ripeness does not require landowners to undertake heroic measures to chase permits via procedures that do not exist or the government has not made clear, or to exhaust every available avenue for approval. *Pakdel*, 141 S.Ct. at 2230 ("[N]othing more than *de facto* finality is necessary."). Ripeness does not necessarily require a "final decision" but merely a "definitive position." *Williamson Cnty. Reg'l Plan. Comm'n*, 473 U.S. at 186. A single "no" is all that is required, not elimination of every possible "yes."

These modest rules, applied here, show Mendelson's takings claim is ripe:

1. The County may be taken at its word. Mendelson cannot be faulted for asking the County whether it would approve his development

via an informal process the County itself told him to chase. A property owner doing what the County tells him to is "meaningful."

2. The complaint plausibly pleads that the County's silence in response to Mendelson's override request was a *de facto* definitive position that its restrictive LCP riparian corridor law is to be applied as written.

STANDARD OF REVIEW

This Court reviews a district court's dismissal of a constitutional claim for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) *de novo*. *City of Oakland v. Wells Fargo & Co.*, 972 F.3d 1112, 1121 (9th Cir. 2020); *Carson Harbor Vill., Ltd. v. City of Carson*, 353 F.3d 824, 826 (9th Cir. 2004). This rule also governs appeals of dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) and questions of statutory interpretation. *Id.*

ARGUMENT

Ripeness in taking cases usually requires the owner to make a meaningful application for a use of her property, and the government to take a "definitive position" about what uses are allowed and prohibited. *See Vill. Green at Sayville, LLC v. Town of Islip*, 43 F.4th 287, 299 (2nd

Cir. 2022) ("[A] dispute can ripen when a municipal entity uses 'repetitive and unfair procedures' to *avoid* a final decision[.]") (internal citation omitted).

I. Requesting a Section 30010 Override by Following the County's Instructions Is a "Meaningful Application"

A. The County's Website Is Its Official Public Stance

An application requesting approval of some use of property is not required in all circumstances. If a regulation on its face prohibits any beneficial uses, for example, a takings claim is ripe and there is no need for the property owner to ask the government for a permit to make the prohibited use. *See Suitum v. Tahoe Reg'l Plan. Comm'n*, 520 U.S. 725, 739 (1997) (resorting to "sound judgment about what use will be allowed," the Court held the takings claim ripe because the land was entirely within a development-restricted zone). *See also Palazzolo*, 533 U.S. at 621 (owner wanted to fill in a wetland for development, but state law categorically prohibited such use; the Court held that the owner's takings claim was ripe even though he had not asked the State for a permit to fill).

But where, as here, the government claims some discretion about what uses can be allowed in spite of the restrictions, one way to ensure

the government has taken a "definite position" such that a property owner's case is ripe for review, is for an owner to ask the government. *See S. Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 503 (9th Cir. 1990) (owner may file a development application). The application must be "meaningful" which means that the application is free from any "exceedingly grandiose development plans." *Id.* That is precisely what Mendelson did. The County's website offers the way:

> Any intention to proceed with an application for development that would run counter to any of these policies [the Riparian Corridor prohibition on residential development] *must* first be thoroughly reviewed by the Community Development [aka Planning] Director and County Counsel.

San Mateo County – Montecito Riparian Corridor (emphasis added).[12]

That is a very clear command: if you, property owner, want to build a home on property in a riparian corridor in contravention of the LCP restrictions on doing so, you *must* ask the specified County officials. This isn't some random site on the internet, posted by an anonymous blogger. This requirement is published by the County on the County's official government website. *See Nacarino v. Kashi Co.*, 77 F.4th 1201, 1213 (9th

[12] https://www.smcgov.org/planning/san-mateo-county-montecito-riparian-corridor.

Cir. 2023) ("Our conclusion is also supported by another source of agency guidance: an industry-facing FDA 'Frequently-Asked-Questions' (FAQ) webpage. The weight we may accord to this webpage 'depend[s] upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.'") (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)); *Pharm. Rsch. & Mfrs. of Am. v. United States Dep't of Health & Hum. Servs.*, 43 F.Supp.3d 28, 33 (D.D.C. 2014) ("Courts . . . have frequently taken judicial notice of information posted on official public websites of government agencies."). The County's website is one major way in which it communicates with the public, and the County's constituents.

There are other indicators of reliability. The County uses mandatory language ("must be"), which tells the public that this is not an optional process: you *must* do it if you are going to try to build a home in a riparian corridor. *See Woodbury v. Brown-Dempsey*, 108 Cal.App.4th 421, 433 (2003) ("Ordinarily, the word 'may' connotes a discretionary or permissive act; the word 'shall' connotes a mandatory or directory duty."); *Guzman v. Cnty. of Monterey*, 46 Cal.4th 887, 910–11 (2009) ("To

construe a statute as imposing a mandatory duty on a public entity, 'the mandatory nature of the duty must be phrased in explicit and forceful language.'") (citation omitted).

It tells property owners to ask the proper County officials—the very officials who you'd imagine (and who actually do) make these kind of decisions, the Community Development Director and County Counsel. *See Hoehne v. Cnty. of San Benito*, 870 F.2d 529, 535 (9th Cir. 1989) (claim ripe where owner had "offered to submit a subdivision application creating three twenty-acre parcels and was told by County Planning Director . . . that such an application would be denied"). These are not low-level staffers, but the very County officials directly responsible for implementing the LCP and the County's laws. *See, e.g., Vill. Green at Sayville*, 43 F.4th at 299 ("It is true that, ordinarily, a town attorney will 'not have the power to bind [a] Zoning Board with regard to' a land-use application. But Village Green asserts not that the town attorney denied its application on his own authority, but merely that he conveyed the Town Board's position. We cannot fathom why Village Green should now be penalized for having believed him.") (citation omitted); *Ateres Bais Yaakov Acad. of Rockland v. Town of Clarkstown*, No. 22-1741-cv, 2023

WL 8494453, at *1, *5 (2d Cir. Dec. 8, 2023) ("[O]n July 9, 2019, Town counsel wrote to ABY that the ZBA 'will not entertain any appeal by [ABY] with respect to the [property].' This letter made the ZBA's position pellucid[.]") (citation omitted).

The County has never adequately cleared up why it tells owners they "must" ask the Community Development Director and County Counsel about overrides, if doing so is meaningless and only seeks what the County now characterizes as their "personal opinions." What purpose does it serve to lead property owners down this illusory path? After all, government officials acting in their official capacities don't have personal opinions (or at least personal opinions that are relevant to an inquiry about whether the County will override its development prohibitions). *See McGarry v. Bd. of Cnty. Comm'rs of Cnty. of Pitkin*, 175 F.3d 1193, 1200 (10th Cir. 1999) (finding the County Personnel Director's discriminatory comments were made within the scope of his employment and thus were properly attributed to the County and could not be ignored as personal opinion); *Demery v. Arpaio*, 378 F.3d 1020, 1032 (9th Cir. 2004) (finding a sheriff's webcam statements were not personal communications because "[a]bsent his official position, [the sheriff] could

not have obtained or transmitted the images. The speech was therefore that of a governmental executive officer acting in his official, managerial capacity, and as such is governmental speech, not the personal speech of a government employee."); *United States v. 31.45 Acres of Land, Whitman Cnty.*, 376 F.Supp. 1277, 1281 (E.D. Wash. 1974) ("Citizens should be able to rely on statements and actions of government agents. . . . There should be no reason for a party to question the authority of the Government's counsel to speak for the Government[.]"); *see also Arizona v. Evans*, 514 U.S. 1, 14–15 (1995) (finding government agents are entitled to rely in good faith on government information even when it contains errors). Nor does the County explain why *even today*, its website continues to broadcast this to the public, even though during oral arguments in the earlier appeal of this case more than a year ago, the County asserted that these instructions mean essentially nothing. *See* James S. Bowman, *Ethics in Government: A National Survey of Public Administrators*, 50 Pub. Ad. Rev. 345, 345 (1990) ("[R]epresentative democracy rests on officials and the trust they engender.").

Moreover, there doesn't seem anywhere else for an owner to go to ask for a section 30010 override, because the County has not

implemented any other process by which an owner may request it. Nowhere in the County's LCP, its zoning code, its other ordinances, or even in the myriad forms and applications it publishes is there a procedure for landowners to request a "30010 takings exemption," or an "override," or anything even remotely similar or apparently related. That being so, it was reasonable (and thus "meaningful") for Mendelson to take the County's website at face value and do what it told him to do: ask the Planning Director and the County Counsel to review whether the County would override the riparian corridor's homebuilding ban. He did so. ER-207–210; Compl. ¶ 30.

Yet the district court faulted Mendelson for failing to file a CDP application. ER-5–9 ("The plaintiff in this lawsuit, Felix Mendelson, admits that he didn't submit such a proposal to San Mateo County, so the Court previously held that his takings claim wasn't ripe. . . . The disagreement at issue here is still abstract because it is unclear how much development the County will permit on Mendelson's land."). But how would Mendelson have known to do this? Neither the County's LCP, nor its other ordinances, regulations, or rules tell the public that to ask for a section 30010 override, that owners must submit a CDP application.

And when it had the opportunity, the County said nothing, and failed to direct him to the proper procedure. It wouldn't have taken much: an email to Mendelson telling him, "if you want the County's position on a 30010 override, file a CDP application." *See, e.g., Wigton v. Berry*, 949 F.Supp.2d 616, 632 n.19 (W.D. Pa. 2013) (decrying a "double secret" procedure that "would matter greatly to those it affects, but whose effect they cannot appreciate because they don't know that it is affecting them."); *Scribner v. Worldcom, Inc.*, 249 F.3d 902, 908 (9th Cir. 2001) (refusing to "allow one party's 'double-secret' interpretation of a word to undermine the other party's justified expectations as to what that word means.").

You might think that when Mendelson submitted what the County now characterizes as essentially a request for the Community Development Director's and the County Counsel's "personal opinions" about whether he could get a section 30010 override of the riparian corridor prohibition on homebuilding, the County might have simply responded, "oh no, you should not pay any attention to our website—we won't even consider that question unless you ask us by submitting a CDP application" or something similar. Instead, the County battened down

and clammed up. A reasonable inference to be drawn from the allegations in Mendelson's complaint is that the County was avoiding taking any action that could be deemed to be a "definitive position," that would ripen a constitutional challenge to its draconian riparian corridor restrictions. The unfairness of the procedures alone may merit this inference. *See MacDonald, Sommer & Frates*, 477 U.S. at 350 n.7 ("A property owner is of course not required to resort to piecemeal litigation or otherwise unfair procedures in order to obtain this determination."); *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496, 1506 (9th Cir. 1990) ("Requiring appellants to persist with this protracted application process to meet the final decision requirement would implicate . . . concerns about disjointed, repetitive, and unfair procedures . . ."); *Sherman v. Town of Chester*, 752 F.3d 554, 561 (2d Cir. 2014) ("[G]overnment authorities, of course, may not burden property by imposition of repetitive or unfair land-use procedures in order to avoid a final decision.") (citation omitted).

B. What About a CDP Application?

But even in the absence of the County doing the right thing and just telling Mendelson to ignore the County's website and apply for a CDP, shouldn't he have known, as the district court concluded, that he must

ignore the County's website, and have realized he could only request a 30010 override by submitting a CDP application? Let's walk through the reasons why not, and why it is not obvious to your average property owner that to ask for an override she should apply for a CDP. *See Brody v. Vill. of Port Chester*, 434 F.3d 121, 132 (2d Cir. 2005) (when an owner's property rights are at stake and "the average landowner would [not] have appreciated" that agency action required a response, the government has an obligation to inform the owner of the available avenues to respond).

First, it isn't at all clear from the LCP that the County can even grant a CDP for a use that contravenes its LCP (a home in a riparian corridor). The LCP's definition of a CDP indicates that a CDP cannot be granted to gain approval of a use that is forbidden by the LCP. *See Doe v. City of Butler*, 892 F.2d 315, 322 (3d Cir. 1989) (no formal application needed for development because "[n]o prospective operator of a transitional dwelling is likely to spend the time, effort and expense required to initiate a project which is patently barred by the ordinance."). The LCP's definition of "CDP" says so: it defines CDP as a "letter or certificate issued by the County of San Mateo in accordance with the provisions of this Chapter, approving a project in the 'CD' District as

being in conformance with the [LCP]." *See* Cnty. of San Mateo, Zoning Regulations § 6328.3(e), at 20B.1 (2020) ("Zoning Reg."). To emphasize: "[i]n accordance with the provisions in this Chapter." A section 30010 override is, by definition, *not* in accordance with the County's LCP (an owner is asking for an exemption from the LCP's restrictions), because the County would be allowing residential development in a prohibited riparian zone, so designated under the LCP. Moreover, a development allowed under 30010 is not "in conformance with the [LCP]" for the same reasons. Dead end.

Second, any section 30010 override the County might grant is solely a creature of the California Coastal Act, not the County's LCP. Unlike some other California municipalities, the County's LCP does not contain any exemption allowing it to issue a CDP for a home to be built in a riparian corridor. *See* LCP § 1.1 (the County must "require a [CDP] for all development in the Coastal Zone subject to certain exemptions"). In the County, "[a]ll development in the Coastal Zone requires either a [CDP] or an exemption from [CDP] requirements." *Id.*; Zoning Reg. § 6328.4, at 20B.4. The "certain exemptions" mentioned do not apply here. *Id.* § 6328.5(a)–(n). When reviewing a CDP application, the local

government must comply with its own LCP. Cal. Pub. Res. §§ 30108.6, 30603(b)(1); *Yost v. Thomas*, 685 P.2d 1152, 1160 (Cal. 1984). Nothing else in the LCP allows it to ignore the categorical residential prohibition in section 7.9(a), to grant a CDP not in conformity with the LCP, or to otherwise allow a home to be built in a riparian corridor. Thus, any section 30010 override is expressly *not* a part of the County's LCP, but rather a creature of state law. This matters because section 30010 only applies to situations where a local government is "acting pursuant to this division [the Coastal Act]" when issuing CDP's. *See* Cal. Pub. Res. Code § 30010. But because it has adopted its own LCP, when it issues CDP's, the County is *not* acting "pursuant to this division" but rather pursuant to its LCP.

Third, an owner might conceivably be put on alert that a CDP application is the way to seek a 30010 override by some indication in the County's myriad forms and worksheets it publishes for an owner to apply for a CDP. Somewhere in there must be a way for the owner to ask for a takings override, right? No, none of the County forms or worksheets

reasonably inform owners, "*this* is how you seek a 30010 override."[13] A CDP application must include:

1. General application form for all County development permits.[14]

2. A CDP-specific "companion page" on which an applicant lists other information needed for CDP applications, such as ownership of adjacent property, and the type and color of materials to be used in construction, and whether "this project, the parcel on which it is located or the immediate vicinity include" creeks, wetlands, beaches, landscaping, and other environmental and topographic features.[15]

3. Forms and worksheets to seek an exemption from a CDP under section 6328.5(a)–(n) of the zoning ordinance if such an exemption is available.[16]

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[13] *See generally* Cnty. of San Mateo, *Coastal Development Permit (Staff-Level)*, https://planning.smcgov.org/coastal-development-permit-staff-level.

[14] Cnty. of San Mateo, *Planning Permit Application Form*, https://planning.smcgov.org/documents/planning-permit-application-form.

[15] Cnty. of San Mateo, *Coastal Development Permit Application - Companion Page*, https://planning.smcgov.org/documents/coastal-development-permit-application-companion-page.

[16] Cnty. of San Mateo, *Coastal Development Exemption*, https://planning.smcgov.org/coastal-development-exemption; Cnty. of San Mateo, *Certificate of Exemption From a Coastal Development Permit*, https://planning.smcgov.org/documents/certificate-exemption-coastal-development-permit; Cnty. of San Mateo, *Coastal Development Coastal Development Permit Exemptions/Exclusion Worksheet*, https://planning.smcgov.org/documents/coastal-development-permit-exemptionsexclusion-worksheet.

4. A checklist regarding water runoff.[17]

Nothing there about section 30010, takings, or overrides.

Fourth, and finally, the standards by which the County reviews a CDP application give no indication that the CDP process may be used to seek a section 30010 takings override. *See* LCP at 1 ("For a permit to be issued, the development must comply with the policies of the [LCP] and those ordinances adopted to implement the LCP. The project must also comply with other provisions of the County Ordinance Code, such as zoning, building and health regulations."). As the County zoning code provides:

> The officer, commission or board action on a Coastal Development Permit *shall review the project for compliance with: all applicable plans, policies, requirements and standards of the Local Costal Program, as stated in Sections 6328.19 through 6328.30 of this Chapter*; the County General Plan; requirements of the underlying district; *and other provisions of this Part*. To assist this review, the Planning Director shall, as part of the recommendation required by Section 63.28.8, complete a Coastal Policy Checklist, as defined in Section 6328.3.

Zoning Reg. § 6328.12, at 20B.14 (emphasis added).

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[17] Cnty. of San Mateo, *C.3 and C.6 Development Review Checklist*, https://planning.smcgov.org/documents/c3-and-c6-development-review-checklist.

The County must then "approve, condition or deny the CDP application." *Id.* § 6328.9. Critically, to issue a CDP, the County must expressly find that the development is consistent with the LCP (which a section 30010, being a creature of state law and not the County's LCP, is not):

> That the project, as described in the application and accompanying materials required by Section 6328.7 and as conditioned in accordance with Section 6328.14, *conforms with the plans, policies, requirements and standards of the San Mateo County Local Costal Program.*

Id. § 6328.15(a) (emphasis added). The County may also grant a CDP with conditions. But even CDPs with conditions must conform to the LCP:

> Approval of a Coastal Development Permit shall be conditioned *as necessary to ensure conformance with and implementation of the Local Coastal Program*. The approving authority may require modification and resubmittal of project plans, drawings and *specifications to ensure conformance with the Local Coastal Program*. When modification and resubmittal of plans is required, action shall be deferred for a sufficient period of time to the project.
>
> For all proposed development requiring a domestic well water source and not subject to the provisions of Section 6328.7(e), require as a condition of approval demonstrated proof of the existing availability of an adequate and potable water source for the proposed development, and that use of the water source will not impair surface streamflow, the water supply of

> other property owners, agricultural production or sensitive habitats.

Id. § 6328.14.

With the CDP process not being expressly (or even reasonably implied) as the procedure by which, a property owner could request a section 30010 override, it was meaningful when Mendelson acted in accordance with the County's website.

C. What About a Variance?

Similarly, Mendelson could not use the variance process to ask for a section 30010 override to allow residential development in a riparian corridor.[18] True, the County's zoning regulations establish a general

[18] A section 30010 override is not a "variance," which is a narrowly-applied zoning tool to allow development that does not strictly conform to the zoning's height or density standards. *See* Zoning Reg. § 6531 (variance permitted only when "(1) development is proposed in an existing legal parcel zoned R-1/S-7 or R-1/S-17, which is 3,500 square feet or less area and/or 35 feet or less in width; (2) the proposed development varies from the minimum yard, maximum building height or maximum lot coverage requirements; or (3) the proposed development varies from any other specific requirements of the Zoning Regulations"). Moreover, the County cannot approve of a variance to build a home in a riparian corridor, because it may not approve a variance inconsistent with LCP policies. *See* Zoning Reg. § 6534.1(5), at 25. ("In order to approve an application for a variance, the approving authority must [find that] . . . [t]he variance is consistent with the objectives of the General Plan, the Local Costal Program (LCP) and the Zoning Regulations."). Finally,

variance process. But a property owner may not obtain a variance that grants a CDP from a home in a riparian corridor. The County's variance procedures and standards do not allow it to grant a CDP application that violates the provisions of the LCP. Rather, variances are for "minor deviations" from governing land use regulations so that landowner does not suffer undue hardship, but are expressly limited by County and by state law to a very narrow range:

> Variances are permitted when one of the following conditions exist: (1) development is proposed in an existing legal parcel zoned R-1/S-7 or R-1/S-17, which is 3,500 square feet or less area and/or 35 feet or less in width; (2) the proposed development varies from the minimum yard, maximum building height or maximum lot coverage requirements; or (3) the proposed development varies from any other specific requirements of the Zoning Regulations.

Zoning Reg. § 6531, at 25.2. A variance may not be used to seek or to approve any use in violation of the overall established land use regulatory scheme. *Milagra Ridge Partners, Ltd. v. City of Pacifica*, 72 Cal. Rptr. 2d

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California law bars the use of variances to allow uses inconsistent with the land use regulations governing the property. *See* Cal. Gov't Code § 65906 ("A variance shall not be granted for a parcel of property which authorizes a use or activity which is not otherwise expressly authorized by the zone regulation governing the parcel of property.").

394, 400 (Cal. App. 1998).[19] In short, the County cannot backdoor rezone Mendelson's riparian corridor property by variance.

More specifically, the County's zoning regulations do not allow the County to approve of a variance to build a home in a riparian corridor because the County may not approve a variance inconsistent with LCP policies:

> In order to approve an application for a variance, the approving authority must [find that] [t]he variance is consistent with the objectives of the General Plan, the Local Coastal Program (LCP) and the Zoning Regulations[.]

Zoning Reg. § 6534.1(5), at 25.4.

Finally, and most critically, the County's inability to issue a variance to bypass the LCP's residential prohibition is consistent with state law requirements, which disallow variances to approve uses

[19] A variance application cannot be used to ask the County to override its land use regulations if strict application of those regulations would be a taking. An exception to avoid "unnecessary hardships" is "not deemed equivalent to the taking of property, in the constitutional sense . . ." 8 Eugene McQuillin, *The Law of Municipal Corporations,* § 25.167, at 761 (3d ed. 1991) (footnote omitted), *cited in Belvoir Farms Homeowners Ass'n, Inc. v. North*, 734 A.2d 227, 240 (Md. 1999) ("We reject the proposition that the unnecessary or unwarranted hardship standard is equal to an unconstitutional taking standard. If this were true, it would be a superfluous standard because the constitutional standard exists independent of variance standards.").

inconsistent with the regulations governing the permitted uses of the property:

> A variance *shall not be granted for a parcel of property which authorizes a use or activity which is not otherwise expressly authorized by the zone regulation governing the parcel of property*. The provisions of this section shall not apply to conditional use permits.

Cal. Gov't Code § 65906 (emphasis added).

Thus, a variance is impossible here because a single-family home or any other economically beneficial development is "not otherwise expressly authorized" by the LCP. What this limitation means is that a variance may be available to increase the density or configuration of uses allowed in a riparian corridor (regarding uses like trails and water supply projects, or uses in LCP § 7.9(b), for example), but may not be employed to simply override the list of allowed uses in 7.9(a) and allow a prohibited use. The variance statute prohibits employing a variance to change the governing law.

After all, any type of use Mendelson might request beyond the narrow list of minimal uses listed in LCP § 7.9 would be a major 180-degree departure from the allowed uses under the LCP and not by any stretch of the imagination a "minor deviation from existing land use

regulations." *Milagra Ridge*, 72 Cal. Rptr. 2d at 400. Making such major changes to the LCP is for the County's law-making branches, not the planning department.[20] Thus, the County cannot require a property owner to seek a variance to override the fundamental development prohibitions listed in section 7.9(a) of the LCP and request to develop Mendelson's property in an economically beneficial manner. Any such development would plainly "violate [the] overall established land use regulatory scheme" in the LCP. *Id*. In short, because a variance from the LCP's riparian corridor restrictions to build a home or any other economically beneficial use is not available and cannot be granted, Mendelson could not—and therefore need not—have sought a variance.

In sum, Mendelson properly followed the County's mandatory instructions and asked the County's Community Development Director and County Counsel whether the County would consider a section 30010 override. If not, end of story (at least of the development entitlement

[20] And even if a variance might be employed to change the LCP to allow homes in a riparian corridor, a takings claimant need not ask to change the law in order for her case to be ripe. *See*, *e.g.*, *Leone v. Cnty. of Maui*, 284 P.3d 956, 968 (Haw. Ct. App. 2012) ("Because the Community Plan is legally binding, an amendment amounts to a change of the existing law rather than an administrative exception to its application.").

story), and no home could be built in the riparian corridor. If they were to respond positively, then it would have made sense for Mendelson to have submitted a CDP application to build a home in a riparian corridor.

II. The County's Silence Established Its *De Facto* "Definitive Position" to a "Reasonable Degree of Certainty"

In response to Mendelson's request, the County chose to go utterly silent. ER-209–210; Compl. ¶ 29–30. The County didn't simply overlook Mendelson or forget about his request, it actively ignored him. As the County stated when it was last before this Court:

> [The takings analysis Mendelson used is] an informal process. It hasn't been used often, as far as I know. Once. At most. And, um, frankly I don't know why the County has not responded to Mr. Mendelson in this takings analysis. But the fact remains that it is not part of the formal application process and so it doesn't trigger any obligation on part of the County to respond. . . . In any case, silence should not be taken as a rejection because what *Pakdel* makes clear is that some sort of clear communication of this final decision or the government's adopted position is necessary for plaintiff to be able to show that their takings claim is ripe. . . Mr. Mendelson has not engaged in the formal process by which the County generally considers whether development is possible in the riparian corridor. And so its silence in response to this informal takings claim that's not even clear by what procedures it goes through, what the rules are, what's necessary, and what the content of the response is going to be. That is not the kind of, that does not indicate that the County has avoided making a final decision in Mr. Mendelson's case.

Oral Argument Recording, *Mendelson*, No. 20-17389, at 25:02–25:49, 27:00–28:39 (cleaned up).

The Supreme Court doesn't always require the government to expressly say "no" (for that would allow the government, not a court, to control whether a constitutional takings claim can be adjudicated), as long as the government's position on development is clear "to a reasonable degree of certainty." *Palazzolo*, 533 U.S. at 620. *See also Hoehne*, 870 F.2d at 535 (further application unnecessary when takings plaintiff had "offered to submit a subdivision application creating three twenty-acre parcels and was told by County Planning Director . . . that such an application would be denied"). Other courts have come to the same conclusion that even in the absence of an express, formal, or official denial of an application, the court concluded the government's position on development was sufficiently fixed such that the claim was ripe for review. *See, e.g., Vill. Green at Sayville*, 43 F.4th at 298; *Ateres Bais Yaakov Acad. of Rockland*, 2023 WL 8494453, at *5.

The County's silence, which continued for over a year (until Mendelson filed suit), was *de facto* a sufficiently definitive position about whether it was going to override the LCP's development prohibition and

allow Mendelson to build a home in contravention of the Montecito Riparian Corridor's prohibition on home construction. *See Env't Def. Fund, Inc. v. Hardin*, 428 F.2d 1093, 1099 (D.C. Cir. 1970) ("But when administrative inaction has precisely the same impact on the rights of the parties as denial of relief, an agency cannot preclude judicial review by casting its decision in the form of inaction rather than in the form of an order denying relief."); *Stone v. U.S. Embassy Tokyo*, No. 19-3273(RC), 2020 WL 4260711 *1, *5 (D.D.C. July 24, 2020) ("The Government's position appears to be that it could indefinitely avoid judicial review of its actions here by postponing a 'formal' decision, which strikes the Court as untenable."); Jean-Paul Sartre, *Existentialism is a Humanism* 44 (Carol Macomber trans., Yale Univ. Press 2007) ("[W]hat is impossible is not to choose. I can always choose, but I must also realize that, if I decide not to choose, that still constitutes a choice."). True, the County didn't expressly tell Mendelson no, but its purposeful silence in the face of an obligation to respond can be the same thing. *See Alweiss v. City of Sacramento*, No. 2:21-cv-02095-WBS-DB, 2022 WL 1693520, at *1, *4 (E.D. Cal. May 26, 2022) ("[B]y alleging that the City declined to process an application to develop his property in retaliation for his refusal to

grant an easement for part of that same property, as well as for his complaints about the City's handling of a park directly abutting that property, plaintiff's allegations plausibly suggest a connection between his actions and the City's given the significant overlap in subject matter."); *Hill v. SmithKline Beecham Corp.*, 393 F.3d 1111, 1116 (10th Cir. 2004) ("[T]he district court's failure to address Hill's arguments may be properly construed as an implicit denial of those arguments."); *Stevens v. Corelogic, Inc.*, 899 F.3d 666, 676 (9th Cir. 2018) ("We treat the district court's failure specifically to address the Rule 56(d) request as an implicit denial."); *Kentucky Div., Horsemen's Benev. & Protective Ass'n v. Turfway Park Racing Ass'n*, 20 F.3d 1406, 1415–16 (6th Cir. 1994) (finding the Interstate Horseracing Act did not require a state to do anything when presented with a request for its consent to off-track betting but the state's inaction or silence would preserve the general federal prohibition).

But what of the County's argument that its website only offers its advice to property owners to seek the help and the "personal opinions" of the County's Community Development Director and its Counsel?[21] Did

[21] In the *Ralston* oral arguments, the County's lawyer argued that the County website requires owners to essentially seek the "personal

the County indeed have an obligation to respond in some way to Mendelson, even if this was, as the County now characterizes it, an "informal" procedure? You'd hope so, at least for purposes of the threshold issue of ripeness. *See Brody*, 434 F.3d at 132 (when an owner's property rights are at stake and "the average landowner would [not] have appreciated" that agency action required a response, the government has an obligation to inform the owner of the available avenues to respond); *Kellberg v. Yuen*, 319 P.3d 432, 536 (Haw. 2014) ("[T]he right to be heard is meaningless without being given the information necessary to exercise that right."); *Town of Randolph v. Est. of White*, 693 A.2d 694, 696 (Vt. 1997) ("The right to be heard is worth little unless one is informed that the matter is pending and can choose 'whether to appear or default, acquiesce or contest.'") (citation omitted).

As the Supreme Court has reminded, takings ripeness is a practical inquiry, not ruled by technicalities, or controlled by what the government says (but rather what it has actually done). *See Pakdel*, 141 S.Ct. at 2230 ("The rationales for the finality requirement underscore that nothing

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opinion" of the County's chief planning and legal officers. Oral Argument Recording, *Ralston v. Cnty. of San Mateo*, No. 21-16489 (9th Cir. Oct. 20, 2022) at 15:38–16:47, 22:22–24:15.

more than *de facto* finality is necessary. . . . The Ninth Circuit's contrary approach—that a conclusive decision is not 'final' unless the plaintiff *also* complied with administrative processes in obtaining that decision—is inconsistent with the ordinary operation of civil-rights suits.").

If landowners such as Mendelson must find their way blindfolded and at their own peril through the County's informal, vague, and apparently standardless process without even a County roadmap, then the application process has failed to accomplish its purpose of gathering the information necessary to approve or deny uses of the property, and providing the government data enough to make a clear response. Instead, the land use process would serve mostly as a regulatory black hole with its own inexorable gravity shrouded in "correct" procedures only the government seems to be aware of, while drawing out the process so long and so confusingly (and so expensively) that property owners bleed out financially or spiritually, and eventually give up. And most importantly, are prevented from having their day in court even though their property has been rendered useless. *See Sherman*, 752 F.3d at 561 ("[G]overnment authorities, of course, may not burden property by imposition of

repetitive or unfair land-use procedures in order to avoid a final decision.") (citation omitted).

All because the government holds out the promise that—*just maybe*—it might allow a reasonable use if the owner only asked the right way. *See City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 694 (1999) ("The city, in a series of repeated rejections, denied proposals to develop the property, each time imposing more rigorous demands on the developers."). In that case, this court held the case ripe. *Del Monte Dunes*, 920 F.2d at 1506 ("Requiring appellants to persist with this protracted application process to meet the final decision requirement would implicate the concerns about disjointed, repetitive, and unfair procedures[.]"). And what of the property owner's civil rights claim for a taking in these circumstances? In the County's and the district court's view, it "dies aborning." *See Knick v. Twp. of Scott*, 139 S.Ct. 2162, 2167 (2019) (describing the "Catch-22" that takings plaintiffs found themselves in as a result of *Williamson County*'s "state procedures" ripeness requirement).

The County's purposeful silence, coupled with its LCP facially barring a home or any type of economically-beneficial development

consistent with the R-1 zoning on Mendelson's property, is enough for a reviewing court to understand what uses are allowed (riparian corridor uses, *see* LCP § 7.9(a), at 7.3), and what uses are prohibited (R-1 uses). Requiring Mendelson to continue to press for a yes by applying for a CDP even after getting the County's no, would be the very same exhaustion the Supreme Court has expressly rejected, by another name. *See Palazzolo*, 533 U.S. at 622 ("Ripeness doctrine does not require a landowner to submit applications for their own sake").

The district court erroneously concluded that the extent of the loss of use and value that results from the LCP prohibitions could only be analyzed after Mendelson submitted a CDP application. ER-8 ("Under section 30010 of the Coastal Act, the County has discretion to deviate from its LCP if necessary to avoid an unconstitutional taking. Until the County exercises that discretion, the Court cannot confidently state that 'there is no question about how the regulations at issue apply to the particular land in question.'") (citing *Pakdel*, 141 S.Ct. at 2230). Not so.

Mendelson has met his "relatively modest" obligation to show *de facto* finality because no reasonable doubt remains, even after he requested a takings analysis from the County, which it refused to answer

aside from its own LCP wording—that the County cannot issue a CDP for any economically beneficial development. Further action to pursue a CDP that cannot possibly be issued is futile. The "[r]ipeness doctrine does not require a landowner to submit applications for their own sake," *Palazzolo*, 533 U.S. at 622, and additional applications are required "only if there is uncertainty as to the land's permitted use." *Id*. Here, in the face of a riparian corridor designation, a categorical prohibition in the LCP on building a home, and a refusal by the County to answer Mendelson's takings analysis' request, no reasonable uncertainty remains. *See Brandt v. Hickel*, 427 F.2d 53, 57 (9th Cir. 1970) ("To say to these appellants, 'The joke is on you. You shouldn't have trusted us,' is hardly worthy of our great government."). Mendelson's takings claim is ripe.

CONCLUSION

Mendelson's takings claims are ripe for judicial review, and the district court wrongly dismissed the Complaint. The Order on Remand should be reversed or vacated, and the case remanded for a consideration of the merits.

DATED: December 15, 2023.

Respectfully submitted,

/s/ Kathryn D. Valois

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STATEMENT OF RELATED CASES

Plaintiff-Appellant is aware of no related cases within the meaning of Circuit Court Rule 28-2.6.

Form 8. Certificate of Compliance for Briefs
9th Cir. Case Number 21-16489

I am the attorney or self-represented party.

This brief contains 11,549 words excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

[X] complies with the word limit of Cir. R. 32-1.

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Signature /s/ Kathryn D. Valois **Date** December 15, 2023

CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Kathryn D. Valois
KATHRYN D. VALOIS

ADDENDUM (Cir. R. 28-2.7)

Table of Contents

Statutes

County of San Mateo Regulations

Cal. Gov't Code § 65906

A variance shall not be granted for a parcel of property which authorizes a use or activity which is not otherwise expressly authorized by the zone regulation governing the parcel of property. The provisions of this section shall not apply to conditional use permits.

* * * *

Cal. Pub. Res. Code § 30004(a)

The Legislature further finds and declares that:

(a) To achieve maximum responsiveness to local conditions, accountability, and public accessibility, it is necessary to rely heavily on local government and local land use planning procedures and enforcement.

* * * *

Cal. Pub. Res. Code § 30010

The Legislature hereby finds and declares that this division [the Coastal Act] is not intended, and shall not be construed as authorizing the commission, port governing body, or local government acting pursuant to this division to exercise their power to grant or deny a permit in a manner which will take or damage private property for public use, without the payment of just compensation therefor. This section is not intended to increase or decrease the rights of any owner of property under the Constitution of the State of California or the United States.

* * * *

Cal. Pub. Res. Code § 30108.6

"Local coastal program" means a local government's (a) land use plans, (b) zoning ordinances, (c) zoning district maps, and (d) within sensitive coastal resources areas, other implementing actions, which,

when taken together, meet the requirements of, and implement the provisions and policies of, this division at the local level.

* * * *

Cal. Pub. Res. Code § 30500

(a) Each local government lying, in whole or in part, within the coastal zone shall prepare a local coastal program for that portion of the coastal zone within its jurisdiction. However, any local government may request, in writing, the commission to prepare a local coastal program, or a portion thereof, for the local government. Each local coastal program prepared pursuant to this chapter shall contain a specific public access component to assure that maximum public access to the coast and public recreation areas is provided.

(b) Amendments to a local general plan for the purpose of developing a certified local coastal program shall not constitute an amendment of a general plan for purposes of Section 65358 of the Government Code.

(c) The precise content of each local coastal program shall be determined by the local government, consistent with Section 30501, in full consultation with the commission and with full public participation.

* * * *

Cal. Pub. Res. Code § 30512(a)

(a) The land use plan of a proposed local coastal program shall be submitted to the commission. The commission shall, within 90 working days after the submittal, after public hearing, either certify or refuse certification, in whole or in part, of the land use plan pursuant to the following procedure:

(1) No later than 60 working days after a land use plan has been submitted to it, the commission shall, after public hearing and by majority vote of those members present, determine whether the land use plan, or a portion thereof applicable to an identifiable

geographic area, raises no substantial issue as to conformity with the policies of Chapter 3 (commencing with Section 30200).
If the commission determines that no substantial issue is raised, the land use plan, or portion thereof applicable to an identifiable area, which raises no substantial issue, shall be deemed certified as submitted. The commission shall adopt findings to support its action.

(2) Where the commission determines pursuant to paragraph (1) that one or more portions of a land use plan applicable to one or more identifiable geographic areas raise no substantial issue as to conformity with the policies of Chapter 3 (commencing with Section 30200), the remainder of that land use plan applicable to other identifiable geographic areas shall be deemed to raise one or more substantial issues as to conformity with the policies of Chapter 3 (commencing with Section 30200). The commission shall identify each substantial issue for each geographic area.

(3) The commission shall hold at least one public hearing on the matter or matters that have been identified as substantial issues pursuant to paragraph (2). No later than 90 working days after the submittal of the land use plan, the commission shall determine whether or not to certify the land use plan, in whole or in part. If the commission fails to act within the required 90-day period, the land use plan, or portion thereof, shall be deemed certified by the commission.

* * * *

Cal. Pub. Res. Code § 30603(b)(1)

. . .

(b)(1) The grounds for an appeal pursuant to subdivision (a) shall be limited to an allegation that the development does not conform to the standards set forth in the certified local coastal program or the public access policies set forth in this division.

* * * *

Cnty. of San Mateo, Cal.,
***Local Coastal Program Policies* § 7.1 (2013)**

7.1 Definition of Sensitive Habitats

Define sensitive habitats as any area in which plant or animal life or their habitats are either rare or especially valuable and any area which meets one of the following criteria: (1) habitats containing or supporting "rare and endangered" species as defined by the State Fish and Game Commission, (2) all perennial and intermittent streams and their tributaries, (3) coastal tide lands and marshes, (4) coastal and offshore areas containing breeding or nesting sites and coastal areas used by migratory and resident water-associated birds for resting areas and feeding, (5) areas used for scientific study and research concerning fish and wildlife, (6) lakes and ponds and adjacent shore habitat, (7) existing game and wildlife refuges and reserves, and (8) sand dunes.

Sensitive habitat areas include, but are not limited to, riparian corridors, wetlands, marine habitats, sand dunes, sea cliffs, and habitats supporting rare, endangered, and unique species.

* * * *

Cnty. of San Mateo, Cal.,
***Local Coastal Program Policies* § 7.3 (2013)**

7.3 Protection of Sensitive Habitats

a. Prohibit any land use or development which would have significant adverse impact on sensitive habitat areas.
b. Development in areas adjacent to sensitive habitats shall be sited and designed to prevent impacts that could significantly degrade the sensitive habitats. All uses shall be compatible with the maintenance of biologic productivity of the habitats.

* * * *

Cnty. of San Mateo, Cal.,
***Local Coastal Program Policies* § 7.4 (2013)**

7.4 Permitted Uses in Sensitive Habitats

a. Permit only resource dependent uses in sensitive habitats. Resource dependent uses for riparian corridors, wetlands, marine habitats, sand dunes, sea cliffs and habitats supporting rare, endangered, and unique species shall be the uses permitted in Policies 7.9, 7.16, 7.23, 7.26, 7.30, 7.33, and 7.44, respectively, of the County Local Coastal Program on March 25, 1986.

b. In sensitive habitats, require that all permitted uses comply with U.S. Fish and Wildlife and State Department of Fish and Game regulations.

* * * *

Cnty. of San Mateo, Cal.,
***Local Coastal Program Policies* § 7.8 (2013)**

7.8 Designation of Riparian Corridors

Establish riparian corridors for all perennial and intermittent streams and lakes and other bodies of freshwater in the Coastal Zone. Designate those corridors shown on the Sensitive Habitats Map and any other riparian area meeting the definition of Policy 7.7 as sensitive habitats requiring protection, except for manmade irrigation ponds over 2,500 sq. ft. surface area.

* * * *

Cnty. of San Mateo, Cal.,
***Local Coastal Program Policies* § 7.9 (2013)**

7.9 Permitted Uses in Riparian Corridors

a. Within corridors, permit only the following uses: (1) education and research, (2) consumptive uses as provided for in the Fish and Game Code and Title 14 of the California Administrative Code, (3) fish and wildlife management activities, (4) trails and scenic overlooks on public land(s), and (5) necessary water supply projects.

b. When no feasible or practicable alternative exists, permit the following uses: (1) stream dependent aquaculture, provided that non-stream dependent facilities locate outside of corridor, (2) flood control projects, including selective removal of riparian vegetation, where no other method for protecting existing structures in the floodplain is feasible and where such protection is necessary for public safety or to protect existing development, (3) bridges when supports are not in significant conflict with corridor resources, (4) pipelines, (5) repair or maintenance of roadways or road crossings, (6) logging operations which are limited to temporary skid trails, stream crossings, roads and landings in accordance with State and County timber harvesting regulations, and (7) agricultural uses, provided no existing riparian vegetation is removed, and no soil is allowed to enter stream channels.

* * * *

Cnty. of San Mateo, Cal.,
***Zoning Regulations* § 6328.3(e) (2020)**

SECTION 6328.3. DEFINITIONS. For the purpose of this Chapter, certain terms used herein are defined as follows:

. . .

(e) "Coastal Development Permit" means a letter or certificate issued by the County of San Mateo in accordance with the provisions of this Chapter, approving a project in the "CD" District as being in conformance with the Local Coastal Program. A Coastal Development Permit includes all applicable materials, plans and conditions on which the approval is based.

* * * *

Cnty. of San Mateo, Cal.,
***Zoning Regulations* § 6328.4 (2020)**

SECTION 6328.4. REQUIREMENT FOR COASTAL DEVELOPMENT PERMIT. Except as provided by Section 6328.5, any person, partnership, corporation or state or local government agency wishing to undertake any project, as defined in Section 6328.3(r), in the "CD" District, shall obtain a Coastal Development Permit in accordance with the provisions of this Chapter, in addition to any other permit required by law. Development undertaken pursuant to a Coastal Development Permit shall conform to the plans, specifications, terms and conditions approved or imposed in granting the permit.

* * * *

Cnty. of San Mateo, Cal.,
***Zoning Regulations* § 6328.5 (2020)**

SECTION 6328.5. EXEMPTIONS. The projects listed below shall be exempt from the requirement for a Coastal Development Permit. Requirements for any other permit are unaffected by this section.

(a) The maintenance, alteration, or addition to existing single-family dwellings; however, the following classes of development shall require a permit because they involve a risk of adverse environmental impact:
  (1) Improvements to a single-family structure on a beach, wetland or seaward of the mean high tide line.
  (2) Any significant alteration of landforms including removal or placement of vegetation, on a beach, wetland or sand dune, or within 50 feet of the edge of a coastal bluff.
  (3) The expansion or construction of water wells or septic systems.
  (4) On property located between the sea and the first public road paralleling the sea or within 300 feet of the inland extent of any beach or of the mean high tide of the sea where there is no

beach, whichever is the greater distance, or in scenic road corridors, an improvement that would result in an increase of 10% or more of internal floor area of an existing structure, the construction of an additional story (including lofts) in an existing structure, and/or any significant non-attached structure such as garages, fences, shoreline protective works, docks or trees.

(5) In areas determined to have critically short water supply that must be maintained for the protection of coastal resources or public recreational use, the construction of any specified major water using development not essential to residential use including but not limited to swimming pools, or the construction or extension of any landscaping irrigation system.

(b) The maintenance, alteration, or addition to existing structures other than single-family dwellings and public works facilities; however, the following classes of development shall require a permit because they involve a risk of adverse environmental impact:

(1) Improvements to any structure on a beach, wetland, stream or lake, or seaward of the mean high tide line.

(2) Any significant alteration of landforms including removal or placement of vegetation, on a beach, wetland or sand dune, or within 100 feet of the edge of a coastal bluff, or stream or in areas of natural vegetation designated as a sensitive habitat.

(3) The expansion or construction of water wells or septic systems.

(4) On property located between the sea and the first public road paralleling the sea or within 300 feet of the inland intent of any beach or of the mean high tide of the sea where there is no beach, whichever is the greater distance, or in scenic road corridors, an improvement that would result in an increase of 10% or more of external floor area of the existing structure, and/or the construction of an additional story (including lofts) in an existing structure.

(5) In areas determined to have critically short water supply that must be maintained for the protection of coastal recreation or public recreational use, the construction of any specified major water using development including but not limited to

swimming pools or the construction or extension of any landscaping irrigation system.

(6) Any improvement to a structure which changes the intensity of use of the structure.

(7) Any improvement made pursuant to a conversion of an existing structure from a multiple unit rental use or visitor-serving commercial use to a use involving a fee ownership or long-term leasehold including but not limited to a condominium conversion, stock cooperative conversion or motel/hotel time-sharing conversion.

(c) Maintenance dredging of existing navigation channels or moving dredged material from such channels to a disposal area outside the Coastal Zone, pursuant to a permit from the United States Army Corps of Engineers.

(d) Repair or maintenance activities that do not result in an addition to, or enlargement or expansion of, the object of such repair or maintenance activities; however, the following classes of development shall require a permit because they involve a risk of adverse environmental impact:

(1) Any method of repair or maintenance of a seawall, revetment, bluff retaining wall, breakwater, groin, or similar shoreline work that involves:

a) Repair or maintenance involving substantial alteration of the foundation of the protective work including pilings and other surface or subsurface structures;

b) The placement, whether temporary or permanent, of riprap, artificial berms of sand or other beach materials, or any other forms of solid materials, on a beach or in coastal waters, streams, wetlands, estuaries and lakes or on a shoreline protective work;

c) The replacement of 20% or more of the materials of an existing structure with materials of a different kind; or

d) The presence, whether temporary or permanent, of mechanized construction equipment or construction materials on any sand area or bluff or within 20 feet of coastal waters or streams.

(2) The replacement of 50% or more of a seawall, revetment, bluff retaining wall, breakwater, groin or similar protective work under one ownership.

(e) Any category of development requested by the County as a Categorical Exclusion pursuant to Section 13241 of the Coastal Commission's Regulations and approved by the Coastal Commission pursuant to Section 13243 of the Regulations. Categorical Exclusions in effect on March 25, 1986, may be deleted or restricted by the Board of Supervisors, but they may not be increased, expanded, or otherwise altered without approval by a majority of the voters of San Mateo County, voting in a valid election. The Board of Supervisors may, by four-fifths vote, after consideration by the Planning Commission, submit the proposed amendment(s) to the voters.

(f) The installation, testing, and placement in service or the replacement of any necessary utility connection between an existing service facility and any development provided that the County may, where necessary, require reasonable conditions to mitigate any adverse impacts on coastal resources, including scenic resources.

(g) The replacement of any structure, other than a public works facility, destroyed by natural disaster. Such replacement structure shall conform to applicable existing zoning requirements, shall be for the same use as the destroyed structure, shall not exceed either the floor area, height, or bulk of the destroyed structure by more than 10%, and shall be sited in the same location on the affected property as the destroyed structure.

As used in this subdivision, "natural disaster" means any situation in which the force or forces which destroyed the structure to be replaced were beyond the control of its owner.

As used in this subdivision, "bulk" means total interior cubic volume as measured from the exterior surface of the structure.

(h) Projects normally requiring a Coastal Development Permit but which are undertaken by a public agency, public utility or person performing a public service as emergency measures to protect life and property from imminent danger or to restore, repair or maintain public works, utilities and services during and

immediately following a natural disaster or serious accident, provided such projects are reported to the Planning Director and an application for a Coastal Development Permit is submitted within five days.

(i) Lot line adjustments not resulting in an increase in the number of lots.

(j) Harvesting of agricultural crops, including kelp.

(k) Timber operations which are in accordance with a timber harvesting plan submitted pursuant to the provisions of the Z'berg-Nejedly Forest Practice Act of 1973 (commencing with Section 4511).

(l) Land division brought about in connection with the purchase of land by a public agency for public recreational use.

(m) Encroachment permits.

(n) Street closure permits.

* * * *

Cnty. of San Mateo, Cal.,
***Zoning Regulations* § 6328.9 (2020)**

SECTION 6328.9. ACTION ON COASTAL DEVELOPMENT PERMIT. Action to approve, condition or deny a Coastal Development Permit shall be taken only by the Planning Director (acting in that capacity or as the Zoning Administrator or as the Design Review Administrator), the Zoning Hearing Officer, the Planning Commission or the Board of Supervisors. To the extent possible, action on a Coastal Development Permit shall be taken concurrently with action on other permits or approvals required for the project, in accordance with the following procedures:

(a) Where action on other permits or approvals is to be taken by the Planning Director, the Zoning Hearing Officer, the Planning Commission or the Board of Supervisors, then that person, commission, or board shall also act on the Coastal Development Permit.

(b) Where action on other permits or approvals is to be taken by a County officer or body other than those specified in paragraph (a), the Planning Director shall act on the Coastal Development

Permit prior to action by the appropriate body on the other required permits or approvals.

(c) Should the project require no County permit or approval other than a Coastal Development Permit, the Planning Commission shall act on the Coastal Development Permit

(d) Where, in accordance with paragraphs (a) and (b), above, action on a Coastal Development Permit would be taken by the Planning Director, but Section 6328.10(a)2 requires a public hearing, the Zoning Hearing Officer or Planning Commission, as appropriate, shall act in place of the Planning Director.

(e) Where final action on other permits or approvals requires the recommendation of one officer or body to another, as in the case of a Planning Commission recommendation to the Board of Supervisors, that officer or body shall make a concurrent recommendation on the Coastal Development Permit.

* * * *

* * * *

Cnty. of San Mateo, Cal.,
***Zoning Regulations* § 6328.12 (2020)**

SECTION 6328.12. STANDARDS FOR APPLICATION REVIEW. The officer, commission or board acting on a Coastal Development Permit shall review the project for compliance with: all applicable plans, policies, requirements and standards of the Local Coastal Program, as stated in Sections 6328.19 through 6328.30 of this Chapter; the County General Plan; requirements of the underlying district; and other provisions of this Part. To assist this review, the Planning Director shall, as part of the recommendation required by Section 6328.8, complete a Coastal Policy Checklist, as defined in Section 6328.3.

* * * *

Cnty. of San Mateo, Cal.,
***Zoning Regulations* § 6328.14 (2020)**

SECTION 6328.14. CONDITIONS. Approval of a Coastal Development Permit shall be conditioned as necessary to ensure conformance with and implementation of the Local Coastal Program. The approving authority may require modification and resubmittal of project plans, drawings and specifications to ensure conformance with the Local Coastal Program. When modification and resubmittal of plans is required, action shall be deferred for a sufficient period of time to the project.

For all proposed development requiring a domestic well water source and not subject to the provisions of Section 6328.7(e), require as a condition of approval demonstrated proof of the existing availability of an adequate and potable water source for the proposed development, and that use of the water source will not impair surface streamflow, the water supply of other property owners, agricultural production or sensitive habitats.

* * * *

Cnty. of San Mateo, Cal.,
***Zoning Regulations* § 6328.15(a) (2020)**

SECTION 6328.15. FINDINGS. A Coastal Development Permit shall be approved only upon the making of the following findings:

(a) That the project, as described in the application and accompanying materials required by Section 6328.7 and as conditioned in accordance with Section 6328.14, conforms with the plans, policies, requirements and standards of the San Mateo County Local Coastal Program.

Cnty. of San Mateo, Cal.,
***Zoning Regulations* § 6531 (2020)**

SECTION 6531. GENERAL PROVISIONS. Variances are permitted when one or more of the following conditions exist: (1) development is proposed on an existing legal parcel zoned R-1/S-7 or R-1/S-17, which is 3,500 square feet or less in area and/or 35 feet or less in

width; (2) the proposed development varies from minimum yard, maximum building height or maximum lot coverage requirements; or (3) the proposed development varies from any other specific requirements of the Zoning Regulations.

Notwithstanding Chapter 4 of the Zoning Regulations, home improvement exceptions may be approved to grant relief from the strict provisions of the Zoning Regulations for yards, lot coverage, daylight planes, and floor area ratio. To qualify for a home improvement exception, the following requirements must be met: (1) the home improvement exception is for an addition to an existing residential dwelling unit or a detached garage in the R-1, R-2, RE, RH, RM, and combining districts; (2) the home improvement exception is for addition to an existing one-family residential unit, an existing two-family residential unit, or a detached garage in the R-3 district; (3) the addition will not result in the creation of a new story; (4) at least 75% of the existing exterior walls (in linear feet) will remain; (5) at least 50% of the existing roof (in square feet) will remain; (6) the addition will be located at least three feet from a property line; (7) the existing structure is located in an area with an average slope of less than 20%; (8) development on the parcel does not exceed maximum floor area, if located in the Mid-Coast; and (9) the total floor area approved through home improvement exceptions on a given parcel shall not be greater than two hundred and fifty (250) square feet and no more than one hundred (100) square feet may extend into a side yard. If the addition will not result in a visible change to the exterior shape and size of the residential unit, improvement exceptions may apply to projects which (1) require relief from the provisions of the Zoning Regulations for height; (2) involve the addition of a new story; and (3) exceed the 250 square feet limit.

A Home Improvement Exception application can only be submitted if the date of the application is five (5) years or more after the date certificate of occupancy was granted for subject residential unit.

Notwithstanding the above, the following restrictions apply to home improvement exception applications: (1) a home improvement exception shall not be granted for a structure if an existing building code violation involves the Zoning Regulations for yards, lot coverage, daylight

planes, or floor area ratio; (2) a building code violation cannot be used to justify the integrity of an existing design concept pursuant to Section 6534.2(2); (3) a final building permit inspection for a home improvement exception may not occur until all building violations have been corrected.

Variances and home improvement exceptions may not be granted to allow a use, activity or an increased number of dwelling units which are not permitted by the Zoning Regulations.

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Cnty. of San Mateo, Cal.,
***Zoning Regulations* § 6534.1(5) (2020)**

SECTION 6534.1 VARIANCE FINDINGS. In order to approve an application for a variance, the approving authority must make all of the following findings in writing:

. . .

(5) The variance is consistent with the objectives of the General Plan, the Local Coastal Program (LCP) and the Zoning Regulations.

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