No. 21-16489

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RANDY RALSTON; LINDA MENDIOLA,

Plaintiffs – Appellants,

v.

COUNTY OF SAN MATEO,

Defendant – Appellee,

and

CALIFORNIA COASTAL COMMISSION,

Defendant.

On Appeal from the United States District Court
for the Northern District of California
No. 21-CV-01880-EMC
Honorable Edward M. Chen, District Judge

APPELLANTS' OPENING BRIEF

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GLOSSARY AND ABBREVIATIONS

30010: Section 30010 of the Coastal Act, Cal. Pub. Res. Code § 30010.

CDP: a Coastal Development Permit under the County's LCP.

Coastal Act: the California Coastal Act, Cal. Pub. Res. Code § 30000, *et seq*.

Coastal Commission: Defendant California Coastal Commission, a California state agency.

County: Defendant-Appellee County of San Mateo, a California municipal government.

County Counsel: the attorney for the County.

LCP: San Mateo County's Local Coastal Program: Cty. of San Mateo, Cal., *Local Coastal Program Policies* (2013).

LIP: a county's Local Implementation Program under Cal. Pub. Res. Code § 30511, which consists of "the zoning ordinances, zoning district maps, and, if required, other implementing actions . . . "

LUP: a county's Land Use Plan as defined in Cal. Pub. Res. Code § 30511.

Planning Director: the Community Development Director for the County of San Mateo.

Ralston: Plaintiffs-Appellants Randy Ralston and Linda Mendiola, jointly.

Variance: a procedure under the County's Zoning Regulations to grant relatively minor design changes to a development.

Zoning Regulations: the County's zoning and land use ordinance. *See* Cty. of San Mateo, *Zoning Regulations* (2020).

INTRODUCTION

When County laws, County maps, and County officials all unequivocally say that a home cannot be built on "protected" land in an "environmentally sensitive habitat area," the property's owner may take the County at its word.[1] The landowner need not ask the County for permission to build a home when the County's own laws "strictly regulate[] development" and plainly forbid it. The Supreme Court's "relatively modest"[2] ripeness requirement in takings cases—which asks whether the government has definitively taken a position about what uses may be allowed and prohibited on the property—is satisfied.

The critical, dispositive question in this appeal asks: does the County have the authority to approve a permit to build a home in the Montecito Riparian Corridor despite the absolute prohibition on such use in the County's coastal land use law? The answer is a definitive "no." The

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[1] In this brief, Plaintiffs-Appellants Randy Ralston and Linda Mendiola are jointly referred to as "Ralston," Defendant-Appellant County of San Mateo as "the County," and Defendant-Appellant California Coastal Commission as "Coastal Commission."

[2] *Pakdel v. City & Cty. of San Francisco*, 141 S. Ct. 2226, 2230 (2021) (per curiam) ("We, too, think that the Ninth Circuit's view of finality is incorrect. The finality requirement is relatively modest.").

County's regulations establish that "only" five uses are legally permitted in riparian corridors. Things like "education and research," "consumptive uses as provided for in the Fish and Game Code," "fish and wildlife management activities," "trails and scenic overlooks on public land(s)," and "necessary water supply projects." *No home*.

Consequently, Ralston's takings claim—which asserts that by barring him from building a home, the County has deprived him of the property's economically-beneficial use—is ripe because the court does not need any additional information to understand what uses the County legally might allow on Ralston's land (the five uses under the law), and what uses are *not* allowed (everything else, including a home). Ralston need not have undertaken the expense, time, and effort to prepare and submit an application to build a home, when the County's laws plainly mandate that no homes are allowed in these "sensitive" and "protected" areas, and in accordance with its own laws, the County cannot possibly grant a permit to build one. If the County's laws did not make the residential prohibition in riparian corridors clear enough, County officials—including the Planning Director and lawyer—unsurprisingly reconfirmed to Ralston what their laws plainly say: *no home*.

Neither the Planning Director nor the County's lawyer (nor anyone else at the County for that matter) possesses the authority to "override" (to use the words of the Planning Director) the law's residential prohibition. Nothing in the County's laws, or state law, permits a local government to allow a use that fails to conform to the restrictions in its coastal zoning and coastal program. A variance is not available (the County cannot grant a variance to allow a use that violates its own use restrictions; variances are reserved only for "relatively minor" deviations in design for allowed uses, not for a wholesale override of a residential prohibition). Nor does the County have the authority to violate its own law to allow a home to be built if the County thinks that by doing so, it will avoid having to provide compensation for a taking.

And because it lacks the authority to ignore the restrictions in its own laws, the County has not established any procedures by which a property owner may ask the County to do so. Ralston is not required to ask the County to allow a use it cannot approve, via process that does not exist.

The district court, however, concluded that the County has the authority to allow a home to be built in the Montecito Riparian Corridor.

The court also held that the County has established a process by which a property owner may seek such approvals. Thus, the district court required Ralston to apply for an exemption from the residential ban, and to await the County's response. In the court's view, maybe a home can be built in a riparian corridor. If the County might possibly say yes to a home, Ralston cannot claim a taking until the County finally, definitively, says no.

The Supreme Court, however, doesn't require Ralston to chase chimeras. The Court's prudential ripeness requirement prevents the government from hiding behind any uncertainties about what uses *its own regulations* prohibit or allow. Ripeness also prevents the government from hiding the ball by not plainly informing property owners what the government's own regulations might allow. After all, the Court begins with the presumption that "the right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a 'governmental benefit.'" *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 833 (1987). Because the County's "permitting requirements" burden this right, it has a corresponding duty to make clear to its constituents what those

requirements are. The County has taken a definitive position on a home in a riparian corridor. *No home*.

Once the reviewing court understands what the regulation allows and what it doesn't, the court possesses all the information it needs to determine whether that regulation goes "too far" by depriving the owner of all—or substantially all—economically-beneficial and productive use of her property. Here, we know precisely what uses the County might legally allow on Ralston's riparian corridor property: *no home*. That's it.

By requiring that Ralston make an application to build a home when the only response the County could legally give is that *no home* is allowed, the district court endorsed a remarkably citizen-hostile process which gives government every incentive to be opaque when it should be transparent, and to keep the process as vague and informal as possible. To withhold the roadmap when it should helping property owners navigate the government's own maze of regulations.

The Supreme Court recently reemphasized that the "final decision" ripeness requirement isn't a talisman to be employed by the government to force property owners through a gauntlet of procedures in the illusory hope that even though the regulations say "no," the government might

say "yes" if only the property owner were to ask the right way—or ask the right official. The Court has decidedly rejected a ripeness model based on speculation on what the government *might* allow in favor of a rule that is "relatively modest" where a claim is ready once the reviewing court knows "to a reasonable degree of certainty" the government's position on what uses are allowed and prohibited.

That case—*no home*—is presented here.

STATEMENT OF JURISDICTION

1. Statutory basis of the district court's original subject matter jurisdiction: 28 U.S.C. §§ 1331 (civil action arising under Constitution or federal law), 1343 (federal civil rights), 2201 (declaratory judgment), and 42 U.S.C. § 1983 (federal civil rights).

2. The district court entered the Amended Judgment "in favor of all defendants and against plaintiff." Excerpt of Record ("ER") 5. Statutory basis of appellate jurisdiction: 28 U.S.C. § 1291 (final decisions of district courts).

3. Date of entry of the Amended Judgment: August 27, 2021. ER-5. Date the district court entered Judgment: August 26, 2021. ER-6. Date of the filing of the Notice of Appeal: September 9, 2021. ER-175. Timeliness of the appeal: Fed. R. App. P. 4(a)(1)(A) (30 days after entry of judgment in civil cases).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

This appeal presents a question of ripeness in regulatory takings. Two questions of law are presented for *de novo* review:

1. Does the County's Local Coastal Program categorically prohibit the building of a home in the Montecito Riparian Corridor?

2. May the County ignore the residential prohibition in its Local Coastal Program by granting a variance or some other exception to the Local Coastal Program's categorical residential prohibition?

RELIEF SOUGHT ON APPEAL

The district court's Amended Judgment [ER-5] should be reversed or vacated, and the case remanded to the district court for consideration of Ralston's takings claims on the merits.

ADDENDUM

In accordance with Cir. R. 28-2.7, the pertinent constitutional provisions, statutes, ordinances, regulations, and rules are forth separately in a separately-bound Addendum.

STATEMENT OF THE CASE

The issues presented turn on whether the County's laws and other regulations might authorize it to issue a permit to develop a home on Ralston's riparian corridor property. This this part of the brief first describes the governing regulatory scheme (sections I–IV). Next, in sections V-VII, the brief sets out the facts as pleaded in the Complaint. Finally, section VIII describes the district court's order dismissing the Complaint.

I. The County's Local Coastal Program

The California Coastal Act (Cal. Pub. Res. Code § 30000, *et seq*.) requires local governments within the coastal zone to promulgate a "Local Coastal Program" ("LCP") to strictly regulate private uses and development within the coastal zone. These LCPs consist of "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" 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.

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 submitted, 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.[3] Once the Coastal Commission certifies the LCP, it is local law. *See id.* § 30108.6. The County has adopted, with Coastal Commission certification, a LCP.

[3] As part of its review, the Coastal Commission evaluates the local government's Land Use Plan ("LUP"). *Id.* § 30511. The Coastal Commission's review of the LUP is limited to its "administrative determination that the land use plan submitted by the local government does, or does not, conform with the requirements of Chapter 3" of the Coastal Act. *Id.* § 30512.2. Next, the Coastal Commission reviews the Local Implementation Program ("LIP"), which consists of "the zoning ordinances, zoning district maps, and, if required, other implementing actions . . . " *Id.* § 30511. The Commission may only reject LIPs "on the grounds that they do not conform, or are inadequate to carry out the provisions of the certified land use plan." *Yost v. Thomas*, 685 P.2d 1152, 1155 (Cal. 1984) (citing Cal. Pub. Res. Code § 30513).

II. Coastal Development Permits

A "Coastal Development Permit" (CDP) is 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* Cty. of San Mateo, *Zoning Regulations* § 6328.3(e), at 20B.1 (2020) ("Zoning Reg.").

Under a certified LCP, authority to grant or deny Coastal Development Permits (CDP) is delegated exclusively to the local government. Cal. Pub. Res. Code § 30519(a). When reviewing a CDP application, the local government must comply with its own LCP. *Id.* §§ 30108.6, 30603(b)(1); *Yost*, 685 P.2d at 1160. The Coastal Commission only retains limited administrative appellate jurisdiction to review a local government's CDP decision. Cal. Pub. Res. Code § 30603. But even when the Coastal Commission has jurisdiction over an appeal, its review is limited to whether the CDP conforms to the local government's LCP. *Id.* § 30603(b)(1). The CDP must also conform to the Coastal Act, but only the "public access policies" of the statute. *Schneider v. Cal. Coastal Comm'n*, 44 Cal. Rptr. 3d 867, 871 (Cal. App. 2006) (the only grounds for

appeal are that the locally approved development does not conform to the standards of a certified LCP, or the Coastal Act's public access policies).

A. The County's CDP Application Process

In San Mateo County, "[a]ll development in the Coastal Zone requires either a [CDP] or an exemption from [CDP] requirements." Cty. of San Mateo, Cal., *Local Coastal Program Policies* § 1.1, at 1.1 (2013) ("LCP") (the County must "require a [CDP] for all development in the Coastal Zone subject to certain exemptions"); *Zoning Reg.* § 6328.4, at 20B.4. Certain projects—none of which are applicable here—are exempt from the requirement to obtain a CDP. *Id.* § 6328.5(a)-(n). A CDP application must include a fee (*id.* § 6328.7(a)),[4] a location map (*id.* § 6328.7(b)), a site plan (*id.* § 6328.7(c)), building elevations (*id.* § 6328.7(d)), proof of water availability (*id.* § 6328.7(e)), and "any additional information determined by the Planning Director to be necessary for evaluation of the proposed development." *Id.* § 6328.7(f).

[4] "Approx. Fee: $2,400." *See* Cty. of San Mateo, *Coastal Development Permit (Staff-Level)*, https://planning.smcgov.org/coastal-development-permit-staff-level.

The County publishes forms by which property owners apply for a CDP.[5]

1. General application form for all County development permits.[6]

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.[7]

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.[8]

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

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

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

[8] Cty. of San Mateo, *Coastal Development Exemption*, https://planning.smcgov.org/coastal-development-exemption; Cty. of San Mateo, *Certificate of Exemption From a Coastal Development Permit*, https://planning.smcgov.org/documents/certificate-exemption-coastal-development-permit; Cty. 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.[9]

A CDP application is submitted to the Planning Director. *Zoning Reg.* § 6328.8, at 20B.9. The Planning Director makes recommendations and forwards the application and recommendations to one of four other County officials or entities. *Id.*

B. CDP Application Review Standards

"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." LCP at 1. As the County zoning code provides:

> 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

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

> Section 6328.8, complete a Coastal Policy Checklist, as defined in Section 6328.3.

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

The County must then "approve, condition or deny the CDP application." *Id.* § 6328.9 ("Action to approve, condition or deny a [CDP] shall be taken . . ."). To issue a CDP, the County must expressly find that the development is consistent with the LCP:

> 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*.

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.

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

The County's LCP designates lands within "riparian corridors" as "environmentally sensitive habitat areas." ER-77. These riparian corridors are "sensitive habitats requiring protection." LCP § 7.8, at 7.2 (2013).[10] Consequently, the County "strictly regulates development within and adjacent to such areas," and uses in a riparian corridor are severely restricted. ER-77. 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 is not allowed.

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[10] *See also* Cty. of San Mateo, Cal., *Local Coastal Program Policies* § 7.1 at 7.1 (2013) ("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.").

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:

> (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.

Id. § 7.9(b), at 7.3 (emphasis added).

In short, under the County's LCP, building a home is not legally permissible in a riparian corridor, and under its own laws, the County has no procedure by which a property owner may ask the County to approve such development (an owner may not apply for a CDP that is not in "compliance" or in "conformance" with the LCP).

IV. No Variance or Other LCP Exemption to Build a Home in a Riparian Corridor

Nor does the County have the authority to grant any such request, even if made. Nothing in the County's LCP allows it to ignore the LCP's prohibitions, or to otherwise allow a home to be built in the Montecito Riparian Corridor. *See id*. § 1.1 (the County must "require a[CDP] for all development in the Coastal Zone subject to certain exemptions"). The LCP itself does not recognize any exemption from the allowed uses in a riparian corridor or any other way for the County to approve building a home in a riparian corridor.

The County does not include in the earlier-noted applications any form to allow a property owner to ask the County to grant a CDP that does *not* comply with "all applicable plans, policies, requirements and standards of the Local Coastal Program," or to ask the County to exercise its power to grant a permit—or grant a permit with conditions—in a manner that avoids takings or damaging private property for public use without the payment of just compensation.

Nor does the LCP or the County's zoning regulations establish a procedure to obtain a variance from the LCP's requirements.[11] The County publishes forms by which property owners may apply for a variance. *See* Cty. of San Mateo, *Variance Application – Companion Page*, https://planning.smcgov.org/documents/variance-application-companion-page. The variance procedures and standards, however, are not applicable to CDP applications, but are limited to a narrow category of uses:

> 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.

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[11] The zoning code contains procedures and standards for variances, the purpose of which "is to allow, under special circumstances, development to vary from the requirements of the Zoning Regulations when strict enforcement would: (1) make it difficult to develop a parcel, (2) cause unnecessary hardships to the landowner, or (3) result in inconsistencies with the general purposes of the Zoning Regulations." *Zoning Reg.* § 6530, at 25.1.

Moreover, the County's zoning code does not allow it 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. *See Zoning Reg.* § 6534.1(5), at 25.4 ("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"). This is consistent with state law, which bars 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.").

V. Ralston's Residential Zoned Property

Randy Ralston and Linda Mendiola own a small (50' x 100') vacant and undeveloped parcel in Half Moon Bay in an unincorporated part of the County on which they'd like to build a home. ER-167–168, ¶¶ 2, 8.[12] The property is zoned "R-1" (single-family residential). ER-167, ¶ 1.

VI. Ralston's Property Is Entirely Within the Montecito Riparian Corridor

Ralston's property is in the coastal zone and therefore subject to the County's LCP, under which the County has designated the property as part of the "Montecito Riparian Corridor." ER-168, ¶ 14.

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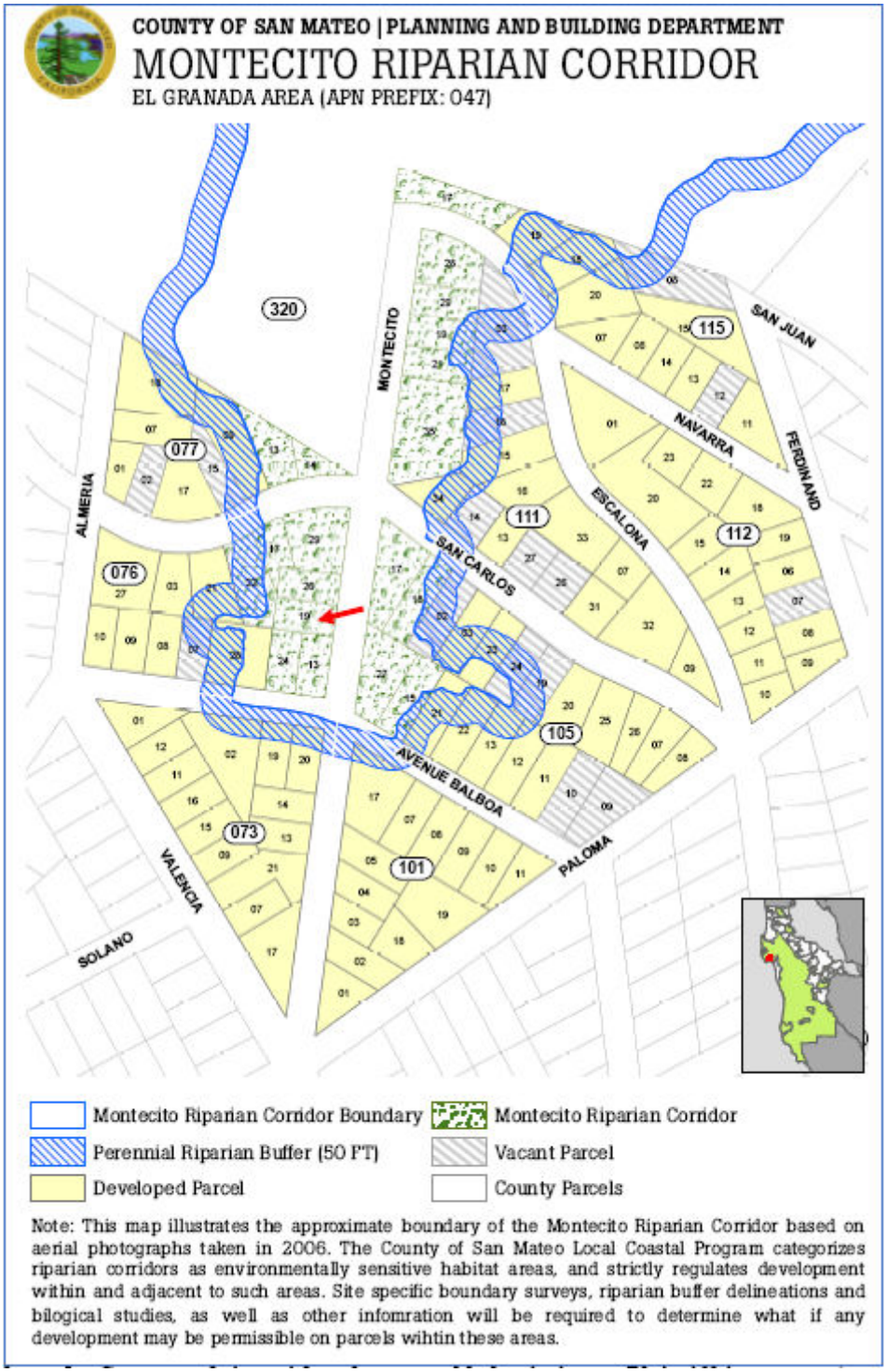
[12] These facts are from the district court's Order (ER-7) or from the Complaint (ER-166). The facts in the complaint at taken as true. *Rowe v. Educ. Credit Mgmt. Corp.*, 559 F.3d 1028, 1029–30 (9th Cir. 2009); *Carson Harbor Vill., Ltd. v. City of Carson*, 353 F.3d 824, 826 (9th Cir. 2004).



See San Mateo County - *Montecito Riparian Corridor*, https://planning.smcgov.org/documents/san-mateo-county-montecito-

riparian-corridor.

As noted above, that means that by law, the uses the County might allow are very limited and do not include building a home. *See* LCP § 7.9(a)–(b) at 7.3. The Complaint alleged that the property is not suitable for any of the uses that may be allowed in a riparian corridor under the County's LCP. ER-169, ¶ 17.

VII. County Officials Confirmed the LCP's Prohibition on Residential Development

The County's website notes that "[a]ny intention to proceed with an application for development that would run counter to any of these policies must first be throughly [sic] reviewed by the Community Development [aka Planning] Director and County Counsel." ER-9; ER-169, ¶ 18. The County does not state the basis for its assertion that the Planning 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.

Nonetheless, in compliance with this directive, Ralston requested review by the Planning Director of his intention to build a residence in conformity with the County's R-1 zoning. ER-169, ¶ 19. The Planning Director consulted with County Counsel and—not surprisingly in light of

the LCP's prohibition on such use—rejected the request. ER-169, ¶ 20. Ralston kept trying, but the County rejected two other requests relating to building a home: (1) the Planning Director rejected a request for a "buildability letter," which is necessary for the provision of treated water to the property. ER-169–170, ¶¶ 21–23; and (2) the County's Board of Supervisors also rejected Ralston's request to reconsider the matter or to provide compensation for a taking. ER-170, ¶ 25.

VIII. District Court: Despite the LCP's Residential Prohibition, the County Might Allow a Home, and Hasn't Definitively Said No Yet

Ralston filed a two-count complaint in the district court against the County and the Coastal Commission, alleging Fifth and Fourteenth Amendment regulatory takings without compensation. ER-166–174.

The district court granted the County's Fed. R. Civ. P. 12(b)(1) and 12(b)(6) motion to dismiss (ER-7–21), concluding that Ralston had not alleged that he sought the County's permission to build a home in the Montecito Riparian Corridor. Thus, the district court concluded Ralston had deprived the County of the opportunity to make a "final decision" either allowing or denying the development. *See* Order Granting Defendant County of San Mateo's Motion to Dismiss at 15 (Aug. 26, 2021)

("Order") ("The allegations in Plaintiffs' complaint, taken as true, do not establish that the County has issued a 'final decision' rejecting an application for a CDP, and therefore their claim is not ripe."); ER-21.[13]

The district court assumed that the County reserved the power to approve Ralston's request to build a home in the riparian corridor, despite the LCP's categorical prohibition. The district court concluded that the County may either grant a variance, or otherwise possesses the authority to ignore the LCP's requirements if to apply the categorical residential prohibition to Ralston's property would be, in the County's opinion, a taking. *See* ER-13–21.

Based on this assumption, the district court concluded that although Ralston had informally asked the Planning Director for these exemptions, Ralston had not submitted CDP application to formally seek an exemption. The court noted that the Planning Director does not have the final authority to issue a CDP. ER-14 (Order at 8). Instead, the

[13] The Coastal Commission also filed a motion to dismiss seeking Eleventh Amendment immunity and asserting the takings claim was not ripe. Because it granted the County's motion, the district court did "not address the Commission's motion." ER-7 (Order at 1, n.1).

district court concluded that "[f]our separate 'appropriate bodies' can adjudicate CDP applications in the County." *Id.* "Here," the court held, "it is impossible to tell from Plaintiffs' informal communications with the Planning Director whether their proposed project requires 'other permits or approvals' or 'a public hearing,' such that the Zoning Hearing Officer, Planning Commission, or Board of Supervisors—instead of the Planning Director—must issue the 'final decision' on Plaintiffs' a [sic] CDP application." ER-15 (Order at 9).

In sum, the district court held that "Plaintiffs' complaint has not established *de facto* finality because questions remain as to 'how the [County's LCP] appl[ies] to the [Property]." ER-14 (Order at 8) (quoting *MacDonald, Sommer & Frates v. Yolo Cty.*, 477 U.S. 340, 348 (1986)). The County, the court concluded, had not "committed to a position." ER-13 (Order at 7) (quoting *id.* at 348). The court noted that "Plaintiffs may refile this action, if necessary, after they apply for a CDP and the County issues a final decision." ER-13 (Order at 7).

The district court entered judgment. ER-6. The following day, the district court entered an Amended Judgment which entered judgment "in

favor of all defendants and against plaintiff." ER-6. This appeal followed. ER-175.

SUMMARY OF ARGUMENT

The Argument first summarizes the Supreme Court's approach to regulatory takings, which focuses on the uses of property the regulation prohibits and allows. If the regulation deprives an owner of all or substantially all economic uses, the government is obligated to provide just compensation in accordance with the Fifth Amendment ("nor shall private property be taken for public use, without just compensation"). The Court's "final decision" ripeness requirement in takings cases asks whether a reviewing court understands how the challenged regulation applies to the plaintiff's—what the regulation forbids, and what it allows—"to a reasonable degree of certainty." Takings ripeness does not require landowner undertake heroic measures to chase permits that cannot be granted, via procedures that do not exist or the government has not made clear.

These modest rules, applied here, show why Ralston's takings claims are ripe:

1. The County's own laws do not allow residential development in the protected Montecito Riparian Corridor in which Ralston's property is located. Consequently, the County may not issue—and may not even process—a Coastal Development Permit to allow a home on Ralston's property. The ripeness requirement does not require a property owner to assemble and submit an application for a development permit that asks the County to ignore its own laws prohibiting the requested development, in the vain hope that the County might, contrary to its own laws, grant it.

2. The County has no authority to override the categorical prohibition in its Local Coastal Program law on residential uses in a riparian corridor, by way of variance under the zoning code, or a "takings" exception under an inapplicable state statute. Even if such authority existed, the County has not established a process by which a landowner may ask it to override the LCP.

STANDARD OF REVIEW

This Court considers the appeal *de novo*.

1. This Court reviews *de novo* the district court's dismissal of the constitutional claim for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1). *City of Oakland v. Wells Fargo & Co.*, 972 F.3d 1112, 1121 (9th Cir. 2020); *Carson Harbor Vill., Ltd.*, 353 F.3d at 826.

2. *De novo* review also governs appeals of dismissals for failure to state a claim under Rule 12(b)(6). *Id.*

3. In addition, this Court "review[s] *de novo* questions of statutory interpretation." *City of Oakland*, 972 F.3d at 1121.

4. For purposes of *de novo* review of a motion to dismiss, this Court accepts all factual allegations in the Complaint as true. *Rowe*, 559 F.3d at 1029–30; *Carson Harbor*, 353 F.3d at 826.

ARGUMENT

I. Takings Ripeness Requires the Government to Stake Out Its Final Position by Law or by Rejecting a Permit Application

A. Regulatory Takings

The government's regulation of an owner's use of her property is deemed a taking if the regulation intrudes "too far" into an owner's

property rights, and is, from the owner's viewpoint, the functional equivalent of an exercise of eminent domain. *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922). The Supreme Court's "regulatory takings" inquiry is informed by the purpose of the Takings Clause, which is to prevent the government from 'forcing some people alone to bear public burdens' which, in all fairness and justice, should be borne by the public as a whole. *Armstrong v. United States*, 364 U.S. 40, 49 (1960). The point is that the government may reasonably regulate the use of property to prevent threats to the public's health, safety, and welfare (the police power), but if those regulations overly burden a property owner, the government must provide compensation. If preserving riparian corridors is a good thing, absorbing the cost of doing so is not Ralston's alone.

The Supreme Court instructs that a taking will be found in the following circumstances:

1. A "regulation which 'denies all economically beneficial or productive use of land' will require compensation under the Takings Clause." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1018–19, 1025 n.12 (1992).

2. A regulation that doesn't go that far still may result in a taking, depending on a complex factual inquiry about (1) the regulation's economic effect on the landowner, (2) the extent to which the regulation interferes with distinct investment-backed expectations, and (3) the character of the government action. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

The Complaint alleges that by prohibiting Ralston from building a home in conformity with the R-1 zoning, the County's riparian corridor LCP regulation has resulted in a taking. The LCP prohibits the only use the Complaint alleges is economically-viable—a home—and consequently, the County is forcing Ralston to bear the cost of the public benefit of preserving a riparian corridor, which in all fairness and justice, should be borne by the public. ER-167, ¶ 1.

B. Final Decision Takings Ripeness

Takings ripeness is a "relatively modest" requirement, grounded in the substance of takings law. *Pakdel*, 141 S. Ct. at 2230.[14] The Supreme

[14] Moreover, in this Circuit, regulatory takings ripeness does not go to the district court's subject matter jurisdiction, but is merely "prudential," meaning that the Court "has some discretion whether to impose" it. *Pakdel*, 952 F.3d at 1169.

Court holds that a regulatory takings claim is usually premature until the government has made a "final decision" applying its regulations to a landowner. *Williamson Cty. Reg'l Plan. Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 178 (1985), *overruled in part by Knick v. Twp. of Scott*, 139 S. Ct. 2162 (2019). It is not an exhaustion requirement, but a pragmatic, factual inquiry that asks: what uses might the challenged regulation allow "to a reasonable degree of certainty?" *Palazzolo v. Rhode Island*, 533 U.S. 606, 620 (2001) ("once it becomes clear that the agency lacks the discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened"); *Pakdel*, 141 S. Ct. at 2230 ("All a plaintiff must show is that there is no question about how the regulations at issue apply to the particular land in question.") (quoting *Suitum v. Tahoe Reg'l Plan. Agency*, 520 U.S. 725, 739 (1997)). "[N]othing more than *de facto* finality is necessary." *Pakdel*, 11 S. Ct. at 2230.

Requiring the owner to ask the government to take a position about what uses it will allow under the challenged regulation serves two purposes.

The first is based in justiciability concerns: the finality requirement assures that a land use decision-maker has "arrived at a definitive position on the issue that inflicts an actual, concrete injury." *Williamson Cty.*, 473 U.S. at 193. After all, if the government's decision is not final, it might still allow the requested use. If it does, the plaintiff has not been harmed.

The second, related, reason for requiring a final decision is based in the Takings Clause itself, to ensure that the key factual substantive inquiry in these cases is teed up: to evaluate whether a regulation deprives an owner of all economically beneficial use or has otherwise resulted in severe loss of use, the court needs to know what uses are allowed and prohibited under the challenged regulation. If some economically-beneficial uses are allowed under the regulation but the owner has not asked to make any of them, it is too early to evaluate whether all beneficial use has been taken. But once the court knows "how the regulations will be applied to [a landowner's] property," the takings claim is ripe because the court can assess the regulation's effects on the owner's uses. *Id.* at 200.

If the regulation facially prohibits any beneficial uses of the property, the takings claim is ripe and there is no need to ask the government for a permit to make the prohibited use. *Suitum*, 520 U.S. at 739.[15] *See also Palazzolo*, 533 U.S. at 621 (owner wanted to fill wetland, 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: "On the wetlands there can be no fill for any ordinary

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[15] In *Suitum*, the Supreme Court considered whether an agency's designation of a property as being within a "Stream Environment Zone" (SEZ), and thus subject to an absolute prohibition on development under the agency's regulations, was sufficiently final for purposes of a regulatory taking. *Id*. at 729–31. The Court began with the observation that finality is a "prudential hurdle[] to a regulatory takings claim brought against a state entity in federal court." *Id*. at 734. The Court reviewed its prior caselaw on finality, but ultimately decided against adopting any sort of rigid test. *Id*. at 738–39. ("[l]eaving aside the question of how definitive a local zoning decision must be to satisfy *Williamson County*'s demand for finality," the Court opted to resort to "sound judgment about what use will be allowed." *Id*. at 739. Because (i) the agency had "finally determined that petitioner's land lies entirely within an SEZ", and (ii) the agency's regulations categorically prohibit development on land designated as within an SEZ, it was apparent to the Court's sound judgment that the agency had "no discretion to exercise over Suitum's right to use her land." *Id*. at 739. Because the agency had no discretion to allow development on the SEZ-designated land, "no occasion exists for applying *Williamson County*'s requirement that a landowner take steps to obtain a final decision about the use that will be permitted on a particular parcel." *Id*. Where it is clear no development will be allowed regardless of the specifics of the development, no specific further process is required for finality.

land use. There can be no fill for its own sake; no fill for a beach club, either rustic or upscale; no fill for a subdivision; no fill for any likely or foreseeable use.").

II. LCP: By Law, a "No Home" Zone

The County's LCP on its face bars a home on Ralston's property because the LCP identifies the land as entirely within the Montecito Riparian Corridor. ER-168, ¶ 14. There is no need (and no ability) to file a CDP application for a use categorically prohibited by law. *Palazzolo*, 533 U.S. at 622 ("Ripeness doctrine does not require a landowner to submit applications for their own sake"). But the district court concluded that "[a]s a result [of Ralston's failure to file a CDP application], the Planning Director was unable to issue a final decision explaining in any detail how or why the LCP prevents Plaintiffs from building their home in the Property[.]" ER-16 (Order at 10). It was not necessary, however, for Ralston to file an application for a CDP, simply to allow the Planning Director (or some other County official or agency) to restate what the County's law plainly says. The County has already made it clear—in the plainest possible terms—"how or why the LCP prevents" building a home in the Montecito Riparian Corridor: it's right there in the LCP. LCP

§ 7.9(a), at 7.3. The district court's conclusion was the result of two fundamental legal errors.

A. The LCP Categorically Bars the County from Issuing a CDP for Riparian Corridor Property

First, the district court wrongly assumed that Ralston could file a meaningful CDP application (an application that the County could conceivably grant). The LCP, however, leaves no room for the County to consider, or issue, a CDP to build a home in the Montecito Riparian Corridor. Any such application must be denied because CDPs must be "in conformance with the [LCP]."[16] The Complaint plausibly alleges that Ralston's land is in the Montecito Riparian Corridor. ER-168, ¶ 14.[17] And there is no question how the LCP applies to property within a riparian

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[16] *Zoning Reg.* § 6328.3(e), at 20B.1 (defining "Coastal Development Permit" (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].").

[17] Even if the County disputed that fact, however, the location of Ralston's property is plausibly pleaded, and consequently, the court must accept it as true for purposes of *de novo* review of a motion to dismiss. Resolving any factual dispute about the location of Ralston's property vis-à-vis the riparian corridor would only be appropriate later, not at the pleadings stage. *Rowe*, 559 F.3d at 1029–30 (appellate court accepts all pleaded facts as true).

corridor. A home is not "in conformance."[18] This Court is not bound by the district court's contrary assumption,[19] and may freely review the County's LCP and determine for itself that indeed, section 7.9 of the LCP prohibits building a home in "protected" riparian corridors. LCP § 7.9(a), at 7.3 ("only" certain uses allowed in riparian corridors). The County's LCP is interpreted like a statute.[20] The inclusion of a list of permitted uses in section 7.9(a) means that all other uses are prohibited.[21]

The district court's assumption that the County could process and perhaps issue a CDP resulted in its erroneous conclusion that "questions remain as to 'how the [County's LCP] appl[ies] to the [Property].'" ER-14

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[18] The Coastal Commission acknowledged below that the County "cannot grant" a CDP to build a house. ER-107.

[19] This Court "review[s] *de novo* questions of statutory interpretation." *City of Oakland*, 972 F.3d at 1121.

[20] *Berkeley Hills Watershed Coal. v. City of Berkeley,* 243 Cal. Rptr. 3d 236, 248 (Cal. App. 2019) ("In interpreting municipal ordinances, we exercise our independent judgment as we would when construing a statute.") (citing *Harrington v. City of Davis*, 224 Cal. Rptr. 3d 351 (Cal. App. 2017)); *Wheeler v. City of Santa Clara*, 894 F.3d 1046, 1054 (9th Cir. 2018) ("It is a fundamental canon that where the 'statutory text is plain and unambiguous,' a court 'must apply the statute according to its terms.'") (quoting *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009)).

[21] *Wildlife Alive v. Chickering*, 553 P.2d 537, 539–40 (Cal. 1976) ("under the doctrine of *Expressio unius est exclusio alterius*, the creation of a limited express exemption suggests that a broader implied exemption could not have been intended. . . ") (citing *Martello v. Super. Ct.*, 261 P. 476, 478 (Cal. 1927)).

(Order at 8 (citing *MacDonald*, 477 U.S. at 348)). Although the district court correctly concluded that the Planning Director does not have the final say whether to grant a CDP,[22] that conclusion is irrelevant where, as here, a CDP cannot possibly be issued. When the County may not grant a CDP, property owners cannot apply for one.

The Supreme Court has confirmed that filing a development application is not an invariable rule, but that finality is based on common-sense and pragmatism: when the law prohibits a use, the property owner does not need to apply for a use that can't possibly be granted. As in *Suitum*, the County's own law designates the property as being entirely within a categorical "no home" zone. Consequently, when the law itself—the LCP—prohibits any residential use of the property (and indeed, even prohibits the County from *considering* an application to develop a home within the Montecito Riparian Corridor), no application is needed to ripen a takings claim. *Palazzolo*, 533 U.S. at 621 ("Government authorities, of course, may not burden property by imposition of repetitive or unfair land-use procedures in order to avoid a

[22] ER-14 (Order at 8) ("The Planning Director does not have the exclusive authority under the County's zoning regulations to issue a final decision on a CDP application.").

final decision."). Put another way, an application to develop cannot remotely be considered "meaningful" if it cannot be considered or granted as a matter of law. *See S. Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 503 n.5 (9th Cir. 1990) (owner need only make "one meaningful development proposal"); *Dunn v. Cty. of Santa Barbara*, 38 Cal. Rptr. 3d 316, 331 (Cal. App. 2006) ("Because the County has made it clear that its wetland and [Environmentally Sensitive Habitat Area] regulations effectively limit the development of [plaintiff's] property to one residence, his takings claim is ripe for adjudication even though he has not sought permission to build that residence.").

It is not incumbent on Ralston to make an application for a use the County is barred by its LCP from even considering, much less granting.

B. The Economic Viability of the Five Uses Allowed by LCP Section 7.9 Are Matters of Proof, Not Pleading

Once a reviewing court knows that building a home is not permitted by law, it has all the information needed to consider a takings claim on the merits. Are the allowed uses on this property physically and legally possible, and economically viable in Ralston's circumstances? These factual questions remain. remain for resolution. But they are a matter

for proof and determination on the merits (either trial or summary judgment), and not a matter of pleading sufficiency.

As long as the Complaint contains plausible allegations that the non-residential uses in a riparian corridor were not physically possible or financially feasible, Ralston's claim are viable. The Complaint made these allegations ER-169, ¶ 17 (property "is not suitable for any of the uses listed in the LCP as the only uses permissible in a riparian corridor"); ER-170, ¶¶ 26, 27; ER-171, ¶ 37 (LCP restrictions deprive Ralston of all economic benefit from the property). At trial, if Ralston proves that none of these are economically-beneficial uses or are possible given the size, shape, geography, or topography of his land—facts that the Complaint plausibly alleges—there's been a taking. *See Lucas*, 505 U.S. at 1025.

The district court erroneously concluded that the extent of the loss of use and value that results from the residential prohibition could only be analyzed after Ralston submitted a CDP application. ER-18 (Order at 12 ("Again, that decision [whether Ralston may build a home] will only come when the Plaintiffs apply for a CDP and submit a proposal for how they plan to use the Property, which will give the County or the

Commission a chance to apply the County's LCP to that proposed project[.]")).

Not so. The law itself made the decision: the LCP imposes a categorical ban for any home in the Montecito Riparian Corridor. This injured Ralston by denying him *any* home on his property, even though a home is a permissible use under the R-1 zoning. To conclude there has been a taking here, a reviewing court does not need to know what *other* non-residential uses Ralston might propose to make because the categorical ban means that the court already understands what otherwise-permissible uses are allowed (the uses listed in section 7.9(a)), and not allowed (*no home*) under the challenged regulation. The district court does not need to know exactly what kind of home Ralston *can't* build in order to determine that none of the uses allowed under section 7.9(a) are economically-viable or physically possible. That would be the subject of proof on the merits by engineers, appraisers, economists, and Ralston himself.

Because it is legally impossible to issue a CDP to build *any* home on the property, the lack of a denial of a request for a CDP is irrelevant and does not inhibit consideration of a takings claim. The law tells the

district court that the only non-residential uses allowed on the property are "education and research," "consumptive uses as provided for in the Fish and Game Code," "fish and wildlife management activities," "trails and scenic overlooks on public land(s)," and "necessary water supply projects." LCP § 7.9(a), at 7.3. *No home.*

III. No Authority to Override the LCP's Categorical Prohibition

The district court also concluded that *some other* regulation might conceivably allow Ralston to build a home in the Montecito Riparian Corridor, despite the LCP's categorical bar. ER-16 (Order at 9) ("Here, it is impossible to tell from Plaintiffs' informal communications with the Planning Director whether their proposed project requires 'other permits or approvals' or 'a public hearing' such that the Zoning Hearing Officer, Planning Commission, or Board of Supervisors—instead of the Planning Director—must issue the 'final decision' on Plaintiff's CDP application."). The district court did not expressly identify the "other regulation," and cited only to the County's arguments in its briefs. ER-16 (Order at 9 (citing ER-28)).

Having concluded that such a process exists, the district court not surprisingly required Ralston to go through that process, holding that the Planning Director did not have the final say.

But contrary to the district court's conclusion, the County may not override the LCP's residential ban. The district court's opinion referred to three possibilities. First, a variance under Chapter 25 of the County's zoning regulations; second, an exemption for CDP denials that result in takings; and third, an informal "request" as noted on the County's website. None of these apply, and this brief addresses each in turn.

A. No Variance

The district court apparently assumed a variance may allow the County to issue a CDP to build a home in a riparian corridor, even though the court did not expressly so hold. ER-16 (Order at 10 (noting that in *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 297 (1981), the Court cited the lack of a "variance" request); *id.* at 11 ("because respondent failed to apply for variances from the regulations") (quoting *Williamson Cty.*, 473 U.S. at 187); *id.* at 14 (citing *Williamson Cty.* as an example of a property owner being able to request a variance)).

But a variance is not available under the County's general zoning regulations. Nor does the LCP recognize any exemption allowing the County 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"). The "certain exemptions" mentioned do not apply here. 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 the Montecito Riparian Corridor.

Consequently, the County has no procedure under the LCP by which a property owner may ask—or for the County to consider—overriding the LCP's residential ban and issuing a CDP in spite of the categorical bar. The County has not published in the myriad applications and forms it makes available any way for a property owner to ask the County to grant a CDP that does *not* comply with "all applicable plans, policies, requirements and standards of the Local Coastal Program[.]"[23]

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[23] Highlighting the lack of a variance here is the Tenth Circuit's recent decision in *N. Mill St., LLC v. City of Aspen*, 6 F.4th 1216, 1230 (10th Cir. 2021). In that case, the Tenth Circuit concluded that a takings claim was

(footnote continued on next page)

The County did not expressly point the district court to the procedures and standards it asserted allow it to issue a CDP in a riparian corridor. *See* ER-118–126.

True, the County's zoning regulations establish a general variance process. But a property owner may not obtain a variance that grants a CDP for 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 existing land use regulations, and are limited to a narrow range of uses:

> 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.

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not ripe because the owner had not received the city's final decision that might allow the proposed use. The owner argued it did not need to apply for a use because it was not in conformity with the zoning. *Id*. at 1231. The Tenth Circuit rejected the claim, concluding that the city's *other* regulations allowed owners to ask the city to grant uses contradictory to the zoning. *Id*. at 1231. Here, by contrast, the County's procedures afford no similar process.

Zoning Reg. § 6531, at 25.2. A variance permits a "minor deviation" from existing land use regulations so that landowner does not suffer undue hardship, but that deviation may not allow a use in violation of the overall established land use regulatory scheme. *Milagra Ridge Partners, Ltd. v. City of Pacifica*, 72 Cal. Rptr. 2d 394, 400 (Cal. App. 1998). In short, the County cannot backdoor rezone Ralston'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 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 home 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, a home in a "protected" riparian corridor would be a *major* departure from the residential prohibition, 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.[24] Thus, the County cannot require a property owner to seek a variance to override the fundamental residential prohibition in section 7.9(a) of the LCP and request to build a home. A home in the Montecito Riparian Corridor 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 is not available and cannot be granted, Ralston could not—and therefore need not—have sought a variance.

B. Section 30010 of the Coastal Act Does Not Allow a County with a Certified LCP to Ignore Its Certified LCP

The district court also concluded that—despite the LCP's facial prohibition on building a home in the Montecito Riparian Corridor— the County might otherwise grant a CDP to build a home. *See* ER-16 (Order at 10) ("An application for a CDP is important because even if a CDP would normally not be permitted under a certified LCP, the [Coastal Act]

[24] 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. Cty. 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.").

allows for exceptions where a takings [sic] occurs.").[25] The only process the district court pointed to was section 30010 of the Coastal Act. ER-16 (Order at 10) ("An application for a CDP is important because even if a CDP would normally not be permitted under a certified LCP, the CCA allows for exceptions where a takings occurs. See Cal. Pub. Res. Code §§ 30010.").

1. Section 30010 Does Not Apply to Certified LCP Jurisdictions

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 (emphasis added).

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[25] The district court relied on the County's representations to support its conclusion that indeed, there is a process available to ask the County to ignore the LCP's residential ban, and that the County could allow a home to be built. *See* ER-19 (Order at 13 ("but the County repeatedly represented that there is a possibility—despite the Planning Director's preliminary statements—that it will allow them to build a home on the Property")).

(a) Section 30010 Does Not Govern Where a Local Government Has Adopted a Coastal-Commission Certified LCP

By its terms, this statute applies to permitting agencies (including the Coastal Commission) that are required, in the absence of a certified LCP, to apply the Coastal Act to a development proposal. Section 30010 applies only to government entities "acting pursuant to this division" (the Coastal Act). *Id.* (". . . this division is not intended . . ."). Only the Coastal Commission and local governments *without* certified LCPs act "pursuant to" and apply the Coastal Act, and not their own LCP, when processing permit applications. *Id.* § 30604(a).

In stark contrast, when a local government such as the County *with* its own LCP considers development applications, its acts pursuant to that LCP—and not "this division." *Id.* § 30604(b) ("After certification of the local coastal program, a coastal development permit shall be issued if the proposed development is *in conformity with the certified local coastal program*.") (emphasis added); *see also id.* § 30519 (LCP certification ends the Commission's "development review authority," which is thereafter delegated "to the local government that is implementing the local coastal

program").[26] In short, section 30010 applies only to a local government *without* its own LCP.

The district court relied on *McAllister v. Cal. Coastal Comm'n*, 87 Cal. Rptr. 3d 365 (Cal. App. 2008) for the proposition that "[a]n application for a CDP is important because even if a CDP would normally not be permitted under a certified LCP, the [Coastal Act] allows for exceptions where a taking occurs. As noted, a CDP may be granted [by the County] with mitigatory conditions." ER-16 (Order at 10). *McAllister*, however, held only that "section 30010 . . . generally authorizes it [the Coastal Commission] to approve non-resource dependent uses in habitat areas"—uses expressly disallowed by the applicable land-use regulations—"where doing so is necessary to avoid an unconstitutional taking." *McAllister*, 87 Cal. Rptr. 3d at 385. *McAllister* does not say that section 30010 allows a *local government* to relax or otherwise deviate from land-use restrictions imposed by its LCP.

[26] The County's LCP also establishes that the County acts pursuant to the LCP, not the Coastal Act, when reviewing permit applications. *Zoning Reg.* § 6328.12 (the County applies the LCP); *id.* § 6328.3(e) (same)).

(b) Section 30010 Does Not Apply Because Unlike the Coastal Commission, the County May Provide Compensation

The truism that only *un*compensated takings are unconstitutional has unique consequences for the Coastal Commission. *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 536 (2005) (the Takings Clause does not render all takings unconstitutional, only takings for which just compensation is not provided). The Commission lacks the power to acquire private property, either by purchase or by eminent domain. *McAllister*, 87 Cal. Rptr. 3d at 385 ("[T]he Commission is not authorized to purchase property."). Thus, the Commission is barred from effectuating an *uncompensated* taking through a permit denial, because it has no means of paying compensation for the taken property. Thus, section 30100 has been interpreted to allow the Commission to relax its standards and grant a CDP when denial would result in an uncompensated taking or damaging. Thus, section 30010 simply affirms the unremarkable proposition that the Coastal Act does not authorize *uncompensated*—and thus unconstitutional—takings. *Surfrider Foundation v. Martins Beach 1, LLC*, 221 Cal. Rptr. 3d 382, 395 (Cal. App. 2017) (section 30010 "merely restates the limitations imposed by

the takings clause[]," which requires compensation for taken property). *See also Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2021 (2021) ("the government must pay for what it takes").[27]

Moreover, as the statute notes, "[t]his section is not intended to increase or decrease the rights of any owner property under the Constitution of the State of California or the United States." *Id*. The Takings Clause does not forbid takings, only uncompensated takings. *Lingle*, 544 U.S. at 536. A takings claim accepts the limitations which the regulation imposes on the owner's uses, and the focus in these challenges is on the impact of the regulation on the owner's uses. The takings plaintiff does not in most cases object to the regulatory restrictions themselves. *Id*. (the Court abandoned "fails to substantially advance a legitimate state interest" standard as a takings test). That's why in most takings cases, the remedy is compensation and not an injunction ordering the government to back off its restrictive regulation. *Knick*, 139 S. Ct. at 2170. Thus, if applicable here, section 30100 does not give Ralston the

[27] If section 30010 barred *all* takings, compensated or not, it might mean that even a permitting authority with the power to take and pay compensation could be required to relax the restrictive land-use regulations and allow sufficient use to avoid a taking. But that is not what section 30010 says.

authority to demand that the County relax its riparian corridor regulations to allow the building of a home in violation of the LCP. The County has chosen in its LCP to designate riparian corridors as "protected" land in "environmentally sensitive habitat area[s]," and has chosen to "strictly regulate development." Ralston's takings claim merely asks the County to live up to the natural consequences of its choices, and that he not shoulder the financial burden alone

But local governments are not in the same position as the Coastal Commission. They face no similar restriction on their acquisition and payment power. The California Constitution allows local governments to take (and pay for) private property. *See* Cal. Const. art. I, § 19; *San Diego Metro. Transit Dev. Bd. v. Handlery Hotel, Inc.*, 86 Cal. Rptr. 2d 473, 482 (Cal. App. 1999). Because local governments have the ability to provide compensation if they take or damage property, there is no need for them to have the ability to also waive their mandatory regulatory requirements. Thus, section 30100 only confirms that local government must provide compensation—which they already are obligated to do under the federal and state constitutions).

The County, of course, is not bereft of other choices: it might remove Ralston's property from the Montecito Riparian Corridor (done by amending the LCP). Or it might amend the LCP to allow a home to be built in riparian corridors. But these are legislative matters for the lawmaking branches of the County. None of those choices may be accomplished administratively, simply by invoking section 30100 to *de facto* and *ad hoc* amend the LCP only as it applies to Ralston's property.

2. The County Has Not Adopted a Provision Similar to Section 30010 in Its LCP

Nor is there anything similar to section 30010 in the County's LCP, or other ordinances or regulations, that allow it to process—much less grant—a CDP application that is not in conformity with the LCP's residential prohibition on the grounds that to deny the CDP would result in an uncompensated taking. The County's zoning regulations require that for a CDP to issue, a finding be made that the development conforms to the LCP. *See Zoning Reg.* § 6328.3(e), at 20B.1. But those same regulations say nothing about making findings relating beneficial uses or takings.

A local government might—if it so chooses—replicate provisions outside Chapter 3. The County of Monterey, for example, has adopted its

version of section 30010, which clarifies that Monterey's LCP shall not be construed to authorize Monterey County to apply its provisions in a way that results in an uncompensated taking. *McAllister*, 87 Cal. Rptr. 3d at 385.[28] It remains unsettled whether the government may insist that property owners submit constitutional takings claims to the very government claimed to be violating the owner's civil rights. After all, property rights takings claims are constitutional civil rights claims, entitled to their day in a federal court. And if, as the Supreme Court recently concluded, property owners need not submit these federal constitutional takings claims to state courts to satisfy ripeness, there's no reason they can be compelled to submit those same claims to a local government official or agency before asking a federal court to resolve

[28] *See id*. at 938–39 ("In conformity with section 30100, section 20.02.040 of the [Monterey] Coastal Zoning Ordinance provides, in relevant part, that the Coastal Zoning Ordinance 'is not intended and shall not be construed as authorizing the County of Monterey . . . to exercise its 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.'"). The local government in *McAllister* specifically incorporated its own version of section 30010 into its LCP. *McAllister*, 87 Cal. Rptr. 3d at 385. This undercuts any argument that section 30010 binds local governments that have LCPs; if that were so, what purpose could possibly be served by a local government's repeating the terms statute—like Monterey and other counties do—in their LCPs?

their claim. *Knick*, 139 S. Ct. at 2172 ("because a taking without compensation violates the self-executing Fifth Amendment at the time of the taking, the property owner can bring a federal suit at that time"); *Califano v. Sanders*, 430 U.S. 99, 109 (1977) ("Constitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions.").[29] This court need not reach that issue here, and only need confirm that the County has not adopted a provision in its LCP like 30010.

Local governments are not required to incorporate a 30100-like provision in their LCP, and San Mateo has opted to *not* expressly include a provision like section 30010 in its LCP. The County's LCP does not contain any similar provision, or any other mechanism allowing it to

[29] This may be even worse than the Catch-22 scenario that concerned the Court in *Knick*. Here, the district court has effectively immunized the County from any taking liability. If the district court is right, then the County—in this and likely in most cases—will have achieved the dual objectives of barring all development *and* avoiding any evaluation of whether it must provide compensation. Few if any owners have the financial or spiritual resources to go through the a permit that will be met with certain denial, and to present their constitutional civil rights claims to the very agency claimed to be violating their rights, simply to ripen a taking claim for judicial review.

avoid its obligation to deny any residential development proposal within a riparian corridor.

Nor can it be presumed that the County's LCP has implicitly incorporated section 30010 terms, for three reasons. First, the absence of similar language in the County's LCP indicates the County did not mean to adopt it. *See* Cal. Civ. Code § 3530 ("That which does not appear to exist is to be regarded as if it did not exist."); *Wildlife Alive*, 553 P.2d at 539–40 ("the creation of a limited express exemption suggests that a broader implied exemption could not have been intended . . . .").

Second, if certified, the LCP is presumed to conform only to "the minimum policies and standards of the Coastal Act"—*i.e.*, the "development restrictions" contained in Chapter 3 of the Coastal Act. Cal. Pub. Res. Code § 30512.2(a) (requiring conformance only with Chapter 3). But because the Coastal Act does not require conformance to provisions outside of Chapter 3 (such as section 30010), there can be no presumption that a certified LCP impliedly incorporates or otherwise adopts those provisions.

Third, the County has not established a procedure by which a property owner may ask the County to consider a section 30010

exception. A riparian corridor property owner cannot be faulted for not pursuing a process that otherwise might allow for LCP override and permit the issuance of a CDP to build a home, if the County has not in fact have such a process.

C. No Other Procedures

Finally, what of the County's website, which informs property owners that "[a]ny intention to proceed with an application for development that would run counter to any of those policies must first be throughly [sic] reviewed by the Community Development Director and County Counsel." Cty. of San Mateo, *San Mateo County | Montecito Riparian Corridor*, https://planning.smcgov.org/documents/san-mateo-county-montecito-riparian-corridor. The district court noted that Ralston had asked these County officials, as the website directs.

1. The County Has No Authority to Require "Informally" Asking for an LCP-violating CDP

As noted throughout this brief, the County's laws do not recognize any permits or approvals that may be sought or issued to allow building a home in a riparian corridor. Thus, not surprisingly, the County website does not provide any authority supporting its insistence that an owner submit a CDP application to ask the County to issue a CDP "counter" to

the LCP's residential prohibition, or how the Planning Director or the County's lawyer to "review" a property owner's "intention."

Review for what? Neither the Planning Director nor the County Counsel may override the LCP's residential prohibition, by themselves or in concert with any other official or County agency. The County's own law categorically bars issuance of a CDP, and a County website referring to an "informal" process (as the district court labeled it) that tells property owners to ask the Planning Director and the County Counsel for their views cannot change that. *Util. Air Regul. Grp. v. E.P.A.*, 573 U.S. 302, 328 (2014) (A "core administrative-law principle [is] that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate.").[30] Not only the County's own law bar the issuance of a CDP. Once a LCP has been certified by the Coastal Commission, the County has primary permitting authority—but only to the extent of the

[30] The County's improvisational approach may make some sense because it probably saves the County the paperwork, time, and effort devoted to processing development applications that must ministerially be denied because the LCP categorically bars homes in riparian corridors. Owners of restrictively-regulated property also benefit by getting to this ministerial no without undertaking the wasteful expenditure of time and money necessary to prepare a CDP application that will inevitably be denied. But that informal process cannot supplant conformity with the County's own laws and procedures (or lack thereof).

certified plan. Were the County to attempt here to issue a CDP outside the terms of its certified LCP, the lack of conformity would constitute a "substantial issue" triggering the Coastal Commission's appellate authority to review the permit issuance *de novo* and countermand it.

2. No Process to Ask for an Exemption

Even if it were legally possible, the County has not adopted any procedures by which an owner may request an "override," and nowhere in its ordinances, or the forms and applications it publishes, is there a way for landowners to request a "30010 takings exemption" or anything similar. No method exists. We know that CDPs cannot be granted contrary to the ban in the LCP, so the CDP approval forms may not be employed. And we know that the variance process isn't available to allow a home in a riparian corridor on the grounds that to deny a home would be a taking, so an owner cannot apply for a variance.[31] There are no other

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[31] 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

(footnote continued on next page)

official means by which to ask the Planning Director or the County Counsel to "review" a LCP-violative CDP. Nor is there another process by which a property owner may ask the County to consider granting a CDP despite the LCP's prohibition because to do so would result in a taking without just compensation (other than this lawsuit, that is). Nor is there a procedure by which an owner may demand the County provide compensation (again, other than this lawsuit). After all, whether a regulation triggers the constitutional obligation to provide just compensation is a judicial question, not matters for an agency. An agency cannot be expected—and has no authority—to review whether its own actions are constitutional. *Califano*, 430 U.S. at 109 ("Constitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions.").

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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.").

3. The County Can't Insist on "Informal" Review, Then Complain That Ralston Didn't Chase It

At minimum, the County's procedures to request permissions and exemptions—if any indeed exist—should be navigable enough that an average person understands how to proceed. *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). If the County tells property owners that they must go from A to B, it has some obligation to provide directions. *Nollan*, 483 U.S. at 833 (the right to build on one's own property is not a government benefit). Because its regulations limit property's uses, it is not unfair to ask the County provide clear guidelines how to seek the necessary approvals or exemptions under its own rules.

In short, Ralston didn't need to ask the Planning Director and the County Counsel whether he might build a home because the allowed uses are just what the unambiguous text of the riparian corridor regulations categorically provide: no residence of any kind.

But even though there is no basis for the County to require property owners who intend to "proceed with an application for development that would run counter to any of those policies" to allow the Planning Director and the County's lawyer to "thoroughly review" that intention, Ralston did so—as any rational property owner would have, even though the County had not made clear its authority, or the point of asking (in light of the categorical ban on homes). It is not unreasonable, after all, that when the County tells property owners that they should run their "intentions" by the Planning Director and County Counsel, that they do so.

The Complaint alleges that in response, the County confirmed its legal prohibition to Ralston no less than three times. The County's multiple responses to Ralston's requests to build a home in the Montecito Riparian Corridor were the only responses it could have provided in conformity with its law: no building of a home in a riparian corridor. ER-169, ¶¶ 18–19.

First, by refusing to issue a buildability letter. ER-170, ¶ 23. Second, the developability of Ralston's riparian corridor property was squarely presented to the County's Board of Supervisors, which refused both to reconsider the decision or provide compensation. ER-170, ¶ 25. Finally, the Complaint alleges that the Planning Director, in consultation with County Counsel also reviewed the applicable law and stated, "I reviewed the information you submitted with County Counsel. It is our view that the totality of the circumstances surrounding the recent acquisition of the property, including its purchase price, do not establish that the property owners had a reasonable investment-backed expectation to develop the property as a separate single-family residence such that it would be justifiable to override the [LCP] limitation on development within wetland and riparian areas in order to accommodate a reasonable economic use." ER-169, ¶ 20.

Thus, if the County's LCP had not already made it abundantly clear that no home is possible, it became even more so after Ralston's three rejected additional requests. At the very least, these add up to the County having fixed its position, to a "reasonable degree of certainty," what uses it allows and prohibits on Ralston's property. *Palazzolo*, 533 U.S. at 620.

See also Hoehne v. Cty. of San Benito, 870 F.2d 529, 535 (9th Cir. 1989) (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").

Yet the district court faulted Ralston for accepting the County's laws and its officials' responses at face value and doing what its website directs. ER-15 (Order at 9 ("Here, it is impossible to tell from Plaintiffs' informal communications with the Planning Director whether their proposed project 'requires permits or approvals' or 'a public hearing,' such that the Zoning Hearing Officer, Planning Commission, or Board of Supervisors—instead of the Planning Director—must issue the 'final decision' on Plaintiffs' CDP application.")).

As the Supreme Court has reminded, however, final decision takings ripeness is a practical inquiry. *See Pakdel*, 141 S. Ct. at 2230 ("The rationales for the finality requirement underscore that nothing 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."). As a practical matter it would be idle to require a property owner—simply to ripen a takings claim *and for no other reason*—to file an application for a CDP that could not possibly be granted under the LCP; an application that not only contains the usual detailed disclosures and plans about design, planning, engineering, and environmental matters, but also requires the owner to append full-blown legal arguments and supporting evidence (such as appraisal and economics reports and similar proof) in the vain hope that this evidence just might convince County officials that the *Lucas* or *Penn Central* federal takings standards or the separate test for takings under the California Constitution,[32] mean that they had better issue a LCP-violating CDP to build a home, or else agree to provide compensation. *Cf.* Cal. Civ. Code § 3532 ("The law neither does nor requires idle acts.").

[32] Under the California Constitution, a regulation that fails to "substantially advance a legitimate state interest" is a taking (even though the U.S. Supreme Court in *Lingle* repudiated the same test under the U.S. Constitution). *See Landgate, Inc. v. California Coastal Comm'n*, 953 P.2d 1188, 1198 (Cal. 1998).

If landowners must navigate this informal, vague, and standardless process without even a 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. By contrast, the application process would serve mostly as a regulatory black hole with its own inexorable gravity that draws out the process so long and so confusingly that property owners bleed out financially or spiritually, and eventually surrender. All while 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 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 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, Coastal Commission's, and district court's view, it "dies aborning." *See Knick*, 139 S. Ct. at 2167 (describing the "Catch-22" that takings plaintiffs found themselves in as a result of *Williamson County*'s "state procedures" ripeness requirement).

Ralston has met his "relatively modest" obligation to show *de facto* finality because no reasonable doubt remains, even after three unnecessary requests to the County to confirm that the County's laws say what they plainly say—that the County cannot issue a CDP to build any kind of home on his property. 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 three rejected requests, no reasonable uncertainty remains. Ralston's case is ripe.

CONCLUSION

Ralston's takings claims are ripe for judicial review, and the district court wrongly dismissed the Complaint. The Amended Judgment should

be reversed or vacated, and the case remanded for a consideration of the merits.

DATED: January 7, 2022.

Respectfully submitted,

Robert H. Thomas
Jeffrey McCoy

/s/ Robert H. Thomas
Robert H. Thomas
Attorneys for Plaintiffs – Appellants

STATEMENT OF RELATED CASES

Plaintiffs-Appellants are aware of the following cases that may be related within the meaning of Circuit Rule 28–2.6:

1. *Mendelson v. Cty. of San Mateo*, No. 20-17389 (9th Cir.).

2. *Mendelson v. Cty. of San Mateo*, No. 3:20-cv-05696-AGT (N.D. Cal.).

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

I am the attorney or self-represented party.

This brief contains 13,810 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.

[ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

[ ] is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

[ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

[ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:

[ ] it is a joint brief submitted by separately represented parties;

[ ] a party or parties are filing a single brief in response to multiple briefs; or

[ ] a party or parties are filing a single brief in response to a longer joint brief.

[ ] complies with the length limit designated by court order dated ____.

[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature /s/ Robert H. Thomas **Date** January 7, 2022

CERTIFICATE OF SERVICE

I hereby certify that on January 7, 2022, 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/ Robert H. Thomas
ROBERT H. THOMAS

ADDENDUM (Cir. R. 28-2.7)

Table of Contents

U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

* * * *

U.S. Const. amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * *

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 § 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.

* * * *

Cty. 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.

* * * *

Cty. 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.

* * * *

Cty. 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.

* * * *

Cty. 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.

* * * *

Cty. of San Mateo, Cal.,
***Zoning Regulations* § 6328.13 (2020)**

SECTION 6328.13. PRECEDENCE OF LOCAL COASTAL PROGRAM. Where the plans, policies, requirements or standards of the Local Coastal Program, as applied to any project in the "CD" District, conflict with those of the underlying district, or other provisions of this Part, the plans, policies, requirements or standards of the Local Coastal Program shall take precedence.

* * * *

Cty. 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.

* * * *

Cty. of San Mateo, Cal.,
***Zoning Regulations* § 6328.15 (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.

(b) Where the project is located between the nearest public road and the sea, or the shoreline of Pescadero Marsh, that the project is in conformity with the public access and public recreation policies of Chapter 3 of the Coastal Act of 1976 (commencing with Section 30200 of the Public Resources Code).

(c) That the project conforms to specific findings required by policies of the San Mateo County Local Coastal Program.

(d) That the number of building permits for construction of single-family residences other than for affordable housing issued in the calendar year does not exceed the limitations of Policies 1.22 and 1.23 as stated in Section 6328.19.

* * * *

Cty. 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.

* * * *

Cty. of San Mateo, Cal.,
***Zoning Regulations* § 6534.1 (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:

(1) The parcel's location, size, shape, topography and/or other physical conditions vary substantially from those of other parcels in the same zoning district or vicinity.

(2) Without the variance, the landowner would be denied the rights and privileges that are enjoyed by other landowners in the same zoning district or vicinity.

(3) The variance does not grant the landowner a special privilege which is inconsistent with the restrictions placed on other parcels in the same zoning district or vicinity.

(4) The variance authorizes only uses or activities which are permitted by the zoning district.

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

* * * *

Kiren Mathews

From: ca9_ecfnoticing@ca9.uscourts.gov
Sent: Friday, January 07, 2022 5:01 PM
To: Incoming Lit
Subject: 21-16489 Randy Ralston, et al v. County of San Mateo, et al "Brief on the Merits (Opening, Answering, Reply, Supplemental, etc)"

United States Court of Appeals for the Ninth Circuit

Notice of Docket Activity

The following transaction was entered on 01/07/2022 at 5:01:01 PM PST and filed on 01/07/2022

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Case Number:	21-16489
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Docket Text:
Submitted (ECF) Opening Brief for review. Submitted by Appellants Randy Ralston and Linda Mendiola. Date of service: 01/07/2022. [12334973] [21-16489] (Thomas, Robert)

Notice will be electronically mailed to:

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