UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

PEYMAN PAKDEL, et al.,

Plaintiffs,

v.

CITY AND COUNTY OF SAN FRANCISCO, et al.,

Defendants.

Case No. 17-cv-03638-RS

ORDER GRANTING MOTION TO DISMISS

I. INTRODUCTION

Defendant City and County of San Francisco ("City") moves to dismiss this action brought by plaintiffs Peyman Pakdel and Sima Chegini. The City argues that this Court lacks jurisdiction to hear some or all of the claims set forth in the complaint, the complaint fails to state a claim for which relief can be granted, and some or all of the claims set forth in the complaint are not ripe for review. For the reasons explained below, plaintiffs' non-takings constitutional claims are dismissed for failure to state a claim and their state law claims are dismissed as procedurally barred. Because the remaining takings claims are not ripe, they are dismissed without prejudice.

II. BACKGROUND[1]

Plaintiffs are residents of Akron, Ohio. In 2009, they purchased a tenancy-in-common

[1] The factual background is based on the averments in the complaint, which must be taken as true for purposes of this motion.

("TIC") interest in a six-unit apartment building in San Francisco. Their TIC interest gave them ownership rights to a single unit in the building ("Unit"). Plaintiffs do not occupy the Unit, but instead rent it out to a residential tenant. They represent that they do not intend to use the Unit as their home until after they retire. At the time plaintiffs signed the TIC agreement, plaintiffs believed that if they entered and won the condominium conversion lottery they would be entitled to raise rents to market level under the Costa Hawkins Act. They also believed they had the option to perform an "Owner Move In" eviction under the S.F. Rent Ordinance, and to quit the rental business under the Ellis Act. The TIC agreement provides that plaintiffs agree to take all steps necessary to convert the building to condominiums and to share the expenses of such conversion equally with the other co-tenants.

In 2013, the City enacted Ordinance 117-13 ("Ordinance"), which put a moratorium on the condominium conversion lottery and created the Expedited Conversion Program, San Francisco Subdivision Code sections 1396.4, 1396.5 ("ECP"). As a condition of approval under the ECP, an applicant for conversion must offer a lifetime lease to any existing non-owning tenants. In 2015, plaintiffs and their fellow TIC owners sought and obtained permission under San Francisco law to subdivide their property from a TIC into six condominiums under the ECP. As a condition of conversion under the ECP, plaintiffs submitted to the San Francisco Department of Public Works lease documents relating to the Unit and an agreement with the City to offer a lifetime lease of the Unit to the tenant residing there at the time of conversion.

The condominium deeds for the building including the Unit were recorded on March 25, 2017. The plaintiffs' tenant in the Unit submitted an executed lifetime lease to the plaintiffs on or about May 5, 2017. On June 9, 2017, and June 13, 2017, plaintiffs requested that the City not require them to execute and record the lifetime lease under the Ordinance, or in the alternative to compensate them for transferring a lifetime lease interest in their property. The City refused both requests and indicated that failure to execute the lifetime lease would be a violation of the Ordinance and subject plaintiffs to enforcement action. Plaintiffs have not executed and recorded the lifetime lease but intend to do so by the Ordinance's March 2019 deadline unless the lifetime

lease requirement is enjoined by this Court. On June 26, 2017, plaintiffs filed this action seeking that remedy.

III. LEGAL STANDARD

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). While "detailed factual allegations are not required," a complaint must have sufficient factual allegations to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 566 U.S. 662, 678 (2009) (citing *Bell Atlantic v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible "when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* This standard asks for "more than a sheer possibility that a defendant acted unlawfully." *Id.* The determination is a context-specific task requiring the court "to draw on its judicial experience and common sense." *Id.* at 679.

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) challenges the court's subject matter jurisdiction over the asserted claims. It is the plaintiff's burden to prove jurisdiction at the time the action is commenced. *Tosco Corp. v. Communities for Better Environment*, 236 F.3d 495, 499 (9th Cir. 2001); *Morongo Band of Mission Indians v. Cal. State Bd. of Equalization*, 858 F.2d 1376, 1380 (9th Cir. 1988). A court considering a 12(b)(1) motion to dismiss is not limited to the pleadings, *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988), but may rely on extrinsic evidence to resolve factual disputes relating to jurisdiction. *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989). Once a challenge has been raised to the court's subject matter jurisdiction, the party opposing dismissal must "present affidavits or any other evidence necessary to satisfy its burden of establishing that the court, in fact, possesses subject matter jurisdiction." *St. Clair*, 880 F.2d at 201; *Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1039 n.2 (9th Cir. 2003).

A motion to dismiss a complaint under Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the claims alleged in the complaint. *See Parks Sch. of Bus., Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). Dismissal under Rule 12(b)(6) may be based on either the

"lack of a cognizable legal theory" or on "the absence of sufficient facts alleged under a cognizable legal theory." *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1014 (9th Cir. 2013). When evaluating such a motion, the Court must "accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party." *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005). When a plaintiff has failed to state a claim upon which relief can be granted, leave to amend should be granted unless "the complaint could not be saved by any amendment." *Gompper v. VISX, Inc.*, 298 F.3d 893, 898 (9th Cir. 2002) (citation and internal quotation marks omitted).

IV. DISCUSSION

A. Whether Plaintiffs' Takings Claims Are Ripe?

The City seeks dismissal of the first through fourth claims for relief, which each allege that San Francisco's application of the ECP to the Unit resulted in an unconstitutional taking of plaintiffs' property without compensation. According to the City, none of these claims is ripe and therefore the Court lacks jurisdiction to adjudicate any of them.

"The Fifth Amendment does not proscribe the taking of property, it proscribes taking without just compensation." *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985). The Fifth Amendment does not require "that just compensation be paid in advance of, or contemporaneously with, the taking; all that is required is that a 'reasonable, certain and adequate provision for obtaining compensation' exist at the time of the taking." *Id.* Accordingly, where a state provides an adequate procedure, a property owner cannot make a claim for just compensation until he has used the procedure and been denied compensation. *Id.* at 173. There is no constitutional injury until plaintiffs have availed themselves of the state's procedures for obtaining compensation for the injury, and been denied compensation. *San Remo Hotel v. City and County of San Francisco*, 145 F.3d 1095, 1102 (9th Cir. 1998). Invoking *Williamson County*, the City asserts that plaintiffs' claims are not ripe because they did not file a state court judicial challenge to the ECP.

Plaintiffs respond that subsequent Supreme Court and Ninth Circuit decisions have

clarified that *Williamson County* is a prudential standing rule, not a jurisdictional bar. *See Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702 (2010) (finding that defendants had waived nonjurisdictional ripeness argument); *Horne v. Department of Agriculture*, 569 U.S 513, 133 S. Ct. 2053, 2062 (2013) (recognizing that the *Williamson County* inquiry "is not, strictly speaking, jurisdictional."); *Guggenheim v. City of Goleta*, 638 F.3d 1111 (9th Cir. 2010) (exercising discretion not to impose *Williamson County*'s prudential requirement). While plaintiffs correctly characterize *Williamson County* as establishing "prudential ripeness principles" rather than a jurisdictional bar, *see Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 733-34 (1997), the distinction is not critical here because, unlike the defendants in *Stop the Beach*, the City has not waived its ripeness argument. As-applied takings claims, such as those advanced in the complaint, require *Williamson County* exhaustion, and the authorities on which plaintiffs rely do not stand for the proposition that their claims fall outside its prudential ripeness principles. In *Horne*, the Supreme Court declined to find that the petitioner's claim was not ripe on the grounds that there was no alternative remedy. *See* 133 S. Ct. at 2055 ("The Government argues that petitioners' takings claim is premature because the Tucker Act affords a remedy, but, in fact, the AMAA provides a comprehensive remedial scheme that withdraws Tucker Act jurisdiction over a handler's takings claim. As a result, there is no alternative remedy."). Plaintiffs here do not claim that a state court judicial remedy is similarly unavailable. In *Guggenheim*, the Ninth Circuit declined to impose the prudential state court exhaustion requirement because it rejected the plaintiff's claim on the merits and because the parties had already litigated in state court. No such factors counsel deviation from *Williamson County*'s requirements here.

Still, plaintiffs advance several arguments against application of *Williamson County*. First, plaintiffs assert that the Ordinance's poison pill provision, which halts the conversion process for non-resident TIC owners upon the filing of a lawsuit challenging the Ordinance, applies equally whether the suit is filed in state or federal court. They do not, however, explain how this fact relates to the advisability of deferring to state court jurisdiction as a prudential matter.

Second, plaintiffs argue that because their first claim for relief alleges a private taking, that

claim is exempt from the *Williamson County* ripeness doctrine. Because a "private taking" is in essence an illegal government action that cannot be justified with any amount of compensation, such a claim becomes ripe regardless of whether the plaintiff has sought compensation. *See Armendariz v. Penman,* 75 F.3d 1311, n.5 (9th Cir. 1996). That being said, at least one Ninth Circuit decision has rejected the characterization of claims as "private takings," and dismissed such claims as merely part of a standard regulatory takings claim. *See Rancho de Calistoga v. City of Calistoga*, 800 F.3d 1083, 1093 (9th Cir. 2015). The Ninth Circuit's holding is instructive in this case, as it is unclear how plaintiffs can state on the face of their complaint that the Ordinance violates the Public Use Clause of the Fifth Amendment. In *Kelo v. City of New London*, the Supreme Court interpreted the Fifth Amendment's "public use" requirement broadly, and asked only whether the government's exercise of eminent power served a "public purpose." *See* 545 U.S. 469, 480 (2005). This approach reflects the judiciary's "longstanding policy of deference to legislative judgments in this field." *Id.* Plaintiffs' view that the lifetime lease requirement has no conceivable public purpose is plainly contradicted by the Ordinance's text, which articulates a government purpose of controlling displacement of renters into an expensive rental market. To look beyond the plain language of the Ordinance's stated purpose would entail an unwarranted second-guess of the policy decisions of San Francisco's elected officials. Therefore, plaintiffs' "private taking" claim must be construed as an element of the regulatory takings claim, which is subject to the ripeness requirement.

Finally, plaintiffs argue that *Williamson County* does not apply to facial takings claims seeking only injunctive or declaratory relief. *See Levin v. City and County of San Francisco,* 71 F. Supp. 3d 1072, 1079 (N.D. Cal. 2014). Accordingly, plaintiffs reason that claim 10, which seeks declaratory relief for constitutional violations alleged in the complaint, and claim 11, which seeks corresponding injunctive relief, cannot be dismissed on ripeness grounds. As a technical matter, those are not "separate claims" for pleading purposes, but rather requests for alternative forms of relief. Plaintiffs styled their first through fourth claims for relief as "as-applied" takings claims, and the thrust of their complaint is that a particular provision of the Ordinance has effected an

unconstitutional taking of their property. Thus, it is not clear from the face of the complaint that plaintiffs are bringing a facial challenge to the Ordinance. In any case, plaintiffs believe they have incurred a $500,000 loss in property value as a result of the lifetime lease provision, which suggests that damages is a central aspect of their claim, even if it may not be their preferred remedy.

In short, plaintiffs' takings claims are properly characterized as as-applied challenges and subject to the *Williamson County* ripeness requirements. Because plaintiffs have not sought compensation for the alleged taking of their property through a state court inverse condemnation proceeding, they have not exhausted state remedies and their takings claims must be dismissed, without prejudice.[2]

B. Whether Plaintiffs' Section 1983 Claims Are Precluded?

The City also argues that plaintiffs' remaining Section 1983 claims are each precluded by their failure to seek writ relief in state court. Under the "full faith and credit" provision of 28 U.S.C. § 1738, state administrative proceedings are given the same preclusive effect as state court judicial proceedings if they possess the "requisite judicial character." *See White v. City of Pasadena*, 671 F.3d 918, 927 (9th Cir. 2012). The City argues that San Francisco's approval of the Tentative Map was an adjudicative decision by an administrative agency, *Arnel Development Co. v. City of Costa Mesa,* 28 Cal. 3d 511, 518 (1980), and therefore plaintiffs' failure to seek review through an administrative writ precludes federal court review of their Section 1983 claims. In determining the preclusive effect of a state administrative decision or a state court judgment,

[2] The City asserts that because plaintiffs' state law claims are procedurally barred for reasons discussed in greater detail below, dismissal of plaintiffs' takings claims with prejudice is warranted. Although the Ninth Circuit has yet to address this particular scenario, at least three circuits have concluded that dismissal is appropriate under similar circumstances. *See Holliday Amusement Co. of Charleston, Inc. v. South Carolina*, 493 F.3d 404, 408 (4th Cir. 2007); *Pascoag Reservoir & Dam, LLC v. Rhode Island*, 337 F.3d 87, 94 (1st Cir. 2003); *Harbours Pointe of Nashotah, LLC v. Vill. of Nashotah*, 278 F.3d 701, 706 (7th Cir. 2002). While the state law claims asserted in the complaint may be procedurally barred, it is not clear from the face of the complaint that those procedural hurdles necessarily preclude plaintiffs from seeking compensation on their takings theory in state court. Therefore, dismissal without prejudice is appropriate.

federal courts look to the state's rules of preclusion. *See White*, 671 F.3d at 926. *White* sets out several factors that a court considers in deciding whether a state agency is acting in a judicial capacity:

> (1) the administrative hearing was conducted in a judicial-like adversary proceeding; (2) the proceeding required witnesses to testify under oath; (3) the agency determination involved the adjudicatory application of rules to a single set of facts; (4) the proceedings were conducted before an impartial hearing officer; (5) the parties had the right to subpoena witnesses and present documentary evidence; and (6) the administrative agency maintained a verbatim record of the proceedings.

Id. at 928.

The City contends that California courts have weighed these factors and concluded that the City's subdivision decision became *res judicata* when plaintiffs failed to appeal the Tentative Map decision, and its preclusive effect now bars any collateral challenge. None of the authorities relied upon by the City, however, cast light on whether Tentative Map approval was quasi-judicial in character. *Mola Development Co. v. City of Seal Beach*, 57 Cal. App. 4th 405 (1997), assumed that the defendants' disapproval of a tentative map was quasi-judicial without explaining its reasoning, whereas *Miller v. County of Santa Cruz*, 39 F.3d 1030 (9th Cir. 1994), merely stated that an administrative decision may have preclusive effect without satisfying every provision of the California APA. The City's only authority that explicitly discusses the *White* factors similarly fails to support its position. *See McQuiston v. City of Los Angeles*, 564 Fed. App'x 303 (9th Cir. 2014). In that case, the administrative proceeding in question involved fact development through the taking of testimony and admission of evidence, clearly satisfying the *White* elements. *Id.* at 307-08. By contrast, nothing in plaintiffs' complaint suggests that the Tentative Map approval decision satisfied any of the elements of a quasi-judicial proceeding. Therefore, plaintiffs' Section 1983 claims are not subject to dismissal on grounds of preclusion.

C. Whether Plaintiffs Fail to State a Claim Under 42 U.S.C. § 1983?

To state a claim under Section 1983, a plaintiff must show that defendants, acting under color of state law, deprived him or her of federal rights, privileges, or immunities, and caused damages. *See Thornton v. City of St. Helens*, 425 F.3d 1158, 1164 (9th Cir. 2005). Because

Section 1983 is not itself a source of substantive rights, plaintiffs must establish that the City's alleged actions deprived them of some right, privilege, or immunity protected by the Constitution or the laws of the United States.

1. Equal Protection

The City argues that plaintiffs fail to state a claim under the Equal Protection Clause of the Fourteenth Amendment because they have not alleged membership in a protected class and do not seek protection of a fundamental right. As a general rule, unless a classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification further a legitimate state interest. *See, e.g., City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439-41 (1985); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

Here, plaintiffs do not claim to belong to a suspect class. Rather, they contend that the lifetime lease requirement infringes upon the fundamental right to privacy in the use of their home. *See Tom v. City & Cty of San Francisco*, 120 Cal. App. 4th 674, 686 (2004) ("We agree with the trial court that there is an 'autonomy privacy' interest in choosing the persons with whom a person will reside, and in excluding others from one's private residence."). This argument is unavailing for the principal reason that plaintiffs have already in some sense opened their home to the possession and use by their existing tenant. *Tom* involved a challenge to an ordinance that prohibited TIC owners from executing agreements that gave each owner exclusive access to their own unit. The court in that case held that the ordinance violated the plaintiffs' privacy interest in choosing persons with whom they reside. This case is different. Here, what plaintiffs seek is the ability to remove an existing tenant from their home at whichever point in time they desire to occupy the home. Although plaintiffs may feel they should be entitled to pursue that course, it is not a fundamental right in the constitutional sense. Because the lifetime lease requirement does not implicate a fundamental right, plaintiffs do not state a claim subject to strict scrutiny.

Under the more deferential rational basis review, the City argues that the constitutionality

of the lifetime lease requirement is presumed unless plaintiffs can show that the City's disparate treatment of TIC owners with existing tenants has no rational relationship to a legitimate state interest. Rational basis review in Equal Protection analysis "is not a license for courts to judge the wisdom, fairness, or logic of legislative decisions." *Heller v. Doe*, 509 U.S. 312, 319 (1993). The City's objectives in imposing the lifetime lease requirement are expressly articulated in the Ordinance and pass rational basis review. Mindful that permitting large-scale conversion of apartments into condominiums could result in widespread displacement of existing tenants, the Ordinance sought to balance this impact by requiring that applicants for the ECP offer existing tenants a lifetime lease. This requirement is not applied to TIC owners without existing tenants because conversion of their units to condominiums is not projected to result in displacement. While reasonable minds may question the Board of Supervisors' reasoning in making this distinction, plaintiffs have alleged no facts warranting a second-guess of that legislative decision. Accordingly, plaintiffs' seventh claim for relief under the Equal Protection Clause must also be dismissed.

2. Due Process

As explained above, plaintiffs fail to show that the lifetime lease requirement infringes upon a fundamental right. Because plaintiffs also cannot show that the lifetime lease requirement is devoid of a legitimate government purpose, their substantive due process claim fails as well. The bar for demonstrating governmental arbitrariness is high, requiring an "abuse of power lacking any reasonable justification in the service of a legitimate governmental objective." *Shanks v. Dressel*, 540 F.3d 1082, 1088 (9th Cir. 2008) (internal quotations omitted). Plaintiffs have alleged no governmental conduct that gives rise to a constitutional violation. Therefore, plaintiffs' sixth claim for relief is also dismissed.

3. Unreasonable Seizure

The City seeks dismissal of plaintiffs' fifth claim for relief, which asserts that the lifetime lease requirement amounts to an unreasonable seizure in violation of the Fourth Amendment to the United States Constitution. Under the Fourth Amendment, a seizure occurs when "there is some

meaningful interference with an individual's possessory interests" in the property seized. *Maryland v. Macon*, 472 U.S. 463, 469 (1985). According to the City, plaintiffs were not compelled by the government to convert their TIC into condominiums. Once they voluntarily chose to do so, they accepted a valuable property right from the City in exchange for offering a lifetime lease to their existing tenant. The nature of this exchange is not a "seizure" for purposes of the Fourth Amendment. *Maryland v. Macon*, 472 U.S. at 469.

Plaintiffs not surprisingly disagree, arguing that their contractual obligation to take all steps necessary to convert their TIC into condominiums rendered the lifetime lease offer "involuntary". They allege that the TIC agreement they signed bound them to participate in condominium conversion. When the other TIC co-owners applied for condominium conversion, plaintiffs assert they were contractually required to cooperate or compensate their co-tenants for potentially significant damages. After conversion was complete, plaintiffs requested that the City not enforce the execution of the lifetime lease offer they had extended as a condition of condominium conversion. Because the City refused to release them from this obligation, plaintiffs believe they did not voluntarily consent to the seizure of their property within the meaning of the Fourth Amendment.

Although events outside of their control may have frustrated plaintiffs' expectations with respect to future use of the Unit they purchased in 2009, they fail to identify any basis for alleging that the City was responsible for coercing them into doing anything. That the TIC agreement compelled plaintiffs to make concessions they found disagreeable is a risk that all tenants-in-common bear when entering into that type of legal relationship. A subsequent change in the law that affected plaintiffs' obligations under the TIC agreement might have been cause for plaintiffs to contest the TIC agreement itself, but the City did not force plaintiffs to initiate the ECP application process. Because plaintiffs extended the lifetime lease offer in order to obtain a property right granted by the City, they do not allege an involuntary seizure within the meaning of the Fourth Amendment. Therefore, plaintiffs' fifth claim for relief must be dismissed.

D. Whether Plaintiffs' State Law Claims Are Procedurally Barred?

1. Statute of Limitations

The City asserts that each of plaintiffs' state law claims is time-barred under California Government Code Section 66499.37. Section 66499.37 states:

> Any action or proceeding to attack, review, set aside, void, or annul the decision of an advisory agency, appeal board, or legislative body concerning a subdivision, or of any of the proceedings, acts, or determinations taken, done, or made prior to the decision, or to determine the reasonableness, legality, or validity of any condition attached thereto, including, but not limited to, the approval of a tentative map or final map, shall not be maintained by any person unless the action or proceeding is commenced and service of summons effected within 90 days after the date of the decision.

The 90-day limitations period is expressly applicable to any action "to determine the reasonableness, legality, or validity" of any subdivision condition "including, but not limited to, the approval of a tentative map or final map . . . ." *Aiuto v. City and County of San Francisco*, 201 Cal. App. 4th 1347, 1357 (2011). The limitations period to challenge a condition of approval of the Tentative Map begins to run from the time the City issues its Tentative Map decision. *See, e.g.*, *Griffis v. County of Mono*, 163 Cal. App. 3d 414, 423 (1985). Accordingly, the City argues that plaintiffs were required to bring a mandamus action challenging the conditions of approval no later than 90 days after the date of approval of the Tentative Map – in April 2016. Because this lawsuit was not filed until June 26, 2017, the City insists plaintiffs' claims are barred by the statute of limitations.

Plaintiffs disagree with the City's view of when the limitations period began to run. They argue that they could not have challenged the City's decision in April 2016 because the condition placed on the Tentative Map approval required them only to extend a lifetime lease *offer* to their tenant. Until the tenant accepted, they reason, there was no basis to challenge the City's decision as an unconstitutional taking. Instead, they propose that the clock started on either (1) the date the tenant signed the lifetime lease form; or (2) the date the City denied relief from the unfair taking. In other words, according to plaintiffs, they could not have challenged the City's decision until a takings claim had ripened, which was either when the tenant signed the lifetime lease offer, which established the amount of compensation to which plaintiffs believed they were entitled, or when

the City denied relief from the allegedly improper taking by refusing to exempt plaintiffs from the lifetime lease or to pay compensation. Because the dates of these events were May 5, 2017, and June 2017, respectively, plaintiffs contend that their lawsuit is timely.

The City appears to have the better of the argument. Plaintiffs cite no authority supporting their view that the decision referenced in Section 66499.37 refers to any date other than when the relevant condition is placed on approval of a tentative plan. Furthermore, the ripeness of plaintiffs' takings claims, which are brought under federal law, is irrelevant to the question of when the statute of limitations began to run on their state law claims. Plaintiffs have given no indication that their challenges to the Ordinance under the Ellis Act and Costa Hawkins Act, and under the California Constitution, could not have been brought within the 90-day limitations period following Tentative Map approval. Accordingly, the eighth and ninth claims for relief are time-barred and will be dismissed.

2. Forfeiture

The City also argues that plaintiffs forfeited their state law claims by accepting the significant benefits of the Tentative and Final Subdivision Maps when they converted the Unit from a TIC to a condominium. "In the land use context, a landowner may not challenge a permit condition if he has acquiesced to it either by specific agreement, or by failure to challenge the condition while accepting the benefits afforded by the permit." *Lynch v. California Coastal Commission*, 3 Cal. 5th 470 (2017). In the City's view, because plaintiffs completed the conversion into condominiums and realized its associated financial advantages (such as an increase in the value of the property and ability to sell, lease, and finance the Unit separately from the other units in the property), they forfeited the right to seek a judicial determination on their objections to the conditions of Tentative Map approval.

Plaintiffs argue that the Mitigation Fee Act creates an exception to the forfeiture rule, allowing landowners to comply with an improper condition under protest if that condition is related to a possessory interest in the property. Government Code § 66000 *et seq.*, *Sterling Park LP v. City of Palo Alto*, 57 Cal. 4th 1193, 1206-1207 (2013). That may be so, but plaintiffs have

alleged no facts showing that the Mitigation Fee Act, rather than Section 66499.37, is applicable here. Plaintiffs are not developers seeking to challenge "fees, dedications, reservations, or other exactions imposed on a development project." Government Code § 66020. Because nothing in the complaint reflects that the Mitigation Fee Act governs this case, plaintiffs must comply with the general requirements of Section 66499.37. Plaintiffs also argue, without citation to authority, that the forfeiture doctrine in *Lynch* only applies to *discretionary* conditions placed on government approval. Because the lifetime lease offer is a mandatory requirement for approval under the ECP, plaintiffs believe *Lynch* is inapplicable to the facts of this case. Unfortunately for plaintiffs, nothing in *Lynch* itself suggests that its holding is limited by the nature of conditions attached to land use permits.

The facts of *Lynch* do appear to be analogous to this case in important respects. There, beachfront homeowners sought to obtain a permit to build a seawall. While litigation over certain conditions attached to the seawall permit was pending, the homeowners satisfied the permit's other conditions and built the seawall. The Supreme Court of California subsequently held that the homeowners, by accepting the benefits of the permit, had forfeited the right to challenge conditions attached to it. Because plaintiffs have successfully converted their property from a TIC into a condominium under the ECP, they have arguably accepted the projected benefits of the conversion and therefore forfeited the right to challenge a condition of conversion. That the actual value of conversion may have been affected by the condition does not necessarily impact the analysis. The homeowners in *Lynch* challenged a condition that placed a 20-year expiration on the seawall's permit, which likely reduced the projected benefit of the seawall to the homeowners. Nonetheless, once the seawall was built, the homeowners were held to have accepted the benefits of the seawall permit. Accordingly, because plaintiffs did not sue until condominium conversion was complete, they forfeited the right to challenge conditions attached to conversion approval. The eighth and ninth claims for relief are dismissed for that reason.[3]

[3] The City also contends that similar principles can be applied to plaintiffs' federal claims under federal law, which the City believes are equitably estopped. *See Kaneb Services, Inc. v. Federal*

3. Exhaustion

The City asserts that plaintiffs' failure to bring timely administrative and judicial challenges to the Tentative Map approval also bars their state law claims under the doctrines of exhaustion of administrative remedies and *res judicata*. In order to bring a judicial challenge to a decision of an administrative agency, a party must demonstrate that it has exhausted all available administrative procedures, including all available appeals of the agency's decision. *See Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd.*, 35 Cal. 4th 1072, 1080 (2005). Furthermore, a party who does not seek timely judicial review of an administrative decision is precluded from later litigating the issue, under the doctrines of *res judicata* and collateral estoppel. *See Johnson v. City of Loma Linda*, 24 Cal. 4th at 70; *City and County of San Francisco v. Ang*, 97 Cal. App. 3d at 677-79. Therefore, because plaintiffs cannot demonstrate that they appealed the conditions of the Tentative Map approval to the Board of Supervisors as required by the San Francisco Subdivision Code, *see* S.F. Subd. § 1314, the City argues, they cannot now challenge those conditions.

As articulated in their objections to the City's statute of limitations argument, discussed in Part IV.C.1, plaintiffs respond that exhaustion is not required because their takings claims did not ripen within the limitations period for raising administrative and judicial challenges to the lifetime lease requirement. Once again, it is unclear why the ripeness analysis of plaintiffs' federal takings claims are dispositive with respect to exhaustion of their state law claims. Because there is no indication that those state law claims would not have ripened within the limitations period, the eighth and ninth claims for relief are dismissed for failure to exhaust administrative remedies.

V. CONCLUSION[4]

Sav. And Loan Ins. Corp., 650 F.2d 78, 81 (C.A.5, 1981). The single case relied upon by the City is not instructive on this matter. Therefore, the City's forfeiture arguments will be construed as applying only to plaintiffs' state law claims, which are forfeited under California law.

[4] In the event plaintiffs' claims are not dismissed with prejudice, the City asks this Court to abstain from entertaining this action under the *Pullman* doctrine. The *Pullman* doctrine is an equitable doctrine that allows a federal court to avoid deciding federal constitutional questions where resolution of state law issues could obviate the need for a ruling under federal law, and the state

In summary, claims for relief 5 through 7 are dismissed for failure to state a claim for which relief can be granted. Claims for relief 8 and 9 are dismissed as procedurally barred by the statute of limitations, forfeiture, and the doctrine of administrative exhaustion. Because the defects in these claims cannot be cured by amendment, dismissal is without leave to amend.

Claims for relief 1 through 4 are dismissed as not ripe. Dismissal is without prejudice, as plaintiffs are not precluded from seeking compensation for their alleged takings in state court.

Claims for relief 10 through 12 are construed as requests for alternative forms of relief, as opposed to free-standing claims, and are dismissed in accordance with the underlying claims for relief articulated in the complaint.

IT IS SO ORDERED.

Dated: November 20, 2017

RICHARD SEEBORG
United States District Judge

law issues would be more properly decided by a state court. *See Railroad Commission of Tex. v. Pullman Co.*, 312 U.S. 496 (1941); *San Remo Hotel*, 145 F.3d 1095, 1104 (9th Cir. 1998). While a close question, *Pullman* abstention is not warranted in this case, particularly where there is no indication that a legal challenge is already in place for adjudication in state court. This is not a case involving a complicated state administrative or regulatory scheme that a federal court is poorly situated to evaluate. Plaintiffs challenge only the lifetime lease requirement aspect of the ECP scheme, and their complaint does not present legal and factual issues so complex that it is beyond the power of a federal court to adjudicate. Because the City has not provided adequate grounds for this Court to refrain from the deciding the issues of this case, the complaint will not be dismissed on abstention grounds.