(ENDORSED)
FILED
APR 04 2019
Clerk of the Court
Superior Court of CA County of Santa Clara
BY Maggie Castellon DEPUTY

Order Issued on Submitted Matter

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

FRIENDS OF BETTER CUPERTINO, et al., Petitioners, vs. CITY OF CUPERTINO, et al., Respondents.	Case No. 18CV330190 ORDER DENYING MOTION FOR JUDGMENT ON THE PLEADINGS
VALLCO PROPERTY OWNER, LLC, Real Party in Interest.	

The motion for judgment on the pleadings by real party in interest Vallco Property Owner, LLC came on for hearing before the Honorable Helen E. Williams on March 29, 2019, at 9:00 a.m. in Department 10. The matter having been submitted, the Court finds and orders as follows:

I. Statement of the Case

This is a traditional mandamus proceeding under Code of Civil Procedure section 1085 brought by Friends of Better Cupertino and its members Kitty Moore, Ignatius Ding, and Peggy Griffin (collectively, "Petitioners") against the City of Cupertino (the "City") and its clerk Grace Schmidt (collectively, "Respondents"). Petitioners oppose the redevelopment of Vallco

Shopping Mall in Cupertino by real-estate developer Vallco Property Owner, LLC ("Developer"). They challenge the City's review and approval of the proposed development under new procedures established by Senate Bill 35 (Stats. 2017, ch. 366, § 3), principally Government Code section 65913.4.[1]

A. Legislative and Statutory Background

In 2017, the Legislature enacted Senate Bill 35 to create, among other things, "a streamlined, ministerial approval process for infill developments in localities that have failed to meet their regional housing needs assessment [ ] numbers."[2] (Sen. Rules Com., Rep. on Sen. Bill No. 35 (2016–2017 Reg. Sess.) May 27, 2017.)

As relevant here, section 65913.4 states: "A development proponent may submit an application for a development that is subject to the streamlined, ministerial approval process provided by subdivision (b) and is not subject to a conditional use permit if the development satisfies all of the [ ] objective planning standards" set forth in subdivision (a).

The objective planning standards are a set of criteria designed to accelerate approval of high-density housing developments in urban environments while ensuring that developments in ecologically-sensitive or hazardous areas receive thorough review under existing procedures. For example, the proposed development must be "a multifamily housing development that contains two or more residential units" in an urban area that will not require demolition of either rent-controlled or income-restricted housing. (§ 65913.4, subds. (a)(1)-(2), (a)(7).) A development may not be proposed for construction in or on a coastal zone, fire zone, flood plain, earthquake fault zone, hazardous-waste site, wetland, or prime farmland. (§ 65913.4, subd. (a)(6).)

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[1] Further unspecified statutory references are to the Government Code.

[2] As part of the housing element of a municipality's general plan, it must calculate its Regional Housing Needs Allocation or Assessment ("RHNA"), which is the " 'existing and projected need for housing' " in the area for individuals and households of all income levels. (*Fonseca v. City of Gilroy* (2007) 148 Cal.App.4th 1174, 1186, fn. 8, quoting § 65583.) If a municipality's present and projected housing needs exceed its housing stock and land available for development, it must work to satisfy its RHNA by increasing the availability of land for housing development through, for example, changes in zoning and development restrictions. (§ 65583, subd. (c)(1)(A).)

A city must notify a developer in writing if the proposed development *does not* comply with the objective planning standards set forth in Section 65913.4, subdivision (a). (§ 65913.4, subd. (b)(1).) The developer must be so notified within either 60 or 90 days depending on the size of the proposed development. (§ 65913.4, subds. (b)(1)(A)-(B).) If the city does not timely notify the developer that the objective planning standards are not met, "the development shall be deemed[3] to satisfy the objective planning standards in subdivision (a)." (§ 65913.4, subd. (b)(2).) There is no parallel requirement for a city to affirmatively notify a developer if the objective planning standards have been initially determined to have been met.

Proposed developments that qualify for the streamlined, ministerial approval process are still subject to design review and public oversight with the limitation that this oversight "shall be objective and be strictly focused on assessing compliance with criteria required for streamlined projects, as well as any reasonable objective design standards published and adopted by ordinance or resolution by a local jurisdiction before submission of a development application, and shall be broadly applicable to development within the jurisdiction." (§ 65913.4, subd. (c)(1).) The design review must be completed within 90 or 180 days depending on the size of the development and "shall not in any way inhibit, chill, or preclude the ministerial approval provided by this section or its effect … ." (§ 65913.4, subd. (c)(1).) Also, development proposals satisfying certain criteria pertaining to subdivision of parcels "shall be exempt from the requirements of the California Environmental Quality Act (Division 13 (commencing with Section 21000) of the Public Resources Code) and shall be subject to the public oversight timelines set forth in paragraph (1)." (§ 65913.4, subd. (c)(2).)

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[3] To deem something is "to treat [a thing] as being something that it is not, or as possessing certain qualities that it does not possess." (Garner, Dict. of Modern Legal Usage (3d ed. 2011) at p. 254.) It is frequently used "in legislation to create legal fictions … ." (Garner, Dict. of Modern Legal Usage (3d ed. 2011) at p. 254.) The California Supreme Court has explained that the term "deemed" creates a rule of substantive law by establishing the legal equivalent of a particular fact or scenario. (*People v. McCall* (2004) 32 Cal.4th 175, 188.)

B. Factual Background

In March 2018, Developer submitted to the City an application entitled "Vallco Town Center Project Application pursuant to SB35" proposing construction of a large mixed-use development with high-density housing as well as office and retail space. (Am. Pet., ¶ 34 & Ex. 4.) The City made an initial determination that the project met objective planning standards and so notified Developer. But, according to Petitioners, the proposed development is on a hazardous waste site, does not have sufficient residential space, exceeds height limits, lacks a sufficient setback, does not comply with requirements for below-market-rate units, and lacks dedicated parkland, meaning it does not meet the objective planning standards. (Am. Pet., ¶¶ 44–113.) Petitioners thus assert the proposed development is ineligible for the streamlined, ministerial approval process because it does not comply with objective planning standards and, in addition, it does not comport with objective design standards sufficient to qualify for final approval. (Am. Pet., ¶¶ 124–130.) On these bases, Petitioners set forth two "causes of action" challenging: (1) the City's initial determination on June 22, 2018, that Developer's proposal met objective planning standards and thus qualified for the streamlined, ministerial approval process under section 65913.4; and (2) the City's decision on September 21, 2018, to approve and issue permits for Developer's project. (Am. Pet., ¶¶ 24–25 & Exs. 1-2.) They petition the Court to nullify or direct the City to rescind both decisions.

C. Procedural Background

Petitioners filed their original petition for writ of mandate on June 25, 2018, which date they believed to be the City's deadline for notifying Developer that its proposed development was ineligible for streamlined, ministerial review. They initially alleged that the City never acted in response to Developer's application and intentionally ran out the clock so the proposed development would be "deemed" to satisfy the objective planning standards under section 65913.4, subdivision (b)(2). (Pet., ¶¶ 32–35.) They simultaneously filed an application asking the Court to issue the writ ex parte, which they withdrew shortly thereafter upon learning that the City had, in fact, responded to Developer's application on the evening of Friday, June 22, 2018.

On October 16, 2018, Petitioners filed the amended petition in which they acknowledge the City did respond to Developer's application. (Am. Pet., ¶¶ 4-5 & Exs. 1-2.)

In February 2019, Developer filed a motion for judgment on the pleadings, which is accompanied by a request for judicial notice. Petitioners oppose the motion and include a request for judicial notice in their opposition. Respondents filed a statement of non-opposition stating they take no position, either in support of or against, the motion.

II. Legal Standard

Under Code of Civil Procedure section 438, a defendant may move for judgment on the pleadings on the ground that the pleading fails to state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 438, subd. (c)(1)(B)(ii).) The pleading defect must "appear on the face of the challenged pleading or from any matter of which the court is required to take judicial notice." (Code Civ. Proc., § 438, subd. (d).)

III. Requests for Judicial Notice

Developer filed a request for judicial notice of court records, particularly: (1) proof of service of summons of amended petition; (2) Petitioners' case-management statement from September 26, 2018; (3) Respondents' case-management statement from September 25, 2018; and (4) Developer and Respondents' case-management statement from November 21, 2018.

A court may take judicial notice of court records under Evidence Code section 452, subdivision (d). But when a court does so, particularly with respect to a pleading challenge, it does not take judicial notice of the truth of statements in the records; rather, it takes judicial notice of the fact that the records say what they say. (*Hamilton v. Greenwich Investors XXVI, LLC* (2011) 195 Cal.App.4th 1602, 1608, fn. 3; *Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1564-65.)

Developer requests judicial notice of and relies on the truth of statements in the court records, including the truth of representations made about service of process. The Court cannot take judicial notice of the truth of statements in the court records. Consequently, Developer's request for judicial notice is DENIED.

In a footnote of Petitioners' opposition, they request judicial notice of the Administrative Record in this action. (Opp. at p. 4, fn. 3.) "Any request for judicial notice must be made in a separate document listing the specific items for which notice is requested … ." (Cal. Rules of Court, rule 3.1113(*l*).) Petitioners' request does not comply with this rule, and so it is improper. And, like Developer, Petitioners appear to improperly request and rely on the truth of statements in the Administrative Record. For both of these reasons, Petitioners' request for judicial notice is likewise DENIED.

IV. Merits of Motion

Developer's central argument is that the amended petition is barred by the statute of limitations. While a party may raise the statute of limitations as a basis for challenging the sufficiency of a pleading, it must be shown that the statute clearly and affirmatively bars the action. (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1315-16.) If the allegations merely reflect that the action *may* be barred, a court cannot dismiss the action at the pleading stage. (*Ibid.*) The moving party must demonstrate (1) which statute of limitations applies and (2) when the claim accrued. (*Id.* at p. 1316.) Although Developer persuasively argues that the Court should apply the 90-day statute of limitations set forth in section 65009, its position on accrual is not convincing. Accordingly, for the reasons set forth below, Developer does not demonstrate that the amended petition is clearly and affirmatively barred by the statute of limitations.

A. Applicable Statute of Limitations

The parties dispute whether this action is subject to the 90-day limitations period set forth in section 65009. No court has addressed the statute of limitations applicable to an action arising from a dispute over the novel procedures for streamlined, ministerial review under section 65913.4. This is an issue of first impression.

The Legislature enacted section 65009 because it found "there currently is a housing crisis in California and it is essential to reduce delays and restraints upon expeditiously completing housing projects." (§ 65009, subd. (a)(1).) The statute "is intended 'to provide certainty for property owners and local governments regarding decisions made pursuant to this

division' (§ 65009, subd. (a)(3)) and thus to alleviate the 'chilling effect on the confidence with which property owners and local governments can proceed with projects' (*id.*, subd. (a)(2)) created by potential legal challenges to local planning and zoning decisions." (*Travis v. County of Santa Cruz* (2004) 33 Cal.4th 757, 765 (*Travis*).) "To this end, section 65009 establishes a short statute of limitations, 90 days, applicable to actions challenging several types of local planning and zoning decisions … ." (*Travis,* at p. 765.)

Section 65009, subdivision (c)(1) provides that "no action or proceeding shall be maintained in any of the following cases by any person unless the action or proceeding is commenced and service is made on the legislative body within 90 days after the legislative body's decision … ." The cases subject to this limitation consist of actions "[t]o attack, review, set aside, void, or annul the decision of a legislative body to adopt or amend" a general or specific plan, a zoning ordinance, or a development agreement as well as challenges to decisions on a regulation attached to a specific plan, a conditional use permit, or any other permit. (§ 65009, subds. (c)(1)(A)-(E).) Additionally, an action "[c]oncerning any of the proceedings, acts, or determinations taken, done, or made prior to any of the decisions listed" above are subject to the 90-day limitations period. (§ 65009, subd. (c)(1)(F).)

A decision on whether to approve and issue a permit for a project indisputably comes within section 65009, subdivision (c)(1)(E). (See *Travis*, *supra*, 33 Cal.4th at pp. 766-67; see also §§ 65901, 65903.) This is so irrespective of whether the decision follows a traditional review or a streamlined, ministerial review; in either case, the decision rests on an evaluation of planning and zoning standards. (Cf. Cupertino Mun. Code, §§ 19.12.010, 19.12.080 with Gov. Code, § 65913.4, subds. (a) & (c)(1).) Additionally, in light of section 65009, subdivision (c)(1)(F), a preceding decision about whether to conduct a streamlined, ministerial review under section 65913.4 in the first instance is necessarily subject to the 90-day limitations period as well. Thus, the amended petition challenging the City's decisions in June and September 2018, is subject to the 90-day limitations period in section 65009, which "courts have interpreted … as

applying to challenges to a broad range of local zoning and planning decisions. [Citations.]"[4] (*Save Lafayette Trees v. City of Lafayette* (2019) 32 Cal.App.5th 148, 156-157.)

Petitioners do not advance any compelling points to support a contrary conclusion.

First, Petitioners argue unspecified policy considerations establish that section 65009 should not apply. There are a number of problems with this argument. Petitioners do not identify and there does not appear to be an ambiguity in section 65009 warranting consideration of public policy as an extrinsic aid to interpretation. (See *Coburn v. Sievert* (2005) 133 Cal.App.4th 1483, 1496.) And they do not clearly articulate just what public policy is at issue. They state that applying the 90-day limitations period would require a party to file a petition and then amend the pleading to challenge a municipality's subsequent decisions about the same project, which they characterize as "an unnecessary multiplicity of filings in respect of the same project." (Opp. at p. 7:2–3.) It is unclear whether Petitioners are relying on the general policy of judicial economy or attempting to invoke some other canon of statutory interpretation (see, e.g., *State Dept. of Public Health v. Super. Ct.* (2015) 60 Cal.4th 940, 955-956). In either case, they do not provide a reasoned explanation or support for the characterization quoted above, which appears to be overstated. Their argument also seems to be based on a hypothetical scenario that is not necessarily typical or representative. For these reasons, Petitioners' policy argument is unavailing.

In reaching this conclusion, the Court observes the Legislature's stated policy reason for enacting both section 65009 and section 65913.4 was to remedy California's housing crisis by expediting the development process. (§§ 65009, subd. (a)(1), 65913, subd. (a)(1).) Thus, applying the 90-day statute of limitations under these circumstances is consistent with the public policy informing the statutes, particularly in the absence of an identifiable countervailing policy.

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[4] Petitioners state that their amended petition raises other issues unrelated to section 65913.4. (Opp. at p. 4:13-21.) But Developer disputes this characterization. (Reply at pp. 12:27–13:3.) And, in any event, the additional issues still concern the City's decision to approve and issue permits for Developer's project. Consequently, although not especially clear, to the extent Petitioners intended to argue the amended petition is not entirely subject to Section 65009, their argument lacks merit.

Second, Petitioners argue that section 65009 applies only to discretionary planning and zoning decisions and not ministerial decisions made during the streamlined approval process. They do not identify any statutory language in support. Indeed, no such limitation is apparent from the face of the statute. And Petitioners do not cite any case espousing their interpretation.

Finally, Petitioners contend that section 65009 does not apply because they are not challenging the decision of a legislative body. This argument is not supported by the statute's express language. Section 65009 does not just apply to actions challenging decisions by legislative bodies. As relevant here, section 65009, subdivisions (c)(1)(E) and (F) encompass any decision or determination on a permit or a prior determination and do not contain the phrase "decision of a legislative body." (See *Stockton Citizens for Sensible Planning v. City of Stockton* (2012) 210 Cal.App.4th 1484, 1496 (*Stockton Citizens*); see also *1305 Ingraham, LLC v. City of Los Angeles* (2019) 32 Cal.App.5th 1253, [*6-*7].) Petitioners do not otherwise cite authority to support their interpretation. In fact, the Court of Appeal rejected a nearly identical argument in *Stockton Citizens*. In that case, the Court held that a challenge to a permitting decision made by an official in Stockton's planning department came within section 65009, subdivision (c)(1)(E) and rejected the argument that the 90-day limitations period did not apply because he did not qualify as a legislative body. (*Stockton Citizens*, at p. 1495.) In reaching this conclusion, the Court determined "legislative body" as used in section 65009, subdivision (c)(1) encompasses municipal zoning boards and administrators authorized to make decisions about project applications. (*Stockton Citizens*, at p. 1495.) Accordingly, Petitioners' argument lacks merit. The fact that the City Manager signed the letters at issue here thus does not support the conclusion that section 65009 is inapplicable.

B. Accrual

Developer asserts that this action accrued in June 2018, when the City made its first decision about the project application—that it met objective planning standards under section 65913.4, subdivision (a). In presenting this argument, Developer asks the Court either to disregard that Petitioners also challenge the City's later approval decision in September 2018, or to treat the decisions as though they are one and the same, accruing in June. Put differently,

Developer seems to argue that the June 2018 letter constituted the City's final approval of its application *following* the intended streamlined, ministerial review such that the September 2018 letter is redundant or inoperative. Developer's construction of the pleading is not justified and its accrual argument is not convincing.

Developer urges that the Court should treat the petition as challenging the June decision alone because "the City had no choice but to issue the permits in September, given the deemed-compliance provision was triggered." (Mem. of Pts. & Auth. at p. 14, fn. 8.) This assertion is not well-taken because it is not supported by a reasoned explanation, legal authority, or the facts alleged.

Presumably, Developer is referring to section 65913.4, subdivision (b)(2), which says, "[i]f the local government fails to provide the required documentation pursuant to paragraph (1), the development shall be deemed to satisfy the objective planning standards in subdivision (a)." This provision was not triggered here because the City affirmatively communicated with Developer about its application. Developer's project was not *deemed* to comply with the objective planning standards by operation of law.[5] And it is fundamentally unclear how section 65913.4, subdivision (b)(2) would alone require a city to finally approve and issue permits for a project.

Although not clearly articulated by Developer, it appears to be relying on the assumption that the streamlined, ministerial review process is a one-step process culminating in a single decision on whether a proposed development meets the objective planning standards set forth in section 65913.4, subdivision (a). But Developer does not substantiate or consistently rely on that interpretation of the statute.

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[5] Developer simultaneously and inconsistently states that section 65913.4, subdivision (b)(2) rendered the City's June 2018 decision a final decision on its application. (Mem. of Pts. & Auth. at p. 11:1–23.) But that subdivision does not purport to finalize a city's affirmative act; rather, it operates when a city fails to act. Section 65913.4, subdivision (c) does not support a contrary conclusion; Developer's reliance on out-of-context language from that subdivision is misplaced.

Petitioners, for their part, treat the June 2018 letter as an initial determination by the City that Developer's proposal qualified for streamlined, ministerial review and the September 2018 letter as a decision to finally approve and issue permits for the project upon completing the streamlined, ministerial review. This treatment is factually consistent with the City's own representations about the nature and significance of these letters. (Am. Pet., Exs. 1-2.) At times, Developer appears to take a position consistent with Petitioners' by describing section 65913.4 as involving two processes. (Mem. of Pts. & Auth. at pp. 5:20-6:23.) Thus, to the extent Developer is arguing the streamlined, ministerial review process consists of one phase that culminates in a single decision, it is taking inconsistent positions on interpretation of the statute.

More significantly, this interpretation is not supported by the language of the statute. The objective planning standards in section 65913.4, subdivision (a) are prerequisites that must be satisfied for the proposal to be "subject to the streamlined, ministerial approval process in subdivision (b) … ." This language suggests—consistently with Petitioners' interpretation and the City's apparent interpretation—that a city must first determine whether a proposal qualifies for streamlined, ministerial review before actually conducting that review. Additional support for that interpretation can be found in section 65913.4, subdivision (k), which refers to "[t]he determination of whether an application for a development is subject to the streamlined ministerial approval process" as though that determination is a separate, preliminary determination of eligibility. That said, there is also language in section 65913.4, subdivisions (b)(1) and (c)(1) suggesting evaluation of the objective planning standards is not just a prerequisite for streamlined, ministerial review, but is also a part of the review itself. In either case, section 65913.4 allows review to be completed in two stages and does not provide that a city may render only one decision to approve or deny a project application. Section 65913.4, subdivisions (b)(1) and (c)(1) set forth two different deadlines for evaluating the objective planning standards and objective design standards.[6] A city's initial evaluation of whether a

[6] Although not raised by the parties, an argument could be made that the objective design standards are themselves objective planning standards because there is a reference to those design standards at section 65913.4, subdivision (a)(5). But placing significant reliance on that reference is problematic in light of section 65913.4, subdivision (c)(1), which gives localities

proposed development comports with objective planning standards must be completed within 60 or 90 days, and a city then has an additional 30 to 90 days to determine whether the project complies with objective design standards. And so, the statute does not require a city to issue one decision at the conclusion of a unified or single-phase review. This is particularly true in light of the default provision in section 65913.4, subdivision (b)(2), which reflects that a city may be required to issue an initial decision on the criteria in subdivision (a) before its deadline for design review and public oversight elapses.

For these reasons, Developer does not demonstrate the June 2018 decision was the only statutorily authorized decision the City could issue for the purpose of conducting a streamlined, ministerial review under section 65913.4.

Ultimately, whether the Legislature envisioned a two-step process or a one-step process culminating in a single decision to approve or deny a project application, the City issued two distinct decisions here. The June 2018 "letter serves as a determination of whether the Project Application is eligible for streamlined, ministerial review … ." (Am. Pet., Ex. 1.) The September 2018 "letter serves as ministerial approval … pursuant to [ ] Section 65913.4 … ." (Am. Pet., Ex. 2.) Thus, irrespective of what the City should have done, the facts alleged show that it made an initial eligibility determination and a later decision finally approving and issuing permits for the project. Accordingly, there is no factual basis for treating these decisions as though they are one and the same or disregarding the September 2018 decision, even as to satisfaction of the objective planning standards.

In addition to the fact that the June 2018 letter does not purport to be a final decision following the City's streamlined, ministerial review, the September 2018 letter also reflects as much. The September 2018 letter states that the City received additional application information from June through September 2018, and did not receive a "cumulative ('clean') package" from

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additional time to review objective design standards. If compliance with objective design standards was treated as an objective planning standard under subdivision (a), design review would need to take place in accordance with the deadlines in subdivision (b)(1) and subdivision (c)(1) would be surplusage. Courts typically avoid interpreting statutes in such a manner. (*Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 22.) And so, the Court does not interpret the statute in that way.

Developer until September 15, 2018. (Am. Pet., Ex. 2.) In other words, it appears Developer did not actually submit a complete application until September 2018.[7] A final decision on the project could not possibly have been rendered before the submission of the information upon which the ultimate decision was based. Also, in August 2018, the City prepared an environmental impact report that contains statements about the Vallco area qualifying as a hazardous waste site. (Am. Pet., Ex. 8.) In the September 2018 letter, the City included language purporting to amend a portion of the June 2018 letter addressing whether the proposed development is on a hazardous waste site. (Am. Pet., Ex. 2 at p. 4.) These additional facts support the conclusion that the June 2018 letter was not a final approval at the conclusion of the City's review.[8] These circumstances instead buttress the conclusion that the September 2018 letter is the operative "decision" for statute of limitations purposes.

In light of this conclusion, Developer's reliance on *Honig v. San Francisco Planning Department* (2005) 127 Cal.App.4th 520 (*Honig*) is misplaced. In *Honig*, the petitioner challenged a municipality's issuance of a zoning variance and accompanying building permit, which itself rested on the variance. (*Honig*, *supra*, 127 Cal.App.4th at pp. 523-524.) In evaluating a statute-of-limitations argument, the Court construed the petition as a challenge to the variance rather than the permit because the focus of the challenge was whether the variance should have been granted and the permit simply memorialized the variance. (*Id.* at p. 528.) Based on this construction, the Court concluded that the petition was untimely. (*Ibid.*) *Honig* is not

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[7] The City stated in its September 2018 letter that it did not "find that the clarifying information resulted in a new application." (Am. Pet., Ex. 2 at p. 4.) But it is not apparent that this statement would necessarily control. Developer has not briefed the issue of what constitutes submission of an application under section 65913.4, and so a determination cannot be made at this juncture that it or the City have correctly interpreted the statute in that regard. In any event, this fact is not material to the resolution of the motion because the City ultimately issued two distinct decisions, one in June 2018, and one in September 2018, the first being preliminary to the second.

[8] Developer mischaracterizes statements in Petitioners' opposition about the significance and finality of the June 2018 letter. Petitioners are not conceding it was the operative, final decision at the conclusion of the review process.

analogous here because Petitioners are not challenging two functionally identical or coextensive determinations.

In sum, Petitioners are not solely challenging the initial eligibility determination made in June 2018 and there is no basis for disregarding their challenge to the approval decision made in September 2018, which did not merely rest on the prior June determination. Accordingly, Developer fails to demonstrate that this action accrued in June 2018, and thus had to be challenged within the following 90 days.[9]

Even assuming the action accrued in part in June 2018, the Court cannot grant Developer's motion for several reasons. First and foremost, a motion for judgment on the pleadings directed to a pleading as a whole cannot be granted unless the entire pleading is defective. (See, e.g., *Mendoza v. Continental Sales Co.* (2006) 140 Cal.App.4th 1395, 1406-07; see also *Warren v. Atchison, T. & S.F. Ry. Co.* (1971) 19 Cal.App.3d 24, 29 [discussing standard for demurrer to complaint as a whole].) Because Developer does not demonstrate that the statute of limitations bars the petition in its entirety, its motion directed to the entire petition cannot be granted. And Developer's timeliness argument rests on extrinsic facts about service that cannot be substantiated based on the record before the Court.[10]

V. Conclusion

Developer's statute-of-limitations argument lacks merit because it is based on an erroneous construction of the allegations in the pleading and the operative statute, section 65913.4. Developer's motion for judgment on the pleadings is, therefore, DENIED.

Date: April 4, 2019

HELEN E. WILLIAMS
Judge of the Superior Court

[9] In light of this conclusion, it is unnecessary to consider Developer's relation-back argument.

[10] The record before the Court for the purpose of Developer's motion for judgment on the pleadings does not include the matters of which Developer requests judicial notice because those matters are not proper subjects of judicial notice for the reasons set forth in section III above.

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA
DOWNTOWN COURTHOUSE
191 NORTH FIRST STREET
SAN JOSÉ, CALIFORNIA 95113
CIVIL DIVISION

(ENDORSED)
FILED
APR 04 2019
Clerk of the Court
Superior Court of CA County of Santa Clara
BY Maggie Castellon DEPUTY

Heather Marie Minner
396 Hayes St
San Francisco CA 94102

RE: **Friends of Better Cupertino, et al. vs. City of Cupertino, et al. (CEQA)**
Case Number: **18CV330190**

PROOF OF SERVICE

Order denying motion for judgment on the pleadings was delivered to the parties listed below the above entitled case as set forth in the sworn declaration below.

If you, a party represented by you, or a witness to be called on behalf of that party need an accommodation under the American with Disabilities Act, please contact the Court Administrator's office at (408) 882-2700, or use the Court's TDD line (408) 882-2690 or the Voice/TDD California Relay Service (800) 735-2922.

DECLARATION OF SERVICE BY MAIL: I declare that I served this notice by enclosing a true copy in a sealed envelope, addressed to each person whose name is shown below, and by depositing the envelope with postage fully prepaid, in the United States Mail at San Jose, CA on April 04, 2019. CLERK OF THE COURT, by Maggie Castellon, Deputy.

cc: Bern Steves 19925 Stevens Creek Blvd Cupertino CA 95014
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