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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

49HOPKINS, LLC,  
Plaintiff,  
v.  
CITY AND COUNTY OF SAN  
FRANCISCO, et al.,  
Defendants.

Case No. [19-cv-00811-SI](#)

**ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANTS'  
MOTION TO DISMISS SECOND  
AMENDED COMPLAINT**

Re: Dkt. No. 54

Now before the Court is a motion to dismiss filed by defendants City and County of San Francisco (“the City”), Planning Commission of the City and County of San Francisco (“Planning Commission”), San Francisco Planning Department (“Planning Department”), San Francisco Department of Building Inspection (“DBI”), and the San Francisco Board of Supervisors (“BOS”). Pursuant to Civil Local Rule 7-1(b) and General Order No. 72-5, the Court finds this matter appropriate for resolution without oral argument and VACATES the hearing set for September 4, 2020. The Court CONTINUES the case management conference to October 16, 2020, at 3:00 p.m. For the reasons set forth below, the Court GRANTS IN PART and DENIES IN PART the motion to dismiss.

**BACKGROUND**

This lawsuit arises out of the demolition of a home in the Twin Peaks neighborhood of San Francisco. Plaintiff is a California limited liability company and is the owner of real property situated at 49 Hopkins Avenue, San Francisco, California. Dkt. No. 51 (“SAC”) ¶ 3. The subject property was originally constructed in 1935 as a one-bedroom, 927 square foot single-family home

1 by well-known architect Richard Neutra. *Id.* ¶ 21. The home had since been altered, primarily  
2 between 1959 and 2004, to include a second story, garage, and an enclosed swimming pool. *Id.*  
3 Post-alterations, the property included a 240 square foot garage; a 1,312 square foot two-story, one-  
4 bedroom home; and a 1,580 square foot indoor pool house, for a total of 3,132 square feet. *Id.* ¶ 22.

5 In 2014, the then-property owner engaged an architect to redesign the property into a three-  
6 story, four-bedroom/four bath, 3,675 square foot single-family home with a 240 square foot garage.  
7 *Id.* ¶ 23. The architect submitted the plans to the Planning Department, the then-owner engaged an  
8 architectural historian as required to conduct a historic evaluation of the property,<sup>1</sup> and on July 25,  
9 2014, the then-owner began the permit approval process by submitting the architectural plans  
10 (commonly referred to as a “site plan”) to DBI. *Id.* ¶¶ 23-25. The site plan and subsequently  
11 submitted addendum (including structural engineering plans) were part of the plans that were  
12 approved under the assigned permit number (“2014 Permit”). *Id.* ¶ 25. On or about August 10,  
13 2015, the Planning Department approved the site plan, which authorized:

14 REMOVAL [OF] EXISTING SUNROOM, INTERIOR REMODEL  
15 & VERTICAL ADDITION. WORK TO INCL: VERTICAL  
16 ADDITION ABOVE THE 2ND FLOOR, INTERIOR REMODEL  
OF 1ST & 2ND FLOOR. FRONT YARD TO REMOVE EXISTING  
WALL ENCLOSURE & PROPOSE LANDSCAPE.

17 *Id.* ¶ 26. The 2014 Permit required maintaining “(1) portions of the east side CMU [concrete  
18 masonry unit] wall; (2) portions of the existing second story kitchen floor; (3) portions of the  
19 existing framing above the garage; (4) portions of the westside wall at the bottom of [the] stairs  
20 leading to the front entrance[;] and (5) the underlying structure supporting the east side windows.”  
21 *Id.* ¶ 31.

22 On or about December 3, 2015, after the Planning Department and DBI’s approval of the  
23 site plan, the then-property owner submitted a structural engineering plan addendum to DBI as part  
24 of DBI’s process for approving the 2014 Permit. *Id.* ¶ 28. In May 2016, DBI approved and stamped  
25 the 2014 Permit for the proposed three-story, four-bedroom/four bath single-family home,  
26

27 \_\_\_\_\_  
28 <sup>1</sup> The architectural historian determined the property “was not a historic resource given the  
multiple alterations and renovations that had taken place since Neutra’s original 1935 construction  
of the Property.” SAC ¶ 24.

1 containing 3,675 square foot of living space and a 240 square foot garage. *Id.*

2 Plaintiff purchased the property and 2014 Permit in January 2017. *Id.* ¶ 29. Work on the  
3 property began in August 2017 after plaintiff secured construction financing. *Id.* The SAC alleges,  
4 “During the approved demolition work at the Property, the General Contractor exposed various  
5 portions of the existing building structure that were previously hidden behind walls. Upon exposure,  
6 the General Contractor discovered that several of the structural elements expected to remain in place  
7 by the 2014 Permit were, in fact, structurally compromised and he determined that those elements  
8 posed immediate life-safety dangers to his construction crew.” *Id.* ¶ 30. “The General Contractor,  
9 based on his professional experience and knowledge, understood and determined that the  
10 compromised structural elements uncovered during demolition would need to be removed one way  
11 or the other because they could not structurally support the three-story home in the 2014 Permit  
12 AND because they posed immediate life-safety hazards for workers.” *Id.* ¶ 37 (emphasis omitted).  
13 Rather than stop work, plaintiff’s general contractor “immediately remove[d] the compromised  
14 structure for life-safety reasons even though the 2014 Permit called for maintaining those structural  
15 elements as part of the new home.” *Id.* Plaintiff’s general contractor “understood that as a matter  
16 of long-standing practice at DBI, the removal of the compromised structure would necessarily  
17 require submission of revised structural engineering plans to DBI as part of an alteration permit  
18 prior to commencement of any construction.” *Id.*

19 On October 4, 2017, in response to a neighbor’s complaint, DBI issued a Notice of Violation  
20 (“NOV”) “for the portion of demolition work that had occurred beyond the scope of the 2014  
21 Permit.” *Id.* ¶ 38 (emphasis omitted). The notice of violation states that “it appears the scope of  
22 demolition has been exceeded. The entire house has been demolished, except for the garage area.”  
23 Dkt. No. 37 at 6 (RJN Ex. B – Notice of Violation);<sup>2</sup> *see also* Dkt. No. 55 at 4 (Defs’ RJN Ex. A –  
24 Notice of Violation).<sup>3</sup> The NOV cited San Francisco Building Code (“SFBC”) section 106A.4.7,

25 \_\_\_\_\_  
26 <sup>2</sup> For ease of reference, all citations to page numbers refer to the ECF branded number in the  
upper right corner of documents.

27 <sup>3</sup> The Court previously granted judicial notice of this document. Dkt. No. 48 at 1 n.1. The  
28 parties have now filed numerous additional requests for judicial notice. Dkt. Nos. 55 (“Defs’ RJN”),  
59 (“Pl.’s RJN”), 64. Judicial notice of local laws, resolutions, and records of administrative

1 “ADDITIONAL WORK-PERMIT REQUIRED.” SAC ¶ 38. The NOV listed three Corrective  
2 Actions: “STOP ALL WORK SFBC section 104A.2.4, file building permit application within 15  
3 days with plans, and obtain permit within 30 days and complete all work within 60 days including  
4 final inspection and sign-off.” *Id.* The NOV further stated, “STOP ALL WORK. Submit plans  
5 that show full scope of demolition. Plans shall be routed to Planning Dept. For [sic] review and  
6 approval. No work may take place until a new building permit has been obtained.” Dkt. No. 55 at  
7 4 (Defs’ RJN Ex. A – Notice of Violation).

8 A meeting among plaintiff’s representatives and senior DBI inspectors followed. SAC ¶ 39.  
9 Plaintiff alleges that on October 20, 2017, BOS member Aaron Peskin wrote to several individuals,  
10 including the head of the Planning Department and the Planning Department’s Zoning  
11 Administrator regarding the subject property and said, “This is insane. We need to figure out how  
12 to stop this. I am going to start holding hearings as this is happening way too often and is entirely  
13 unacceptable.” *Id.* ¶ 40. That same day, the Planning Department’s Zoning Administrator stated  
14 via email that the subject property “wasn’t a historic resource because it no longer retained integrity  
15 given past alterations. Also. . . the building last sold for \$1.7 million . . . so it may appraise out of  
16 the CU requirement.” *Id.* (ellipses and emphases in SAC). The SAC states, “The ‘CU requirement’  
17 refers to Planning Code section 317, under which ‘tantamount to demolition’ violations under the  
18 Planning Code are processed. If the property at issue is ‘demonstrably not affordable . . . housing’  
19 then the property need not go through the Planning Commission to have a ‘tantamount to  
20 demolition’ violation approved; the Planning Department may so do without the issuance of a  
21 conditional use authorization.” *Id.* ¶ 40 n.1.

22 On November 7, 2017, the Planning Department issued a Notice of Enforcement (“NOE”).  
23

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24 proceedings is appropriate here. *See, e.g., Colony Cove Properties, LLC v. City Of Carson*, 640  
25 F.3d 948, 954-56 n.3-4 (9th Cir. 2011) (taking judicial notice of undisputed contents of local  
26 ordinances and resolutions). In all other respects, the parties’ requests for judicial notice are  
27 DENIED without prejudice. The parties largely seek judicial notice either: of the contents of  
28 documents that are in dispute, making them inappropriate for judicial notice under Federal Rule of  
Evidence 201; or of documents otherwise not properly subject to judicial notice, such as the SAC  
and prior Court Order in this case and a declaration from plaintiff’s managing member Ross  
Johnston. *See, e.g.,* Defs’ RJN, Ex. C-F (seeking judicial notice of documents regarding whether  
plaintiff requested cancellation of the 2014 Permit); Pl.’s RJN, Ex. A (SAC), O (Prior Order), Q  
(Johnston Decl.).

1 *Id.* ¶ 42. The NOE “indicated that ‘the subject property is in violation for exceeding scope of work’  
2 under the 2014 Permit” and that the “Planning Department requires that you immediately proceed  
3 to abate the violation by submitting a revised Building Permit Application.” *Id.*

4 Plaintiff alleges that on or about November 17, 2017, “DBI and the Planning Department  
5 erroneously instructed the Architect that the 2014 Permit would need to be cancelled in order to  
6 submit revised plans, even though work had already commenced under the 2014 Permit.” *Id.* ¶ 43.  
7 Plaintiff alleges that defendants “were required to issue an *additional* alteration permit for any  
8 change in work or additional work, as stated in the NOV, and per SFBC section 106A.4.7[.]” and  
9 that defendants lacked the discretion to cancel the 2014 Permit. *Id.* Plaintiff contends that if “DBI  
10 [had] intended to prevent further work from being performed under the 2014 Permit, DBI was  
11 required to *revoke* the 2014 Permit” rather than cancel it. *Id.* ¶ 43 n.2.

12 On December 7, 2017, plaintiff’s architect submitted revised plans and a conditional use  
13 authorization (“CUA”) application to the Planning Department, seeking “approval for the portion  
14 of demolition that had exceeded the scope of the 2014 Permit and approval for a three-story single-  
15 family house substantially similar to the one previously approved[.]” *Id.* ¶ 46. That same day, the  
16 architect also provided the Planning Department with plaintiff’s property purchase agreement for  
17 the purpose of appraising out of the CUA requirement. *Id.* Plaintiff alleges that the subject  
18 property’s valuation at the time would have permitted the property to administratively appraise out  
19 of the CUA requirement. *Id.* However, the Planning Department verbally informed plaintiff’s  
20 architect that the property would not meet the threshold valuation, “despite the fact that the \$1.7  
21 million purchase price exceeded the then-existing valuation threshold of \$1.63 million. The \$1.63  
22 million threshold valuation was then changed by the Planning Department’s Assistant Zoning  
23 Administrator to \$1,900,000 eight days later (effective December 15, 2017), so that the Property no  
24 longer qualified for appraising out of the CUA requirement.” *Id.*

25 Plaintiff alleges that on December 13, 2017, DBI erroneously cancelled the 2014 Permit in  
26 violation of its own procedures, and that plaintiff therefore “had no opportunity to appeal the  
27 cancellation as would have been the case if the 2014 Permit had been ‘revoked.’” *Id.* ¶ 47.  
28 Subsequently, defendants informed the architect that plaintiff would need to proceed with a CUA

1 to legalize the demolition that had exceeded the scope of the 2014 Permit. *Id.* ¶ 48. Plaintiff states,  
2 “Effectively, this meant that the Defendants were now treating the code violation as an ‘unlawful  
3 demolition’ under SFBC section 103A.1 instead of a ‘work beyond permit scope’ violation under  
4 106A.4.7 for which Plaintiff had been cited.” *Id.*

5 In January 2018, plaintiff alleges that senior DBI inspectors, “in an apparent response to the  
6 brewing political firestorm and a variety of negative press-releases about unauthorized demolition  
7 work,” made a presentation to the Building Inspection Commission “on various City construction  
8 projects where the scope of a permit had been exceeded[,]” including the subject property. *Id.* ¶ 49.  
9 Plaintiff alleges that throughout January and February 2018 the property “was the hyper-focus” of  
10 various negative and false press accounts. *Id.* ¶ 51. The SAC states that “[b]etween March and  
11 October 2018, the Planning Department staff began demanding Plaintiff modify its plan for the  
12 Property,” including removal of the third floor of the project, which had previously been authorized  
13 under the 2014 Permit. *Id.* ¶ 52. “The Planning Department also indicated to Plaintiff that its  
14 recommendation to the Planning Commission would be to approve the CUA, with the modification  
15 that the third story be removed.” *Id.*

16 Plaintiff’s CUA for the property was set to be heard before the Planning Commission on  
17 December 13, 2018. *Id.* ¶ 58. The Notice for the hearing stated that the item was a “Request for  
18 Conditional Use Authorization, pursuant to Planning Code Sections 303 and 317 **to legalize the**  
19 **tantamount to demolition** of a single-family home . . . **Preliminary Recommendation: Approve**  
20 **with Conditions and Modifications.**” *Id.* (emphasis in SAC). On December 10, 2018, BOS  
21 member Aaron Peskin “announced proposed City legislation that would punish property owners  
22 who illegally demolish homes.” *Id.* ¶ 59. At the December 13, 2018 Planning Commission meeting,  
23 “[a]s expected, the Planning Department recommended that the project be modified to two stories  
24 instead of the three stories previously approved in the 2014 Permit.” *Id.* ¶ 61. After plaintiff  
25 presented its proposal and after close of public comments, the Planning Commission, “led by  
26 Commissioner Richards,” voted 5-0 to approve a project that required plaintiff to (1) rebuild a  
27 replica of the 1935 original 927 square foot, one-bedroom structure, and (2) install an “interpretative  
28 plaque” stating the property was a replica of a Neutra design that had been “accidentally demolished”

1 and rebuilt per the decision of the Planning Commission (“CUA Decision I”). *Id.* ¶¶ 62, 65. Plaintiff  
2 alleges that because public comment had closed and because there had been no indication on the  
3 Notice of Hearing that the Planning Commission was contemplating requiring plaintiff to build a  
4 wholly different project from what was authorized under the 2014 Permit, plaintiff had no  
5 opportunity to object and had no automatic appellate rights to challenge the decision. *Id.* ¶ 65.  
6 Following CUA Decision I, the Planning Department determined that it would “prepare a notice  
7 once the [CUA Decision] becomes final and give the owner 30 days to respond.” *Id.* ¶ 66.

8 The SAC alleges that CUA Decision I received “extraordinary levels of media coverage  
9 locally, regionally, nationally, and internationally,” and that “within days” plaintiff’s reputation was  
10 damaged by negative and unfair coverage “painting Plaintiff as a real estate speculator who illegally  
11 demolished the 1935 San Francisco home of a world-renowned architect.” *Id.* ¶ 67. For instance,  
12 on December 15, 2018, the San Francisco *Chronicle* reported, “Planning Commissioner Dennis  
13 Richards said he hopes the commission’s action in the 49 Hopkins case will send a message to  
14 speculators accustomed to ignoring city planning and building laws with few or no repercussions.  
15 ‘We are tired of seeing this happening in the city and are drawing a line in the sand,’ said Richards.”  
16 *Id.* ¶ 92. In a December 17, 2018 *Washington Post* article,<sup>4</sup> Planning Commissioner Richards  
17 (whom plaintiff describes as “the ringleader of CUA Decision I”), was quoted as saying, in reaction  
18 to plaintiff’s potential appeal to the Board of Supervisors, “They would probably vote 11-0 and tell  
19 him to go to hell.” *Id.* ¶ 68. On January 16, 2019, according to the SAC,

20 Planning Commissioner Richards was quoted in the San Francisco *Chronicle* as  
21 stating that the Planning Commission never claimed that the building on the Property  
22 was historic. Rather, Richards stated, the CUA Decision I was aimed at speculators  
23 who buy modest homes only to knock them down illegally and replace them with  
much larger, more valuable houses. In response to Plaintiff challenging the CUA  
Decision I, Richards replied flippantly:

24 “Good luck to him — he is within his right to appeal, but I don’t know what he thinks  
25 he is going to get out of it. He is not going to get permission to build a 4,000-square-  
26 foot replacement structure. I would bet my house on it.”

27 *Id.* ¶ 69.

28 <sup>4</sup> The SAC states the article ran on December 17, 2017, but the Court presumes this is an  
error and the correct year is 2018, given the chronology of events here. *See* SAC ¶ 68.

1 In response, on February 14, 2019, plaintiff filed this action, along with “a related state court  
2 action.” *Id.* ¶¶ 17, 70. Through its attorneys, plaintiff “called the decision ‘invalid, bizarre, and  
3 illegal’ in the press. Plaintiff was quoted in the San Francisco *Chronicle* on February 15, 2019 as  
4 saying: ‘This case is just another example of abusive, retroactive government overreach by  
5 unaccountable, unelected bureaucrats drunk with power.’” *Id.* ¶ 91.

6 After filing the instant lawsuit, plaintiff met with the City Attorney’s Office and Planning  
7 Department staff to confer about CUA Decision I and develop an alternative project to present to  
8 the Planning Commission. *Id.* ¶ 71. Over the course of nearly seven months, they negotiated a  
9 project proposal for a three-story, two-unit building, totaling 4,180 gross square feet allocated into  
10 (1) a 2,625 square foot four-bedroom, three-bath, primary unit on the top two floors, (2) a 1,200  
11 square foot, two-bedroom, two-bath accessory dwelling unit on the lower level, and (3) a 355 square  
12 foot garage.<sup>5</sup> *Id.*

13 On August 29, 2019, after denying plaintiff’s request for a continuance, the Planning  
14 Commission considered the negotiated project proposal. *Id.* ¶¶ 73-74. Planning Department staff  
15 recommended the Commission approve the proposal. *Id.* ¶ 74. The Planning Commission did not  
16 fully approve the negotiated proposed project, stating that it was “incompatible with the size and  
17 massing of the neighborhood[.]” *Id.* ¶ 76. In its decision (“CUA Decision II”), the Planning  
18 Commission limited the project to 3,280 square feet, with at least 1,000 square feet allocated to a  
19 two-bedroom accessory dwelling unit, and removed the proposed roof deck from the primary unit.  
20 *Id.* ¶¶ 71, 77-79. Plaintiff alleges that the imposition of these conditions on the negotiated project  
21 proposal and the failure to approve the demolition over the scope of the 2014 Permit effectively  
22 “resulted in *no* approval of any project.” *Id.* ¶ 76. According to plaintiff, the loss of square footage  
23 that the Planning Commission imposed (635 square feet from the 2014 Permit plans and 900 square  
24 feet from the negotiated project proposal) makes the project economically infeasible. *Id.* ¶ 77.  
25 Plaintiff further alleges that “[t]he actual reason for the Planning Commission’s CUA Decision II  
26 was to retaliate against Plaintiff for suing them for the imposition of the CUA Decision I.” *Id.* ¶ 79.

27 \_\_\_\_\_  
28 <sup>5</sup> Plaintiff refers to this project proposal as the “Negotiated Compromise,” SAC ¶ 71, and  
the “Negotiated Decision.” *See* Opp’n at 23.

1 In response to CUA Decision II, on October 11, 2019, plaintiff filed an amended complaint,  
2 bringing seven claims for relief. *See* Dkt. No. 23. On February 28, 2020, the Court granted in part  
3 and denied in part defendants’ motion to dismiss the amended complaint. Dkt. No. 48. The Court  
4 concluded “that plaintiff 49 Hopkins, LLC does not have a vested right in the 2014 permit at issue[.]”  
5 *Id.* at 1. The Court therefore dismissed, with leave to amend, plaintiff’s first cause of action for  
6 Violation of Fundamental Vested Rights under 42 U.S.C. § 1983, second cause of action for  
7 Violation of Due Process under 42 U.S.C. § 1983, and third cause of action for Inverse  
8 Condemnation. The Court deferred ruling on plaintiff’s remaining claims for relief until after the  
9 filing of plaintiff’s second amended complaint.

10 On May 8, 2020, plaintiff filed a second amended and supplemental complaint. Dkt. No.  
11 51. The second amended complaint includes the following claims for relief: Violation of the  
12 Constitutional Right to Petition and of Access to Courts, under 42 U.S.C. § 1983 (First Claim),  
13 Violation of Due Process under 42 U.S.C. § 1983 (Second Claim), Inverse Condemnation (Third  
14 Claim), Violation of Equal Protection under 42 U.S.C. § 1983 (Fourth Claim), Violation of  
15 Excessive Fines Clause under 42 U.S.C. § 1983 (Fifth Claim), Writ of Mandate per California Code  
16 of Civil Procedure § 1094.5 or 1085 (Sixth Claim), and Writ of Mandate per California Code of  
17 Civil Procedure § 1094.5 or 1085, California Government Code § 65589.5 (Seventh Claim).  
18 Defendants now move to dismiss all seven claims of the second amended complaint.<sup>6</sup>

19  
20 **LEGAL STANDARDS**

21 **I. Rule 12(b)(1) Motion**

22 Fed. R. Civ. P. 12(b)(1) allows a party to challenge a federal court’s jurisdiction over the  
23 subject matter of the complaint. As the party invoking the jurisdiction of the federal court, the  
24 plaintiff bears the burden of establishing that the court has the requisite subject matter jurisdiction  
25 to grant the relief requested. *See Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377

26  
27 <sup>6</sup> The SAC also alleges an Eighth Claim (previously brought as the First Claim in the  
28 amended complaint), for violation of fundamental vested rights, which plaintiff realleges “expressly  
to preserve it for Plaintiff’s right to appeal.” SAC ¶¶ 143-144 & n.5. The Court will not address  
this claim further.

1 (1994) (internal citations omitted). A complaint will be dismissed if, looking at the complaint as a  
2 whole, it appears to lack federal jurisdiction either “facially” or “factually.” *Thornhill Publ’g Co.,*  
3 *Inc. v. General Tel. & Elecs. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979); *Safe Air for Everyone v.*  
4 *Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004) (“A Rule 12(b)(1) jurisdictional attack may be facial or  
5 factual.”).

6 When the complaint is challenged for lack of subject matter jurisdiction on its face, all  
7 material allegations in the complaint will be taken as true and construed in the light most favorable  
8 to the plaintiff. *NL Indus. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986).

9 “In resolving a factual attack on jurisdiction, the district court may review evidence beyond  
10 the complaint without converting the motion to dismiss into a motion for summary judgment.” *Safe*  
11 *Air for Everyone*, 373 F.3d at 1039 (citing *Savage v. Glendale Union High Sch.*, 343 F.3d 1036,  
12 1039 n.2 (9th Cir. 2003)). If the moving party converts its motion to dismiss into a factual motion  
13 by submitting affidavits, the opposing party must then also present affidavits or other evidence to  
14 meet its burden for satisfying subject matter jurisdiction. *Id.*

## 15 16 **II. Rule 12(b)(6) Motion**

17 A complaint must contain “a short and plain statement of the claim showing that the pleader  
18 is entitled to relief,” and a complaint that fails to do so is subject to dismissal pursuant to Rule  
19 12(b)(6). Fed. R. Civ. P. 8(a)(2). To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must  
20 allege “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*,  
21 550 U.S. 544, 570 (2007). This “facial plausibility” standard requires the plaintiff to allege facts  
22 that add up to “more than a sheer possibility that a defendant has acted unlawfully.” *Ashcroft v.*  
23 *Iqbal*, 556 U.S. 662, 678 (2009). While courts do not require “heightened fact pleading of  
24 specifics,” a plaintiff must allege facts sufficient to “raise a right to relief above the speculative  
25 level.” *Twombly*, 550 U.S. at 555, 570. “A pleading that offers ‘labels and conclusions’ or ‘a  
26 formulaic recitation of the elements of a cause of action will not do.” *Iqbal*, 556 U.S. at 678  
27 (quoting *Twombly*, 550 U.S. at 555). “Nor does a complaint suffice if it tenders ‘naked assertion[s]’  
28 devoid of ‘further factual enhancement.’” *Id.* (quoting *Twombly*, 550 U.S. at 557). “While legal

1 conclusions can provide the framework of a complaint, they must be supported by factual  
2 allegations.” *Id.* at 679.

3 In reviewing a Rule 12(b)(6) motion, courts must accept as true all facts alleged in the  
4 complaint and draw all reasonable inferences in favor of the non-moving party. *See Usher v. City*  
5 *of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). However, courts are not required to accept as  
6 true “allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable  
7 inferences.” *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008) (citation omitted).

8 If a court dismisses a complaint, it must decide whether to grant leave to amend. The Ninth  
9 Circuit has repeatedly held that “a district court should grant leave to amend even if no request to  
10 amend the pleading was made, unless it determines that the pleading could not possibly be cured by  
11 the allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (citations and  
12 internal quotation marks omitted).

13  
14 **DISCUSSION**

15 **I. Plaintiff’s Claims Under 42 U.S.C. § 1983**

16 In order to state a claim under § 1983, a plaintiff must show both (1) the deprivation of a  
17 right secured by the Constitution and laws of the United States, and (2) that the deprivation was  
18 committed by a person acting under color of state law. 42 U.S.C. § 1983; *Broam v. Bogan*, 320  
19 F.3d 1023, 1028 (9th Cir. 2003). Plaintiff’s first, second, third, fourth, and fifth causes of action  
20 implicate § 1983.

21  
22 **A. Constitutional Right to Petition and of Access to Courts (First Claim)**

23 In the SAC, plaintiff adds a new claim for relief under the First Amendment of the U.S.  
24 Constitution. *See* SAC ¶¶ 94-97. Plaintiff alleges that it “has made active and continuous attempts  
25 to protect its Property interest and prosecute Defendants’ illegal CUA Decision I and CUA Decision  
26 II by filing this action, filing the related state court action, and making public statements about the  
27 improprieties of the Planning Commission and Commissioner Richards.” *Id.* ¶ 96. Plaintiff alleges  
28 that after it “made such public statements and sued Defendants for their imposition of the CUA

1 Decision I, Defendants deliberately and intentionally retaliated against Plaintiff via Defendants[']  
2 imposition of CUA Decision II for Plaintiff exercising Plaintiff's constitutional right to petition the  
3 government for redress of its grievances." *Id.* In other words, plaintiff's First Amendment theory  
4 is that "Defendants' imposition of CUA Decision II was retaliatory in nature in that it was meant to  
5 stifle Plaintiff's constitutional rights . . . ." *Id.* ¶ 97.

6 In their motion to dismiss, defendants misconstrue the nature of this claim, arguing that  
7 "Plaintiff appears to assert that its First Amendment rights were violated when Plaintiff was forced  
8 to submit to the Conditional Use process" and stating that "Plaintiff's application for a Conditional  
9 Use authorization is not equivalent to a petition to the Government for redress of grievances under  
10 the First Amendment." Dkt. No. 54 ("Mot.") at 20. In their reply brief, defendants argue that  
11 "Plaintiff offers wholly unsupported conclusions, without factual allegations supporting a  
12 cognizable claim that the City 'retaliated,' injuring Plaintiff." Dkt. No. 63 ("Reply") at 9.

13 The Court agrees with defendants that the SAC offers only conclusory allegations on an  
14 element of plaintiff's First Amendment retaliation claim, namely, the causal relationship between  
15 the protected activity and defendants' conduct. As the Ninth Circuit has explained,

16 To bring a First Amendment retaliation claim, the plaintiff must allege that (1) it  
17 engaged in constitutionally protected activity; (2) the defendant's actions would  
18 "chill a person of ordinary firmness" from continuing to engage in the protected  
19 activity; and (3) the protected activity was a substantial motivating factor in the  
20 defendant's conduct—i.e., that there was a nexus between the defendant's actions  
21 and an intent to chill speech. *O'Brien [v. Welty]*, 818 F.3d [920,] 933-34 [(9th Cir.  
22 2016)] (citing *Pinard v. Clatskanie Sch. Dist.* 6J, 467 F.3d 755, 770 (9th Cir. 2006);  
*Mendocino Env't'l Ctr. v. Mendocino County*, 192 F.3d 1283, 1300 (9th Cir. 1999));  
*see also Blair v. Bethel Sch. Dist.*, 608 F.3d 540, 543 (9th Cir. 2010). Further, to  
prevail on such a claim, a plaintiff need only show that the defendant "intended to  
interfere" with the plaintiff's First Amendment rights and that it suffered some injury  
as a result; the plaintiff is not required to demonstrate that its speech was actually  
suppressed or inhibited. *Mendocino Env't'l Ctr.*, 192 F.3d at 1300.

23 *Arizona Students' Ass'n v. Arizona Bd. of Regents*, 824 F.3d 858, 867 (9th Cir. 2016). *But see Sharp*  
24 *v. County of Orange*, 871 F.3d 901, 919 (9th Cir. 2017) (applying but-for causation standard in  
25 summary judgment context); *see also Skoog v. County of Clackamas*, 469 F.3d 1221, 1231-32 (9th  
26 Cir. 2006). "At the pleading stage, a plaintiff adequately asserts First Amendment retaliation if the  
27 complaint alleges plausible circumstances connecting the defendant's retaliatory intent to the  
28 suppressive conduct." *Arizona Students' Ass'n*, 824 F.3d at 870 (citing *O'Brien*, 818 F.3d at 933-

1 34, 935).

2 Thus, in *Arizona Students' Association*, the Ninth Circuit reversed the dismissal of a First  
3 Amendment retaliation claim brought by a non-profit student corporation against the Arizona Board  
4 of Regents, after the Board suspended collection of the student corporation's funding weeks after  
5 an election in which the corporation advocated for a ballot initiative that several members of the  
6 Board had opposed. In finding that the complaint adequately alleged the defendant acted with a  
7 retaliatory motive, the Ninth Circuit cited "several plausible factual allegations": that several  
8 Regents publicly acknowledged the decision to suspend fee collection was "political in nature and  
9 resulted from [the plaintiff's] advocacy in support of" the ballot initiative; that several members of  
10 the Board criticized the plaintiff for supporting the initiative; and the temporal proximity between  
11 the plaintiff's exercise of its free speech rights and Board's allegedly retaliatory conduct. *Id.* at 870-  
12 71.

13 By contrast, in a case out of this District, Judge Seeborg found that the plaintiff AIDS  
14 Healthcare Foundation, Inc. failed to adequately allege that San Francisco city legislators had  
15 retaliated against it "for taking a public and unpopular position in opposition to a certain HIV/AIDS  
16 treatment [PrEP]" when the City passed new zoning rules, with the effect of delaying and imposing  
17 additional costs on the plaintiff's pending building permit application. *AIDS Healthcare Found.,*  
18 *Inc. v. City & County of San Francisco*, No. 14-cv-3499-RS, Dkt. No. 53 at 1, 11-13 (N.D. Cal. Jan.  
19 21, 2015). Judge Seeborg summarized the relevant allegations as follows:

20 Supervisor Wiener publicly advocates the use of PrEP; AHF is a visible critic of the  
21 same medication. AHF's views in this regard are apparently controversial within the  
22 HIV/AIDS healthcare community and conflict with the position taken by SFAF, a  
23 competing healthcare organization supported by Supervisor Wiener. Without more,  
these allegations simply cannot support an inference that Supervisor Wiener  
spearheaded the passage of the Interim Controls to punish AHF for its views.

24 *Id.* at 12. Finding the complaint failed to "achieve the requisite standard of plausibility" under *Iqbal*,  
25 Judge Seeborg dismissed the claim with leave to amend. *Id.* at 12-13.

26 Here, the allegations of the SAC are more like those of *AIDS Healthcare Foundation* than  
27 of *Arizona Students' Association*. The SAC lacks detail to support the allegations that CUA  
28 Decision II was a retaliatory response to plaintiff filing this lawsuit or to plaintiff making negative

1 remarks in the press. Taking the allegations of the SAC as true, the SAC shows that plaintiff's  
 2 property was already the subject of controversy before plaintiff filed suit or spoke to the press.  
 3 Plaintiff filed suit in this Court on February 14, 2019. Dkt. No. 1; SAC ¶ 70. In the wake of the  
 4 December 2018 CUA Decision I, plaintiff made comments to the press that the decision was  
 5 "invalid, bizarre, and illegal," and plaintiff was quoted in the *San Francisco Chronicle* on February  
 6 15, 2019, saying, "This case is just another example of abusive, retroactive government overreach  
 7 by unaccountable, unelected bureaucrats drunk with power." SAC ¶ 90. Following CUA Decision  
 8 I, nearly seven months of meetings and negotiations ensued among plaintiff, the City Attorney's  
 9 Office, and Planning Department staff. *Id.* ¶ 70. This resulted in a project proposal for a 31 foot  
 10 tall, three-story, two-unit building, allocated into (1) a 2,625 square foot four-bedroom, three-bath,  
 11 primary unit with a roof deck on the top two floors, (2) a 1,200 square foot, two-bedroom, two-bath  
 12 accessory dwelling unit on the lower level, and (3) a 355 square foot garage. *Id.* On August 29,  
 13 2019, in CUA Decision II, the Planning Commission "approved" the project, with limitations as  
 14 follows: the project would not exceed 3,280 square feet, with at least 1,000 square feet allocated to  
 15 a two-bedroom accessory dwelling unit, and without the proposed roof deck on the primary unit.  
 16 *Id.* ¶¶ 71, 77-79.

17 What the SAC lacks are any allegations rising above the speculative level to tie CUA  
 18 Decision II to plaintiff's filing of the lawsuit or speaking out in the press. From the timeline of the  
 19 SAC, it appears that the City Attorney's Office and Planning Department staff began negotiations  
 20 with plaintiff before or around the time that plaintiff filed this suit (i.e., roughly seven months, *see*  
 21 *id.* ¶ 71), and that those negotiations continued well after plaintiff filed suit. Plaintiff cites no  
 22 statements from any defendant that CUA Decision II was a "political decision" or that it was meant  
 23 as punishment for plaintiff's exercise of First Amendment rights. While the SAC cites a quote from  
 24 Planning Commissioner Richards that he would "bet [his] house on it" that plaintiff would never  
 25 gain approval to build a 4,000 square foot structure, that statement was made in January 2019, nearly  
 26 one month *before* plaintiff sued or was quoted in the *San Francisco Chronicle*. *See id.* ¶ 69.

27 Because the SAC lacks allegations showing "a nexus between the defendant's actions and  
 28 an intent to chill speech," *see Arizona Students' Ass'n*, 824 F.3d at 867, plaintiff's First Claim is

1 DISMISSED, with leave to amend.

2

3 **B. Due Process (Second Claim)**

4 In relevant part, the Fourteenth Amendment commands that “no state shall make or enforce  
5 any law which shall abridge the privileges or immunities of citizens of the United States; nor shall  
6 any state deprive any person of life, liberty, or property, without due process of law . . . .” U.S.  
7 Const. amend. XIV § 1. Plaintiff contends that defendants violated its procedural and substantive  
8 due process rights. SAC ¶¶ 105.

9 To succeed on either a substantive or procedural due process claim, a plaintiff “must first  
10 demonstrate that he was deprived of a constitutionally protected property interest.” *Gerhart v. Lake*  
11 *County, Mont.*, 637 F.3d 1013, 1019 (9th Cir. 2011) (citing *Shanks v. Dressel*, 540 F.3d 1082, 1087  
12 (9th Cir. 2008) (substantive due process); *Foss v. Nat’l Marine Fisheries Serv.*, 161 F.3d 584, 588  
13 (9th Cir. 1998) (procedural due process)). As stated by the Ninth Circuit,

14 [I]n *Nunez*, we explicitly held that “[t]here is no general liberty interest in being free  
15 from capricious government action.” *Nunez [v. City of Los Angeles]*, 147 F.3d  
16 [867,] 873 [(9th Cir. 1998)]; see *City of Cuyahoga Falls, Ohio v. Buckeye Comm.*  
17 *Hope Fdn.*, 538 U.S. [188,] 200, 123 S. Ct. 1389 [(2003)] (Scalia, J., concurring)  
18 (“Those who claim ‘arbitrary’ deprivations of non-fundamental liberty interests must  
19 look to the Equal Protection Clause.”).

20 *Squaw Valley Dev. Co. v. Goldberg*, 375 F.3d 936, 949 (9th Cir. 2004), *overruled on other grounds*  
21 *by Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005).

22 The Court previously dismissed this claim with direction for plaintiff to amend “to specify  
23 exactly what property rights defendants impinged.” Dkt. No. 48 at 9. The SAC is less than clear  
24 on the property right at stake but appears to continue to rest on a vested right to the 2014 Permit  
25 even after the Court rejected this argument. See SAC ¶¶ 99, 100, 102, 104.<sup>7</sup>

26 <sup>7</sup> These paragraphs allege, in relevant part:

27 Defendants’ cancellation of the 2014 Permit, requirement that Plaintiff submit a  
28 CUA application to appear before the Planning Commission, CUA Decision I, and  
CUA Decision II deprived Plaintiff of due process as required by law in that such  
cancellation, submission requirements, and CUA decisions were made without  
notice, and/or after public comment had closed, and/or without allowing Plaintiff an  
opportunity to object or appeal.

1 In its opposition to the motion to dismiss, plaintiff articulates the following property  
2 interests: “(1) the right to be free of selective enforcement of the laws; (2) the right to use and  
3 enjoyment of its Property; (3) the right under the California Housing Accountability Act, Gov. Code  
4 section 65589.5 (the ‘HAA’) to approval of the Negotiated Decision; and (4) reputational injury  
5 combined with Defendants’ deprivation of the aforesaid interests.” Dkt. No. 58 (“Opp’n”) at 23.

6 Plaintiff raises the first interest, the right to be free of selective enforcement of the laws, only  
7 with respect to its Equal Protection claim, which the Court addresses in § I.D, below. With regard  
8 to “the right to use and enjoyment of its Property,” the Court agrees with defendants that plaintiff  
9 has not articulated a cognizable property interest under the facts alleged here. Plaintiff relies on  
10

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11  
12 SAC ¶ 99.

13 . . . DBI unlawfully deprived Plaintiff of its property interest by cancelling the 2014  
14 Permit without notice and thus violated Plaintiff’s substantive and procedural due  
15 process rights.

16 *Id.* ¶ 100.

17 . . . the Planning Commission unlawfully deprived Plaintiff of right to appeal DBI’s  
18 cancellation of the 2014 Permit, rejected continuance requests at both CUA hearings  
19 that are customarily granted, deprived Plaintiff of right to be heard prior to imposing  
20 a wholly new project on Plaintiff during both CUA Decision I and CUA Decision II,  
21 provided no notice of its imposition of the CUA Decision I or CUA Decision II, and  
22 deprived Plaintiff [of] a meaningful opportunity to be heard on CUA Decision I or  
23 CUA Decision II. . . . The Planning Commission’s failure to give Plaintiff notice of  
24 its intent to deprive Plaintiff of its property interests and failure to allow Plaintiff a  
25 meaningful opportunity to be heard regarding CUA Decision I and CUA Decision II  
26 violated Plaintiff’s due process.

27 *Id.* ¶ 102.

28 The cancellation of the 2014 Permit, CUA Decision I, and CUA Decision II  
arbitrarily, capriciously, improperly, and unreasonably imposes a requirement that  
Plaintiff construct a building of 3,280 square feet – a wholly separate project than  
the 3,915 square foot building approved under the 2014 Permit and a wholly separate  
project from the Negotiated Compromise – without due process of law.

*Id.* ¶ 104.

For the foregoing reasons, the cancellation of the 2014 Permit, the CUA Decision I,  
and CUA Decision II violate Plaintiff’s right to substantive and procedural due  
process of law.

*Id.* ¶ 105.

1 *Squaw Valley* for the proposition that there is a “constitutionally ‘protected property interest’ in a  
2 landowner’s right to ‘devote [his] land to any legitimate use.’” *Id.* at 24 (quoting *Squaw Valley Dev.*  
3 *Co.*, 375 F.3d at 949). Yet the *Squaw Valley* court didn’t reach the question of whether a plaintiff  
4 developer had stated a substantive due process claim; instead, the court found that claim was  
5 foreclosed by the Takings Clause (a proposition that the Supreme Court since overruled in *Lingle*).  
6 The Ninth Circuit in *Squaw Valley* said only that “presumably” the developer’s substantive due  
7 process claim rested on the assertion that the “alleged overzealous and selective regulation of Squaw  
8 Valley interferes with its use of its real property”—the court made no ruling that such a claim was  
9 validly stated. *See Squaw Valley Dev. Co.*, 375 F.3d at 949. Likewise, *Harris* (as relied on by the  
10 *Squaw Valley* court) is distinguishable, in that there the Ninth Circuit stated that the county’s  
11 rezoning of the plaintiff’s land to residential use “unquestionably” deprived the plaintiff of his right  
12 to use the property for commercial purposes. *See Harris v. County of Riverside*, 904 F.2d 497, 501  
13 (9th Cir. 1990).

14 Here, even under the facts alleged in the SAC, plaintiff has not been deprived of its right to  
15 use and enjoyment of the property. Although plaintiff argues that CUA Decision II “in effect,  
16 resulted in *no* approval of any project[,]” *see* Opp’n at 18, the facts pleaded show otherwise. In  
17 CUA Decision II, plaintiff received approval to proceed with a project totaling 3,280 square feet,  
18 consisting of two units, with the accessory dwelling unit having two bedrooms and at least 1,000  
19 square feet. SAC ¶¶ 77-79. Plaintiff’s allegation that “[t]he loss of square footage makes the  
20 [project approved in CUA Decision II] economically infeasible” is simply not plausible.

21 Third, plaintiff asserts a property right in its alleged “right . . . to approval of the Negotiated  
22 Decision” under California Government Code section 65589.5. Opp’n at 23. The Court presumes  
23 that plaintiff relies on subsection (j), as contrasted with subsection (d), which applies to “very low,  
24 low-, or moderate-income households.” *See* Cal. Gov’t Code § 65589.5(d), (j). Subsection (j)  
25 provides, in relevant part:

26 (j)(1) When a proposed housing development project complies with applicable,  
27 objective general plan, zoning, and subdivision standards and criteria, including  
28 design review standards, in effect at the time that the application was deemed  
complete, but the local agency proposes to disapprove the project or to impose a  
condition that the project be developed at a lower density, the local agency shall base

1 its decision regarding the proposed housing development project upon written  
2 findings supported by a preponderance of the evidence on the record that both of the  
3 following conditions exist:

4 (A) The housing development project would have a specific, adverse impact upon  
5 the public health or safety unless the project is disapproved or approved upon the  
6 condition that the project be developed at a lower density. As used in this paragraph,  
7 a “specific, adverse impact” means a significant, quantifiable, direct, and  
8 unavoidable impact, based on objective, identified written public health or safety  
9 standards, policies, or conditions as they existed on the date the application was  
10 deemed complete.

11 (B) There is no feasible method to satisfactorily mitigate or avoid the adverse impact  
12 identified pursuant to paragraph (1), other than the disapproval of the housing  
13 development project or the approval of the project upon the condition that it be  
14 developed at a lower density.

15 *Id.* § 65589.5(j).

16 Subsection (h) further provides:

17 “Disapprove the housing development project” includes any instance in which a local  
18 agency does either of the following:

19 (A) Votes on a proposed housing development project application and the application  
20 is disapproved, including any required land use approvals or entitlements necessary  
21 for the issuance of a building permit.

22 (B) Fails to comply with the time periods specified in subdivision (a) of Section  
23 65950. An extension of time pursuant to Article 5 (commencing with Section 65950)  
24 shall be deemed to be an extension of time pursuant to this paragraph.

25 *Id.* § 65589.5(h).

26 Plaintiff relies on a ruling out of this District, *North Pacifica, LLC v. City of Pacifica*, 234  
27 F. Supp. 2d 1053, 1059-60 (N.D. Cal. 2002), *disapproved on other grounds by N. Pacifica LLC v.*  
28 *City of Pacifica*, 526 F.3d 478 (9th Cir. 2008). There, the plaintiff asserted a substantive due process  
right to approval of its permit application under section 65589.5, after the city took nearly two years  
to approve the application. The district court found that the plaintiff had sufficiently asserted a  
constitutionally protected property interest in the enforcement of section 65589.5. *N. Pacifica, LLC*,  
234 F. Supp. 2d at 1059-60. That case is distinguishable because the statute lists delays in the  
approval process as one of two circumstances constituting a “disapproval” that must trigger the local  
agency to make certain findings. *See* Cal. Gov’t Code § 65589.5(h)(6). Moreover, defendants  
argue, and this Court agrees, that the statute does not on its face entitle a developer to approval of a  
proposed project as it is proposed. *See Gerhart*, 637 F.3d at 1019 (“To have a property interest in a

1 government benefit, ‘a person clearly must have more than an abstract need or desire for [the  
2 benefit]. He must have more than a unilateral expectation of it. He must, instead have a legitimate  
3 claim of *entitlement* to it.’”) (quoting *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972)  
4 (emphasis added by Ninth Circuit). Rather, the statute states that if the local agency disapproves  
5 the project, or if it requires the project be developed at a lower density, then the agency must make  
6 certain findings. *See* Cal. Gov’t Code § 65589.5(j)(1). The Court finds that the property interest in  
7 section 65589.5 that plaintiff articulates does not rise to the level of a constitutionally protected  
8 interest under the Due Process Clause.<sup>8</sup>

9 Finally, plaintiff argues that “a plaintiff is deprived of a due process liberty when government  
10 both injures one’s reputation and extinguishes legal rights.” Opp’n at 25. Even disregarding the  
11 threadbare nature of the allegations concerning harm to plaintiff’s reputation in the SAC, where the  
12 Court has now found there are no “aforesaid property interest deprivations,” *see id.*, plaintiff has  
13 failed to state a constitutionally protected property interest based on reputational harm.

14 Where there is no constitutionally protected property interest, there can be no Due Process  
15 violation. The Court previously dismissed the Due Process claim with leave to amend to specify  
16 exactly what property rights defendants impinged. Having found that the SAC still fails to identify  
17 a cognizable property right, the Court will not grant further leave to amend this claim. Accordingly,  
18 the Due Process claim (Second Claim) is DISMISSED with prejudice.

19

20 **C. Inverse Condemnation (Third Claim)**

21 Plaintiff invokes the Fifth Amendment’s Takings Clause, which states, “nor shall private  
22 property be taken for public use, without just compensation.” U.S. Const. amend. V § 4; SAC ¶ 109.  
23 As with a Due Process claim, the Takings Clause requires that “a plaintiff must first establish that  
24 he possesses a constitutionally protected property interest.” *See McIntyre v. Bayer*, 339 F.3d 1097,  
25 1099 (9th Cir. 2003) (citing *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1000-01 (1984)).

26

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27 <sup>8</sup> The Court notes, however, that this claim will survive in some form, *see* § II, in that plaintiff  
28 also seeks a writ of mandate under California law “directing Defendants to approve the Negotiated  
Compromise as required under . . . Gov. Code section 65589.5 et seq.” SAC ¶ 131.

1           The Court previously dismissed this claim with leave to amend in light of the Court’s ruling  
2 that plaintiff does not have a vested right in the 2014 Permit. Dkt. No. 48 at 11. Now, having found  
3 that the SAC still fails to allege a constitutionally protected property interest, for the same reasons  
4 discussed in § I.B above, the Inverse Condemnation/Takings Clause claim (Third Claim) is  
5 DISMISSED with prejudice.

6  
7           **D.     Equal Protection (Fourth Claim)**

8           Plaintiff’s “equal protection claims do not require a constitutionally protected property  
9 interest.” *See Hermosa on Metropole, LLC v. City of Avalon*, 659 F. App’x 409, 411 (9th Cir. 2016)  
10 (citing *Outdoor Media Grp. v. City of Beaumont*, 506 F.3d 895, 903 (9th Cir. 2007)). The Equal  
11 Protection Clause ensures that “all persons similarly situated should be treated alike.” *City of*  
12 *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). The parties agree that because plaintiff  
13 asserts an Equal Protection claim as a “class of one” rather than based on membership in a protected  
14 class, rational basis review applies; that is, the action being challenged must bear “a rational relation  
15 to some legitimate end.” *See Romer v. Evans*, 517 U.S. 620, 631 (1996); *see also Engquist v. Oregon*  
16 *Dept. of Agriculture*, 478 F.3d 985, 993 (9th Cir. 2007) (“we have applied the class-of-one theory  
17 in the regulatory land-use context to forbid government actions that are arbitrary, irrational, or  
18 malicious”) (citations omitted).

19           The Court previously deferred ruling on this claim until after the filing of the second  
20 amended complaint. Dkt. No. 48 at 10. The Court now finds that the SAC pleads sufficient facts  
21 for the Equal Protection claim to survive a motion to dismiss. In the SAC, plaintiff contends that  
22 defendants “singled out and targeted Plaintiff” in multiple ways: (1) by cancelling the 2014 Permit,  
23 instead of revoking or suspending it, as it did with other properties; (2) by citing plaintiff for a  
24 violation of “work beyond permit scope” violation under San Francisco Building Code (SFBC)  
25 section 106A.4.7 but then requiring plaintiff to submit to the Conditional Use Authorization  
26 requirements of Planning Code section 317 (for a “tantamount to demolition” violation);<sup>9</sup> (3) by

27 \_\_\_\_\_  
28           <sup>9</sup> Plaintiff further alleges that the CUA process under Planning Code section 317 required  
plaintiff to go to a hearing before the Planning Commission, whereas following the “work beyond

1 imposing CUA Decision I; and (4) by imposing CUA Decision II. SAC ¶ 114. By doing so, plaintiff  
2 alleges defendants intentionally treated it “differently than similarly situated properties, including  
3 one owned by Planning Commissioner Dennis Richards.” *Id.* The SAC also alleges that after  
4 learning of the demolition at the subject property, Supervisor Aaron Peskin wrote to the head of the  
5 Planning Department and others, “This is insane. We need to figure out how to stop this. I am  
6 going to start holding hearings as this is happening way too often and is entirely unacceptable.” *Id.*  
7 ¶ 40.

8 It may behoove plaintiff to narrow its theories of liability in the future. For now, the Court  
9 finds adequate plaintiff’s allegations that it was singled out for unfair treatment with the imposition  
10 of CUA Decision I and CUA Decision II. With CUA Decision I, plaintiff presented a project  
11 proposal “for a three-story single-family home substantially similar to the one previously approved  
12 by the Planning Department in the 2014 Permit.” *Id.* ¶¶ 46, 62. Yet despite prior approval of a  
13 three-story, 3,675 square foot single-family home, in December 2018 the Planning Commission  
14 “approved” a plan in which plaintiff would be required to rebuild a replica of the original, 927 square  
15 foot house built in 1935 and to install an “interpretative plaque” stating that the property was a  
16 replica of a Neutra design that had been “accidentally demolished” and rebuilt per the decision of  
17 the Planning Commission. *Id.* ¶ 65. Plaintiff alleges this decision was issued after the close of  
18 public comment and without any warning to plaintiff that the Commission was considering  
19 approving this “wholly *different* project” from what was previously permitted.<sup>10</sup> *Id.* In 2019,  
20 plaintiff, the City Attorney’s Office, and Planning Department staff engaged in nearly seven months  
21 of negotiations, with staff checking in with the Planning Commission on what it would be inclined  
22 to approve, to negotiate a compromise on a two-unit building totaling 4,180 square feet. *Id.* ¶ 71.  
23 Yet at the Planning Commission hearing on this project, the Commission rejected the negotiated  
24

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25 permit scope” process would have allowed plaintiff to proceed without a Planning Commission  
26 hearing. SAC ¶¶ 48, 101-102.

27 <sup>10</sup> The SAC alleges that between March 2018 and October 2018, Planning Department staff  
28 “began demanding Plaintiff modify its plan for the Property” by removing the third floor of the  
project but does not allege that staff indicated plaintiff may only receive approval for rebuilding the  
original one-story 927 square foot home. *See* SAC ¶ 52.

1 proposal and approved a two-unit project comprised of 3,280 square feet and without the roof deck  
2 that would have made the project comply with “open space” regulations under the Planning Code.  
3 *Id.* ¶¶ 77-79.

4 In their motion to dismiss, defendants do not provide a rational basis for the Planning  
5 Commission’s actions. Defendants state that “the City’s Planning Code provides broad discretion  
6 to the Planning Commission to shape projects in the Conditional Use process[,]” Mot. at 23, but that  
7 argument does not address whether the Planning Commission exercised its discretion in an arbitrary,  
8 irrational, or malicious manner. *See Engquist*, 478 F.3d at 993.

9 Defendants also argue that they “required other similarly situated property owners who  
10 demolished residences without appropriate permits to obtain and comply with a conditional use  
11 authorization requirement of Section 317 of the Planning Code.” Reply at 12 (citing Defs’ RJN,  
12 Ex. H). Meanwhile, the SAC describes two properties that plaintiff alleges were similarly situated,  
13 in that they were also cited for exceeding the scope of their permits, but that those properties did not  
14 have their permits cancelled and/or were not forced to submit to the CUA process that required a  
15 Planning Commission hearing. *See SAC* ¶¶ 55, 82-84. These sorts of factual disputes are best  
16 reserved for summary judgment and the Court will not at this stage engage in analysis of the  
17 similarities and differences of various real property and the types of building permit violations that  
18 occurred at each.

19 Rather, taking plaintiff’s allegations as true, the Court DENIES defendants’ motion to  
20 dismiss the Equal Protection claim (Fourth Claim) of the SAC.

21

22 **E. Excessive Fines (Fifth Claim)**

23 The Excessive Fines Clause of the Eighth Amendment prohibits the government from  
24 imposing “excessive fines” as punishment. *See U.S. Const. amend. VIII.* The Excessive Fines  
25 Clause is an incorporated protection applicable to the States under the Fourteenth Amendment’s  
26 Due Process Clause. *Timbs v. Indiana*, 139 S. Ct. 682, 691 (2019). “The Excessive Fines Clause  
27 . . . limits the government’s power to extract payments, whether in cash or in kind, as punishment  
28

1 for some offense.” *United States v. Bajakajian*, 524 U.S. 321, 328 (1998) (internal quotation marks  
2 and citation omitted).

3 The Court previously deferred ruling on Plaintiff’s Excessive Fines claim until after the  
4 filing of the SAC. Dkt. No. 48 at 10. Plaintiff now asserts defendants violated the Excessive Fines  
5 Clause when, “as punishment for Plaintiff exceeding the scope of the 2014 Permit, they invalidated  
6 Plaintiff’s vested rights and/or property interests by unlawfully cancelling the 2014 Permit.” SAC  
7 ¶ 118. Plaintiff also alleges that “CUA Decision I and CUA Decision II deprived Plaintiff of any  
8 viable economically productive use of the Property. Defendants imposed this arbitrary, unlawful  
9 and excessive fine on Plaintiff all without notice, opportunity to object or appeal, and without due  
10 process of law.” *Id.*

11 For several reasons, the Court finds the Excessive Fines Clause inapplicable to the facts at  
12 hand. First, in *Browning-Ferris Industries of Vermont, Inc., v. Kelco Disposal, Inc.*, 492 U.S. 257  
13 (1989), the Supreme Court explained that the Eighth Amendment was addressed to “bail, fines, and  
14 punishment,” and that those matters “traditionally have been associated with the criminal process,  
15 and by subjecting the three to parallel limitations the text of the Amendment suggests an intention  
16 to limit the power of those entrusted with the criminal-law function of government.” *Browning-*  
17 *Ferris Indus.*, 492 U.S. at 262-63. Although the *Browning-Ferris* Court refrained from “go[ing] so  
18 far as to hold that the Excessive Fines Clause applies just to criminal cases,” this Court is doubtful  
19 that “the outer confines of the Clause’s reach” encompass the conduct plaintiff alleges here. *See id.*  
20 at 263-64; *see also Kortlander v. Cornell*, 816 F. Supp. 2d 982, 994-95 (D. Mont. 2011) (granting  
21 judgment on the pleadings in favor of federal agents who seized property during investigation,  
22 explaining, “Since Kortlander was never even charged with an offense, let alone required to pay a  
23 fine as punishment for being convicted of an offense, the [Excessive Fines Clause claim] must be  
24 dismissed as implausible”) (citing *Bajakajian*, 524 U.S. at 327-28). Plaintiff cites no cases applying  
25 the Excessive Fines Clause to a local agency’s review of a conditional use or permit application or  
26 to any other like land-use context, and the Court finds the Clause a poor fit to the facts alleged here.

27 In support of its claim, plaintiff cites only to *Bajakajian*, 524 U.S. at 334. *See* Opp’n at 31-  
28 32. In that case, the Supreme Court concluded that the forfeiture of foreign currency during a

1 criminal proceeding was punitive, and was “thus a ‘fine’ within the meaning of the Excessive Fines  
2 Clause[.]” *See Bajakajian*, 524 U.S. at 334; *see also Fed. Trade Comm’n v. Credit Bureau Ctr.,*  
3 *LLC*, 937 F.3d 764, 770 (7th Cir. 2019), *cert. granted sub nom. FTC v. Credit Bureau Ctr.*, No. 19-  
4 825, 2020 WL 3865251 (U.S. July 9, 2020) (explaining that the first step in an Excessive Fines  
5 analysis is whether there is a “fine” and holding that an injunction does not implicate the Excessive  
6 Fines Clause because it is not a fine). Here, plaintiff has failed to allege that it was subject to a fine.  
7 Plaintiff points to the allegedly “unlawful” enforcement of Planning Code section 317 as well as the  
8 imposition of CUA Decision I and CUA Decision II. *See Opp’n* at 32. These do not constitute a  
9 fine, either in cash or in-kind, as encompassed by the Excessive Fines Clause. *See Bajakajian*, 524  
10 U.S. at 328; *see also Fed. Trade Comm’n*, 937 F.3d at 770 (“The Supreme Court has limited ‘fines’  
11 to ‘cash [or] in-kind payment[s] imposed by and payable to the government.’”) (quoting *Dep’t of*  
12 *Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 136 n.6 (2002) (quotation marks omitted)).

13 Finally, even if the actions plaintiff complains of were “fines” within the meaning of the  
14 Eighth Amendment, the Court also finds implausible plaintiff’s allegation that the imposition of  
15 CUA Decision I and CUA Decision II “was plainly excessive in that it deprived Plaintiff of any  
16 viable economically productive use of the Property.” *See Opp’n* at 32. For the reasons stated in  
17 § I.B, above, the allegation that plaintiff has been deprived of any economically productive use of  
18 the property is not plausible in light of the fact that plaintiff received approval to proceed with a  
19 two-unit project totaling 3,280 square feet. *See SAC ¶¶ 77-79.*

20 Because this claim cannot be saved by the allegation of additional facts, the Court  
21 DISMISSES the Fifth Claim with prejudice.

22  
23 **II. State Law Claims**

24 Plaintiff brings two state law claims in the SAC: writ of mandate per California Code of  
25 Civil Procedure § 1094.5 or 1085 (Sixth Claim); and writ of mandate per California Code of Civil  
26 Procedure § 1094.5 or 1085, under California Government Code § 65589.5 (Seventh Claim).

27 In the motion to dismiss, defendants state that plaintiff’s state law claims must be dismissed  
28 as barred by the statute of limitations. Defendants argue that plaintiff should have brought a

1 mandamus action “within 90 days of the cancellation of the 2014 Permit[.]” Mot. at 26-27 (citing  
2 Cal. Code Civ. Proc. § 1094.6). Yet the crux of plaintiff’s complaint is that defendants “unlawfully  
3 cancelled” its 2014 Permit, rather than revoking or suspending the permit, and that this “unlawful  
4 cancellation” left plaintiff in a proverbial no-man’s land, where it was deprived of the right to an  
5 automatic appeal to the Board of Appeals that would have attached if DBI had revoked the permit.  
6 SAC ¶¶ 90, 100. Where the misconduct alleged in the SAC was the very deprivation of plaintiff’s  
7 appellate rights, the Court will not at this stage dismiss the complaint on statute of limitations  
8 grounds for failure to appeal the 2014 Permit cancellation. *See Von Saher v. Norton Simon Museum*  
9 *of Art at Pasadena*, 592 F.3d 954, 969 (9th Cir. 2010) (“[A] complaint cannot be dismissed unless  
10 it appears beyond doubt that the plaintiff can prove no set of facts that would establish the timeliness  
11 of the claim.”) (citation omitted).

12 Defendants also argue the amended complaint fails to state a claim for writ relief under  
13 California Code of Civil Procedure § 1094.5 or § 1085. They argue that the Planning Commission  
14 acted within its authority in issuing CUA Decision II, that plaintiff’s allegation that it did not have  
15 notice or meaningful opportunity to be heard before CUA Decision II is “disingenuous,” and that  
16 California Government Code section 65589.5 “provides no guarantees that a project will be  
17 approved as proposed.” Mot. at 28-29. Defendants focus on factual disputes better reserved for  
18 summary judgment. Their arguments rest on (1) whether plaintiff received an opportunity to be  
19 heard before the Planning Commission issued CUA Decision II, and (2) whether CUA Decision II  
20 is properly categorized as a “disapproval” of plaintiff’s project. *See id.* at 29. But plaintiff’s SAC  
21 alleges that, after plaintiff had an opportunity to present its project and after the close of public  
22 comment, with no warning to plaintiff that the Planning Commission was considering approving a  
23 project that was 900 square feet less than the “Negotiated Compromise,” the Planning Commission  
24 issued CUA Decision II. SAC ¶¶ 76-79. Plaintiff also alleges that CUA Decision II was issued  
25 “under the guise of an ‘approval,’” rather than as a disapproval, which would have triggered certain  
26 required findings under Government Code section 65589.5. *See id.* ¶ 76; Opp’n at 31.

27 Treating plaintiff’s allegations as true, the Court finds dismissal of the state law claims at  
28 this stage is not warranted and accordingly DENIES the motion to dismiss the state law claims from

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the SAC.

**CONCLUSION**

For the foregoing reasons and for good cause shown, the Court orders as follows:

Defendants’ motion to dismiss is GRANTED in part, and plaintiff’s First Claim for violation of the First Amendment is DISMISSED with leave to amend. Plaintiff’s Second Claim for violation of Due Process, Third Claim for Inverse Condemnation/Takings, and Fifth Claim for Excessive Fines are DISMISSED with prejudice.

Defendants’ motion to dismiss is DENIED in part as to plaintiff’s Fourth Claim for violation of Equal Protection and Sixth and Seventh Claims for writs of mandate under California state law.

Plaintiff is granted leave to amend only insofar as needed to amend its First Claim. Any Third Amended Complaint is due no later than **September 16, 2020**.

The Court CONTINUES the further case management conference set for September 4, 2020, to **October 16, 2020, at 3:00 p.m.** The parties’ joint case management statement shall be due **October 9, 2020**.

**IT IS SO ORDERED.**

Dated: September 2, 2020



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SUSAN ILLSTON  
United States District Judge