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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

TOUFIC AND EVA JISSER, AND THE TOUFIC AND EVA JISSER REVOCABLE TRUST, Plaintiffs, v. CITY OF PALO ALTO, Defendant.	No. 5:15-cv-05295-EJD **PLAINTIFFS' OPPOSITION TO THE CITY OF PALO ALTO'S RULE 12(b)(1) AND 12(b)(6) MOTION TO DISMISS** Date: May 26, 2016 Time: 9:00 a.m. Courtroom: 4 Judge: Hon. Edward J. Davila

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INTRODUCTION

The Jissers[1] have brought this civil-rights action for declaratory and injunctive relief because the City of Palo Alto ("City") prohibits them from closing the mobilehome park they have owned and operated for nearly 30 years ("Buena Vista") unless they make an extraordinary lump-sum payment of approximately $8 million to their tenants. On the basis of its Mobilehome Conversion Ordinance ("Ordinance"), the City issued a final decision on May 26, 2015, allowing the park's closure upon satisfaction of this massive monetary demand (and other lesser conditions). The City's application of the Ordinance transformed that law into an unconstitutional command forcing the Jissers to pay money to tenants (who may use it for any purpose) to satisfy the City's desire to mitigate the lack of affordable housing–a problem Buena Vista does not cause. But for the unconstitutional application of the Ordinance, the Jissers would close Buena Vista, making way for an alternative future use of their property on the heels of the Jissers' retirement from the business.

Plaintiffs specifically allege that the tenant payments demanded by the City (1) amount to an unconstitutional condition on the Jissers' property rights and/or a *per se* taking; (2) violate the Public Use Clause of the Fifth Amendment; and (3) violate California's Mobilehome Residency Law, which prohibits conditions on a mobilehome park closure "exceed[ing] the reasonable costs of relocation" of a park's tenants. The City has now moved to dismiss the Complaint, primarily contending that the Jissers have failed to state valid as-applied claims because (1) the claims are really a time-barred facial challenge; (2) *Yee v. City of Escondido*, 503 U.S. 519 (1992), forecloses the claims; (3) the Jissers' have not exhausted administrative or state-court remedies seeking compensation; and (4) declaratory and injunctive relief are inappropriate remedies for their claims. The City further urges the Court to decline supplemental jurisdiction over the Jissers' state-law claim.

The City's arguments are without merit. The Jissers have brought a timely as-applied challenge sufficiently alleging constitutional and state-law violations arising from a particular

[1] As in the Complaint (Dkt #1), Plaintiffs Toufic ("Tim") and Eva Jisser and the Toufic and Eva Jisser Revocable Trust are collectively referred to as the "Jisser Family" or simply "the Jissers."

application of the City's Ordinance to Buena Vista. *Yee* not only allows such claims, it invites them. Finally, no ripeness, exhaustion, or remedies principles bar the claims here. In contending otherwise, the City improperly relies on precedent dealing with regulatory takings claims that seek monetary compensation for oppressive land use or rent control rules, a line of cases that has no bearing here. The City's motion should be denied.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. The Jisser Family and Buena Vista

The Jissers moved to the United States from Israel in 1973 and soon after opened a grocery store in Palo Alto, the All American Market, adjacent to Buena Vista. Compl. ¶¶ 12-13. They purchased the grocery-store building and Buena Vista in 1986, when the previous landowner put the land containing both businesses up for sale. *Id.* ¶ 14. The Jissers closed the All American Market in 1998, but continue to run Buena Vista up to today. *Id.* ¶¶ 14, 17. Toufic ("Tim") Jisser and his son, Joe, manage the daily operation of Buena Vista. *Id*. ¶¶ 1, 18.

Buena Vista is an aging mobilehome park with relatively few amenities. *Id*. ¶¶ 21, 24. It sits on a little less than five acres with approximately 96 occupied mobilehome spaces. *Id*. ¶ 15. The park has been in operation since the 1950s and substantial investments in sewer, electric, and other systems are needed within the next few years, if the Jissers are forced to continue its operation. The average age of the mobilehomes occupying Buena Vista's spaces is approximately 42 years. *Id.* ¶¶ 21, 22. Tim Jisser is retiring and the Jissers want to close Buena Vista to put their property to another future use. *Id*. ¶¶ 19, 25.

B. Summary of California and Palo Alto Mobilehome Laws

California's Mobilehome Residency Law, Cal. Civ. Code § 798, *et seq*., protects the right of mobilehome park owners to close a mobilehome park and take exclusive possession of their land. Under Cal. Gov't Code § 65863.7, a local legislative body–such as Palo Alto's City Council–may require the property owner to "mitigate any adverse impact of the [park closure] on the ability of the displaced mobilehome park residents to find adequate housing in a mobilehome park." Importantly, the conditions imposed "shall not exceed the reasonable costs of relocation." *Id.* § 65863.7(e).

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The City's Ordinance is the local legislation implementing the closure of mobilehome parks in Palo Alto. Pursuant to the Ordinance, a park owner must submit an application for approval to close a park, supported by a "Relocation Impact Report" ("Report"). Palo Alto Municipal Code (PAMC) 9.76.030. The Report must propose measures to be taken by the park owner to mitigate adverse impacts of the park closure on residents. *Id.* The City then holds a hearing, upon deeming an application and Report complete, to determine whether the proposed mitigation measures are adequate. PAMC 9.76.040(g). If the City grants a permit to close the park, the property owner is then is required to return a "Certificate of Acceptance" form, which acknowledges and finalizes the City's decision. PAMC 9.76.050 (a closure permit "shall not be valid and effective until the park owner has filed a certificate of acceptance of the conditions of approval").

C. The City Applies Its Mobilehome Conversion Ordinance to Buena Vista

The Jissers applied to close Buena Vista on November 9, 2012. Compl. ¶ 45. At that point, the Ordinance required them to submit a Report. In fact, between May 2013 and February 2014, they submitted a total of five Relocation Impact Reports, each one responding to a rejection and comments from City staff. *Id.* ¶ 46. The City accepted the Jissers' final Report on February 20, 2014. *Id.* ¶ 47.

The City held hearings on the Jissers' application in May 2014, and on September 30, 2014, granted a permit to close Buena Vista. *Id.* ¶ 49. That decision conditioned the closure of Buena Vista on the Jissers' payment of "enhanced relocation assistance benefits," including: (a) the purchase of each and every mobilehome in the park for an amount equal to 100% of the on-site value of the mobilehome; (b) a lump sum payment equal to 100% of the difference between average rents for apartments in Palo Alto and surrounding cities and the average rents for spaces in Buena Vista, for a period of 12 months; and (c) the payment of "start-up costs" to their tenants for first and last months' rent plus security deposit in alternative housing, as well as actual moving costs. *Id.* ¶ 50. These conditions require the Jissers to pay a lump-sum of approximately $8,000,000 to their tenants or be forced to continue operating Buena Vista. *Id.* ¶ 54. Buena Vista's tenants appealed the hearing officer's decision arguing, among other things, that the mandated payment

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was too small. The tenants' appeal was denied by the City on May 26, 2015 when the City affirmed its previous decision, including the conditions. *Id.* ¶¶ 3, 53.

D. Procedural History

On August 31, 2015, the Jissers filed a "Certificate of Acceptance", as the Ordinance required, acknowledging the City's decision and making it final. DKT # 21 (Def.'s RJN), Exh. D.[2] In addition to the Certificate, the Jissers also sent a letter to the City noting that its "acceptance" did not waive federal constitutional claims such as those at issue here. On August 24, 2015, a group of Buena Vista's residents filed an action against the city in state court challenging the City's final decision and opposing the closure of Buena Vista. Def.'s RJN, Exh. C. On November 19, 2015, the Jissers filed the present action and the City's Motion to Dismiss (DKT #20) followed on December 22, 2015.

STANDARD OF REVIEW

In considering a motion to dismiss, the Court must construe the pleadings in a light most favorable to the non-moving party, accepting as true all material allegations in the complaint and any reasonable inferences drawn therefrom. *See, e.g.*, *Broam v. Bogan*, 320 F.3d 1023, 1028 (9th Cir. 2003). To overcome the City's motion to dismiss, the Jissers' "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Only if the Complaint's allegations fail to supply a "cognizable legal theory" or facts sufficient to support a cognizable legal theory, should the motion be granted. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

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[2] The Jissers do not object to the City's request for judicial notice, however, *Lee v. City of Los Angeles*, 250 F.3d 668 (9th Cir. 2001), describes the proper scope of that notice. In that case, a district court erred by taking notice of disputed facts–particularly incorrectly taking "judicial notice of the validity of [the plaintiff's extradition] waiver, which was as yet unproved," instead of the mere "*fact* that a Waiver of Extradition was signed [by plaintiff]." *Id*. at 689-90. Accordingly, judicial notice of the materials submitted by the City should extend only to the fact that the Certificate of Acceptance (and the Jissers' subsequent letter clarifying that acceptance) exist and were sent and received. The meaning of their content are legal matters for the court to decide, however, and City's conclusory assertions about the meaning of the documents must be disregarded as disputed facts.

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ARGUMENT

I

THE JISSERS HAVE STATED AN AS-APPLIED UNCONSTITUTIONAL CONDITIONS CLAIM

The Jissers first count states an as-applied claim of an unconstitutional condition and/or *per se* taking (Count I). In essentials, the Jissers allege that the City's approximately $8 million monetary demand unconstitutionally burdens the Jissers' right to go out of the mobilehome rental business and enjoy the personal use and possession of their property–a right recognized by, *e.g.*, *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979), *Yee*, and California state law (*see* Compl. ¶ 29). The Jissers specifically claim that the monetary exaction applied to their property is an unconstitutional condition, in violation of the principles set out in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), *Dolan v. City of Tigard*, 512 U.S. 374 (1994), and *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013), because it does not mitigate and is not proportionate to public impacts caused by the Jissers' withdrawal of property from the rental market. Compl. ¶¶ 76-79, 83.

The City contends, however, that the Jissers have failed to state a valid as-applied unconstitutional conditions claim because (in its view) the claim is really a facial claim that is time-barred, *id.* ¶¶ 9-13, and it further argues that *Yee v. Escondido* forecloses the claim and that it is not ripe. *Id.* ¶¶ 16-18. The City's positions reflect a fundamental misconception of the Jissers' claims and each of their arguments fail.

A. The Jissers' Claims Are As-Applied Claims

The City's argument that the unconstitutional conditions claim raises a facial, rather than as-applied challenge, is easily refuted. "In the takings context, the basis of a facial challenge is that the very enactment of the statute has reduced the value of the property or has effected a transfer of a property interest. This is a single harm, measurable and compensable when the statute is passed." *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1119 (9th Cir. 2010) (quoting *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 688 (9th Cir. 1993)). By contrast, "a[n] as-applied challenge involves a claim that the particular impact of a government action on a specific piece of property"

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effects a taking or is otherwise unlawful. *Ventura Mobilehome Communities Owners Ass'n v. City of San Buenaventura*, 371 F.3d 1046, 1051 (9th Cir. 2004) (quotation omitted).

Here, the Jissers have alleged that the City imposed an unconstitutional condition on them by *applying* its tenant relocation payment ordinance to Buena Vista in a manner that causes a taking under the particular circumstances of this case. Compl. ¶¶ 3-5. The Jissers never claimed that the "enactment"of the ordinance was the problem, as is necessary for a facial claim. They never used the word "facial" in their complaint. Their claims repeatedly refer to the "application" of the Ordinance. Compl. ¶¶ 65, 72, 82, 92, 94, 104. The allegations in the complaint easily put the City and Court on notice that the Jissers are raising as-applied claims. *See Hacienda Valley Mobile Estates v. City of Morgan Hill*, 353 F.3d 651, 656 (9th Cir. 2003) (a challenge to mobilehome rent control was as-applied rather than facial where the city's "decision not to grant the bulk of [the park owner's] rent increase[s]," and not the Ordinance's mere enactment, benefitted tenants at the property owner's expense). As Plaintiffs, the Jissers, and not the City, are the "masters of their complaint." *Tanoh v. Dow Chem. Co.*, 561 F.3d 945, 953 (9th Cir. 2009). They reiterate here what should be obvious on the face of the complaint: their claims raise as-applied, not facial challenges.

Nevertheless, the City tries to convert this as-applied case into facial one (so it can raise a statute of limitations argument) by pointing to *Ventura Mobilehome Communities*, *Guggenheim*, and *Rancho de Calistoga v. City of Calistoga*, 800 F.3d 1083 (9th Cir. 2015). MtD Br. at 10-11. This is futile. In the cited cases, the Ninth Circuit deemed certain regulatory takings challenges to mobilehome rent control laws as facial claims. It did so because the plaintiffs in each case alleged harms that arose directly from a legislative enactment, rather than from a particularized administrative decision.[3]

[3] For instance, in *Ventura Mobilehome Communities* a mobilehome park owner alleged that a rent control ordinance effected a taking because its provisions reduced the value of the parkowner's land and correspondingly raised the value of the park tenants' mobilehomes (described as a "premium" in the value of the mobilehomes). It was further alleged that the rent control ordinance failed to provide for a "fair and reasonable return for a capital investment in a mobilehome park project." *Ventura Mobilehome Communities*, 371 F.3d at 1050. The court held that such challenges "are inherently facial because the premium is a direct result of the ordinance's enactment." *Id.* at (continued...)

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Here, in contrast, the harms to which the Jissers object, including the violation of their right to be free from an unconstitutional monetary exaction, do not flow from the enactment of the City's Ordinance. The Ordinance only establishes a process. But it is the City's decision to implement that process here in a particular way–namely to require the Jissers to make the $8 million payment–that causes the harms underlying the Jissers' complaint. Compl. ¶¶ 3, 65. In short, the Jissers' conflict is not with the Ordinance, but with the City's decision to construe it to require an $8 million tenant payment in their case. While some applications of the Ordinance might be constitutional, the one challenged here is not. Therefore, construing the allegations in a light most favorable to the Jissers, *Broam*, 320 F.3d at 1028, the Jissers have alleged as-applied claims.

B. *Yee* Invites, Rather Than Forecloses, the Jissers' Unconstitutional Conditions Claim

The City's next argument is that *Yee v. Escondido*, 503 U.S. 519 (1992), requires dismissal of the Jissers' federal constitutional claims. Mtd. Br. at 13-15. This position is as weak as the City's facial claims argument.

Yee was an explicitly facial takings challenge to a rent control scheme. The mobilehome park owners had not "run th[e] gauntlet" of the administrative process posed by the ordinance. *Yee*, 503 U.S. at 528. Nevertheless, they contended that the unutilized scheme "transferred a discrete interest in land–the right to occupy the land indefinitely at a submarket rent–from the park owner to the mobile home owner." *Id*. at 527.

Noting that the California Mobilehome Residency Law allows a mobilehome park owner to withdraw property from the rental market, *id.* at 523, the Court held that "[a]t least *on the face* of the regulatory scheme, neither the city nor the State compels petitioners, once they have rented their property to tenants, to continue doing so" and so "no government has required any physical invasion of petitioners' property." *Id*. at 527-28 (emphasis added). The Court observed, however, that "this case provides no occasion to consider how the procedure *has been applied* to petitioners'

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[3] (...continued)
1051; *accord Levald*, 998 F.2 at 689 ("the premium arises solely from the existence of the statute itself").

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property . . . . A *different case would be presented* were the statute, on its face *or as applied*, to compel a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy." *Id*. (citations omitted; emphasis added).

The Jissers' case is one of the "different cases" expressly unaddressed by *Yee*. Again, this is not a facial case. The Jissers have run the administrative "gauntlet" by applying for a permit from the City to close their mobilehome park and have received a particularized, final decision–one with unlawful conditions. Moreover, *Yee* did not include a *Nollan/Dolan* unconstitutional conditions claim, like the claim here. To the extent *Yee* has anything to say on the issue, it seems to support such claims. *Id*. at 531-32 (observing that a mobilehome park owner property owner may have a valid constitutional claim if a city's rules forced the owner to stay in the rental business).

The bottom line is that *Yee* does not help the City. Instead, it either invites and supports the Jissers' as-applied constitutional claims or is inapposite to the resolution of such claims.

C. The Jissers' Claims Properly Seek Equitable Relief and Are Ripe

The City argues that the Jissers' unconstitutional conditions claim is improper because the Jissers must seek monetary damages, rather than equitable relief, but fail to do so. From there, the City argues that the Jissers' federal constitutional claims are not ripe under *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), because they were not first pursued in state court. MtD Br. at 16-18. These arguments are unavailing.

1. The Jissers' Claims Can and Do Seek Equitable Relief

Contrary to the City's position, it is perfectly appropriate for a property owner to seek equitable relief, rather than monetary compensation, in a case such as this one–where the government conditions the use of property on a transfer of money, but no money has yet changed hands. *See, e.g.*, *Eastern Enterprises v. Apfel*, 524 U.S. 498, 538 (1998) ("the Coal Act's allocation of liability to Eastern violates the Takings Clause, and [] should be enjoined"); *Brown v. Legal Found. of Washington*, 538 U.S. 216, 228-30 (2003); *Student Loan Mktg. Ass'n v. Riley*, 104 F.3d 397, 401 (D.C. Cir. 1997).

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This makes sense for several reasons. First, "it would 'entail an utterly pointless set of activities' to require a plaintiff to pay money demanded by challenged legislation and then go seek one for one dollar reimbursement before challenging the law as a taking." *Levin v. City & Cnty. of San Francisco*, 71 F. Supp. 3d 1072, 1079 (N.D. Cal. 2014) (quoting *Student Loan*, 104 F.3d at 401). Thus, property owners may seek "equitable relief under [] circumstances, like those presented here, where the lump-sum payment from property owner to tenant . . . neither provides nor sensibly contemplates compensation." *Levin*, 71 F. Supp. 3d at 1079 n.3 (citing *Washington Legal Found. v. Legal Found. of Washington*, 271 F.3d 835, 850 (9th Cir. 2001)); *see also Transohio Sav. Bank v. Director, Office of Thrift Supervision*, 967 F.2d 598, 613 (D.C. Cir. 1992).

Second, *Nollan* and *Dolan* and progeny clearly allow a landowner to challenge a finalized property condition before the condition has been satisfied; *i.e.*, before money or other property is transferred from the owner to government. *See Dolan*, 512 U.S. at 396 (invalidating a permit condition that threatened a taking, but had not been completed); *Koontz*, 133 S. Ct. at 2595 (unconstitutional condition doctrine prohibits "extortionate *demands*" for money) (emphasis added); *see also Wilkie v. Robbins*, 551 U.S. 537, 583-84 (2007) (Ginsburg, J., concurring in part and dissenting in part) (noting that both *Nollan* and *Dolan* challenged a finalized condition before the condition was satisfied). Since a property owner can challenge a monetary exaction before monetary losses, equitable relief to halt the taking must be a proper remedy. *See, e.g.*, *Koontz*, 133 S. Ct. at 2595 (halting imposition of a monetary condition prior to money being paid), *Brown v. Legal Found. of Wash.*, 538 U.S. at 228-29 (seeking injunctive relief to prevent a money taking).

Therefore, a suit for compensation is not required under the circumstances of this case, and declaratory and injunctive relief is proper. *See Levin*, 71 F. Supp. 3d at 1079; *see also Horne v. Dep't of Agriculture*, 133 S. Ct. 2053, 2063 (2013) ("it would make little sense to require the party to pay the fine in one proceeding and then turn around and sue for recovery of that same money in another proceeding").

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2. *Williamson County*'s State Procedures Rule Does Not Apply Here

In *Williamson County*, the U.S. Supreme Court held that a federal regulatory takings claim is not ripe until the "government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson County*, 473 U.S. at 186. Further, the Court observed that a "violation of the Just Compensation Clause" is ripe only after the property owner has used the state's "procedure [to seek compensation] and been denied just compensation." *Id.* at 195.

Here, there is no doubt the City reached a final decision[4] and it does not claim otherwise. The City does invoke the state procedures requirement, MtD. Br. at 16, but it poses no bar here for at least three reasons. First, the doctrine does not apply to a money takings case, like this one. *See*, *e.g.*, *Horne*, 133 S. Ct. at 2063; *Eastern Enters. v. Apfel*, 524 U.S. at 520-21; *Levin*, 71 F. Supp. 3d at 1079. Second, the doctrine does not apply to claims, such as those here, that do not seek and do not hinge on compensation. *See San Remo Hotel, L.P. v. City & County of San Francisco*, 545 U.S. 323, 345-46 (2005) (petitioners "could have raised most of their facial takings challenges, which by their nature requested relief distinct from the provision of 'just compensation' directly in federal court"); *Yee*, 503 U.S. at 533-34 (same).

The *Williamson County* state procedure's doctrine is prudential, and not jurisdictional.[5] Therefore, if the state procedures doctrine otherwise applies, the Court should use its prudential discretion to decline to apply the rule in this case. It is inefficient, unfair and unwise to require the

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[4] The City stresses, Mtd. Br. at 6, 16, 21, that the Jissers returned a "Certificate of Acceptance" acknowledging the City's permit decision and suggests that it precludes them from now challenging the conditions imposed by that decision. *See* DKT #21, Def.'s RJN, Ex. D. To the contrary, the return was a necessary step to making the City's decision final and to ripening the Jissers' rights. This is so because, under Palo Alto Municipal Code section 9.76.050, the City's decision granting the closure permit "*shall not be valid and effective* until the park owner has filed a certificate of acceptance of the conditions of approval." (Emphasis added.) The Jissers had to file the acceptance to perfect their legal claims against the conditions. To ensure that the City did not twist the meaning of this action, the Jissers also sent a follow-up letter to the City on October 26, 2015, noting that the "acceptance" did not waive federal constitutional claims such as those at issue here.

[5] This Court has original jurisdiction over Takings claims under 28 U.S.C. § 1331. *Williamson County*, even were it to apply, is not a jurisdictional barrier. *See Stop the Beach Renourishment, Inc. v. Florida Dep't of Environmental Protection*, 560 U.S. 702, 729 & n.10 (2010).

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Jissers to start a whole new state court case to seek compensation for a money exaction that can be challenged here, through a claim for equitable relief. *See Levin*, 71 F. Supp. 3d at 1079 (prudential considerations make it appropriate to adjudicate claim); *Guggenheim*, 638 F.3d at 1117-18 (ripeness presents prudential concern, not jurisdictional bar).

The City supplies nothing to undercut the conclusion that the Jissers' takings claims are ripe under the foregoing analysis. Indeed, the City's ripeness argument depends on takings cases in which the property owner sought monetary compensation for land use and rent control restrictions. *See* Mtd. Br. at 16-18. This precedent has no bearing in this equitable relief, money takings context. *See Levin*, 71 F. Supp. 3d at 1088 (distinguishing cases such as this one from the rent control context). The Jissers' unconstitutional conditions claim is ripe.

D. The City Does Not and Cannot Challenge the Viability of the Jissers' Unconstitutional Conditions Claim

The City argues that the Jissers' case shouldn't be heard, but it nowhere challenges the merits of the unconstitutional conditions claim for the simple reason that it cannot: the City's monetary demand utterly fails constitutional scrutiny under *Nollan*, *Dolan* and progeny.

The unconstitutional conditions "doctrine comes into play when the government demands a private payment in exchange for granting a landowner permission to make a different use of her property." *Levin*, 71 F. Supp. 3d at 1081 (citing *Nollan*, *Dolan*, and *Koontz*). Under that well-settled doctrine, governments may only constitutionally exact money from property owners as a condition of changing the use of their property if (1) the exaction has an "essential nexus" to the public impact of the proposed new use, *Nollan*, 483 U.S. at 837 (citations omitted) and (2) the exaction is roughly proportionate in both nature and extent to the public impacts caused by the new use, *Dolan*, 512 U.S. at 391. The massive lump-sum demanded by the City in this case fails on both counts.

1. The Jissers Have Stated a Claim That the Exactions Fail the *Nollan* "Nexus" Test

Nollan held that a land-use permit can be conditioned on an exaction only if there is an "essential nexus" between the exaction and the public impact of the property owner's proposed

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use. *Nollan*, 483 U.S. at 833-37. If the government's demand would be a taking outside of the permitting process, then the exaction is not a valid regulation of land use but an "out-and-out plan of extortion," making the condition unconstitutional. *Id.* at 837.

Here, the City demands the Jissers pay approximately $8 million as a condition of receiving a permit to change the use of their property, *i.e.*, close Buena Vista. The lump-sum payments to tenants are designed to mitigate the lack of affordable housing in the City–to give money to Buena Vista's tenants so that they can afford the high cost of alternative housing in the City when the park closes. Had the City commanded those payments outside a permitting process, it would surely constitute a *per se* taking of the Jissers' money.

The high cost of housing in Palo Alto is not caused, however, by the closure of Buena Vista. Compl. ¶¶ 60-62. The severe lack of affordable housing is the result of market forces (and the City's own long-term land-use policies). *Id.* ¶ 63. There is, therefore, no "essential nexus" between the monetary exaction demanded by the City and the public impact of closing Buena Vista. The City's $8 million monetary exaction fails scrutiny under *Nollan*.

2. The Jissers Have Stated a Claim That the Exactions Fail the *Dolan* "Rough Proportionality" Test

Dolan extended the analysis in *Nollan* and clarified that an exaction must have not only an essential nexus but must be roughly proportionate "both in nature and extent to the impact of the proposed development." *Dolan*, 512 U.S. at 391. The City's monetary demand also fails *Dolan*'s test.

The withdrawal of Buena Vista causes its tenants to incur certain immediate moving costs and possibly to move sooner to new housing than they might have otherwise. That is the impact of the Jissers' proposed new use of their property. The massive payments demanded by the City, however, are not proportionate in *nature* to that impact because the payments are not restricted in any way and do not have to be used for future housing or moving costs.

The exaction is also not proportionate in *extent* to that impact because it goes beyond mitigating the direct impact of the withdrawal, and forces the Jissers to purchase all of their tenants' mobilehomes and subsidize their future rent at Palo Alto rates for a year. Compl. ¶¶ 77-79.

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The closure of Buena Vista does not cause the shortage of alternative property to which the tenants can feasibly relocate their mobilehomes. Likewise, the high rent prices that tenants must pay to live in Palo Alto (or their need to do so) is not caused not by the closure of Buena Vista, but by the tenants' choices and larger economic forces. Because the City's $8 million exaction is not proportionate to the impact of Buena Vista's closure, in either nature or extent, it fails *Dolan*'s test.

The monetary demand in this case cannot withstand scrutiny under *Nollan* and *Dolan* because, at bottom, the City's aim is not to mitigate the direct impacts of Buena Vista's closure. Rather, the City has singled out the Jissers to pay what is, in effect, tenant public assistance to remedy the City's severe lack of affordable housing. That is a general social problem, however, that "in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

E. The Jissers Have Stated an Alternative *Per Se* Physical Takings Claim

The City's monetary demand provides the Jissers only one escape: they may avoid paying so long as they continue to operate Buena Vista and allow unwanted tenants to remain on their land. This alternative, however, constitutes a *per se* taking of the Jissers' right of exclusive possession of their property. "In effect, the Jisser Family has been told that they must choose between an unconstitutional taking of their money and an unconstitutional taking of their land." Compl. ¶ 4. The City's motion seems to ignore this *per se* physical taking element of the Jissers' Complaint. *See, e.g.*, Compl. ¶¶ 72, 74, 81, 82 (allegations concerning the physical taking alternative imposed by the City's unconstitutional condition).

The Jissers have a fundamental right to the exclusive possession of their property. *Nollan*, 483 U.S. at 831; *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982); *Kaiser Aetna v. United States*, 444 U.S. at 176. The City has demanded that the Jissers accede to the occupation of their property by unwanted tenants, and to forfeit their right to exclusively possess their property, unless they make an $8 million payment to their tenants. This is a *per se* physical taking of the Jissers' discrete property right to the exclusive possession of their property. In *Yee*, for example, the Supreme Court repeatedly indicated that rent control regulations cause a physical taking if they compel a property owner to continue renting property. 503 U.S. at 527-28,

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532. The Court said essentially the same thing in *Loretto*. 458 U.S. at 440 ("So long as these regulations do not require the landlord to suffer the physical occupation of a portion of his building by a third party, they will be analyzed under the multifactor inquiry generally applicable to nonpossessory governmental activity."). Thus, the City's demand either takes the Jissers' money or it takes a discrete property interest in their land.

II

THE JISSERS HAVE STATED AN AS-APPLIED PUBLIC USE CLAUSE CLAIM

The Jissers' second count asserts that, as-applied, the City's permit decision violates the Public Use Clause (Count II) because it fails to place "restrictions on how the funds are spent by tenants," allowing them to "be used for any private purpose whatsoever." Compl. ¶ 93. The "private benefits accruing to tenants from the mandated payments far outweigh any conceivable public benefit." Compl. ¶ 94. Pursuant to applicable law, a payment "intended to favor a particular private party [here, the tenants], with only incidental or pretextual public benefits" violates the Public Use Clause. *Kelo v. City of New London*, 545 U.S. 469, 491 (2005) (Kennedy, J., concurring).

The City attacks the claim on a number of fronts, but none of its arguments in favor of dismissal have merit. Initially, it is not clear if the City is arguing that the Public Use claim is unripe and not amendable to equitable relief, as it does with respect to the unconstitutional conditions claim. If it is, the position is easily disposed. Public use claims are not subject to *Williamson County*. *See Armendariz v. Penman*, 75 F.3d 1311, 1321 n.5 (9th Cir. 1996) ("because a 'private taking' cannot be constitutional even if compensated," they are not subject to *Williamson County*) (overruled on other grounds). And since such claims challenge the legitimacy of the exaction, rather than the lack of compensation, equitable relief is the standard remedy for a violation of the Public Use Clause. *Lingle v. Chevron U.S.A.*, 544 U.S. 528, 543 (2005) ("[I]f a government action is found to be impermissible–for instance because it fails to meet the 'public use' requirement [. . .]–that is the end of the inquiry. No amount of compensation can authorize

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such action."); *Kelo*, 545 U.S. at 491 (Kennedy, J., concurring) (a court "should strike down" a taking that violates the Public Use Clause).

On the merits, the City argues that the Public Use claim here has been rejected by "unequivocal authority." MtD. Br. at 20-22. But no Ninth Circuit or Supreme Court precedent deals with a private-to-private party money taking, like the one here. This is not a rent control case, such as *Rancho de Calistoga*. In such cases, a plaintiff asserts that rent control itself violates the Public Use Clause by indirectly transferring a premium (the difference between open market and rent controlled rent rates) to tenants in rent controlled units. Notably, the rent control premium can *only* be used to lower housing costs.

Not so here. Here, the City is mandating a direct transfer of cash from a landlord to a tenant, *with no requirement that the money be used for housing*. There are no strings attached at all. There is no reason to think the Jissers' unconditional transfer of money to tenants will advance any public housing purpose. The precedent cited by the City does not cover this situation. Instead, this case is governed by portions of *Kelo*. In *Kelo*, Justice Kennedy stated "A court applying rational-basis review under the Public Use Clause should strike down a taking that, by a clear showing, is intended to favor a particular private party, *with only incidental* or pretextual *public benefits*." *Kelo*, 545 U.S. at 491 (Kennedy, J., concurring) (emphasis added). The majority similarly noted that a "City would no doubt be forbidden from taking [property] for the purpose of conferring a private benefit on a particular private party." *Id.* at 477. The Jissers have alleged that the decision requiring them to transfer cash to their tenants (1) favors particular private parties and (2) does not benefit the public, because the tenants can use the money for any private purpose whatsoever. Compl. ¶¶ 94-95. It thus results in an impermissible private taking. The Complaint sets out a plausible Public Use claim under *Kelo*.

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CONCLUSION

The Jissers have stated viable claims for violations of their constitutional rights and are entitled to prove them on summary judgment or at trial.[6] Further, because there is no basis to dismiss the Jissers' federal claims, and because it is in the interest of judicial economy, the Court should exercise its supplemental jurisdiction under 28 U.S.C. § 1367 over the Jissers' state-law claim.

For the foregoing reasons, the Jissers respectfully request that the Court deny the City's motion to dismiss the Complaint.

DATED: January 13, 2016.

Respectfully submitted,

LAWRENCE G. SALZMAN
J. DAVID BREEMER

By /s/ Lawrence G. Salzman
LAWRENCE G. SALZMAN

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[6] If the Court deems the present complaint insufficiently pled, the Jissers are entitled to amend their complaint to correct any defects because leave to amend should be granted if it appears at all possible that the plaintiff can correct the defect. *Lopez v. Smith*, 203 F.3d 1122, 1130-31 (9th Cir. 2000).