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7
8 SUPERIOR COURT OF CALIFORNIA
9 COUNTY OF SANTA BARBARA

10
11 SANTA BARBARA ASSOCIATION OF)
REALTORS and ROBERT D. HART,)
12 Petitioners/Plaintiffs,)
13 v.)
14 CITY OF SANTA BARBARA and)
MEMBERS OF THE SANTA BARBARA)
15 CITY COUNCIL, in their official capacities,)
16 Respondents/Defendants.)
17

Case No.: 17CV04720

**PETITIONERS'/PLAINTIFFS'
OPPOSITION TO DEMURRER OR,
ALTERNATIVELY, OPPOSITION TO
MOTION TO STRIKE PORTIONS OF
FIRST AMENDED VERIFIED PETITION
FOR WRIT OF MANDATE AND
COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

18 Date: February 26, 2018
19 Time: 9:30 a.m.
20 Place: Dept. 5
Judge: Hon. Colleen K. Sterne
21 Action Field: October 19, 2017
22 Trial Date: None Set

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1 **INTRODUCTION**

2 The Santa Barbara Association of Realtors (SABOR) and Robert D. Hart (together,
3 SABOR), challenge the constitutionality of the City of Santa Barbara’s (City) Zoning Information
4 Ordinance (“ZIR” or “Ordinance”), on its face and as applied to Hart. The Ordinance is
5 unconstitutional on its face, because it requires an inspection of owner-occupied, single-family
6 homes prior to sale, and because it imposes unconstitutional conditions on the homeowner. Those
7 unconstitutional conditions, which include civil and criminal penalties for refusing an inspection,
8 are sufficient to compel involuntary consent. That was the case when Robert Hart “consented” to
9 an inspection of his home. *See* Declaration of Robert D. Hart, in support of this opposition brief.

10 The City’s primary argument is that the provisions for a ZIR are zoning ordinances, and
11 are thus subject to the short statute of limitations found in Government Code Section 65009. But
12 neither the legislative intent of that statute, nor the cases cited by the City support that claim. The
13 statute of limitations that applies to this constitutional challenge is the four year provision in
14 Government Code Section 343.

15 Lastly, the City’s claim that SABOR admits the Ordinance is constitutional as interpreted
16 and applied is not so for several reasons. First, the interpretation of a “physical inspection” as
17 taking a photograph of a private home from a public area is not a physical inspection to a clear
18 meaning of a “physical inspection,” nor does it accomplish the reasons the Ordinance was
19 adopted. The fact that the Ordinance was not amended to add the new interpretation of a physical
20 inspection is irrelevant to SABOR’s facial challenge, as is the City’s claim that the most onerous
21 provisions of the Ordinance have never been enforced.

22 For the reasons discussed in this brief, the demurrer should be overruled, and the motion
23 to strike portions of the First Amended Complaint (FAC) should be denied.

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1 **STANDARD OF REVIEW**

2 On demurrer the Court should read the complaint as a whole and consider all of the parts
3 in their context. *Courtesy Ambulance Serv. v. Superior Court*, 8 Cal. App. 4th 1504, 1519 (1992).
4 All allegations of facts contained in the complaint are accepted as true (*Sheehan v. San Francisco*
5 *49ers, Ltd.*, 45 Cal. 4th 992, 998 (2009)), and the Court can accept facts that may be inferred from
6 those expressly alleged (*Cundiff v. GTE California, Inc.*, 101 Cal. App. 4th 1395, 1404-05
7 (2002)). Matters outside the pleading that are subject to judicial notice may also be considered.
8 *Blank v. Kirwan*, 39 Cal. 3d 311, 318 (1985). Finally, the Court can determine whether the facts
9 alleged in the complaint might support any cause of action, even a cause not explicitly alleged.
10 In that case the Court should allow the plaintiff to amend. *Lee v. Bank of America National Trust*
11 *and Savings Assoc.*, 27 Cal. App. 4th 197, 216 (1994).

12 **ARGUMENT**

13 **I**

14 **PETITIONERS HAVE TAXPAYER STANDING TO RAISE A FACIAL CLAIM**

15 This case is brought as a taxpayer action pursuant to Code of Civil Procedure § 526a. Both
16 SABOR and its members pay taxes which support the City’s actions complained of in this case.
17 FAC, ¶ 6. Mandate can be used to test the constitutional validity of a legislative enactment. *See*
18 *Weatherford v. City of San Rafael*, 2 Cal. 5th 1241, 1245 (2017) (“An allegation that the plaintiff
19 has paid an assessed tax to the defendant locality is sufficient.” *Id.* at 1252.) “No showing of
20 special damage to a particular taxpayer is required as a requisite for bringing a taxpayer suit.”
21 *Connerly v. State Personnel Board*, 92 Cal. App. 4th 16, 29 (2001) (citing *White v. Davis*, 13 Cal.
22 3d 757, 764 (1975)). Taxpayer suits seek preventative relief to restrain an illegal expenditure.
23 *Connerly*, 92 Cal. App. 4th at 29.

24 A facial challenge to the constitutionality of a law need not be brought at the time the law
25 is adopted. *Dillon v. Municipal Court*, 4 Cal. 3d. 860, 865-66 (1971) (“Such a challenge is directed
26 solely to the language of the enactment and not to its application in the particular case.
27 Accordingly, we are not called upon to resolve the facts disputed by the parties.”).
28

1 **II**

2 **THE ZIR ORDINANCE WAS APPLIED TO THE SALE OF HART’S HOME**

3 Petitioner and Plaintiff Robert Hart listed and sold his owner-occupied single-family home
4 prior to the City’s adoption of its policy, to allow an owner to reject the inspection required by
5 the Ordinance. Hart did not want to comply with the physical inspection of the Ordinance, but
6 was compelled to do so for financial and personal reasons. He signed the check for the fees under
7 protest. *See* Declaration of Robert D. Hart in Opposition to the City’s Demurrer or, Motion to
8 Strike.

9 **III**

10 **THE STATUTE OF LIMITATIONS IS FOUR YEARS, NOT 90 DAYS AS**
11 **ARGUED BY THE CITY**

12 This case is subject to Cal. Civ. Proc. Code § 343, which allows that “[a]n action for relief
13 not [otherwise] provided for must be commenced within four years after the cause of action shall
14 have accrued.” The City argues that ordinances allowing administrative searches of single-family,
15 owner-occupied homes at the point of sale are zoning ordinances subject to the 90-day statute of
16 limitations.

17 **A. The City’s Inspection Ordinance Is Not a Zoning Ordinance**

18 The City claims that ordinances allowing administrative searches of single-family, owner-
19 occupied homes at the point of sale are zoning ordinances. Although the provisions appear in the
20 Zoning Code, they are “zoning ordinances” in name only. Rules of statutory construction provide
21 that neither the title of the statute nor the section it is in controls. *See, e.g., Berkeley Hillside*
22 *Preservation v. City of Berkeley*, 60 Cal. 4th 1086, n. 2 (2015) (“A provision’s title is never
23 allowed to enlarge or control the language in the body of the provision.”); *Dailey v. City of San*
24 *Diego*, 223 Cal. App. 4th 237, 251 (2013) (“[t]itle or chapter headings are unofficial and do not
25 alter the explicit scope, meaning, or intent of a statute”).
26

27 Other California cities that have adopted laws permitting similar inspections do not
28 consider them “zoning ordinances.” For example, Novato’s inspection ordinance is in the

1 “Building and Housing” Code (Petitioners’ RJN, Exh. A); Carpinteria’s ordinance is in the
2 “Building and Construction” Code (*id.*, Exh. B); and Pasadena’s ordinance is located in the
3 Building and Housing Code (*id.*, Exh. C). Each of those cities have separate zoning codes. *Id.*,
4 Exh. A-C.

5 Cases relied upon by the City demonstrate that zoning ordinances apply in the context of
6 seeking a permit, variance, or other permission to build new structures or alter existing ones. *See*
7 *Gonzalez v. Cnty. of Tulare*, 65 Cal. App. 4th 777, 786 (1998) (changing zoning of particular
8 parcel); *Freeman v. City of Beverly Hills*, 27 Cal. App. 4th 892, 897 (1994) (building permit
9 modification of a restaurant exterior to add drive-in and restroom); *Hensler v. City of Glendale*, 8
10 Cal. 4th 1, 26-7 (1994) (controversy related to a subdivision that prohibited construction on a major
11 ridge); *Howard Jarvis Taxpayers Assn. v. Los Angeles*, 79 Cal. App. 4th 242, 247 (2000)
12 (expanded categories of permitted business occupations in all agricultural and residential zones);
13 *Cnty. of Sonoma v. Superior Court*, 190 Cal. App. 4th 1312, 1325 (2010) (a Cooperative failed to
14 apply for a permit); *Napa Citizens for Honest Gov. v. Napa Cnty. Bd. of Supervisors*, 91 Cal. App.
15 4th 342, 388, (2001) (decision to adopt or amend a general or specific plan); *Royalty Carpet Mills,*
16 *Inc. v. City of Irvine*, 125 Cal. App. 4th 1110, 1114-15 (2005) (challenging a public agency’s action
17 re: conditional use permit).

18 The sale of an existing home does not require a permit, or any other form of permission
19 from the City. *See* Exh. D, section I. to FAC (“The ZIR is a report; it is not an entitlement
20 document or a permit.”) Nor does “[t]he failure to comply with the provisions of this Section...
21 invalidate the transfer or conveyance of real property.” Chapter 28.87.220 (H); Exhibit A to FAC.

22 **B. Section 65900 Does Not Apply to Existing Homes**

23 SABOR plaintiffs do not claim that the City cannot administer and enforce zoning
24 regulations. City’s argument that Government Code sections 65900 and 65901 authorize cities to
25 establish zoning boards, have zoning administrators determine specific zoning permit issues, and
26 “exercise any other powers granted by local ordinances” does not establish that any particular
27 ordinance is, in fact, a zoning ordinance. The legislature adopted section 65009 to reduce “delays
28 and restraints upon expeditiously completing housing projects.” § 65009(a)(1). The purpose “is

1 to provide certainty for property owners and local governments regarding decisions” that will
2 increase housing projects. § 65009(a)(2) and (3). Thus, it was determined that legal actions or
3 proceedings challenging local decisions should be subject to a short statute of limitations so
4 lawsuits would not “prevent the completion of needed developments” that government entities
5 have approved. *Id.* § 65009(a)(2). The City does not explain how a physical inspection of an
6 existing home falls within the language or intent of section 65009.

7 Neither of the cases cited by the City support its argument. The 90-day statute of
8 limitations states that one of its purposes is “to determine the reasonableness, legality, or
9 validation of any condition attached to a variance, conditional use permit, or any other permit.”
10 *Stockton Citizens for Sensible Planning v. City of Stockton*, 210 Cal. App. 4th 1484, 1492 (2012).
11 In that case, Stockton Citizens for Sensible Planning, and others, sought to vacate the approval of
12 a Wal-Mart Supercenter. *Id.* at 1487. The plaintiffs argued that section 65009, subdivision
13 (c)(1)(e), did not apply because the project was not approved by a legislative body, but rather by
14 a letter from the City’s Community Development Director. *Id.* The Court disagreed because the
15 Director was acting as the zoning administrator and was exercising powers granted by the local
16 ordinance when he sent a letter approving construction of the Wal-Mart Supercenter. *Id.*

17 *Cal. Building Industry Assoc. v. City of San Jose*, 61 Cal. 4th 435, 441 (2015), involved a
18 facial challenge to San Jose’s inclusionary housing ordinance requiring certain new residential
19 housing projects to provide affordable, low, or moderate income households. CBIA sought to
20 invalidate the action by arguing that the requirements created unconstitutional takings and
21 unconstitutional conditions on the approval of a new development. *Id.* at 453. Ruling that there
22 was no taking, the Court explained that “the ordinance falls within what we have already described
23 as municipalities’ general broad discretion to regulate the use of real property.” *Id.* at 461-62.
24 The list of examples provided by the Court does not suggest that an ordinance requiring a
25 warrantless search of a single-family, owner-occupied home is a zoning ordinance or that it is
26 permissible under the Fourth Amendment.

1 IV

2 **A PHOTO FROM A PUBLIC SPOT IS NOT A PHYSICAL INSPECTION**

3 City Ordinance 28.87.220(A), requires a “Zoning Information Report” when residential
4 properties are sold. Among other things, that Ordinance requires a “physical inspection” of the
5 home and property. *Id.* Section (B)(2) defines residential property as “any improved real property,
6 designed or permitted to be used for any residential purpose, situated in the City and shall include
7 the building or structures located on said improved real property.” Finally, section (D)(7)
8 references “[t]he results of a physical inspection for compliance with the Zoning Ordinance.”
9 This has been the law for many years, and it is still the law. The City declines to revise it (FAC
10 ¶¶ 22, 51), although the plain language violates citizens’ right to refuse intrusive physical
11 inspections of the sort that have been conducted for many years.

12 Plaintiffs’ claim is that the City failed to bring the Ordinance into compliance with state
13 and federal law, not that the City adopted the Ordinance in the first instance. Rather than amend
14 the Ordinance to clearly state that homeowners need not allow a warrantless search of their homes
15 and the surrounding property, City officials revised the meaning for the phrase “physical
16 inspection.” If a homeowner rejects the request for the warrantless inspection described in the
17 Ordinance, the City will take a picture of the property from a public area. But a picture does not
18 constitute a “physical inspection.” Nor does it advance the purpose of the Ordinance to inform
19 the buyer of unpermitted changes and other building code violations. Section 28.87.220(D)(6).

20 “The fundamental rule of statutory construction is that the Court should ascertain the intent
21 of the Legislature so as to effectuate the purpose of the law.” *Select Base Materials v. Board of*
22 *Equal*, 51 Cal. 2d 640, 645 (1959). The intent is determined by first examining the words of the
23 Ordinance. *California Teachers Assn. v. San Diego Community College Dist.*, 28 Cal. 3d 692, 698
24 (1981). The plain meaning rule requires that the words of the Ordinance be given their usual and
25 ordinary meaning. *Lungren v. Deukmejian*, 45 Cal. 3d 727, 735 (1988). The meanings of the
26 operative words are defined as follows:

- 27 1. “Physical. Material, substantive, having an objective existence, as
28 distinguished from imaginary or fictitious; real, having relation to facts, as

1 distinguished from more or constructive.” Black’s Law Dictionary (Fifth
2 Edition, West Publishing Co., 1979, at 1032).

3 2. “Inspection. To examine; scrutinize; investigate; look into; check over; or
4 view for the purpose of ascertaining the quality, authenticity or conditions of an
5 item, product, document, residence, business, etc.” *Id.* at 716.¹

6 3. “Inspector: A name given to certain officers whose duties are to examine and
7 inspect things over which they have jurisdiction. Officers whose duty it is to
8 examine the quality of merchandise,...structural soundness of building, etc...”
9 *Id.* at 717.

10 These definitions appear to require precisely the intrusive, physical inspection that the
11 City has been conducting for years. The City’s inspection program cannot be construed to mean
12 a picture taken from a public space. The case of *California v. Ciraolo*, 476 U.S. 207 (1986), is not
13 on point. That case dealt with a warrantless aerial observation of marijuana plants located in a
14 fenced-in backyard. After receiving an anonymous tip, police officers took a photograph of the
15 home, yard, and surrounding areas from an airplane. *Id.* at 209. The picture was taken for the
16 purpose of providing evidence sufficient to criminally charge the homeowner with cultivating
17 marijuana. *Id.* In this case, the City’s picture of a home from the sidewalk, or other public space,
18 is not designed to further the purpose of the inspection program, which is to discover health and
19 safety or code violations.

20 The fact that City officials agreed to informally change the inspection process does not
21 change the analysis. The Ordinance remains as it has been for many years (*See* City’s RJN, Exh.
22 1, at p. 4, n. 4), and there is nothing to prevent the City from resuming the warrantless inspections
23 at any time. Plaintiffs understand that charter cities enjoy autonomous rule over municipal affairs,
24 but not when a city’s provisions conflict with federal and state Constitutions and preemptive state
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27 ¹ Alternatively, “[t]o examine scrutinize, investigate; look into; check over; or view for the
28 purpose of ascertaining the quality, authenticity or conditions of an item. A careful examination
of something.” Bryan A. Garner, Editor in Chief, Fourth Pocket Edition, 1996 West Publishing
Co., at p. 388.

1 law. *Bishop v. City of San Jose*, 1 Cal. 3d 56, 61-62 (1969); *Sonoma County Organization of*
2 *Public Employees v. County of Sonoma*, 23 Cal. 3d 296, 315-16 (1979).

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4 V

5 **UNCONSTITUTIONAL CONDITIONS INDUCE HOMEOWNERS TO**
6 **“CONSENT” TO WARRANTLESS INSPECTIONS**

7 The unconstitutional conditions doctrine protects constitutional rights by ensuring that
8 government cannot coerce people into giving up their rights. *See Koontz v. St. Johns River Water*
9 *Mgmt. Dist.*, 133 S. Ct. 2586, 2594 (2013). In this case, the City’s Ordinance requires a ZIR. FAC
10 ¶ 12. Whether or not the Ordinance is read in conjunction with Cal. Civ. Proc. Code § 1822.50,
11 *et seq.*, (requiring consent or a warrant), the ordinance imposes unconstitutional conditions on
12 people who are selling their homes. Although the sale of the home can proceed without a ZIR or
13 an inspection (FAC, Exhibit A), the Ordinance includes severe consequences for refusing an
14 inspection. FAC ¶ 23. Pursuant to the ZIR Ordinance, it is unlawful to transfer title to residential
15 property without providing the transferee with a ZIR. Municipal Code §§ 28.87.220(H) and
16 28.98.002 provide that anyone who violates any provision in Title 28 (including the ZIR
17 provisions):

18 Section 29.98.002 “shall be deemed guilty of a misdemeanor, and upon conviction thereof
19 shall be punishable by a fine of not more than five hundred dollars (\$500), or by
20 imprisonment in the county jail for a period of not more than six (6) months, or by such
21 fines and imprisonment. Each day that violation of this title continues shall be considered
a separate offence.”

22 Section 28.87.220(C)(1) “requires that the owner or owner’s authorized representative
23 apply for a ZIR and pay a fee no later than 5 days after entering into an “agreement of
24 sale.” Generally, the report will be available no later than fifteen days after the
application is received.” *Id.* Section (C)(2)

25 Section (C)(3) “requires that a copy of the report obtained by the owner must be provided
26 to the buyer or buyer’s representative before title to the property is transferred.” FAC,
27 Exhibit A.
28

1 Even after the City allowed homeowners to decline the search required by the Ordinance,
2 a buyer must provide the ZIR report to the buyer or buyer's representative, even though the City
3 makes it clear that, due to the lack of consent to inspect the property, the City cannot confirm
4 violations that are not currently in the City's records. FAC, ¶ 23 and Exhibit D.

5
6 Any one of these conditions is sufficient to encourage those who want, or need, to sell
7 their homes to consent to a warrantless inspection. FAC, ¶¶ 36-39, 45-47. In *Currier v. City of*
8 *Pasadena*, 48 Cal. App. 3d 810 (1975), the City of Pasadena argued that its ordinance involved
9 only consensual entries. The Court disagreed.

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12 “The argument is specious. (1) To compel a property owner to let his property lie
13 vacant and to prohibit him from selling it, unless he “consents” to a warrantless
14 search is to require an involuntary consent. The owner's basic right to use and enjoy
15 the fruits of his property cannot be conditioned on his waiving his constitutional
16 rights under the Fourth Amendment and under article I, section 13, of the California
17 Constitution.”

18 *Id.* at 815.

19 VI

20 **FOURTH AMENDMENT CASES TO DO NOT PROVIDE FOR INSPECTIONS OF** 21 **OWNER-OCCUPIED, SINGLE-FAMILY HOMES**

22 “Physical entry of the home is the chief evil against which the wording of the Fourth
23 Amendment is directed.” *Payton v. New York*, 445 U.S. 573, 585 (1980). Although courts have
24 upheld government inspections of rental homes, multi-family residences, hotels, and businesses
25 (as cases cited by the City demonstrate), plaintiffs have found no precedent for warrantless
26 inspections of single-family, owner-occupied homes. Such homes should not be subject to
27 warrantless administrative inspections without a warrant supported by a suspicion of illegal
28 behavior or health and safety issues. Neither of those reasons apply in this case.²

² If the reason for inspecting homes is to correct health and safety issues, the City would not wait until a home is put up for sale.

1 Even Civil Procedure Code § 1822.50, *et seq.*, give no indication that they apply to owner-
2 occupied, single-family homes. Those sections, as noted by the City, were adopted in 1968 as a
3 response to *Camara v. Municipal Court of the City and County of San Francisco*, 387 U.S. 523
4 (1967). That case involved periodic inspections of apartment units. *Id.* at 525-26, n. 1. *Currier*,
5 48 Cal. App. 3d at 813, 818, also following *Camara*, applies to “a dwelling unit in a single-family
6 ‘residence building’”). The *Currier* court noted that the Ordinance exempts from the definition
7 of Change of Use, “a residence for one family.” *Id.* at n. 1. *See also, See v. City of Seattle*, 387
8 U.S. 541, 542 (1967) (commercial warehouse); *People v. Tillery*, 211 Cal. App. 3d 1569, 1574
9 (1989) (family living in relatives’ garage that was not suitable for habitation).

10 The Fourth Amendment, and the personal rights which it secures, have a long history. At
11 the very core of the Fourth Amendment stands the right of a man to retreat into his own home and
12 there be free from unreasonable governmental intrusion.” *See, e.g., Silverman v. United States*,
13 365 U.S. 505, 511 (1961).

14 CONCLUSION

15 For the foregoing reasons, Petitioners and Plaintiffs SABOR and Robert D. Hart
16 respectfully request that the Court deny the City’s demurrer in its entirety, as well as the motion
17 to strike portions of the First Amended Complaint. In the alternative, Petitioners and Plaintiffs
18 request leave to amend the First Amended Complaint.

19
20 DATED: February 9, 2018.

21 Respectfully submitted,

22 MERIEM L. HUBBARD
23 TIMOTHY R. SNOWBALL
24 Pacific Legal Foundation

25 By 
26 MERIEM L. HUBBARD
27 Attorneys for Petitioners/Plaintiffs
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DECLARATION OF SERVICE

I, Kiren Mathews, declare as follows:

I am a resident of the State of California, residing or employed in Sacramento, California.

I am over the age of 18 years and am not a party to the above-entitled action.

My business address is 930 G Street, Sacramento, California 95814.


On, February 9, 2018, true copies of **PETITIONERS’/PLAINTIFFS’ OPPOSITION TO DEMURRER OR, ALTERNATIVELY, OPPOSITION TO MOTION TO STRIKE PORTIONS OF FIRST AMENDED VERIFIED PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

were placed in an FedEx Envelope addressed to:

Thomas B. Brown
Burke, Williams & Sorensen, LLP
1901 Harrison Street, Suite 900
Oakland, California 94612-3501

which envelopes, with postage thereon fully prepaid, were then sealed and deposited with a FedEx Courier for overnight delivery service in Sacramento, California.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 9th day of February, 2018, at Sacramento, California.


KIREN MATHEWS