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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

LUKE BROST et al., Plaintiffs and Respondents, v. CITY OF SANTA BARBARA, Defendant and Appellant.	2d Civil No. B246153 (Super. Ct. No. 1342979) (Santa Barbara County)

Plaintiffs Luke Brost, Lavell and Louise Canley, and Ruben and Pam Barajas, through their respective trusts, own three parcels of land in an active landslide area known as Slide Mass C of the Conejo Slide. An ordinance adopted by the City of Santa Barbara (City) in 1997 prohibits new construction on properties entirely within that slide mass. (See Santa Barbara Mun. Code (SBMC), ch. 22.90.)

Plaintiffs resided on the properties until their homes were destroyed by a wildfire in November 2008. When plaintiffs inquired about rebuilding their homes, the City maintained it had no discretion to permit reconstruction and declined to amend the ordinance to provide an exemption. The trial court determined the ordinance, as applied to plaintiffs, constituted an unlawful regulatory taking of their properties. To avoid having to compensate plaintiffs for a permanent taking, the City amended the ordinance in April 2012 to allow reconstruction. The court awarded plaintiffs damages for a temporary taking plus attorney fees and costs.

The City raises two arguments on appeal. First, it contends plaintiffs' takings claim is not ripe for consideration because they failed to file formal applications to rebuild their homes. The trial court rejected this contention, finding the filing of development applications would have been futile because the City lacked discretion to permit any development on plaintiffs' properties. Given the certainty of the properties' permitted uses, we agree that plaintiffs were not required to file formal development applications. Because the 1997 ordinance precludes all development, the City's inevitable rejection of plaintiffs' development applications was not necessary for the court to determine the extent of permitted development on the properties. (See *Monks v. City of Rancho Palos Verdes* (2008) 167 Cal.App.4th 263, 283 (*Monks*); *Dunn v. County of Santa Barbara* (2006) 135 Cal.App.4th 1281, 1285, 1300-1301 (*Dunn*).)

Second, the City asserts the moratorium on new construction was justified under principles of state nuisance law. The trial court determined the City failed to meet its burden of showing that reconstruction of plaintiffs' homes would create a nuisance. It found that, at best, uncertainty exists regarding the stability of the geology within Slide Mass C. We conclude substantial evidence supports this finding. As stated in *Monks*, uncertainty regarding the area's geological stability "is not a sufficient basis for depriving a property owner of a home." (*Monks, supra*, 167 Cal.App.4th at p. 306.) We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The Canleys acquired the single-family residence at 474 Conejo Road in 1970. Brost purchased the neighboring residence at 478 Conejo Road in 1992. The Barajases acquired the residence behind the Canleys' property, at 17 Ealand Place, in 1975. The properties are entirely within the portion of the Conejo Slide known as Slide Mass C.

Approximately 30 parcels are partially or entirely within the boundary of Slide Mass C. Of the parcels entirely within Slide Mass C, 13 have been developed. As discussed below, these include plaintiffs' three homes, which were destroyed by fire in

2008, a home destroyed by a landslide in 1983, five homes destroyed by a slide in 1998, and four remaining homes.

In the 1980's, the generally slow-moving Conejo Slide had two larger movements, which broke utility lines, blocked a portion of Conejo Road, partially collapsed one home and adversely impacted three others. The City commissioned a geological report which recommended, among other things, a moratorium on new construction within Slide Mass C. Based on that report, the City adopted SBMC Ordinance No. 4294, which prohibited new construction subject to review of the ordinance every five years. The City extended the prohibition in 1991, but added a provision allowing new construction on lots partially within Slide Mass C, as long as the proposed building site is at least 25 feet outside of its boundary. (See SBMC Ord. No. 4698.)

In 1997, the City determined, based on updated geological reports, that "[t]he earth within the boundary of Slide Mass C is unstable; structures and other property on Slide Mass A, Slide Mass B, and Slide Mass C have been damaged because of that instability; and further damage to structures and property within the boundary of Slide Mass C is highly probable." Consequently, the City adopted SBMC Ordinance No. 5030, which added Chapter 22.90 to its Municipal Code (Chapter 22.90). Subject to limited exceptions, Chapter 22.90 permanently enjoins "[a]ll new construction . . . on the parcels which are located entirely or partially within the boundary of Slide Mass C," so as to allow the area to return to an undeveloped state upon expiration of the useful life of the existing buildings.

Chapter 22.90 defines "New Construction" as "any man-made change to improved or unimproved real property after June 11, 1991, including, but not limited to, buildings or other residential structures, mining, dredging, filling, grading, paving, excavation or drilling operations, which requires a building permit." (SBMC, ch. 22.90.020, subd. C.) The exceptions include (1) routine repairs and maintenance to residential structures, roads, driveways and utilities, (2) remodeling of the interior of existing homes and (3) additions to an existing structures which do not exceed 150 square

feet during any 24-month period. (*Id.* at ch. 22.90.030, subd. C.) An exemption also is possible for new construction that is at least 25 feet outside the boundary of Slide Mass C. (*Id.* at ch. 22.90.040, subd. A.)

The 1998 slide occurred after a series of heavy winter rains. In addition to destroying five homes within Slide Mass C, it caused the City to red-tag the Barajas home because the garage was pushing up against the residence. The Canley home was yellow-tagged due to broken waste piping and sanitation concerns. The Brost home was green-tagged as safe. The City established a Conejo Slide hazardous mitigation program which qualified for state and federal disaster assistance funds. Under this program, the City formed a nonprofit corporation and offered to purchase 11 properties within Slide Mass C. It ultimately purchased the five properties where the homes were completely destroyed.

The City lifted the red-tag on the Barajas home in 2001 after the structure was stabilized. During that time period, the owners of a neighboring property within Slide Mass C requested that Chapter 22.90 be amended to allow the rebuilding of homes destroyed by a fire or other non-geologic catastrophe. The City rejected the request, concluding the proposed amendment could not be justified based on the "area's landslide movement, the original 1984 study and analysis of Geotechnical Consultants, continued subsequent landslide movement that has substantially damaged several existing homes, and the recent slide analysis and recommendations of [the City's] Engineering Geologist Consultant."

A wildfire, known as the "Tea Fire," swept through Santa Barbara in 2008, destroying plaintiffs' homes and more than 150 other residences. Plaintiffs and others who had lost their homes retained the City's former chief building official, Roy Harthorn, to assist them in obtaining permits to rebuild. Harthorn met numerous times with George Estrella, the successor chief building official, who determined plaintiffs were ineligible for building permits under Chapter 22.90. Estrella explained that while he had some discretion to issue a building permit for new construction on a parcel that is at least 25

feet outside Slide Mass C, he had no such discretion for properties entirely within that slide mass.

Harthorn completed a master building application for the Barajas property, which included drawings of their previous home with a "specific request to reconstruct [the] home using those plans as a general guide." When Harthorn showed the drawings to Estrella during a meeting on January 7, 2010, Estrella said "[he] would not authorize [the request] to be processed where he would authorize others outside the slide boundary to be processed." Estrella also stated that City staff would not support an amendment of Chapter 22.90 to allow development of those properties.

At Harthorn's recommendation, plaintiffs and other homeowners retained Robert Hollingsworth, an engineer and geologist, to re-evaluate the limits of the Conejo Slide and to assess whether burned homes within the active slide area could safely be rebuilt. Hollingsworth prepared a report in May 2009, in which he concluded that construction should be allowed at the owner's risk because future movement rates should not exceed those in the past due to recent drainage improvements. Frank Kenton, the City's retained engineer and geologist, disagreed. He opined that although the slide movement historically has been slow, a change in the landslide dynamics has occurred since 1984, raising concerns regarding how the landslide will move under seismic conditions, particularly in a year with increased groundwater.

After a number of informal meetings, public hearings and written communications, the City Council declined to amend Chapter 22.90 to allow new construction on properties entirely within Slide Mass C. The City attorney advised Harthorn by email that "there generally are no 'appeals' to the City Council unless a specific city ordinance provides [an] express right to appeal to the City Council." Estrella also confirmed to Harthorn there are "no provisions in the . . . code to appeal to [the] City Council or to the Building [and] Fire Code Board of Appeals."

Plaintiffs filed a petition for writ of administrative mandamus in conjunction with an amended complaint for inverse condemnation and declaratory relief. They alleged that Chapter 22.90, as applied to their properties, constituted a regulatory

taking. The trial court overruled the City's demurrer to the plaintiffs' inverse condemnation cause of action and sustained the demurrer to the petition and claim for declaratory relief. The case proceeded to a bifurcated trial on the inverse condemnation claim.[1]

Following the three-day liability phase, the trial court issued a written tentative decision concluding the inverse condemnation claim is ripe for judicial consideration even though plaintiffs did not file development applications. The court found the City "made it clear that its Ordinance positively precluded rebuilding [plaintiffs'] homes, and that they would have been required to file for land use permits only if there was "uncertainty as to the lands permitted use." It determined there was no uncertainty and that "it was clearly futile for the plaintiffs to seek any administrative leave of any kind; the City had made its position crystal clear and the proof was overwhelming on the issue."

Next, the trial court rejected the City's assertion that Chapter 22.90's moratorium on new construction was justified under principles of state nuisance and property law. Finding *Monks*, *supra*, 167 Cal.App.4th 263, dispositive, it determined the City had failed to prove a reasonable probability of personal injury or property damage, "other than the possibility of damage to plaintiffs' desired homes in the distant future, damage that could be repaired." The court found that "[a]t best there remains *uncertainty* with respect to the stability of the geology of Slide Mass C," and that, under *Monks*, "'[u]ncertainty' [alone] is not a sufficient basis for depriving the property owner of a home."

The trial court also determined the inverse condemnation claim was not barred by the statute of limitations. It found the action accrued, not when Chapter 22.90 was enacted in 1997, but when the plaintiffs lost the economic use of their respective

[1] The amended complaint also included claims by two other plaintiffs, Richard and Nancy Algert. The trial court sustained the demurrer to their inverse condemnation claim with leave to amend. Rather than amend, the Algerts allowed judgment to be taken against them. They are not parties to this appeal.

properties following the 2008 Tea Fire. The court concluded the ordinance constituted a regulatory taking because it deprives them of all economically beneficial use of their properties, without justification under state nuisance or property law. It gave the City the option to amend Chapter 22.90 to exempt plaintiffs' properties, to withdraw the ordinance or to exercise eminent domain and proceed to a trial on damages.

The City chose to amend Chapter 22.90 to exempt the construction of a residence on a parcel within Slide Mass C if the parcel contained a home that was "destroyed by fire or other casualty after November 12, 2008." Following this amendment, the City maintained it was not liable for damages for a temporary regulatory taking. The trial court disagreed, concluding the construction ban constituted a total taking of the plaintiffs' properties between the time of the Tea Fire and the amendment.

Plaintiffs sought an award that reflected the fair market rental value of their homes during the period of the temporary taking. The City, in turn, argued the proper measure of damages was a fair return on the plaintiffs' investment in each parcel. The City's expert determined that each of the three vacant lots had a fair market value of $200,000, and opined that with a 6 percent fair rate of return the damages would be $12,000 per year per parcel.

The trial court accepted the City's proposed measure of damages and awarded the plaintiffs $42,000 per parcel, for a total of $126,000. It also granted plaintiff's motion for attorney's fees and other litigation expenses totaling $410,413.78. The City appeals from the judgment and order awarding attorney's fees and costs.[2]

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[2]When the City filed its opening brief, it moved to augment the record with a 1984 Geotechnical Consultants, Inc. report, marked as Trial Exhibit 107, which the trial court determined was inadmissible based on its pretrial ruling to "exclude expert[] reports from persons not designated as experts in this matter." Plaintiffs opposed the motion and moved to strike the portions of the City's opening brief discussing this exhibit. Because the City does not challenge the trial court's exclusion of the report as evidence, we deny the motion to augment and disregard the discussion of the report at pages 8-9 of the City's opening brief. (See *Artiglio v. Corning, Inc.* (1998) 18 Cal.4th 604, 612.) We deny plaintiffs' motion to strike as moot.

DISCUSSION

I. Plaintiffs' Motion to Dismiss Appeal

After the parties filed their briefs, Bettie Weiss, the acting director of the City's community development department, sent identical letters to plaintiffs asking, inter alia, if they require assistance in rebuilding their homes. Plaintiffs moved to dismiss the appeal, claiming the letters demonstrate the appeal is moot. The City opposed the motion, and we deferred our ruling. For the limited purpose of addressing the motion, we grant plaintiff's request to take judicial notice of the letters. (See *Reserve Insurance Co. v. Pisciotta* (1982) 30 Cal.3d 800, 813.)

Weiss's letters refer to 152 homes that were destroyed in the Tea Fire and recite that the owners of 115 of these properties have completed the permitting process to rebuild. Weiss represents "there are still some 30 home sites and property owners that have had limited contact with the City regarding plans to rebuild," and that she was tasked with contacting those owners "to get a better understanding of what may be preventing the reconstruction of homes at the remaining sites." She asks that the owners "voluntarily contact our office within [30] days so we can report back to the [single family design board] regarding the status of your property."

"A case is moot when the decision of the reviewing court 'can have no practical impact or provide the parties effectual relief. . . .' [Citation.] 'When no effective relief can be granted, an appeal is moot and will be dismissed.' [Citations.]" (*MHC Operating Limited Partnership v. City of San Jose* (2003) 106 Cal.App.4th 204, 214; *Steiner v. Superior Court* (2013) 220 Cal.App.4th 1479, 1485.) Plaintiffs have not demonstrated that Weiss's letters contain some type of admission or concession rendering it impossible for us to grant the City's requested relief, i.e., reversal of the judgment awarding damages, fees and costs for a temporary regulatory taking. (See *ibid.*) The "form" letters simply request a status update regarding building plans, if any, for plaintiffs' properties and presumably the 27 other remaining sites. They do not, as plaintiffs suggest, reflect any individualized determination or admission by the City as to whether it is feasible for plaintiffs to rebuild their homes. We therefore deny the motion

to dismiss and address the appeal on its merits. (See *Gogerty v. Coachella Valley Junior College Dist.* (1962) 57 Cal.2d 727, 729); *Johnson v. Sun Realty Co.* (1932) 215 Cal. 382, 383).

II. Ripeness

The City contends the trial court erred by concluding plaintiffs had perfected an "as-applied" regulatory takings challenge to Chapter 22.90. It maintains they were required to file formal applications to rebuild their homes and to allow the City to act upon the applications. Plaintiffs acknowledge that an-applied challenge typically is not ripe for consideration unless the landowner has filed, and the agency has processed, at least one meaningful development application. They contend this was not required here because the City lacked discretion to permit any new construction within Slide Mass C and, as a result, no meaningful application for development could be made. We agree with plaintiffs.

A. Standard of Review

Ripeness is a question of law that we review de novo. (*Wilson & Wilson v. City Council of Redwood* City (2011) 191 Cal.App.4th 1559, 1582; *Farm Sanctuary, Inc. v. Department of Food & Agriculture* (1998) 63 Cal.App.4th 495, 501, fn. 5.) Whether it would have been futile for plaintiffs to pursue administrative remedies is a question of fact we review for substantial evidence. (*Howard v. County of San Diego* (2010) 184 Cal.App.4th 1422, 1431; *Twain Harte Assocs., Ltd. v. County of Tuolumne* (1990) 217 Cal.App.3d 71, 91 (*Twain Harte*); *Grainger v. Antoyan* (1957) 48 Cal.2d 805, 807.) Under this standard, "we resolve any conflict in the evidence and reasonable inferences to be drawn from the facts in support of the determination of the trial court. [Citation.]" (*Citizens Business Bank v. Gevorgian* (2013) 218 Cal.App.4th 602, 613.)

B. Ripeness Principles

The federal and state constitutions prohibit the taking of property for public use without the payment of just compensation. (U.S. Const., 5th Amend.; Cal. Const., art. I, § 19, subd. (a); see *First English Evangelical Lutheran Church v. County of Los Angeles* (1987) 482 U.S. 304, 310, fn. 4.) A landowner may bring an action for inverse

condemnation to recover damages resulting from an unlawful taking. (*First English*, at p. 315; *Baker v. Burbank-Glendale-Pasadena Airport Authority* (1985) 39 Cal.3d 862, 867, fn. 4.) A regulatory, as opposed to physical, taking occurs when a governmental "regulation deprives the owner of all economically viable use" of its property. (*Charles A. Pratt Construction Co., Inc. v. California Coastal Com.* (2008) 162 Cal.App.4th 1068, 1080; see *Palazzolo v. Rhode Island* (2001) 533 U.S. 606, 617 (*Palazzolo*).)

There are two types of regulatory taking challenges. The first is a facial challenge in which the landowner asserts the enactment of the regulation constitutes a taking. The second is as-applied challenge in which the landowner avers the regulation's particular impact on its property constitutes a taking. (*Levald, Inc. v. City of Palm Desert* (9th Cir.1993) 998 F.2d 680, 686.) A facial challenge generally is ripe for consideration when the regulation is passed. (*Suitum v. Tahoe Regional Planning Agency* (1997) 520 U.S. 725, 736, fn. 10.) An as-applied challenge is not ripe until the landowner (1) has obtained a final decision from the governmental authority charged with implementing the regulation, and (2) pursued compensation through state remedies. (*Williamson County Regional Planning Com. v. Hamilton Ban*k (1985) 473 U.S. 172, 186, 194, 196; *Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 10 (*Hensler*); *Dunn*, *supra*, 135 Cal.App.4th at p. 1299; *Milagra Ridge Partners, Ltd. v. City of Pacifica* (1998) 62 Cal.App.4th 108, 116-117 (*Milagra Ridge*).)

A final governmental decision is required because the court cannot determine whether a taking has occurred unless it understands "'the extent of permitted development' on the land in question.' [Citation.]" (*Palazzolo, supra,* 533 U.S. at p. 618.) "A final decision by the responsible state agency informs the constitutional determination whether a regulation has deprived a landowner of `all economically beneficial use' of the property [citation], or defeated the reasonable investment-backed expectations of the landowner to the extent that a taking has occurred [citation]. (*Ibid.*)

C. Futility Exception

"'[F]ailure to exhaust administrative remedies is excused if it is clear that exhaustion would be futile.' [Citations.] 'The futility exception requires that the party

invoking the exception "can positively state that the [agency] has declared what its ruling will be on a particular case." ' [Citations.]" (*Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1080-1081 (*Coachella*); *Sea & Sage Audubon Society, Inc. v. Planning Com.* (1983) 34 Cal.3d 412, 418.) The "'mere possibility, or even the probability,'" that the agency would have denied a variance or otherwise denied the requested relief is insufficient to trigger the exception. (*Toigo v. Town of Ross* (1998) 70 Cal.App.4th 309, 327 (*Toigo*).) What is required is a "'sort of inevitability'" based on the actions of the administrative agency. (*Ibid*.)

In *Dunn*, the plaintiff filed an application to subdivide his property to allow construction of two separate residences. (*Dunn*, *supra*, 135 Cal.App.4th at p. 1285.) The County denied the application, indicating it would allow only one residence. (*Id.* at pp. 1299-1300.) The trial court found the plaintiff's takings claims were not ripe because the plaintiff had not applied for a permit to build a single residence on his property. We reversed, explaining that "`[w]hile a landowner must give a land-use authority an opportunity to exercise its discretion, once it becomes clear that the agency lacks the discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened.'" (*Id.* at p. 1300, quoting *Palazzolo*, *supra*, 533 U.S. at p. 620.) Because the County had made it clear that only one residence would be allowed, we concluded the plaintiff did not need to seek a building permit before filing suit. (*Id.* at pp. 1299-1301.) The permissible use of the property as a single building site was known to a reasonable degree of certainty. (*Id.* at p. 1301.)

The City contends the trial court erred by applying the futility exception here because, unlike in *Dunn*, plaintiffs did not submit any formal development applications. Pointing to *County of Alameda v. Superior Court* (2005) 133 Cal.App.4th 558 (*County of Alameda*), it maintains the exception merely "'relieve[s] a developer from submitting "*multiple applications* when the manner in which the *first application* was rejected makes it clear that no project will be approved.' [Citation.]" (*Id.* at p. 568; see

Milagra Ridge, supra, 62 Cal.App.4th at p. 120; *Calprop Corp. v. City of San Diego* (2000) 77 Cal.App.4th 582, 594 (*Calprop*); *Del Monte Dunes, Ltd. v. City of Monterey* (9th Cir. 1990) 920 F.2d 1496, 1501 ["At a minimum, the landowner must submit one formal development plan and seek a variance from any regulation barring the development proposed in the plan"].)

County of Alameda involved an as-applied takings challenge to Measure D, a voter-approved initiative designed to curb urban sprawl. (*County of Alameda, supra*, 133 Cal.App.4th at p. 563.) The initiative changed the land use designation of the plaintiff's property from agricultural to "resource management." (*Ibid.*) The trial court rejected the County's argument that the plaintiff's claim was not ripe because it had failed to submit a development proposal. It determined that any development application would have been futile because Measure D deprived the County of discretion to permit any economically viable uses on the property, and thus all permissible uses were known to a reasonable degree of certainty. (*Id.* at p. 564.) The Court of Appeal disagreed, noting that the futility exception is narrowly construed and "generally cannot be invoked unless a landowner has first made a development proposal that the authorities have rejected." (*Id.* at p. 568.) The court concluded that while Measure D restricts the permissible uses of the plaintiff's property, the outcome of any development proposal is uncertain because not all uses are precluded. (*Id.* at p. 570.) Without the County's interpretation of the permissible uses, the court could not assess whether a regulatory taking had occurred. The court observed: "[I]t may be that the County's interpretation of Measure D will make one of [the permissible] uses economically beneficial. [Fn. omitted.]" (*Ibid.*; see *Milagra Ridge, supra*, 62 Cal.App.4th at pp. 119-120; *Calprop, supra*, 77 Cal.App.4th at pp. 598-599.)

We do not read *County of Alameda* or any of the other cited cases as requiring a landowner to go through the motion of filing a formal development application when the outcome of the administrative process is certain. (See *Dunn, supra*, 135 Cal.App.4th p. 1285; *Sea & Sage Audubon Society, Inc. v. Planning Com., supra*, 34 Cal.3d at p. 418.) The ripeness doctrine imposes obligations on landowners

because "[a] court cannot determine whether a regulation goes "too far" unless it knows how far the regulation goes.' [Citation.] [It] does not require a landowner to submit applications for their own sake. [A landowner] is required to explore development opportunities on his . . . parcel only if there is uncertainty as to the land's permitted use." (*Palazzolo, supra*, 533 U.S. at pp. 620-622.)

Monks, supra, 167 Cal.App.4th 26, is instructive. The City imposed a moratorium on construction in a landslide area. (*Id.* at pp. 271-273.) After the plaintiffs applied for an exemption, the City adopted an ordinance requiring landowners to undertake a very expensive study of the *entire* landslide zone to show that it has a safety factor of 1.5 or higher, even though geologists agreed it has a lesser safety factor. (*Id.* at pp. 282-283.) The court rejected the City's argument that, in the absence of the required study, the plaintiffs' takings claim was not ripe. It found the outcome of the administrative process was certain, i.e., the plaintiffs' application would be denied because they cannot show the requisite safety factor. The court concluded: "'Given this, plaintiffs cannot build homes on their lots. Thus, it is clear "how far the regulation goes." [Citation.]'" (*Id.* at p. 283.)

In *Herrington v. County of Sonoma* (9th Cir. 1988) 857 F.2d 567 (*Herrington*), the plaintiffs proposed to build a 32-lot subdivision but did not submit a formal development plan. (*Id.* at p. 569.) The County's board of supervisors determined the proposal was inconsistent with its general plan and could not be approved without a plan amendment. (*Ibid.*) The evidence established plaintiffs had no chance of obtaining an amendment. (*Id.* at pp. 569-570.) The court recognized the general rule that a landowner must make at least one development application before invoking the futility exception, but concluded the County had definitively rejected the proposal and "it would have been futile for the [plaintiffs] to pursue their application for the 32-lot development." (*Id.* at p. 569.) The court explained: "The County's determination of inconsistency effectively told the [plaintiffs] to stop the application process in regard to the 32-lot proposal. Under the circumstances of this case it would be inappropriate to require the [plaintiffs] to have formally completed a hopeless application." (*Ibid.*; see

Powell v. County of Humboldt (2014) 222 Cal.App.4th 1424, 1434-1435 [case is ripe where correspondence between the parties established a final agency decision that no building permit would be issued without grant of an easement]; *Ogo Associates v. City of Torrance* (1974) 37 Cal.App.3d 830, 834 [applying futility exception where requiring plaintiffs to seek a variance "would be to require them to pump oil from a dry hole"].)

Here, the trial court similarly determined "plaintiffs made all reasonable efforts to seek any administrative remedies; it was certainly clear further attempts would be totally futile; the outcome was inevitable and there was no possibility of any appeal, amendment or alternative administrative remedy of any kind available." It found that Chapter 22.90 does not permit any case-by-case exceptions to the new construction ban, and that plaintiffs' only option was to leave the lots in their current vacant state. Substantial evidence supports these findings.

It is undisputed Chapter 22.90 prohibits new construction on lots entirely within Slide Mass C. In 2001, the City Council rejected a neighboring landowner's request to amend the ordinance to allow the rebuilding of homes destroyed by a fire or other non-geological event. Estrella, the City's chief building official, testified that Chapter 22.90 affords no discretion to allow new construction within that mass, and that its purpose is to allow the properties to return to an undeveloped state when the useful life of existing buildings has expired. He stated the only post-fire construction the City would have approved for plaintiffs was debris removal.

Estrella determined plaintiffs "were not eligible for building permits by virtue of the building ban of [Chapter] 22.90," and understood his decision was not appealable. He sent Harthorn an email confirming the lots within the boundary of Slide Mass C "are not subject to an exemption . . . to be reconstructed." He also told plaintiffs that City staff would not recommend an amendment that would allow them to rebuild.

Harthorn corroborated this testimony, stating that City officials repeatedly advised him that Chapter 22.90 prohibited landowners within Slide Mass C to "process any building applications." He testified that when he presented Estrella with an informal application to rebuild the Barajas residence, Estrella indicated he could not process that

or any other applications for building permits within that slide mass. Estrella said he would only "authorize others outside the slide boundary to be processed." Consequently, Harthorn did not prepare applications for the Brost and Canley properties.

During a meeting in January 2010, City staff reiterated they would not support an amendment to allow new construction on properties entirely within Slide Mass C. In three subsequent public meetings, Harthorn unsuccessfully attempted to persuade the City Council to amend Chapter 22.90 to benefit plaintiffs and others within that slide mass. The City Attorney advised Harthorn that the "interpretation and application of a City ordinance is administrative in nature and is not appealable to the City Council," and that generally there "are no 'appeals' to the City Council unless a specific City ordinance provides an express right to appeal to the City Council." Chapter 22.90 contains no such provision. Moreover, the City conceded in discovery responses that the ordinance "prohibits new construction on [plaintiffs'] real properties with no right to request a waiver or administrative appeal." It produced a map, prepared at the request of the assistant public works director, identifying the lots within the Conejo Slide and describing each of plaintiffs' properties as "No existing structure/Development not allowed."

"[A]n owner should not be required to take patently fruitless and wasteful economic steps, the outcome of which is foreknown from the nature of the history of governmental action with respect to the property." (*Twain Harte*, *supra*, 217 Cal.App.3d at pp. 89-90.) Here, the outcome of the administrative process is "foreknown." (*Ibid.*) First, it is unlikely the City would have accepted or processed any formal development applications had they been prepared. Estrella effectively terminated the application process by informing plaintiffs he would not authorize the processing of any applications for development on their properties. (See *Herrington*, *supra*, 857 F.2d at p. 569.) Second, assuming the City did accept and process such applications, they inevitably would have been denied. The City steadfastly maintained that plaintiffs' homes could not be rebuilt due to the construction ban, that no discretion exists to grant a variance and that plaintiffs' only option was to leave the lots in an undeveloped state. (See *Coachella*,

supra, 35 Cal.4th at pp. 1080-1081.) It also advised, "with rhythmic regularity, that there was no administrative way the City Council would amend [the ordinance] to allow the reconstruction of their homes."

We recognize that in most cases, the nature and extent of the land's permissible uses will not be certain and that the processing of at least one development application will be necessary to define those uses. But, as the trial court aptly observed, this case "presents the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted." (See *Hensler, supra*, 8 Cal.4th at pp. 12-13.) Since Chapter 22.90 precludes *all* development on plaintiffs' lots, it is clear "'how far the regulation goes.'" (*Id.* at p. 12; see *Malagra Ridge*, *supra*, 62 Cal.App.4th at p. 120 [rejecting futility exception where, inter alia, "City's general plan does not preclude all development of the Property"].) The City need not consider, and inevitably reject, formal development applications for the court to determine the nature and extent of the regulation. In the absence of any uncertainty as to the permitted uses, we conclude plaintiffs were not required to file "hopeless application[s]" to rebuild their homes. (*Herrington*, *supra*, 875 F.2d at p. 569.) The trial court properly determined plaintiffs' takings claim is ripe for consideration.

II. Nuisance

"[T]he government must pay just compensation for . . . 'total regulatory takings,' except to the extent that 'background principles of nuisance and property law' independently restrict the owner's intended use of the property." (*Lingle v. Chevron, USA, Inc.* (2005) 544 U.S. 528, 538, quoting *Lucas v. South Carolina Coast Council* (1992) 505 U.S. 1003, 1026-1032 (*Lucas*).) The City contends the trial court erred by rejecting its assertion that principles of nuisance law independently constrain plaintiffs' ability to rebuild their homes. We conclude otherwise.

A. Standard of Review

The parties agree that whether a permanent regulatory taking occurred is a question of law subject to de novo review. (*Monks*, *supra*, 167 Cal.App.4th at p. 295.) They disagree on the standard applicable to the trial court's determination that principles

of state nuisance and property law do not independently restrict plaintiffs' intended use of their properties. Pointing to *Monks*, plaintiffs contend it is a question of fact reviewed for substantial evidence. (*Ibid.*; *Hellman v. La Cumbre Golf & Country Club* (1992) 6 Cal.App.4th 1224, 1231 ["Determination whether something . . . is a nuisance in fact in a particular instance, is a question for the trier of fact"].) The City argues deference must be given to its legislative determination in Chapter 22.90 that new construction on properties entirely within Slide Mass C would create a public nuisance.

As *Monks* explained, *Lucas* "made clear" that to establish that no compensation is warranted for a permanent regulatory taking, "the government bears the burden of proving that the property owner's intended use is not allowed under state law." (*Monks*, *supra*, 167 Cal.App.4th at p. 299.) To meet this burden, the government "'must do more than proffer the [L]egislature's declaration that [any intended uses] are inconsistent with the public interest, or the conclusory assertion that they violate a common-law maxim.'" (*Ibid.*) It "'must identify background principles of nuisance and property law that prohibit the uses . . . in the circumstances in which the property is presently found.'" (*Ibid.*) "'Only on this showing'" can the government "'fairly claim'" it takes nothing in proscribing the uses. (*Ibid.*)

Monks considered whether a compensable taking was effectuated by the city's moratorium on new construction in the 110-lot area where the plaintiffs' lots were located. (*Monks*, *supra*, 167 Cal.App.4th at pp. 305-306.) The court explained that to satisfy its burden of proving the moratorium is justified by state nuisance law, the city must show there was a "reasonable probability" of "significant harm to persons or property" such that construction of homes on the properties would constitute a nuisance the city could enjoin. (*Id.* at p. 305.) The court determined the city did not meet this burden. It cited several fact-based reasons, including uncertainty as to the stability of the landslide zone and lack of evidence that earth movement would occur in that zone in the foreseeable future or that new construction would pose a risk of significant or imminent harm. (*Id.* at pp. 305-308.)

Here, the City attempts to distinguish *Monks* on the basis that Chapter 22.90 contains express findings that significant harm from construction on the Conejo Slide was "highly probable" and a prohibition was "necessary to protect the public safety and welfare," and that this is the equivalent of declaring a nuisance per se. We are not convinced. As previously discussed, *Lucas* requires that the City do more than proffer its legislative declaration that the intended uses are inconsistent with the public interest. (*Lucas, supra,* 505 U.S. at pp. 1031-1032; *Monks, supra,* 167 Cal.App.4th at p. 299, 308 ["[W]e should credit the opinion of the experts who wrote the report, not the findings of a legislative body like the [city] council"].) The City cites no post-*Lucas* authority suggesting that deference to legislative findings is appropriate in assessing whether an unconstitutional taking has occurred. (See *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1104 (*Gallo*).)

Moreover, Chapter 22.90 does not expressly declare that new construction on properties entirely within Slide Mass C would create a "public nuisance." Nor does the declaration in that Chapter, which was formulated in 1997, address the uses plaintiffs "now intend[] in the circumstances in which the property is *presently* found." (*Lucas, supra,* 505 U.S. at pp. 10310-1032, italics added; *Monks, supra,* 167 Cal.App.4th at p. 299.) We agree with the trial court that "*Monks* is controlling . . . on [the] facts," and accordingly adopt the burden of proof and substantial evidence standard applied in that case. (*Monks,* at p. 295.)

B. Application of Nuisance Law

A taking does not occur if a regulation merely "duplicate[s] the result that could have been achieved in the courts – by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise. [Fn. omitted.]" (*Lucas, supra,* 505 U.S. at p. 1029.) Under California law, a nuisance is "[a]nything which is injurious to health . . . or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property . . . ." (Civ. Code, § 3479.) A public nuisance is one that

substantially and unreasonably interferes with "the exercise of rights *common to the public*." (*Gallo*, *supra*, 14 Cal.4th at p. 1103; see Civ. Code, § 3480.)

Thus, to justify Chapter 22.90's construction moratorium, the City must prove that rebuilding plaintiffs' homes would pose significant harm to persons or property and that, as a consequence, it could obtain an order enjoining the reconstruction. (*Monks*, *supra*, 167 Cal.App.4th at p. 306; *Lucas*, *supra*, 505 U.S. at p. 1029.) To assess whether the City has met this burden, we must consider the degree of harm posed by plaintiffs' proposed activities to public lands and adjacent private property; the social value of the activities and their suitability to the locality in question; the relative ease with which the alleged harm can be avoided; whether a particular use has been long engaged in by similarly situated owners; and whether those similarly situated owners are permitted to continue the use denied to plaintiffs. (*Lucas*, at pp. 1031-1032; *Monks*, at p 306.)

As *Monks* points out, there is nothing inherently harmful or dangerous about plaintiffs' desire to use their properties as residences. (*Monks*, *supra*, 167 Cal.App.4th at p. 306.) Their lots are zoned for that purpose, and the City has installed the requisite utilities and sewer system. (See ibid.) It is undisputed plaintiffs continuously resided on the properties until their homes were destroyed by a non-geological event; and but for that event, they likely would still be there. Other landowners continue to reside within Slide Mass C and have done so for many years. The City has not ordered them to vacate their properties. Nor are they restricted from renting or selling their homes. They also are not precluded from remodeling the interior of their homes or from making additions to existing structures which do not exceed 150 square feet during any 24-month period. (SBMC, ch. 22.90.030, subd. C.) "The fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition . . . ." (*Lucas*, *supra*, 505 U.S. at p. 1031.)

The focus of the parties' dispute is on the degree of harm posed by plaintiffs' proposed reconstruction. The City asserts that the history of Slide Mass C, particularly its destruction of six homes prior to 1999, supports a nuisance finding. The City exhaustively recites its history of red- and yellow-tagging of homes following slide

activity, its need to redesign the sewer system to accommodate earth movement, and its efforts to deal with utility maintenance, cracking in the roads and other consequences of earth movement. While this evidence underscores the potential risk of allowing new development, it does not, in and of itself, establish that plaintiffs' reconstructed homes would be unsafe or that any potential damage could not be repaired. (See *Monks*, *supra*, 167 Cal.App.4th at pp. 307-308.)

For example, the City red-tagged a portion of the Barajas home following the 1998 slide. After the necessary repairs were made, the City declared the structure safe and abated the red tag. That the ordinance allows owners of existing homes to remain and to repair damage caused by earth movement undercuts the City's contention that development of plaintiffs' lots for the exact same use would cause significant harm to persons or property. (See *Lucas*, *supra*, 505 U.S. at pp. 1025, fn. 11, 1031 [questioning state regulation that "permits owners of *existing* structures to remain and even to rebuild if their structures are not 'destroyed beyond repair'"]; *Monks*, *supra*, 167 Cal.App.4th at p. 308 [city's approval of additions to existing homes is inconsistent with its assertion that new construction would be detrimental].)

For the most part, the trial court accepted the City's evidence regarding the history of Slide Mass C, but noted that, under *Monks*, "uncertainty" regarding the geological stability of that area is not a sufficient basis for depriving plaintiffs of the right to rebuild their homes. (*Monks*, *supra*, 167 Cal.App.4th at p. 306.) To gauge the future geological stability of the area and potential impact of the proposed reconstruction, the court looked to the opinion testimony of the parties' geology experts, Hollingsworth and Kenton.

Both experts agreed the speed of the Conejo Slide is "slow," and that when the slide moves, it stays intact, moving as "one unit." Kenton testified that while the speed remains slow, he believes it is increasing, and expressed concern that a future event will cause rapid movement or that the rate will otherwise increase. Nonetheless, he stated it would be "pure speculation" to opine as to what damage would occur to plaintiffs' homes if they were allowed to rebuild. Kenton testified he did not believe it would be

unsafe for plaintiffs to rebuild on their lots or that rebuilding would risk injury or property damage to neighboring properties. He acknowledged that earth movement has not destroyed any homes in the Conejo Slide since 1999 and that he has no safety concerns for people living in that area. He stated he is unaware of any personal injuries caused by the slide.

Hollingsworth concluded, based on his extensive soil testing and review, that all three of plaintiffs' properties can safely support new homes as long as they are specifically designed for slide conditions and are built away from the lateral limit of the landslide, which is feasible due to the size of the lots. He testified that such specially designed systems, which involve a floating foundation, are currently in use for homes within slide areas but, to date, have only been used on existing homes as a retrofit. Hollingsworth opined that new homes constructed in accordance with these specifications would perform well and be safe, but require a greater-than-normal amount of maintenance. He explained that with this system in place, earth movement would cause nothing more than minimal cracking which easily could be repaired.

The trial court found Hollingsworth a "very credible witness," and "was impressed by his clarity of thought and the logical conclusions he drew." The court also found Kenton credible, but noted he could only make "assumptions" about the three properties. Kenton could not say the homes will be unsafe if rebuilt or identify the damage that will occur if they are rebuilt. The court found "[t]he failure to identify what problems that particular homes will have, if any, militates against the City's theory of the case. The best characterization that can be said about his evidence is that there is 'uncertainty' in a landslide area as to what will happen if plaintiffs were allowed to rebuild."

In performing a substantial evidence review, we do not resolve issues of credibility. (*Simons v. City of Los Angeles* (1976) 63 Cal.App.3d 455, 470.) The testimony of even a single witness, if believed by the trier of fact, constitutes substantial evidence. (*In re Marriage of Mix* (1975) 14 Cal.3d 604, 614.) The trial court was persuaded by Hollingsworth's expert opinion that reconstruction is feasible and would be

safe. It also found that the expert geological evidence on both sides did not support a finding that that the future instability of Slide Mass C is certain. (*Monks, supra*, 167 Cal.App.4th at p. 309.) To the extent the evidence supports conflicting inferences, we may not substitute our own judgment for that of the trial court. (*Little v. Amber Hotel Co.* (2011) 202 Cal.App.4th 280, 304.)

The City highlights the trial court's suggestion during the damage phase of trial that plaintiffs are unlikely to rebuild their homes. This comment was made in the context of justifying the measure and amount of damages, not as to whether a taking had occurred. Plaintiffs cite no authority stating that plaintiffs must rebuild their homes as a prerequisite to obtaining damages for a temporary regulatory taking.

Plaintiffs urge that the City, by electing to amend Chapter 22.90 to allow plaintiffs to rebuild, implicitly conceded that new construction within Slide Mass C does not pose an imminent or reasonably probable threat to public safety. Although they cite no cases supporting this view, we agree that the City's decision to amend the ordinance to allow reconstruction is inconsistent with, and does not bolster, its argument that reconstruction is neither feasible nor safe.

We are mindful of the importance of safety in determining whether land is suitable for residential construction. State nuisance law, however, "focuses on the actual harm posed by plaintiffs' intended use of the property, not scientific labels that merely reflect the uncertainties of the situation. [Citations.]" (*Monks, supra*, 167 Cal.App.4th at p. 309.) At best, the evidence established that uncertainty exists regarding the future stability of the geology in Slide Mass C and its potential effect on the proposed reconstruction of plaintiffs' homes. This speculative harm is insufficient for the City to preclude plaintiffs, for their "own good," from all economically beneficial uses of their properties. (*Id.* at pp. 308-309.) The trial court did not err by rejecting the City's nuisance theory.

DISPOSITION

The judgment is affirmed. Plaintiffs/respondents shall recover their costs on appeal.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Thomas P. Anderle, Judge

Superior Court County of Santa Barbara

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