

No. 25-

IN THE
Supreme Court of the United States

NICHOLAS HONCHARIW, TRUSTEE,
HONCHARIW FAMILY TRUST,

Petitioner,

v.

COUNTY OF STANISLAUS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether an approved vesting tentative map which conferred a statutory vested right to finalize a subdivision upon substantial compliance with the conditions of approval is property protected by the Takings Clause?

Whether a claim of taking of rights under an approved vesting tentative map is tested with regard to the vesting tentative map in and of itself or with regard to the overall property encompassing the subdivision?

LIST OF ALL PARTIES

The party to the judgment from which review is sought is Petitioner Nicholas Honchariw, Trustee of the Honchariw Family Trust U/A/D March 8, 1991, as amended. He was a party in all proceedings below.

Respondent is the County of Stanislaus.

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PETITION FOR A WRIT OF CERTIORARI

Nicholas Honchariw, Trustee of the Honchariw Family Trust U/A/D March 8, 1991, as amended, respectfully requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Memorandum Opinion of the Ninth Circuit Court of Appeals is unpublished. It is attached hereto as Appendix (App.) A. The Order Granting Defendant's Motion for Summary Judgment of the district court is reported at *Honchariw, Tee v. County of Stanislaus*, No. 1:21-cv-00801-SKO (E.D.Cal. August 22 2024). It is attached hereto as App. B.

JURISDICTION

The lower court had jurisdiction over this case under 28 U.S.C. § 1331, 42 U.S.C. § 1983, and the Fifth Amendment to the United States Constitution. The Court of Appeals for the Ninth Circuit entered final judgment on December 9 2025. App. A at 1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Fifth Amendment to the U.S. Constitution provides, "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

INTRODUCTION

After denial in 2009, in 2012 the County approved Honchariw's vesting tentative map 2006-06 ("VTM 2006-06") for subdivision of a portion of his 33 acres of rural land into 3 5-acre lots, 4 1-acre lots, one ½-acre already improved lot, and a 13-acre remainder pursuant to review under mandate ordered by the California Fifth District Court of Appeals under the California Anti-NIMBY Law. *Honchariw, Tee v. County of Stanislaus*, 200 C.A.4th 1066, 1075 (2011) ("*Honchariw, Tee 2011*"). Approval of a vesting tentative map conferred a statutory vested right to finalize the subdivision by substantial compliance with the conditions of approval.

In 2016 Honchariw submitted his proposed final map for VTM 2006-06 with plans and specs for improvements required by the conditions of approval to the County to finalize the subdivision in substantial compliance with the conditions of approval. But the County demanded that he add a municipal-sized fire suppression system to the water line extension that he was required to design and construct for the local Knights Ferry Community Services District ("KFCSD") water system to serve the proposed 4 1-acre lots, which were within the district, with municipal-sized 1000 gallon-per-minute ("gpm") fire flows. No such requirement was included in his conditions of approval. The conditions of approval provided that fire suppression was to be addressed by the KFCSD in accordance with its usual rural fire standards. The County had no authority to impose additional requirements. The demand was infeasible and stopped the project in its tracks after years of time, money and effort, spent at significant investment risk. The project could not bear the cost of a

municipal-sized fire suppression system to serve 4 rural 1-acre lots and Honchariw had no ability to supply water at 1000 gpm while the KFCSD system only supplied 50 gpm for the line extension.

Honchariw sought another writ of mandate to compel withdrawal of the demand. In *Honchariw, Ttee v. County of Stanislaus*, 51 C.A.5th 243 (2020) (“*Honchariw, Ttee 2020*”) the Fifth District held that the County violated Honchariw’s statutory vested rights to finalize his subdivision.

The Fifth District affirmed that the County had a statutory ministerial duty to approve his proposed plans and specs for the water line extension if they were in substantial compliance with the requirements of VTM 2006-06. The Fifth District recognized that the County had provided for Honchariw to rely upon KFCSD for both domestic and fire suppression water and held that the County had “unambiguously” delegated exclusive authority for design of the extension, including fire suppression, to KFCSD. If, as determined, the plans and specs complied with KFCSD rules, they had to be approved. While public safety is of course a legitimate public purpose, having exercised its discretionary authority to provide for fire suppression at approval of VTM 2006-06 in the conditions of approval by delegation to KFCSD, the County had no basis to demand more years later.

Honchariw’s writ petition was granted, and the County was forced to accept his proposed plans and specs as approved by KFCSD for water improvements, including for fire suppression, and his right to rely upon

KFCSD water, in 2021. Since the demands brought the project to a halt for almost 5 years, Honchariw filed this action for compensation for a temporary regulatory taking of his rights under VTM 2006-06 and / or damages for a deprivation of substantive due process. The County moved for summary judgment, and the district court granted the motion.

In granting the County's motion for summary judgment as to the taking claim, the district court did not recognize Honchariw's vested property interest in VTM 2006-06 as a property right itself constitutionally protected under the Takings Clause, instead treating it as just another strand of the bundle of rights comprising ownership of real property. As just another strand, a taking claim would only be addressed with reference to the property as a whole under well-established law. The district court applied the *Penn Central* factors to the property as a whole as though this was just another instance of a run-of-the-mill denial of a subdivision application under the broad discretionary authority accorded a local agency. This ineluctably doomed his claim. The property as a whole did not suffer a loss in value sufficient to state a taking claim under well-established law—Honchariw might otherwise develop his property with another application, and he retained a usable 13-acre remainder. The County eviscerated his rights under VTM 2006-06.

Application of the *Penn Central* factors with respect to his rights in VTM 2006-06 rather than his property as a whole would mandate a finding of a taking. While all of the *Penn Central* factors would be satisfied, the complete taking of VTM 2006-06 compelled a finding of a taking under *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986

(1984), as an interference with Honchariw’s investment-backed expectations. *Ruckelshaus* found that this factor overwhelmed the other *Penn Central* factors and by itself mandated a finding of a taking.

Petitioner argues that the district court and then the Ninth Circuit erred in not recognizing that his right to finalize VTM 2006-06 was a vested property right protected by the Takings Clause in and of itself, not with regard to his property as a whole.

STATEMENT OF THE CASE

A. Factual Background

In 2009 the County denied Honchariw’s application for approval of VTM 2006-06 in the face of strong NIMBY opposition to its four 1-acre lots. In doing so, it overrode the findings of its Planning Department that the project complied with all local zoning and general plan requirements, met all local requirements for subdivision, and its recommendation for approval. The Board of Supervisors applied its broad discretionary powers under the local version of the California Subdivision Map Act to “find” that the project site was “unsuitable”. It rejected Honchariw’s demand to apply the California “Anti-NIMBY Law”, Cal. Gov. C. § 65589.5 et al, requiring approval of a residential subdivision which complied with all zoning and general plan requirements unless an agency made “written findings supported by substantial evidence on the record” that the project would have a “specific, adverse impact upon the public health or safety” and that “there is no feasible method to satisfactorily mitigate or avoid the adverse impact . . . other than disapproval. . . .”

Honchariw filed a petition for writ to overturn the disapproval, but the Stanislaus County Superior Court rejected the petition on the basis of the County's new assertion—repudiating the finding of the Planning Department—that the project did not comply with general plan and zoning requirements because the proposed lots were not connected to the KFCSO water system. In *Honchariw, Ttee 2011*, the Fifth District Court of Appeals held in a unanimous published opinion that the disapproval was an unlawful abuse of discretion. The Fifth District found the language of the statute “clear and unambiguous”. 200 C.A.4th at 1073. Pointedly it found that the County's critical representation to the trial court that Honchariw failed to comply with local water connection requirements was wholly specious—the court saw “nothing in this record which would support a conclusion that” Honchariw's project did not comply with the requirement of County Code section 20.52.210 that “lots of a subdivision shall be connected to a public water system”, recognizing that “[l]ots of a subdivision cannot be connected to a public water system until those ‘lots of a subdivision’ exist.” *Id.* at 1080. No lots existed until lots were approved and additional steps completed. The court recognized that “[Honchariw] has consistently asserted that if the project were approved . . . [he] would connect the lots as required by the County ordinance”. *Id.* at 1080-81.

Pursuant to the Fifth District's order, the trial court issued its writ, and, upon reconsideration, the Board of Supervisors was unable to find any basis to disapprove the project under the Anti-NIMBY Law and finally approved it in May 2012. In ordinary course, the approval of VTM 2006-06 carried conditions of approval. The relevant ones

in this action addressed extension and functionality of the KFCSD water system. Because the four 1-acre lots were within the KFCSD district, Honchariw had to connect those lots to the system under County Code § 20.52.210 and seek water service from KFCSD. (The three 5-acre lots were outside the district and would rely upon wells.) Since water connection requirements were a central issue in Honchariw's successful litigation, the Planning Department's 2012 Action Agenda Summary for VTM 2006-06 prepared by the Planning Department for the Board identified water service as a "core issue" in its analysis of the application and its preparation of proposed conditions of approval for the Board.

The inadequacies of the KFCSD system were well-known. It was and remains a small antiquated rural system serving the unincorporated community of Knights Ferry (population 92) with 65 users. Its distribution facilities were severely limited, with only 150 gpm pumps at the storage tank, well under standard fire flows of 1000 gpm for municipal water districts, with flows diminishing to 50 gpm over small main lines to the foot of the Honchariw property. At its terminus at the foot of the property, the water main was only 2", not the 8" demanded for extension by the County. To connect the four 1-acre lots would require the design and construction of an uphill extension of the water main over 1000' with booster pumps.

In anticipation of the Board's re-hearing of his application pursuant to the Fifth District decision, County planning staff met with KFCSD. KFCSD confirmed that it had water capacity and that service would be available upon extension of the water line to the four new 1-acre lots. The Planning Department accordingly drafted conditions

of approval providing for fire as well as domestic water service for the four 1-acre lots within the district to be obtained from KFCSD under applicable KFCSD rules, regulations, standards and ordinances and delegated responsibility for the water line extension to KFCSD.

Customized fire flow requirements would be designed case-by-case as new houses were built upon the lots based upon a number of variables, eg, their size, type of construction, type of in-structure sprinklers, water storage (eg, pools or tanks), etc. As expressly referenced in the Action Agenda Summary, this approach to fire flows in rural and suburban areas in which adequate and reliable water systems did not exist was authorized by the California Fire Code (24 Cal. Code Regs., Title 24, Part 9), which had been adopted by the County (County Code § 16.55.010) without relevant change (see § 16.55.040).

In 2015, Honchariw submitted a request to KFCSD for water service for the 4 1-acre lots, secured a “will serve letter”, and reached agreement with KFCSD for the water line extension, including primary and back-up booster pumps to supply water uphill to the four 1-acre lots together with a 2000 gallon stainless steel pressurized storage tank. With its incoming flows of only 50 gpm to the foot of the property, KFCSD requested that the booster pumps be limited to 60 gpm and buffered with a pressurized storage tank in order to avoid draining the system.

Honchariw had plans prepared accordingly, with a 60 gpm booster pump, a 60-gpm back-up pump, a 2000-gallon pressurized storage tank, and risers for the future attachment of hydrants, and submitted them to the County

Department of Public Works upon submitting his proposed final map to the County in April 2016. The proposed final map and plans and specs were in substantial compliance with the conditions of approval of VTM 2006-06.

But the County rejected his plans. It demanded that he design and construct a full municipal-sized fire suppression system with fire flows “based on functional fire hydrants” of 1000 gpm for 2 hours, refusing to recognize that it had accepted the alternative fire flow and water supply measures provided in the Fire Code and in the County Fire Directive for substandard systems such as the KFCSD system at approval of VTM 2006-06. This required a pumping station larger than the KFCSD pumping station, with primary and back-up 1000 gpm pumps, with massive back-up on-site power generators with fuel storage in case of power outage, and water flows at 1000 gpm. Since KFCSD could not supply 1000 gpm, the County declared that Honchariw would have to supply them himself and would need to construct storage tanks for two hours of fire flows of 1000 gpm, or 120,000 gallons.

The demands were out of the blue. Nowhere in the conditions of approval was there any requirement of a municipal-sized fire suppression system; municipal fire flows were never even mentioned in the Action Agenda Summary or at the hearing by anyone; KFCSD testified that it operated at 50 gpm and wanted to stay at that level.

The County’s demands rendered VTM 2006-06 infeasible. Honchariw’s best quote for the improvements demanded by the County was for over \$500,000 over and above the costs of the water line extension of over \$300,000. Yet the County’s own appraiser here estimated

the value of the four 1-acre lots at not more than \$100,000 each, or \$400,000 in total.

After over a decade, and significant costs of time, money and effort, the project was stone-cold dead. VTM 2006-06 was rendered worthless.

B. State Court Procedure

Accordingly Honchariw filed a petition for writ of mandate in August 2017 to compel withdrawal of the County's demand for a municipal-sized fire suppression system. It was denied by the superior court on the basis that the County was within its discretion to interpret the conditions of approval to require the municipal-sized fire suppression system since it was a "matter of life and death".

Honchariw appealed. In June 2020, the Fifth District reversed and ordered the trial court to issue its writ to enjoin the County's demands in accordance with its opinion. *Honchariw, Ttee 2020*.

Upon remand, the superior court vacated its judgment in July 2020 and issued a writ of mandate. Upon issuance of the writ, the County in 2021 finally approved a final map and the proposed plans and specs prepared in accordance with KFCSD's requirements and abandoned its demand for a municipal-sized fire suppression system.

Since Honchariw had to bear significant costs from the delay and the trust was deprived of sales proceeds and absorbed extra costs for the entire period of the demands, Honchariw filed a supplemental and amended

complaint for damages. Under California procedural requirements, Honchariw had to secure the writ before seeking compensation for a taking or damages for a deprivation of due process.

C. Federal Court Procedure

The County removed the action to the United States District Court, Eastern District, on May 17 2021. The County filed a Motion to Dismiss December 3 2021. The motion was granted November 7 2022 with leave to amend. Honchariw filed a First Amended Complaint November 28 2022. The County again filed a Motion to Dismiss on December 22 2022. The motion was granted April 13 2023 with leave to amend. Honchariw filed a Second Amended Complaint May 3 2023. The County again filed a Motion to Dismiss on May 16 2023. The court denied the Motion on July 18 2023.

On May 28 2024, the County filed its Motion for Summary Judgment. The Motion was granted and judgment entered August 22 2024.

A notice of appeal to the Ninth Circuit was timely filed by Honchariw on September 20 2024. The Ninth Circuit issued its Memorandum Opinion on December 9 2025 affirming the district court judgment.

REASONS FOR GRANTING THE PETITION

Both the district court and the Ninth Circuit smothered Honchariw's claim of a taking of his rights under VTM 2006-06 under the blanket rule stated in *Penn Central*. The district court quoted *Penn Central*:

“‘Taking’ jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather on the character of the action and the nature and extent of the interference with rights in the parcel as a whole. . . .” 438 U.S. at 130-31 (emphasis added). “

App. B at 20a. The district court rotely treated his claim as simply a claim for interference with just one of the many strands of ownership comprising the bundle of rights of ownership of his property. It noted:

“[p]laintiff does not cite, and the Court has not found, any legal authority finding a statutory entitlement to real estate development constitutes a property interest cognizable apart from the underlying land for takings purposes.”

App. B at 22a-23a. The Ninth Circuit affirmed, echoing the district court’s reasoning. Honchariw was in no different position than if he were challenging an initial disapproval of an initial subdivision application. While the blanket *Penn Central* rule remains fundamental in takings jurisprudence, it should be recognized by the Court explicitly that any strand which is itself a vested property right is protected by the Takings Clause in and of itself and any claim of taking is tested with regard to the right itself, not with regard to the underlying parcel as a whole. Absent such explicit recognition, such vested rights can be simply extinguished without compensation.

I. Honchariw’s taking claim is based on the County’s taking of his statutory vested property rights under VTM 2006-06 and his associated rights under the Anti-NIMBY Law.

After the County’s disapproval of VTM 2006-06 in 2009, Honchariw established his statutory rights to develop his property as a residential subdivision under the California Housing Accountability Act (known as the “Anti-NIMBY Law”) in *Honchariw, Ttee 2011*. The court explained:

“Government Code Section 65589.5 is known as the Housing Accountability Act (see sec 65589.5, subd. (o)), and has been referred to colloquially as the ‘Anti-NIMBY law’. The purpose of the statute is to limit the ability of local governments ‘to *reject or make infeasible housing developments . . .* without a thorough analysis of the economic, social and environmental effects of the action. . . .’ (Sec 65589.5, subd. (b)). Subdivision (j) of the statute provides that ‘[w]hen a proposed housing development complies with applicable, objective general plan and zoning standards, including design review standards, in effect at the time that the housing development’s application is determined to be complete,’ a local agency which ‘proposes to disapprove the project . . . shall base its decision regarding the proposed housing development upon written findings supported by substantial evidence on the record that . . . (1) [t]he housing development would have a specific, adverse impact upon the public health

or safety unless the project is disapproved' and '(2) [t]here is no feasible method to satisfactorily mitigate or avoid the adverse impact . . . other than disapproval of the housing development project. . . ." (Italics added)

200 C.A.4th at 1068-69. The Fifth District ordered issuance of a writ ordering reconsideration of the application. Unable to cite any specific, adverse impact upon public health or safety, the Board was compelled to approve VTM 2006-06 and did so upon re-hearing in 2012.

Upon approval, Honchariw had statutory vested rights to finalize VTM 2006-06 with approval and recordation of a final map on the basis of substantial compliance with its terms and conditions. Cal. Gov. C. § 66474.1. Approval was a ministerial act. The County could not impose further demands. In *Beck Development Co., Inc. v. Southern Pacific Transportation Company*, 44 C.A.4th 1160, 1199 (1996), the court explained:

“The approval of a tentative map gives the subdivider certain rights with respect to approval of a final map. Thus, a final map may not be disapproved if it is in substantial compliance with a previously approved tentative map. (Gov. Code Sec. 66474.1). And only those requirements and conditions that were applicable to the subdivision at the time of approval of the tentative map may be considered with respect to the final map. (Gov. Code Sec. 66473) In other words, the time for a local agency to take action with respect to a proposed subdivision is when the tentative map is under

consideration and, provided the final map is in substantial compliance with the tentative map and any conditions attached on its approval, the approval of the final map becomes a ministerial act. (*See Youngblood v. Board of Supervisors* (1978) 22 Cal.3d 644, 656.)”

Upon issuance of a “will serve” letter from KFCSO, the conditions of approval required Honchariw to construct a water line extension to the four 1-acre lots as prescribed by KFCSO in accordance with its applicable rules and regulations. Domestic and fire suppression water would be provided by KFCSO. The County has never questioned that Honchariw was not required to include a municipal-sized fire suppression system in his water line extension under any local ordinance, standard, or policy applicable upon approval in 2012. The County could demand a municipal-sized fire suppression system only if authorized by the conditions of approval.

“[A] final map shall be disapproved only for failure to meet or perform requirements or conditions which were applicable to the subdivision at the time of approval of the tentative map.”

Cal. Gov. C. § 66473. *Honchariw, Tee 2020* explained:

“The vesting tentative map statute was enacted to ‘establish a procedure for the approval of tentative maps that will provide statutorily vested rights to a subdivider’ (Sec. 66498, subd. (a)) and to ‘insure that local requirements governing the development of a proposed

subdivision are established in accordance with Section 66498.1 when a local agency approves or conditionally approves a vesting tentative map.’ (Sec. 66498.9, subd. (b).) The Legislature declared that ‘[t]he private sector should be able to rely upon an approved vesting tentative map prior to expending resources and incurring liabilities without the risk of having the project frustrated by subsequent action by the approving local agency. . . .’ (Sec. 66498.9, subd. (b).)

51 C.A. 5th at 254. The Fifth District recognized:

“An approach that fails to protect the objectively reasonable expectations of the applicant would undermine the purpose of the vesting tentative map statute. (See Sec. 66498.9, subd. (b).)”

Id. It held that the County’s demands for a municipal-sized fire suppression system were beyond Honchariw’s objectively reasonable expectations under the conditions of approval and thus violated Honchariw’s vested rights. The court expressly determined that the County had no authority *in any case* to impose its own demands. Noting that the conditions of approval required Honchariw to “cause all public improvements required by KFCSD to be completed and accepted for public use”, the court found that “[t]his clause is unambiguously limited to public improvements required by KFCSD. As a result, the clause does not support the imposition of requirements by other entities”. 51 C.A.5th in unpublished Part III. The County was barred from superimposing its own demands. The court summarized:

“In summary, an objective interpretation of the language in the conditions of approval leads to the conclusion that the County delegated to KFCSD the determinations about the fire suppression water service that would need to be in place prior to the approval of the final subdivision map. The fact County personnel regret this choice and now offer rational arguments for imposing requirements beyond those required by KFCSD prior to approving the final map is not a justification for altering the conditions of approval as drafted.”

Id. The court remanded for determination whether Honchariw’s plans were approved by KFCSD and ordered the County, as a ministerial duty, to approve such plans. Upon remand, Honchariw established that his plans were approved by KFCSD, and the County finally withdrew its demands. The County had violated its ministerial duty to approve Honchariw’s plans in 2016.

In doing so, it also violated his rights under the Anti-NIMBY Law. As recognized in *Honchariw, Tee 2011*, the Anti-NIMBY Law barred a local agency not only from rejecting but also from “making infeasible” housing developments absent substantial evidence of a specific, adverse impact upon public health or safety that could not be satisfactorily mitigated. The Action Agenda Summary itself had recognized that the determination of fire flow and fire suppression requirements could—and would—be made under Chapter 5 of the Fire Code at permitting and construction of new structures. Because a municipal-sized fire suppression system would make the project infeasible, and there were officially-accepted ways to mitigate fire

dangers, the County could not have imposed a requirement for municipal-size fire suppression infrastructure in 2012, and it could not do so in 2017. Indeed, the three 5-acre lots immediately adjacent to the four 1-acre lots were approved for residential development under VTM 2006-06 without any public water system at all, just on the basis of these same officially-accepted ways to mitigate fire dangers.

II. Honchariw had a vested property right in VTM 2006-06 protected by the Takings Clause in and of itself.

Under Cal. Gov. C. § 66498.1(b) (formerly § 66498(a)), Honchariw enjoyed vested property rights in VTM 2006-06:

“When a local agency approves or conditionally approves a vesting tentative map, that approval shall confer a vested right to proceed with development. . . .”

As vested property rights expressly conferred by statute, Honchariw’s rights to finalize his subdivision were entitled to the protection of the Takings Clause of the U.S. Constitution and the Takings clause of the California Constitution.

The Supreme Court addressed the question what rights constitute a property interest protected by the Takings Clause in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984). Monsanto had collected health, safety, and environmental data protected as trade secrets by Missouri law and submitted it to the EPA. The threshold question identified by the Court was whether Monsanto had a property interest protected by the Takings Clause

against public use by the EPA. In answering the question, the Court was:

“mindful of the basic axiom that “[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.”” *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980), quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).”

Id. at 1001. The Court recognized:

“That intangible property rights protected by state law are deserving of the protection of the Takings Clause has long been implicit in the thinking of the Court.”

Id. at 1003. The Court concluded:

“We therefore hold that, to the extent that Monsanto has an interest in its health, safety, and environmental data cognizable as a trade secret under Missouri law, that property right is protected by the Takings Clause of the Fifth Amendment.”

Id. at 1003-1004.

Since Honchariw’s rights under VTM 2006-06 were expressly created and recognized by California law, they similarly were property protected by the Takings Clause.

This is true whether the rights are categorized as real or personal property rights, including intangible rights. In *Horne v. Department of Agric.*, 576 U.S. 351 (2015), the Supreme Court traced the history leading to the adoption of the Takings Clause to demonstrate that the term “private property” includes both real and personal property, which may be tangible (see *Andrus v. Allard*, 444 U.S. 51, 65 (1979), cited by the Court) or intangible personal property (see *Ruckelshaus*, 467 U.S. at 1000, also cited).

The California Supreme Court in *City of Oakland v. Oakland Raiders*, 32 C.3d 60 (1982) canvassed the application of the California takings clause to intangible personal property. In doing so, it confirmed that the California takings clause also extended to real and personal property, including intangible property. Noting that “numerous . . . decisions both federal and state have expressly acknowledged that intangible assets are subject to condemnation”, the court declared that “neither the federal nor the State Constitution distinguishes between property which is real or personal, tangible or intangible”. *Id.* at 68.

Nevertheless the district court ruled that case law precludes a finding that a “statutory entitlement to real estate development constitutes a property interest cognizable apart from the underlying land for takings purposes”, citing *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470 (1987), itself citing *Penn Central* and *Andrus*. App. B at 22a-23a. It then applied the *Penn Central* tests to Honchariw’s property as a whole. The court of appeal affirmed this ruling.

But their citations are off the mark. Honchariw does not challenge the holdings. They are simply inapposite. While each did reject an attempt to categorize a claim except with regard to the underlying parcel of real property as a whole, each claim was founded upon a single strand of the bundle of rights comprising ownership which—in and of itself—did not rise to the level of a vested property interest protected by state law. In *Penn Central* itself, the right at issue was the right to develop air space. Penn Central enjoyed no statutory vested rights to develop the air space above its terminal. The right to develop air space was simply one of many strands in its bundle of rights. In *Andrus*, similarly, the property owners had no cognizable vested interest protected by state law, simply a single strand of a bundle of rights. While state law recognized a “support estate” in *Keystone*, the support rights were similarly just one strand in the traditional bundle of rights. Nowhere did plaintiff claim a statutory vested right.

If Honchariw were claiming a taking based on disapproval of a subdivision application under the discretionary authority usually conferred upon local agency, his claim would be but for taking of a single strand in his bundle of rights which was not itself a vested property right. A *Penn Central* analysis with respect to his property as a whole—as performed by the district court here—would be appropriate. But Honchariw’s taking claim should be reviewed on the basis of his vested rights under VTM 2006-06, not on the basis of the property as a whole. The County’s demand effected a complete taking of his vested rights.

That individual strands of ownership may be vested property interests which are themselves protected by the Takings Clause has been recognized. The Ninth Circuit recognized that a land use right can itself become protected under the Takings Clause by vesting in *Bowers v. Whitman*, 671 F.3d 905 (9th Cir. 2012). Oregon voters had adopted “Measure 37” in 2004 to provide that government compensate land owners for the reduction in market value resulting from any land use regulations restricting use regardless whether the regulations effected a taking. The government could avoid payment by granting a waiver from the regulations. By 2007, the legislature extinguished Measure 37. Land owners who had applied for but not received compensation under Measure 37 sought, inter alia, just compensation for a taking. The Ninth Circuit set forth its framework for analysis:

“We use a two-step analysis to determine whether a [constitutional] ‘taking’ has occurred: first, we determine whether the subject matter is ‘property within the meaning of the Fifth Amendment and, second, we establish whether there has been a taking of that property for which compensation is due’. [Citations omitted]

‘Property interests . . . are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law rules that secure certain benefits and that support claims of entitlement to those benefits’. [Citations omitted]

In some cases, the Supreme Court has recognized property rights that were constitutionally protected, such that they were safeguarded by due process, but still not vested, and thus the government could take away these interests so long as it provided proper procedures. [Citations omitted] But in other cases, constitutionally protected property rights were held to have been vested and thus became cognizable under the Takings Clause, such that the government could not remove the right without providing just compensation. See *United States v. Sioux Nation*, 448 U.S. 371, 414-15, 424 (1980) (holding that the government could not enact legislation to take back land it had expressly given to the Sioux Nation without committing a constitutional taking); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164-65 (1980) (holding that the state's confiscation of the interest on interpleader funds was a constitutional taking); *Lynch v. United States*, 292 U.S. 571, 576 (1934) (holding that the government could not avoid payment of its commitment to pay disability and life insurance by enacting a statute repealing the laws granting the benefit without committing a constitutional taking). . . .”

Id. at 912-13. Accord *Zeyen v. Bonneville Joint District*, 114 F.4th 1129 (9th Cir. 2024).

While holding that the property interests under Measure 37 were not constitutionally protected by the

Takings Clause, the Ninth Circuit recognized that vested rights could qualify:

“To the extent that the property interest provided under Measure 37 was merely a right to particular land uses, it is analogous to a zoning permit. It is well established that there is ‘no federal Constitutional right to be free from changes in the land use laws’. [Citations omitted] Therefore, an interest in a particular land use does not constitute a protected property interest, unless the interest has vested in equity based on principles of detrimental reliance.”

Id. at 915. “Vesting” distinguishes an approved vesting tentative map which confers a vested right to finalize a development from rights which are just unvested strands in the bundle of ownership rights, such as “air rights” in *Penn Central*, “support rights” in *Keystone*, or rights to subdivide land generally. Approval of VTM 2006-06 in May 2012 conferred a vested right under Cal. Gov. C. § 66498.1(b) (formerly § 66498(a)) to finalize his subdivision, and Honchariw incurred significant costs of time, money, and effort to finalize the subdivision. This has been undisputed.

Honchariw was completely deprived of his statutory vested right to finalize VTM 2006-06 under Cal. Gov. C. § 66498.1(b) (formerly § 66498(a)) (and, since the County “made” the project “infeasible”, under the Anti-NIMBY Law). The deprivation was complete and by its terms permanent, not a temporary moratorium. If the County had directly rescinded the approval for VTM 2006-06,

there could be no question that this would constitute a complete taking of a vested protected property right under the *Bowers* analysis. It would be irrelevant that the underlying property retained meaningful value. It would be irrelevant that Honchariw could file an application for another subdivision. The only question would be the value of his lost rights.

The *Penn Central* factors would provide an appropriate framework of analysis if applied with regard to his vested property right in VTM 2006-06 itself, not with regard to the property as a whole. This would flip the conclusions of the district court and the Ninth Circuit. Indeed, one factor by itself—the County’s interference with his reasonable investment-backed expectations evidenced by VTM 2006-06—compels a finding of a taking. This is the directive of *Ruckelshaus*. With regard to certain trade secrets, the Federal government had guaranteed to Monsanto an extensive measure of confidentiality and exclusive use. The Court elaborated:

“This explicit government guarantee formed the basis of a reasonable investment-backed expectation. If EPA . . . were now to disclose trade secret data . . . EPA’s actions would frustrate Monsanto’s reasonable investment-backed expectations. . . .”

467 U.S. at 1005. Identifying the salient factors for its analysis as “the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations” per *Penn Central*, the Court stated:

“It is to the last of these three factors that we now direct our attention, for we find that the force of this factor is so overwhelming . . . that it disposes of the taking question. . . .”

Id. Here the application for, and approval of, VTM 2006-06—a subdivision designed for the sale of custom lots—provides the basis for a reasonable investment-backed expectation. Thus it similarly disposes of the taking question. But the other factors support a determination of a taking as well. While the lower courts here found insufficient economic impact with regard to the value of the Honchariw property as a whole, VTM 2006-06 itself lost all of its economic value. While the lower courts found the character of the governmental action with regard to Honchariw’s property as a whole to be a misguided attempt to regulate land use for the legitimate purpose of fire safety, even if misconceived, its character with regard to VTM 2006-06 was a unilateral demand “unambiguously” beyond its authority in blatant violation of Honchariw’s vested rights under VTM 2006-06 and the Anti-NIMBY Law prohibition against rendering a housing development “infeasible”.

Because the County withdrew its demands pursuant to the writ secured by Honchariw, ultimately the confiscation was only temporary, but he completely lost his right to finalize VTM 2006-06 and the ability to offer and sell his lots for an extended period while bearing carrying costs. The County’s demands brought to a dead stop a project with vested statutory rights underway since before Honchariw’s application in 2006. He is entitled to compensation for damages arising from the delay.

CONCLUSION

The Court should grant the Petition for Writ of Certiorari.

DATED: March 9, 2026

Respectfully submitted,

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APPENDIX

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**APPENDIX A — MEMORANDUM OF THE
UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT, FILED DECEMBER 9, 2025**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NICHOLAS HONCHARIW, TRUSTEE,
HONCHARIW FAMILY TRUST,

Plaintiff-Appellant,

v.

COUNTY OF STANISLAUS,

Defendant-Appellee.

No. 24-5788

D.C. No. 1:21-cv-00801-SKO

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Sheila K. Oberto, Magistrate Judge, Presiding

Submitted December 3, 2025**
San Francisco, California

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes that this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Appendix A

Before: RAWLINSON and SANCHEZ, Circuit Judges,
and ROSENTHAL,^{***} District Judge.

Nicholas Honchariw, trustee, appeals the district court’s summary judgment for the County of Stanislaus over a land use dispute. Honchariw had tried to finalize a property subdivision that the County alleged did not comply with plans it had previously approved. We have jurisdiction under 28 U.S.C. § 1291, and we review the district court’s summary judgment ruling de novo. *See Johnson v. Barr*, 79 F.4th 996, 998-99 (9th Cir. 2023). We affirm.

1. Honchariw argues that the County’s interpretation of the conditions of approval on his vesting tentative subdivision map, and the resulting delays in finalizing the subdivision of his property, amounted to an uncompensated taking. “Where the government ‘physically acquires private property for a public use,’ a ‘per se’ taking has occurred.” *Pharm. Rsch. & Mfrs. of Am. v. Stolfi*, 153 F.4th 795, 833 (9th Cir. 2025) (quoting *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 147-48, 141 S. Ct. 2063, 210 L. Ed. 2d 369 (2021)). “But where the government ‘instead imposes regulations that restrict an owner’s ability to use his own property,’ courts ‘appl[y] the flexible test developed in’” *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978). *Id.*

Honchariw asserts that the relevant property interest was his “statutory vested rights” in his tentative map and that the County’s actions that delayed the finalization of

^{***} The Honorable Lee H. Rosenthal, United States District Judge for the Southern District of Texas, sitting by designation.

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his subdivision plans interfered with those rights and resulted in a per se taking. However, a court may not extract one “strand” out of a “bundle” of property rights and analyze it separately. *Andrus v. Allard*, 444 U.S. 51, 66, 100 S. Ct. 318, 62 L. Ed. 2d 210 (1979); *see also Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 500, 107 S. Ct. 1232, 94 L. Ed. 2d 472 (1987) (the Supreme Court’s takings jurisprudence “forecloses reliance on . . . legalistic distinctions within a bundle of property rights”). The relevant property interest is Honchariw’s parcel as a whole and it must be analyzed under *Penn Central*. *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 331, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002).

Under *Penn Central*, three factors determine whether government action constitutes a regulatory taking: (1) “[t]he economic impact of the regulation on the claimant,” (2) “the extent to which the regulation has interfered with distinct investment-backed expectations,” and (3) “the character of the governmental action.” *Penn Cent. Transp. Co.*, 438 U.S. at 124. As to the first factor, the record shows that the value of Honchariw’s property after the alleged taking was comparable to its original value. That is not sufficient for a taking. *See Colony Cove Props., LLC v. City of Carson*, 888 F.3d 445, 451 (9th Cir. 2018) (explaining that courts are loath to find a taking where diminution of value is less than 50 percent and have found no taking even where diminution is between 75 and 92.5 percent).

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The second factor similarly does not weigh in Honchariw's favor because there was insufficient interference with his investment-backed expectations. The kind of delays he encountered are "a normal part of the development process." *Landgate, Inc. v. California Coastal Comm'n*, 17 Cal. 4th 1006, 1030, 73 Cal. Rptr. 2d 841, 953 P.2d 1188 (1998). Honchariw had only an "expectation, but not an assurance" that he would be able to subdivide the property when he acquired it. *MacLeod v. Santa Clara Cnty.*, 749 F.2d 541, 548 (9th Cir. 1984) (rejecting the argument that a taking occurred when the government denied an owner's permit to "exploit his property by pursuing a particular project" that he believed "would be available for development").

Third, the "character" of the County's action also weighs against finding a taking. Requiring fire safety equipment generally does not "amount to a physical invasion." *Bridge Aina Le'a, LLC v. Land Use Comm'n*, 950 F.3d 610, 635-36 (9th Cir. 2020) (cleaned up); see *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982) (holding that regulations that require "smoke detectors, fire extinguishers, and the like" are not physical takings). The record also does not show that the County "single[d] out" Honchariw "from similarly situated landowners." *Bridge Aina Le'a*, 950 F.3d at 636. And even if this factor weighed in Honchariw's favor, it is not a sufficient basis on its own for finding a taking. *Id.*

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2. Honchariw also argues that the County's interpretations of the conditions of approval violated substantive due process. "To state a substantive due process claim, the plaintiff must show as a threshold matter that a state actor deprived it of a constitutionally protected life, liberty or property interest." *Shanks v. Dressel*, 540 F.3d 1082, 1087 (9th Cir. 2008). In the permitting context, "only egregious official conduct can be said to be arbitrary," and the conduct "must amount to an abuse of power lacking any reasonable justification in the service of a legitimate governmental objective." *Id.* at 1088 (cleaned up).

The record shows no abuse of power sufficient for a substantive due process claim. Although the parties disagreed in state court as to the meaning of the conditions of approval, the County's interpretation was reasonable. *See Brittain v. Hansen*, 451 F.3d 982, 996 (9th Cir. 2006) ("Substantive due process secures individuals from arbitrary government action that rises to the level of egregious conduct, not from reasonable, though possibly erroneous, legal interpretation." (cleaned up)). Honchariw does not dispute that County had a legitimate interest in fire safety, instead arguing that it acted with "no authority" to impose additional conditions before approving his final map. This argument is undercut by his concession that the official in charge of reviewing the tentative map for compliance with the conditions acted in good faith.

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Although Honchariw endured delay and aggravation in the development process, he did not meet his “heavy burden” of demonstrating that the County’s actions violated his substantive due process rights. *Halverson v. Skagit Cnty.*, 42 F.3d 1257, 1262 (9th Cir. 1994). The district court did not err in granting summary judgment to the County on this claim.

AFFIRMED.

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**APPENDIX B — ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE EASTERN DISTRICT
OF CALIFORNIA, DATED AUGUST 21, 2024 AND
FILED AUGUST 22, 2024**

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

Case No. 1:21-cv-00801-SKO
(Doc. 61)

NICHOLAS HONCHARIW, TRUSTEE,
HONCHARIW FAMILY TRUST,

Plaintiff,

v.

COUNTY OF STANISLAUS,

Defendant.

**ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION

Plaintiff Nicholas Honchariw (“Plaintiff”), in his capacity as trustee for the Honchariw Family Trust, brings this action against Defendant County of Stanislaus (“the County”) alleging causes of action under 42 U.S.C. § 1983 for a temporary taking and denial of due process under the Fifth and Fourteenth Amendments to the

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United States Constitution, and Article I, Sections 7 and 19 of the California Constitution. (Doc. 44.)¹ On May 28, 2024, the County filed a motion for summary judgment. (Doc. 61.) Pursuant to stipulation (Doc. 60), Plaintiff filed his opposition on July 2, 2024 (Doc. 63)², and the County replied on July 23, 2024 (Doc. 64). After reviewing the parties' papers, the matter was deemed suitable for decision without oral argument pursuant to Local Rule 230(g), and the Court vacated the hearing set for August 7, 2024. (Doc. 65.)

For the reasons set forth below, the County's motion for summary judgment will be granted.³

1. The operative pleading is Plaintiff's Second Amended Complaint ("SAC"). (Doc. 44.)

2. In the absence of prejudice, which the County has not shown, the Court has considered Plaintiff's opposition in its entirety despite it exceeding the 25-page limit. (*See* Doc. 56 at 4.)

3. The parties consented to the jurisdiction of a U.S. Magistrate Judge for all purposes. (*See* Doc. 28.)

*Appendix B***II. SUMMARY OF RELEVANT EVIDENCE⁴****A. The Property**

At all times relevant to this action, the property at issue in the litigation (“Property”) comprised 33 acres in unincorporated Stanislaus County, near the community of Knights Ferry, California. (Doc. 61-1, JSUF ¶ 1.) The Property was subject to different zoning designations and included a 13-acre area with a historical zoning designation to the east, and a 20-acre area with an agricultural zoning designation to the west. (*Id.*) The Property includes a three-bedroom house with a living room, kitchen, one full bath, an attic, and a full basement. (*Id.* ¶ 2.) In approximately 2008, Plaintiff renovated the house, including installing new electrical and plumbing systems, remodeling the kitchen and bathroom, and renovating the septic system. (*Id.*)

4. The evidence adduced by the parties in conjunction with this motion comprises: (i) the parties’ Joint Statement of Undisputed Facts (“JSUF”) (Doc. 61-1); (ii) the County’s Separate Statement of Undisputed Facts (“Def.’s SSUF”) (Doc. 61-2); (iii) Declaration of Angela Freitas (“Freitas Decl.”) (Doc. 61-3); (iv) Declaration of Frederic Clark (“Clark Decl.”) (Doc. 61-4); (v) Declaration of Jeremy Ballard (“Ballard Decl.”) (Doc. 61-5); (vi) Declaration of Matthew D. Zinn (“Zinn Decl.”) (Doc. 61-6); (vii) Declaration of David Wraa (“Wraa Decl.”) (Doc. 61-7); (viii) exhibits to the foregoing declarations (Doc. 61-8); (ix) Declaration of Plaintiff Nicholas Honchariw (“Honchariw Decl.”) (Doc. 63-1); and (x) Plaintiff’s Response to the County’s Separate Statement of Undisputed Facts (“Plt.’s Resp. to Def.’s SSUF”) (Doc. 63-2). The summary of relevant evidence is distilled from these sources.

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Plaintiff's predecessor-in-interest, Reverend Iwan Honchariw, acquired the Property in 1973. (Doc. 61-1, JSUF ¶ 3.) Reverend Honchariw purchased the Property as a long-term investment, which he intended to operate and develop while using the small house as his residence. (*Id.* ¶ 5.) The Property had been operated for years as a family resort. (*Id.*) Reverend Honchariw had longer-term plans to subdivide the Property into multiple small residential lots in the eastern area with historic zoning and residential lots in the western area with agricultural zoning. (*Id.*) In 1991, Reverend Honchariw transferred the Property to the Honchariw Family Trust ("Trust"). (*Id.* ¶ 3.) Plaintiff became the successor trustee of the Trust in 1992. (*Id.*)

B. Application to Subdivide the Property

In 2006, Plaintiff filed an application with the County for a "Vesting Tentative Subdivision Map" ("VTSM") under the California Subdivision Map Act, Cal. Gov't Code § 64410 *et seq.*,⁵ proposing to subdivide the Property

5. The Subdivision Map Act ("Act") requires every subdivision of land, with few exceptions, to be approved by the local government. *See Witt Home Ranch, Inc. v. Cty. of Sonoma*, 165 Cal. App. 4th 543, 551 (2008). The Act ensures local governments have "the power to regulate the manner in which their communities grow" and necessary improvements are made before new development is built. *Id.* The Act provides a two-step process for review of proposed subdivisions creating five or more parcels. *See* Cal. Gov't Code § 66426. The applicant first submits either a tentative map or vesting tentative map depicting the proposed subdivision. *Id.* §§ 66424.5, 66452. The local government may approve the map, conditionally approve it, or disapprove it. *Id.*

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into eight lots and a remainder.⁶ (Doc. 61-1, JSUF ¶ 6.) Specifically, the VTSM provided that the Property be divided into three five-acre lots in the western portion of the Property; four one-acre lots on the north side of the Property; and one river-front half-acre lot including the existing house at the corner of the property nearest Knights Ferry, with balance of the Property consisting of a large remainder. (*Id.* ¶ 10.)

The County's Board of Supervisors ("Board") denied the VTSM in 2009. (Doc. 61-1, JSUF ¶ 7.) Plaintiff filed a petition for writ of mandate and complaint in state court to overturn the denial. (*Id.* ¶ 8.) The superior court denied the petition, but the appellate court reversed and ordered reconsideration of the VTSM under the California Housing Accountability Act. (*Id.*)

C. Conditional Approval of the VTSM

In 2012, the Board approved the VTSM, subject to conditions of approval ("Conditions of Approval"). (Doc.

§§ 66452.1, 66452.2. The applicant then prepares a detailed final map for approval, including depiction of required infrastructure and improvements to serve the new lots in the subdivision. *Id.* §§ 66456, 66457; *Witt Home Ranch*, 165 Cal. App. 4th at 551. The subdivider must ensure the final map is consistent with the tentative map and complies with the conditions of approval of the tentative map. Cal. Gov't Code §§ 66458(a). The map is then considered by the local legislative body, *id.* § 66457(a), here the County Board of Supervisors, for final approval.

6. The Court has previously taken judicial notice of the VTSM. (*See* Doc. 41 at 2 n.4.)

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61-1, JSUF ¶ 9.) The Conditions of Approval included three conditions (numbers 24, 25, and 40) addressing improvements related to water service for domestic and fire suppression purposes for the four one-acre lots.⁷ (*Id.*

7. Conditions of Approval numbers 24, 25, and 40 read as follows:

24. Prior to recording the “Final” Subdivision Map, the applicant shall contact the Knights Ferry Community Services District (KFCSD) and submit a written application to obtain water service (domestic & fire suppression) for all lots within the Community Services District boundaries, in accordance with all applicable KFCSD rules, regulations, standards, and ordinances, and shall cause all public improvements required by KFCSD to be completed and accepted for public use.
25. Prior to recording the “Final” Subdivision Map, water service provided by the Knights Ferry Community Services District, shall be established, constructed and operational for the four (4) proposed 1-Acre Lots, identified as being Lots No. 4-7 on the [VTSM], and the designated “Remainder” parcel.

[. .]

40. Fire hydrants shall be extended to serve any new structures. on parcels within the Community Services District boundaries, with no structure residing further than 1000 feet from a hydrant or as required by Knights Ferry Community Services District ordinance, whichever provides a higher level of fire protection.

(Doc. 61-3, Freitas Decl. ¶ 5; Doc. 61-8, Ex. 4.)

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¶ 11.) The three five-acre lots would be served by their own wells, and the remainder had an existing water connection. (*Id.* ¶ 12.) That water connection was to the Knights Ferry Community Services District (“KFCSD”) water system, a small antiquated rural system with substandard distribution facilities. (*Id.* ¶ 13.)

In April 2016, Plaintiff submitted plans to the County showing proposed infrastructure and improvements to address the Conditions of Approval for the VSTM. (Doc. 61-1, JSUF ¶ 15.) The plans were based upon connection to, and reliance upon water from, KFCSD. (*Id.*) At the request of KFCSD, he provided stub-outs for hydrants instead of hydrants themselves. Unless and until KFCSD’s water system was upgraded, the water system could not provide normal flows. (*Id.*)

The County responded in November 2016 in a letter that cited several deficiencies in the plans, including Plaintiff’s failure to “provide calculations to show that pressure and flow conditions [for fire suppression] are met.” (Doc. 61-1, JSUF ¶ 16.) Plaintiff then re-submitted plans and met with County staff. (*Id.* ¶ 17.)

D. Disagreement over the Conditions of Approval for the VTSM

In early 2017, it became clear that Plaintiff and County staff disagreed about the meaning of the Conditions of Approval related to fire suppression infrastructure for the four one-acre lots on the VTSM. (Doc. 61-1, JSUF ¶ 18.) Plaintiff took the position that the Conditions of Approval

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required him to design infrastructure—including fire hydrants—sufficient to handle fire suppression flows should KFCSD upgrade its system to be able to supply them. (*Id.* ¶ 19.) Further, he took the position that the actual fire suppression requirements—and the source of water to meet them—would be resolved by lot owners at the building permit stage. (*Id.*)

The County took the position that Conditions of Approval’s requirement for fire hydrants “to serve any new structures” (*see* fn.5, *supra*) meant that Plaintiff was required to design and construct (or bond for the construction of) functioning fire hydrants, including a water supply capable of providing fire suppression flows, prior to final map approval in order to protect the future residents of the subdivision from life safety hazards, including wildfire. (Doc. 61-1, JSUF ¶ 20; Doc. 63-2, Plt.’s Resp. to Def.’s SSUF ¶ 4.)

In August 2017, Plaintiff filed another petition for writ of mandate and complaint in state court relating to the disagreement over the conditions of approval related to fire suppression for the four one-acre lots on the VTSM. (Doc. 61-1, JSUF ¶ 21.) The superior court denied the petition in early 2018. (*Id.* ¶ 22.) The court of appeals reversed, and the superior court issued a writ of mandate on April 15, 2021.⁸ (*Id.* ¶¶ 23-24.) Two weeks later, the County withdrew its fire suppression demands for the VTSM. (*Id.* ¶ 25.)

8. This Court has previously taken judicial notice of the facts and proceedings in *Honchariw v. Cty. of Stanislaus*, 51 Cal. App. 5th 243 (2020). (*See* Doc. 29 at 2 n.3; Doc. 41 at 2 n.4.)

*Appendix B***E. The County Approves a Final *Parcel* Map for the Property**

To date, Plaintiff has not submitted a final version of the VTSM for approval or made (or bond for) any improvements required by the Conditions of Approval. (Doc. 61-1, JSUM ¶ 26.) Instead, while the state court litigation was pending in 2019, Plaintiff applied for a “vesting tentative parcel map” that would create three five-acre lots on the western portion of the Property and an approximately 18-acre remainder.⁹ (*Id.* ¶ 27.) The County approved Plaintiff’s final parcel map for the Property in 2023. (*Id.* ¶ 28.)

In July 2023, Plaintiff sold the three five-acre lots to a single buyer for \$1.15 million. (Doc. 61-1, JUSF ¶ 29.) After the purchase, the buyer applied to the County for, and the County approved, a merger of two of the five-acre parcels into one ten-acre parcel. (*Id.* ¶ 30.) The value of the approximately 18-acre remainder retained by Plaintiff following the sale of 15 acres in 2023 retains “significant value.”¹⁰ (Doc. 63-2, Plt.’s Resp. to Def.’s SSUF ¶ 8.)

9. A subdivider seeking to create four or fewer new parcels submits a “parcel map,” rather than a subdivision map. Cal. Gov’t Code § 66426. “Parcel map procedures are considerably simpler, and parcel maps can usually be processed far more quickly than [subdivision] maps.” Curtin, *et al.*, CALIFORNIA SUBDIVISION MAP ACT AND THE DEVELOPMENT PROCESS § 3.9 (Con’t Ed. Bar 2d ed. 2023)); *see also* Cal. Gov’t Code § 66411.1 (limiting improvements that may be required in parcel maps).

10. As of March 2017, the value of the remainder was appraised at \$780,000. (Doc. 63-2, Plt.’s Resp. to Def.’s SSUF ¶ 9.)

*Appendix B***F. Plaintiff Files the Present Suit for Damages**

Following the superior court's issuance of the writ of mandate in 2021, Plaintiff filed a supplemental complaint in the state court asserting three state and federal claims arising from the County's rejection of the VTSM for his failure to comply with the Conditions of Approval. Plaintiff alleged (1) a violation of California Government Code § 815.6; (2) inverse condemnation and temporary taking under the Fifth and Fourteenth Amendments to the U.S. Constitution; Article I, Section 19 of the California Constitution; and 42 U.S.C. § 1983; and (3) denial of his substantive due process rights under the Fifth and Fourteenth Amendments to the U.S. Constitution; Article 1, Section 7 of the California Constitution; and 42 U.S.C. § 1983. (Doc. 1 at 237-45.) The County removed the action to this Court in May 2021. (*See* Doc. 1.)

The County filed three motions to dismiss. (Docs. 15, 35, 45.) The Court granted the first two motions, dismissing Honchariw's state law claim without leave to amend, and twice dismissing the takings and substantive due process claims with leave to amend. (Docs. 29, 41.) The Court denied the County's third motion to dismiss directed to Plaintiff's Second Amended Complaint ("SAC"). (Doc. 51.)

III. LEGAL STANDARD

Summary judgment is appropriate when the pleadings, disclosure materials, discovery, and any affidavits provided establish that "there is no genuine

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dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). A material fact is one that may affect the outcome of the case under the applicable law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute is genuine “if the evidence is such that a reasonable [factfinder] could return a verdict in favor of the nonmoving party.” *Id.*

The party seeking summary judgment “always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (internal quotation marks omitted). The exact nature of this responsibility, however, varies depending on whether the issue on which summary judgment is sought is one in which the movant or the nonmoving party carries the ultimate burden of proof. *See Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007). If the movant will have the burden of proof at trial, it must demonstrate, with affirmative evidence, that “no reasonable trier of fact could find other than for the moving party.” *Id.* By contrast, if the nonmoving party will have the burden of proof at trial, “the movant can prevail merely by pointing out that there is an absence of evidence to support the nonmoving party’s case.” *Id.* (citing *Celotex*, 477 U.S. at 323).

If the movant satisfies its initial burden, then the nonmoving party must go beyond the allegations in its

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pleadings to “show a genuine issue of material fact by presenting *affirmative evidence* from which a [factfinder] could find in [its] favor.” *FTC v. Stefanichik*, 559 F.3d 924, 929 (9th Cir. 2009) (emphasis in original). “[B]ald assertions or a mere scintilla of evidence” will not suffice in this respect. *Id.* at 929; *see also Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (“When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts.”) (footnote omitted). “Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no ‘genuine issue for trial.’” *Matsushita*, 475 U.S. at 587 (quoting *First Nat. Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 289 (1968)).

In resolving a summary judgment motion, “the court does not make credibility determinations or weigh conflicting evidence.” *Soremekun*, 509 F.3d at 984. That remains the province of the fact finder. *See Anderson*, 477 U.S. at 255. Instead, “[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.” *Id.* Inferences, however, are not drawn out of the air; the nonmoving party must produce a factual predicate from which the inference may reasonably be drawn. *See Richards v. Nielsen Freight Lines*, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), *aff’d*, 810 F.2d 898 (9th Cir. 1987).

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IV. DISCUSSION

A. Plaintiff Cannot Prevail on His Regulatory Takings Claim under *Penn Central*

As this Court has previously held (*see* Docs. 29, 41, 51), Plaintiff’s regulatory takings claim is governed by the Supreme Court’s decision in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978) (“*Penn Central*”). Under *Penn Central*, three factors are of “particular significance” in determining whether a regulatory taking has occurred: (1) “[t]he economic impact of the regulation on the claimant;” (2) “the extent to which the regulation has interfered with distinct investment-backed expectations;” and (3) “the character of the governmental action.” *Penn Central*, 438 U.S. at 124. “Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law, . . . and this Court has accordingly recognized, in a wide variety of contexts, that government may execute laws or programs that adversely affect recognized economic values.” *Id.* (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922)). “The first and second *Penn Central* factors are the primary factors.” *Bridge Aina Le’a, LLC v. Land Use Comm’n*, 950 F.3d 610, 630 (9th Cir. 2020) (citing *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538-39 (2005)). However, *Penn Central* sets forth no “set formula” to determine whether a regulatory action is “functionally equivalent to the classic taking.” *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1120 (9th Cir. 2010). Instead, the outcome of the inquiry “depends largely upon the

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particular circumstances in the case at hand.” *Bridge Aina Le’a, LLC*, 950 F.3d at 630 (internal quotations omitted).

1. The Relevant Property is the Property as a Whole

As an initial matter, the parties disagree as to the relevant property right at issue in this case. The County contends that a takings inquiry must focus on Plaintiff’s right in the entire parcel, that is, all 33 acres of the Property. (Doc. 61 at 19-20; Doc. 64 at 4-5.) Plaintiff asserts instead that the “property” taken by the County is the “right to finalize his subdivision” of a portion of the Property as set forth in the VTSM, which he contends is protected by the Housing Accountability Act and the Subdivision Map Act. (Doc. 63 at 16-23.)

As explained in *Penn Central*,

“Taking” jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel *as a whole*. . . .

438 U.S. at 130-31 (emphasis added). *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Plan. Agency*, 535 U.S.

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302, 326-27 (2002) (*Penn Central* did . . . make it clear that even though multiple factors are relevant in the analysis of regulatory takings claims, in such cases we must focus on ‘the parcel as a whole.’”). *See also Murr v. Wisconsin*, 582 U.S. 383, 396 (2017) (“[T]he Court has declined to limit the parcel in an artificial manner to the portion of property targeted by the challenged regulation.”); *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979) (“At least where an owner possesses a full ‘bundle’ of property rights, the destruction of one ‘strand’ of the bundle is not a taking, because the aggregate must be viewed in its entirety.”). Following this legal authority, this Court previously held in this case that to determine whether a taking has occurred, it must evaluate the “economic impact to Plaintiff’s property *as a whole*.” (Doc. 41 at 9 (emphasis added).)

Plaintiff has provided no basis to depart from the law of the case as to this issue.¹¹ He attempts to distinguish *Penn Central*’s “parcel-as-a-whole” rule by pointing to state statutes that allegedly “protect” his right to finalize the subdivision of a portion of the Property, but none of the cases on which he relies supports this distinction. (*See* Doc. 63 at 20-21.) Plaintiff cites *Ruckelshaus v. Monsanto*, 467

11. *See Huynh v. Harasz*, No. 14-CV-02367-LHK, 2016 WL 2757219, at *21 (N.D. Cal. May 12, 2016) (applying the “law of the case” doctrine to preclude summary judgment on legal issues previously decided by a court on a motion to dismiss) (citing *Bollinger v. Oregon*, 172 F. App’x 770, 771 (9th Cir. 2006)). *See also Morgan v. Haviland*, No. 2:09-CV-2155 WBS KJN, 2011 WL 6153602, at *6 (E.D. Cal. Dec. 9, 2011) (“While defendant raises these arguments in the context of a summary judgment motion rather than a motion to dismiss, it has presented no grounds for departing from the law of the case.”).

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U.S. 986 (1984), and *City of Oakland v. Oakland Raiders*, 32 Cal. 3d 60 (1982), but those cases involved discrete intangible personal property interests—trade secrets and contractual rights in an NFL team, respectively—not rights to use real property. *Ruckelshaus*, 467 U.S. at 1001-03; *City of Oakland*, 32 Cal. 3d at 66-67.

Plaintiff’s reliance on *North Pacifica LLC v. City of Pacifica*, 234 F. Supp. 2d 1053 (N.D. Cal. 2002), is equally unavailing. (See Doc. 63 at 21.) That case concerned whether the plaintiff had pleaded a cognizable property interest under the Housing Accountability Act sufficient to support a substantive due process—not takings—claim. 234 F. Supp. 2d at 1059-60. The court further considered whether the plaintiff’s due process claim was preempted by the Taking Clause, found that it was, and dismissed the claim on grounds of ripeness. *Id.* at 1061-66. Nowhere did *North Pacifica* consider, much less hold, that the Housing Accountability Act (or any other statute) gave rise to a protected property interest for the purposes of a takings claim. And, because *North Pacifica* did not concern a takings claim in the first instance, it did not address or distinguish either *Penn Central* or the “parcel-as-a-whole” rule.¹²

Plaintiff does not cite, and the Court has not found, any legal authority finding a statutory entitlement to

12. In fact, the Ninth Circuit reversed the district court’s determination that the plaintiff’s substantive due process was preempted, holding that the court “incorrectly treat[ed] it as a takings claim.” *N. Pacifica LLC v. City of Pacifica*, 526 F.3d 478, 480, 484-85 (9th Cir. 2008).

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real estate development constitutes a property interest cognizable apart from the underlying land for takings purposes. In fact, case law suggests the contrary. *See, e.g., Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 500 (1987) (rejecting takings claim where state law created a “distinct segment of property,” observing that “[i]t is clear . . . that our takings jurisprudence forecloses reliance on such legalistic distinctions within a bundle of property rights.”) (citing *Penn Central*, 438 U.S. at 130, and *Andrus*, 444 U.S. at 65-66). *Cf. The Park at Cross Creek, LLC v. City of Malibu*, 12 Cal. App. 5th 1196, 1209 (2017) (A land use permit “is not a personal interest. It does not attach to the permittee; rather, [it] creates a right that runs with the land.”).

The Court will therefore not revisit its prior determination based on pertinent, Supreme Court case authority, that the property interest at issue here is Plaintiff’s right in the entire 33 acres of the Property, and not his right in the subdivision of a portion of it.

2. There is No Triable Question of Fact as to Economic Impact to the Property

As to the first “primary” *Penn Central* factor, Plaintiff has not presented sufficient evidence from which a finder of fact could conclude that the economic impact to the Property, when construed as a whole, rose to the level of an unconstitutional taking by the County.

Economic impact “is determined by comparing the total value of the affected property before and after the

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government action.” *Colony Cove Properties, LLC v. City of Carson*, 888 F.3d 445, 450 (9th Cir. 2018) (citing *MHC Fin. Ltd. P’ship v. City of San Rafael*, 714 F.3d 1118, 1127 (9th Cir. 2013)); see *Keystone Bituminous Coal Ass’n*, 480 U.S. at 497 (“[O]ur test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property. . . .”). “Not every diminution in property value caused by a government regulation rises to the level of an unconstitutional taking.” *Colony Cove*, 888 F.3d at 451; see *MacLeod v. Santa Clara Cnty.*, 749 F.2d 541, 548 (9th Cir. 1984) (“The Supreme Court has repeatedly held that mere diminution in value, standing alone, cannot establish a taking.”) (citing *Penn Central*, 438 U.S. at 131). Although there is “no litmus test [that] determines whether a taking occurred,” the Ninth Circuit has made clear that diminution in property value “ranging from 75% to 92.5% does not constitute a taking,” and it is “aware of no case in which a court has found a taking where diminution in value was less than 50 percent.” *Id.* (citations omitted). See also *Bridge Aina Le’a, LLC*, 950 F.3d at 631 (“[O]ur value comparison again aims ‘to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owners from his domain.’”) (quoting *Lingle*, 544 U.S. at 539).

Here, Plaintiff concedes that “[t]he value of the Property at the end of the alleged taking was *comparable* to the value of the Property at the start of the alleged taking.” (Doc. 63-2, Plt.’s Resp. to Def.’s SSUF ¶ 17 (emphasis added).) Consistent with this concession, the

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undisputed evidence demonstrates that the difference in the value of the Property as a whole between the time the County rejected the VTSM for Plaintiff's failure to comply with its fire suppression demands and the withdrawal of those demands (after which Plaintiff abandoned the VTSM and successfully obtained a final parcel map from the County) was \$820,000, representing only 29.8% diminution in value. (*See* Doc. 64 at 6. *See also* Doc. 61-1, JSUF ¶ 29; Doc. 63-1, Honchariw Decl. ¶ 64; Doc. 63-2, Plt.'s Resp. to Def.'s SSUF ¶¶ 9, 12.) Such diminution in value falls substantially below that which the Ninth Circuit requires to establish a taking. *See Colony Cove*, 888 F.3d at 451. There is therefore no triable question of fact as to the economic impact to the Property by the County's rejection of the VTSM.

3. Plaintiff Has Not Adduced Evidence of the County's Interference with Any Reasonable Distinct Investment-Backed Expectations

Plaintiff also has not adduced any evidence as to the second "primary" *Penn Central* factor, *i.e.*, that the County's rejection of the VTSM interfered with Plaintiff's "investment-backed expectations." Such expectations must be "objectively reasonable." *Colony Cove*, 888 F.3d at 452. In addition, "what is relevant and important in judging reasonable expectations is the regulatory environment at the time of the acquisition of the property." *Bridge Aina Le'a, LLC*, 950 F.3d at 634 (internal quotations and citation omitted); *see Pakdel v. City & Cnty. of San Francisco*, 636 F. Supp. 3d 1065, 1076 (N.D. Cal. 2022) ("[T]his factor must

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consider the extent to which the challenged regulation departs from or extends beyond past or conceivable future regulatory developments.”).

Plaintiff contends that the County interfered with his “entitlement to finalize his residential development in substantial compliance with the terms and conditions attached to [the VTSM]” (Doc. 63 at 24), but such expectation was not objectively reasonable at the time the Property was acquired in 1992.¹³ *See Colony Cove*, 888 F.3d at 452 (“[A] purported distinct investment-backed expectation must be objectively reasonable” in order “to form the basis for a taking claim.”). At that time, Plaintiff had no entitlement to the finalization of the VTSM, as the undisputed facts show it was not submitted for approval to the County until 14 years later, in 2006.

As for approval of a tentative subdivision map generally (a necessary step in the process of subdividing

13. Plaintiff also could not have reasonably expected the County to approve the VTSM without delay associated with litigation concerning the Conditions of Approval, as such litigation “is a normal part of the regulatory process.” *Landgate, Inc. v. California Coastal Comm’n*, 17 Cal. 4th 1006, 1030, 953 P.2d 1188, 1203 (1998). *See Loewenstein v. City of Lafayette*, 103 Cal. App. 4th 718, 737, 127 Cal. Rptr. 2d 79, 93 (2002) (“A landowner can have no reasonable expectation that there will be no delays or bona fide differences of opinion in the application process for development permits. Sometimes the application process must detour to the court process to resolve a genuine disagreement.”). *Cf. Tahoe-Sierra Preservation Council*, 535 U.S. at 335 (“[N]ormal delays in obtaining building permits, changes in zoning ordinances, variances, and the like . . . have long been considered permissible exercises of the police power” that do not require compensation.).

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property in California, Cal. Gov't Code § 64410 *et seq.*), such approval was and is a matter within the County's discretion. *See Youngblood v. Bd. of Supervisors*, 22 Cal. 3d 644, 655-56 (1978) (whether and upon what conditions to approve a proposed subdivision based on a tentative map a "discretionary decision"). As such, at the time he acquired the Property in 1992, Plaintiff would have had an "expectation, but not an assurance" that a tentative subdivision map would be approved. *See MacLeod*, 749 F.2d at 548. Under these circumstances, such expectancy is not reasonable. *See id.*; *Furey v. City of Sacramento*, 592 F. Supp. 463 (E.D. Cal. 1984), *aff'd*, 780 F.2d 1448 (9th Cir. 1986). *See also Evans Creek, LLC v. City of Reno*, No. 21-16620, 2022 WL 14955145, at *2 (9th Cir. Oct. 26, 2022) (noting the city's discretion to annex the property under Nevada law cuts against the plaintiff's economic expectations); *Collins v. Cnty. of Monterey*, No. 22-CV-02560-NC, 2023 WL 5743236, at *7 (N.D. Cal. Aug. 18, 2023) ("The closest Collins comes to a reasonable expectation are the recommendations to approve the rezone issued by County planning staff. However, any such expectation is quickly dispelled by the applicable regulatory backdrop and uncertain nature of the political process."), *aff'd*, No. 23-16153, 2024 WL 3066046 (9th Cir. June 20, 2024); *Diller v. Schenk*, No. CIV.A. C-83-20043WAI, 1986 WL 1788, at *19 (N.D. Cal. Feb. 6, 1986) ("[E]ven investment-backed expectations may not be reasonable if their fruition depends on discretionary acts by governmental authorities, *i.e.*, acts, like issuing building permits, whose future performance cannot be assured.") (citing *Furey* and *MacLeod*).

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The undisputed facts show that the County's rejection of the VTSM did not interfere with any reasonable expectations held at the time of the acquisition of the Property. Plaintiff acquired the Property in Trust as a successor trustee from his relative, Reverend Honchariw, who purchased it as a "long-term investment" that was expected to operate as a "family resort" and ultimately be subdivided into residential lots. (Doc. 61-1, JUSF ¶¶ 3, 5. *See also* Doc. 63 at 23.) Notwithstanding the County's rejection of the VTSM, Plaintiff was able to realize those expectations. While the litigation over the VTSM was pending in state court, Plaintiff applied for, and the County approved, a final parcel map that divided the Property into three five-acre lots and an approximately 18-acre remainder. (*Id.* ¶ 27, 28.) Plaintiff thereafter sold the lots for \$1.15 million and retained "significant value" in the remainder. (*Id.* ¶ 29; Doc. 63-2, Plt.'s Resp. to Def.'s SSUF ¶ 8.)

In sum, Plaintiff has failed to present evidence from which a finder of fact could reasonably conclude that the County interfered with any reasonable investment-backed expectations at the time the Property was acquired. The undisputed evidence shows otherwise.

4. Plaintiff Has Not Shown that the Character of the County's Action Supports a Taking

Plaintiff has not met his burden of establishing that the character of the County's rejection of the VTSM supports a finding by a factfinder that a taking occurred. He first points to the "unlawful" nature of the County's fire

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suppression demands (Doc. 63 at 25-26), but the alleged impermissibility of the County's actions cannot form the basis of a takings (as opposed to a substantive due process) claim. *Lingle*, 544 U.S. at 543 (“[I]f a government action is found to be impermissible . . . that is the end of the inquiry. No amount of compensation can authorize such action. . . . Whatever the merits of that claim, it does not sound under the Takings Clause.”). See *Small Prop. Owners of San Francisco v. City & Cnty. of San Francisco*, 141 Cal. App. 4th 1388, 1409 (2006) (“The appropriate question for the third prong of a regulatory takings analysis . . . is the *nature* rather than the merit of the governmental action.) (emphasis in the original). Accord *S. Grande View Dev. Co., Inc. v. City of Alabaster, Alabama*, 1 F.4th 1299, 1311-12 (11th Cir. 2021) (*Lingle* changed the type of inquiry permitted in a just compensation claim, and abrogated our earlier precedent permitting an inquiry into the rationale behind the regulation.”); *S. Nassau Bldg. Corp. v. Town Bd. of Town of Hempstead*, 624 F. Supp. 3d 261, 277-78 (E.D.N.Y. 2022) (“[T]he character-of-the-governmental-action inquiry does not incorporate ‘a means-ends test [that] asks, in essence, whether a regulation of private property is effective in achieving some legitimate public purpose. . . . Nor does it ‘probe[] the regulation’s underlying validity.’”) (quoting *Lingle*, 544 U.S. at 543).

Plaintiff next contends that the County's fire suppression demands “entailed a physical take-over and seizure of some of [his] property.” (Doc. 63 at 26.) While “[a] ‘taking’ may more readily be found when the interference with property can be characterized as a physical invasion by government,” *MHC Fin. Ltd. P’ship*,

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714 F.3d at 1128 (quoting *Penn Central*, 438 U.S. at 124), Plaintiff has not shown that the County’s requirement to provide a fire suppression system on a portion of his Property is akin to a “physical invasion” of the Property as a whole. *See Norman v. United States*, 63 Fed. Cl. 231, 286-87 (2004) (rejecting argument that regulatory imposition was “akin to a physical taking of 220.85 acres of land,” finding that “[i]n light of the entire 2280-acre relevant parcel, plaintiffs’ overall bundle of property rights was not diminished with respect to the larger parcel at issue.”), *aff’d*, 429 F.3d 1081 (Fed. Cir. 2005). In fact, courts have found regulations requiring the installation of fire suppression measures such as sprinkler systems do not constitute a taking under *Penn Central*. *See, e.g., Dyke v. Vill. of Alsip*, No. 18 C 06112, 2019 WL 13247925, at *2 (N.D. Ill. Dec. 6, 2019) (“Defendants’ enforcement of the zoning ordinance which requires certain properties to maintain fire sprinklers falls far short of a regulatory taking.”), *aff’d sub nom. Van Dyke v. Vill. of Alsip*, 819 F. App’x 431 (7th Cir. 2020); *Cf. Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (contrasting the government’s “power to require landlords to comply with building codes and provide . . . smoke detectors, fire extinguishers, and the like” with regulations that “require the landlord to suffer the physical occupation of a portion of his building by a third party.”).

5. The *Penn Central* Factors Do Not Support a Finding that a Taking Occurred

Even were the “character of the governmental action” factor to weigh in favor of Plaintiff, it “is not alone a

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sufficient basis to find that a taking occurred.” *Bridge Aina Le’a, LLC*, 950 F.3d at 636. Plaintiff has not met his burden of establishing a genuine issue of material fact that the County’s rejection of the VTSM due to its fire suppression demands was an unconstitutional taking under *Penn Central*. Instead, as set forth above, the undisputed evidence demonstrates that the two primary *Penn Central* factors weigh strongly against a finding that a taking occurred. Accordingly, the Court will grant summary judgment in favor of the County on Plaintiff’s takings claim.

B. The County is Entitled to Summary Judgment on Plaintiff’s Substantive Due Process Claim

1. Plaintiff Must Meet the “Exceedingly High Burden” of Demonstrating the County’s Conduct was “Egregious”

In an action like this one, challenging land use action, “the ‘irreducible minimum’ of a substantive due process claim . . . is failure to advance any legitimate governmental purpose.” *Shanks v. Dressel*, 540 F.3d 1082, 1088 (9th Cir. 2008) (quoting *North Pacifica LLC v. City of Pacifica*, 526 F.3d 478, 484 (9th Cir. 2008)). A plaintiff bears an “exceedingly high burden” required to show that the state actor “behaved in a constitutionally arbitrary fashion.” *Id.* at 1088. As the Ninth Circuit explained, “[w]hen executive action . . . is at issue, only ‘egregious official conduct can be said to be arbitrary in the constitutional sense’: it must amount to an ‘abuse of power’ lacking any ‘reasonable justification in the service of a legitimate governmental

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objective.” *Id.* (quoting *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998)).

Plaintiff does not dispute that the County’s acts at issue are “executive” (as opposed to “legislative”) in nature.¹⁴ Instead, he contends that he need not meet the “exceedingly high burden” of showing the County engaged in “egregious official conduct” required by *Shanks*, because the County owed him a “ministerial duty” to approve the VTSM and thus “had no right to take ‘executive’ action.” (Doc. 63 at 29.) In so doing, Plaintiff is attempting to draw a distinction between “ministerial” and “executive” acts, for which he cites no legal authority in support.¹⁵ In fact,

14. The law of substantive due process distinguishes between governmental acts that are “legislative” and those that are “executive” in character. *Gunter v. N. Wasco Cnty. Sch. Dist. Bd. of Educ.*, 577 F. Supp. 3d 1141, 1153 (D. Or. 2021) (“As a threshold matter for evaluating a substantive due process claim, the Court must determine whether Plaintiffs are alleging that they have been harmed by an ‘executive’ or a ‘legislative’ act.”) (citing *Lewis*, 523 U.S. at 846). “Executive action generally involves ‘a specific act of a governmental officer that is at issue.’” *Gunter*, 577 F. Supp. 3d at 1153 (quoting *Lewis*, 523 U.S. at 846). “Legislative acts, on the other hand, generally apply to a larger segment of—if not all of—society; laws and broad-ranging executive regulations are the most common examples.” *Gunther*, 577 F. Supp. 3d at 1153 (quoting *McKinney v. Pate*, 20 F.3d 1550, 1557 n.9 (11th Cir. 1994)).

15. Plaintiff’s cited cases (Doc. 63 at 26-27) are directed to the issue of whether state law can create a constitutionally protected property interest—an essential element of a due process claim. *See, e.g., Gerhart v. Lake Cnty., Mont.*, 637 F.3d 1013, 1019 (9th Cir. 2011) (“To succeed on [his substantive due process] claim, Gerhart must first demonstrate that he was deprived of a constitutionally protected property interest. We hold that Gerhart

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“ministerial or administrative activities of members of the executive branch” are “executive” acts. *Gunter*, 577 F. Supp. 3d at 1153. Accord *McKinney*, 20 F.3d at 1557. As such, they are subject to the egregiousness standard, *Lewis*, 523 U.S. at 846, which is an “exceedingly high burden” to meet, *Samson v. City of Bainbridge Island*, 683 F.3d 1051, 1058 (9th Cir. 2012).

2. Plaintiff Has Not Met This Burden

Plaintiff has failed to present sufficient material facts from which a finder of fact reasonably could conclude that the County “behaved in a constitutionally arbitrary fashion.” *Shanks*, 540 F.3d at 1088. Plaintiff contends that the County’s rejection of the VTSM was an “abuse of power” lacking “any reasonable justification in the service of a legitimate governmental objective” because it “acted in violation of state law designed to prevent exactly

cannot make this threshold showing.”) (internal citations omitted); *Groten v. California*, 251 F.3d 844, 849-50 (9th Cir. 2001) (“We must determine whether Groten, as a first-time applicant for a temporary appraiser’s license, had a property interest protected by the Due Process Clause.”); *Foss v. Nat’l Marine Fisheries Serv.*, 161 F.3d 584, 588 (9th Cir. 1998) (“The threshold question is whether Foss has a constitutionally protectible property interest in acquiring an IFQ permit. . . .”); *Parks v. Watson*, 716 F.2d 646, 656 (9th Cir. 1983) (“Before Klamath can prevail on [its procedural due process claims], however, it must demonstrate the threshold requirement of a constitutionally cognizable right. . . . [W]e must determine whether Klamath, as a vacation petitioner, had such an interest protected by the due process clause.”). The County does not challenge the existence of a constitutionally protected property interest in this case. (*See* Doc. 64 at 11 n.7.)

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what it did.” (Doc. 63 at 29.) But a violation of state law (even if committed in this case) alone does not establish a substantive due process claim. *Samson*, 683 F.3d at 1060 (“It is axiomatic . . . that not every violation of state law amounts to an infringement of constitutional rights.”) (citing *Paul v. Davis*, 424 U.S. 693, 700 (1976)).

Nor does the fact that the appellate court ultimately concluded the County had “misinterpreted” the Conditions of Approval of the VTSM. (See Doc. 63 at 30, 31, 32-33 (citing *Honchariw v. Cty. of Stanislaus*, 51 Cal. App. 5th 243 (2020), Doc. 1 at 144-74).) “Official decisions that rest on an erroneous legal interpretation are not necessarily constitutionally arbitrary.” *Shanks*, 540 F.3d at 1089. See *Brittain v. Hansen*, 451 F.3d 982, 996 (9th Cir. 2006) (“[S]ubstantive due process secures individuals from ‘arbitrary’ government action that rises to the level of ‘egregious conduct,’ not from reasonable, though possibly erroneous, legal interpretation.”); *Sinaloa Lake Owners Ass’n v. City of Simi Valley*, 864 F.2d 1475, 1486 (9th Cir. 1989) (Errors of judgment, mistaken actions, or even misguided actions do not violate due process.). In fact, there can be no substantive due process violation “if it is ‘at least fairly debatable’ that the government’s conduct is rationally related to a legitimate interest.” *Flint v. Cnty. of Kauai*, 521 F. Supp. 3d 978, 995 (D. Haw. 2021) (quoting *Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1238 (9th Cir. 1994)). See also *Halverson v. Skagit Cnty.*, 42 F.3d 1257, 1262 (9th Cir. 1994) (explaining that plaintiffs in substantive due process claims “shoulder [the] heavy burden” of demonstrating “the irrational nature of the County’s actions by showing that the County could

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have had no legitimate reason for its decision”). Under these circumstances, courts “do not require that the government’s action actually advance its stated purposes, but merely look to see whether the government *could* have had a legitimate reason for acting as it did.” *Wedges/Ledges of California, Inc. v. City of Phoenix*, 24 F.3d 56, 66 (9th Cir. 1994) (emphasis in original).

Here, Plaintiff cannot meet his “heavy burden” of demonstrating that the County’s rejection of the VTSM was devoid of a legitimate governmental interest. Plaintiff claims that the County had “no justification” for their fire suppression demands (Doc. 63 at 29), but at the same time does not dispute that County staff were “acutely aware that wildfires posed a significant risk to rural and semi-rural communities at the time of the dispute over the meaning of the [C]onditions of [A]pproval” and believed that requiring Plaintiff, not KFCSO, to “provide functioning fire hydrants, including a water supply capable of providing fire suppression flows” prior to approval of the VTSM was “in order to protect the future residents of the subdivision from life safety hazards, including wildfire.” (Doc. 63-2, Plt.’s Resp. to Def.’s SSUF ¶¶ 4-5.) The trial court in *Honchariw v. County of Stanislaus* expressly emphasized the County’s interest in fire safety, noting that the parties’ dispute over the Conditions of Approval “involves a clear issue of public safety: fire suppression. . . . This dispute is not about esthetics; it is a life or death concern.” (Doc. 1 at 66.) The appellate court, which sided with Plaintiff, nevertheless also acknowledged the County’s “safety concerns related to fire.” (See *Honchariw v. Cty. of Stanislaus*, 51 Cal. App. 5th 243 (2020), Doc. 1 at 133.)

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Plaintiff's proffered statements made by County personnel that KFCSD would supply the water for fire suppression (*see* Doc. 63-1, Honchariw Decl. ¶¶ 48-49) also fail to create a genuine issue of material fact as to whether the County "**could** have had a legitimate reason" for insisting that Plaintiff do so instead. This is particularly true in view of the uncontroverted evidence that the KFCSD water system was "small" and "antiquated," with "substandard" distribution facilities that produced "well under standard fire flows of 1000 gpm for residential subdivision systems served by municipal water districts." (Doc. 63-1, JSUF ¶13.) It is therefore "at least fairly debatable" that the County's fire suppression demands, even if legally erroneous, were rationally related to the legitimate interest in protecting the subdivision's residents against wildfires.

In this way both *Bateson v. Geisse* and *Ali v. City of Los Angeles*, relied on by Plaintiff (*see* Doc. 63 at 27, 32), are inapposite. In *Bateson*, the city council voted not to issue a building permit even though the applicant had satisfied all the requirements for the permit. 857 F.2d 1300, 1302 (9th Cir. 1988). It did so despite the city attorney's warning that the decision would almost certainly be overturned in court and would expose the city to substantial civil liability. *Id.* The Ninth Circuit held that the city council's vote was an "arbitrary administration of the local regulations, which single[d] out one individual to be treated discriminatorily" and constituted a deprivation of substantive due process. *Id.* at 1303. In *Bateson*, it was undisputed that a condominium development complied with the zoning classification applicable to Bateson's

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property; in this case, the meaning of the Conditions of Approval related to fire suppression infrastructure was unsettled at the time the County rejected the VTSM. Further, Plaintiff has not adduced any evidence of bad faith by the County in this case. To the contrary, it is undisputed that Frederic Clark, the County staff member responsible for reviewing the VTSM for compliance with the Conditions of Approval, interpreted those conditions “in good faith”; that he “had no interest in obstructing the project”; and that “[n]obody at the County suggested to [him] that he obstruct the project.” (Doc. 63-2, Plt.’s Resp. to Def.’s SSUF ¶¶ 3, 14-16.)

In *Ali*, the appellate court observed that because the illegality of the City’s action was apparent from case authority existing before the City initially withheld the permit, its position was “‘so unreasonable from a legal standpoint’ . . . as to be arbitrary, not in furtherance of any legitimate governmental objective, and for no other purpose than to delay any development. . . .” 77 Cal. App. 4th 246, 255 (1999). Here, the County’s rejection of the VTSM was not objectively unreasonable, particularly given its argument regarding the purpose of the Conditions of Approval was endorsed by the trial court in *Honchariw v. Cty. of Stanislaus*. See *Allegretti & Co. v. Cnty. of Imperial*, 138 Cal. App. 4th 1261, 1284 (2006) (distinguishing *Ali*).

Because Plaintiff has failed to meet his “exceedingly high burden” of putting forth evidence sufficient to establish a substantive due process violation, the Court

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finds that the County is entitled to summary judgment on this claim.¹⁶

V. CONCLUSION AND ORDER

For the foregoing reasons, Defendant County of Stanislaus's motion for summary judgment (Doc. 61) is GRANTED. Judgment shall be entered in favor of Defendant. The Clerk of Court is directed to vacate any pending deadlines and to close this case.

IT IS SO ORDERED.

Dated: **August 21, 2024**

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE

16. Plaintiff asserts that the County has demonstrated a "history of obstruction" related to the VTSM, and specifically points to the Board's "unlawful disapproval" of the VTSM in 2009. (See Doc. 63 at 33-34.) But, as noted above, Plaintiff concedes that, at least as to the present dispute that is relevant here, County staff "had no interest in obstructing the project" and that "[n]obody at the County suggested" that Plaintiff's project be "obstruct[ed.]" (Doc. 63-2, Plt.'s Resp. to Def.'s SSUF ¶¶ 3, 14-16.) Regarding the Board's 2009 denial of the VTSM, it is not before the Court, and Plaintiff's attempt to assert a substantive due process claim related to it was unsuccessful. See *Honchariw v. Cnty. of Stanislaus*, 530 F. Supp. 3d 939, 952 (E.D. Cal. 2021) (granting motion for judgment on the pleadings), *aff'd*, No. 21-15801, 2022 WL 522287 (9th Cir. Feb. 22, 2022). The Court will not revisit that ruling here.