No. 21-16489

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RANDY RALSTON; LINDA MENDIOLA,

Plaintiffs – Appellants,

v.

COUNTY OF SAN MATEO,

Defendant – Appellee,

and

CALIFORNIA COASTAL COMMISSION,

Defendant.

On Appeal from the United States District Court
for the Northern District of California
No. 21-CV-01880-EMC
Honorable Edward M. Chen, District Judge

APPELLANTS' PETITION FOR REHEARING EN BANC

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FRAP 35(b) STATEMENT

Appellants Randy Ralston and Linda Mendiola (jointly "Ralston") respectfully request rehearing en banc. Consideration by the full Court is necessary to secure uniformity and to resolve unsettled issues:

1. The panel opinion conflicts with *Ernst & Haas Mgmt. Co. v. Hiscox, Inc.*, 23 F.4th 1195, 1199 (9th Cir. 2022), and myriad Ninth Circuit decisions holding that on a motion to dismiss, the facts as alleged in the complaint are deemed true and any dispute about those facts are reserved for discovery, summary judgment, or trial.

2. The panel also conflicts with *Pakdel v. City & Cnty. of San Francisco*, 141 S.Ct. 2226, 2330 (2021) (per curiam), and *Palazzolo v. Rhode Island*, 533 U.S. 606, 620 (2001), which together hold the "final decision" ripeness requirement in takings cases is "relatively modest" and only requires a "de facto" decision, not a rejection of a formal development application; a takings claim is ready "once it becomes clear ... the permissible uses of the property are known to a reasonable degree of certainty[.]"

FACTS

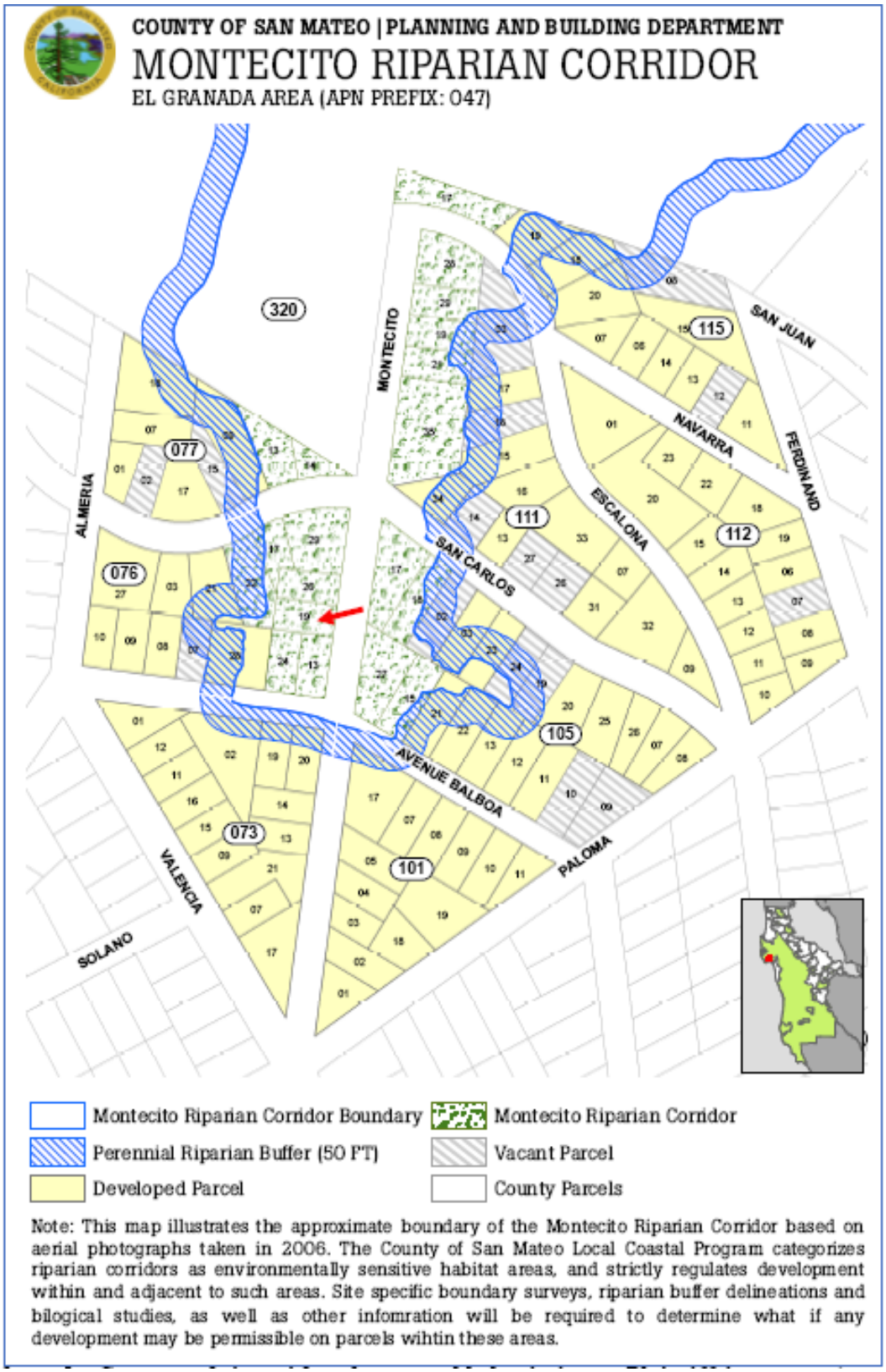
I. Ralston's Residentially-Zoned Property

The complaint alleges Ralston owns a vacant parcel zoned "R-1" (single-family residential), which means that—absent other restrictions—Ralston may build a single-family home by-right. ER-167. The complaint also alleges the property is entirely within the Montecito Riparian Corridor ("MRC"), a restrictive "overlay" district as shown on the County's website:

> 14. The Property is depicted as being entirely within a "Montecito Riparian Corridor" on a County website, https://planning.smcgov.org/documents/san-mateo-county-montecito-ripariancorridor.

ER-168. The County's Local Coastal Program ("LCP") requires the County produce this map. LCP § 7.8 ("Establish riparian corridors … [and d]esignate those corridors shown on the Sensitive Habitats Map and any other riparian area meeting the definition of Policy 7.7 as sensitive habitats requiring protection."). If a parcel is at least 50% covered by riparian vegetation such as arroyo willow, it is in the MRC. LCP § 7.7. The LCP prohibits residential development in these "environmentally sensitive habitat areas." ER-77. The County "strictly regulates development within and adjacent to such areas" as "sensitive habitats

requiring protection." LCP § 7.8.



II. As the County Requires, Ralston Requested—and Received—a Development Decision

All development must be consistent with *both* the residential zoning *and* the overlay MRC. Here, uses allowed in R-1 zones are prohibited in the MRC; conversely, uses allowed in the MRC are prohibited in R-1 zones. Thus, every otherwise legal use of Ralston's land is barred by the zoning/MRC inconsistency, and absent other relief, Ralston cannot be granted a Coastal Development Permit ("CDP") for any use.

But the County says it can "override" the MRC's restrictions. It asserts state law grants it this discretion, but only if Ralston convinces it that enforcing the MRC's restrictions would result in an uncompensated taking.[1] The County's website requires that "[a]ny intention to proceed with an application for development that would run counter to any of these policies [the riparian corridor prohibitions] *must* first be throughly [*sic*] reviewed by the Community Development [a/k/a Planning] Director and County Counsel." ER-169 (emphasis added).

[1] Cal. Pub. Res. Code § 30010. Ralston asserts section 30010 does not grant such authority to the County, but for purposes of this petition assumes it authorizes an override.

https://www.smcgov.org/planning/san-mateo-county-montecito-riparian-corridor.

Similarly, there is no procedure in the County's ordinances by which owners can ask for confirmation their land is in the MRC. But the County's website notes that "site specific boundary surveys, riparian buffer delineations and bilogical [*sic*] studies, as well as other infomration [*sic*] will be required to determine what if any development may be permissible on parcels wihtin [*sic*] these areas." *See* https://www.smcgov.org/media/73051/download?inline=.

The complaint alleges Ralston did just that and requested review. The complaint also alleges:

> 20. The County's Community Development Director consulted with County Counsel and rejected the intention, going so far as to state that no home on the Property would be allowed: "I reviewed the information you [Plaintiffs] submitted with County Counsel. *It is our view that the totality of the circumstances surrounding the recent acquisition of the property, including its purchase price, does not establish that the property owners had a reasonable economic-backed expectation to develop the property as a separate single-family residence such that it would be justifiable to override the Local Coastal Plan limitations on development within wetland and riparian areas in order to accommodate a reasonable economic use*."

ER-169 (emphasis added). The complaint further alleges the County

rejected two additional requests: (1) for a "buildability letter," which is necessary for the provision of treated water to the property, ER-169–170, and (2) a request the Board of Supervisors reconsider or provide compensation. ER-170.

III. Panel Opinion

A panel of this Court affirmed the 12(b)(6) ripeness dismissal because Ralston had not (1) asked the County to confirm that his property is in the MRC, or (2) filed a CDP application to build a home.

First, it declined to accept as true the complaint's allegation Ralston's property is entirely in the MRC. Mem. at 3. The County's brief (p.33) asserted the complaint's allegation was "flat wrong." The panel held the complaint's reference to the County's map (ER-168, ¶14) was not a sufficiently clear allegation because the map merely "depict[s]" the property as entirely within the MRC (and the County argues Ralston's property might *not* be in the MRC). Moreover, the County map says it's just an approximation. Thus, until Ralston "submit[s] a permit application" (presumably meaning a CDP) asking the County to confirm his property is indeed in the MRC, a takings claim is premature. Mem. at 3. Parroting the County's website, the panel concluded the CDP

application must include "[s]ite specific boundary surveys, riparian buffer delineations and biological studies" to allow County experts to agree that Ralston's property is choked with arroyo willow. *Ralston v. County of San Mateo*, 2022 WL 16570800, at *1 (9th Cir. Nov. 1, 2022).

Second, the panel held Ralston's takings claim is not ripe because the complaint didn't allege he submitted a CDP application asking whether his property is buildable or for a 30010 override. It apparently is not sufficient to allege that as directed by the County, Ralston asked if his property is buildable and for an override—and the Director responded no. The panel held that the County's directive to ask the Planning Director and County Attorney to "throughly [sic] review[]" whether the MRC restrictions can be overridden, merely elicits the Director's "personal opinion about the likelihood of success of Ralston's proposal[.]" *Id.* at *2

ARGUMENT

I. Whether Ralston's Property Is in the MRC "Can Be Flushed Out in Discovery"—The Panel's Decision Conflicts With the Rule That Allegations in the Complaint Are Deemed True

The panel rejected the 12(b)(6) rule that the complaint's allegation Ralston's property is in the MRC must be taken as true. *City of Almaty*

v. Khrapunov, 956 F.3d 1129, 1131 (9th Cir. 2020). Instead, it held the complaint must have alleged *both* that Ralston asked the County to confirm his property is in the MRC *and* that the County formally agreed.

But Ralston's § 1983 civil rights takings claim is not subject to special pleading requirements. *Leatherman v. Tarrant Cnty.*, 507 U.S. 163, 164 (1993) (federal court does not "apply a 'heightened pleading standard'" in civil rights 1983 cases). A civil rights complaint must only plausibly allege the plaintiff is subject to the challenged regulation. It need not allege government has *agreed* the regulation applies, because this isn't really a question of ripeness, but one of standing and injury-in-fact. *See*, *e.g.*, *Nelsen v. King Cnty.*, 895 F.2d 1248, 1252 (9th Cir. 1990) (plaintiff has standing when, after "individualized inquiry," there is a "credible threat" he will suffer the harm alleged). Here, the complaint credibly alleges that Ralston's property is in the MRC, and as a consequence the property is deprived of all use. That's sufficient to plead a regulatory takings claim.

Nor must a takings complaint allege the plaintiff has given government a chance to avoid applying its regulations to the plaintiff's property by some kind of "jurisdictional determination" process that does

not exist in the County's law.[2] Here, the panel imposed a variation of the "primary jurisdiction" doctrine, a form of judicial avoidance in which courts allow agencies to first make determinations if a technical issue requires expertise and is thus "within the special competence of an administrative agency." *See Reiter v. Cooper*, 507 U.S. 258, 268 (1993) (Interstate Commerce Commission isn't given first pass on unreasonable rate claims). But if *Pakdel* and *Knick v. Township of Scott*, 139 S.Ct. 2162 (2019), stand for anything, they reflect the Supreme Court's thorough rejection of the longstanding trope that takings claims challenging land use regulations are "local" matters outside the competency of federal judges. The Court made clear that land use and takings claims are civil rights matters and are to be treated like every other civil rights claim. If federal courts can resolve cases about monkey selfies,[3] nude dancing,[4]

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[2] For example, Mendocino County's LCP includes a process to determine riparian boundaries. If an owner is "uncertain about the extent of sensitive habitat" on her property, she may make a written request for an expedited (three weeks) "special review to determine the current extent of the sensitive resource." Mendocino Cnty. *Resource & Dev. Issues & Policies* § 3.1-2 (https://www.mendocinocounty.org/home/showpublisheddocument/5314/636242343773330000).

[3] *Naruto v. Slater*, 888 F.3d 418 (9th Cir. 2018).

[4] *Flanigan's Enters. v. Fulton Cnty.*, 596 F.3d 1265 (11th Cir. 2010).

creating Valentine's Day artwork out of naked bodies,[5] and whether pet pigeons are diseased,[6] then surely these same courts don't need "experts in the regulations, experts in uses, the land" (as the County put it in the *Mendelson* arguments) to determine whether Ralston's property is more than 50% covered in "an abundant and widespread native tree" like arroyo willow.[7] *See Mont. Envtl. Info. Ctr. v. Stone-Manning*, 766 F.3d 1184, 1190–91 (9th Cir. 2014) (court is competent to make "firm prediction" that application will be granted).

The County, of course, is entitled to dispute whether Ralston's property is blanketed in arroyo willow. LCP § 7.7 (parcel is in MRC if it is at least 50% covered by riparian vegetation such as arroyo willow). But that is a routine factual dispute subject to evidence and discovery, and resolved by summary judgment or trial—not on the pleadings. As noted by Judge Bumatay during arguments in the related case *Mendelson v. Cnty. of San Mateo*, No. 20-17389, 2021 WL 4988022 (9th Cir. Oct. 27,

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[5] *Sole v. Wyner*, 551 U.S. 74 (2007).

[6] *Recchia v. City of L.A. Dep't of Animal Servs.*, 889 F.3d 553, 556 (9th Cir. 2018).

[7] Arroyo Willow, *Salix lasiolepis*, https://calscape.org/Salix-lasiolepis-(Arroyo-Willow).

2021),[8] questions of whether property is in the MRC "can be flushed out in discovery."

> MS. CARROLL: I suppose if he is correct – if he were correct that it was absolutely clear in the law that he could not develop on his property, that might be a different situation and the claim might be ripe. But that just is not the case here. First of all, it is not clear that Mr. Mendelson's property is even entirely covered in riparian vegetation, which is what triggers the application of the LCP riparian corridor regulation in the first place.
>
> JUDGE BUMATAY: Well, the 12(b)(6) stage, shouldn't we – don't we take the factual allegations as true?
>
> MS. CARROLL: Yes, Your Honor, but as I read the Complaint, Mr. Mendelson used this County map to figure out if his land was in the riparian corridor. This is the map that is attached to the complaint at page 36 of the record, Exhibit B to the complaint. And that complaint – or that – that map very clearly states a disclosure that these are only the approximate boundaries of the riparian corridor. And that site-specific boundary surveys, riparian buffer delineations, and biological studies as well as other information will be required to determine what, if any, development may be permissible on parcels within those areas. And it's based on aerial photographs taken in 2006. So this map isn't the actual boundary of the riparian corridor, it's an approximate boundary. And you can see one of Mr. Mendelson's –

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[8] Like Ralston, Mendelson owns R-1 property he alleges is in the MRC, which results in a taking. As here, the district court dismissed under 12(b)(6) for final decision ripeness. After oral arguments, a panel of this Court (Judges Bade, Bumatay, and Sessions), remanded to the district court for further consideration in light of *Pakdel*. *See Mendelson*, No. 20-17389, 2021 WL 4988022, at *1.

> JUDGE BUMATAY: All that can be flushed out in discovery, couldn't it? I mean the district court knocked this out at the 12(b)(6) stage, so none of this is actually at issue. And it could be flushed out after discovery.
>
> MS. CARROLL: It could be flushed out in discovery, Your Honor. However, the County does have its own process for determining whether land is in the riparian corridor. And considering the fact that the federal courts have long considered issues of land use to be delegated to the state and local governments, it makes a lot more sense to have the process go through the County's established procedure first, where we have experts in the regulations, experts in uses, the land, and they can actually exercise their own discretion and perhaps avoid a taking in the first place, so doing all this in discovery wouldn't be necessary and the federal courts wouldn't be tasked with putting themselves in the shoes of the County and imagining what – how the County might have responded to this hypothetical development proposal.

https://youtu.be/pXSELAX8t88?t=1102 (18:22–21:35).[9]

Review by the entire Court is essential to ensure that uniform pleadings standards apply to all cases, and that civil rights cases involving takings are not singled out for more stringent treatment.

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[9] If the panel was only taking issue with the phrasing of the MRC allegation (ER-168, ¶ 14) that the map merely "depict[s]" the property as entirely within the MRC, and he should instead have alleged that "Ralston's property is entirely in the MRC," any such problem should be addressed by leave to amend, not dismissal.

II. The County Has No Standards by Which It Can Grant or Deny a 30010 Override

Let's assume the panel was correct when it concluded section 30010 gives the County authority to override the MRC's development prohibition and grant Ralston a CDP to build a home in the MRC if he proves that denying that use would be a taking. Let's also assume, as did the panel, that a CDP application is how you ask for an override (even though the CDP application form lacks even a hint it can be used to ask for an override: there's no mention of section 30010, "takings," or "overrides," and property owners are provided no clue about what they should submit to support a claim for a 30010 takings override; here's the form: https://www.smcgov.org/planning/coastal-development-permit-application-companion-page).

But let's put all that aside and assume further that a property owner must assemble both an application to build a home, at a cost of "thousands and thousands of dollars" as Judge Bumatay put it in the *Mendelson* argument (https://youtu.be/pXSELAX8t88?t=1289) (21:30)), and also provide evidence and argument that to deny the proposed home would be a taking.

That exposes the fundamental problem the panel's holding presents: What standards will the County apply to process an application, to determine if denying residential use would be a taking? We know what standards other California municipalities employ, because—unlike the County—they have publicly-accessible standards, adopted by legislation, as part of their LCP. For example, the City of Santa Barbara has adopted an ordinance[10] expressly informing owners *how* to ask for an override, and *what evidence* must be submitted: "An applicant who requests such a takings override must provide, as part of any coastal development permit application evidence sufficient to support its request and to make the findings required pursuant to subsection C." Policy 1.2-3.

Most importantly, the "findings required pursuant to subsection C" give the public notice of the substantive standards Santa Barbara will apply to consider whether the application merits an override. The list is long and detailed. It gives property owners notice of how their override

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[10] City of Santa Barbara, *Dev. Review Policies* 1.2-3 (2019), https://santabarbaraca.gov/sites/default/files/documents/Services/LCP%20Update/Chapter%201.2%20Santa%20Barbara%20Local%20Coastal%20Program.pdf.

applications will be considered, and what standards will apply. By law, the City must find:

> (1) "each use allowed by the policies and standards of the LCP would not provide reasonable use of the applicant's lawfully created property";
>
> (2) "[a]pplication of the policies and/or standards of the LCP would unreasonably interfere with the applicant's reasonable investment-backed expectations";
>
> (3) "[t]he use proposed by the applicant is consistent with the City's Zoning Ordinance";
>
> (4) "[t]he use and development design, siting, and size are the minimum necessary to avoid a taking";
>
> (5) "[t]he project is the least environmentally damaging feasible alternative and is consistent with all policies and standards of the LCP other than the provisions for which the deviation is requested"; and
>
> (6) "[t]he development will not be a public nuisance or violate other background principles of the state's law of property (e.g., public trust doctrine). If it would violate any such background principle of the state's law of property, the development shall be denied."

Id., Policy 1.2-3(C)(i)–(vi). Finally, if an override is granted, it has the force and effect of legislation amending the zoning ordinance: "The City's Zoning Ordinance should be amended to incorporate the findings listed above for coastal development permits that involve a takings override." *Id.*, Policy 1.2-3(D).

Contrast Santa Barbara's procedures and standards for processing 30010 overrides with the County's. It's night and day because County law has no procedures, no standards—*nothing*. And if you look in the Coastal Act to see if, by chance, it supplies the missing processes or standards for considering 30010 overrides, you find the same—nothing.

As a consequence, San Mateo County property owners like Ralston and Mendelson who are told by the federal courts they must submit CDP applications to ask the County for overrides have no idea what information they are required to submit. They're left to guess. Maybe owners can ask the Planning Director and the County Attorney, but remember: the panel concluded their responses are merely "personal opinion," so owners can't rely on that. And even if owners took an educated guess (maybe the County will want the same information as Santa Barbara?), there is also nothing in the County's laws providing applicants notice of how the County will consider their application. The County is not required to apply any standards, reach any conclusions, or make any findings.

It may be, as the County suggested in the *Mendelson* argument and here, that it applies some kind of not-in-our-ordinance standards for how

it grants or denies overrides. But in the absence of actual standards *in the County's laws*, any informal practices or its litigation statements don't matter. *Alaska v. Fed. Subsistence Bd.*, 544 F.3d 1089, 1095 (9th Cir. 2008) (refusing to defer to government's "litigation position" when that position does not reflect "any legally-binding regulation or in any official agency interpretation of the regulation"); *United States v. Trident Seafoods Corp.*, 60 F.3d 556, 559 (9th Cir. 1995) ("No deference is owed when an agency has not formulated an official interpretation of its regulation, but is merely advancing a litigation position."). Which means the system endorsed by the panel is standardless, and the County apparently can process override applications any way it wants.

Courts don't require people to submit to processes untethered from standards adopted by law. We treat decisions resulting from processes that delegate unbridled discretion as arbitrary and capricious. *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 769–70 (1988) (city officials can't make up standards when their jurisdiction has not established any by law; "the doctrine forbidding unbridled discretion … requires that the limits the city claims are implicit in its law be made explicit by textual incorporation, binding judicial or administrative

construction," and the "Court will not write nonbinding limits into a silent statute") (internal citations omitted); *Spirit of Aloha Temple v. Cnty. of Maui*, 49 F.4th 1180, 1193 (9th Cir 2022) (regulation delegating officials "unbridled discretion to deny a permit" is unconstitutional). The County's lack of override standards reveals these decisions are really more legislative than adjudicative in nature.[11] Especially because, as the panel emphasized, Ralston's override must ultimately be approved by the County Board.

This standardless take is the Achilles' heel of the County's approach to overrides, because property owners are not obligated to ask for legislative changes to ripen a claim. *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 938 F.2d 153, 157 (9th Cir. 1991) ("[R]ipeness did not require the plaintiffs to ask [the government] to amend the 1984 [regional] Plan before bringing their [federal takings] claims."); *Ward v. Bennett*, 592 N.E.2d 787, 790 (N.Y. 1992) (landowners not required to pursue "demapping" procedure for ripeness); *Leone v.*

[11] Santa Barbara understands the legislative nature of overrides—it requires amendment of the Zoning Ordinance if it overrides the LCP. *See* Policy 1.2-3(D).

Cnty. of Maui, 284 P.3d 956, 969 (Haw. App. 2012); *Howard v. Cnty. of San Diego*, 109 Cal.Rptr. 3d 647, 654 (2010).

If Ralston can't be forced to chase the County's standardless override procedures to ripen his claim, then the only thing he could be expected to do is what he in fact did: when the County instructs property owners they "must" ask "the Community Development Director and County Counsel" to "throughly [*sic*] review[]" "[a]ny intention to proceed with an application for development," you do so. And if the County replies that "[i]t is our view that … it would [not] be justifiable to override the Local Coastal Plan limitations on development," you—and the courts—may treat this de facto decision as definitive. Because the County wouldn't require owners to make inquiries of its officials merely to get meaningless answers, would it, even if that answer is "informal" (doesn't "de facto" mean "not formal")? The Supreme Court also seems to believe that government shouldn't be in the business of requiring constituents to navigate pointless mazes. *Niz-Chavez v. Garland*, 141 S.Ct. 1474, 1486 (2021) ("If men must turn square corners when they deal with the government, it cannot be too much to expect the government to turn square corners when it deals with them."). After all, *Pakdel* said that all

finality requires is that the court understand how the offending regulations apply to the specific property.

The County has no obligation to adopt standards like Santa Barbara's (and it hasn't). The County chooses to keep it vague, and one can see why. By keeping things informal—regulation-by-website and insisting permit seekers "just apply because you never know how we might react"—the County can delay, perhaps indefinitely, telling property owners "no, you really can't build a home in 'environmentally sensitive habitat areas' that 'require protection'." And thereby avoid facing the Fifth Amendment music for turning R-1 zoned properties into public environmental preserves.

But choosing to not adopt standards for considering overrides has consequences: Ralston cannot be required to run an arbitrary and capricious gauntlet just to ripen his claim; when the County tells owners they "must" ask the Planning Director if they can build a home in a riparian corridor and he replies *of course not*, that's enough to ripen a civil rights claim.

But what's the big deal, you might ask? After all, this is just a dismissal *without* prejudice because Ralston is purportedly too early. By

going through the process, isn't there a chance, however remote and fantastic, that he might convince the County that denying use of his property is a taking, and thereby secure that elusive override so he can build a home in the middle of the MRC? Or one day might the County say "no," the LCP really means what it says when it says no homes in the MRC, thus ripening a takings claim? Shouldn't he *celebrate* the possibility of a proverbial light at the end of the tunnel and take advantage of it? No: if landowners must navigate an informal, vague, and most importantly standardless override process, then the process is designed to fail its avowed purposes of gathering the information necessary to approve or deny uses, providing the County data to elicit a clear response, and to let owners know how a 30010 override request will be evaluated.

Instead, the process becomes a regulatory black hole with its own inexorable gravity that drags out so long and so vaguely that owners bleed out financially or spiritually, and give up. All while the County holds out an illusion that—*just maybe*—it might allow a development, if the owner only asked the "right" way and the "right" people.

By requiring that Ralston make an application to request an override when there are no standards guiding how it is considered, the panel endorsed a remarkably citizen-hostile approach which encourages the County to keep being opaque when it should be transparent, and to keep its process as informal as possible. The full Court should rehear this case.

CONCLUSION

The entire Court should rehear this appeal to resolve the conflicts and important questions presented.

DATED: November 15, 2022.

Respectfully submitted,

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/s/ Robert H. Thomas
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STATEMENT OF RELATED CASES

Plaintiffs-Appellants are aware of the following cases that may be related within the meaning of Circuit Rule 28–2.6:

1. *Mendelson v. Cnty. of San Mateo*, No. 20-17389 (9th Cir.).

2. *Mendelson v. Cnty. of San Mateo*, No. 3:20-cv-05696-AGT (N.D. Cal.).