Norman La Force 102772
802 Balra Drive
El Cerrito, CA 94530-3002
T: (510) 295-7657
laforcelaw@comcast.net

Stuart Milton Flashman 148396
5626 Ocean View Dr.
Oakland, CA 94618-1533
T: (510) 652-5373
stu@stuflash.com

Attorneys for Petitioners
SPRAWLDEF, et. al.

UNITED STATES DISTRICT COURT
IN THE NORTHERN DISTRICT OF CALIFORNIA

SPRAWLDEF, et al, Petitioners, vs. CITY OF RICHMOND, et al, Respondents.	Case no. 18-cv-03918-YGR **PETITIONERS' REPLY IN SUPPORT OF MOTION FOR LEAVE TO AMEND PETITION** Hearing: Date: November 3, 2020 Time: 2:00 p.m. Room: 1 **Before the Hon. Judge Yvonne Gonzalez Rogers**

I. INTRODUCTION

The Respondents' opposition does not provide any basis for the Court to deny Petitioners' leave to amend their petition and flies in the face of the Court's own dicta in its December 11, 2019 order denying Respondents' motion for judgment on the pleadings. The Respondents also ignore the fact that from June 19, 2019, the date the Respondent Tribe filed its appeal, to September 17, 2020 when the Court of Appeal denied the Tribe's appeal, this Court did not have jurisdiction to entertain a motion for leave to amend. *See*, *Mayweathers v. Newland*, 470 F.3d 930, 935 (9th Cir.2001) (citing *Marrese v. American Academy of Orthopedic Surgeons*, 470 U.S. 373, 379 (1985) The Court made this very clear in

its December 11, 2019 order denying Respondents motion for judgment on the pleadings contending that the Amended Judgment resolved the Petitioners' claims on the grounds that it lacked jurisdiction because the appeal divested it of jurisdiction except as to orders maintaining the status quo. (See Dkt #97).

The Court also made it clear that even if the Court had jurisdiction to grant the Respondents' motion for mootness, the Petitioners would have an opportunity to amend their petition. The Court stated:

> "Even if the Court determined that judgment on the pleadings could be granted on mootness grounds, petitioners would seek, and likely be entitled to, leave to amend the petition as stated in their supplemental brief."

(Dkt #97, p. 2) Respondents ignore this language in their opposition and raise a set of arguments that do not support a denial of the Petitioners' motion.

II. THE FEDERAL RULES FAVOR GRANTING LEAVE TO AMEND PLEADINGS

The policy that underlies the Federal Rules of Civil Procedure, Rule 15 is that leave to amend should be freely given with extreme liberality. *Sonoma County Ass'n of Retired Employees v. Sonoma County*, 708 F.3d 1109, 117 (9th Cir. 2013) As the Supreme Court noted in *Conley v. Gibson*, 435 U.S. 41, 47, 78 S.Ct. 99, the need to plead facts that, if true, establish each element of a "cause of action" was abolished by the Rules of Civil Procedure in 1938, which signified the radical change from code pleading, also replaced "cause of action" with "claim for relief." At the pleading stage the plaintiff receives the benefit of imagination, so long as the hypotheses are consistent with the complaint. *Sanjuan v. American Board of Psychiatry and Neurology*, 40 F.3d 247, 151 (7th Cir. 1994).

Only if there is strong evidence of undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice, or futility, may a Court decline to grant leave to amend. *Sonoma County Ass'n of Retired Employees v. Sonoma County*, *supra* at p. 1117.

The party seeking leave to amend need only establish the reason why the amendment is required, the burden is on the party opposing the motion to convince the court that justice requires denial. *Shipner v. Eastern Airlines, Inc*. (868 F.2d 401, 406-407 (11th Cir. 1989); *See, Alzheimer's Institute of America v. Elan Corp.*, 274 FRD 272, 276 (N.D. CA 2011)

A trial court's ruling on a motion for preliminary injunction does not and cannot dispose of a case as moot. In Big *Country Foods, Inc. v. Board of Education of the Anchorage School District*, 868 F. 2d 1085, 1087 (9th Circuit 1989) made that very clear. It stated:

> "We emphasize again the limited scope of our review of a district court order granting or denying a preliminary injunction. We do so because we are concerned that parties appeal such orders for the purpose of ascertaining, prematurely, our views on the merits. As we repeatedly have cautioned, our disposition in these appeals offers little if any guidance on the proper resolution of the underlying merits. *Caribbean Marine*, 844 F.2d at 753; *Zepeda*, 753 F.2d at 724, *Sports Forms*, 686 F2d at 753. The purpose of a preliminary injunction is to preserve rights pending resolution of the merits of the case by the trial. It ordinarily does not obviate the need to proceed with preparation for trial and trial."

Accord, *Varian Medical Systems, Inc. v. Delfino*, 35 Cal.4th 180, 193 (2005) (The decision on a motion for a preliminary injunction does not resolve the merits of the causes of action in the complaint.) Consequently, the law disfavors denying a party a right to amend even when the court denies a motion for preliminary injunction.

III. RESPONDENTS HAVE FAILED TO MEET THEIR BURDEN TO ESTABLISH WHY THE COURT SHOULD DENY THE MOTION FOR LEAVE TO AMEND

Petitioners promptly moved for leave to amend their petition just days after the Court of Appeal decision. Instead of stating a non-opposition to the motion, Respondents chose to oppose the motion. They do not claim that Petitioners have acted in bad faith or failed to cure repeated deficiencies. They argue that the amendment is futile, that there was undue delay and that they are prejudiced. None of those arguments has any validity.

\\

\\

A. Respondents Have Not Met Their Heavy Burden to Show That Leave to Amend Is Futile

Ordinarily, courts do not consider the validity of a proposed amended pleading in deciding whether to grant leave to amend. *SAES Getters S.p.A. v. Aeronex, Inc.*, 219 F.Supp.2d 10891, 1086 (S.D. Ca. 2002) citing *Netbula, LLC v. District Corp*. 212 FRD 534, 549 (N.D. CA 2003) The test for "futility" is whether the proposed amended pleading does not plead sufficient facts to survive a motion under Federal Rules of Procedure, Rule 12(b)(6) to make out a plausible claim for relief. *HSBC Realty Credit Corp. (USA) v. O'Neill*, 745 F.3d 564, 578 (1st Cir. 2014); See, *Krainski v. Nevada ex rel. Bd. Of Regents of Nevada System of Higher Ed.*, 616 F.3d 963, 972 (9th Cir. 2010)

Respondents claim that the amendment is futile because of mootness and because it is time barred. First, the case is not moot because this case was never just about an initial failure of Respondent City to comply with the notice requirements of the Brown Act. Nor is it time barred.

1. The Case Is Not Moot

Petitioners First Amended Petition, in paragraphs 37, 38, and 46, pled the facts and legal grounds asserting that Respondent City's settlement agreement violated California's planning laws. While these facts may not have been as clearly pleaded as they could have, nevertheless, they were pleaded. The gist of the claims is that a City may not constrain its future discretion regarding land uses, amendments to the general plan, and zoning changes through specific decisions reached during a closed session under the litigation exception to the Brown Act. *Trancas Property Owners Assn. v. City of Malibu*, 138 Cal.App.4th 172, 210 (2006); *Accord, League of Residential Neighborhood Advocates v. City of Los Angeles*, 498 F.3d 1052, 1056 (9th Cir. 2007) ("'Land use regulations …involve the exercise of the state's police power, and it is settled that the government may not contract away its right to exercise the police power in the future.'")[1]

[1] The development agreement statutes (Government Code §§ 65864 et seq.) provide a tightly limited exception to this rule, which incorporates the public protections of requiring adoption by ordinance and the right of referendum. Those protections were not provided in the settlement and judgment at issue here.

Indeed, California Planning Laws place specific procedural requirements on approving a zoning change or a development agreement. *City of Sausalito v. County of Marin* (1970) 12 Cal.App.3d 550, 563; *Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, 245-246 (resolution claiming to affect a rezoning of land invalid for violating procedural requirement.) Yet, the City violated those requirements when it entered into the Judgment. The Amended Judgment did not cure those violations of California planning law, and Petitioners have a right to amend their petition to make clear that the City has violated California's planning law.

The City argues that it went through a planning process, apparently trying to show that it somehow complied with the law, but it conveniently failed to mention two key problems with the process it went through. First, the process was tainted because the settlement and judgment placed stringent limits on what members of the public could propose and what the City had "discretion" to approve. *See, Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 138 (in approving development agreement, city committed itself, without prior CEQA review, to the project – so as to preclude otherwise feasible alternatives and mitigation measures.)

Petitioners should be allowed to allege and prove by evidence that the City had granted entitlements and illegally sidestepped required approval processes. As a result of those illegal actions, during the planning process the City summarily rejected otherwise feasible alternatives and mitigation measures because they were contrary to the settlement agreement. That evidence includes the City's assertions, at planning workshops held after it had illegally approved the initial "Settlement/Judgment" in closed session, that (1) "The ratio of 30% development areas to 70% open space …must be maintained;" (2) Land uses at Point Molate were not limited to designations identified in the 'Reuse Plan' or in the General Plan 2030 land use maps; (3) a minimum of 670 housing units must be provided… (4) "buildings in the Core Historic District a…could be adaptively reused, but could not be demolished, regardless of their state of disrepair. Participants in the workshops who sought to propose alternatives without housing were told that they would not be considered because the Settlement Judgment required at least 670 units. The City stated that alternatives that did not have housing, or which had more than

70% open space would violate the Judgment and would not be considered by the City as alternatives for Point Molate.

Second, the Judgment that the City voluntarily agreed to in closed session contained a penalty provision that made a mockery of the City's purported "discretion" in granting its approvals. That Judgment[2] mandates that if the City fails, by a certain specified date, to approve a project meeting the requirements of: (1) including 70% open space [no more, no less], (2) not tearing down any buildings in the Core Historic District, but adaptively reusing all of them, and (3) including no less that 670 housing units, Respondents Upstream and the Tribe can declare a breach of the agreement and force the City to sell them the three parcels that make up the planning area, totaling 412 acres, for $100 each. (See Amended Judgment ¶25)

Petitioners will show that the City planning bodies considering the "discretionary" approvals were explicitly told that if they did not approve the project as proposed, the City would be in breach of the Judgment and the later Amended Judgment, with the draconian consequences that would entail. Petitioners have the right to plead and show that the City's purported discretionary authority was illusory, that it had, in fact, illegally and improperly bargained away its land use authority, and thus the Amended Judgment violated California planning law.

2. The Case Is not Time Barred

The Respondents make a most bizarre argument that the Petitioners' are time barred by the running of a 90-day statute of limitations from when Respondent City approved the Amended Judgment. Federal Rules of Civil Procedure Rule 15(c) and the "Relation back Doctrine" contradict that argument. An amended complaint "relates back" to the date the action was commenced. Thus, if the original complaint was timely filed, expiration of the statute of limitations at the time of the amendment is no bar. *Valadez -Lopez v. Chertoff*, 656 F.3d 851, 857-858 (9th Cir. 2011) (primary purpose of Rule 15(c) is to address, and defeat, statute of limitations problems.) Relation back is permitted if the newly asserted claim arises out of conduct, transaction, or occurrence alleged in the original proceeding, *Mayle v. Felix*,

[2] These provisions are unchanged in the Amended Judgment.

545 U.S. 644, 656, 125 S.Ct. 2562 (2005). The relation back doctrine is liberally applied and an amended complaint is not time barred because it asserts a new theory. The basic inquiry is whether the opposing party was on notice of the facts and the nature of the claim raised in the amended pleading. *Santamarina v. Sears, Roebuck & Co.*, 466 F.3d 570, 573 (7th Cir. 2006)

In the case at bar, Petitioners have alleged that the basic operative facts in the Judgment establish that the City violated California's planning laws. The Amended Judgment, which amended the underlying Judgment, only supposedly amended the "Judgment" with the self-serving provision that the City allegedly had not granted any entitlements. The Petitioners' amended petition arises out of the same operative facts that existed at the time of the Judgment. Thus, the amended pleading is not time barred.

B. There Is No Undue Delay Or Prejudice Because the Action Was Stayed Pending The Tribe's Appeal

Respondent City argues that the Petitioners have prejudiced the City due to alleged undue delay in making this motion. This last argument ignores the fact that Respondents Upstream and Tribe claimed to be necessary parties and then the Tribe moved to dismiss the case on jurisdictional grounds that it had not waived its sovereign immunity, and thus the case had to be dismissed. When it lost that motion, it filed an appeal that stayed the case as this Court noted in its December 2019 order. Thus, for almost a year and a half, the underlying case was stayed pending that appeal. Thus, any "delay" was due to that appeal. In the meantime, Respondent City barreled forward with the planning and land use decisions constrained by the Judgment and the Amended Judgment, without any concern that all of those decisions could be found to be illegal once the merits of Petitioners' claims are adjudicated. Respondent City sought to take a chance on approving a project that will more than likely be found to be illegal. Any prejudice is due to its own actions.

IV. CONCLUSION

For all of the foregoing reasons, the Court should grant Petitioners' motion.

DATE: October 20, 2020

NORMAN LA FORCE
STUART M. FLASHMAN
Attorneys for Petitioners
SPRAWLDEF et al

_____/s/_____
NORMAN LA FORCE