No. A138354

IN THE CALIFORNIA COURT OF APPEAL
FIRST APPELLATE DISTRICT, DIVISION ONE



GENE HAZZARD,
Plaintiff, Appellant

vs.

CITY OF OAKLAND, CITY OF OAKLAND; ALL MEMBERS OF THE OAKLAND CITY COUNCIL AS OF OCTOBER 23, 2012: COUNCIL PRESIDENT LARRY REID, NANCY NADEL, JANE BRUNNER, REBECCA KAPLAN, PAT KERNIGHAN, LIBBY SCHAAF, IGNACIO DE LA FUENTE, DESLEY BROOKS; MAYOR JEAN QUAN; DEANNA SANTANA, CITY ADMINISTRATOR; FRED BLACKWELL, SSISTANT CITY ADMINISTRATOR; FORMER COMMUNITY AND ECONOMIC DEVELOPMENT DIRECTORS DAN LINDHEIM AND WALTER COHEN; FORMER OBRA DIRECTOR ALIZA GALLO, OAB PROJECT MANAGER PAT CASHMAN; REDEVELOPMENT DIRECTOR GREGORY HUNTER; OAB PROJECT MANAGER AL AULETTA; PHIL TAGAMI, CALIFORNIA CAPITAL & INVESTMENT GROUP (CCIG) (formerly known as CALIFORNIA CAPITAL GROUP (CCG); DANIEL LETTER, PROLOGIS, LP (formerly known as AMB PROPERTY CORPORATION); MARK HANSEN, PROLOGIS; PROLOGIS, INC.; PROLOGIS CCIG OAKLAND GLOBAL, LLC,
Defendants, Respondents.

APPEAL FROM THE SUPERIOR COURT OF ALAMEDA
CASE NO. RG12642082
HON. JOHN TRUE, III

# APPELLANT'S OPENING BRIEF

GENE HAZZARD, In Pro Per
282 Adams Street, #
Oakland, CA 94612
(510) 418-0501
APPELLANT

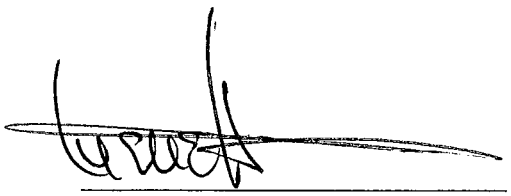
## CERTIFICATE OF INTERESTED ENTITIES AND PERSONS

The undersigned certifies:

No party to this proceeding is an "entity" as defined in California Rules of Court, Rule 8.208.

Other than the parties, appellant knows of no person or entity that has a financial or other interest in the outcome of this proceeding as described in Rule 8.208.

Dated: June 21, 2013



GENE HAZZARD

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

**Statutes**

**Municipal Codes, Resolutions and Ordinances**

## STATEMENT OF THE CASE

This appeal arises from the dismissal of an action brought by Appellant Gene Hazzard, an Oakland taxpayer, pursuant to California Code of Civil Procedure §526(a), alleging fraud and threat of public waste resulting from the City of Oakland's selection of real estate developer Phil Tagami as Master Developer of the former Oakland Army Base project. After issuing a tentative ruling in favor of Appellant on March 5, 2013, the trial court reversed its decision, denying plaintiff's motion for leave to file a second amended complaint, sustaining defendant's demurrers without leave to amend, and dismissing plaintiff's case with prejudice. By dismissing the case without careful review of the allegations contained in Appellant's First Amended Complaint, and without consideration of the arguments contained in plaintiff's moving and opposing briefs, justice was denied to Appellant and all residents and taxpayers of the City of Oakland.

## STATEMENT OF APPEALABILITY

Appellant Gene Hazzard appeals three orders and the final judgment entered in the Alameda Superior Court Action No. RG12642082, *Hazzard v. City of Oakland, et al.* as follows: the (1) the Judgment of Dismissal filed on March 26, 2013 and entered on April 3, 2013; (2) the Order Sustaining Defendants' Demurrers to Plaintiff's First Amended Complaint entered on March 22, 2013; (3) the Order Denying Plaintiff Gene Hazzard's Motion for Leave to File a Second Amended Complaint entered on March 20,

2013; and (4) the Order of the Court Striking the Request for Dismissal without prejudice filed by Appellant Gene Hazzard on dated March 14, 2013. Appellant further seeks a reversal of the judgment for costs and attorneys' fees contained in the Judgment of Dismissal in that Respondents failed to file a Memorandum of Costs pursuant to Code of Civil Procedure §685.095.

All of the above-described orders and judgments are appealable in that the dismissal of this action with prejudice, and other errors of the trial court described below exceeded the bounds of reason, constituting an abuse of discretion. Plaintiff seeks relief in the form of reversal of the orders described above, reversal of the Judgment Dismissal of April 3, 2013, and reversal of the Order Striking Plaintiff's Dismissal without prejudice.

## STATEMENT OF FACTS

### I. INTRODUCTION

Appellant Gene Hazzard (hereafter "plaintiff") filed his initial Complaint under California Code of Civil Procedure §§ 527(a) and 1060 on August 3, 2012, challenging the validity of the Exclusive Negotiating Agreement (ENA) and the Lease Disposition Development Agreement (LDDA) between the City of Oakland and the Master Developer of the Oakland Army Base (OAB).

The Master Developer defendants (also referred to as "Developer defendants") are Phil Tagami, California Capital Group (CCG), California

Capital Investment Group (CCIG), Daniel Letter; AMB Property (AMB), and Prologis Property, LP (Prologis), Mark Hansen, and Prologis CCIG Oakland Global, LLC.

Plaintiff sought relief pursuant to Code Civ. Proc. §1060 and §527(a) to prevent the mobilization of the OAB project based on the City's failure to secure financial proof from the Master Developer as required. Plaintiff further alleged that the City unlawfully advanced costs on behalf of the Developer defendants, failed to secure matching funds from the Developer defendants, and violated various contract and government codes.

Plaintiff alleged that all of these transactions were done in a negligent, arbitrary, capricious and fraudulent manner, inconsistent with due process and without regard to public benefit with intent to arrive at a predetermined result contrary to the spirit and purpose of the law. (App. 533) Plaintiff alleges that a controversy and dispute arises over the financial viability and capability of the master developers, and requested judicial determination "because [of] irreparable harm to the limited public financial resources of the city." (App. 15)

In support of plaintiff's claims, plaintiff attached exhibits to his complaint, one of which was the Fox Theater Performance Audit of October 8, 2011 (App. 197). This audit concluded that the City's contract administration with Phil Tagami had caused the City to sustain massive, overruns of approximately $58 million. This Audit, in conjunction with

other evidence supplied by plaintiff, supports Gene Hazzard's allegations that the City is once again putting the taxpayers at risk of excess expenditures by the City given the size and scope of the OAB project.

Defendants demurred to the initial complaint, which the Court sustained with leave to amend. (App., 510, 513) Plaintiff thereafter restructured the allegations of his Complaint and timely filed his First Amended Complaint (FAC) on December 14, 2012. (App. 532) In the meantime, the City and Master Developer executed the Lease Disposition and Development Agreement (LDDA) (App. 1017). This contract finalization, in blatant disregard of the pendency of this lawsuit, changed gravamen of plaintiff's complaint from one of injunctive relief based on a pattern of "trickery and deceit" to one of actual fraud resulting from the fraudulent conveyance of the OAB from the City to Phil Tagami.

Plaintiff's attempts to adequately plead his case were met with a second round of demurrers filed by both defendants, premised on an unsupported assertion that that plaintiff, a long-time resident and taxpayer of Oakland, lacks standing. Plaintiff denies this contention, and the law supports plaintiff on this point. Plaintiff did concede that curable errors existed in the First Amended Complaint (FAC); he therefore brought a motion to amend. Defendants opposed on the grounds that the mere existence of plaintiff's complaint was objectionable. (App. 1241) The motion to amend was thereafter denied by the court. (App. 1144)

Immediately upon learning of the Court's ruling denying the motion to amend, plaintiff filed a Request for Dismissal without prejudice. (App. 1145) At the same time, two proposed orders were submitted by defendants, over the objections of plaintiff. These orders were nevertheless approved by the court and filed. (App. 1150, 1154)

The records and pleadings contained in the accompanying Appendix demonstrate abuse of discretion by the court in ruling against plaintiff in every single matter in the case, including the failure to make a judicial determination as to the material facts pursuant to Code Civ. Proc. §§ 526(a), 527(a) and 1060 as requested by plaintiff in his complaint. (App. 15), thereby violating the standard of review.

Appellant Gene Hazzard respectfully submits this matter to the Court of Appeal for proper determination as to the following issues:

(a) whether plaintiff met the standing requirements pursuant to Code Civ. Proc. § 526(a);

(b) whether plaintiff's allegations of fraud except the case from the "separation of powers" doctrine

(c) whether the court erred in failing to rule on the allegations brought by plaintiff that the City abused its discretionary authority;

(d) whether the trial court erred in denying the motion to amend;

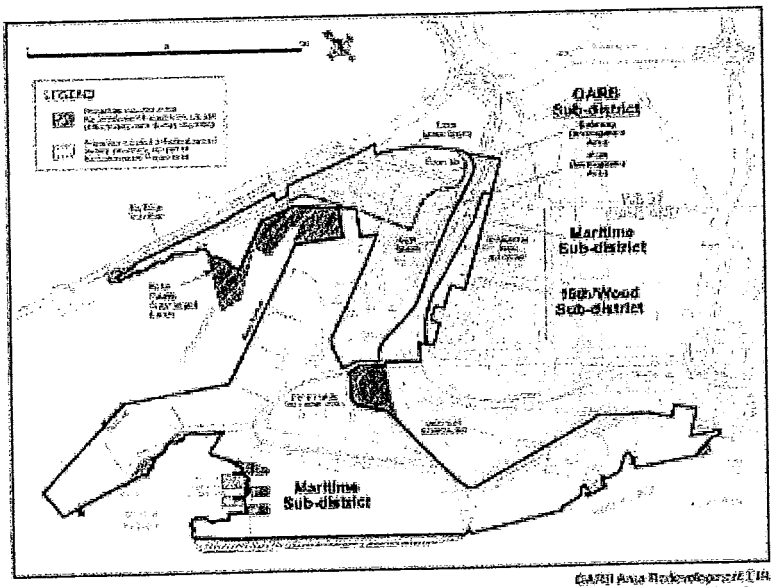
(e) whether the court erred in sustaining defendants' demurrers without leave to amend; and

(f) whether the court abused its discretion in striking plaintiff's dismissal without prejudice and entering a judgment dismissing the action with prejudice.

## II. THE DEVELOPMENT AT ISSUE: FORMER OAKLAND ARMY BASE

### A. Conveyance of the Oakland Army Base to the City of Oakland

The redevelopment of the former Oakland Army Base (OAB) is the largest capital project embarked upon by the City of Oakland. This long-awaited project, poised to become the "gateway to Oakland," covers 366 acres along the waterfront adjacent to the Bay Bridge terminus.




For nearly 50 years the OAB property belonged to the U.S. Army. The OAB functioned as a distribution and maintenance center for fueling,

delivery, and maintenance of vehicles, locomotive engines, and trucks. [1] When the U.S. closed the base in 1998 as part of the Base Realignment & Closure (BRAC) plan to decommission military bases, the City of Oakland lost revenue with the elimination of approximately 2,050 military jobs. (App. 46)

When the OAB was conveyed to the Oakland Base Reuse Authority (OBRA) at no cost, OBRA prepared a comprehensive redevelopment analysis presented in an Economic Development Conveyance (EDC) of April 2000. (App. 44) The Redevelopment Agency of Oakland (RDA) then prepared a Reuse Plan (June 11, 2000) which set forth goals for the former OAB: "the mitigation of the economic and social degradation faced by Oakland due to the closure of the Oakland Army Base.... strengthening of the economic base of the community by the construction and installation for infrastructure and other needed site improvements to stimulate new development, employment, and social and economic growth."[2]

The redevelopment of former U.S. military bases has been fraught with remediation challenges, and the OAB was no exception. One of primary concerns was soil and groundwater contamination resulting from the Army's custom prior to the 1970s of burying gasoline tanks and

---

[1] California Regional Water Quality Control Board, San Francisco Region, Site Cleanup Requirements, Order No. R2-2004-0086, p. 2.

[2] 2nd Amended and Restated Oakland Army Base Redevelopment Plan 5/17/05.

dumping of methane and petroleum alongside the railroad tracks. Indeed, the OAB property was subject to the California Environmental Quality Act (CEQA) and the National Environmental Protection Act (NEPA) by the Department of Toxic Substances (DTSC). Under the supervision of the California Department of Toxic Substances Control (DTSC), the OAB was placed on a cleanup schedule with periodic milestones, with an end date of December 31, 2013.[3] After more than a decade of soil remediation, the OAB was finally put out to bid in early 2008. (App. 262).

The Reuse Plan stated its goal to transform the site into a warehousing and logistics center for the Port of Oakland. Prior to any construction, however, the OAB would first require demolition, remediation, and installation of new rail lines, roads, and utilities[4] The EDC was clear in its finding that the only way that the City of Oakland could afford to undertake such a massive project was to select a financially secure Master Developer willing to advance funds to "jump start" development and infuse developer equity towards the infrastructure costs. (App. 53) The estimated budget for the total OAB project was initially set at $484 million, but current estimates are projected closer to $1 billion.

---

[3]California Regional Water Quality Control Board, San Francisco Bay Region, Order R2-2000-0086, Site Cleanup Requirements for the Property Located at the Former Oakland Army Base, Oakland, Alameda County11/5/204

[4] 2nd Amended and Restated Oakland Army Base Redevelopment Plan *supra*.

### B. Selection of the OAB Master Developer

The Port of Oakland took the lead in selecting a Master Developer and preliminarily selected former Port Commissioner Phil Tagami to the exclusion of other viable, financially sound competitors. (App. 603) Similarly, the City followed suit in selecting Phil Tagami as the OAB developer, and in January of 2010 the City entered into an Exclusive Negotiating Agreement (ENA) with AMB Property (AMB) and California Capital Group (CCG) of which Phil Tagami is a principal.[5] The joint venture AMB/CCG assigned 15% to AMB and 85% to CCG. (App. 234)

While the City purports that an adequate selection process was utilized, plaintiff alleges that the City intended all along to choose Phil Tagami as Master Developer of the OAB. Phil Tagami is well-known to the Oakland community in his prior dealings with the City, in particular the Fox Theater Renovation Project. As early as 2007, three years before the City entered into the first ENA, Phil Tagami was poised to get the contract. He gave a Chamber of Commerce presentation outlining his plans for the OAB, in which plaintiff was present. Thus, defendant Tagami had been vying for the project at least a year before the Request for Qualification (RFQ) was issued by the City. Since then, Phil Tagami began operating

---

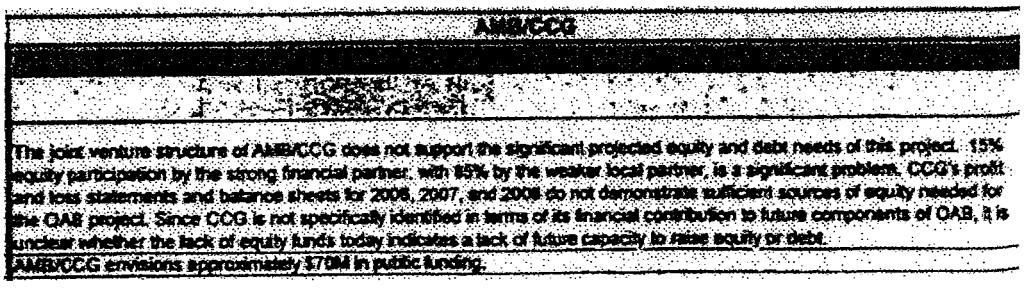
[5] AMB Property, which merged with Prologis Property, LP in 2011, was a publicly traded firm listed with the New York Stock Exchange. CCG is a privately owned real estate firm based in Oakland that operates out of the Rotunda Building located across the plaza from City Hall.

under a motto of "One Project, One Team, One Vision," which demonstrates his single-minded determination to take possession of this property. [6]

### C. Master Developer's Lack of Financial Capacity

Another allegation stemmed from the Master Developer's failure to provide matching funds to the City as required in the Term Sheet, Exhibit D) attached to the ENAs which required that the Master Developer "shall match the $27,000,000 that was invested by the Redevelopment Agency (City of Oakland) and that the Developer shall match future investment in the development of the property on a dollar-for-dollar basis." (App 145)

The Term Sheet also states, "Guarantor must be financially strong entity with significant assets to guarantee LDDA project completion obligation as determined by Agency. (App. 144) Yet an analysis conducted by the City determined that the "joint venture structure of AMB/CCG does not support the significant projected equity and debt needs of the project." (App. 234):



AMB/CCG

The joint venture structure of AMB/CCG does not support the significant projected equity and debt needs of this project. 15% equity participation by the strong financial partner, with 85% by the weaker local partner, is a significant problem. CCG's profit and loss statements and balance sheets for 2006, 2007, and 2008 do not demonstrate sufficient sources of equity needed for the OAB project. Since CCG is not specifically identified in terms of its financial contribution to future components of OAB, it is unclear whether the lack of equity funds today indicates a lack of future capacity to raise equity or debt.
AMB/CCG envisions approximately $79M in public funding.

[6] City of Oakland website

In the Schedule of Performance attached the ENA, the City required Master Developer to provide evidence of financing by the end of the Negotiation Period. (App. 160)

**EXHIBIT D**
**Schedule of Performance**

| No. | Task | Performance Time |
|---|---|---|
| 15.0 | Developer shall engage an Appraiser, acceptable to the Agency, to appraise the Fair Market Value of the Property. | Within 120 days of commencement of the Negotiation Period. |
| 16.0 | Developer shall obtain final appraisal from the Appraiser. | Prior to execution of the LDDA |
| 17.0 | For the purpose of Agency staff preparing a recommendation for the terms and conditions of a LDDA and Ground Lease, the Developer shall submit all necessary information, including but not limited to: | By the end of the Negotiation Period |
| 17.1 | Evidence of financing, including letters of intent and other commitments from lenders and equity partners, if any, to provide financing for the development of the Agency-approved Phase 1 of the Project | |

While the City *claims* that Item 17.1 of the Schedule of Performance was "completed," the City to date has failed to provide evidence of this financing to the public -- despite the numerous requests for the information made by plaintiff through public records requests.

This lack of financial viability of AMB/CCG was factored into the Port of Oakland's decision in October of 2011 to terminate its ENA with Phil Tagami, effective January 6, 2012. (App. 136)

To date, the City of Oakland defends its actions invoking its discretionary authority over budgetary issues even in the face of its own findings that AMB/CCG (Phil Tagami) had not met the required thresholds for Master Developer of the OAB project.

### D. Unlawful Advancement of Developer Costs

Plaintiff's claims of fraud and breach of fiduciary duty arise from the City's incremental modifications to the ENA during the three-year negotiating period which increased costs and risk to the City of Oakland while decreasing the Developer's. The First Amendment to the ENA, executed on October 6, 2010 eliminated the requirement that the Developer pay all costs of environmental compliance, and the City then agreed to pay the for the CEQA and NEPA studies. (App. 146-147)

The Oakland Municipal Code (OMC) states that authorizing payment for consulting services is only allowable if it is "deemed by the City Administrator to be an **emergency** for the immediate preservation of the public peace, health or safety." (OMC 2.04.02 – Authority of the City Administrator.)

Defendants' justification for advancing these costs on behalf of the Developer was based on a deadline for the City to attract federal funding. (App. 146) While the OAB project is certainly in need of whatever public funding it can secure, a *funding deadline* is not an emergency as defined by the OMC. Nevertheless, the City agreed to advance these costs on behalf of the Developer. Specifically, the First Amendment to the ENA provided that the City pay $240,000[7] and that the Master Developer would "timely

[7] or two-thirds of the total environmental review not to exceed $360,000.

reimburse" the City for the additional one-third of the negotiated amount. (App. 147)

Public records requests demonstrate that to date, Phil Tagami has not reimbursed the City, calling into question how advancing costs for the Master Developer is deemed to be "in the best interests of the City." In fact, the records indicate that Phil Tagami never paid the required security deposit to the Port of Oakland to secure the ENA in the first place. (App. 633)

The CEQA cost was not the only cost the City advanced for the Master Developer. The Second Amendment to the ENA, entered on March 15, 2011, provided that the City fund $14,000,000 for the Master Developer's "consultant team to do the needed infrastructure planning." (126) The City has offered no plausible reason why it did not select a more viable, experienced developer willing to incur these costs, rather than harm the citizens of Oakland with the depletion of the City's revenue.

**E. Violation of Contract Codes**

The City defendants assert that their negotiations with Phil Tagami was not illegal and that plaintiff therefore "cannot convert his policy preferences and political objectives into a legal issue." (App. 507) However, plaintiff alleges number of *illegal actions*, including, but not limited to, violation of contract codes, including Cal. Govt. Code §4529.12 which requires that all the contracts be procured by a fair competitive

selection process and without conflicts of interest or unlawful activities. (Cal. Govt. Code §4529.19) (App. 11); and California Public Contract Code § 20175(C)(3)(A)(ii) which requires that design-build entities have the experience, competence, capability, or capacity to complete projects of similar size, scope, or complexity, and that the proposed key personnel have sufficient experience and training to competently manage and complete the design and construction of the project. (App. 575) Plaintiff alleges that the selection of Phil Tagami was not only imprudent, it was illegal in that he has no experience in intermodal or logistics, nor in the redevelopment of former military bases; even the City questioned his controlling 85% of the project. (App. 234) Thus, the question of whether any laws were broken is for a court to determine, not the defendants.

**F. Change of Business Structure and Name Changes**

Around the time of the ENA's Second Amendment, the more financially sound partner of the joint venture, AMB, merged with Prologis Property, LP. This name change required approval by the City. At the same time, the resolution resolved that CCG assign all of its rights and responsibilities to California Capital Investment Group (CCIG)[8]. This Resolution, passed on September 28, 2011, changed the Master Developer joint venture from AMB/CCG to Prologis/CCIG. (App. 38)

[8] incorporated on April 22, 2009 reflecting its agent of service as Damien Fink, the broker under whose license Phil Tagami practices as a real estate agent (California Secretary of State Business Portal).

On and after October of 2011, Oakland citizen Gene Hazzard learned through attending public hearings and city documents obtained through public records requests that the City, as described above, was acting in direct opposition to the intent of the EDC. Plaintiff further learned that the City had not, as recommended by the Fox Theater Performance Audit, implemented the necessary safeguards to prevent another financial catastrophe, such as the Fox Theater Renovation project, from occurring. (App. 197) Plaintiff further learned that the Master Developer had not "timely reimbursed "the City for the environmental reports, and that Phil Tagami had never even paid the $50,000 refundable security deposit to the Port of Oakland to secure the ENA. (App. 632)

All of these discoveries were alarming, and plaintiff repeatedly brought his findings to City Council, but his concerns and objections were systematically ignored, culminating in the filing of this lawsuit.

The City of Oakland claims that the OAB Project will benefit the community in many ways, but in overlooking the financial viability of the lack of experience of a developer, in addition to covering his costs, the City has breached its mandatory duty to the citizens of Oakland, and is not acting in the best interests of the City.

### F. The Fox Theater Performance Audit

Plaintiff's complaint alleges that the repeated selection of Phil Tagami on capital projects in Oakland constitutes negligence and a breach

of fiduciary duty. (App. 5) This allegation is partially based on the findings of the Fox Theater Performance Audit which establishes past behavior of the Developer defendants. The audit found that, under the management of Phil Tagami, costs to the City escalated 172% over its projected budget. (App. 157) A $58 million "mistake" should not be ignored by the City when negotiating with the same developer on a larger, more complex project.

The renovation of the Fox Theater was lauded as the impetus for Oakland's Uptown revitalization. While the restoration of this historical theater was considered an architectural and construction success, the Audit clearly reveals that its management was a fiscal disaster. The audit specifically advised the City of Oakland to change its policies and management structure with regard to future capital investments. In fact, it specifically mentioned the Oakland Army Base: "With a deal for the redevelopment of Oakland's former Army Base underway, it is critical that the City adopts the appropriate administrative measures and internal controls to ensure that this project estimated at more than half a billion dollars will not duplicate past mistakes." (App. 200)

Thus, the City was on notice of the deficiencies of its "boilerplate" contracts, but negligently or fraudulently neglected to make the necessary changes to guard against future public waste before signing the final

agreement with the Master Developer on the OAB project. Plaintiff alleged:

> These actions were done with fraudulent intent and in order to arrive at a predetermined result contrary to the spirit and purpose of the law, and detrimental to plaintiff and other similar situated resident citizens and taxpayers of the City of Oakland. (App. 564)

## PROCEDURAL BACKGROUND

### I. PLAINTIFF'S INITIAL COMPLAINT

The initial Complaint was filed on August 3, 2012. (App. 1) There were 17 exhibits attached to the original complaint (Exhibits A through Q), which were included in Appellant's Appendix. (App. 34-317)

### II. NOTICE OF LIS PENDENS

On August 21, 2012, plaintiff filed and recorded a court-approved Notice of Pending Action Lis Pendens pursuant to Code Civ. Proc. §405.12 which thereafter was expunged by order of Judge True on December 17, 2012. On January 3, 2013, plaintiff filed a Motion for Reconsideration under Code Civ. Proc. §1008, and oral argument was heard on February 19, 2013. (App. 1253) The court denied plaintiff's motion, and the temporary restraining order issued on November 29, 2012 was dissolved.[9]

[9] Plaintiff never received notice of this restraining order and, in fact, just learned of its existence when drafting this opening brief. This order is not part of the Appendix, in that it was stated in the Order to Expunge Lis Pendens.

Due to the elapse of time, Appellant is not challenging the court's order expungement of the *lis pendens,* and the papers regarding the *lis pendens* are not included in Appellant's Appendix, given that they are not necessary for proper consideration of the issues pursuant to California Rule of Court 8.124(b)(1)(B).

## III. DEFENDANTS' DEMURRERS

On September 4, 2012, Phil Tagami and Daniel Letter ("Developer defendants") filed a Demurrer pursuant to Code Civ. Proc. §430.10, *et seq.* (App. 318) and a Request for Judicial Notice (RJN) attaching Chapter 2.04 from the Oakland Municipal Code (OMC) in support of their argument that the City's alleged waiver of the bid procedures in the contract regarding the OAB was not illegal. (App. 336)

The City of Oakland filed its demurrer pursuant to §430.10(e) of Code Civ. Proc. on the grounds that the complaint failed to state facts sufficient to state a cause of action against the City, and joined in the demurrer of Developer defendants. (App. 361) The City also filed an RJN (App. 381) attaching OMC Chapter 2.04, in addition to Ordinance 12388 adopted by City Council on or about December 18, 2001. (App. 402)

Plaintiff opposed the demurrers on October 4, 2012, asserting that the complaint stated sufficient facts to constitute a cause of action against defendants as alleged, and that plaintiff has standing to sue as a resident taxpayer. (App. 409) Plaintiff further asserted that the injunctive relief

sought did not violate the separation of powers doctrine, citing Code Civ. Proc. 1060, 526(a), Civil Code 3368 and 3422. (App. 409). Plaintiff asserted actual controversy surrounding the unreasonable discretion being exercised by the City, arguing that defendants had exceeded the bounds of reasonable discretion needed for a judicial intervention. (App. 414)

To establish standing pursuant to Code Civ. Proc. §526(a), plaintiff stated, "Gene Hazzard has been an Oakland resident since 1969, was a property owner in Oakland from 1975 to 1991, and is presently a business owner with Oakland Business License (Permit #1125192) who has had several businesses in Oakland since 1980." (App. 413-414)

Developer defendants filed a reply on November 9, 2012 arguing that plaintiff failed to demonstrate standing because "plaintiff cannot identify any specific tax paid, that there was no violation of the law, and that plaintiff had cited no legal authority to support his contention that the relief sought does not violate the law." (App. 488) The City filed a reply echoing the same. (App. 503)

## IV. THE COURT'S NOVEMBER 19, 2012 ORDER

Judge True issued a tentative ruling on November 15, 2012, sustaining the demurrers of defendants with leave to amend. In his ruling, he stated that plaintiff had not pleaded sufficient facts to establish the existence of "actual controversy" requiring judicial intervention. He pointed out that plaintiff had not formally labeled his causes of action

pursuant to California Rule of Court 2.112. (App. 510, 513) The Court further stated that:

> Plaintiff must also allege that he paid taxes assessed by the City within one year before the commencement of the action on August 3, 2012. See *Cornelius v. Los Angeles County Metropolitan Tran. Auth.* (1996) 49 Cal.App.4th 1761, 1775. (App. 510, 513)
>
> In addition, plaintiff is required to plead facts supporting his claim that the actions of the City constitute a breach of a mandatory duty. See *Daily Journal Corp. v. County of Los Angeles* (2009) 172 Cal.App.4th 1550, 1557-1558; and *Humane Society of U.S. v. State Board of Equalization* (2007) 152 Cal.App.4th 349, 356-358." (App. 510-511, 513)

The court did not address plaintiff's allegations of fraud, and declined to rule on the issue of "separation of powers" raised by defendants. Without contestation, the tentative ruling became the official order of the court on November 19, 2013 (hereafter "11/19/12 Order"). (App. 510, 513)

## V. PLAINTIFF'S FIRST AMENDED COMPLAINT

On December 14, 2012, plaintiff timely filed a First Amended Complaint ("FAC") under Code Civ. Proc. §§ 425.10, 526(a), 527(a), 1085, 1094 and California Civil Code §§3368, 3420, 3422 requesting declaratory and injunctive relief; breach of fiduciary duty and duty of care (22:1-26:3), negligence (27:1-30:12), fraud (30:13-33:25), contract code violations (34:1-35:25); and a prayer for relief (36:1-37:1). (App. 532)

In following the guidelines contained in the 11/19/12 Order, plaintiff reorganized his claims, correcting the language to properly establish

standing as instructed by the court.[10] The FAC included a new allegation for fraud in that the circumstance which plaintiff was seeking to prevent by way of injunctive relief (the execution of the LDDA) had taken place between the initial filing and the First Amended Complaint. (App. 564)

Also of importance was the incorporation of Prologis CCIG Oakland Global, LLC, which occurred on September 17, 2012. Since this entity did not exist at the time plaintiff filed his initial complaint, it was not named as a defendant. Prologis CCIG Oakland Global LLC, the "official" Master Developer to the LDDA, was added to the caption of the FAC, and plaintiff included an identifying paragraph (¶20) as to the date of its incorporation and its relationship with the other defendants named in the complaint. (App. 537)[11]

There were 24 exhibits attached to the First Amended Complaint, comprised of the original 17 exhibits (A through Q) and 8 additional exhibits (R through Y), which are identified in Appellant's Appendix.

---

[10] ¶14 of the FAC properly alleged standing. (App. 536) Ironically, by attaching tax receipts to the FAC (App. 570-771) defense counsel argued *ad naseum* throughout the duration of this action that plaintiff did not qualify as a taxpayer based on plaintiff's "failure" to identify the type of tax paid. Plaintiff had, in fact, provided that information in his opposition to the first round of demurrers. (App. 413-414).

[11] Plaintiff added this party to the caption before learning the rules regarding adding named defendants. He later attempted to formally add Prologis CCIG Oakland Global, LLC in his motion to amend, which was denied.

Plaintiff filed RJNs for 24 exhibits, for a total of 24 RJNs.[12] These requests were not accepted by the court and are not included in the Appendix, given that they are duplicative and are not necessary for proper consideration of the issues pursuant to California Rule of Court 8.124(b)(1)(B).

## VI. DEMURRERS TO FIRST AMENDED COMPLAINT

On or about January 3, 2013, Developer defendants again demurred (App. 637) echoing their earlier attacks that plaintiff lacked standing to sue and that the complaint did not constitute a violation of the separation of powers doctrine. Again, defendants filed RJNs, one attaching the 11/19/12 Order, the Oakland City Charter §106 (App. 680) and OMC §§ 2.04.050 and 2.04.051. (App. 676)

City defendants also filed a Demurrer (App. 698) asserting that the FAC failed to state facts sufficient to state a cause of action against the City defendants. Again, the City filed an RJN attaching Chapter 2.04 from the OMC and Ordinance No. 12388 adopted by Oakland City Council on or about December 18, 2001.

Plaintiff filed oppositions to both demurrers on February 21, 2013, asserting that (a) plaintiff had met his burden of proof with regard to

---

[12] The exhibits attached to the First Amended Complaint in the Appendix begin with Exhibit R to eliminate unnecessary duplication in the Appendix. Exhibits A-Q of the FAC are identical to Exhibits A-Q of the initial Complaint.

standing; (b) that plaintiff's claims stated valid causes of action; (c) that the separation of powers doctrine in this action does not apply; and (d) that the subject matter has jurisdiction pursuant to California Constitution.[13] (App. 820-858)

Plaintiff concurrently filed RJN Notice No. 25, attaching the legislative history of Code Civ. Proc. §526(a); RJN No. 26, attaching Business & Professions Code §§ 17200-17210; RJN No. 27, attaching California Civil Code §§3439.04 and 3439.09; RJN No. 28, attaching a pamphlet from Oakland City Auditor; and RJN No. 29 attaching excerpts of the OMC § 2.04.030(B). (App. 863-891)

The City filed its reply on February 28, 2013. (App. 919), asserting that plaintiff still had failed to establish standing and that plaintiff had failed to demonstrate a breach of mandatory duty. Still, all of the defendants were silent on the allegations of fraud.

Developer defendants filed their reply on February 28, 2013 still asserting that plaintiff had failed to demonstrate standing and legal authority in to support his position that the relief sought does not violate the separation of powers; and that plaintiff had not stated a cognizable cause of action to demonstrate a breach of mandatory duty. (App. 933) Again,

---

[13] There was a typographical error in the FAC which plaintiff explained and provided the correct Article of the Constitution. (CITE)

both defendants were silent on the issue of fraud alleged in plaintiff's First Amended Complaint.

## VII. PLAINTIFF'S MOTION TO FILE A SECOND AMENDED COMPLAINT

Despite plaintiff's lawsuit for injunctive and declaratory relief, defendants moved forward in executing the final contract with the Master Developer on October 23, 2012 which took material effect on December 4, 2012. (App. 1015-1017) These actions by defendants changed the nature of plaintiff's complaint, changing it from one of "trickery and deceit" (larceny) to one of "knowingly entering into an unlawful contract." Further, plaintiff continued to uncover facts which supported his claims that defendants were not acting in the "best interests of the City" but rather in the "best interests of the Developer." Indeed, between the December 14, 2012 filing and the hearings on March 7, 2013, plaintiff learned of three new causes of action to be asserted against defendants arising out of the same set of circumstances. He just didn't learn about all three at the same time.

### A. First Version of the Second Amended Complaint

Despite having corrected the deficiencies outlined in the 11/19/12 Order, plaintiff discovered curable errors in the First Amended Complaint. One involved an error in alleging negligence and fraud without praying for damages; another pertained to the date that he paid a City tax. Also, he realized that the addition of Prologis CCIG Oakland Global LLC to the

caption of the FAC might need to be made by application to the court. Lastly, plaintiff learned of a new cause of action to allege against the defendants, arising out of the same set of circumstances: Unfair Competition Pursuant to Business & Professions Code §17200, *et seq.*

Given that he had *curable errors* to correct, plaintiff filed a motion for leave to file a second amended complaint. (App. 756) A declaration in support of the motion was filed which complied with Rule of Court 1324(b) that stated when declarant Gene Hazzard learned of the errors and new cause of action, and why he was seeking to amend. (App. 772) A copy of the proposed Second Amended Complaint was attached to his declaration. (App. 775)

**B. Supplemental Declaration of Gene Hazzard**

When drafting his reply to the motion to amend (App. 948), plaintiff learned of an additional cause of action premised on the Developer's lack of financial proof: Fraudulent Conveyance. To address this, plaintiff filed a Supplemental Declaration explaining why he wanted to add the additional cause of action and requesting that he be allowed to do so. (App. 960) He attached a second version of the Second Amended Complaint (App. 964) which superceded the version previously submitted. In addition, plaintiff attached the article he found by Klueger & Stein © which gave credence to his argument in support of a cause of action for Fraudulent Conveyance, and which he obtained permission to use from the author. (App. 1031)

Klueger & Stein's article is instructive in distinguishing fraud from fraudulent conveyance. While plaintiff's cause of action for fraud stems from the City's actions in showing favoritism and changing the terms of the ENAs in favor of the Developer defendants at the expense of the Oakland taxpayers, the cause of action for fraudulent conveyance is directly tied to the date of the execution of the LDDA.

### C. Second Supplemental Declaration of Gene Hazzard

After filing the Supplemental Declaration, plaintiff discovered what would appear at first glance to be an insignificant discrepancy, but is actually a significant detail. As discussed earlier, all name changes of the Developer entities need to be approved by City Council. Indeed, the City passed Resolution No. 83565 on September 28, 2011 approving the name change of the joint venture Developer from AMB/CCG to Prologis/CCIG. Yet Resolution No. 83930, dated June 19, 2012, states the name of the Master Developer as "Prologis CCIG Oakland Global, LLC." (App. 35) This raised the question of, What happened to the joint venture?

A public records request by plaintiff confirmed that no other name changes had been brought before City Council for approval before June 19, 2012. Further, plaintiff noted that the name of the signatory on the LDDA was not Phil Tagami nor even Daniel Letter. It was "Mark Hansen, Sr. VP." In then recalling that Prologis CCIG Oakland Global, LLC was not *incorporated* until September 17, 2012 -- a fact plaintiff had checked when

filing the December 14th FAC – plaintiff realized that the City had passed Resolution 83930 and the subsequent Ordinance which authorized the City to execute the LDDA with Prologis CCIG Oakland Global, LLC -- *an entity that did not yet exist.*

Armed with this newly discovered fact, plaintiff sought to add another cause of action to his complaint: Conspiracy to Commit Fraud. .[14] Plaintiff prepared a Second Supplemental Declaration of Gene Hazzard which was hand-served on defense counsel prior to the hearing on March 7, 2013.

## VIII. RULING ON MOTION TO AMEND

Oral argument on the demurrers and motion to amend was heard on March 7, 2013. A tentative ruling was issued on March 5, 2012 granting the Motion for Leave to File a Second Amended Complaint. The ruling also dropped the demurrers to the First Amended Complaint, since, per the court, the motion to amend had rendered the demurrers moot.

Appellant Gene Hazzard received a telephone call from Kevin Siegel, representing the City, shortly after 12:00 p.m. on March 5, 2013, advising him that defendants planned to appear and contest the tentative ruling.

---

[14] Further investigation revealed that Prologis CCIG Oakland Global, LLC did not possess a business license in the City of Oakland at any time in 2012 as required for any successful proposer for the City of Oakland; this fact was not discovered until after the filing of the Second Supplemental Declaration and was not addressed in the scope of this lawsuit.

### A. Proposed Orders Prepared by Defendants

On March 8, 2013 counsel for Developer defendants sent plaintiff for "approval as to form" two proposed orders: one denying the motion to amend, the other sustaining the demurrer without leave to amend and dismissing the case with prejudice. (App. 1150-1151, 1154-1155)

Upon receipt of the proposed orders, plaintiff wrote to defense counsel, objecting to the inclusion of *Foxborough v. Van Atta* (1994) 26 Cal. App.4th in the Order Denying the Motion to Amend and the language contained in the Order Sustaining the Demurrers that the case would be dismissed with prejudice. The letter stated, in pertinent part:

> ...the orders submitted cite language that is not supported by the official transcript of the proceedings. Specifically, the Court did not instruct defendants to submit an order to dismiss the action with prejudice. Nor did the court state that the order denying plaintiff's motion to amend was granted based on *Foxborough v. Van Atta* (1994) 26 Cal. App. 4th....
>
> ....
>
> Plaintiff therefore objects to the form and content of both orders. The Court did not state that *Foxborough* was the reason plaintiff's motion to amend was denied, nor did the Court state that the action would be dismissed with prejudice.
>
> (App. 1181-1182)

### B. Orders Dropping the Demurrers

Some confusion arose at the same time when Gene Hazzard received two orders from the court dated March 7, 2013: "Order on Demurrers - Dropped." (App. 1129-1133) Per his understanding of the C.C.P., plaintiff

filed and served notices of entry for each order, delivering courtesy copies to Department 23. (App. 1134, 1139)

### C. Order Denying Motion to Amend

The Court issued its ruling denying the motion to amend on March 13, 2013. (App. 1144) On the same afternoon, defense counsel electronically submitted the proposed orders to the Clerk of the Honorable John True, III. (1211)

Upon learning of the ruling, plaintiff voluntarily dismissed the action *without prejudice* by filing a Request for Dismissal on March 14, 2013. (App. 1220) Plaintiff included a letter to Judge True as to his reasons for dismissing. Copies of his letter and the dismissals were served on defense counsel the same day. (App. 1219)

As of March 14, 2013, the case was still "alive" in that the demurrers had been dropped and the dismissal without prejudice had been filed.

While the orders submitted by defense counsel are file-stamped March 13, 2013, Appellant raises a question as to whether these orders were, in fact, actually signed and filed on March 13, 2013. This is based in part on how late the Orders were electronically submitted to the court on March 13, 2013, and on the declaration of his legal assistant, Heather Ehmke, who had checked the court docket "on line" a number of times between March 14, 2013 and March 19, 2013. (App. 1156) Notably, the Orders dated March 13, 2013 were not posted on the docket until after

March 14, 2013 (App. 1128). Further, the Order Stricking (sic) the Dismissal did not appear on the docket until sometime between 5:00 p.m. on March 15, 2013 and 12:00 noon on March 18, 2013. (App. 1159-1160)

Regardless of when the orders were filed, the final Judgment of Dismissal was not filed until March 26, 2013 (App. 1232) and was not entered until April 4, 2013 (App. 1240) -- after the date plaintiff had dismissed his case without prejudice. (App. 1220)

## ARGUMENT

### I. THE COURT IMPROPERLY GRANTED DEFENDANTS' DEMURRERS TO THE FIRST AMENDED COMPLAINT

#### A. Plaintiff's First Amended Complaint Followed the Guidelines of the Court's November 19, 2012 Order

Plaintiff revised the complaint as outlined in the court's 11/19/12 Order. Again defendants demurred, failing to note the new facts contained in the First Amended Complaint which arose from the execution of the LDDA on October 23, 2012. (App. 544)

Further, counsel for the City misrepresented to the court that plaintiff's first amended pleading was a "repackaging" of the original complaint. Plaintiff's causes of action in the amended complaint were premised on the execution of the LDDA. Thus, the trial court erred in failing to review the First Amended Complaint based on what defense counsel told him.

### B. Plaintiff Provided Ample Case Authority in the First Amended Complaint to Prove Standing

Plaintiff properly established standing by alleging he was a taxpayer under Code Code. Civ. Proc. §526(a). (App. 536) Further, plaintiff included case law in the FAC to establish that this case qualifies for judicial review under Code Civ. Proc. §526(a). (App. 534-536) and also in his opposition to the demurrers found in the Appendix (App. 843-848)

Appellant's argument boils down to the language in California Code of Civil Procedure §526(a):

> "restraining and ***preventing any illegal expenditure of, waste of***, or injury to, the estate, ***funds***, or other property ***of a*** county, town, ***city*** or city and county of the state, may be maintained against any officer thereof, or any agent, or other person, acting in its behalf, ***either by a citizen resident therein***, *or* by a corporation, ***who is assessed for and is liable to pay***, ***or*** within one year before the commencement of the action, has paid, a tax therein." (Emphasis added.) (App. 534)

The inclusion of the case authorities in plaintiff's First Amended Complaint under a section labeled "STANDING" does not support defendants' grounds for a demurrer. Defendants incorrectly argued that plaintiff had included the authorities "apparently in an effort to convince the Court its Orders on the original demurrers were erroneous." (App. 716); the 11/19/12 Order never stated plaintiff lacked standing; it simply instructed plaintiff to *properly allege* standing pursuant to Code Civ. Proc. §526(a), which plaintiff did, in paragraph 14 of the FAC. (App. 536)

The case law cited in the First Amended Complaint demonstrated that plaintiff was well aware of his rights as a citizen to bring suit against the City and its agents, including the Developer defendants. The legislative intent behind Code Civ. Proc. §526(a) was to create a "checks and balances" for citizens challenging the wasteful expenditures of its elected representatives. (App. 865-867) This is exactly the controversy in the instant action.

### C. Even If Some of the Allegations Were "Incognizable," the Allegation of Fraud Is a Triable Issue and Not Subject to Disposal Through Demurrer

The question of fraudulent conduct is a *triable issue* and not one that plaintiff needs to be proved in the pleadings. Case law is clear that it is sufficient that plaintiff simply *allege* that a law was violated.

"When a scheme is evolved which on its face violates the fundamental rules of honesty and fair dealings, a court of equity is not impotent to frustrate its consummation because the scheme is an original one." *American Philatelic Soc. v. Claibourne* (1937) 3 Cal. 2d. 689. "We are satisfied that appellants are entitled to the aid of the court of equity to prevent the consummation of threatened fraud, and the complaint sets out sufficient grounds of injunctive relief." *Ibid.* (App. )

In order for the allegations to be "cognizable," plaintiff need only allege that fraud has occurred in an arbitrary and fraudulent manner, inconsistent with due process, and ... without regard to benefit." *Maxwell*

*v. City of Santa Rosa* (1959) 53 Cal.2d 274. Thus, regardless of any imperfections contained in plaintiff's complaint, it is sufficient that plaintiff *allege* that fraud was committed. Plaintiff provided ample evidence of some "trickery and deceit" taking place; hence, the demurrers should not have been sustained.

### D. Plaintiff Pleaded Sufficient Facts to Constitute a Breach of Mandatory Duty

Defendants represented to the Court that the "central theme" of plaintiff's complaint was that the City's waiver of the competitive bidding requirements under the OMC was "not in the best interests of the City." (App. 661) This *phrase* was taken out of context. Plaintiff had stated, "While defendants may have completed with each procedural step required by law in the competitive bidding process, **plaintiff alleges that these steps were performed with fraudulent intent in order to arrive at a result contrary to the spirit and purpose of the law."** (Emphasis added.) (App. 539)

One of plaintiff's claims is the City's failure to use reasonable discretion in the *repeated* use (routine) waiving the competitive bidding process, including the Fox Theater Renovation Project, which has resulted in the loss and continued loss of public revenue. (App. 11) Plaintiff provided factual support for these allegations by attaching a copy of the October 2011 Performance Audit (App. 197)

The Audit specifically instructed the City to "ensure that contractual decisions are made by individuals who are independent, objective, and do not directly benefit from contractual decisions." (App. 218) Further, the City's own analysis concluded that CCG did not have the financing nor equity needed for the OAB project (App. 234), and the Port's termination of its ENA with Phil Tagami and CCG/CCIG. (App 136) These facts support plaintiff's contention that the City willfully acted against the public welfare of the citizens, all of which support a breach of mandatory duty.

The City of Oakland is bound to the provisions of Government Code §815.6 which provides:

> Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty.
>
> (Govt. Code. §815.6.

Here, the City was under a ***mandatory duty*** to safeguard public funds and to ensure against the risk of public waste, the failure of which in the past has harmed, and continues to harm, the citizens of Oakland in the form of decreased public services. In the wake of the Fox Theater financial fiasco, the City had a ***mandatory duty*** to ensure that it does not repeat the same mistakes. Thus, this case is not about a "budgetary issue" – it is a request for judicial determination of ***unreasonable discretion***. Plaintiff's

"central theme" was not the City's use of a waiver. One of plaintiff's claims is the *repeated use* of the waiver with the same developer has caused waste in the past would lead a *reasonable person* to conclude that more waste would occur if the City failed to amend its contractual language.

### E. Defendants' Failure to Adhere to the Performance Audit Shows Lack of Discretion by the City

Plaintiff demonstrated that this is one of those rare cases in which judicial interference with the legislative process is justified in that the plaintiff is requesting a *factual finding.* Defendants persisted in claiming that it is within their discretion whether or not to heed to the recommendations of the Performance Audit; however, the office of the City Auditor confers authority. Section 2.04.021 of the OMC describes the duties of the City Auditor:

> ...to report to the Council instances of noncompliance with accepted accounting principles where recommendations for compliance have not been implemented by the City Administrator after reasonable time and opportunity,... (OMC 2.04.021)

Thus, defendants' argument that the City had discretion to choose whether or not to follow the Audit's recommendations fails.

### F. Plaintiff's Repetitive Use of the "Special Exception" in the OMC Points to Favoritism, Which Is Specifically Prohibited

The repetitive use of the special exception waiver with one developer points to favoritism by the City, which is specifically prohibited

by the OMC. (OMC 2.04.140) The OMC states: "Any officer of the city or of any department thereof, who shall aid or assist a bidder in securing a contract to furnish labor, material, or supplies at a higher price than that proposed by another bidder, **or who shall favor one bidder over another**..." (OMC 2.04.140) Favoritism is specifically prohibited by the OMC and is therefore within the purview of judicial review under Code Civ. Proc. §526(a).

### G. The Court Never Ruled on the "Separation of Powers" Doctrine

From the outset, defendants sought to defeat plaintiff's claims, attacking standing and relying on the "separation of powers" doctrine. Interestingly, the court never addressed "separation of powers" in its initial 11/19/12 Order, nor was it cited in his final Orders. (App. 1144, 1147) Appellant briefed this issue extensively in his oppositions to the demurrers, citing, which are found in Appendix (App. 828-831)

In *Scott v. Common Council* (1996) 44 Cal. App. 4th 684, the Court held that the actions of the Council was in excess of its jurisdiction, arbitrary and capricious, and an abuse of discretion, and thus the superior court had the power to take action. (App. 853)

The facts of this case meet the definition of the "exception," and thus defendants' argument that they are protected by the "separation of doctrine" doctrine fails.

## H. The Court Is Authorized by Law to Exercise Independent Judgment on the Evidence and Has a Duty to Intervene

Appellant cited *City of Vernon v. Superior Court* (1952) 38 Cal. 2d 509 to support plaintiff's argument that legislative discretion cannot be immune to judicial scrutiny of the facts or substantial evidence supporting the findings. (App. 853) "The record of the court must affirmatively show upon its face the facts upon which jurisdiction depends...the review of the evidence is limited to determining whether there was any **substantial evidence** to sustain the jurisdiction of the trial court. *Ibid.* 509.

The cases cited herein by Appellant require the court to review the evidence, regardless of any deficiencies in the complaint. When a determination is made that an action is ***fraudulent*** or so ***palpably unreasonable*** and arbitrary as to indicate an abuse of discretion as a matter of law, the courts not only have a right to intervene, ***they have a duty to do so***. (Emphasis added) *Hicks v. Board of Supervisors* (1977) 69 Cal. App. 3d 228. (App. 854)

Plaintiff's complaint does not focus on a single objectionable action but rather is comprised of many arbitrary and capricious actions which *collectively* constitute an abuse of discretionary authority and breach of mandatory duty -- elements which satisfy the requirements of a C.C.P. § 526(a) and call for judicial intervention. (App. 828)

In summary, plaintiff established proper standing under C.C.P § 526(a) in the First Amended Complaint. Plaintiff sufficiently stated causes of action for breach of mandatory duty and fraud, the *exception* to the "separation of powers" doctrine and warrants judicial interference. It was an abuse of discretion for the court to sustain the demurrers without proper review of plaintiff's claims. At the most, the Court should have allowed plaintiff, who has shown diligence every step of the way, to amend his complaint. At the least, the court could have sustained without leave to amend, *without prejudice*. After all it was not the content of pleadings that were being argued; it was the technicalities.

## II. THE COURT ABUSED ITS DISCRETION IN DISALLOWING PLAINTIFF LEAVE TO FILE A SECOND AMENDED COMPLAINT

### A. Plaintiff's Motion for Leave to Amend Was Properly Brought Before the Court

In spite of the many changes he had made to correct the deficiencies in the pleading, the First Amended Complaint contained *curable errors*. To expediently correct these mistakes, plaintiff filed a Motion for Leave to File a Second Amended Complaint. (App. 762-763)

In support of the motion to amend, plaintiff cited Code Civ. Proc. §§ 473(a) and 576. (App. 763), and set forth ample case authority in support of his motion (App. 764-765) concluding that, "It is in the interests of justice to permit plaintiff to amend the complaint to cure the question of standing. There is no prejudice to defendants ... (App. 770) Plaintiff filed

a declaration in setting forth the amendments he wished to make, stating when he learned of the mistakes, why he wanted to make the amendments, and attached a draft of the Second Amended Complaint. (App. 772-817) This declaration fully conformed with the requirements of Rule of Court 3.1324(b).

Still, in grasping for anything to throw out M. Hazzard's motion to amend, defendants argued that the motion was procedurally defective in that the declaration filed by plaintiff had not complied with California Rule of Court 3.1324(b) which requires that the accompanying declaration specify:

> The effect of the amendment; (2) Why the amendment is necessary and proper; (3) When the facts giving rise to the amended allegations were discovered; and (4) The reasons why the request for amendment was not made earlier." (Cal. Rule of Court 1324[b].)

Defendants' assertion is simply incorrect. Gene Hazzard complied fully with Rule 1324(b): He declared when he discovered the amendments and why they were not earlier sought: "**since I discovered an error in paragraph #14**) (App. 773, ¶3); "**the new cause of action was learned after the filing of the [first amended] complaint**" (App. 773, ¶5); and the effect of the amendments and why they were necessary and proper: "**to add clarification to the claims alleged in the complaint**" (App. 773 ¶4); "**to insert the language necessary to state the facts sufficient to state this cause of action.**" (App. 773, ¶4).

More importantly, plaintiff complied with Rule 3.1324 by declaring that the amendments would not prejudice the defendants in any way. (App. 774, ¶8) The argument submitted by the defendants failed to state how the proposed amendments would prejudice them in any way. They simply wanted the entire case to be dismissed from the onset, and indeed, they were granted their wish.

### B. Defendants Used as Plaintiff's Request to Amend a Typographical Error as Fodder to their Argument that Plaintiff Lacked Standing

Paragraph 14 of the First Amended Complaint contained a *curable error*. The paragraph stated:

> 14. At all times mentioned herein plaintiff Gene Hazzard is a taxpayer of the City of Oakland in that he has resided in the City of Oakland, County of Alameda, and State of California, since 1969. Plaintiff has paid taxes assessed by the City within the one year before the commencement of this action on August 3, 2012. (App. 563)

Plaintiff meant to say: "Plaintiff was *assessed* a tax by the City within the one year before the commencement of the action..." This is a *curable error*.

Defendants' argument that plaintiff had undermined his own allegation is based on a misinterpretation and/or mischaracterization by defendants of the meaning of Code Civ. Proc. §526(a), which allows not only that a tax be paid within a year before the action, but that it be

assessed ***assessed and/or paid.*** (Emphasis added.) (Code Civ. Proc. §526(a). )

The tax receipts attached to the FAC reflect tax payments to the City on an assessed business tax in October 2012. (App. 570-571) Clearly, plaintiff was not trying to "pull one over" on the court, since he was *not required to attach anything*. Further, he told the defense what type of tax it was back in the beginning of this case:

> Gene Hazzard has been an Oakland resident since 1969, was a property owner in Oakland from 1975 to 1991, and is presently a business owner **with Oakland Business License (Permit #1125192)** who has had several businesses in Oakland since 1980. (Emphasis added.) (App. 413-414)

It was in following his custom of attaching evidence to the complaint that plaintiff provided the receipts. *Cornelius Cornelius v. Los Angeles County Metropolitan Tran. Auth.* (1996) 49 Cal.App.4th 1761was a case where the plaintiff was not a resident in the county where he was attempting to bring suit; it does not confer a requirement in C.C.P. 526(a) that plaintiff to specifically describe his taxes, yet defense counsel continued to argue that point:

MR. SIEGEL: It's the same situation as before where there is just a conclusory ascertain (sic) that Mr. Hazzard pay taxes. But then he undercuts it by referring to Exhibit R, which is a document that just shows that there was a debt owed to the City. **Doesn't discuss what type of debt**. So he's undercut his own allegations....So I think that it's fair then to say that he can't do it. And I think that it's fair then to say it's now been enough

> time. And this is his, you know, it's the 2nd Amended Complaint he's basically put forth....It's costing us time and money and it's just not – it's just not right. (Emphasis added.) (App. 1243, 6:6-22) CITE:

Indeed, if anyone is undercutting its argument, it is the City in admitting that there is a tax owed by plaintiff to the City. The irony in the court dismissing this case due to lack of taxpayer standing, based on the City's argument that "it's just not right," is that included with those tax payments attached as Exhibit R to the FAC was a letter from the City of Oakland dated November 12, 2012 addressed to Gene Hazzard as "Dear Taxpayer." (App. 569)

Ultimately this case was defeated as a result of two attorneys using diversionary tactics -- void of any legal support -- in the hopes that by sheer repetition they would convince the court that plaintiff did not meet taxpayer standing. Indeed this tactic worked, and the court ruled in favor of the defendants without any legal basis; thus, the denial of the motion by the court was an abuse of discretion.

### C. Plaintiff's Claim Included a Cause of Action for Fraudulent Transfer Which Plaintiff Was Entitled to Add to his Complaint

Appellant endeavored to add a cause of action for Fraudulent Transfer after he learned that it was a separate cause of action from fraud. The Uniform Fraudulent Transfer Act ("UFTA") (Civil Code § 3439-3439.12) sets provides that actual intent of fraudulent conveyance occurs

when a transfer is made or an obligation incurred "(a) with actual intent to hinder, delay or defraud any creditor of the debtor; (b) without receiving a *reasonably equivalent value in exchange for the transfer* or obligation; … (1) was engaged or was about to engage in a business or a transaction for which the remaining *assets of the debtor were unreasonably small in relation to the business transaction* or (2) intended to incur … *debts beyond his or her ability to pay* as they became due." Civ. Code § 3439.04 (Emphasis added.) (App. 879)

The debts of the Developer defendants are beyond their ability to pay; the City's own documents reflect this. The creditors in this case are the citizens of Oakland – not the City – in that *the City represents a body of taxpayers*. Thus, Judge True's statement that "you just talked yourself out right out of court" (App. 1245, 8:12-13) was made without examining who the parties really are to the contract between the City and the Master Developer; the contract is between the taxpayers of Oakland and the Master Developer in terms of who will be at risk if one of the parties defaults on the contract. While City staff entered into the contract, it was they were *representing a body of the citizens*. Plaintiff fully briefed the fraudulent conveyance "badges of fraud" in his reply to the motion to amend (App. 954-966) to show how they were applicable, all of which was unheeded by the court.

### D. Plaintiff Is Allowed Pursuant to C.C.P. § 473(a) to Add Parties and Causes of Action

1. Addition of Mark Hansen

In plaintiff's Second Supplemental Declaration to the Motion to Amend, plaintiff sought to add Mark Hansen, Sr. VP, and Prologis CCIG Oakland Global, LLC as parties under to Cal. Civ. Proc. §473(a).

The September 28, 2011 Resolution No. 83565 reflects that the City's ENA was with "Prologis Property, L.P./CCIG Oakland Global, LLC." (App. 40) Yet the LDDA that was executed on October 23, 2012 includes only the signature of Mark Hansen "Sr. VP" of Prologis CCIG Oakland Global, LLC. (App. 1017) The absence of Prologis Property, L.P. constitutes yet another element of fraudulent conduct; the City began negotiations with a joint venture with Prologis Property, L.P. ("the stronger financial partner") and CCIG (now mysteriously "CCIG Oakland Global, LLC") ("the weak partner"), but now the strong partner somehow morphed into the weak partner Prologis CCIG Oakland Global LLC to execute the final contract with the City. **If there was a merger, City staff did not inform anyone of this.** This entity – Prologis CCIG Oakland Global, LLC – was not approved by City Council; thus, in executing the LDDA, the *legal liability of the parties changed*, which puts the taxpayers at risk for the entire cost of the project. There is no more Prologis, LP in the contract; there is now only an LLC – *a limited liability company.* This maneuver has

put the City at risk for the *entire project*, and those behind the scenes at the City, who finagled the names and the language in the contract, certainly know this. This new entity is not listed with the Stock Market Exchange, which precludes any citizens of Oakland from following the fiscal health of the Master Developer. ***This name change of the Master Developer was never brought to City Council for approval.***[15]Yet this seemingly insignificant detail crossed the desks of City Council, and they knowingly or unknowingly approved the execution of the LDDA with this brand-new entity of unknown origin and capacity. (App. 1015-1017) Thus, plaintiff had every right to add these newly discovered defendants to his complaint.

2. Addition of Queen Thurston

Plaintiff sought to add Queen Thurston to the complaint after securing her agreement to enjoin in the matter. Ms. Thurston's desire to join in the action in not a matter that needs to be questioned; if she is a taxpayer then plaintiff has a right to add her as a party under Code Civ. Proc. § 473(a). The addition of Queen Thurston, another Oakland taxpayer, was not a concession by plaintiff that he had not met the standing requirement, but rather a vehicle to move the case forward and direct the case back to the issues of the case.

[15] This was verified by plaintiff through a public records request which is not part of this file

### E. Second Supplemental Declaration of Gene Hazzard

Between filing his reply and the March 7, 2013 hearing, plaintiff discovered yet another cause of action to be included in his complaint: Conspiracy to Commit Fraud. This new cause of action, arising out of the same set of circumstances, was determined by plaintiff to be viable after discovering that the name of the Master Developer joint venture developers had inexplicably changed as described above. Plaintiff declared when he learned of the discrepancy (App. 1070).

Upon the realization it would appear that the Master Developer colluded with someone on City staff to "slip past" this name change by City Council, plaintiff submitted a Second Supplemental Declaration in Support of amending his pleading to include a cause of action for Conspiracy to Commit Fraud. (App. 1070)

The submittal of the declaration was strongly objected to by defense counsel at the March 7, 2013 hearing. While plaintiff acknowledges that incremental amendments are unconventional, there is nothing in the Code that precludes plaintiff from submitting proposed amendments by declaration, so long as they comply with Rule 3.1324(b).

### F. Amending a Pleading Is Allowable When the Moving Party Demonstrates that Defendants Have Not Been Prejudiced in Any Way by the Amendments, and, in Fact, the Case Was Delayed by Defendants' Demurrers.

Defendants failed to show how they had suffered any prejudice as a result of the proposed amendments. In each declaration plaintiff declared that the amendments did not prejudice the defendants in any way; in fact, any delay in the case moving forward was the result of defendants' continued attacks on plaintiff's pleadings.

While the submission of three versions of the proposed Second Amended Complaint may be irregular, there is no prohibition in the Code to limit proposed amendments, so long as they do not prejudice the defendants. Defense counsel argued that he didn't know which "iteration" plaintiff wanted to submit (App. 1240, 3:9-11), but clearly plaintiff intended the latest proposed Second Amended Complaint to be the one submitted. This is common sense that plaintiff did not anticipate would be misunderstood; indeed, it is clear that defense counsel was just throwing everything possible he could at this self-represented plaintiff to "make him go away."

Defendants' arguments were grounded purely on their annoyance of the mere presence of the case as reflected in the March 7, 2013 transcript of the proceedings. Still, while implying that plaintiff's claims were frivolous, defense counsel expressed great concern that the lawsuit was holding up the OAB project. In putting higher priority to defendants' non-legal arguments over the substance of plaintiff's complaint, the trial court erred in dismissing the case for reasons unsupported by the law.

The filing of the Second Amended Complaint posed no undue hardship or delay in in the proceedings of this matter. As there was no prejudice to any of the defendants, the motion to amend should have been granted. "[I]t is abuse of discretion to deny leave to amend where the opposing party was not misled or prejudiced by the amendment." *Kittredge Sports Co. v. Superior Court* (1989) 213 Cal.App.3d 1045.

Defendants could not cite any prejudice in this matter. Plaintiff's motion was brought in a timely manner; the amendments related to the same general set of facts; the why and when and purpose of all substantive amendments were explained in declarations. There was no legal basis for the court to deny plaintiff's motion to amend; in doing so the court abused its discretion.

It is judicial policy to resolve all disputes between all parties ***on the merits***, and to allow a party to amend a pleading to put all such disputes at issue at the time of trial. (Emphasis added.) Defendants attacked this case from the onset to ensure there would be no trial on the merits. From Judge True's comments in court, it is clear that he agreed with defendants' *self-serving opinion* that plaintiff had not met the standing requirement, when, in fact, the law (C.C.P. §526(a); *Maxwell v. Santa Rosa* (1959) 53 Cal.2d 274) supports that plaintiff had met all of the requirements to bring a taxpayer suit; thus plaintiff should have been allowed to amend the complaint.

Defendants' opposition boils down to their dislike of the fact that plaintiff filed a complaint that was interfering with the time frame of a project that the City was using to leverage public funds. Defense counsel failed to demonstrate how the *lawsuit* was prejudicing his clients, but rather how the fact that there was a lawsuit was making it inconvenient and "costing time and money." (1243, 6:12). Their "legal argument" in open court centered on an ***opinion*** plaintiff was using the case as a forum to "castigate the City." (App. 1241, 4:21-24) -Absent a trial on the merits of the case, this "scolding" was, in fact, within the rights of plaintiff which Judge True himself conceded. (App. 1241: 4:26-27)

### G. Defendants' Objections to the Amendments Were Based on Plaintiff's Conduct Outside the Scope of the Lawsuit

Defendants' objections to the motion to amend were not based not on law but rather Gene Hazzard's conduct at City Council.

> MR. ADAMS: Your Honor, this case has been extant since last August. And the existence of the lawsuit itself has served as fodder in collateral public hearings for Mr. Hazzard to castigate my client in public forums and that has gone on for months and months and months." (App. 1241, 4:21-25)

Other than citing *Foxborough v. Van Atta* (1994) 26 Cal.App.4th 217 – a case that was not even close in factual content – the defense brought no legal reason why plaintiff should not be allowed to amend his complaint. *Foxborough* involved a plaintiff in a legal malpractice case who had been dilatory in bringing his claims. Here, we have the opposite scenario – an

extremely proactive plaintiff whose case is trying to be "cut off at the pass." While courts are allowed discretion in allowing amendments, the trial court erred in this case because the plaintiff had met all of the requirements asked of him to amend. Thus, it was an abused of discretion to deny the motion to amend.

## III. THE TRIAL COURT SHOWED BIAS AGAINST PLAINTIFF DURING ORAL PROCEEDINGS

The hearing on plaintiff's motion to amend was set for March 7, 2013, and the parties appeared to argue the matter. Even though the tentative ruling was poised to grant plaintiff's motion and the defendants did not present further legal argument outside of *Foxborough*, it is clear, from the transcript that once Judge True saw who the parties were before him, he reversed his ruling in a 360-degree turn rarely seen in law-and-motion matters.

This was the third time that Judge True had presided over the case, and each time he became increasingly more agitated with this persistent plaintiff who, unlike his opponents, arrived at court armed with the law. By this time Judge True should have recognized that Gene Hazzard was not your "typical" self-represented plaintiff. Perhaps Judge True was gambling on the hope that Mr. Hazzard had failed in his effort to state viable causes of action just so the whole case would "go away."

On the previous occasion when the parties had appeared before Judge True, counsel for the City gave the court his opinion on the First Amended Complaint filed by plaintiff on December 14, 2012:

> MR. SIEGEL: We have demurred again [on] the fraud, and the contract claim issues that Mr. Hazzard are bringing up are not new facts. It's just a repackaging of the same allegations that already existed and is putting a new title and a little bit of spin on the issues, but we really have the same complaint here. (App. 1258, 6:13-18)

This statement by defense counsel was self-serving and made to mislead the court into believing that plaintiff had not stated sufficient facts in the First Amended Complaint to withstand demurrer. Yet, a reading of the First Amended Complaint shows a myriad of "sufficient facts" stated therein. Nevertheless, the court relied upon the statements of defense counsel in deciding how he should rule on the matter on March 7, 2013. The transcript of March 7, 2013 bears this out. (App. 1237-1247)

Bill Adams concluded that that "there mere existence of this lawsuit is what we take offense to, and that's why we believe it's time to bring this matter to and end and resolve it." (App. 1242, 5:7-9.) Kevin Siegel concurred, but provided no legal authority whatsoever in for his argument other than "it's just not right." (App.1243, 5:11.)

Mr. Adams argued that "Mr. Hazzard had his day...Mr. Hazzard has had his say." (App. 1241, 4:3-6). This may be true in the context of City

Council, but Mr. Hazzard never had his day *in court*. Still, the court conferred these comments of defense counsel as if he had.

The court told plaintiff that "It is apparent to me...that you're not going to be able to plead a claim against the City of Oakland and all these individuals...So why shouldn't this just be dismissed?" (App. 1243, 6:27-7:6) Plaintiff responded by offering points as to the inapplicability of *Foxborough* -- since he had yet to be allowed his argument (App. 1244, 7:13-15)-- but he was interrupted by Judge True who said, "I'd appreciate it if you would just answer my question (App. 1244, 7:16-17), referring to the question "Why shouldn't this be dismissed?" Plaintiff appeared to give argument on a motion to amend, but instead was asked why his case should not be dismissed?

The oral proceedings reflect Judge True's bias in relying solely on the nonlegal statements of defense counsel, and not the written arguments filed by plaintiff, that his case does have standing and is an exception to the "separation of powers": doctrine. Still, the court instructed defense counsel to prepare an order granting the demurer without leave to amend. (App. App. 1246, 9:22) While it is not unusual for the court to instruct attorneys to prepare orders, Judge True had no authority in making this determination other than agreeing with defense counsel that plaintiff did not have a claim. Indeed, he left the drafting of the order to defense counsel who then improperly cited *Foxborough* in one order (App 1151) and improperly

included a phrase dismissing the action with prejudice in the other (App. 1155).

Based on the foregoing, it is clear that the orders of dismissal were executed by Judge True without a proper review of the claims set forth in plaintiff's First Amended Complaint. Instead, the Court denied the motion simply because he was fed up with the case. He relied on disputed hearsay as to what the documents contained rather than derive the facts from the complaint filed by plaintiff and the attachments thereto.

## IV. THE DISMISSAL OF THE ACTION WITH PREJUDICE WAS IMPROPER AND MADE WITHOUT GOOD CAUSE SHOWN

Immediately upon receipt of the proposed orders, Mr. Hazzard wrote to defense counsel setting forth his objections as to the content of the orders, a copy of which was hand-delivered to the court. (App. 1201) The court issued its ruling denying the motion to amend on March 13, 2013 (App. 1209), and the proposed orders thereafter were submitted by Bill Adams to Judge True's clerk by email. (App. 1211).

In conceding defeat on the motion to amend, plaintiff prepared a Request for Dismissal without prejudice and filed it on March 14, 2013 to preserve his right to re-file. (App. 1220) The dismissal was accompanied by a letter to the court explaining the reasons for dismissing. (App. 1219)

While the orders are filed-stamped "March 13, 2013," a question is raised as to whether the orders were, in fact, actually signed and filed on

that day, which is addressed in the Declaration of Heather M. Ehmke who observed the electronic docket between March 14, 2013 and March 19, 2013 and filed a Declaration as to those observations. (App. 1156) Attached to the declaration was a copy of the docket time stamped March 14, 2013 reflecting that no orders had been filed on March 13, 2013. (App. 1224)

Code of Civ. Proc. §581 provides: "An action may be dismissed in the following cases: (1) by plaintiff, by written request to the clerk, filed with the papers in the case...at any time before the actual commencement of trial..."

In seeking affirmative relief within the meaning of Code Civ. Proc. §581 plaintiff had an absolute right to dismiss without prejudice. Accordingly, the court was without jurisdiction to act upon the dismissal.

Once a dismissal is entered, and absent an explicit reservation of power pursuant to Code Civ. Proc. §664.6, the court lacks subject matter jurisdiction to strike the dismissal.

In general, when there is a voluntary dismissal of an entire action, the action is no longer pending and the court's jurisdiction over the parties and the subject matter terminates. *In re Casa de Valley View Owner's Assn.* (1985) 167 Cal.App.3d 1182, 1992. Absent a pending lawsuit, a court cannot issue judgments or orders. *Hagan Engineering v. Mills* (2003) 115 Cal.App.4th 1004. Absent an applicable exception, a plaintiff's right to

dismiss any time before trial is absolute. The clerk of the court has no discretion to refuse to enter the dismissal; and the court has no power to set it aside against plaintiff's will. *O'Dell v. Freightliner Corp.* (1992) 10 Cal.App.4th 645, 659. *Franklin Capital Corp. v. Wilson* (2007) 148 Cal.App.4th 187, 190; *Henderson Receivables Origination LLC v. Red Tomahawk* (2009) 172 Cal.App.4th 290, 302.

Certainly, upon learning of the new causes of action plaintiff attempted to add to his complaint, he could have voluntarily dismissed his case and refiled. This certainly would have been a "cleaner" way of handling the learning curve, and he was well within the statutory time frame to do so. Rather than waste the time and resources, however, plaintiff chose to amend since the matter was already pending in superior court. Defense counsel's objections to the amendments were based on nothing more than annoyance that plaintiff was discovering new allegations of their clients' wrongdoing; this is not a legal basis to deny a motion to amend.

Lastly, even if the court used its discretionary power to dismiss the action based on plaintiff's incremental declarations, the court had no authority to dismiss the action *with prejudice* to preclude plaintiff from seeking judicial determination of his claims in a new lawsuit.

Based on all of the arguments set forth above, it is clear that the court abused its discretion in denying the motion to amend and the order denying plaintiff's motion to amend should be reversed.

## CONCLUSION

Appellant's initial pleading was an action for an injunction, but due to error, the matter was put on "regular" civil track where it bounced and bumped along in Judge True's courtroom. The complaint was asking for an *emergency injunction* to stop the City from executing its final contract conveying the OAB property to Phil Tagami. The defendants ignored plaintiff's complaint and went through with their plans. They signed the LDDA on October 23, 2012. Still, plaintiff persisted in drafting cognizable claims to support his factual allegations that City of Oakland was about to make what may be the biggest financial blunder in the history of Oakland.

The law of taxpayer standing in Code of Civil Procedure § 526(a) is clear: a citizen can bring suit if the acts of a legislative body are alleged to be unlawful. In granting defendants' demurrers without reviewing plaintiff's oppositions, the trial court abused its discretion.

Further the trial court acted without reasonable discretion in denying plaintiff's motion to amend. Plaintiff was diligent in complying with all the rules. If plaintiff made any technical mistakes, it was not from lack of good faith to present a viable pleading for the court to consider. Plaintiff followed the guidelines of the court in its 11/19/12 Order and presented a

new pleading. In the course of doing so, he realized the he needed to add claims alleging the actions that had occurred in the interim, including the execution of the LDDA. The signing of the contract changed everything. Plaintiff's claims alleging a pattern of "trickery and deceit" had now blossomed into a full-fledged case for fraud.

The First Amended Complaint was no longer vague and ambiguous; in fact, it was highly indicative of a taxpayer case for fraud and waste. Yet defense counsel told the court that the First Amended Complaint was just a "repackaging" of the same allegations. Even if counsel viewed the FAC as "repackaging," the court had a duty to review the claims himself. But this was not done because, in keeping with the confusion buzzed around this case from the beginning, the court dropped defendants' demurrers from calendar; he declared them moot after plaintiff had filed a motion for leave to amend.

Defense counsel claimed that plaintiff had had sufficient time to correct his errors, and misrepresented that the matter had been corrected five times. It hadn't. Plaintiff had been granted only one prior chance to amend. He was denied a second chance to add what had become inflammatory causes of action against the defendants, only because he was uncovering more facts of their wrongdoing.

Still, the court declined to review the matter, relying on statements made by defense counsel that plaintiff had no standing. In doing so, Judge

True allowed the defendants to dictate how to rule. Indeed, he told defense counsel to prepare an order that he would "give very serious consideration to granting" without giving any grounds for denying plaintiff's motion to amend.

Appellant's attempts to have this matter judicially reviewed were thwarted at every step. The claims in his pleadings were dismissively ignored. The court was clear in his language and manner that he wanted nothing more than for this case to "go away."

Defense counsel relied on a "catch all" defense that the City is allowed to make "budgetary decisions" within its discretion. Plaintiff's claims, however, alleged that the City was acting *unlawfully*, which establishes actual controversy. In the wake of having sustained $58 million in losses on a project with the same developer, plaintiff properly invoked his right to demand that the City "show him the money" when he learned that the City was about to embark upon the same mistake.

Plaintiff's controversy with the City is clear: In selecting Phil Tagami the City has breached its fiduciary duty to "act in the best interests of the City." The Developer has not shown the necessary capital to mobilize the Oakland Army Base project. The City *knew all along* that Phil Tagami was not financially fit for the job, but *they gave it to him anyway*.

The allegations in plaintiff's complaint establish breach of fiduciary duty, negligence, fraud, fraudulent conveyance, and conspiracy to commit

fraud. The complaint also alleges public and government code violations. Defendants claim they have done anything illegal, but they have. The evidence is all right there, attached in plaintiff's exhibits.

The modifications to the ENAs were made to benefit the Master Developer, not the City, and these changes took place in increments over a period of three years in order as to "slip one past" the public. But the City didn't anticipate a citizen such as Gene Hazzard to watch their actions as closely as he did, and now they're in trouble. But instead of backtracking and changing the terms of the contract it has just signed, they are moving forward with the stubbornness that people do when acting in a narrow frame. They can't see out of their own mess. It was a result of defendants' conduct that brought about this lawsuit – not the conduct of plaintiff's at City Hall.

The citizens of Oakland have a lot to lose if the court does not intervene and reverse the trial court errors. What will harm the taxpayers of Oakland is if the City moves forward with this "One Project, One Team, One Vision" and puts the taxpayers on the hook when the developer asks for more and more money to finish his project. That's what he did with the Fox Theater; there is no indication that he will behave any differently now that he has his prized project, the Oakland Army Base.

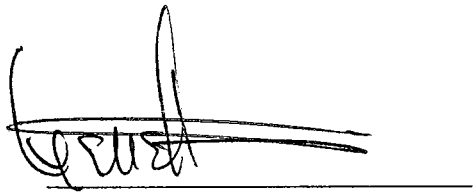
This is what plaintiff asked the court to review -- to make a determination, given that laws were violated, favoritism was shown, and

proof of financing was never provided the City to the public. This case has merit but was treated frivolously. The Oakland Army Base is a repeat mistake of the Fox Theater, with hundreds of millions on the line.

Plaintiff's diligence in pursuing this case was a feat unparalleled because Gene Hazzard believes in his cause. He did everything the court told him to do to correct the deficiencies in his complaint, but the court still disregarded his efforts and dismissed his case with prejudice, and without just cause.

Based on the foregoing, Appellant respectfully requests that all of the dispositive orders and the Judgment Dismissal filed and entered in this case be reversed.

Dated: June 21, 2013

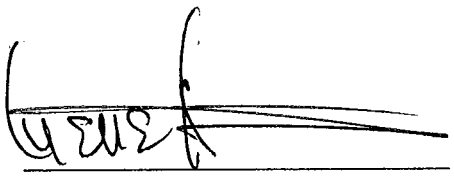


GENE HAZZARD

CERTIFICATE OF WORD COUNT

Pursuant to California Rule of Court 8.204(c), the undersigned certifies that this brief contains 13,805 words.

Dated: June 21, 2013



GENE HAZZARD

PROOF OF SERVICE

I am over the age of 18 and not a party to this action. I am a resident of the county where the mailing described herein took place. My business address is 731 Mandana Boulevard, Oakland, California 94610.

On June 21, 2013, I caused to be hand-delivered the following documents:

APPELLANT'S OPENING BRIEF

APPELLANT'S APPENDIX (Binders 1 and 2)

I served the document by enclosing copies in envelopes and hand-delivering the above-described documents in sealed packages addressed and sent as follows:

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

June 21, 2013

_____

HEATHER M. EHMKE

SERVICE LIST

Clerk of the Court of Appeal
~~455 Golden Gate Avenue~~ 350 McAllister Street
San Francisco, CA 94102

Joseph M. Quinn
Christine Hiler
Hanson, Bridgett
425 Market Street, 26th Floor
San Francisco, CA 94104

Kevin D. Siegel
Burke, Sorensen & Siegel
1901 Harrison Street, Suite 900
Oakland, CA 94612-3501

Barbara J. Parker
Oakland City Attorney
One Frank Ogawa Plaza, 6th Floor
Oakland, CA 94612

The Honorable John M. True, III
Judge of the Superior Court
Alameda County Superior Court
Department 23
1221 Oak Street
Oakland, CA 94612