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Court of Appeal, First District, Division 1, **California**.

1049 MARKET STREET, LLC, Plaintiff and Appellant,

v.

CITY AND COUNTY OF SAN FRANCISCO et al., Defendants and Respondents;

Ben Cady et al., Real Parties in Interest and Respondents.

A148716

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(San Francisco City & County Super. **Ct**. No. CGC–15–545950)

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Opinion

Margulies, J.

***1** Plaintiff 1049 Market Street, LLC (1049 Market) appeals from adverse rulings by the trial court in connection with its writ petition challenging certain conduct by the City and County of San Francisco, its Planning Department, Department of Building Inspection, and Board of Appeals (collectively, the City) to suspend and then revoke a demolition permit. 1049 Market sought the demolition permit after the City issued two notices of violation because units in the building had been converted from commercial to residential without a permit. The demolition permit was originally issued in 2013, but it was soon suspended. Although 1049 Market challenged this suspension through an administrative appeal, it eventually withdrew the appeal. In early 2015, the City reinstated the permit. Property tenants then challenged this reinstatement through another administrative appeal, and in May 2015, the Board of Appeals (Board) revoked the permit. 1049 Market filed the current writ petition challenging the Board's decision.

The trial court agreed with 1049 Market that the Board exceeded its jurisdiction in revoking the permit, and remanded the matter to the Board for further consideration. But it otherwise rejected 1049 Market's claims that the permit's revocation constituted an impermissible taking or an infringement of a vested right. It also rejected 1049 Market's challenge under the **California** Environmental Quality Act (Pub. Resources Code, § 21000 et seq.; CEQA) to the City's 2015 adoption of an ordinance controlling the conversion of living spaces to other uses.

At oral argument, the parties agreed 1049 Market's CEQA challenge is moot because the 2015 ordinance has expired. We agree, and therefore dismiss 1049 Market's appeal from the trial court's CEQA ruling as moot. As to the remaining claims, we affirm the trial court's judgment although we do not adopt all of its reasoning. Specifically, we conclude 1049 Market's taking claims as to the initial suspension and delay are barred for failure to exhaust administrative remedies. And to the extent 1049 Market's taking claims are based on the City's later conduct, those claims are not ripe. We additionally conclude there is no merit to 1049 Market's vested right claim.[1]

I. BACKGROUND

A. *Factual Background*

1. *The Building Located at 1049 Market Street*

The six-story building at issue, located at 1049 Market Street, was originally constructed for commercial use. The sixth floor of the building contains six permitted live/work units. Floors

one through five of the building contain 77 unpermitted live/work units. Approximately 38 of these unpermitted units have windows, while the remainder are windowless. The prior owner began renting the unpermitted live/work units to residential tenants in the early 1990's. The building also has ground-floor retail units.

***2** In 2007, the City issued a notice of violation (2007 NOV) regarding the unpermitted live/work units on floors one through five. The 2007 NOV stated in part: "[A permit] was approved for six live/work units on top floor. Site inspection revealed existing office units converted to habitable space on remaining floors. No permit exists for this conversion." The corrective action section of the 2007 NOV directed the owner to "[o]btain [a] building permit with Planning Department approval for conversion of office units to live/work units."

Following issuance of the 2007 NOV, the prior owner and the City explored how to legalize the unpermitted live/work units. The prior owner represented the building met applicable fire codes, but alleged the City's "natural light" requirement remained an obstacle to permitting the units.

In 2012, 1049 Market purchased the property.[2] 1049 Market continued to discuss with the City how to legalize the unpermitted units and resolve the 2007 NOV. 1049 Market also continued to represent that the building met fire and safety standards and the "natural light" requirement was the primary obstacle to resolving the 2007 NOV. A site inspection conducted by the City's building and fire departments confirmed there were no significant life-safety issues. Despite these efforts, the 2007 NOV remained unresolved. As a result, the City issued a second notice of violation (2013 NOV) for failure to comply with the 2007 NOV. Throughout this period, 1049 Market continued to enter into new leases with residential tenants and collect rent from tenants residing in the unpermitted units.

2. ***The Permit, Subsequent Suspension, and Board Appeal***

In response to the 2013 NOV, 1049 Market filed an application for a demolition permit to remove internal walls on floors one through five. The application did not identify any preexisting residential use on those floors, and 1049 Market responded "No" to the question asking, "Does this alteration constitute a change of occupancy?" In response to questions regarding the present legal use, proposed legal use, and number of units before and after the proposed demolition, 1049 Market only identified six dwelling units for both the existing and future use. The permit was issued on August 2, 2013, as a routine, "over the counter," matter, not requiring administrative review. 1049 Market did not seek approval from the San Francisco Planning Department (Planning Department) as the 2007 NOV instructed.

The Planning Department subsequently became aware of the permit, and questioned whether the building's prior commercial use had been abandoned. As a result and at the request of the Planning Department, the Department of Building Inspection temporarily suspended the permit on October 28, 2013.

On November 8, 2013, 1049 Market filed an administrative appeal from the permit suspension. On February 18, 2014, after discussions with the City, 1049 Market withdrew its appeal. At that time, the City believed 1049 Market planned to request a letter of determination from the City regarding legalization of the unpermitted live/work units. However, 1049 Market apparently never made such a request or had any further substantive contact with the City.

Instead, almost a year later, 1049 Market requested the City either lift the suspension or revoke the permit. Following receipt of this request, the Planning Department completed its review of the permit based on then-existing law, determined the commercial use had not been abandoned, and reinstated the permit on February 2, 2015.

***3** Tenants residing in the unpermitted units timely appealed the permit reinstatement to the Board. On April 8, 2015, the Board granted the appeal, finding the Planning Department "erred in failing to recognize that the subject permit is defective." 1049 Market filed a request for rehearing, which was denied. 1049 Market then proceeded to evict tenants in the unpermitted units pursuant to the Ellis Act, without any City interference.

3. ***The Interim Ordinances***

From 2013 to 2015, the City adopted several land use regulatory measures. In 2013, the San Francisco Board of Supervisors (Board of Supervisors) adopted resolution No. 428–13 (2013 Controls), which provided the "reestablishment of any commercial use that has been converted to residential use shall require Planning Commission approval through ... a conditional use, and if triggered by Planning Code Section 322, a Proposition M authorization." 1049 Market did not challenge the 2013 Controls, which expired in 2014.

In 2015, the Board of Supervisors considered resolution No. 61–15 (2015 Controls). The 2015 Controls' express purpose was "to control the removal of any existing residential uses in commercial spaces and review status of the original legal uses until such time as the Planning Department can propose permanent legislation." The 2015 Controls designated commercial use within these buildings as "abandoned" and required the "re-establishment of a commercial use that has been converted to residential use shall require Planning Commission approval ...." The Board of Supervisors referred the proposed 2015 Controls to the Planning Department for environmental review. Following that review, the Planning Department determined the 2015 Controls was not a project subject to CEQA review because it would not result in a physical change in the environment. The Board of Supervisors thereafter amended the proposed 2015 Controls to apply retroactively to issued permits and adopted the 2015 Controls as amended. The 2015 Controls expired by their own terms in 2016.

In 2016, the City adopted ordinance Nos. 23–16 and 33–16 (Permanent Controls). The Permanent Controls require in part, "Any application for a permit that would result in the Removal of one or more Residential Units or Unauthorized Units is required to obtain Conditional Use authorization. The application for a replacement building or alteration permit shall also be subject to Conditional Use requirements." (S.F. Planning Code, § 317, subd. (c)(1).)

B. ***The Writ Petition***

After the Board sustained the tenants' appeal, 1049 Market filed the instant writ petition alleging the Board exceeded its jurisdiction in revoking the permit. 1049 Market also alleged the delay in issuing the permit resulted in a taking of its property and violated its vested rights in the permit. Finally, it claimed the 2015 Controls was a "project" subject to CEQA review.

The trial court agreed the Board exceeded its jurisdiction in revoking the permit, and remanded the issue to the Board for further consideration, noting the question of what law would apply to the Board's decision would be for the Board to determine in the first instance. The trial court, however, denied 1049 Market's CEQA and taking claims. The trial court's order did not address the vested rights claim.

1049 Market filed motions for reconsideration and for a new trial. The trial court denied the motion for reconsideration, but granted in part the motion for new trial. The trial court affirmed its prior order, but clarified the bases for its findings and expressly rejected 1049 Market's vested rights claim. The trial court also held 1049 Market had failed to exhaust its administrative remedies with respect to the permit suspension. 1049 Market timely appealed the trial court's adverse rulings.

II. DISCUSSION

***4** The parties concede, and we agree, 1049 Market's challenge to the 2015 Controls under CEQA is moot. (See *Colony Cove Properties v. City of Carson* (2010) 187 Cal.App.4th 1487, 1509.) 1049 Market raises two additional arguments on appeal. First, 1049 Market argues the City's suspension and revocation of its permit constitutes a taking. Second, 1049 Market argues it has a vested right in the permit. We address these arguments in turn.

A. ***Taking Claims***

1. 1049 Market Cannot Assert a Regulatory Taking Claim as to the Initial Permit Suspension Because It Failed to Exhaust Its Administrative Remedies

In its amended order, the trial court acknowledged exhaustion was a requirement for regulatory taking claims and held 1049 Market "failed to exhaust state administrative and judicial remedies relating to the Permit suspension" because it withdrew its appeal of the initial permit suspension.[3] 1049 Market likewise acknowledges exhaustion is a prerequisite for its regulatory taking claims and concedes it withdrew its administrative appeal of the initial permit suspension. 1049 Market argues, however, its taking claims are based on the City's lengthy delay in resolving the permit suspension, which occurred *after* it withdrew its administrative appeal. We are cognizant that 1049 Market's claim is not a "typical" taking case in this regard. 1049 Market does not seek to reverse the City's decision because the City reinstated the permit after its initial suspension. It instead seeks to obtain temporary taking damages for the City's alleged delay in reinstating the permit.

Generally, "[a] party aggrieved by the application of a[n] ... ordinance must invoke and exhaust the administrative remedies provided thereby before he may resort to the courts for relief." (*Metcalf v. County of Los Angeles* (1944) **24 Cal**.2d 267, 269; see *Hensler v. City of Glendale* (1994) 8 **Cal**.4th 1, 10–11 (*Hensler*) [cannot determine whether regulatory taking occurs until property owner exhausts all

available administrative and judicial remedies for challenging land use regulation].) " 'When administrative machinery exists for the resolution of differences, the courts will not act until such administrative procedures are fully utilized and exhausted. To do so would be in excess of their jurisdiction.' " (*Leff v. City of Monterey Park* (1990) 218 Cal.App.3d 674, 680.)

This exhaustion requirement applies to taking claims based on government inaction as well as more typical regulatory taking claims. (See *Landgate, Inc. v. California Coastal Com.* (1998) 17 Cal.4th 1006, 1018 [noting taking claim " 'cannot be evaluated until the administrative agency has arrived at a final, definitive position' " in evaluating whether delay in the developmental approval process constitutes a taking].) The Supreme Court in *Williamson Planning Comm'n v. Hamilton Bank* (1985) 473 U.S. 172, explained the exhaustion requirement for regulatory taking claims thusly: "[A] claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." (*Id.* at p. 186.) This is because until there has been a "final, definitive position" as to how the regulations will be applied to the land, a court cannot determine the extent of the economic impact, a factor that bears on the question whether a compensable taking has occurred. (*Id.* at p. 191.) Specifically, the property owner must obtain a final administrative decision from the public agency regarding the regulation's application to the owner's property. (*Hensler*, *supra*, 8 Cal.4th at pp. 10–11.)

***5** The owner also must seek judicial review of that administrative decision through a petition for writ of administrative mandamus.[4] (*Hensler*, *supra*, 8 Cal.4th at pp. 13–14.) Only after exhausting these administrative and judicial remedies may a property owner seek compensation through an inverse condemnation claim. (*Jefferson Street Ventures, LLC v. City of Indio* (2015) 236 Cal.App.4th 1175, 1194.) "This requirement is jurisdictional and not a matter of judicial discretion." (*Ibid.*)

As explained in *Hensler*, the reason a taking claim cannot be allowed unless the landowner first challenges the governmental action is to give the agency warning and an " 'early opportunity' " to change a decision for which compensation may be required. (*Hensler*, *supra*, 8 Cal.4th at p. 27.) " 'If no such early opportunity were given, and instead, persons were permitted to stand by in the face of administrative actions alleged to be injurious or confiscatory, and three or five years later, claim monetary compensation on the theory that the administrative action resulted in a taking for public use, meaningful governmental fiscal planning would become impossible.' " (*Id.* at pp. 27–28, quoting *Patrick Media Group, Inc. v. California Coastal Com.* (1992) 9 Cal.App.4th 592, 612.)

As noted above, 1049 Market withdrew its administrative appeal to the initial suspension. The record indicates 1049 Market did so following a meeting with the City regarding future use of the building. According to the City, it believed 1049 Market intended to seek a "letter of determination" from the City regarding the possible conversion of unpermitted live/work units to permitted live/work units. But no such request was ever received by the City following the meeting. Nor was there any further communication between the parties. Instead, almost one year later, 1049 Market requested the City either reinstate or revoke the permit. The City reinstated the permit shortly thereafter.

Apart from this one communication, 1049 Market did not otherwise contest the then-ongoing permit suspension. 1049 Market could have attempted to pursue administrative remedies with the Board regarding the delay. (See Rules of the Board of Appeal, art. V, § 1; S.F. Bus. & Tax Reg. Code, art. 1, § 30.) It did not do so. 1049 Market's decision to withdraw its administrative appeal well prior to achieving the requested permit reinstatement, its suggestion to the City that it would seek a "letter of determination" to legalize the live/work units, and its subsequent inaction for almost a year cannot reasonably constitute exhaustion. To the contrary, 1049 Market's position runs directly afoul of *Hensler*—namely, governmental entities must be given fair warning and an opportunity to correct its position before a taking claim can arise. (*Hensler*, *supra*, 8 Cal.4th at pp. 27–28.) We therefore conclude 1049 Market failed to exhaust its administrative remedies in connection with the initial suspension, and cannot pursue a taking claim related to the period of delay between the permit's initial suspension on October 28, 2013, and its reinstatement by the City on February 2, 2015.[5]

***6** While 1049 Market failed to exhaust its administrative remedies as to the initial permit suspension, it successfully exhausted administrative remedies as to any additional delay caused by the Board's decision to re-suspend the permit following the tenants' administrative appeal of the City's reinstatement of the permit. 1049 Market properly raised its taking claims with the Board in opposition to the tenants'

appeal of the permit reinstatement, requested a rehearing following the Board's adverse decision, and then filed the instant writ proceeding after the Board denied rehearing. Thus, as to the period after the Board sustained the tenants' appeal on April 8, 2015, 1049 Market duly exhausted its administrative and judicial remedies. (See *Hensler*, *supra*, 8 Cal.4th at pp. 10–14.)

2. *1049 Market Cannot Assert a Regulatory Taking Claim as to the Board's Revocation of the Permit Because Its Claim Is Not Ripe*

In its supplemental brief, filed at the request of this court, 1049 Market contends its taking claim is not ripe because the trial court reversed the permit revocation and remanded the issue to the Board for further consideration. As a result of this remand, 1049 Market argues there is no final administrative decision regarding the permit. The City, in its supplemental brief, agrees 1049 Market's taking claim is not ripe. We concur.

In the context of regulatory takings, exhaustion and ripeness are related concepts. While 1049 Market exhausted all available administrative remedies as to the Board's decision to revoke the permit (see part II.A.1., *ante*), a claim " 'is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.' " (*Hensler*, *supra*, 8 Cal.4th at p. 10.) The purpose of ripeness is to ensure a court can understand how the regulations will be applied in order to determine whether a compensable taking has occurred. (*Ibid.*)

Here, the record illustrates the status of the permit is far from resolved. In the pending dispute, the trial court reversed the Board's decision to revoke the permit, and remanded the issue to the Board for further consideration. Then, following passage of the Permanent Controls and shortly after the trial court's remand, the City re-revoked the permit pursuant to the Permanent Controls. That revocation resulted in additional litigation between the parties, including (1) an appeal by 1049 Market to the Board contesting the permit revocation pursuant to the Permanent Controls; (2) a petition for writ of mandate to enjoin the City from enforcing the Permanent Controls (Super. Ct. S.F. City & County, case No. CPF–16–515046); (3) a complaint for damages due to revocation of the permit (Super. Ct. S.F. City & County, case No. CGC–17–559890); and (4) a petition for writs of administrative mandamus or mandate contesting the Board's subsequent denial of 1049 Market's appeal from the permit revocation based on the Permanent Controls (Super. Ct. S.F. City & County, case No. CPF–17–515754). In addition, 1049 Market applied for a conditional use authorization permit pursuant to the Permanent Controls, which appears to still be pending.

Until these matters are finally resolved, we cannot know the pivotal facts bearing on 1049 Market's delay-based regulatory taking claim, namely, how long a delay it will have endured and what legal constraints and economic consequences it will have suffered during that period. (See *Landgate, Inc. v. California Coastal Com.*, *supra*, 17 Cal.4th at p. 1018 [" 'factors [bearing on whether taking has occurred] simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue' "].) Consequently, any taking claim arising from the Board's revocation of the permit is not yet ripe.

3. *1049 Market Has Not Alleged Facts Supporting a Physical Taking Claim as to the Board's Permit Revocation*

***7** 1049 Market also contends the permit revocation created lifetime tenancies, resulting in a permanent physical taking. Here, 1049 Market claims it can neither evict those tenants residing in unpermitted units, nor collect rent from them because doing so would violate state law prohibiting the collection of rent for unauthorized residential units. The facts, however, do not support such a conclusion.

A physical taking, as compared to a regulatory taking, occurs when the government "causes" or " 'authorizes' " a physical invasion of private property. (*Hensler*, *supra*, 8 Cal.4th at p. 9.) This includes "requir[ing] an owner to suffer a 'permanent physical invasion' of his property." (*Allegretti & Co. v. County of Imperial* (2006) 138 Cal.App.4th 1261, 1270.) Such physical takings may occur where " 'real estate is actually invaded by ... other material' "; "flooding results in an ' " actual, permanent invasion of the land" ' "; "telephone lines, rails and underground pipes or wires are placed above or below an owner's property"; or "the government causes frequent aircraft flights immediately above an owner's property." (*Id.* at p. 1272.) The unifying theme among these examples is the government physically taking possession of an interest in the property. (*Id.* at p. 1273; *NJD, Ltd. v. City of San Dimas* (2003) 110 Cal.App.4th 1428, 1435.)

1049 Market's inability to collect rent was not caused by the City's permit revocation, but rather by the original creation of unpermitted live/work units. 1049 Market was

well aware of the residential tenants, the unpermitted live/work units, and the 2007 NOV prior to purchasing the property, and it continued to rent those unpermitted units to residential tenants after purchasing the property. Nor has 1049 Market demonstrated that it has been compelled to continue the residential tenancies at issue. Rather, 1049 Market is proceeding with Ellis Act evictions without interference by the City. In considering these facts, we conclude 1049 Market has not been required to provide uncompensated residential tenancies, but rather its inability to collect rent is a consequence of its and the prior owner's decision to rent units to residential tenants without obtaining the necessary permit for the conversion. It is not a consequence of any delay associated with the Board's permit revocation. Accordingly, the City has not "physically" intruded upon 1049 Market's property.

C. *Vested Interest Claim*

1049 Market asserts the City violated its "vested right" in the demolition permit when the Board sustained the tenants' administrative appeal from the City's release of the suspension. 1049 Market claims a vested right in the permit because it expended over $325,000 in tenant relocation payments and costs related to defending against the subsequent wrongful eviction lawsuit. We disagree.

To obtain a vested right in a construction permit, a property owner must have "performed substantial work and incurred substantial liabilities in good faith reliance" upon that permit. (*Avco Community Developers, Inc. v. South Coast Regional Com.* (1976) 17 **Cal**.3d 785, 791.) Courts have generally held "substantial work" and "substantial liabilities" reference actual work performed in connection with the permit. (See, e.g., *Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach* (2001) 86 Cal.App.4th 534, 552 ["no right to develop vests until all final discretionary permits have been authorized and significant 'hard costs' have been expended in reliance on those permits—that is, until substantial construction has occurred in reliance on a building permit"]; *San Diego Coast Regional Com. v. See the Sea, Limited* (1973) 9 **Cal**.3d 888, 890 [permit rights vested "for builders performing substantial lawful construction of their projects" prior to change in law]; *County of San Diego v. McClurken* (1951) 37 **Cal**.2d 683, 691 ["If an owner has legally undertaken the construction of a building before the effective date of a zoning ordinance, he may complete the building and use it for the purpose designed after the effective date of the ordinance."].)

***8** Conversely, preparatory work generally will not give rise to a vested right. (See, e.g., *Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach*, *supra*, 86 Cal.App.4th at p. 553 [services of engineers, consultants, and legal advisors, and other preparatory work, are not "hard" construction costs]; *Aries Dev. Co. v. **California** Coastal Zone Conservation Com.* (1975) 48 Cal.App.3d 534, 551 ["Demolition of the structure and rough grading were merely preparatory work and, hence, did not constitute construction" that would give rise to a vested right].)

A leading treatise explains: "The vested rights rule requires that the government agency exercise its final discretion to issue a grant of authority or permit which specifically describes a particular approval or work of improvement. Thereafter, if the developer *begins to perform the work described in the grant or permit*, he or she may acquire a vested right to complete the specific and particular work that is described. The grant or permit does not give any rights to complete any work not specifically described." (7 Miller & Starr, **Cal**. Real Estate (4th ed. 2017) § 21:28, pp. 21–181, original italics omitted, italics added, fn. omitted.) Here, 1049 Market did not begin the work described in the permit**.**

Neither *Palacio* nor *Congregation ETZ Chaim*, the two cases cited by 1049 Market, suggest the eviction costs identified by 1049 Market create a vested interest in its permit. (See, e.g., *Palacio de Anza v. Palm Springs Rent Review Com.* (1989) 209 Cal.App.3d 116, 119–120 [discussing vested land-use rights created by ordinance]; *Congregation ETZ Chaim v. City of Los Angeles* (9th Cir. 2004) 371 F.3d 1122, 1125 [holding plaintiff had vested right in building permit because it began construction and incurred substantial liabilities].) Nor are we aware of any such authority. As such, we decline to expand the vested rights doctrine to encompass the types of tenant removal costs 1049 Market has incurred here.

III. DISPOSITION

1049 Market's appeal from the trial court's CEQA ruling is dismissed as moot. We affirm the judgment as to 1049 Market's taking claim based on the initial suspension and subsequent delay in reinstating the permit on the sole ground 1049 Market failed to exhaust administrative remedies. We affirm the judgment as to 1049 Market's regulatory taking claim based on the delay following the Board's revocation of the permit on the sole ground that the claim is not ripe. We also affirm the judgment as to the physical taking claim based on

the delay following the Board's revocation of the permit and as to 1049 Market's vested rights claim. The parties shall bear their own costs on appeal. (**Cal**. Rules of Court, rule 8.278(a)(3).)

We concur:

Humes, P.J.

Banke, J.

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Footnotes

1 On July 10, 2017, 1049 Market filed an unopposed request for judicial notice of San Francisco Planning Code section 306.7. On December 5, 2017, 1049 Market filed a supplemental letter brief, in which it requested we take judicial notice of the City's re-revocation of the permit, its administrative appeal, its subsequent petition for writ of mandate, and two related superior court cases. The City has not opposed this request. We hereby grant these requests for judicial notice.

2 We note two of the three members of 1049 Market are the children of one of the prior owners of the property.

3 The trial court also suggested 1049 Market's failure to exhaust administrative remedies as to the initial suspension carried a res judicata effect. We disagree. 1049 Market's withdrawal of its appeal did not result in the suspension becoming finalized, and the permit was subsequently reinstated. 1049 Market is thus not precluded by the doctrine of res judicata from raising its claims. (See *Mola Development Corp. v. City of Seal Beach* (1997) 57 Cal.App.4th 405, 407 [when dismissal of administrative appeal "allow[s] the administrative decision to achieve finality," then that decision has preclusive effect].)

4 Mandamus challenges may be combined with a complaint for inverse condemnation. (*Hensler*, *supra*, 8 **Cal**.4th at pp. 14–16.)

5 Unlike regulatory takings, physical takings generally are not subject to the administrative exhaustion requirement. (*Hurwitz v. City of Orange* (2004) 122 Cal.App.4th 835, 846–847.) As the court in *Hensler* explained, "When property is damaged, or a physical invasion has taken place, an inverse condemnation action may be brought immediately because an irrevocable taking has already occurred." (*Hensler*, *supra*, 8 **Cal**.4th at p. 13.) Here, however, 1049 Market's physical taking claim derives from the City's actions with regard to its permit application. Because no regulatory taking claim will lie as to this initial suspension period due to failure to exhaust, we do not see how a derivative physical taking claim could nevertheless proceed absent exhaustion.