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CASE NOS. G060835, G060842, G061107, G061108, G061116 & G061117

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION THREE**

CALIFORNIANS FOR HOMEOWNERSHIP, INC., CALIFORNIA RENTERS LEGAL ADVOCACY AND EDUCATION FUND and THDT INVESTMENT, INC.

Respondents and Cross-Appellants,

v.

CITY OF HUNTINGTON BEACH

Appellant and Cross-Respondent.

RESPONDENTS' AND CROSS-APPELLANTS' MOTION TO DISMISS FOR LACK OF JURISDICTION

On Appeal From the Superior Court for the State of California, County of Orange, Case Nos. 30-2019-01107760-CU-WM-CJC and 30-2020-01140855-CU-WM-CJC, Honorable Deborah Servino

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MOTION TO DISMISS FOR LACK OF JURISDICTION

Respondents and Cross-Appellants Californians for Homeownership, Inc., California Renters Legal Advocacy & Education Fund, and THDT, Inc. (collectively "Plaintiffs") hereby move this Court to dismiss each of the six related appeals filed by Appellant and Cross-Respondent City of Huntington Beach (hereafter "the City"). This motion is based on the attached Memorandum of Points and Authorities, the declaration of Lisa Ells and exhibits attached thereto, and the pleadings, papers, and records in each of the City's appeals.

MEMORANDUM OF POINTS AND AUTHORITIES

In this case under the Housing Accountability Act ("HAA"), Government Code section 65589.5, the City of Huntington Beach (hereafter "the City") has filed several defective appeals in a transparent effort to avoid compliance with the trial court's November 8, 2021 judgment. The City first appealed from an unappealable order denying a motion for reconsideration, before the trial court entered judgment. This procedural misstep was not an accident. The City admitted on the record that it *deliberately* chose to appeal a non-final, pre-judgment order based on a theory that the HAA requires the posting of an appeal bond only in appeals from judgments, not in appeals from mere "orders." The City then ignored the writ of mandate issued by the trial court requiring the City's compliance within 60 days and fought tooth and nail to persuade both the trial court and this Court that its patently defective appeal automatically stayed the judgment and relieved the City of its obligation to comply. Both courts properly denied these requests for extraordinary relief.

Now, 93 days after the trial court entered judgment, the City has decided that it wants to appeal that judgment after all, along with the writ of mandate itself, in a desperate effort to avoid the substantial penalties it faces under the HAA for failing to comply with the trial court's writ. All six of the City's appeals must be dismissed for lack of jurisdiction because they are patently defective, untimely, or both.

STATEMENT OF FACTS

Petitioner Californians for Homeownership, Inc. ("Californians") initiated this matter on October 28, 2019 by filing a Petition for Writ of Mandate alleging that the City of Huntington Beach violated the HAA, Government Code section 65589.5, by disapproving a multi-family housing project that would provide 48 homes in an area that the City itself has

designated for multi-family housing. (See 10/28/2019 Petition, Ex. A 1:7-25.) On April 6, 2020, Californians filed an Amended Petition. Petitioners California Renters Legal Advocacy and Education Fund and THDT Investment, Inc., filed a Petition for Writ of Mandate on May 26, 2020 and an Amended Petition for Writ of Mandate on August 12, 2020, alleging similar claims. (See 05/26/20 Petition, Ex. B 1:26-62.)[1]

The trial court initially denied the Petitions and entered judgment in favor of the City, but subsequently vacated that judgment on Plaintiffs' motion relying on the September 10, 2021 decision in *California Renters Legal Advocacy & Education Fund v. City of San Mateo* (2021) 68 Cal.App.5th 820 ("*California Renters*"), which interpreted the HAA. (See 10/04/21 Vacatur Order, Exs. E-F 1:109-16.)[2] The trial court's vacatur order did not grant the Petitions—it simply vacated the August 11 judgment and reopened the proceedings to determine the proper terms of a new judgment. (*Id.*)

On October 4, 2021, the trial court issued a separate minute order and proposed statement of decision for the parties to consider, in which the court explained its proposed reasoning for granting the Petitions. (10/04/21 Minute Order and Proposed SOD, Exs C-D 1:63-108) On October 11, 2021, the City moved for reconsideration of "the Proposed Statement of

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[1] Californians for Homeownership, Inc., California Renters Legal Advocacy and Education Fund, and THDT Investment, Inc. are collectively referred to as "Plaintiffs." The trial court proceeding initiated by Californians for Homeownership, Inc. is referred to as the "Californians Action," while the trial court proceeding initiated by California Renters Legal Advocacy & Education Fund and THDT, Inc. is referred to as the "CaRLA Action."

[2] Because the pleadings and orders in the two trial-level proceedings were functionally identical in almost all instances, they are referred to herein in the singular, with a citation to the operative documents from both cases, unless a distinction is specifically noted.

Decision." (10/11/21 Reconsideration Mot., Exs. G-H at 1:122-23, 1:204-05.)

The trial court filed a formal Statement of Decision on October 21, 2021, in which it concluded, consistent with subdivision (f)(4) of the HAA and the recent binding precedent in *California Renters*, that there was substantial evidence from which a reasonable person could conclude that the project at issue in the Petition met all applicable objective development standards. (10/21/21 SOD, Exs. I-J 2:282-327.) The court then correctly concluded, consistent with subdivision (j)(1) of the HAA, that the City's findings did not meet the City's burden of proving by a preponderance of the evidence that the project posed a significant and unavoidable public health impact. (*Id.*.) Four days later, on October 25, 2021, the court issued a minute order denying the City's motion for reconsideration. (10/25/21 Minute Order, Exs. K-L 2:328-36)

On November 3, 2021, the City objected to a Proposed Judgment Granting Peremptory Writ of Mandate that Plaintiffs had filed on November 1. (11/3/21 Objs. to Prop. Judgment, Exs. O-P 2:347-54; 11/1/21 Prop. Judgment, Exs. M-N 2:337-46.) The City objected on the grounds of alleged inconsistencies between the proposed judgment and "[t]he Statement of Decision issued by this Court." (11/3/21 Objs., Exs. O-P at 2:349, 2:353.) Instead of asking the court to revise the proposed judgment, however, the City explained that it planned to "appeal the Order granting the Writ of Mandate" and therefore asked the trial court not to enter any judgment at all. (*Id.*) The City then immediately filed a Notice of Appeal in which it purported to appeal from a "Notice of Entry of Trial Court's Order" dated "10/25/21." (11/3/21 NOA, Exs. Q-R 2:355-60.) In the CaRLA Action, no document fitting this description was filed on October 25. (See CaRLA docket, Ex. VV at 3:912.) In the Californians Action, Californians had served notices of entry of three different orders on

that date. (See Californians docket, Ex. UU at 3:893.) No exhibits were attached to the City's Notice of Appeal. (11/3/21 NOA, Exs. Q-R 2:355-60.)

The trial court entered judgment in favor of Plaintiffs on November 8, 2021, five days after the City appealed from the "Notice of Entry of Trial Court's Order" dated "10/25/21." (11/8/21 Judgment, Exs. S-T 2:361-68; 11/3/21 NOA, Exs. Q-R 2:355-60.) In its judgment, the trial court stated that, upon payment of the fee required for issuance of a writ of mandate, it would issue a writ ordering the City to "[t]ake action on the applications for the Project in a manner that complies with the [HAA]." (11/8/21 Judgment, Exs. S-T at 2:363, 2:367.)

Plaintiffs served the City with a notice of the judgment on November 9, 2021. (11/9/21 Notice, Exs. U-V 2:369-82.) The City responded three days later by moving to stay the judgment during the pendency of its November 3 appeals. (11/12/21 Mot. to Stay, Exs. W-X 2:383-414.) Before the trial court could rule on this motion, the City filed a separate motion to vacate the judgment under Code of Civil Procedure section 473(d) on the sole ground that it had been entered after the City filed its November 3 appeals and therefore is purportedly "void." (12/9/21 Mot. to Vacate, Exs. AA-BB, 2:423 – 3:606.) Shortly thereafter, on December 9, 2021, the trial court issued the Writ of Mandate described in its November 8 judgment. (12/9/21 Writ, Exs. Y-Z 2:415-22.) Plaintiffs served the Writ on the City the following day. (12/10/21 Proof of Service, Exs. KK-LL, 3:843-48.) The Writ required the City to "take action on the applications for the Project in a manner that complies with the Housing Accountability Act, Government Code Section 65589, et seq.," and to do so within 60 days. (12/9/21 Writ, Exs. Y-Z, 2:416, 2:420.)[3]

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[3] The relevant provisions of the HAA limit local agencies' discretion to

On December 10, the City filed an ex parte application to shorten time on its December 9 motion to vacate the judgment. In this application, the City acknowledged that, in order to obtain a stay on the judgment and postpone its obligation to comply with the Writ, the City would need to "file a second notice of appeal of the Judgment by January 9, 2021." (12/10/21 Ex Parte App., Exs. CC-DD 3:613, 3:706.) But the City did not want to appeal the judgment, it explained, because "[i]f appealing a judgment, even where the judgment is void, the City will be required to post a bond pursuant to Government Code § 65589.5(m)."[4] (*Id.* at 3:609, 3:702.) The City argued that it would be "irreparably harmed," if it were "forced to file a Notice of Appeal of the Judgment on the same issues

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deny applications for proposed housing development projects that "compl[y] with applicable, objective general plan, zoning, and subdivision standards and criteria, including design review standards, in effect at the time that the application was deemed complete." (Gov. Code, § 65589.5, subd. (j)(1).) A local agency may not, inter alia, "disapprove" such a project unless it issues written findings, supported by a preponderance of the evidence in the record, that the project would have a "specific, adverse impact upon the public health or safety" within the meaning of the statute. (*Id.*) § 65589.5, subd. (j)(1)(A). The HAA separately permits local agencies to disapprove housing development projects without making the findings required by subdivisions (j)(1)(A)-(B) where the local agency has, within a specific timeframe, provided the project applicant with written documentation identifying all applicable, objective planning, zoning, and subdivision standards with which it considers the project to be non-compliant, along with an explanation of the reason or reasons it considers the project to be inconsistent with those standards. (*Id.* § 65589.5, subd. (j)(2).)

[4] Subdivision (m) of section 65589.5 states, in relevant part, that "[i]f the local agency appeals the judgment of the trial court, the local agency shall post a bond, in an amount to be determined by the court, to the benefit of the plaintiff if the plaintiff is the project applicant." Plaintiffs do not concede the City's position that subdivision (m) absolves cities of the obligation to post an appeal bond when they appeal something other than a judgment.

encompassed by the first Notice of Appeal of the Court's Order." (*Id.*).

The trial court denied the City's ex parte application on December 13, 2021, explaining, among other things, that the City's November 3 appeals were defective because the City had not appealed from an appealable order. (12/13/21 Minute Order, Exs. GG-HH 3:810, 4:814.) The next day, on December 14, 2021, the City filed a document in the trial court titled "Amendment to Motion to Vacate the Judgment as Void," in which it argued, again, that it would face "extreme prejudice and irreparable harm by having to file two appeals, and post bond on the second appeal that is based on a void Judgment." (12/14/21 Amendment to Mot. to Vacate, Exs. II-JJ 4:817, 4:831.) The City's vacatur motion remains pending in the trial court and is scheduled for a hearing on April 15, 2022. (See Dockets, Exs. UU-VV, 4:901, 4:922.)

Instead of filing a timely appeal of the judgment and posting the required appeal bond, as the City knew it needed to do in order to avoid complying with the trial court's writ within 60 days of December 9, 2021, the City instead filed a lengthy Petition for Writ of Supersedeas in this Court on January 11, 2022, which was properly denied. On February 9, 2022, the day after the City's deadline to comply with the trial court's writ expired, Plaintiffs filed a motion to impose non-compliance penalties on the City pursuant to Government Code section 65589.5, subdivision (k)(1)(B).[5]

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[5] Subdivision (k)(1)(B) states, in relevant part, that "Upon a determination that the local agency has failed to comply with the order or judgment compelling compliance with this section within 60 days issued pursuant to subparagraph (A), the court shall impose fines on a local agency that has violated this section and require the local agency to deposit any fine levied pursuant to this subdivision into a local housing trust fund. The local agency may elect to instead deposit the fine into the Building Homes and Jobs Trust Fund. The fine shall be in a minimum amount of ten thousand dollars ($10,000) per housing unit in the housing development project on the date the application was deemed complete pursuant to Section 65943.

(2/9/22 Mot. for Noncompliance Penalties, Exs., SS-TT 4:869-82.) The City responded the same day by filing two notices of appeal: one from the November 8 judgment and the other from the December 9 writ of mandate. (2/9/22 NOA-Judgment, Exs. OO-PP 4:857-62; 2/9/22 NOA-Writ, Exs. QQ-RR 4:863-68.) This Court consolidated all of the City's related appeals on March 16, 2022.

ARGUMENT

I. THE CITY'S NOVEMBER 3, 2021 APPEALS MUST BE DISMISSED BECAUSE THE CITY INTENTIONALLY APPEALED AN UNAPPEALABLE ORDER.

Appeals No. G080835 and G060842 (the "November 3 Appeals") are both appeals from unappealable, pre-judgment orders. The City deliberately chose not to wait and appeal from the judgment, apparently thinking that if it instead appealed from a pre-judgment order, it would not have to post the appeal bond required by Government Code Section 65589.5, subdivision (m). Subdivision (m) requires a city to post a bond in an amount set by the trial court if it desires to appeal a judgment under the HAA in favor of the project applicant. (*Id.*) This Court should not exercise its discretion to construe the City's defective appeal as an appeal from the judgment, as doing so would undermine the rule requiring parties to appeal only from final judgments and would reward the City for its transparent attempt to evade its statutory obligation.

A. The November 3 Appeals are Defective.

The City has continually changed its characterization of what exactly it appealed in its November 3 Notices of Appeal, but however the appeals

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In determining the amount of fine to impose, the court shall consider the local agency's progress in attaining its target allocation of the regional housing need pursuant to Section 65584 and any prior violations of this section." (Gov. Code § 65589.5, subd. (k)(1)(B).)

are characterized, they are invalid appeals of unappealable orders. On November 3, 2021, five days before the trial court entered judgment in favor of Plaintiffs, the City filed a Notice of Appeal in each case in which it purported to appeal from a "Notice of Entry of Trial Court's Order" dated "October 25, 2021." (See 11/3/21 NOA, Exs. Q-R 2:355-60; 11/8/21 Judgment, Exs. S-T 2:361-68.) In the CaRLA matter, no such document was filed on October 25. (See CaRLA docket, Ex. VV at 3:912.) In the Californians matter, notices of entry of three different orders were filed on October 25. In the Californians Action, Californians had served notices of entry of three different orders on that date. (See Californians docket, Ex. UU at 3:893.) None of these notices of entry would be appealable even if the City had adequately identified them. (See *Shpiller v. Harry C's Redlands* (1993) 13 Cal.App.4th 1177, 1178 ("*Shpiller*") [dismissing appeal from a "notice of ruling" because "[a] 'notice of ruling' is not an appealable judgment or order"].)

The City's subsequent filings in this Court identify at least three more interlocutory "orders" that it variously claims to be appealing. In its December 14, 2021 Civil Case Information Statements, the City described the target of its November 3 appeals as "10/25/21 Minute Order adopting October 4, 2021 Order" and attached two documents: (1) an October 25 minute order that did not "adopt" anything but rather denied the City's motion for reconsideration, and (2) the trial court's October 4 "Proposed Statement of Decision." Neither of these is appealable either.

The October 25 minute order denying the City's motion for reconsideration cannot be appealed in its own right. (See Code Civ. Proc., § 1008, subd. (g) [denial of motion for reconsideration "not separately appealable"]; *Mack v. All Counties Trustee Services, Inc.* (2018) 26 Cal.App.5th 935, 937, fn. 1 [same]; *Powell v. County of Orange* (2011) 197 Cal.App.4th 1573, 1576 ["The first reason for dismissing the appeal is that

an order denying a motion for reconsideration is not appealable."].) Nor is the October 25 minute order appealable in connection with the October 4 "order" attached to the City's Civil Case Information Statements, which is not an order at all but rather a "Proposed Statement of Decision" that is not independently appealable under Code of Civil Procedure section 904.1. (See *Alan v. American Honda Motor Co., Inc.* (2007) 40 Cal.4th 894, 901 ["The general rule is that a statement or memorandum of decision is not appealable" and "a statement of decision is not treated as appealable when a formal order or judgment does follow, as in this case."].) In any event, the October 4 Proposed Statement of Decision was not mentioned or even hinted at in the City's November 3 Notices of Appeal. (11/3/21 NOA, Exs. Q-R 2:355-60; Rules of Court, rule 8.100(a)(2) [notice of appeal must "identif[y] the particular judgment or order being appealed"]; *Rudick v. State Bd. of Optometry* (2019) 41 Cal.App.5th 77, 89 ["Despite the rule favoring liberal interpretation of notices of appeal, a notice of appeal will not be considered adequate if it completely omits any reference to the judgment being appealed."], *quoting Shiver, McGrane & Martin v. Littell* (1990) 217 Cal.App.3d 1041, 1045.)

The City's January 31, 2022 reply brief in support of its unsuccessful supersedeas petition identifies a fourth interlocutory order that it claims to be appealing: the trial court's October 4, 2021 minute order vacating the prior judgment in favor of the City. Like the Proposed Statement of Decision the City listed in its case information statements, this order was not listed or even hinted at in the City's November 3, 2021 Notices of Appeal, which purported to challenge a "Notice of Entry of Trial Court's Order" dated "10/25/21." Indeed, the City did not identify the October 4 vacatur order as the target of its November 3 Appeals until late January 2022, more than a month after its 60-day deadline to appeal the October 4 vacatur order lapsed. (See Rules of Court, rule 8.104(a).) The

City's attempt to relabel the November 3 Appeals as challenges to the vacatur order is simply the latest chapter in its ongoing attempt to evade its statutory obligation to post an appeal bond. This Court should not give credence to the City's multiple post-hoc attempts to recharacterize the target of its appeals. (See, e.g., *Rudick*, *supra*, 41 Cal.App.5th at p. 89 ["Despite the rule favoring liberal interpretation of notices of appeal, a notice of appeal will not be considered adequate if it completely omits any reference to the judgment being appealed."].)

Even if the City *had* appealed the order it now claims it did, the November 3 Appeals would still be defective. The City has previously argued that the October 4 vacatur order is appealable under Code of Civil Procedure section 904.1, subdivision (a)(2), because it is "an order made after a judgment." But "[a] postjudgment order is not appealable under subdivision (a)(2) of section 904.1 if, 'although following an earlier judgment, [the order is] more accurately understood as being preliminary to a later judgment, at which time [it] will become ripe for appeal.'" (*Concerned Citizens Coalition of Stockton v. City of Stockton* (2005) 128 Cal.App.4th 70, 80 [quoting *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 652, brackets in original].) That is precisely the case here. The trial court's vacatur order did not enter a new judgment in favor of Plaintiffs. Rather, it simply vacated the earlier judgment in favor of the City and reopened the case for further proceedings to determine the precise terms of a new judgment, which the Court subsequently entered on November 8, 2021. (See 10/4/21 Vacatur Order; 11/3/21 Objs. to Proposed Judgment; 11/8/21 Judgment.) The vacatur order is therefore "more accurately understood as being preliminary to a later judgment," rather than as an order that followed an earlier judgment for purposes of Section 904.1(a)(2). As a result, it would not be appealable even if it had been identified in the City's November 3 notices of appeal.

B. Government Code Section 65589.5(m) Does Not Separately Confer Jurisdiction Over the November 3 Appeals.

The City may claim, as it did in its unsuccessful Petition for Writ of Supersedeas, that Government Code section 65589.5, subdivision (m) authorizes interlocutory appeals that would otherwise be impermissible under ordinary rules of appellate jurisdiction. It does not. Subdivision (m) states that "upon entry of the trial court's order, a party may . . . appeal the judgment or order of the trial court *under Section 904.1 of the Code of Civil Procedure*." (Gov. Code, § 65589.5, subd. (m), italics added.) Section 904.1, in turn, provides a very specific list of the sorts of orders that may be appealed—and neither proposed statements of decision, vacatur orders preliminary to a later judgment, nor orders denying motions for reconsideration are among them. Subdivision (m) unambiguously incorporates this narrow list of appealable orders by reference.

Even if the Legislature had *not* made it clear that the reference to "orders" in subdivision (m) is limited to orders that are *also* appealable under Section 904.1, The City's interpretation of the HAA is also untenable in light of the requirement that exceptions to the final-judgment rule be construed narrowly. (See *In re Baycol Cases I & II* (2011) 51 Cal.4th 751, 756-57 ("*In re Baycol Cases*").) The City's suggestion that the HAA *implicitly* expands the availability of interlocutory appeals to *any* "order" issued in an HAA proceeding is fundamentally at odds with the rule that "exceptions to the one final judgment rule should not be allowed unless clearly mandated." (*Id.* at p. 757, quoting *Kinoshita v. Horio* (1986) 186 Cal.App.3d 959, 967 ("*Kinoshita*").)

Because the November 3 Appeals fail to challenge an appealable order, this Court must dismiss them for lack of jurisdiction.

C. This Court Should Not Construe the City's Bad-Faith November 3 Appeals as Appeals From the Judgment Because the City *Deliberately* Chose Not to Appeal the Judgment.

Although this Court has some discretion to construe a premature appeal from a non-final order as an appeal from the judgment, see Rules of Court, rule 8.104(d), it should not do so in this case because the City *deliberately* avoided appealing from the judgment in a transparent attempt to evade its obligation to post an appeal bond under Government Code section 65589.5, subdivision (m). (See 12/10/21 Ex Parte App., Exs. CC-DD 3:613, 3:706 [admitting that the City chose to appeal from an interlocutory order instead of the judgment because it did not want to post an appeal bond].) The City's strange gimmick is fatal to its appeal because the "one final judgment rule" is a fundamental limit on appellate jurisdiction that can only be avoided where a statute "clearly" expands the appellate court's jurisdiction, or where there is good cause for the court to exercise its discretionary saving power. (See *In re Baycol Cases*, *supra*, 51 Cal.4th at p. 757, quoting *Kinoshita*, *supra*, 186 Cal.App.3d at p. 967; *Shpiller*, *supra*, 13 Cal.App.4th at p. 1179 [explaining that "it is no longer this court's policy to 'save' erroneous appeals"].)

The purpose of the final judgment rule is to "reduce[] the ability of litigants to harass opponents and to clog the courts through a succession of costly and time-consuming appeals." (*In re Baycol Cases*, *supra*, 51 Cal.4th at p. 756, quoting *Flanagan v. United States* (1984) 465 U.S. 259, 264.) Courts must proceed with caution when applying exceptions to the rule, the Supreme Court has advised, because "[e]very exception … forges another weapon for the obstructive litigant[.]" (*Id.* at p. 757; see also *Kinoshita*, *supra*, 186 Cal.App.3d at p. 967 [warning that "[a] right to an interlocutory appeal permits a party who benefits from delay to frustrate the goals of promptness and certainty of adjudication"].)

Consistent with the goal of limiting bad-faith appeals by parties who seek to "benefit from delay," courts deciding whether to "save" a premature appeal from a non-final order often consider the appellant's intent and culpability for the error. In one widely cited case, for example, the Supreme Court noted that the appellant had "presented a colorable argument that she *intended* to appeal from the underlying judgment" instead of a subsequent, non-appealable order denying her motion for a new trial. (See *Walker v. Los Angeles County Metropolitan Transportation Authority* (2005), 35 Cal.4th 15, 21 [italics added].) Where "it is reasonably clear the appellant intended to appeal from the judgment," the Court held, "a reviewing court should construe a notice of appeal from an order denying a new trial to be an appeal from the underlying judgment." (*Id*. at p. 22.)

Courts are less forgiving where an appellant appears to be acting in bad faith. In *Hill v. City of Long Beach* (1995) 33 Cal.App.4th 1684, 1695, the court dismissed an appeal from an interlocutory order sustaining a demurrer even though the trial court had failed to enter a properly appealable final judgment, reasoning that the appellant had objected to the entry of final judgment and therefore created the finality problem it was now asking the court to overlook. "While our discretion might be properly exercised when an appellant finds himself without an appealable order because of simple inadvertence or mistake," the *Hill* court explained, "extricating [the appellant] from a problem of his own making is not a proper exercise of our discretion." (*Id.*)

Here, as in *Hill*, the City purposefully created its own jurisdictional problem with respect to the November 3 Appeals and this Court should not bend over backwards to save those defective appeals. Plaintiffs and the trial court each notified the City in mid-December that it had appealed from a non-final order. (12/13/21 Minute Order, Exs. GG-HH 3:810, 3:813;

12/10/21 Opp. Brief, Exs. EE-FF 3:798, 3:805.) But the City did not respond by promptly taking the obvious and necessary step to cure this problem by filing a proper notice of appeal from the November 8 judgment. (See *Good v. Miller* (2013) 214 Cal.App.4th 472, 476 [dismissing appeal from nonappealable order where the appellant received ample notice of the defect but declined to correct it].) Instead, the City filed a series of bizarre motions in the trial court in which it admitted that it was *deliberately avoiding* appealing from the judgment because it wanted to evade its obligation to post an appeal bond by appealing from one or more unappealable interlocutory orders.

On December 10, 2021, for example, the City represented to the trial court that that it would be irreparably harmed if it were "forced" to file a notice of appeal from the judgment, because doing so would trigger its obligation to post an appeal bond under Government Code section 65589.5(m). "Pursuant to the Notice of Entry of the Judgment," the City represented, "the City must file a second notice of appeal of the Judgment by January 9, 2021. The City will be irreparably harmed if it files a Notice of Appeal on the same issues encompassed by the first Notice of Appeal, since this time, it will be required to post a bond pursuant to Government Code § 65589.5(m)." (12/10/21 Ex Parte App., Exs. CC-DD 3:613, 3:706.) In addition to admitting that it intentionally chose not to appeal the judgment, the City's December 10, 2021 filing also shows that the City was *fully aware* of the fact that its defective November 3 Appeals did not automatically stay the judgment and that the City would need to file a proper appeal from the judgment by January 9, 2022 if it wanted to obtain a stay.

On December 13, 2021, the trial court itself notified the City that its appeals were defective. (12/13/21 Minute Order, Exs. GG-HH 3:810, 4:814) [explaining that "[a]n order denying a motion for reconsideration is

not an appealable order"].) The City responded the following day by explaining, again, that it had deliberately chosen not to appeal from the judgment because it did not want to post an appeal bond. (12/14/21 Amendment to Mot. to Vacate, Exs. II-JJ 4:817-18, 4:831-32.)

This Court should not reward the City's gamesmanship by treating its manifestly premature appeals as timely filed. Unlike the appellant in *Walker*, *supra*, 35 Cal.4th at p. 21, who made a "colorable" showing that she intended to appeal from the judgment in her case instead of the non-appealable order listed in her notice of appeal, the City openly admitted here that it made a deliberate choice *not* to appeal from the judgment—or any other appealable order, for that matter. The City's decision to appeal an unappealable order rather than the judgment was not an innocent mistake. It was a reasoned choice that, by the City's own admission, was intended to evade its statutory obligation to post an appeal bond. The City is exactly the type of "obstructive litigant" whom the Supreme Court has counselled should not benefit from an exception to the final judgment rule, *In re Baycol Cases*, *supra*, 51 Cal. 4th at p. 757, and this Court therefore must dismiss the November 3 Appeals for lack of jurisdiction.

II. THE CITY'S APPEALS FROM THE JUDGMENT MUST BE DISMISSED BECAUSE THEY ARE UNTIMELY.

The City eventually did relent and file notices of appeal from the judgment (Nos. G061107 and G061117, hereafter "Appeals from the Judgments"), but only after Plaintiffs filed motions in the trial court to impose penalties on the City under the HAA for failing to comply with the trial court's writ of mandate within the required 60-day period, and only after the trial court rejected for a *second* time the City's claim that its defective November 3 Appeals somehow nullified the judgment. (12/13/21 Minute Order, Exs. GG-HH 3:810, 3:813; 02/07/22 Minute Order, Exs. MM-NN 4:849-56; 02/09/22 NOA, Exs. OO-PP 4:857-62.) These

new appeals are an eleventh-hour, Hail Mary effort to avoid the severe penalties that the HAA imposes on cities that ignore court-ordered compliance deadlines. (See Gov. Code, § 65589.5, subd. (k)(1)(B).)

The City's effort fails because it filed the new appeals on February 9, 2022—93 days after it was served with the judgment—despite having confirmed in a December 10 filing in the trial court that it knew its deadline to appeal the judgment was January 9, 2022. (See 02/09/22 NOA, Exs. OO-PP 4:857-62; 11/8/21 Judgment, Exs. S-T 2:361-68; 12/10/21 Ex Parte App., Exs. CC-DD 3:613, 3:706.) The City's attempt to appeal the judgment is more than a month late. (See Rules of Court, rule 8.104(a).) It therefore must be dismissed. (Rules of Court, rule 8.104(b) ["If a notice of appeal is filed late, the reviewing court must dismiss the appeal."]; *Hollister Convalescent Hospital, Inc. v. Rico* (1975) 15 Cal.3d 660, 666-67 (*"Hollister*") ["If it appears that the appeal was not taken within the 60-day period, the court has no discretion but must dismiss the appeal of its own motion even if no objection is made."].)

Even if this Court did have discretion to overlook the untimeliness of the Appeals from the Judgments, such discretion would not be warranted here. The City was well aware of its deadline to appeal the judgment. On December 10, 2021, it cited this deadline as grounds for an expedited hearing in the trial court. (12/10/21 Ex Parte App., Exs. CC-DD 3:613, 3:706.) The trial court denied that request for an expedited hearing on December 13, 2021, but instead of filing timely appeals from the judgment, the City did nothing for a month and then unsuccessfully petitioned this Court for a writ of supersedeas on the day *after* its deadline to appeal the judgment expired. Only after the 60-day grace period for full compliance with the trial court's writ of mandate ended on February 8, 2022 did the City relent and appeal the judgment.

The City may argue, as it did for the first time in a January 31, 2022

reply brief in this Court, that its December 9, 2021 Motion to Vacate extended the time to appeal the November 8 judgment. (See 12/9/21 Mot. to Vacate, Exs. AA-BB, 2:423 - 3:606.) But that motion, which remains pending in the trial court with an April 15, 2022 hearing date, had no such effect. Only a ***valid*** motion to vacate a judgment can extend the notice of appeal deadline, see Rules of Court, rule 8.108(c), and the City's vacatur motion was invalid for at least three independent reasons.

First, the City's theory of voidness is completely frivolous and thus cannot toll the time to appeal the judgments. To extend the deadline to appeal, a motion to vacate must be "based on some recognized grounds for vacation; it cannot be stretched to include any motion, regardless of the basis for it." (*Lamb v. Holy Cross Hospital* (1978) 83 Cal.App.3d 1007, 1010.) A party cannot extend its deadline to appeal, for example, by simply reciting a broad statutory ground for vacation and then offering a frivolous theory as to why the recited ground applies in its particular case. (See, e.g., *Payne v. Rader* (2008) 167 Cal.App.4th 1569, 1574–75 [no extension of time to appeal where statutory motion to vacate "simply does not lie" under the circumstances], disapproved on other grounds by *Ryan v. Rosenfeld* (2017) 3 Cal.5th 124.) This is precisely what the City did in its vacatur motion.

The City's motion asserts that the November 8 judgment is "void" and recites the text of Code of Civil Procedure section 473(d) relating to void judgments. (12/9/21 Mot. to Vacate, Exs. AA-BB, 2:430, 3:522.) But the City's theory of voidness—that its premature appeal from a non-appealable order stripped the trial court of jurisdiction to enter judgment—is utterly implausible. The City cites no case law that supports its theory, which is squarely foreclosed by Rule 8.104(d) of the Rules of Court. Rule 8.104(d) provides reviewing courts with discretion to save premature appeals like the City's by construing them as appeals from a subsequently

entered judgment.[6] Such a rule would make no sense whatsoever if judgments entered after premature appeals are inherently void, as the City claims.

Indeed, the City's December 9 Motion makes no sense even on its own terms. The City claims that its premature and patently defective November 3 Appeals stripped the trial court of jurisdiction to enter judgment, reasoning that once the City filed its notices of appeal the trial court could not do anything that would affect the "matter which was appealed." (12/9/21 Mot. to Vacate, Exs. AA-BB, 2:429, 3:521.) But if this were true the trial court would have no jurisdiction to *vacate* the judgment either, since that would *also* affect the "matter which was appealed." (See *Copley v. Copley* (1981) 126 Cal.App.3d 248, 298 [trial court lacked jurisdiction to vacate judgment after proper notice of appeal].) The City's self-contradictory vacatur motion is frivolous and therefore invalid for purposes of Rule 8.108(c).

Second, the City's motion is invalid and therefore does not extend its time to appeal the judgment because it was filed for the improper purposes of delay and harassment. The City has spent months fighting tooth and nail to delay the issuance and enforcement of the judgment in order to evade its statutory obligation to post an appeal bond. The City has admitted that its goal in filing the premature and defective November 3 Appeals was to prevent the judgment from issuing at all. (See 11/3/21 Objs. to Prop. Judgment, Exs. O-P 2:347-54; 12/10/21 Ex Parte App., Exs. CC-DD 3:610, 3:703.) When that did not work, the City moved to stay and then to vacate the judgment based solely on the fact that it filed the November 3 Appeals a

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[6] This Court should not exercise its discretion to save the November 3 Appeals in this case because the City *deliberately* appealed prematurely and from a non-appealable order. *See supra* Section I.

few days before the trial court entered judgment on November 8. (11/12/21 Mot. to Stay, Exs. W-X 2:383-414; 12/9/21 Mot. to Vacate, Exs. AA-BB, 2:423 - 3:606.) The City's December 9 Motion to Vacate is nothing more than an attempt to capitalize on its bad-faith attempt to prevent the trial court from entering judgment by preemptively appealing a non-final order. At least one court in this state has sanctioned a party who deliberately filed a premature appeal for the sole purpose of impeding further trial court proceedings. (See *Say & Say v. Castellano* (1994) 22 Cal.App.4th 88, 92–93 [sanctioning appellant who deliberately appealed from non-appealable, pre-judgment order "in an effort to thwart the superior court's proper exercise of its jurisdiction"].) A motion to vacate filed solely to advance a similar dilatory scheme cannot possibly be "valid" for purposes of extending the time to appeal under Rule 8.108(c). Treating it as such would incentivize bad-faith appeals and frivolous post-judgment motions by other parties hoping to avoid complying with a judgment for as long as possible.

Finally, the City's vacatur motion could not have tolled the time to appeal the judgment because it was not authorized by Code of Civil Procedure section 473(d) in the first place. The City's motion alleges that the November 8 judgment is void as a matter of law because it was entered five days after the City filed the November 3 Appeals. But Section 473(d) grants trial courts the power to vacate judgments that are void *due to a clerical error*, not because the trial court lacked the fundamental power to enter them. Both the title of Section 473 and the first clause of subdivision (d) refer to clerical "mistakes" in pleadings, and the statute is replete with references to the same and similar words bespeaking innocent typographical errors. No such scrivener's error occurred here, nor does the City allege one. Subdivision (d) must be read consistent with the clear intent of the rest of the statute.

A broader read of the statute cannot be reconciled with the fact that the Legislature created a different, more specific statutory scheme—Code of Civil Procedure section 663 and 663a— that governs challenges to judgments that are void due to the kind "judicial error" that the City alleges in its December 9 motion. (See *Burch v. CertainTeed Corp.* (2019) 34 Cal.App.5th 341, 346 ["[A]lthough clerical errors may be corrected at any time (Code Civ. Proc., § 473, subd. (d)), the only way for a court to correct judicial error is on a motion for new trial or on a motion under Code of Civil Procedure section 663 to vacate the judgment and enter a different one."].) The City's interpretation of Section 473(d) would effectively nullify the limitations set out in Section 663 and 663a—which the City failed to comply with in this case—by allowing any party to completely sidestep them by simply citing Section 473(d) instead. As such, the City's motion to vacate does not extend its time to appeal because Section 473(d) does not contemplate or authorize such a motion.

The City's February 9 Appeals from the Judgments must be dismissed because they were not timely filed and thus cannot confer jurisdiction on this Court.

III. THE CITY'S APPEALS FROM THE WRIT MUST BE DISMISSED BECAUSE THEY PURPORT TO APPEAL A NON-APPEALABLE ORDER AND ARE UNTIMELY.

On February 9, 2022, the same day that the City filed its untimely Appeals from the Judgments, the City also filed separate notices of appeal from the writs of mandate issued by the trial court on December 9, 2021 and served on the City the following day (G061116 and G061108, hereafter "Appeals from the Writs"). The City's Appeals from the Writ must be dismissed both because they are untimely and because a writ is not an appealable order.

The Appeals from the Writ are untimely because they were filed on

February 9, 2022—62 days after the writs were issued and 61 days after Plaintiffs served the writs on the City. (02/09/22 NOA-Writ, Exs. QQ-RR 4:863-68; 12/9/21 Writ, Exs. Y-Z 2:415-22; 12/10/21 Proof of Service, Exs. KK-LL, 3:844, 3:847.) Because the 60-day deadline to appeal is jurisdictional, this Court has no discretion and must dismiss the untimely Appeals from the Writs. (See Rules of Court, rule 8.104(b) ["If a notice of appeal is filed late, the reviewing court must dismiss the appeal."]; *Hollister Convalescent*, *supra*, 15 Cal. 3d at p. 666 ("If it appears that the appeal was not taken within the 60-day period, the court has no discretion but must dismiss the appeal of its own motion even if no objection is made.").

Even if the Appeals from the Writs were timely—and they are not—this Court would still lack jurisdiction because a writ of mandate is not itself an appealable order. (*Dep't of Transportation v. State Personnel Bd.* (2009) 178 Cal.App.4th 568, 575 fn. 3; *State Bldg. & Constr. Trades Council of California v. Duncan* (2008) 162 Cal.App.4th 289, 301 fn. 6, as modified on denial of reh'g (May 16, 2008); *C.R.W. v. Orr* (1970) 13 Cal.App.3d 70, 72 fn. 2.)

Because the December 9, 2021 Writ is not is not an appealable order, and because the City's February 9, 2022 appeals would be untimely even if the Writ was appealable, this Court must dismiss the Appeals from the Writs for lack of jurisdiction.

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CONCLUSION

The City's November 3 Appeals must be dismissed because the City deliberately appealed from non-appealable orders. The Appeals from the Judgments must be dismissed because they are untimely. Finally, the Appeals from the Writs must be dismissed both because they are untimely and because they purport to appeal non-appealable orders.

DATED: April 5, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE PURSUANT TO CALIFORNIA RULES OF COURT RULE 8.204(c)(1)

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify that according to Microsoft Word the attached brief is proportionally spaced, has a typeface of 13 points and contains 6,942 words.

By: *_/s/ Lisa Ells_*
Lisa Ells