CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE LEGACY GROUP et al.,

Cross-complainants and Appellants,

v.

CITY OF WASCO,

Cross-defendant and Respondent.

F038382

(Super. Ct. No. 227661)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Jon E. Stuebbe, Judge.

California Lawyers Group and Robert B. Scapa for Cross-complainants and Appellants.

N. Thomas McCartney for Cross-defendant and Respondent.

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Developers of a subdivision sued a city for breach of the development agreements, indemnification, equitable estoppel and declaratory relief alleging the city wrongfully stopped acquiring infrastructure constructed by the developers for the subdivision. The

*Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts I. and III. of FACTS AND PROCEEDINGS and parts I.-II. and IV.-VI. of DISCUSSION.

city claimed it had no further obligation to acquire infrastructure because the 1:3 lien-to-value ratio specified in the contract had not been maintained. The trial court interpreted the agreements to mean that the developers could not sue for monetary damages and also held that all causes of action were barred by the statute of limitations in Government Code section 66499.37.[1]

In the unpublished portion of this opinion, we hold that the agreement is ambiguous and reasonably susceptible to two interpretations that do not eliminate monetary damages as a remedy. We remand the interpretation of the agreement to the trial court. Issues concerning whether or not the lien-to-value ratio was maintained and whether or not the city was subject to equitable estoppel were not reached by the trial court and, accordingly, those issues are remanded also.

In the published portion of this opinion, we hold that a cause of action for breach of a development agreement is not subject to the 90-day statute of limitations contained in section 66499.37 unless the act constituting the breach could have been challenged under the Subdivision Map Act (§ 66410 et seq.).

Accordingly, judgment in favor of the city is reversed and this matter is remanded for further proceedings.

FACTS AND PROCEEDINGS

Appellants The Legacy Group, a California limited partnership (Legacy), and Michael S. Brown, the general partner of Legacy (Brown), are the developers of a subdivision known as Valley Rose Estates located in Wasco, California. Legacy owned the 480 acres of land on which Valley Rose Estates is located. Respondent City of Wasco (City) is a political division and legal subdivision of the State of California invested with corporate powers. This appeal concerns a dispute between Legacy and Brown

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[1]All subsequent statutory reference are to the Government Code unless otherwise indicated.

(collectively, Developers) and the City involving their contracts related to the development of Valley Rose Estates.

I. Background on the Financing of the Development*

Prior to the start of the Valley Rose Estates project, the City and the Wasco Redevelopment Agency formed the Wasco Public Financing Authority (WPFA) by entering into a joint powers agreement under the Marks-Roos Local Bond Pooling Act of 1985 (§ 6584 et seq.)[2] (Marks-Roos Act). The City is governed by an elected city council and the council members also serve as the directors of the Wasco Redevelopment Agency and WPFA. (S.E.C. Release No. 7536 (May 5, 1998) [1998 WL 217136].)

The Marks-Roos bonds that were an initial source of financing for the development of Valley Rose Estates, as well as other projects, became the subject of controversy. Specifically, the Securities and Exchange Commission (SEC) filed suit against the firm that underwrote the bonds[3] and brought an administrative proceeding against the WPFA.[4] Facts derived from the SEC matters are not critical to the outcome of this appeal, but are included here only for background purposes.[5]

On September 20, 1989, WPFA issued $35 million of bonds (1989 Local Bonds)—$25 million as series A and $10 million as series B—under the Marks-Roos Act.

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*See footnote, *ante*, page 1.

[2]One purpose underlying this act was to save money through the economies of scale realized by selling one large bond issue to finance several small projects. (See § 6584.5.)

[3]A copy of the complaint in *Securities and Exchange Commission v. First California Capital Markets Group, Inc., H. Michael Richardson and Derrick Dumont* (N.D.Cal. July 28, 1997, Civ. Action No. 97-2761) is set forth in Doty, Fiduciary Roles and Responsibilities of Municipal Financial Professionals, PLI Corporate Law & Practice Course Handbook Series, No. B0-00VW (Jan. 2001) page 135.

[4]S.E.C. Release No. 7503 (Feb. 2, 1998) [1998 WL 37615].

[5]Judicial notice of the facts from the SEC matters is appropriate. (See Evid. Code, §§ 459, 452, subd. (c).) If those facts had been relied upon by this court in deciding this appeal, notice would have been given to the parties under section 68081.

The official statement[6] for the 1989 Local Bonds stated that the bond proceeds were expected to be used to purchase debt obligations of identified local development projects.[7] (S.E.C. Release No. 7536 (May 5, 1998) [1998 WL 217136].)

From the proceeds of series A of the 1989 Local Bonds, $6 million was set aside to finance the infrastructure of the Valley Rose Estates project. The $6 million was transferred by WPFA to the City in exchange for a two-year, unsecured bond anticipation note (BAN) issued by the City[8] on September 25, 1992.[9] The BAN created a temporary source of funds that allowed construction of the infrastructure to commence. The parties specifically stipulated that the BAN and the construction costs of the Valley Rose Estates project that were paid by the BAN proceeds were funded by proceeds from the series A pool of the 1989 Local Bonds.

The BAN was a means of interim financing for the project until an assessment district could be formed and bonds issued (Improvement Bonds). When the Improvement Bonds were issued, the City would exchange those bonds for the BAN. Until the BAN was replaced by the Improvement Bonds, Legacy was to pay the interest on the BAN.

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[6]A disclosure document that describes the material facts of the bond offering and is circulated to prospective and final purchasers.

[7]On February 2, 1998, the SEC brought an administrative proceeding against WPFA and alleged the official statement was misleading because it failed to disclose that nearly all of the projects listed were highly contingent, if not speculative. (S.E.C. Release No. 7503 (Feb. 2, 1998) [1998 WL 37615].) The SEC and WPFA settled the administrative proceeding by WPFA consenting to the entry of a cease-and-desist order against it. (S.E.C. Release No. 7536 (May 5, 1998) [1998 WL 217136].)

[8]The BAN (see Sts. & Hy. Code, § 8745) was issued by the City pursuant to authority set forth in the Improvement Bond Act of 1915. (Sts. & Hy. Code, § 8500 et seq.)

[9]The BAN may have matured shortly before the city council decided to stop using BAN proceeds to acquire infrastructure. The parties do not discuss, nor does the record indicate, whether the maturity of the BAN had any affect on the decision of the city council to stop funding the acquisition of infrastructure.

II. Development Agreements Between the City and Legacy

On November 3, 1992, the City and Legacy entered into a development agreement (Development Agreement) to facilitate the development of Valley Rose Estates. The Development Agreement was intended to reduce uncertainty in planning, provide for orderly development, ensure timely installation of necessary improvements, provide appropriate public services to the project, and maximize the utilization of resources in an economically efficient manner.

On January 28, 1993, the City and Legacy entered into an acquisition agreement (Acquisition Agreement) pursuant to which Legacy agreed to construct and the City agreed to acquire certain improvements such as storm drains, sewers, water lines and street improvements necessary to provide public services to the project. The maximum amount of the total project cost for the improvements was stated as $5.2 million. To pay the cost of acquisition, the Acquisition Agreement stated the City would "conduct proceedings pursuant to the Municipal Improvement Act of 1913, with bonds to represent the unpaid assessments to be issued under the Improvement Bond Act of 1915 ...."

The City created the assessment district and began the process of creating the bonds (Improvement Bonds) that would pay off the bond anticipation note and serve as the last step in financing the acquisition of the infrastructure of the Valley Rose Estates. As part of this process, an assessment lien was created and recorded against the lots in Valley Rose Estates. A notice of assessment with a total confirmed assessment amount of $4,040,000 was recorded with respect to parcels comprising Valley Rose Estates on March 23, 1995. The Improvement Bonds were to be serviced with funds generated by the payment of the assessments on the lots.

The record does not clearly indicate when each of the steps for the issuance of the Improvement Bonds was taken. Nevertheless, it is clear that the Improvement Bonds were not issued until after Developers filed their cross-complaint against the City on March 31, 1995. According to the city manager of the City, who was also the executive director of WPFA, approximately $4 million "in assessment (bond) proceeds were used in

connection with the Valley Rose project." In contrast, the declaration of Brown asserts the improvement costs of the Valley Rose Estates project were less than $3 million.

The act that precipitated this litigation occurred on October 4, 1994. On that date, the city council held a meeting and decided to invoke the lien-to-value ratio set forth in section 5 of the Acquisition Agreement and to cease all further funding of the Valley Rose Estates project until an appraisal was obtained indicating the lien-to-value ratio had been brought within the limits specified in the Acquisition Agreement.

Because of this decision by the City and other litigation involving the development, Developers brought claims against the City. The first amended cross-complaint of Developers alleged four causes of action against the City; those causes of action are the subject of this appeal. The third cause of action asserted breach of contract, the sixth cause of action asserted indemnity, the seventh cause of action asserted estoppel, and the eighth cause of action requested declaratory relief. In substance, Developers alleged that the City wrongfully withdrew funding for the acquisition of infrastructure in the Valley Rose Estates.

The dispute was presented to the trial court on January 29, 2001.[10] The trial court determined that there was no conceivable set of circumstances under which Developers could prevail on any of their four causes of action against the City. One basis for the determination was that all of Developers' causes of action were barred by the statute of limitations in section 66499.37.

In addition, the trial court interpreted the agreements to "preclude any recovery for monetary damages against the City of Wasco arising from their alleged breach or breaches." This interpretation was based on section 4 of the Acquisition Agreement (AA section 4), which is titled "Limited Liability of the City of Wasco" and provides in part:

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[10]Although the City designated the transcript of the January 29, 2001, proceedings as part of the appellate record, the transcription fee was not paid and it never became part of the appellate record.

"The City of Wasco's obligation to acquire the Improvements is not backed by the full faith and credit of the City of Wasco but is limited solely to funds available to the City of Wasco in the District, if any, as a result of the proceedings for formation of the District, confirmation of assessments and receipt of proceeds from the issuance of bonds."

As its first step in determining the meaning of AA section 4, the trial court ruled the Acquisition Agreement and the Development Agreement were unambiguous and fully integrated and, as a result, did not admit extrinsic evidence concerning the City's contractual obligations.

Based on the trial court's determinations concerning the statute of limitations and the meaning of the contracts, judgment was filed in favor of the City on February 14, 2001, and Developers' cross-complaint against the City was dismissed.

III. Claims of Contractors Against Legacy*

A. Martin-McIntosh's Claim Against Developers

On December 29, 1994, Martin-McIntosh, a general partnership, filed an action against Developers and the City for breach of contract, foreclosure of a mechanic's lien, and common counts. Martin-McIntosh alleged it provided civil engineering services for the creation of the subdivision pursuant to a written contract with Developers and was still owed over $330,000. A declaration of Mr. Martin stated that Martin-McIntosh had received a partial payment for its service of more than $800,000 and all of these funds came from the City, not Developers.

The claims by Martin-McIntosh have been resolved and are not part of this appeal. Martin-McIntosh's claim for a mechanic's lien was severed and subsequently Martin-McIntosh obtained a judgment.

B. Turman Construction's Claim and Assignment to the City

On January 13, 1995, Turman Construction Co., Inc., the general contractor that contracted with Developers to install the improvements for the Valley Rose Estates, filed

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*See footnote, *ante*, page 1.

an action against Developers for breach of contract, indemnification, negligent misrepresentation, and foreclosure of a mechanic's lien. Turman Construction is not a part of this appeal because it settled with the City and assigned its claim against Developers to the City.

By written stipulation signed on January 27, 2001, the City and Developers agreed that (1) the sum of $110,514 was all due and payable by Legacy to Turman Construction on October 19, 1994; (2) the sum of $110,514 was the reasonable and billed value of the work performed by Turman Construction pursuant to its contract with Legacy; and (3) all right, title, and interest in the claims of Turman Construction against Developers was duly assigned by Turman Construction to the City.

On January 29, 2001, the trial court also considered the claim against Legacy assigned to the City by Turman Construction. The City prevailed and the judgment filed on February 14, 2001, awarded the City $110,514 against Legacy on the assigned claim.

DISCUSSION

I. Standard of Review*

City asserts this court "should independently review the legal issues presented." Developers similarly contend this appeal raises questions of law that are subject to independent review. We agree.

The interpretation of AA section 4 presents questions of law subject to independent review on appeal. The first step of contract interpretation requires the court to determine whether the contract is ambiguous; this is a question of law subject to our independent review. (*Winet v. Price* (1992) 4 Cal.App.4th 1159, 1165.) If the contract is determined to be ambiguous, the court proceeds to the second step of determining the meaning of the contract. If no parol evidence is admitted or if the parol evidence is not in conflict, then the interpretation of the contract is a question of law. (*Hess v. Ford Motor Co.* (2002) 27 Cal.4th 516, 527.)

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*See footnote, *ante*, page 1.

II. Contractual Limitations on the City's Obligation to Acquire Improvements*

A. AA Section 4 Does Not Preclude a Claim for Declaratory Relief

Initially, we observe that the trial court's interpretation of AA section 4 did not eliminate Developers' eighth cause of action for declaratory relief as to their rights and duties under the agreements. That cause of action was eliminated only on statute of limitations grounds. (See part III., *post.*)

In asserting that AA section 4 barred Legacy from seeking monetary damages for breach of contract, the City specifically argued Legacy's "remedy was to bring equitable relief seeking an injunction or other equitable relief compelling Wasco to continue to fund the project." If Legacy could have sought injunctive relief as a remedy for the alleged breach of contract, it follows that the remedy of declaratory relief—a milder remedy than injunctive relief—was also available. Under Code of Civil Procedure 1060,[11] a request for declaratory relief may be brought with requests for other relief. Therefore, Developers' breach of contract cause of action which sought monetary damages does not affect the viability of their claim for declaratory relief.[12]

B. AA Section 4 Is Susceptible to More Than One Meaning

The trial court held AA section 4 was unambiguous and interpreted it "preclude[s] any recovery for monetary damages against the City of Wasco arising from their alleged breach or breaches." In holding AA section 4 was unambiguous, the trial court in effect

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*See footnote, *ante*, page 1.

[11]Code of Civil Procedure section 1060 provides in part: "Any person interested ... under a contract ... may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action or cross-complaint in the superior court for a declaration of his or her rights and duties in the premises, including a determination of any question of construction or validity arising under the instrument or contract. He or she may ask for a declaration of rights or duties, either alone or with other relief; and the court may make a binding declaration of these rights or duties, whether or not further relief is or could be claimed at the time."

[12]One reason Developers may have sought declaratory relief is to establish the right to funds when they became "available." The extent to which the City is required to pursue proceedings to make funds available is a question not reached on this appeal.

ruled that AA section 4 was reasonably susceptible to only one interpretation. (See *Southern Pacific Transportation Co. v. Santa Fe Pacific Pipelines, Inc.* (1999) 74 Cal.App.4th 1232, 1240.)

As a result of the trial court's determination and the arguments presented on appeal, we must consider whether AA section 4 is reasonably susceptible to three alternative interpretations. First, as ruled by the trial court, can AA section 4 be read to eliminate damages as a remedy available to Developers? Second, can AA section 4 be read to merely restrict, rather than eliminate, the damages available to Developers? Third, can AA section 4 be read so that it does not address damages at all?

1. The limitation in AA section 4 is not an absolute bar to damages.

Even though AA section 4 does not mention damages or remedies, the trial court determined the only reasonable interpretation of its language was that the parties intended to eliminate damages as a remedy available to Developers. This determination of meaning is derived primarily from the language that the City's obligation to acquire improvements "is not backed by the full faith and credit of the City of Wasco but is limited solely to the funds available ...."

The City contends (1) AA section 4 prohibits recourse to the City's general funds and (2) if a judgment for monetary damages is entered against it, its general funds will be subject to that judgment. From these two premises, the City infers the parties agreed the City would not be liable for monetary damages arising from a breach of contract.

The first premise is flawed because it assumes a matter not yet established to be true. The City has assumed that the language referring to its obligation to acquire improvements includes the responsibility to pay all types of damages that may arise from breaching that obligation. That assumption by the City is refuted in part II.B.2, *post*. Also, the second premise is not accurate. The City does not cite a single case or secondary authority to support the position that when parties to a contract agree that liability is limited to a specific pool of funds, the parties have agreed to the complete

elimination of monetary damages as a remedy.[13] Notwithstanding the City's position, it is possible for the trial court to enter a judgment that states recovery of damages must be made from a particular source of funds.

Moreover, the City has misconstrued the meaning of the word "limited." "The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage ...." (Civ. Code, § 1644.) The ordinary sense of a word is to be found in a general dictionary. (*Scott v. Continental Ins. Co.* (1996) 44 Cal.App.4th 24, 29-30.)

The word "limit" means "to curtail or reduce in quantity or extent." (Merriam-Webster's Collegiate Dict. (10th ed. 1999) p. 676.) Accordingly, the phrase "is limited solely to" plainly means that the extent to which the City could be liable is *reduced* in quantity to "funds available." Therefore, to the extent that funds are available, the City will be liable for any monetary damages caused by its breach. These damages may include incidental and consequential damages[14] if otherwise appropriate. Reading these words of limitation so as to preclude *any* monetary damages would expand their scope beyond merely *reducing the extent* of liability. Such an expansive reading is beyond the plain meaning of the words used and violates the requirement of Code of Civil Procedure section 1858 not "to insert what has been omitted." (See also Civ. Code, § 1654 [uncertainty construed against the drafter].)

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[13]Parties to a contract can agree to vary the rules concerning the availability of damages, so long as the agreement is not unconscionable or otherwise invalid. (Rest.2d Contracts, § 346, com. a, p. 110; cf. Cal. U. Com. Code, § 2719 [in certain circumstances involving the sale of goods, the agreement "may limit or alter the measure of damages recoverable"].) In this case, there is no contention that the agreement was unconscionable or that AA section 4 was otherwise invalid. The dispute is over the meaning of the limitation set forth in AA section 4.

[14]A contracting party's right to damages based on an expectation interest includes incidental and consequential loss caused by the breach. (Rest.2d Contracts, § 347, p. 112; see generally, Wonnell, *Expectations, Reliance, and the Two Contractual Wrongs* (2001) 38 San Diego L.Rev. 53, 63-66.)

Thus, we conclude the language of limitation used in AA section 4 is not reasonably susceptible to the meaning that the parties intended to *eliminate* damages as a remedy, but is reasonably susceptible to the interpretation that the parties intended to *restrict* the amount of damages to the funds available.

2. "Obligation" is susceptible to a narrow interpretation.

Developers' arguments raise another interpretation of AA section 4 that is more favorable to their position. They contend AA section 4 does not address damages or remedies, but instead renders the obligation of the City to acquire the improvements in exchange for money conditional. Our analysis of this interpretation is focused on the phrase "[t]he City of Wasco's obligation to acquire the Improvements" and, in particular, the word "obligation."

Under the City's view, the phrase "obligation to acquire the Improvements" must include both the obligation to do the act specified and the obligation to pay for damages if the act is not done. In contrast, under the more narrow view of Developers, the language only includes the responsibility to do the specified act, namely, exchange money for improvements, and the language of limitation sets forth a condition that must be satisfied before the obligation arises.

One definition of "obligation" is "something one is bound to do: DUTY, RESPONSIBILITY." (Merriam-Webster's Collegiate Dict., *supra*, p. 802.) A broader definition of "obligation" is set forth in Webster's Third New International Dictionary (1986) page 1556, which states, "*broadly*: a formal and binding agreement or acknowledgement of a liability to pay a specified sum or do a specified thing" and "a duty arising by contract: a legal liability."

These definitions do not resolve how broadly the word "obligation" should be interpreted for purposes of AA section 4. If used in a narrow sense as Legacy contends, "obligation" would only include the duty or responsibility to acquire improvements—a *responsibility to act* that is separate and distinct from the *responsibility to pay* damages that could arise later if the responsibility to acquire improvements were breached. Under

this narrow interpretation, AA section 4 would only address the circumstances under which the City was legally bound to exchange money for improvements and would not address, i.e., limit, the liability for damages once a breach of that responsibility was established. Furthermore, the contractual reference to the source of funds would operate as a condition precedent to the responsibility to exchange money for improvements. In other words, if funds were not "available," the City would have no responsibility to exchange money for improvements.

In contrast, if used in a broad sense, "obligation" might include both the responsibility to do the act specified and the responsibility to pay for damages that would arise if that act was not performed. The use of the word "liability" in the heading of AA section 4 may evidence an intent to include the responsibility to pay damages.

However, the use of the prepositional phrase "to acquire the Improvements" suggests an intent to limit the scope of AA section 4. If the drafter of AA section 4 intended to include the responsibility to pay damages with the responsibility to act, use of a phrase like "obligations arising under this agreement" instead of "obligation to acquire the Improvements" would have made that intent somewhat clearer. Even greater clarity would have been attained if the drafter had written "obligations to acquire improvements and to pay damages for breach of contract ...."

In light of (1) these dictionary definitions, (2) the use of the prepositional phrase "to acquire the Improvements" and (3) the failure of the text of AA section 4 to explicitly mention any other contractual obligations of the City or the City's liability for breach of contract, we conclude that the language used in AA section 4 is reasonably susceptible to the interpretation that AA section 4 does not address liability for damages.

C. Summary

Because of our determination that AA section 4 is reasonably susceptible to two interpretations, we conclude AA section 4 is ambiguous. Furthermore, the state of the appellate record does not allow us to determine which interpretation should be adopted. Therefore, we remand to the trial court. On remand, the parties may introduce extrinsic

evidence to explain the meaning of the phrase "[t]he City of Wasco's obligation to acquire the Improvements."

We note that regardless of which interpretation ultimately prevails, the question of whether or not funds were or are available may arise on remand and may involve questions of fact.[15]

On one hand, if the phrase "obligation to acquire the Improvements" was intended to include liability for damages arising from the failure to acquire improvements, then the limiting language in AA section 4 would preclude the recovery of monetary damages in excess of "funds available." A judgment that specifies the amount of damages and the source from which the recovery is to be made would be appropriate in these circumstances.

On the other hand, if the limiting language only sets forth a condition precedent to the responsibility of the City to exchange money for improvements, then the provisions of AA section 4 will not restrict the remedies available in the event of a breach of the City's contractual obligations.

III. Section 66499.37 Does Not Apply to Contract Claims

The city council's decision to invoke the lien-to-value clause of the Acquisition Agreement occurred in the first week of October 1994. Over six months later, the summons for Developers' first cross-complaint was served on the City.

The City contends the four causes of action of Developers are barred by the 90-day period of limitation set forth in section 66499.37. The City asserts the causes of action fall within the express language of section 66499.37[16] because the cross-complaint is an

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[15]In construing the term "funds available," extrinsic evidence concerning the construction given it by the acts and conduct of the parties before any controversy arose is admissible on the issue of the parties' intent. (*Universal Sales Corp. v. Cal. etc. Mfg. Co.* (1942) 20 Cal.2d 751, 761.)

[16]Section 66499.37 provides in relevant part: "Any action or proceeding to attack, review, set aside, void or annul the *decision* of an advisory agency, appeal board or legislative body *concerning a subdivision*, or of any of the proceedings, acts or determinations taken, done or made prior to such decision, or to determine the reasonableness, legality or validity of any

action to attack or review a "decision" of the city council "concerning a subdivision." The trial court agreed with the City's construction of the statute and ruled the cross-complaint of Developers was barred by section 66499.37.

Developers contend their four causes of action against the City arose from the City's failure to perform its contractual obligations and from the misrepresentations of the city manager and, as a result, the controversy did not arise out of the Subdivision Map Act (SMA) (§ 66410 et seq.) and is outside the scope of section 66499.37. Stated in terms of the statutory language, Developers argue that the determination by the city council to invoke the lien-to-value clause of the Acquisition Agreement was not a "decision ... concerning a subdivision" for purposes of section 66499.37.

The contentions of the parties and the ruling of the trial court raise an issue of statutory construction concerning the proper scope of section 66499.37. The construction of a statute is a question of law and subject to independent review on appeal. (*California Teachers Assn. v. Governing Bd. of Golden Valley Unified School Dist.* (2002) 98 Cal.App.4th 369, 375 [construction of a statute is purely a question of law].)

The construction of section 66499.37 and its application to controversies involving subdivisions has been addressed in a number of published decisions. (See *Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 27 [listing nine appellate decisions applying § 66499.37] (*Hensler*); *Maginn v. City of Glendale* (1999) 72 Cal.App.4th 1102 [plaintiff challenged denial by city of a tentative parcel map to subdivide real estate].) In construing section 66499.37, the California Supreme Court has stated it "applies by its terms to *any* action involving a controversy over or arising out of the Subdivision Map Act." (*Hensler, supra*, at p. 23; see *Donohue v. Santa Paula West Mobile Home Park* (1996) 47

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condition attached thereto, shall not be maintained by any person unless such action or proceeding is commenced and service of summons effected within 90 days after the date of such decision. Thereafter all persons are barred from any such action or proceeding or any defense of invalidity or unreasonableness of such decision or of such proceedings, acts or determinations...." (Italics added.)

Cal.App.4th 1168, 1173 [§ 66499.37 did not apply where plaintiffs did not allege the city violated the SMA or improperly approved a tentative map].)

Notwithstanding the number of published cases applying section 66499.37, the appellate briefs of the parties did not cite any published case that explicitly addressed whether or not a claim for breach of a contract is subject to section 66499.37. Our own research did not locate any published decision in point. Because the issue of whether or not section 66499.37 applies to a breach of contract claim appeared to be an issue of first impression, we directed the parties to file supplemental letter briefs citing any case law, treatise, or other authority explicitly addressing whether or not the statute of limitations in section 66499.37 applies to a developer's cause of action for breach of contract. Counsel for Developers submitted a letter stating that they were not able to locate any authority. Counsel for the City did not respond.

Our research uncovered one treatise addressing development agreements and section 66499.37. "Since a development agreement is a contract, presumably the normal contract statute of limitations will apply if either party wants to sue for breach of that contract." (5 Manaster & Selmi, Cal. Environmental Law & Land Use Practice (2002) § 74.65, p. 74-56.) We agree with the authors of this treatise and hold that a claim for breach of a development agreement is subject to the statute of limitations normally applicable to contract claims and is not subject to section 66499.37 unless the breach of contract claim overlaps with a claim arising under the SMA.

Our decision that the city council's determination to invoke the lien-to-value clause was not a decision "concerning a subdivision" for purposes of section 66499.37 is based in part on the principle that a particular clause or section of a statute must be considered in the context of the statutory framework as a whole and harmonized with the other various parts of that statutory framework. (*California Teachers Assn. v. Governing Bd. of Golden Valley Unified School Dist., supra*, 98 Cal.App.4th at pp. 375-376.) Accordingly, we considered section 66499.37 in the context of (1) the SMA, (2) the

statutory provisions concerning development agreements, and (3) related statutes of limitation.

From a general perspective, the provisions of the SMA[17] do not directly address development agreements. Instead, the Development Agreement Statute, article 2.5, chapter 4, division 1 of title 7 of the Government Code (§ 65864 et seq.) (DAS), is the primary source of rules governing development agreements.[18] Therefore, the DAS is the first place one should look for a statute of limitations applicable to controversies involving development agreements. However, the DAS does not contain any period of limitations for actions involving development agreements.

Nevertheless, a specific statute of limitations was enacted to cover particular types of controversies involving development agreements. Subdivision (c)(1) of section 65009 provides in part: "[N]o action or proceeding shall be maintained in any of the following cases by any person unless the action or proceeding is commenced and service is made on the legislative body within 90 days after the legislative body's decision: [¶] ... [¶] (D) To attack, review, set aside, void, or annul the decision of a legislative body to adopt, amend, or modify a development agreement...."

Wherever reasonable, statutory constructions that produce internal harmony and avoid redundancy are preferred. (*Pacific Legal Foundation v. Unemployment Ins. Appeals Bd.* (1981) 29 Cal.3d 101, 114.) Therefore, we must construe the pertinent provisions of section 65009 so that they are not redundant to the provisions in section 66499.37, so long as the construction is reasonable.

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[17]The SMA is set forth in division 2 of title 7 of the Government Code.

[18]The DAS, which was enacted in 1979 after the adoption of the SMA, first authorized local governments to enter into development agreements with persons holding an interest in real estate. The DAS was enacted in an attempt to soften the vested rights doctrine set forth in *Avco Community Developers, Inc. v. South Coast Regional Com.* (1976) 17 Cal.3d 785 (see Curtin et al., Cal. Land Use and Planning Law (22d ed. 2002) p. 205) and thereby provide for more predictable and efficient development.

If a decision to adopt, amend or modify a development agreement is construed to be a decision "concerning a subdivision" for purposes of section 66499.37, then subdivision (c)(1)(D) of section 65009 would be redundant to section 66499.37. To avoid this redundancy, we construe the statutory provisions to mean that a decision to adopt, amend or modify a development agreement is not a decision "concerning a subdivision" for purposes of section 66499.37. In other words—the words used by the California Supreme Court to construe section 66499.37—an action challenging the decision to adopt, amend or modify a development agreement is not an "action involving a controversy over or arising out of the Subdivision Map Act." (*Hensler, supra,* 8 Cal.4th at p. 23.)

It then follows that a decision concerning only the interpretation of a clause in a development agreement—a decision less significant than a decision to adopt a development agreement—also is not a decision "concerning a subdivision" for purposes of section 66499.37.

Finally, because the SMA, including section 66499.37, has been operative since March 1, 1975, and no published decision has applied section 66499.37 to a breach of contract claim, we are reluctant to extend section 66499.37 to breach of contract claims unless the gravamen of the claim concerns acts that could have been challenged as a violation of the SMA. This exception precludes the parties from avoiding the application of section 66499.37 to decisions arising under the SMA simply by restating as contractual covenants the responsibilities imposed on local government by the SMA.

In this case, Developers' cross-complaint sets forth one claim subject to the exception. Developers alleged the City breached the contracts by refusing to approve the final tract maps for the Valley Rose Estates project. The refusal to approve the final tract maps directly concerns a matter addressed by the SMA. (See *Griffis v. County of Mono* (1985) 163 Cal.App.3d 414 [action challenging approval of final subdivision map barred by § 66499.37]; *Soderling v. City of Santa Monica* (1983) 142 Cal.App.3d 501 [action to compel city to approve final subdivision maps barred by § 66499.37]; see also

§§ 66435.1-66463.5.) When a breach of contract claim overlaps with or concerns acts by the city council that could have been challenged under the SMA, then the shorter statute of limitations set forth in section 66499.37 will apply. Accordingly, Developers' attack on the failure to approve maps, even though pled as a breach of contract, should have been brought within the 90-day period of limitation.

In summary, except for the allegations concerning the refusal by the City to approve final tract maps[19] set forth in paragraph 40(c) of the cross-complaint, we conclude that the alleged breaches of contract and other causes of action against the City are not subject to section 66499.37.

IV. Issues Concerning the Lien-to-Value Ratio Were Not Addressed Below*

The appellate briefs of both parties invite this court to consider whether or not the lien-to-value ratio was maintained. However, the trial court did not decide this issue in the 13 specific determinations set forth in its written decision. Because the question of whether the lien-to-value ratio was maintained involves issues of fact, we remand it to the trial court.

The City asserts that the issue of whether the ratio was maintained can be decided as a matter of law because Developers alleged in their cross-complaint that the required lien-to-value ratio was not maintained. In paragraph 72 of the cross-complaint, Developers alleged, based on information and belief, that the City made payments in excess of $3.5 million notwithstanding the fact that the value of the property compared to the payments actually made did not exceed a three-to-one ratio. The City argues this allegation is an admission that is binding on Developers.

The City's argument lacks merit because the modern practice of pleading allows the pleader to set forth alternative factual or legal theories and to make inconsistent

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[19]We do not address whether a change in circumstances might subject the City to a subsequent action to compel approval of final tract maps.

*See footnote, *ante*, page 1.

allegations. (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 690-691.) Therefore, Developers' breach of contract cause of action, which alleges Legacy has performed all conditions and covenants required of it, survives the inconsistent allegation made in paragraph 72 of the cross-complaint.

V. The Estoppel Claim Raises Issues of Fact Not Addressed by the Trial Court*

The 13 specific determinations the trial court set forth in its written decision did not reach the estoppel theories raised by Developers. Developers argue that (1) estoppel may be asserted against the state and its subdivisions in certain circumstances and (2) questions of fact exist in this case concerning whether or not those circumstances are present. In response, the City asserts that Developers' estoppel theories may not be invoked against it because doing so would frustrate a public policy adopted to protect the public.

Although the estoppel doctrine is now freely invoked against the state and its subdivisions (11 Witkin, Summary of Cal. Law (9th ed. 1990) Equity, § 185, p. 867), it may not be used to contravene constitutional and statutory provisions that define an agency's powers or defeat a strong public policy. (*Id.*, §§ 183-184, pp. 864-867.) Thus, equitable estoppel may be used "to avoid grave or manifest injustice." (*Hock Investment Co. v. City and County of San Francisco* (1989) 215 Cal.App.3d 438, 449; *County of San Diego v. Cal. Water etc. Co.* (1947) 30 Cal.2d 817, 826.) Moreover, "as we pointed out in *City and County of San Francisco v. Grant Co.* (1986) 181 Cal.App.3d 1085 ..., '[t]he existence of an estoppel is generally a question of fact for the trial court ....' (*Id.* at p. 1091.)" (*Hock Investment Co. v. City and County of San Francisco, supra*, at p. 449.)

To establish a claim for equitable estoppel against the government, a litigant must prove the four elements that make up a claim against a private party and an additional fifth element. (*La Canada Flintridge Development Corp. v. Department of Transportation* (1985) 166 Cal.App.3d 206, 219.) "The fifth element requires the

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*See footnote, *ante*, page 1.

plaintiff to demonstrate that the injury to his personal interests if the government is not estopped exceeds the injury to the public interest if the government is estopped." (*Ibid.*)

For example, in *Anderson v. City of La Mesa* (1981) 118 Cal.App.3d 657, the city was estopped from enforcing a 10-foot setback because the building permit stated the setback was five feet, the city inspected the home six times during construction, remodeling the house would have cost over $6,000, and the issuance of a variance would not have significantly harmed the public interest. Also, in *Kieffer v. Spencer* (1984) 153 Cal.App.3d 954, the city was estopped from denying permits for video arcade games where the city made affirmative representations to petitioners that it should have known were untrue. (See generally 30 Cal.Jur.3d (1987) Estoppel and Waiver, § 5, pp. 781-787 [availability of estoppel against governmental entities]; 1 Longtin, Cal. Land Use (2d ed. 1987) § 1.94, pp. 160-165 [estoppel].)

Based on the record before us, we cannot determine as a matter of law that Developers are unable to establish the five factual elements essential to their estoppel claim. Therefore, the estoppel theories, with their underlying questions of fact, are remanded to the trial court for resolution.

VI. The Turman Construction Claim Assigned to the City*

Developers assert that they stand in almost identical shoes as Turman Construction and, consequently, if their claims failed, the claims of Turman Construction must also have failed. This argument is based on a false premise because the Turman Construction claims assigned to the City are not sufficiently similar to Developers' claims against the City. None of the defenses or issues raised by the City in defending against the claims of Developers apply to the claims of Turman Construction against Legacy.

First, the sum of $110,514 was due and payable by Legacy to Turman Construction on October 19, 1994. Second, the sum of $110,514 was the reasonable and billed value of the work performed by Turman Construction pursuant to its contract with Legacy.

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*See footnote, *ante*, page 1.

Third, all right, title, and interest in the claims of Turman Construction against Developers was duly assigned by Turman Construction to the City.

Therefore, the City was entitled to prevail on the assigned claim. However, because of the one judgment rule, the judgment filed on February 14, 2001, which contains the trial court's ruling on the assigned claim, will be reversed in its entirety. On remand, the trial court's ruling on the assigned claim should not be reduced to the form of a judgment until the other issues between the parties are resolved. (See 7 Witkin, Cal. Procedure (4th ed. 1997) Judgment, § 7, p. 544 [one final judgment rule]; Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2002) ¶ 2:21, p. 2-16 [a final judgment terminates the trial court proceedings].)

DISPOSITION

The judgment filed February 14, 2001, is reversed. Appellants shall recover their costs on appeal.

GOMES, J.

WE CONCUR:

HARRIS, Acting P.J.

WISEMAN, J.