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Saving the Permit Streamlining Act:

The California Supreme Court Must Depart from *Horn v. County of Ventura*

*Milene Minassians**

Abstract

The Permit Streamlining Act (PSA) ensures swift resolution of permit applications by simplifying the processing of permits for development projects. To achieve this end, the California Legislature set forth various time limits within which local permitting bodies must approve or disapprove of a complete application. After the time expires, the PSA provides that a project shall be "deemed approved" so long as affected landowners are given "public notice required by law." The PSA's statutory framework butts up against Horn v. County of Ventura—a 1979 California Supreme Court case that is inconsistent with California due process principles. The Horn decision has led to the appellate courts' split that this paper explores. It begins by detailing the differing treatment of the PSA's public notice provision between appellate courts. Some courts have treated this as adequate for due process purposes; others disagree. It next deconstructs the Horn decision, demonstrating that its due-process theory is dicta and therefore not binding. Finally, it suggests that Horn's due-process dicta is inconsistent with California's due-process jurisprudence because it fails to balance the competing interests at stake. And, even if Horn's due-process dicta struck a reasonable balance in the 1970s, the balance weighs differently in favor of the governmental interests at issue today, considering the Legislature's priority in addressing the housing crisis. This paper's primary goal is to unfold the appellate courts' split and save the PSA from utter curtailment, so that it remains free to fulfill its legislative purpose: streamlining the permitting process to prevent unjust governmental delays that threaten housing development.

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Introduction

In 1975, a developer, Fredrick P. Osbourne, applied to the County of Ventura's Planning Department for approval of a proposed subdivision of his property into four lots. The subdivision map was tentatively approved by the Planning Department. A few months later, Merlin Horn purchased a parcel of land next to Mr. Osbourne's subdivision. Upset about the potential impacts the subdivision might have on his property, Mr. Horn urged the County Board of Supervisors to grant a public hearing on the original proposal. His request for a hearing was denied. Twice. Mr. Horn's dissatisfaction with the Board's decision reached its finale in the California Supreme Court case that this paper explores, *Horn v. County of Ventura*.[1]

In a short paragraph of dicta, *Horn* spearheaded the theory of due process discussed in this paper: a landowner whose property interests may be "significantly affected" by a project has a due-process right to notice and a hearing before a local agency applies discretionary development standards to that project. Though *Horn* says that a provision of the Subdivision Map Act violates due process, its observation is dicta because the Subdivision Map Act did not apply to Mr. Osbourne's project. But the decisions that followed *Horn* gripped tightly around its due-process dicta and treated it as a holding. This body of case law threatens statutes enacted to streamline housing construction. One such statute is the Permit Streamlining Act ("PSA").[2]

1. *See generally*, Horn v. Cnty. of Ventura, 24 Cal. 3d 605, 606 (1979).
2. *See generally*, CAL. GOV'T CODE § 65920 (West 2011).

The purpose of the PSA is set forth in section 65921: "The Legislature finds and declares that there is a statewide need to ensure clear understanding of the specific requirements . . . of development projects and to expedite decisions on such projects."[3] Originally enacted two years prior to *Horn*, the PSA expedites decisions on land-use permits by imposing time limits on local agency action. A permit application is "deemed approved" if an agency does not act within the statutory timeline, so long as the "public notice required by law has occurred."[4] And, while its clock only starts to run after environmental review is complete under the California Environmental Quality Act ("CEQA"), its primary purpose is to relieve projects from governmental delays and to streamline the permitting process.[5] But both federal and California appellate courts disagree on whether the PSA's deemed-approved provision satisfies due process requirements.

Horn's due-process dicta presents a conflict. On the one hand, the California Legislature has passed numerous bills pushing ministerial approval of permits, void of hearing rights.[6] These bills strip local agencies of discretion entirely, such as Senate Bill 35[7], Senate Bill 9[8], and laws around Accessory Dwelling Units ("ADU").[9] On the other hand, such bills are in tension with land-use norms[10] built upon the discretionary decision-making of local agencies. This immense discretionary power allows cities to delay projects or kill projects entirely. Thus, *too much* discretion threatens projects and undermines the Legislature's priorities for housing, while *too little* discretion removes local control from cities, even if it does not raise due process concerns.[11] Arguably, the PSA's statutory framework strikes an ideal balance. It presents a middle option—one that does not strip cities of their discretionary power altogether but imposes a statutory time limit in which the city may exercise its discretion. After the time limit expires, cities relinquish their right to impose discretionary standards on a project. Unfortunately, *Horn*'s due-process theory takes that middle option off the table.

Owing to *Horn*'s dicta, the constitutionality of the PSA is under threat. California Courts of Appeal and the United States Court of Appeals for the Ninth Circuit stand divided on whether the PSA's notice provision comports with due process. Against the backdrop of the California housing crisis, this split is worthy of immediate resolution by the California Supreme Court. The court should resolve the appellate courts' split in favor of upholding the PSA as constitutional for four reasons. First, *Horn*'s due-process theory is dicta and therefore not

3. GOV'T § 65921.
4. GOV'T § 65956(b).
5. *See* GOV'T § 65950(a)(5); *see generally*, GOV'T § 65921.
6. *See, e.g.*, S.B. 35, 2017-2018 Reg. Sess. (Cal. 2017); S.B. 9 2021-2022 Reg. Sess. (Cal. 2021); A.B. 2011, 2021-2022 Reg. Sess. (Cal. 2021).
7. GOV'T § 65400.
8. GOV'T § 65852.21.
9. *See* A.B. 68, 2019-2020 Reg. Sess. (Cal. 2019).
10. California land-use norms and regulations, which govern the development and use of the community, are derivative of a municipality's general police power. *See* Berman v. Parker, 348 U.S. 26, 32-33 (1954); CAL. CONST. art. XI, § 7.
11. *Horn*, 24 Cal. 3d at 615 (confirming that ministerial approval of permits does not raise a due process problem because the local agency has no discretionary power over the permit).

binding. This fact creates space for the court to depart from its unconsidered line of reasoning. Second, *Horn*'s dicta is anomalous. It does not apply the balancing framework from *People v. Ramirez*, California's leading due-process decision.[12] Third, even if *Horn* did engage in tacit balancing, the balance is different today considering the state's priority in addressing the California housing crisis. The PSA's existing framework strikes a reasonable balance between too much discretion and none. Fourth, *Horn* overlooks the fact that limiting discretion *in time* makes a deemed-approved permit ministerial after the time limit expires.

This paper proceeds in three parts. Part I introduces the Permit Streamlining Act by describing its statutory framework. It subsequently explains the appellate courts' competing views over whether the PSA's notice provision does, in fact, satisfy due process. Part II discusses *Horn*'s due-process dicta and its consequences. Part III advances the contention that the California Supreme Court must uphold the PSA as constitutional. This result is consistent with precedent since the PSA's notice remedy satisfies the balancing test in *People v. Ramirez.* Thus, because the California Supreme Court need not look further then *Ramirez*, its well-established precedent compels the court to uphold the PSA.

I. The Permit Streamlining Act is on Thin Ice

The cases that follow *Horn* treated its dicta as a holding. By constitutionally requiring notice and a hearing to affected landowners, *Horn* puts this limb of housing law on thin ice. Namely, it makes vulnerable those housing bills that, in order to rectify government delay in the permitting process, automatically approve projects after a defined period. The clearest example of *Horn*'s far-reaching effects on such statutes is its curtailment of the PSA.

A. Background on the Permit Streamlining Act

In 1977, the Legislature adopted Assembly Bill 884, commencing with section 65920. These code provisions are referred to as the Permit Streamlining Act. The PSA ensures broad resolution of permit applications by speeding up the processing of permits for development projects.[13] To achieve this goal, it sets forth various statutory time periods within which local government agencies must approve or disapprove a complete application.[14] After the time expires, the PSA provides that a project shall be "deemed approved."

The PSA's statutory framework therefore seeks to counteract both governmental delay and opaque development standards. These two road blocks cut against the state's interest in building housing. Set forth in section 65921, the PSA's purpose is to "ensure [a] clear understanding of the specific requirements which must be met in connection with the approval of development projects and to expedite decisions on such projects."[15] Missing from the PSA's original framework, however, was a notice provision.

12. *See generally*, People v. Ramirez, 25 Cal. 3d 260 (1979).
13. GOV'T § 65950.
14. *See* GOV'T § 65950(a)(1)–(5).
15. GOV'T § 65921.

To expedite decisions on permit applications, the PSA sets forth a time limit within which a government agency must either approve or disapprove a permit application.[16] If the permitting agency fails to reach a decision within the statutory period, the application is "deemed approved" as a matter of law. As originally enacted, section 65956(b) stated: "In the event that a lead agency . . . fails to act to approve or to disapprove a project within the time limits required by this article, such failure to act shall be deemed approval of the development project."[17] Thus, the PSA did not initially impose a public notice requirement as a prerequisite to deemed approval, and therefore "deemed approval was [not] contingent on the occurrence of 'public notice required by law.'"[18]

Its original statutory framework raised due process concerns in *Palmer v. City of Ojai*.[19] There, a developer invoked the deemed-approval provision after the city failed to approve or disapprove his application within the PSA's time limits.[20] The city, relying on *Horn*'s dicta, argued that the deemed-approval process itself was unconstitutional, since "the citizens of Ojai had not been afforded such notice and hearing" within the statute's time frame.[21] The trial court agreed on due-process grounds.[22] But the California appellate court reversed, holding that the city could not use its *own* failure to provide notice and a hearing to affected landowners as a basis to gut the statute.[23] The *Palmer* court thus made clear who it is that owes a duty of notice and a hearing—"it is not the developer-applicant who has the duty; it is the public agencies themselves, including [the] [c]ity."[24] While the *Palmer* court's central holding left the PSA's deemed-approval provision unscathed, its decision triggered a legislative response.

In express response to *Palmer*, the Legislature in 1987 amended the PSA to include public notice requirements.[25] Subdivision (b) of section 65956 now states: "In the event that a lead agency . . . fails to act to approve or to disapprove a development project within the time limits required by this article, the failure to act shall be deemed approval of the permit application for the development project. . . . *However, the permit shall be deemed approved only if the public notice required by law has occurred*."[26] Further, the 1987 amendments added a

16. GOV'T § 65952(a)–(b).
17. Stats. 1977, ch. 1200, § 1, p. 3996 (last amended in 1999).
18. Mahon v. Cnty. of San Mateo, 139 Cal. App. 4th 812, 818 (2006).
19. Palmer v. City of Ojai, 178 Cal. App. 3d 280, 291 (1986).
20. *Id.* at 284–85.
21. *Id.* at 289.
22. *Id.* at 289–90.
23. *See Palmer*, 178 Cal. App. 3d at 292.
24. *Id.* at 291.
25. CAL. GOV'T CODE § 65956(b) (2000); *see* Stats. 1987, ch. 985, § 5, pp. 3298–99 (amended for the second time 1987); *Mahon*, 139 Cal. App. 4th at 818 ("In express response to *Palmer*, the Legislature in 1987 added the public notice requirements now found in section 65956, such that a permit is deemed approved 'only if the public notice requirement by law has occurred.'"); Selinger v. City Council of the Redlands, 216 Cal. App. 3d 259 n.3 (1989) (The 1987 amendments to section 65956 were made in "tacit recognition of the due process problems inherent in the deemed approval provisions.").
26. GOV'T § 65956(b) (emphasis added) (last amended 1999).

self-help provision for developers.[27] If a city delays a project, a developer may assume the responsibility of providing adequate notice to affected landowners.[28] For instance, a developer could post signage explaining that a project may be "deemed approved" if a city fails to act on the project within the applicable timeline. The new and improved PSA therefore does two things. First, it makes public notice required by statute. And second, it empowers developers to satisfy the requirement themselves if a city overlooks its responsibilities and blows the PSA's deadline.

In *Selinger v. City Council of the City of Redlands*, the Court of Appeal held that the PSA's deemed-approval provision violated due process, relying largely on *Horn's* dicta.[29] There, a developer, Stephen Selinger, filed an application to develop his acreage into a residential subdivision.[30] When Mr. Selinger submitted the application for his project in May 1986, the Legislature had not yet amended section 65956 to include a requirement of notice and a hearing.[31] Because the PSA's notice provision was not in effect when Mr. Selinger filed his application, the constitutionality of the notice provision was not an issue before the *Selinger* court.

Predictably, the city dragged its feet and failed to act on Mr. Selinger's project within the requisite timeline, missing the PSA's deadline.[32] In response, Mr. Selinger filed a writ of mandate asserting that his subdivision map must be "deemed approved" because the city failed to act on the application within one year.[33] But the *Selinger* court was not persuaded. The PSA was "defective," the court explained, because it did not "safeguard the constitutional rights of adjacent landowners to notice and a hearing *before* they are deprived of substantial property rights."[34] Thus, the heart of the PSA—its deemed-approval provision—was found unconstitutional by a California Court of Appeal. The decision's last footnote, however, made clear that the PSA's amendment concerning notice resolved the due process problem: "[t]he recent amendments to the Permit Streamlining Act resolve the constitutional issue for all *current* applications for development."[35] In short, the 1987 amendment cured the PSA's defect. By adding this footnote, the Selinger court guaranteed the constitutionality of current (and future) applications under the PSA, so long as affected landowners had notice.

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27. *Id.* ("In the even that a lead agency or a responsible agency fails to act to approve or disapprove a development project within the time limits required by this article . . . an applicant may provide the required public notice).

28. *Id.*

29. *See Selinger*, 216 Cal. App. 3d at 274.

30. *See id.* at 263–64.

31. *See id.* at 265 n.3 ("In 1987, in tacit recognition of the due process problems inherent in the deemed approval provisions, the Legislature amended section 65956 to include a requirement of notice to the public and a hearing . . . [t]he amendments permit the applicant either to bring an action for a writ of mandate to compel the public agency to provide the notice and hearing or allow the applicant to provide such notice himself.").

32. *See id.* at 264.

33. *See id.* at 261.

34. *Id.* at 270 (citing *Horn*, 24 Cal. 3d at 616) (emphasis added).

35. *Selinger*, 216 Cal. App. 3d at 274 n.8 (emphasis added) (internal citations omitted).

B. The Appellate Courts' Split

The PSA's 1987 amendment did not fully settle its due process problem. The amendment clearly states: A "permit shall be deemed approved only if the public notice required by law has occurred."[36] Since *Selinger*, however, federal and California appellate courts have disagreed on the meaning of "public notice required by law," and how much process is due under the California Constitution.

In Mahon v. County. of San Mateo, the First District Court of Appealtreats the PSA's notice requirement as satisfying procedural due process.[37] But the Fourth District Court of Appeal and the United States Court of Appeals for the Ninth Circuit disagree. Their disagreement stems from *Mahon's* interpretation of "public notice required by law," reasoning that *Mahon's* decision fails to effectuate the broader procedural protections enshrined in the California Constitution. Instead, the Fourth District and Ninth Circuit embrace *Horn's* due-process dicta and conclude that *Mahon's* interpretation falls short.[38] To save the PSA, it is imperative that the California Supreme Court resolve the appellate courts' split.

The *Mahon* court upheld the PSA's notice-provision as constitutional.[39] The issue before the court was whether "a statement that the project shall be deemed approved if the permitting agency fails to act within 60 days" must be included in public notice provided by the agency.[40] There, the plaintiff-developer argued that the county's general public notice satisfied the "public notice required by law" necessary for deemed approval under the statute.[41] But the *Mahon* court was not persuaded. Neither the county's mailed notices nor the posted notices advised the neighboring community of the consequences of deemed approval if the county failed to timely respond to the permit application. Rather, the notices provided general descriptions of the projects, such as proposed square footage and height.[42] Such generic notice, the *Mahon* court explained, fell short of the PSA's "public notice required by law" requirement in section 65956(b).[43]

The court turned to standard rules of statutory construction to uncover the meaning of the phrase "public notice required by law."[44] It began by analyzing section 65956(b), which includes a self-help provision for the applicant.[45] The section states: "[I]f the applicant chooses to provide public notice, that notice shall include . . . a statement that the project shall be deemed approved if the permitting agency has not acted within 60 days."[46] The court held that the self-help provision

36. CAL. GOV'T CODE § 65956(b) (2000).
37. *Mahon*, 139 Cal. App. 4th at 821–22.
38. Am. Tower Corp. v. City of San Diego, 763 F.3d 1035, 1049–50 (9th Cir. 2014); Linovitz Capo Shores LLC v. Cal. Coastal Comm'n, 65 Cal. App. 5th 1106, 1121–23 (2021).
39. *Mahon*, 139 Cal. App. 4th at 821–22.
40. *Id.* at 821.
41. *See id.* at 814.
42. *Id.* at 815.
43. CAL. GOV'T CODE § 65956(b) (2000).
44. *Mahon*, 139 Cal. App. 4th at 821.
45. *See id.* at 821–22.
46. GOV'T § 65956(b).

has the same requirements as public notice provided by the agency.[47] "We see no reason," the court explained, "why 'public notice required by law' would mean one thing if notice is provided by the agency and another if provided by the applicant."[48] Thus, according to the *Mahon court*, the due-process standards for the PSA's self-help provision and agency-initiated notice are one and the same.

The plaintiff-developer attacked the self-help provision for placing the burden of providing notice on the applicant.[49] But the court was not sympathetic to this argument. Rather, the self-help provision, the court explains, is "the legislative recognition of the significant benefit the applicant obtains from deemed approval" status.[50] For instance, automatic approval may take effect "before the county's planning department has completed its review or resolved public concerns."[51] *Mahon*'s framework therefore gives applicants a leg up in the permitting process, satisfies affected landowners' due-process rights by warning them of deemed approval status, and penalizes a city's failure to act.

Further, *Mahon* stands for the larger principle that affected neighbors and the public should be warned of a project's potential for automatic approval. This warning must be included in deemed approval "whether the applicant *or* the agency provides the public notice."[52] Thus, whether the developer-applicant elects to use the self-help option in subdivision (b), or the agency provides notice, section 65956(b) states that adequate notice must include a clear, cautionary statement: "The project shall be deemed approved if the permitting agency has not acted within sixty days."[53] Moreover, neither the statute's text nor legislative history suggest different procedural due-process guarantees depending on who provides the notice. The court reasoned: "We see no reason why the Legislature would require an applicant to send out anything more than 'public notice required by law,'" and therefore "the statute's requirement that an applicant's notice include a warning of the potential for deemed approval must have been considered part of 'public notice required by law.'"[54] *Mahon* therefore concludes that adequate warning of a project's deemed-approval status satisfies neighbors' procedural due-process rights. How much process is due is not affected by whether the applicant or the city provides public notice.

The Fourth District Court of Appeal and the Ninth Circuit both declined to adopt *Mahon*'s interpretation of "public notice required by law."[55] In *American Tower Corp.v. City of San Diego*, the Ninth Circuit held that the 1987 amendment to the PSA was inadequate. The court maintains that the PSA's public notice

47. *See Mahon*, 139 Cal. App. 4th at 822.
48. *Id.*
49. *Id.* at 824.
50. *Id.*
51. *Id.*
52. *Id.* at 820.
53. CAL. GOV'T CODE § 65956(b) (2000) ("If the applicant chooses to provide public notice, that notice shall include a description of the proposed development . . . the location of the proposed development, the permit application number, the name and address of the permitting agency, and a statement that the project shall be deemed approved if the permitting agency has not acted within 60 days.").
54. *Mahon*, 139 Cal. App. 4th at 822.
55. *Am. Tower*, 763 F.3d at 1049–50; *Linovitz*, 65 Cal. App. 5th at 1121–23.

requirements are "rooted in the due process protections of the California Constitution,"[56] and not the federal due process clause. Importantly, the California Constitution affords far greater due process protections than does its federal counterpart.[57] Further, as explained in *American Tower* and endorsed in *Linovitz Cap Shores LLC v. California Coastal Commission*, the specific requirement that notice contain a cautionary statement is located in a sentence of the statute concerning the required contents of notice "[i]f the *applicant* chooses to provide public notice" in lieu of an agency.[58] Thus, both courts suggest that public notice provided by the applicant is somehow different from public notice provided by an agency. But this distinction is arbitrary. The PSA's undifferentiated requirement is "public notice required by law" and, as *Mahon* explains, there is no reason to suggest that "the Legislature intended a different standard . . . [when] the agency sends out [the notice]," than when the applicant sends it out.[59] In the absence of any definition of "public notice required by law" if sent out by the agency, it is reasonable to conclude that public notice "entails what the phrase means when [it] is sent out by the applicant."[60]

American Tower and *Linovitz* nonetheless flatly rejected *Mahon's* interpretation. In *American Tower*, the court concluded that *Mahon's* cautionary statement warning the community of deemed-approval status fails to satisfy due process under the California Constitution.[61] Notably, while *Linovitz* does not squarely hold that deemed approval is unconstitutional without a prior hearing, its favorable treatment of American Tower and Horn support this reading by implication.[62]

Horn guides American Tower's interpretation of "public notice required by law." First, the *American Tower* court concluded that *Horn*'s due process analysis is not grounded in the federal due process clause because it does not cite *Mathews v. Eldridge*.[63] Not citing to *Mathews*, which "establish[es] the now-familiar framework for evaluating the sufficiency of administrative procedures under the federal Constitution," must have been intentional, or so the court reasoned.[64] Rather, *Horn* cites to its own precedent and other Supreme Court cases which reflect "[t]he general application of due process principles" as "flexible, depending on the nature of the competing interests involved."[65]

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56. *Am. Tower*, 763 F.3d at 1049–50 (emphasis added).
57. *Id.* at 1050 (citing Today's Fresh Start, Inc. v. L.A. Cnty. Off. Of Educ., 57 Cal. 4th 197, 159 (2013)).
58. *Id.* at 1047–48; *Linovitz*, 65 Cal. App. 5th at 1120 (quoting CAL. GOV'T CODE § 65956(b) (2000) (emphasis added)).
59. *Mahon*, 139 Cal. App. 4th at 822.
60. *Id.* at 822.
61. *Am. Tower*, 763 F.3d at 1047 ("In effect, the court said that the lead agency must warn the public that its own failure to act will result in the application being deemed approved and that if the lead agency does not include such a warning, the lead agency has failed to give 'the public notice required by law.'"); *Linovitz*, 65 Cal. App. 5th at 1121.
62. *Linovitz*, 65 Cal. App. 5th at 1121–23.
63. *Am. Tower*, 763 F.3d at 1049 (citing Mathews v. Eldridge, 424 U.S. 319 (1976)).
64. *Id.* (explaining that *Horn* did not cite to *Mathews*).
65. *Horn*, 24 Cal. 3d at 617.

Further, *American Tower* explains that "California's due-process protections are, at times, broader than those imposed by the Fourteenth Amendment."[66] In other words, the federal standard is the floor, not the ceiling. The court cites to *Today's Fresh Start, Inc. v. Los Angeles County Office of Education,* to bolster its proposition. In that case, the California Supreme Court held that "courts may consider 'the dignitary interest in informing individuals of the nature, grounds, and consequences of the [administrative] action and in enabling them to present their side of the story before a responsible government official.'"[67] This "dignitary interest" is not one the federal due process clause protects without a liberty or property interest at stake.

Taking these two points together, *American Tower* and *Linovitz* conclude that "public notice required by law" means exactly what the dicta in *Horn* said it means: a neighbor whose property interests may be "significantly affected" by a project has a due process right to notice and a hearing before a city may apply discretionary development standards to said project. Its interpretation therefore provides more protection than the cautionary statement advocated for in *Mahon*. Thus, according to both courts, a warning that your rights may be violated is not enough.

II. *Horn's* Due-Process Theory Is Dicta and Therefore Not Binding on California Courts.

Horn's due-process theory is dicta and therefore not binding on California appellate and trial courts. This point further bolsters the contention that the California Supreme Court should resolve the appellate courts' split in favor of upholding the PSA as constitutional. To explain *Horn's* due-process dicta fully, it is worth diving into the facts of the case.

The facts of *Horn* began with a dispute between neighbors. Real party-in-interest, Mr. Osborne, applied to the County of Ventura's planning department for approval of a division of his property into four lots.[68] Mr. Osborne's tentative map was approved. The Subdivision Map Act governs subdivision approvals of *five* or more parcels.[69] Here, the act was inapplicable because Mr. Osbourne's project involved only *four* parcels, and therefore "the project was directly subject only to the county's subdivision ordinance, and *not* to the Subdivision Map Act."[70] Nonetheless, the *Horn* court in dicta analyzed the constitutionality of the Act's automatic approval provision, which states: "If no action is taken upon a tentative map by an advisory agency . . . within the time limits specified . . . the tentative map as filed shall be deemed approved."[71]

After Mr. Osbourne's tentative approval, but before final approval by the board, Petitioner Horn purchased the adjacent parcel of land.[72] Skeptical of the

66. *Am. Tower*, 763 F.3d at 1050.

67. *Id.* (citing *Today's Fresh Start*, 57 Cal. 4th 197, 1150 (2013)) (internal quotation marks and citations omitted).

68. *Horn*, 24 Cal. 3d at 610.

69. CAL. GOV'T CODE § 66426 (2004).

70. GOV'T § 66410 (1974); *Horn*, 24 Cal. 3d at 610 (emphasis added).

71. GOV'T § 66452.4(a).

72. *Horn*, 24 Cal. 3d at 610.

negative impacts the project may have on his new property, Mr. Horn requested the County Board of Supervisors hold a public hearing on the original proposal but his requests were denied.[73] He filed a petition for writ of mandate, arguing that the tentative approval of Mr. Osbourne's subdivision violated his due-process rights, and the due-process rights of other affected landowners. The subdivision, he alleged, constituted a "significant deprivation" of their property, and the county failed to "afford[] constitutionally adequate notice and hearing procedures."[74]

Mr. Horn's parade of horribles merely reflected the realities of urban living. The subdivision, he argued, would "create[] substantial traffic and parking congestion,"[75] and contribute to "air pollution." But he nonetheless persuaded the California Supreme Court to reverse and remand the decision in his favor.[76] In so holding, the *Horn* court also put forward its due-process dicta: that a landowner whose property interests may be significantly affected are entitled to notice and a hearing. Because automatic approval statutes like the Subdivision Map Act "cannot contemplate notice" or a hearing, the court came to the conclusion that it is inconsistent with due process.[77]

But, as previously explained, the *Horn* court *was not actually faced* with analyzing the constitutionality of an automatic approval statute like the Subdivision Map Act. The Act was inapplicable to the facts of the case. Rather, the County of Ventura had a discretionary process and opted not to give notice to neighboring landowners for unknown reasons.[78] There is one short paragraph in the opinion about automatic approvals, which later becomes the basis for Courts of Appeal decisions about the PSA. In *Horn*, it is dicta:

> Finally, it is urged that the Subdivision Map Act itself cannot contemplate notice and hearing procedures even as to larger subdivisions, because the act provides for *automatic approval* of a tentative map if the local entity does not act within a specified period after the application for approval is filed. Cal. Gov't Code § 66452.2. It is a sufficient response to note that the due process requirements discussed herein are not rooted in statute but are compelled by the stronger force of constitutional principle.
>
> We therefore conclude that, whenever approval of a tentative subdivision map will constitute a substantial or significant deprivation of the property rights of other landowners, the affected persons are entitled to a reasonable notice and an opportunity to be heard before the approval occurs.[79]

73. *Id.* at 611–12.
74. *Id.*
75. *Horn*, 24 Cal. 3d at 611, 615.
76. *See id.* at 620.
77. *Id.* at 616.
78. *See id.* at 610.
79. *Id.* at 616 (emphasis added).

The court did not need to analyze the constitutionality of the Subdivision Map Act to resolve Mr. Horn's case. But its theory—that discretion triggers the right to a hearing for landowners whose interests may be 'significantly affected'—became the foundation upon which later courts struck down similar housing bills.

III. The California Supreme Court Should Hold That the Permit Streamlining Act Does Not Violate Due Process.

The California Supreme Court must resolve the appellate courts' split in favor of the Permit Streamlining Act and hold that it does not violate due process. The court should adopt the *Mahon* interpretation of public notice required by law. If a local agency fails to comply with the PSA's time limits, it waives its discretionary power. Thereafter, a deemed-approved permit confers the same privileges and entitlements as a regularly issued permit, which is devoid of hearing rights.[80] In this scenario, a neighbor no longer possesses a due-process right to a hearing.

Both the Ninth Circuit and the Fourth District's reliance on *Horn*'s due-process dicta taints their argument that public notice is protected by the safeguards of the California due process clause. Their argument is faulty because, even if *Horn*'s due-process theory were not dicta, it is inconsistent with the leading case on due process under California law, *People v. Ramirez*. *Ramirez*, published one month after *Horn*, famously rejected federal due-process standards.[81] It held that the California due-process clause embodies more robust procedural protections than its federal counterpart. This inconsistency compels the California Supreme Court to reject *Horn's* due-process dicta and the body of case law that relies on it.

A. Horn's due-process dicta is inconsistent with the leading case on due process under the California Constitution—*People v. Ramirez.*

Horn's due-process dicta is contrary to *People v. Ramirez*, the California Supreme Court's masterpiece due-process decision. At the center of *Ramirez*'s due-process analysis is balancing. It asks the question: What procedural protections does this specific circumstance call for considering the governmental and private interests at stake?[82] The answer dictates the extent to which a claimant may receive due-process safeguards. *Ramirez*'s balancing framework is miles apart from *Horn*'s approach because *Horn*'s due-process dicta does not balance at all. Quite the opposite, *Horn*'s theory is concerned with only one party in the proceeding—the neighbor whose property interest may be "significantly affected" by a city's discretionary decision-making. But, because *Horn* does not consider the competing governmental interests at stake, that case and *Ramirez* are

80. *See* Ciani v. San Diego Tr. & Sav. Bank, 233 Cal. App. 3d 1604, 1613 (1991).

81. *See Ramirez*, 25 Cal. 3d 260 (*People v. Ramirez* was published on September 7, 1979, and *Horn v. County of Ventura* was published on July 9, 1979).

82. *See Ramirez*, 25 Cal. 3d at 267.

irreconcilable. This contrast reveals how ill-considered the due-process dicta in *Horn* is.

Ramirez's balancing framework provides broad procedural protections under the California due-process clause. Its analysis begins by rejecting the federal due-process framework.[83] Under federal law, a party must first establish that their property or liberty interest is at stake. Only then is their right to procedural protections triggered. The *Ramirez* court characterizes the federal standard as "anomalous" and "misguided" because it "masks the fundamental values that underlie the clause."[84] These values include limiting abuse of government discretion and considering the dignitary interests of the claimant.[85] Incorporating these values, the court held that under California law, "freedom from arbitrary adjudicative procedures is a *substantive element* of one's liberty . . . [it] presumes that when an individual is subjected to deprivatory governmental action, he *always* has a due process liberty interest both in fair and unprejudiced decision making."[86] Thus, unlike the approach used in the federal cases, California's due-process analysis "does not start with a judicial attempt to decide whether the statute has created an 'entitlement' that can be defined as 'liberty' or 'property.'"[87]

Ramirez announced a four-part balancing test that the California Supreme Court has embraced ever since. The court has cited to *Ramirez* twenty-six times.[88] Its flexible balancing standard first considers the private interests that will be affected; second, the risk of an erroneous deprivation of such interest; third, the dignitary interest of the individual whose interests may be taken away; and fourth, "the governmental interest, including the function involved and the fiscal and

83. *See id.* at 264 ("[W]hen a person is deprived of a statutorily conferred benefit, due process analysis must start not with a judicial attempt to decide whether the statute has created an "entitlement" that can be fined as 'liberty' or 'property,' but with an assessment of what procedural protections are constitutionally required in light of the governmental and private interests at stake"); *see also* In re Malinda S., 51 Cal. 3d 368, 383 (1990) ("[T]he state and federal Constitutions differ somewhat in determining when due process rights are triggered[.]").

84. *Ramirez*, 25 Cal. 3d at 266–67.

85. *See Ramirez*, 25 Cal. 3d at 267.

86. *Id.* at 268 (emphasis added).

87. *In re Jackson*, 43 Cal. 3d 501, 510 (1987) (citing *Ramirez*, 25 Cal. 3d at 158).

88. The California Supreme Court has cited to *People v. Ramirez* twenty-six times since its decision in 1979. *See, e.g.*, Van Atta v. Scott, 27 Cal. 3d 424, 434, 444–45 (1980); *In re* Vicks, 56 Cal. 4th 274, 310 (2013); *In re* Jackson, 43 Cal. 3d at 511; Saleeby v. State Bar, 39 Cal. 3d 547, 565–66 (1985); People v. Winson, 29 Cal. 3d 711, 718 (1981); *In re* Winnetka V., 28 Cal. 3d 587, 594 (1980); People v. Delgadillo, 14 Cal. 5th 216, 369 (2022); *Today's Fresh Start*, 57 Cal. 4th at 213; Conservatorship of Ben C., 40 Cal. 4th 529, 555 (2007)*;* People v. Weaver, 26 Cal. 4th 876, 904 (2001); *In re* Sade C., 13 Cal. 4th 952 n.18 (1996); Traverso v. People *ex rel.* Dep't of Transp., 6 Cal. 4th 1152, 1164 (1993); Monterey Cnty. v. Cornejo, 53 Cal. 3d 1271, 1286 (1991); People v. Martin, 42 Cal. 3d 437 n.12 (1986); People v. Ramos, 37 Cal. 3d 136, 153 (1984); John A. v. San Bernadino City Unified School Dist., 33 Cal. 3d 301, 481 (1982); Hernandez v. Dep't of Motor Vehicles, 30 Cal. 3d 70 n.12 (1981); *In re* Caudillo, 26 Cal. 3d 623, 646 (1980); People v. Chavez, 26 Cal. 3d 334 n.3 (1980); People v. Rundle, 43 Cal. 4th 76, 184 (2008); People v. Gonzalez, 31 Cal. 4th 745, 755 (2003); *In re* Malinda S., 51 Cal. 3d at 383; Conway v. State Bar, 47 Cal. 3d 1107, 1113 (1989); *In re* Michael L., 39 Cal. 3d 81, 103 (1985) (Bird, J., dissenting); *In re* Reed, 33 Cal. 3d 914 n.8 (1983); Andrews v. Agric. Lab. Rels. Bd., 28 Cal. 3d 781, 798 (1981) (Newman, J., concurring).

administrative burdens that the additional or substitute procedural requirement would entail."[89] Unlike the federal standard, which in the first instance requires showing that the claimant is deprived of a liberty or property interest, *Ramirez* is a holistic, flexible assessment of the governmental and private interests at stake.

In *Ramirez* itself, the court weighed the government's interest against a plaintiff-inmate who was excluded from the California Rehabilitation Center (CRC). There, the subjective nature of the CRC's decision was key to the court's holding because exclusion "depend[ed] on a consideration of intangible factors rather than on the existence of particular contestable facts."[90] Discretionary decisions, unlike decisions guided by objective criteria, breed a risk of erroneous and unreliable governmental results. On balance, the plaintiff-inmate's liberty interest outweighed the CRC's interest in maintaining a secure facility.[91]

Ramirez's four balancing factors were not enumerated in Horn - in fact, Horn's analysis is devoid of overt balancing altogether. Unlike *Ramirez*, the Horn court was unconcerned with contemplating the value of governmental interests versus the concerns of private citizens. . Instead, its decision primarily focused on the interests of one group—the landowners whose property interests may be significantly affected by the development in question. This analysis was not flexible but rigid and narrow. Rather than think critically about governmental concerns, like "the fiscal and administrative burdens" of additional process, the court reduced its discussion of governmental burdens to one sentence: "The extent of administrative burden is one of the factors to be considered in determining the nature of the appropriate notice."[92] Acknowledging that administrative burdens are a factor of due process is not the same as considering what those burdens are.

Further, the risk of erroneous decision-making and the dignitary interests of the claimant are absent from the opinion. But in *Ramirez*, these considerations are central to the protections afforded under the due process clause.[93] Moreover, while *Horn*'s decision is led by what constitutes a "significant deprivation" of property, its tacit description of a "significant deprivation" leaves lower courts with little guidance. A deprivation is not significant, the court states, if the "agency decisions have[] a de minimis effect on land," and therefore do not trigger "constitutional notice and hearing requirements."[94] Resolution of these issues requires a careful balancing of conflicting interests. But *Horn's* decision left lower courts with very little explanation on how much process is due.

In keeping with *Ramirez*'s balance-centered analysis, the PSA's notice remedy, as interpreted in *Mahon*, strikes a reasonable balance that the California Supreme Court should uphold as constitutional. The PSA is a modest statute. It is unlike several housing bills that strip agencies of their discretionary power in favor of ministerial permits, which are void of hearing rights. By contrast, *Horn*'s interpretation of due process rights overburdens the government by triggering a right to a hearing whenever the permitting authority uses discretion. The PSA thus

89. *Ramirez*, 25 Cal. 3d at 269–70.
90. *Id.* at 275.
91. See *id.*
92. *Horn*, 24 Cal. 3d at 617.
93. *Ramirez*, 25 Cal. 3d at 269.
94. *Horn*, 24 Cal. 3d at 616 (emphasis added).

presents an intermediate option between two extremes. Rather than strip agencies of their discretionary power altogether, it imposes a statutory *time limit* in which the city *may* exercise its discretion. The purpose of its notice requirement is not only to prevent undue governmental delay, but also to provide the agency with a final opportunity to decide on the project, thereby avoiding the harshness of a deemed-approved permit. The California Supreme Court should therefore adopt *Mahon*'s interpretation of "public notice required by law" and resolve the appellate courts' split in favor of upholding the PSA's constitutionality.

B. Even if *Horn*'s due-process dicta struck a reasonable balance in the late 1970's, the balance weighs in favor of the governmental interests at stake today.

Armed with *Ramirez's* framework and a legislative directive to streamline permits, the California Supreme Court should agree that *Horn*'s due-process dicta does not strike a reasonable balance between the government and private interests at stake in today's world. Both the California housing crisis and the legislature's interest in increasing housing production should be top of mind.

California's attitude towards pro-housing accountability efforts have changed since the late 1970s when *Horn* was decided. A large chunk of the Legislature's political capital nowadays is spent on alleviating the "lack of housing and the lack of affordable housing . . . that threatens the economic, environmental, and social quality of life in California."[95] The Legislature acknowledgesthat "[w]hile the causes of this crisis are multiple and complex, the absence of meaningful and effective policy reforms to significantly enhance the approval and supply of housing affordable to Californians of all income levels is a key factor."[96] Leading elected officials, like Senator Scott Wiener, Chair of the California Senate Housing Committee, have made increasing housing stock and streamlining the permitting process their top priority, with limited success.[97]

Notwithstanding significant community pushback, the Legislature has passed numerous bills that narrow the scope of a city's discretionary powers. These bills prioritize ministerial approval of project applications, including Senate Bill 35, and the 2017 amendments to the Housing Accountability Act, to name a few. Recent legislation thus reveals that, while the balance may have weighed in favor of neighbors' property interests in 1979, the backdrop of the housing crisis moves the pendulum in the other direction. Today's crisis marks the need for courts to "afford the fullest possible weight to the interest of, and the approval and provision of, housing."[98]

95. CAL. GOV'T CODE § 65589.5(a)(1)(A) (2023).

96. GOV'T § 65589.5(a)(2)(A).

97. *See* Dan Walters, *SF housing project fight may go statewide*, CALMATTERS (Nov. 2, 2022), https://perma.cc/GL39-6ZXP (summarizing the San Francisco Board of Supervisor's 8-3 decision to deny the construction of a 27-story residential high rise on a vacant lot at 469 Stevenson Street).

98. S.B. 167, 2017-2018 Reg., Leg. Sess. (Cal. 2017).

Since the 2017 legislative session, the California Legislature has passed a series of bills that limits the scope of agency discretion.[99] One such bill is the Housing Accountability Act (HAA).[100] The HAA limits a local agency's ability to "deny, reduce the density of, or make infeasible housing development projects . . . that are inconsistent with objective development standards."[101] Its primary purpose is to "address the severity of the California housing crisis by taking a critical look at cities approval process for development."[102] By eliminating subjective standards that curtail the production of housing, the HAA seeks to narrow the pool of projects local agencies can deny. A Senate floor analysis explains that state courts are also to blame, because they "are often too deferential to localities in accepting any justification declaring a development infeasible."[103] Against this backdrop, the HAA created a new frontier called the "deemed to comply" permit, which requires cities to notify developers about noncompliance within a brief window of receiving a complete project application.[104]

A "deemed to comply" permit is likely different from a deemed-approved permit under the PSA. While a deemed-approved permit limits discretion *in time*, a deemed-to-comply permit limits discretion *in substance*. Further, a permit which is "deemed approved" may be challenged in court on the grounds that the project does not actually comply with local standards, whereas the plain meaning of the HAA suggests that deemed-to-comply permits waive local agency standards as a matter of law.[105] Senate Bill 35, authored by Senator Wiener, also includes a "deemed to comply" provision.[106] It creates a streamlined, ministerial approval process for affordable infill developments in cities that have failed to meet their Regional Housing needs Assessment (RHNA) targets.[107] While the independent force of deemed-to-comply permits have not been challenged in court, the bill's legislative findings and plain text suggest that they stand on strong legal ground.

Similarly, several other bills provide for ministerial review to address the housing crisis. Senate Bill 9, also known as the California Housing Opportunity and More Efficiency (HOME) Act, streamlines the process for homeowners to create a duplex or subdivide an existing lot.[108] It requires agencies to approve, "without discretionary review or a hearing," two-unit duplexes or subdivisions in single-family zones.[109] In other words, it allows building up to four homes on a single-family parcel. Senate Bill 9 thereby has the potential to alleviate the state's housing shortage by working within a cherished feature of California living—the

99. *See id.*; *see, e.g.*, S.B. 35, 2017-2018 Reg., Leg. Sess. (Cal. 2017); S.B. 9 2021-2022 Reg., Leg. Sess. (Cal. 2021); A.B. 2011, 2021-2022 Reg. Leg. Sess. (Cal. 2021).

100. *See* GOV'T § 65589.5.

101. *Id.*

102. Sen. Assemb. Comm on Local Gov't., Analysis of S.B. 167, as amended July 3, 2017, p. 7.

103. *Id.*

104. *See* GOV'T § 65589.5(j).

105. *See Ciani*, 233 Cal. App. 3d at 1613.

106. GOV'T § 65913.4.

107. *See* GOV'T § 65400.

108. *See Senate Bill 9 Is The Product Of A Multi-Year Effort To Develop Solutions To Address California's Housing Crisis*, S.B. 9, THE CALIFORNIA H.O.M.E ACT (2021), https://perma.cc/R5A9-CAED (last visited Nov. 4, 2023).

109. Sen. Rules Comm., Analysis of S.B. 9, as amended Aug. 16, 2021, p. 3.

single-family neighborhood. It is still too early to gauge if Senate Bill 9 is working. But its idea—to promote infill development within existing zoning codes—reveals the Legislature's willingness to advance creative solutions to address the housing shortage.

The HOME Act was the logical next step after the Legislature passed accessory dwelling unit (ADU) bills. Assembly Bill 68, the major ADU bill that spearheaded the ones that followed, legalized the widespread construction of the "granny flat."[110] Their appeal is simple—affordability. ADUs do not require paying for land, major new infrastructure, or structured parking. That is why the Legislature has prioritized perfecting laws around ADUs ever since Assembly Bill 68. Today, ADU laws require ministerial approval of applications within sixty days, authorize ADUs on lots with multifamily dwellings, and prohibit local height and set-back standards that conflict with state-set limits.[111] Assembly Bill 2221 and Senate Bill 897 are the latest enactments building upon what Assembly Bill 68 started four years ago.

In what is becoming an annual exercise, the California Legislature enacts new laws to promote housing development in the state. Streamlining the permitting process, eliminating discretionary review, promoting infill development, and penalizing unjust governmental delay is the Legislature's chosen medicine in addressing the housing crisis. Thus, this legislative backdrop should compel the California Supreme Court to reconsider *Horn*'s outdated balancing. Today, the private property interests of a single homeowner are not the primary concern. Rather, today's crisis marks the need for courts to "afford the fullest possible weight to the interest of, and the approval and provision of, housing."[112]

C. *Horn* misses the fact that a deemed-approved permit is legally equivalent to ministerially approved permits, which *Horn* acknowledges to be constitutional.

Finally, the Legislature's push for ministerial review to promote housing development further reveals how wrong *Horn*'s due-process dicta is. It misses the key point that a deemed-approved permit is the legal equivalent of a ministerially approved permit. Projects reviewed ministerially require only an administrative review designed to ensure they are consistent with existing general plan and zoning rules. Free from discretionary decisions, ministerial permits are void of the hearing rights that *Horn* so adamantly calls for.

The PSA is designed to circumvent exactly the kind of permitting delays that ministerial permits are *not* plagued by. It does so by elevating a permit to "deemed-approved" status, which has the practical effect of nullifying hearing rights and treating an application as ministerial. Its statutory purpose bolsters this interpretation, codified in section 65921, its purpose is "[t]o ensure a clear understanding of the specific requirements which must be met in connection with

110. *See* CAL. GOV'T CODE §§ 65852.2, 65852.22 (2023).

111. *See* Todd R. Leishman, *Two New Bills Further Restrict Local Regulation of Accessory Dwelling Units*, BEST, BEST & KRIEGER LLP (Oct. 13, 2023), https://perma.cc/7EQA-S3KH.

112. S.B. 167, 2017-2018 Reg., Leg. Sess. (Cal. 2017).

the approval of development projects and to expedite decisions on such projects."[113] Thus, as soon as the PSA's statutory timeline expires, so too does local agency discretion. In *Ciani v. San Diego Trust & Savings Commission*, a California Court of Appeal made clear that deemed-approved permits confer the same privileges and entitlements as a regularly issued permit.[114] And courts, including the California Supreme Court in *Horn*, have confirmed that ministerial approval does not trigger due-process concerns.[115] Thus, the very nature of a deemed-approved permit in the PSA is identical to ministerial ones., The California Supreme Court should therefore uphold the PSA's deemed-approval provision as constitutional.

Conclusion

The California Supreme Court need not look further than its own well-established precedent of *People v. Ramirez* in holding that the PSA comports with due process. Settling the division between the California Courts of Appeal and the Ninth Circuit will render the PSA free to fulfill its legislative purpose: to create a sturdy legislative infrastructure that expedites the permitting process. In doing so, the PSA will prevent unjust governmental delays that curtail housing production.

113. CAL. GOV'T CODE § 65921 (1977).

114. *See Ciani*, 233 Cal. App. 3d at 1613.

115. *See Horn*, 24 Cal. 3d at 615 (stating that agency approvals that are purely ministerial acts require "no precedent notice or opportunity for hearing.").