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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

ELAN AND REVEREND ORACLE,

Plaintiffs and Petitioners

vs.

SANTA CRUZ COUNTY PLANNING DEPARTMENT; TOM BURNS; SANTA CRUZ COUNTY; ELLEN PIRIE; JAN BEAUTZ; NEAL COONERTY; TONY CAMPOS; MARK W. STONE; JOHN LEOPOLD; and DOES 1-25, inclusive,

Defendants and Respondents

Case No. C09-00373 JF

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY ADJUDICAITON

Date: April 2, 2010
Time: 9:00 a.m.
Dept: 5
Hon. Jeremy Fogel

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I. INTRODUCTION

The evidence in this case tells a tale of government arrogance and deceit so egregious that it would strain credulity were it not for the fact that most of the evidence comes from defendants themselves. Plaintiffs had a lien placed on their property for fourteen months based on safety considerations that, even now, not a shred of evidence supports. This occurred after two inspectors saw no violation, and a government official promised there would be no recordation. Defendants violated virtually every principal of due process, both substantive and procedural. Plaintiffs have suffered from inverse condemnation through a temporary taking and actual damages of approximately $1 million not counting emotional distress, attorney fees and interest. As will be described in greater detail below, the pending motion for summary judgment is not well grounded in either fact or law.

II. STATEMENT OF FACTS

A. The Santa Cruz County Planning Department

The Santa Cruz County Planning Department administers the land use permit process in Santa Cruz County. This includes responsibility for building permits and zoning permits. The Planning Department has also been given the responsibility for the enforcement of the County's building, zoning, and environmental regulations. (Tom Burns Decl., ¶ 2 and Exh. A, p. 2; Mark Deming Decl., ¶ 9) The Department's Code Enforcement Section employs investigators who investigate complaints and enforce code sections concerning land use violations. The Department has a separate Development and Permit Application Review section that employs staff planners who review discretionary permit applications concerning zoning and development.

The Planning Department has only very limited appeal procedures. Decisions made on building permit applications are appealable currently only to the County Board of Supervisors. (Burns Decl., ¶ 2-3 and Exhs. A, B) Discretionary permitting decisions are only appealable to higher level planning staff. (Burns Decl., ¶ 4 and Exh. C, and Exh. A, p. 14 and Attachment 7) Decisions by code enforcement staff to post a red tag are not appealable under Chapter 19.01 of the County Code, although owners may, within 20 days, request a meeting with the Planning Director or his designee to "present evidence that a violation does not exist." County Code §19.01.070. When the County

decides to record a notice of violation against an owner's land title, the decision "is final and not subject to further appeal." County Code §19.01.080. (Burns Decl., ¶ 5 and Exh. D)

B. The County's Fence/Hedge Regulations

County Code § 13.10.525 concerns the height of fences and hedges that abut on a road. The only purpose of this ordinance is relevant to this case is to ensure adequate sight distance for vehicles entering the street from driveways. Under County Code § 13.10.525(c)(2), subject to minor exceptions, no fence or hedge may exceed three feet in height if located in a yard abutting a street, except that heights up to six feet may be allowed by a permit. (*Id.*) There is an exception for fences on properties located in "agricultural zone districts," where fencing for agricultural purposes may have heights up to six feet without a permit, provided that such fencing is "1) six feet or less in height; 2) made of wire which is spaced a minimum of six inches apart (i.e., typical field fencing); or 3) made of horizontally oriented wooden members which are spaced a minimum of one foot apart (i.e., typical wooden corral fencing)." County Code §13.10.525(c)(3). (Emphasis added)

C. Plaintiffs' Hedge and Fence

This case concerns plaintiffs' former property, located at 396 Tolak Road in Aptos. The property sits on a curve where two roads – Tolak Road and Horizon Way – meet. The zoning designation of this property is Residential Agriculture. A substantial portion of the Subject Property was devoted to growing apples, pears, oranges, lemons, plums, persimmons, figs, avocados, olives, strawberries, tomatoes, lettuces, parsley, garlic, fennel, celery, Swiss chard, kale, carrots, squash, eggplant, beets, herbs, lavender and specialty crop pittasporum bushes during the period plaintiffs resided there. (Oracle Decl. ¶ 3)

Plaintiffs purchased the Subject Property on or about March 5, 2001. The perimeter of the property facing the road features pittasporum hedges for privacy, which by 2005 had grown naturally to a height of eight to ten feet, which is very common in the area where plaintiffs resided. (Id. ¶4 and Ex. A) In 2005, Petitioners decided they wished to install new driveway gates and fences for security and to protect their crops from wildlife. (Id. ¶5)

In December 2005 plaintiffs filed Development Permit Application ("DPA") 05-0780 for two

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circular driveway iron gates and a section of black vinyl chain link fencing to separate the front of their property from Tolak Road and Horizon Way. Plaintiffs were advised that they needed to file for this type of permit by the Planning Department intake personnel. They did not tell plaintiffs that six foot fences were permissible in agricultural zones or that pursuant to the building code, no permit was required. Had plaintiffs been told that a particular type of fencing was required, they would have complied. Staff also requested that plaintiffs use alternative materials for the chain link fence material, although neighbors use black chain link fences and it is an updated material used in agricultural zones. (Oracle Decl. ¶ 6)

During the time DPA 05-0780 was being processed, Richard Zscheile, one of plaintiffs' neighbors, submitted a formal Code Complaint concerning plaintiffs' hedges. Zscheile lives at the end of Horizon road and prefers to drive faster than the posted speed limit and to cut across the curve. (Oracle Decl. ¶7)

On May 3, 2006, Petitioners' permit application, No. 05-0780 ("First Permit Application"), was approved by the County with Conditions of Approval requiring the hedges to be maintained at no more than three feet in height for a length of eighty-six feet along the road. No official reference or fixed standard was supplied in support of this condition. Plaintiffs signed the signature page of the Staff Report and Development Permit, without realizing that it contained this condition, as it was not mentioned in the text of the Staff Report, but only at the end of a long list of conditions that were in an attachment. (Oracle Decl. ¶8; Elan Depo., pp. 52:16-53:16; Deming Decl., ¶ 13 and Exh. H)

D. Initial Code Compliance Activity Concerning Plaintiffs' Hedge

In April 2006, Code Compliance Officer Aaron Landry received Zscheile's Code complaint concerning the hedge and he conducted a site inspection. On May 12th he visited the Subject Property. Landry informed Petitioner Elan, "I see no violation existing here." Landry did not believe there was a line-of-sight problem or that the hedge was otherwise dangerous. Landry took no further action to issue or post a notice of violation. (Elan Decl. ¶9; Aaron Landry Depo., pp. 14:16-20:24; 24:23-31:21; 33:21-34:4; 34:20-36:8 and Depo. Exhs. 1, 23, 24, 25)

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Over the next several months, Zscheile continued to contact the County requesting that it take action on his code complaint. (Deming Decl., ¶ 14 and Exh. I) In August 2006, Code Compliance Investigator Kevin Fitzpatrick, who had no knowledge of Landry's prior visit (Fitzpatrick Depo. at 37:16-38:6) conducted a second site inspection of the property. Based on his independent review, Fitzpatrick determined that the complaint was "not valid" and that there was no sight-line issue associated with the hedge. He recorded his conclusion in the Code Compliance department's official record. (Fitzpatrick Depo., Ex. 1, pp. 33:16-43:3; 60:12-18; 64:14-22; 65:15-19; 67:2-21; 68:14-69:5 and Depo. Exh. 1)

In November 2006, David Keyon, the staff planner who worked on DPA 05-0780, sent a letter to plaintiffs notifying them that they were in violation of the conditions of approval for the permit, and that a failure to comply with the conditions would result in a referral to Code Compliance. (Keyon Depo., p. 63:5-64:11 and Depo. Exh. 105; Elan Depo., p. 63:7-22; Deming Decl., ¶ 15 and Exh. J) Plaintiffs wrote Keyon a letter in response, asking him to cancel the permit application, stating that "we withdraw this application." (Oracle Decl. ¶ 11; Deming Decl., ¶ 16 and Exh. K; Keyon Depo., Exh. 106)

In early 2007, plaintiffs, at the suggestion of a traffic engineering consultant, installed double yellow line striping and signs reminding motorists of the 10 mile per hour speed limit. These actions were authorized by a meeting of the Johanna-Tolak Road Association which Zscheile attended. (Oracle Decl. ¶ 12; Marquez Decl. ¶ 3)

On February 2, 2007, Fitzpatrick was ordered by a supervisor to post a Notice of Violation ("NOV" or "red tag") on plaintiffs' property asserting that the property was in violation of County Code § 13.10.525(c)(2). (Fitzpatrick Depo., pp. 24:2-23; 25:13-26:4; 28:2-31:6; 65:20-24; 70:3-72:25; 79:16-80:16; 91:20-93:3; 96:6-20; 121:3-4 and Depo. Exhs. 4, 5; Elan Depo., p. 74:6-19; 77:4-18.) No reason was given, and Fitzpatrick did not agree with the decision. (Fitzpatrick Depo. at 71:12-72:1) Notably Zscheile had written County Supervisor Pirie, who was in close contact with the Planning Department on this topic, to demand posting of the red tag only two weeks earlier. (Pirie Depo at. 16:18-24, 22:24-23:13, Ex. 45; Keyon Depo. at 133:5-10) The sole Code

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section cited in the red tag was Santa Cruz County Code § 13.10.525(c)(2). While posting the notice at the property, Fitzpatrick told plaintiffs that "we hemmed and hawed on whether we should place the red tag because we didn't want to do it..." (Oracle Decl. ¶ 13 and Ex. B; Elan Decl. ¶12)

On March 5, 2007, plaintiffs wrote to Fitzpatrick to protest the Notice of Violation. (Fitzpatrick Depo., Exh. 6; Deming Decl., ¶ 19 and Exh. N.) (Oracle Decl. ¶ 14 and Ex. C) In a separate letter, Bernice Romero of the County notified plaintiffs that their protest was timely. The protest meeting was scheduled for May 16, 2007. (Oracle Decl. ¶ 15 and Ex. D)

On March 22, 2007, plaintiffs wrote to the County to inform it of the traffic control actions that had been taken from 2005 to 2007, including double yellow line striping, pavement boundary signs and painted curbs to enhance the safety of the curve along the road. Plaintiffs also informed the County that the curve along the road was not an intersection as the Planning Department had stated. Plaintiffs provided photographs documenting a line of sight of more than 100 feet at the curve. (Elan Decl. ¶ 15, and Ex. A; Oracle Decl. ¶ 16; Deming Decl. ¶¶ 19-20)

On May 13, 2007, before the scheduled protest hearing, plaintiffs requested that it be postponed because County officials had indicated that they should resolve the matter by re-entering the permit process. (Oracle Decl. ¶ 17; Keyon Depo., pp. 89:24-90:15 and Depo. Exh. 110) The County thereafter re-scheduled the protest meeting for June 14, 2007. (Oracle Decl. ¶ 17; Fitzpatrick Depo., p. 125:5-23 and Depo. Exh. 9.)

E. Plaintiffs' Second Development Permit Application

On June 4, 2007, a meeting took place between plaintiffs, their consultant, Dave Laughlin, a retired Code Compliance Officer, Ron Marquez, Keyon, Code Enforcement supervisor Ken Hart, and Assistant Planning Director Mark Deming. The purpose of the meeting was to discuss a possible resolution of County's fence issues. (Oracle Decl. ¶ 18; Elan Depo., pp. 84:13-85:18) At the meeting, Hart and Deming represented to plaintiffs that the County would not record the red tag while plaintiffs were in the permit process and trying to resolve the issues. (Oracle Decl. ¶18; Elan Depo., p. 85:19-24) In reliance on this promise, plaintiffs withdrew their request for a protest

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meeting concerning the posting of the red tag. (Oracle Decl. ¶18; Fitzpatrick Depo., pp. 129:22-130:5 and Depo. Exhs. 1-A and 9)

Following the meeting, Keyon and Deming conducted a site inspection to review the line of sight around plaintiffs' hedge. Following this site inspection, Keyon corresponded via e-mail with Laughlin, plaintiffs' consultant. Keyon emailed Laughlin noting that he and Deming had "decided that setting the fence/hedge back about five feet from the edge of the paved road would work on both curves, and that the fence/hedge south of the curve at the road could remain where it is now...the hedge along the road before the first driveway can remain if it is cut down to six feet in height...all fences and hedges within the front yard setback must not exceed six feet in height, so the fences and hedges allowed to remain will have to be cut down to this height..." In a subsequent email, Keyon reiterated that if plaintiffs moved the hedge five feet back from the road and cut it down to six feet, "this is a ministerial permit." (Oracle Decl. ¶ 19 and Ex. E; Deming Depo., pp. 31:9-42:21; 46:24-48:21; 90:18-21 and Depo. Exh. 27; Keyon Depo., pp. 94:9-100:8 and Depo. Exh. 27) Based on these emails, Petitioners cut their hedge/fence to six feet in height for the entire length of their property and moved the fence/hedge back five feet where requested by Keyon, all of which was possible by trimming the existing hedge. (Oracle Decl. ¶ 19 and Ex. E)

On June 12, 2007 plaintiffs listed their house for sale with Sally Lyng, one of the top real estate brokers in the County. They listed the house at $2,495,000 based on Lyng's analysis of market values at that time. They reduced the listing price to $2,395,000 in July 2007. (Oracle Decl. ¶ 20)

On June 28, 2007, plaintiffs filed their second Development Permit Application -- DPA 07-0327 -- again requesting to construct a six-foot high chain link perimeter fence with two gates. (Oracle Decl. ¶ 21; Deming Decl., ¶ 23 and Exh. R; Elan Depo., pp. 97:1-98:21)

On August 10, 2007, the County finalized its staff report. In direct contravention to Keyon's earlier e-mails, the staff unilaterally decided that the hedge could not remain at six feet high for much of its length, because it allegedly created a sight distance problem. The three foot limit was more widely applied than it had been to their 2005 permit application. Plaintiffs never received an

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explanation why the County reneged on the understanding Keyon, Deming, and their representative had reached in the June 2007 emails, which they had relied upon. (Oracle Decl. ¶ 22, Ex. F) On August 24, 2007, plaintiffs appealed the conditions of DPA 07-0327, specifically those involving trimming the vegetation. (Oracle Decl. ¶ 23)

F. The County Records The Notice Of Violation Pursuant To Its Standard Practice

On or about August 28, 2007, Code Enforcement Officer Laura Madrigal received notice from a clerical employee that plaintiffs' code violation had not been resolved. Based on her standard practice, Madrigal recorded the red tag on title to the property. (Laura Madrigal Depo., pp. 5:15-21; 21:13-25:6; 26:16-27:21; 32:10-33:16; Depo. Exh. 98) The cover letter she sent falsely represented that there had been a follow up inspection. (Fitzpatrick Depo. at 129:3-131:9; Madrigal Depo. at 26:1-19) Hart, the head of the Code Compliance section, who had made the false representation that the red tag would not be recorded while plaintiffs were still engaged in the permit process testified that Madrigal followed established procedure. (Hart Depo., pp. 43:2-24) Plaintiffs wrote to the Planning Department several times asking them to remove and cancel the recorded red tag. Plaintiffs had no way of appealing the recordation, other than by bringing this suit, because the County Code provides that recordation of a red tag is "final and not subject to further appeal." (Oracle Decl. ¶ 24, Ex. G) County Code §19.01.080.

G. The Appeal Of DPA No. 07-0327

On October 4, 2007, the Planning Director's designee, Don Bussey, issued a decision concerning plaintiffs' appeal. Bussey nullified the approval of the permit with conditions and remanded the project back to staff to "be reworded to limit the application of this requirement or be deleted," and consider sight distance information from plaintiffs' traffic engineer, Ron Marquez. At the appeal hearing itself, Bussey described the permit restrictions as "draconian." (Oracle Decl. ¶ 25) (Deming Decl., ¶ 28 and Exh. V)

The County quickly telegraphed its position that it would not fairly reconsider the issue. On December 7, 2007, Planning Director Burns emailed Plaintiffs' representative, Laughlin. Burns wrote that he "had a chance to sit down with the folks here involved in this application.

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Quite frankly, I am a bit concerned about why we are entertaining this application at all." Burns wrote, "I see no basis at all for permitting such a feature. Quite frankly, it appears the original permit, which the applicant refused to sign, was quite generous." (Oracle Decl. ¶ 26 and Ex. H)

This directive from the top was echoed in a December 26, 2007 email to Laughlin from Alice Daly ("Daly"), the County Project Planner who was nominally assigned to the remanded application. She wrote that "it appears that your very best option might be to sign the original permit approval. While this may not be the outcome your clients prefer, it may be the only thing that CAN be approved per our ordinance requirements. ...if we were starting fresh with this, it is likely that additional trimming back of your shrubs would be required. ...my feeling is that- again, in light of what our ordinance specifies, additional information will not change our ability to approve something beyond what was originally approved here..." (Oracle Decl. ¶ 27 and Ex. I)

On January 9, 2008, Petitioners wrote directly to Burns complaining that Daly had already made up her mind without hearing the appeal or reviewing new information. They pointed out that a report from their Traffic Engineer, Ron Marquez, showed that there was no sight line or safety hazard and requested that the County remove the restrictions on the Second Permit Application and remove the Notice of Violation. (Oracle Decl. ¶ 28 and Ex. J)

During this time period, the relationship between the County and plaintiffs began growing contentious. Plaintiffs were copying Fitzpatrick on e-mails they sent to Daly. In response to one of the e-mails, on February 8, 2008 Fitzpatrick wrote to Daly: "Alice, this violation has been recorded on title and code compliance will not be taking any action. Can you just deny their application and let them appeal your decision. all [sic] this crap is not worth your time." (Hart Depo., pp. 68:16-70:15 and Depo. Exh. 13; Tom Burns Depo., p. 137:5-23)

On March 5, 2008, Fitzpatrick was again copied on an e-mail from Oracle, in which she stated that the red tag was unsubstantiated. Fitzpatrick took offense to this and responded. In an effort to support the truth of her statement, Oracle responded that she held three minister licenses. This caused Fitzpatrick to respond "would they be minister licenses of Babylon the Great" a

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reference to the biblical Antichrist and whore of Babylon. (Oracle Decl. ¶ 30) (Fitzpatrick Depo., pp. 117:19-118:10; 156:15-159:22 and Depo. Ex. 20; Burns Decl., ¶ 11 and Ex. F) Fitzpatrick concedes that the e-mail was not appropriate. (Fitzpatrick Depo., pp. 164:10-165:21)

H. Issuance Of The Second Permit With Conditions

On March 31, 2008, Petitioners counsel wrote to Burns informing him that, because the Subject Property was in an agricultural zone, the three foot height limit of the fence and abutting roadways was not applicable. (Oracle Decl. ¶ 31; Pierce Decl. Ex. N)

During the period that Alice Daly was considering plaintiffs' permit application, from October 2007 to April 2008, plaintiffs repeatedly requested a face to face meeting with Daly. Plaintiffs had a meeting set up for November 16, 2007, but for some reason she never followed through. On December 13, 2007, plaintiffs emailed Daly with six possible dates for a meeting. Daly did not respond. On February 21, 2008, plaintiffs sent Daly another request for a meeting. She never responded. On February 28, 2008, plaintiffs emailed Daly again asking for meeting dates. She did not respond. On March 4, 2008 plaintiffs emailed Daly reminding her that she had not given them a meeting date. There was no response. On March 8, 2008, plaintiffs again emailed Daly to complain about her refusal to talk to them. (Oracle Decl. ¶ 32, Ex. M)

In early March 2008 plaintiffs received a letter from their County Supervisor, Ellen Pirie. Plaintiffs had met with Supervisor Pirie twice, along with Ron Marquez, their road engineer, who explained that there was no safety issue at their property. Pirie said that she had not found any violations of County laws in how plaintiffs had been treated. She also echoed Burns' earlier warnings by recommending that plaintiffs ask "for permission to return to your first permit application." Pirie did not explain how she could be so confident, weeks before Daly's staff report was issued, that it would be harsher than the earlier report. (Oracle Decl. ¶ 33, Ex. N) On April 1, 2008, Daly issued an Amended Staff Report and Development Permit for Permit No. 07-0327. (Oracle Decl. ¶ 34, Ex. O) Instead of requiring plaintiffs to cut the hedges abutting the curved portion of the road, this report required them to remove all existing hedges abutting the road at all points, including along a lengthy straight section of Tolak Rd., required a setback that would

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deprive them of 15% of our usable land, and deprived them of privacy, land value and protection from wildlife. Id. (Deming Decl., ¶ 29 and Ex. W)

On or about April 4, 2008 plaintiffs took their house off the multiple listing services until they could get the red tag removed. (Oracle Decl. ¶ 35)

Defendants charged plaintiffs fees in excess of $7,500 for time spent processing and unlawfully denying Plaintiffs' permits, and recording the Notice of Violation. The bills sent to plaintiffs contained no notice of any deadline or procedure for plaintiffs to protest or otherwise challenge the fees sought by defendants. (Oracle Decl. ¶ 36)

I. Plaintiffs Sue The County

In May 2008, plaintiffs filed a lawsuit in Santa Cruz County Superior Court seeking writs of mandate and other relief concerning the permitting and code enforcement decisions made by the County.

In October 2008, the County expunged the recorded red tag and issued plaintiffs a revised permit allowing them to keep their hedge at a height of six feet. (Deming Decl., ¶ 30 and Exhs. X and Y) To date, plaintiffs have not been mailed a copy of a new or amended permit. The expungement of the red tag and the issuing of the permit seem to be as random and capricious as the original recording of the red tag. There was no settlement agreement. No conditions on the subject property changed other than a complaint filed in court by the plaintiffs, after substantial expenditures for attorneys and consultants. (Oracle Decl. ¶ 38)

J. Plaintiffs Lose $1 Million On The Wrongfully Delayed Sale Of The Property

In November 2008, plaintiffs had their residence appraised by Michael Barcells. His report found that on February 1, 2007 the house had been worth $2,350,000 but that by November 2008, due to the economy, the value had fallen to $1,750,000. (Oracle Decl. ¶ 39, Exs. O and P) Plaintiffs relisted the house in November 2008, shortly after the expungment of the red tag made it saleable again. Id.

In the Fall of 2009, plaintiffs sold the property, which they had originally listed just before the recordation of the red tag, for $1,449,000. During the period the red tag was recorded, (August

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2007 to October 2008) thereby preventing sale, the real estate market suffered the greatest decline since the Great Depression. Higher end properties were especially affected due to the virtual absence of lenders willing to finance such properties. Plaintiffs sold the property for about $1 million less than its value at the time they first listed it. (Oracle Decl. ¶ 40; Sally Lyng Depo., pp. 47-49, 53-59, 92-94 and Depo. Exh. 26; Elan Depo., p. 33:9-13)

III. LEGAL ARGUMENTS

Because many of the summary judgment issues depend on the resolution of recurrent constitutional and statutory questions plaintiffs' presentation will begin with these recurrent issues (sections A, B, and C).

A. The § 1983 Claim (Defendants' Issue No. 7)

1. Plaintiffs Claim for Violation of Civil Rights Under §1983 Presents A Triable Issue of Fact

The plaintiffs' contstitutional claim could not be more straightforward. Plaintiffs owned a parcel of real property valued at over $2 million. Defendants impaired the value of that property by recording a Notice of Violation, aka red tag. Prior to the recordation of the red tag plaintiffs filed a protest. They then took up the County on its suggestion that they file for a permit in lieu of pursuing the protest. During the permit process, after being expressly promised by responsible County officials that there would be no recordation while they engaged in that process, the red tag was recorded. This came just a few weeks after plaintiffs put their property on the market, thinking that there would be no problem. By the time the red tag was expunged, the property had lost approximately $1 million in value due to the real property crash.

Defendants reply that plaintiffs had no vested right to maintain their hedge. Assuming arguendo, that the fence ordinance barred the hedge, nonetheless, defendant's argument misses the point – the County did not take action against the hedge, they posted a notice and recorded an encumbrance against the entire property. The purpose and intent of recordation is to inhibit refinance or sale of the entire property to put pressure on the owner. The red tag itself states that its recordation "may affect transfer of financing of the property." (Oracle Decl., Ex. B; See Hart Depo. at 74:15-20; Pirie Depo. at 97:25-98:7; Mauriello Depo. at 46:24-47:23; 89:14-18; 91:21-

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24 and Ex. 36, p. 2, 1st full paragraph; Fitzpatrick Depo. at 87:1-4; Pierce Decl., Ex. O, p. 2, last full ¶) Given that under County's ordinance, a six foot hedge can easily be legalized by obtaining a permit; plaintiffs were in the process of obtaining such a permit; and plaintiffs were persuaded to drop their legally authorized protest hearing in favor of the permit process by County officials themselves there was no justification for recordation and the resulting immediate impairment of the value of the entire property.

2. The County's Actions Violated Plaintiffs' Rights To Procedural Due Process

The County violated Plaintiffs' due process rights at least four times over. First, without any notice or hearing, it *issued* a Notice of Violation finding Plaintiffs guilty of code violations. Second, without notice or hearing, it *recorded* the Notice of Violation against Plaintiffs' property. Third, there is no appeal from the recordation. Fourth, the permitting process, was rife with constitutional improprieties.

a. Issuing Notice of Violation

Two different code inspectors after two separate inspections independently determined that no violation existed with respect to Plaintiffs' hedges. The County then inexplicably reversed itself without giving any notice or hearing to Plaintiffs, issuing a Notice of Violation finding Plaintiffs guilty of code violations, and ordered Plaintiffs to comply.

For purpose of due process, courts "recognized a constitutionally protected property interest in a landowner's right to devote [his or her] land to any legitimate use." *Squaw Valley Dev. Co. v. Goldberg,* 375 F.3d 936, 949 (9th Cir.2004); *see also Harris v. County of Riverside* 904 F.2d 497, 503 (9th Cir. 1990); *Washington ex rel. Seattle Title Trust Co. v. Roberge,* 278 U.S. 116, 121. Maintaining hedges for privacy and to protect crops from deer is a legitimate use of property. By ordering the destruction of this property, along with the concomitant loss of privacy and protection, the County interfered with a property interest.

The Notice of Violation subjected Plaintiffs to immediate sanctions. The red tag states that "violations … were observed" and that "it is the responsibility of the property owner to correct all posted violations within thirty (30) calendar days of the date of this notice. It shall be

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a separate offense for each and every day during any portion of which any violation of, or failure to comply with, any provision of this code is committed, continued or permitted." (See Oracle Decl. Ex. B) Courts "recognized a constitutionally protected property interest in avoiding fines[.]" *City of Oakland v. Abend*, 2007 WL 2023506, 6 (N.D.Cal., 2007); *see also Cook v. City of Buena Park*, 126 Cal.App.4th 1, 6, 23 Cal.Rptr.3d 700 (2005) (landlord "undoubtedly" had property interest in collecting rent and avoiding fines).

Therefore, *before* finding Plaintiffs guilty of code violations, *before* ordering them to destroy property and *before* subjecting them to the threat of fines, the County had a constitutional obligation to provide at least some type of notice and some type of hearing. For example, in *City of Oakland v. Abend*, 2007 WL 2023506, 6 (N.D.Cal.,2007), the Northern District held that property owners had "a constitutionally protected property interest which suffered a deprivation when the City issued the '30 Day Notice to Abate Letter.'" The Court explained that issuing the Notice to Abate imposed a "nuisance case fee, which could be recovered through the property tax general levy, and additional substantial fines were threatened." The Notice further declared the property a nuisance which "drawing all inferences in the [owners'] favor, this declaration could impair the ability of the [owners] to sell, finance, or lease the property." *See also Luedeke v. Village of New Paltz* 63 F.Supp.2d 215, 222 (N.D.N.Y.,1999) (Notice of Assessment imposing fines for failure to remove snow before any hearing violated due process). Therefore, the County had an obligation to give Plaintiffs notice and a hearing before issuing the Notice.

b. Recording and/or Failing to Expunge Notice of Violation

The County even more egregiously violated Plaintiff's due process rights when it *recorded* the Notice of Violation without notice or an opportunity to be heard. "Without doubt, state procedures for creating and enforcing attachments, as with liens, are subject to the strictures of due process." *Connecticut v. Doehr* 501 U.S. 1, 12 (1991). The "temporary or partial impairments to property rights that attachments, liens, and similar encumbrances entail are sufficient to merit due process protection." *Id.* A recorded Notice of Violation, just like an attachment or lien, "ordinarily clouds title; impairs the ability to sell or otherwise alienate the

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property; taints any credit rating; reduces the chance of obtaining a home equity loan or additional mortgage; and can even place an existing mortgage in technical default where there is an insecurity clause." *Id.* Indeed, the Notice of Violation itself states that recordation "may affect transfer or financing of the property." (Oracle Decl. Ex. B)

For this reason, courts routinely require prior notice and a hearing before recording documents against a real property. *See, e.g., also Tri-State Development, Ltd. v. Johnston,* 160 F.3d 528 (9th Cir. 1998) (attachment recorded without prior notice or hearing violated due process); *Reardon v. U.S.*, 947 F.2d 1509 (1st Cir. 1991) (lien statute violated due process); *Weinberg v. Whatcom County* 241 F.3d 746, 752 (9th Cir. 2001) (prior notice and hearing required before issuing stop work order); *Harris v. County of Riverside* 904 F.2d 497, 503 (9th Cir. 1990) (prior notice required before limiting use of land).

The County does not appear to seriously dispute that Plaintiffs had a constitutional right to a hearing before the County could record Notice of Violation. Instead, it appears to suggest that it satisfied due process because the Notice of Violation advised Plaintiffs that the document would be recorded and they were offered a "protest meeting." The County simply ignores that it promised not to record the document while Plaintiff's pursued a permit. Plaintiffs had requested a protest meeting, but based solely on the County's promise, they withdrew the request and pursued a permit. In direct contravention of its promise and while Plaintiffs were actively pursuing a permit, the County recorded the Notice of Violation. The County gave no prior notice or hearing that it intended to renege.

Any warnings contained the Notice of Violation cannot satisfy due process here because, *after* sending that Notice, the County told Plaintiffs that those warnings no longer applied. Prior, superseded or incomplete notices do not satisfy due process. For example, in *Woll v. County of Lake*, 582 F.Supp.2d 1225, 1229 (N.D.Cal.,2008), the County claimed that it could record a new Notice of Nuisance without issuing a new notice because the property owners had been subject to previous enforcement actions for similar violations. The court rejected this contention. The court held that if the government wished to record a new Notice of Nuisance, it had to give the

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plaintiffs new notice and a new hearing.

Likewise, in *Patel v. Penman*, 103 F.3d 868, 879 (9th Cir. 1996), the city sent notices of code violations, but no notice that the property would be closed down. In finding a due process violation, the court explained "those notices did not apprise [the owner] of his right to be heard to contest the permanent closure of the motel; at the most, they notified [him] of his right to protest the City's determination that code violations existed at the motel." *Id.* at 879.

Finally, the County argues that it negligently recorded the Notice of Violation and negligence cannot support a procedural due process claim. This argument fails for a multitude of reasons. First, *issuing* the Notice of Violation without notice or hearing was not a mistake; it is established County policy. Second, Laura Madrigal, the person who *recorded* the Notice of Violation, did so in accordance with County policy, according to her testimony. (Madrigal Depo. at 26:1-27:21) Madrigal also admitted that it was County policy to issue a letter saying that there had been a "follow up inspection" even if, as in this case, that had not occurred. (Madrigal Depo. at 26:1-19. Fitzpatrick Depo. at 129:3-13) Ken Hart, the head of the Code Enforcement Section, who made the promise that there would be no recordation, knew perfectly well that his section's policy was to record whenever there was no active protest on file, even if the property owner had applied for a permit that would correct the violation. (Hart Depo. at 41:3-9; 43:2-7) There was no "error" in recording – that was established policy. But there was a misrepresentation and perhaps outright fraud, in telling plaintiffs that they should drop their protest in favor of a permit application and that there would be no recordation while the permit process continued.

Third, a triable issue exists that the recordation was the result of political pressure. Mr. Zscheile was pressuring the County to record the red tag through Pirie, Burns, and Mauriello. (See Pirie Decl. Ex. 47, and fuller discussion in Section III. A.2.d below) The County did record, and acknowledges that it should not have. A reasonable jury could conclude that at the time the County recorded the Notice, it was acting pursuant to Zscheile and Supervisor Pirie's wishes. Fourth, even if the initial recording was a mistake, the County intentionally refused to expunge the Notice. The County's intentional decision to maintain the Notice of Violation during a

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fourteen month period when property values were dropping like a rock, caused as much harm as the initial recording.

Under these circumstances, there is absolutely no justification for failing to notify Plaintiffs, let alone failing to provide them with an opportunity to be heard. The private interests at stake are compelling. Plaintiffs lost $1,000,000 in property value as a result of the Notice of Violation. The risk of erroneous deprivation was substantial. Providing notice and an opportunity to be heard would have been a minimal burden to the County. Had the County actually notified Plaintiffs of its intent to renege on its promise and record the red tag, Plaintiffs could have kept their protest active and avoided the catastrophic impact on their property. There was no compelling need to record the Notice quickly. Enforcement officers didn't even think a violation existed. Dozens of neighboring properties had and still have similar conditions which the County simply ignores. (See Oracle Decl. Ex. A; Lyng Depo. at 48:24-49:5)

c. Post-Recordation Process

There was no available post-deprivation procedure. County Code §19.01.080 explicitly states that recordation of a red tag is "final and not subject to further appeal."

d. The Permitting Process

The permitting process, which continued after the County recorded the Notice of Violation, could not remedy the ongoing due process violation. *See, Conn. v. Doehr* 501 U.S. 1, (1991); *Woll v. County of Lake*, 582 F.Supp.2d 1225, 1229 (N.D.Cal. 2008). Moreover, the process itself independently violated Plaintiffs' due process rights.

First, due process precludes an investigator from participating in an appeal reviewing the investigator's decision. "The rule against overlapping functions ... applies to prevent participation at ascending levels of the process, so that a participant will not be in the position of reviewing his own decision or judging a man whom he has either charged or investigated." *Rhee v. El Camino Hospital Dist.* (1988) 201 Cal.App.3d 477, 499; *see also Golden Day Schools, Inc. v. State Dept. of Education* (2000) 83 Cal.App.4th 695, 709 ("no employee involved investigating or prosecuting a case may participate as an adjudicator"): *Union Pacific Railroad Co. v. State Bd. of Equalization*, 282

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Cal.Rptr. 745 (1991) (procedure fundamentally unfair whether attorney advises Board as assessor, then advises Board as appeals board).

Here, the enforcement officer who recorded the Notice of Violation, Fitzpatrick, personally participated in the decision to deny Plaintiffs' appeal to legalize the hedges. While Daly purported to consider the appeal, Fitzpatrick told her to deny it. He said, "Alice, this violation has been recorded on title and code compliance will not be taking any action. Can you just deny their application and let them appeal your decision. all [sic] this crap is not worth your time."

Second, due process requires that "he who decides must hear." *Vollstedt v. City of Stockton* (1990) 220 Cal.App.3d 265, 276, 269; *Morgan v. United States*, 298 U.S. 468, 56 (1936). Here, the Planning Director, Tom Burns, did not hear any of the evidence from Plaintiffs. Yet he announced the decision months before it occurred. (Oracle Decl. Ex. H)

Third, Supervisor Pirie, through Mauriello and Burns improperly interfered with the process. "City council members who improperly interfere with the process by which a municipality issues permits deprive the permit applicant of his property absent that process which is due. *Bateson, 857 F.2d at 1303; Blanche Rd. Corp. v. Bensalem Township,* 57 F.3d 253, 267-68 (3d Cir.) (deliberate interference with the process by which the township issues permit established substantive due process violation); *Bello v. Walker,* 840 F.2d 1124, 1129 (3d Cir.) (improper interference with the process by which municipality issues building permit is arbitrary and violates substantive due process); *Scott v. Greenville County,* 716 F.2d 1409, 1419 (4th Cir.1983) (county council's intervention in administrative issuance process of a building permit violates due process)."

There is substantial evidence of political interference in the process. Defendant Ellen Pirie, the County Supervisor whose district includes the subject property, was approached early and often by Mr. Zscheile, plaintiffs' neighbor. (Pirie Depo. at 7:12-8:15) Pirie received a letter from Zscheile complaining about the "blind corners" on January 17, 2007, just two weeks before Fitzpatrick was ordered, against his wishes to post the red tag. (Fitzpatrick Depo. at 71:12-72:1) (See Pirie Decl. Ex. 45) According to Pirie, her practice in such cases is to have her staff contact

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planning. (Id. 9:11-21) When Oracle and Elan contacted her later to complain about their treatment by the Planning Department, Pirie did not tell them that she was already helping the people who complained about the hedge. (Pirie Depo. at 13:9-12; 45:8-11) Pirie and her staff were able to follow, and influence, the progress of the Code Compliance and permit procedures because, unbeknownst to plaintiffs, she regularly receives computer data about permit applications in her district. (Pirie Depo. at 14:9-15:1; Deming Depo. at 77:6-19) David Keyon, the planner who handled plaintiffs' permit application testified that he and his supervisor regularly met with Pirie to discuss projects that Pirie "had her concerns about" and that the plaintiffs' project was one of those projects. (Keyon Depo. at 130:24-131:6) Keyon knew Pirie had received complaints from the neighbors because of his discussions with her. (Keyon Depo. at 131:13-18) Keyon testified that Tom Burns, the Planning Department head, asked Keyon for status updates "so he could get back to Ellen Pirie." (Id. at 133:5-10)

Pirie received a letter from Zscheile demanding that the red tag be recorded on June 18, 2007, after Hart promised not to record, and shortly before the "erroneous" recordation. (Pirie Depo. Ex. 47) Pirie herself acknowledged that if there is a big issue that she has been involved in, she talks to Burns about it. (Pirie Depo. at 16:18-24) Pirie also acknowledged that Oracle and Elan gave her the Marquez report showing there was no safety issue, and drove the curve herself without finding that there was any hazard. (Id. at 21:11-22:15). (Oracle Decl. ¶ 33) Despite all this, Pirie chose to pressure the Planning Department by telling them only about Zscheile's point of view. (Id. 22:24-23:13) Pirie even went to Burns' supervisor, County Administrator Susan Mauriello, to make sure the Planning Department was "appropriately" reviewing Zscheile's complaints. (Mauriello Depo. at 75:6-77:4) Mauriello dutifully made sure that Burns was aware of Pirie's concerns about the neighbors' complaint. (Mauriello Depo. at 77:5-11; 95:4-8) There is a triable issue of fact as to whether the process was tainted by political interference.

3. Substantive Due Process

A government's arbitrary or irrational refusal to issue a land use permit or arbitrary or

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irrational interference with a person's use of their land violates substantive due process. "A substantive due process claim does not require proof that all use of the property has been denied, but rather that the interference with property rights was irrational or arbitrary." *Bateson v. Geisse* 857 F.2d 1300, 1303 (C.A.9 1988). For purpose of substantive due process, there is a constitutionally "protected property interest" in a landowner's right to "devote [his] land to any legitimate use." *Squaw Valley Development Co. v. Goldberg* 375 F.3d 936, 949 (9th Cir. 2004); *Harris v. County of Riverside,* 904 F.2d 497, 503 (9th Cir.1990).

In *Bateson v. Geisse*, 857 F.2d 1300 (9th Cir.1988), the city continuously changed the requirements for a building permit. After the property owner satisfied these requirements, the city rezoned the property and delayed issuing the permit for six months, during which time the bank foreclosed on the owner's property and caused him to lose his entire investment. *Id.* at 1304. The Ninth Circuit had no problem finding: "This sort of arbitrary administration of the local regulations, which singles out one individual to be treated discriminatorily, amounts to a violation of that individual's substantive due process rights." *Id.* at 1303.

Likewise, in *Del Monte Dunes at Monterey, Ltd. v. City of Monterey* 920 F.2d 1496, 1508 (1990), the city imposed conditions for a project, the property owner fulfilled those conditions, the city staff confirmed as much, but the city denied the permit without specific explanation. A triable issue existed that the city acted arbitrarily and irrationally, in part, because its decision could have been "motivated, not by legitimate regulatory concerns, but **by political pressure from neighbors and other residents of the city** to preserve the property as open space." *Id.* at 1508 (emphasis added) The strong circumstantial evidence of political interference cited in the prior section of this brief creates a triable issue of fact on this point.

"In this type of action, where the property owner contends that it has been unconstitutionally deprived of property through governmental regulation, motions to dismiss and motions for summary judgment must be viewed with particular skepticism. *See Sinaloa Lake Owners Ass'n,* 882 F.2d at 1401. The importance of the specific facts and circumstances relating to the property and the facts and circumstances relating to the governmental action militate

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against summary resolution in most cases." *Del Monte Dunes at Monterey, Ltd. v. City of Monterey* 920 F.2d 1496, 1508 (C.A.9 (Cal.), 1990))

Several cases have held that the enforcement of fence ordinances irrational and arbitrary when they had no rational relation to promoting safety. *See e.g., City of Norris v. Bradford* (1958) 204 Tenn. 319, 321 S. W. 2d 543 ("absence of a fence neither adds to nor lessen any traffic hazard," and "no function of the city in care of its streets will be interfered with by the existence of a fence on the front property line of a residence"); *Williams v. City of Hudson* (1935) 219 Wis. 119, 262 N.W. 607, 609 (fence ordinance could not be enforced where "the otherwise lawful fence creates no danger to anyone lawfully using the streets, or the alley to anyone passing the facility"); *Wondrak v. Kelley* (1935) 129 Ohio 268, 272, 195 N. E. 65 (ordinance limiting fences to 3 ½ feet was unconstitutional unless "they are located so near the street intersection as to endanger the traveling public")

The evidence in this case indicates that Aaron Landry and Kevin Fitzpatrick both visited the property and concluded there was no safety hazard. The Marquez report, which was based on the Public Works' department standard for a public street (even the property was on a less regulated, private street) found there was no hazard. Keyon, with Deming's approval (Deming Depo. at 39:1-40:9; 46:6-47:6), told plaintiffs, after visiting the site, that if the hedges were set back five feet from the road, the permit would be ministerial. Plaintiffs have also submitted graphic proof that their property met the Public Works Department's standard (Elan Decl. ¶ 15, Ex. A) and expert testimony. (Marquez Decl. ¶¶ 2-8, Exs. C and D)

Nonetheless, the County ended up requiring setbacks that would require removing the existing hedge. With respect to the initial ruling on the 2007 permit, Deming, who acknowledged he was not a traffic engineer (Deming Depo. at 9:19-10:12) testified that he based his drawing on a 250 foot sightline, far more than the 60 feet required by Public Works. (Deming Depo. at 34:16-36:21) He took no measurements at the site, which he acknowledged, was not a normal practice. (Deming Depo. at 36:4-18) He also never revisited the site to check its safety after the Plaintiffs set the hedge five feet back from the road. (Deming Depo. at 90:18-

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91:11) There is a triable issue of fact as to whether the County acted irrationally and arbitrarily on the safety issue.

4. Equal Protection

The County violated Plaintiffs' right to equal protection. A plaintiff may establish an equal protection claim by showing that the government action involves a suspect classification or it does not bear a rational relation to a legitimate state interest. *New Orleans v. Dukes*, 427 U.S. 297, 303-04, 96 S.Ct. 2513, 2516-17, 49 L.Ed.2d 511 (1976); *Lockary v. Kayfetz*, 917 F.2d 1150, 1155 (9th Cir.1990).

To show the County's decision involved a suspect classification, Plaintiffs need only create a triable issue that the County did not enforce the fence ordinance against similarly situated neighbors and targeted Plaintiffs for an impermissible reason. Exhibit A to the Oracle Declaration provides graphic proof that plaintiffs were singled out as does the evidence that County Officials were well aware that hedges over three feet predominated in the area. (Oracle Decl. Ex. F, p. 2)

The County's actions violated Plaintiffs' equal protection rights because they had no rational relation to a legitimate state interest. The "rational relation test will not sustain conduct by state officials that is malicious, irrational or plainly arbitrary." *Lockary v. Kayfetz*, 917 F.2d 1150, 1155 (9th Cir.1990). Here, the overwhelming evidence that the County's safety rationale was frivolous and deceitful creates a triable issue of fact. A subjectively improper intent includes actual "hostility" or "antagonism" by government officials toward the citizens. The government may not engage in "a spiteful effort to 'get' [an individual] for reasons wholly unrelated to any legitimate state objective." *Esmail v. Macrane,* 53 F.3d 176, 180 (7th Cir.1995). For example, in *Squaw Valley Development Co. v. Goldberg,* 375 F.3d 936, 947 (9th Cir. 2004), the Ninth Circuit found that the government official's rude comments and behavior showed "genuine animosity" toward the citizens. See also *Valley Outdoor, Inc. v. City of Riverside* 446 F.3d 948, 955 (9th Cir. 2006) (triable issue that city denied permit because regulators were angry that plaintiff had taken previous action opposed by the city). There is ample evidence of malice by

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Fitzpatrick, in his improper emails. (Oracle Decl. ¶¶ 29-30, Exs. K and L) and by Zscheile, who seems to have been pulling the strings. In addition, to prove the County acted irrationally or arbitrarily, Plaintiffs may show that defendants' asserted rational basis was merely a "pretext" for differential treatment. "Pretext" may be demonstrated by showing the County based its conduct on an objectively false rationale *or* a subjectively improper motive. "On summary judgment, an equal protection plaintiff may show pretext by creating a triable issue of fact that either: (1) the proffered rational basis was objectively false; or (2) the defendant actually acted based on an improper motive." *Squaw Valley Development Co. v. Goldberg,* 375 F.3d 936, 945-46 (9th Cir.2004).

Objective falsity was raised in *Lockary v. Kayfetz*, 917 F.2d 1150, 1155. There, the city refused to grant the landowner a permit to hook up water to his property, claiming a water shortage justified a complete moratorium on new water hook ups. However, the plaintiff presented evidence there was no actual water shortage. The Ninth Circuit held that, "Although a water moratorium may be rationally related to a legitimate state interest in controlling a 'water shortage,' the plaintiffs raised a triable issue of fact regarding the 'very existence of a water shortage.'"

Here, there is clearly a triable issue as to defendants' bad faith in handling their alleged safety rationale.

B. Defendants Are Not Entitled To Summary Adjudication With Respect To County Code §13.10.525(c)(3) (Defendants' Issue No. 1)

1. Introduction

Defendants contend that County Code §13.10.525(c)(2), not (c)(3) applies to plaintiffs property. The red tag alleged only §13.10.525(c)(2) as grounds. Plaintiffs contend that if §13.10.525 is applicable, then their property falls within the provisions of sub-section (c)(3), not c(2), which allows fencing up to six feet in height in agricultural zones.

2. Code §13.10.525(c)(3) Is The Section Applicable To RA Zoned Properties Such As Plaintiffs', Assuming The Ordinance As A Whole Is Not Pre-empted

Plaintiffs' property is zoned RA, or Residential Agriculture. Defendants are faced with

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the unenviable task of arguing that a zoning district that has the word "Agriculture" as one of only two words in its name, is nonetheless not an agricultural zone district. Defendants do not argue that any legislative history or other indicia of the legislative intent in §13.10.525 itself supports their position. Instead, defendants base their arguments entirely on the Table of Contents and a listing of agricultural districts in County Code Chapter 13.10.311. It is undisputed that §13.10.525 makes no reference back to the provisions cited by defendants. That is the sum total of defendants' argument.

The critical term in §13.10.525(c)(3) that needs to be defined is "agricultural zone districts." It is also not defined in the code sections cited by defendants. That term, "agricultural zone districts" appears in the zoning implementation table at County Code §13.10.170, which part of the same title as the fence ordinance §13.10.525. The listing of the County General Plan which is part of agricultural zones in 3.10.170 includes RA, Residential Agriculture. It is axiomatic that when a zoning code conflicts with the County General Plan, the zoning code must yield. See *Lesher Communications Inc. v. City of Walnut Creek,* 52 Cal.3d 531, 541 (1990). Here, there is no conflict with the General Plan unless we accept defendants' argument, in which case the conflict must be resolved in favor of plaintiffs' position that agricultural districts are indeed agricultural, as provided in the zoning implementation table of the General Plan County Code § 13.10.170.

Defendants assert that the term "agricultural zone districts" used in §13.10.525, **MUST** be interpreted in conformity with § 13.10.311, which only lists zones, such as Residential Agriculture, under a single heading. But the more inclusive provisions, also included within the Title 13 zoning code, of §13.10.170, reflect the seemingly incontrovertible fact that a Residential Agricultural zone is ***BOTH*** residential and agricultural. Given that the statutory term is "agricultural zone district," not "non-residential zone," the more inclusive definition is the more reasonable one. Indeed, the County's Administrative Officer Susan Mauriello described the general types of zone districts as "You have agricultural. You have residential. You have commercial. You have manufacturing. You have residential agriculture, which is the zone you

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mentioned. There is timber and there is special-use zone." (Mauriello Depo. at 84:15-18) Thus, even the County's CEO does not regard RA as solely a residential district, but acknowledged it for what it is, a hybrid zone.

The more inclusive approach is also more consistent with the legislative purpose discernable from the text of §13.10.525(c)(3) itself. This subsection specifically allows field fencing and corral fencing. The purposes of the Residential Agricultural district, according to County Code §13.10.321, is to allow "small scale commercial agriculture, such as animal keeping, truck farming and specialty crops." Supervisor Pirie acknowledged that there are agricultural uses in the RA zone. (Pirie Depo at 68:4-20) The "principal permitted" uses (not the "allowed" uses which require specific approval) for RA zones include small scale commercial agriculture, such as the raising of specialty crops, animals in stables and paddocks. See table in § 13.10.322. It is reasonable to assume that a fencing ordinance provision addressing fences for fields and corrals was intended to apply to a district, such as the RA zone, where animal keeping and specialty crop raising are principal permitted uses. Defendants make no argument, nor could they, that corral fencing or field fencing would be inappropriate in the RA zone, as raising of crops and animals are both principal permitted uses.

Defendants submit a conclusory declaration by Mark Deming that the County has always considered RA to be a non-agricultural district. However, the County has not shown that Mr. Deming has legal authority to interpret the Zoning Code, that he has ever engaged in any formal process of interpretation, or that the Planning Department has ever issued a written policy interpretation. Turning to actual practice in the RA zone in which plaintiffs reside, vegetation of six feet or higher along the roadside is the norm, as admitted in the County's own staff reports. (See Oracle Decl. Ex. A; Ex. F, p. 2, 2nd full ¶; Lyng Depo at. 48:24-49:5)

In sum, the apparent purpose of the zone; the County's designation of zoning districts by use in its General Plan; and the truism that a Residential Agriculture district would logically be considered both residential and agricultural, certainly overcomes whatever weak inference could be derived from the fact that Residential Agricultural districts are listed under "residential" in an

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unrelated classification that only allows for placement in one category. The code should be given the logical construction that agricultural means agricultural, and in a zone where corrals and field crops are principal permitted uses, we should assume that fencing consistent with those use is permitted.

3. Plaintiffs' Fence And Hedge Would Be Permissible Under §13.10.525(c)(3)

Defendants argue that plaintiffs' hedge and proposed fence would not be permissible even if §525(c)(3) applies. The argument fails for a variety of reasons.

The Notice of Violation cited plaintiffs solely for a violation of §525(c)(2). For purposes of this lawsuit, it is an academic question whether plaintiffs were in violation of §525(c)(3) as they were never charged with such a violation or given the opportunity to apply for a permit to bring them in compliance with that section. They would have put up whatever type of six foot fence the County allowed had they been given the chance. (Oracle Decl. at ¶ 6) Plaintiffs' damages arise out of the County's attempt to enforce §525(c)(2). If that section is not applicable, then all of the County's actions were improper.

The County simply ignores the text of § 525(c)(3), which reads as follows: "in agricultural zone districts, fencing for agricultural purposes may have heights up to six feet in all yards without the need for development permit approval provided that such fencing, including gates, is: (i) six feet or less in height; (ii) made of wire which is spaced a minimum of six inches apart (i.e., typical field fencing); or (iii) made of horizontally oriented wooden members which are spaced a minimum of one foot apart (i.e., typical of wooden corral fencing)…"

The County briefs this matter as though the word "or" was not included in the ordinance. It is black letter law that when a list of condition includes an "or," one need only satisfy one of the conditions, not all three. *See In re Pacific-Atlantic Trading Co.*, 64 F.3d 1292, 1302 (9th Cir.1995) ("In construing a statute, a court should interpret subsections written in the disjunctive as setting out separate and distinct alternatives."). For example, on p.2 line 20-21 of their brief, defendants pretend that there are only *two* provisions, rather than three. The same misrepresentation is made at p.10, lines 10-13. The fact that defendants cannot even bring

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themselves to quote the code accurately in their brief is telling.

It is undisputed that plaintiffs' application was for a chain link fence of six feet in height or less. Accordingly, it clearly falls within the exception granted for fences under six feet high in §535(c)(3)(i). Unless the "or" at the end of the list of three conditions is magically transformed into an "and," defendants' argument is frivolous.

Defendants argument that a hedge is not permissible under §525(c)(3) is equally frivolous. The County has a policy interpretation with respect to fences under §13.10.525, that specifically states that "in situations where a fence over three feet could be approved, landscaping can help to mitigate the visual impacts and create a street front appearance more compatible with surrounding development." (See Burns Depo. Ex. 76) The interpretation *requires*, "those that are approved must be set back a minimum of three feet from the property line, and must have landscaping installed along the length of the fence abutting the street, sufficient to mitigate visual impacts." (Id., p. 1) For the County to now argue that hedges are not allowed in agricultural areas given its own policy interpretation **requiring** such hedges is frivolous.

C. The California Building Standards Law Preempts The County Ordinances Both Procedurally and Substantively (Defendants' Issue No. 2)

The County concedes that the California Building Code is the applicable building code, mandatory for all jurisdictions throughout the state. California Health and Safety Code §17950 states that, "the building standards published in the State Building Standards Code" applicable to dwellings, "apply in all parts of the state." California Health and Safety Code §17922 mandates adoption by the state of the Uniform Housing Code and the Uniform Building Code as well as other national codes. It is well established that these and other code sections were intended to preempt local regulations. In *Briseno v. City of Santa Ana* (1992) 6 Cal.App.4th 1378 the court noted that "one need only track the history of the state's housing laws to appreciate the legislatures' desire to preempt local regulation generally." The court further noted that "the legislature is also impliedly preempted most local regulations, because it has prescribed the manner in which local authorities can adopt ordinances which vary from the uniform codes." Id. at 1382. While the *Briseno* case dealt specifically with the Uniform Housing Code, it is clear

that the decision is equally applicable to the Uniform Building Code, as both codes are made mandatory by the same provision of Health & Safety Code §17922(a). As the County concedes, local governments are authorized to amend the building standards contained in the California Building Code, but only if they make express findings that amendments to the standards are necessary because of local climatic, geological or topographical conditions. *Briseno*, supra at 1383; Health and Safety Code §17958 at seq. It is undisputed that no such findings were made in connection with the adoption of the fence ordinance.

Turning to the substantive provisions of the Building Code, it defines "building standard" to include, "any rule, regulation, order or other requirement…that specifically regulates, requires or forbids the method of use, properties, performance or types of materials used in the construction, alteration, improvement, repair or rehabilitation of a building, structure, factory built housing, or other improvement to real property including fixtures therein, and as determined by the commission" Health and Safety Code §18909(a). The definitions of building are, "any structure used for support or shelter of any use or occupancy." Buildings specifically include "a structure wherein things may be grown, made, produced, kept, handled, stored or disposed of." "Structure" is defined to mean, "that which is built or constructed, an edifice or building of any kind or any piece of work artificially built or composed of parts joined together in some definite manner…" California Health and Safety Code §18908(a).

In the instant case, a fence or hedge is clearly a "structure," and in this case is being used to, among other things, "shelter" plants, pets and residents from trespassers, deer, pets, and other wildlife. Section 312 of the Uniform Building Code indicates that fences and retaining walls are contained within group "U" of the building and structures covered by the code. Section 105.2 provides that fences not over six feet high do not require a permit, which is a further indication that fences are covered by the building standards.

The County's sole argument is that the statutory mandate for uniform building standards are trumped by its separate authority under the Government Code to enact zoning laws. The question then is whether the concerns addressed by the fence ordinance are zoning concerns or

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whether they implicate the preemptive authority of the Building Code.

To the extent that the court finds that §525(c)(3) applies, then clearly the fence ordinance falls on the side of being a building standard as it contains explicit references to wire, fencing and wooden corral fencing. Regulation of building materials is not a zoning matter; it is a question of building standards. In addition, the legislative purpose behind the regulation of front yard fences, as set forth in §525(a), which is to ensure adequate visibility is clearly a building standard concern, given that engineering standards for safe construction of driveways and the fencing of driveway area is a "building standard." The County requires a building permit for driveways and private roads pursuant to County Code §12.10.050(b)(5) and (10). County Code §16.20.180 requires a grading permit, which is also covered by the Building Code, for such construction. The Building Code also provides design standards for rural private roads and driveways. County Code §16.20.180. None of these provisions are zoning provisions, they are Building Code provisions. They closely resemble in both purpose and application, the fence ordinance applied in this case, i.e., they address questions of safety in the design of structures that may impede on traffic visibility.

The inappropriateness of the County's procedural handling of this is exemplified by the fact that, by their own admission, they had nobody in the Planning Department with any expertise on traffic engineering and had to turn to Public Works to obtain information. Defendants concede that they were happy to allow Oracle and Elan a six foot fence around the entire perimeter of their property, provided it was set back up to 35 feet. This setback distance has nothing to do with the zoning; it was allegedly based solely on issues of driveway safety.

The County's mischaracterization of its fence ordinance as a zoning matter also has serious procedural consequences. The County concedes that California Health and Safety Code §17920.5 specifies that counties are supposed to have a local appeals board. See County's Memorandum of Points and Authorities at 13:7-12. The County argues that the Appeals Board was only authorized to hear appeals regarding the building requirements of the County, but not the zoning ordinance. However, as demonstrated above, safety regulation falls within the

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purview of the BAFCAB, or alternatively the Board of Supervisors. [1]

Defendants argue that plaintiffs did not apply for a building permit. However, this misses the mark. As argued above, the fence ordinance, though placed within the zoning code, is justifiable, if at, only as a building standard. It is clear that the building codes do cover fences, driveways and traffic site lines and therefore are preemptive of local ordinances pursuant to the authorities cited above. Plaintiffs should have been informed of this and should have been given the option of appealing to BAFCAB. When, after much independent legal research, they notified the County of their request to have the matter heard by the BAFCAB, they were not given this option. The County's attempts to whitewash its failure to follow the building codes and failure to provide the required procedural protections are unavailing.

D. Plaintiffs First Three Claims Are Not Moot (Defendants' Issue No. 3)

Defendants' first and second claims seek writs of mandate ordering the County to rescind the red tag and issue a building permit.

Defendants claim the circumstances have changed since their prior mootness challenges were rejected because plaintiffs have sold the property. It is true that plaintiffs are no longer seeking a permit or removal of a Notice of Violation. However, plaintiffs' first three claims do not solely seek equitable relief. The Writ of Mandate and Administrative Mandamus claims seek damages pursuant to California Code of Civil Procedure § 1095. Paragraphs 52 and 63 of the complaint both provide: "As a result of Defendants' actions, Plaintiffs have sustained damages in that the Notice of Violation created a cloud on title, making it extremely difficult if not impossible to sell the Subject Property... Plaintiffs have incurred substantial unnecessary consultant and legal fees, have been charged illegal and excessive fees by the County, have suffered a loss in property value, and have suffered severe emotional distress."

[1] As the County notes in its papers, the Board of Supervisors recently eliminated the County BAFCAB in favor of hearing appeals directly. The legality of this blanket elimination of an appeals board is highly questionable under the California Building Code and is currently the subject of a legal challenge. However, for purposes of the instant lawsuit, it is undisputed that the County Codes authorized the existence of a BAFCAB at the times when plaintiffs would have filed an appeal, and that they were never notified of any right to appeal to that body but were instead directed to the internal appeals process, which meant that they were never given the right an appeal to any independent body.

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C.C.P § 1095 permits the recovery of damages in claims for writ of mandate and administrative mandamus. It provides that: "If judgment be given for the applicant, the applicant may recover the damages which the applicant has sustained, ..., together with costs, ... Damages and costs may be enforced in the manner provided for money judgments generally." See also *Hensler v. City of Glendale,* 8 Cal.4th 1, 14 (1994) (damages for a taking may be sought in an administrative mandate action pursuant to CCP § 1095)

Second, the Writ of Mandate and Administrative Mandamus claims seek recovery for attorney's fees and costs pursuant to Government Code § 800(a), and Cal. Code of Civil Procedures §§ 1021.5 and 1032. Paragraphs 54 and 64 both provide: "Plaintiffs are personally obligated to pay their attorneys for attorney services to prosecute this action. Plaintiffs are entitled to recover attorney fees and costs as provided in Government Code § 800(a), Code of Civil Procedures §§ 1021.5 and 1032, on the grounds that Defendants' actions were arbitrary and capricious and that Plaintiffs will have conferred a substantial benefit on the citizens of the region if successful in this action." Cal. Govt. Code § 800(a) allows an award of attorney's fees when officials act arbitrarily or capriciously. C.C.P. § 1021.5 allows an award of attorney's fees when a party confers a significant public benefit.

E. Plaintiffs' Third Claim Presents Issues That Must Go to Trial (Defendants' Issue No. 4)

Defendants have not met their burden of showing that they are entitled to summary adjudication with respect to plaintiffs' claim under California Civil Code §3412.

The County's sole argument against plaintiffs' third cause of action is that, despite the absence of any statutory authority for such drastic invasion of property rights, the County has legal authority to impair plaintiffs' land title in the middle of a disputed proceeding pursuant to a California Attorney General opinion.

Once again, defendants are stretching to make an academic point that does not resolve any claim for relief in the case. The plaintiffs' third claim for relief is not for declaratory relief as to whether the Attorney General's opinion is correct. The complaint alleges that the Notice of Violation was void or voidable because "respondents failed to provide petitioners with notice and

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an opportunity to be heard before recording the Notice of Violation, because the refusal to grant petitioners application to maintain the hedges and fenced vegetation at the height of six feet was unreasonable, arbitrary, capricious and contrary to law and because petitioners' hedge/fence fully comply with and are not in violation of, any applicable section of the Santa Cruz County Code including §13.10.525(c)." See complaint ¶ 68.

Unless ALL of these allegations are resolved in defendants' favor, the third cause of action must go to trial. It is not moot because of the remaining damages issues discussed above in connection with Issue No. 3.

Defendants' argument is particularly surprising in lieu of the fact that they concede elsewhere in the brief that recordation of the Notice of Violation should not have occurred given the direct promise by several high-ranking officials in the planning department that there would be no recordation. After this suit was filed, defendants voluntarily expunged the Notice of Violation, thereby implicitly conceding the validity of plaintiffs' contentions. If anything, it is plaintiffs who deserve summary adjudication that they are entitled to damages and attorney fees with respect to this cause of action.

F. There Are Triable Issues Of Fact With Respect to Plaintiffs' Fourth Cause of Action For A Breach of A Mandatory Duty (Defendants' Issue No. 5)

As argued above, plaintiffs contend that the California Building Code preempts the local fence ordinance and specifically authorized fences up to ten feet in height without a permit. Defendants disagree. Based on that disagreement defendants claim that a number of the mandatory duties alleged in plaintiffs' fourth cause of action are inapplicable. Assuming arguendo that the court agrees with plaintiffs' position on Issue No. 2, then plaintiffs have a triable claim with respect to the allegations in paragraph 72 and 78 of their complaint that Title 24, California Building Codes §§105.2 and 312.1 barred respondents from requiring a permit for fences not over six feet, and California Health and Safety Code §§18949.25-31 and 19870 requiring building officials to be licensed, certified and trained.

Similarly, plaintiffs contend that they were entitled to a hearing under the BAFCAB, or after the abolition of that body, the Board of Supervisors. Defendants concede that no such

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hearing was provided and stand by their argument that BAFCAB did not have jurisdiction in this matter. Thus, unless the court agrees with defendants' argument on Issue No. 2, then plaintiffs have presented a triable issue of fact with respect to violation of Health and Safety Code §§17920.5 and 17920.6, Title 24 California Building Code §108.8.1-3 and related statutes as set forth in paragraph 73 and 74 of this complaint.

Plaintiffs further contend that to the extent that the fence ordinance is enforceable at all, their Residential Agriculture zoned property falls within the provisions of Santa Cruz County Code §13.10.525(c)(3) authorizing fences up to six feet in height in agriculturally zoned areas. Unless the court accepts defendants' argument that this local code section did not exempt plaintiffs' hedge, there is a triable issue with respect to whether the County violated its mandatory duties as alleged in paragraph 72 of the complaint.

Plaintiffs contend that the red tag should never have been recorded and that defendants violated a mandatory duty in doing so. Defendants disagree. Unless the court agrees that defendants were perfectly within their rights in recording the red tag, there is a triable issue of fact on this subject as alleged in paragraph 79 of the complaint.

Plaintiffs contend that there was a violation of due process as argued in Issue No. 7 of this brief, *infra*. Defendants disagree. Unless the court agrees with defendants' position that there was no due process violation as a matter of law, there is a triable issue of fact with respect to violation of mandatory duties as alleged in paragraph 81 of the complaint.

G. There Is A Triable Issue On Plaintiffs' Claim Re Excessive Fees (Defendants' Issue No. 6)

Plaintiffs' position, as argued more fully in section B and C of this brief, dealing with defendants' Issues 1 and 2, is that they were not required to get a permit. They were not informed of this and were charged a flat fee of $700 for their initial application. If the court agrees that they were not required to apply for a permit, then any fee charged by the County was excessive. Susan Mauriello, the County's Administrative Officer, i.e. CEO, testified that "when there's a lack of clarity as to whether or not a task is appropriately part of the permit process or not, we give the applicants the benefit of the doubt and absorb those costs internally. (Mauriello

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Depo. at 52:1-4)

Assuming arguendo that plaintiffs were required to obtain a permit, it is their contention that their first application for a permit, which was charged as a $700 flat fee under the applicable fee schedule, should have sufficed. If defendants had not improperly conditioned that permit on cutting a significant portion of that fence to three feet in height, the matter would have ended and no additional fees would have been necessary. Only if the court agrees that as a matter of law defendants acted properly in issuing the Notice of Violation, thereby turning the matter into a code compliance action despite two code compliance officers concluding that it was not necessary, are any additional fees above the initial $700 justified. Accordingly, if the court agrees that there is a triable issue on any of plaintiffs' contentions on these matters, their claim for excessive fees presents a triable issue on the excessive fees claim as well.

H. Plaintiff's Claim For Inverse Condemnation Presents a Triable Issue Of Fact (Defendants' Issue No. 8)

A taking exists here for the same reason a protectable property interest exists for purposes of Due Process – the County recorded an encumbrance against the plaintiffs' property. *See Garcia-Rubiera v. Calderon* 570 F.3d 443, 457 (1st Cir. 1999) (courts perform "the same analysis in determining whether a property interest is sufficient under both the Takings Clause and the Due Process Clause"); *see also Woll v. County of Lake* 582 F.Supp.2d 1225, 1228 (N.D.Cal., 2008) (County admits that "the recordation of a Notice of Nuisance is a 'taking' of property"). Moreover, because "the California Constitution requires compensation for damage as well as a taking, the California clause "protects a somewhat broader range of property values' than does the corresponding federal provision." *County of Ventura v. Channel Islands Marina, Inc.* 159 Cal.App.4th 615, 624, 71 Cal.Rptr.3d 762, 768 (Cal.App. 2 Dist., 2008)

Also, even a negligent taking can support an inverse condemnation claim. See *Rose v. State of California*, supra, 19 Cal.2d 713 (abutter's right to ingress and egress to and from the public street damaged by improvement to the roadway); *House v. L.A. County Flood Control Dist.* (1994) 25 cal.2d 384 (flood damages to owner's property caused by negligent planning and construction of a bank or wall on a flood control project); *Aetna Life & Casualty Co. v. City of*

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Los Angeles (1985) 170 Cal.App.3d 865 (damages resulting from a brush fire caused by sparks from City of Los Angeles electrical transmission lines).

The County argues, in a very conclusory way, that the taking was justified under its zoning ordinances and that plaintiff suffered no damages. With regard to the first argument, the County has conceded that plaintiffs had the right to a protest hearing, that they exercised that right, that at the County's request they dropped their protest hearing in favor of a permit process, that the code specifically authorized permits for six foot fence heights, that plaintiffs were promised no recordation would take place while they were pursuing the permit, that they did pursue the permit, and that the County wrongfully recorded after promising that they would not do so.

With respect to the impact on plaintiffs' property, the testimony of their realtor, Sally Lyng, indicates that the property became unsalable shortly after it was put on the market because of the recordation of the red tag. (Lyng Depo. at 47:13-48:18, 53:10-56:6, 56:22-57:13, 92:1-13) Indeed, the property was sold, only after the red tag was expunged, albeit at a very substantial loss because of the ensuing real property depression (see Pirie Depo. at 79:2-7; Mauriello Depo. at 80:11-14) in the real property market. (Lyng Depo. 92:7-13; Oracle Decl. ¶¶ 39-40 and Exs. P and Q) The County's own internal memoranda indicate that the purpose and intent of recordation is to impede parties from selling their property so that they are motivated to compromise with the County. (Pierce Decl. Ex. O, p. 2, last full ¶; Pirie Depo. at 97:25-98:7; Mauriello Depo. 46:24-47:23; 89:14-18; 91:21-24, Ex. 36, p. 2, first full ¶) Under these circumstances, the County is in no position to argue that there was not a temporary taking. The amount and effect of that taking is a jury question.

I. Plaintiffs' Eight And Ninth Claims Are Not Moot Because They are Capable Of Repetition Yet Evading Review (Defendants' Issue No. 9)

Plaintiffs do not dispute that the issue sought to be adjudicated with respect to plaintiffs' declaratory and injunctive relief claims were properly before the court so long as plaintiffs owned the property that was subjected to the County's inconsistent and arbitrary administrative schemes. While the plaintiffs' need for declaratory and injunctive relief has lessened in light of their

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having sold their property, they certainly may return from New Zealand at some point and are also concerned that others who are similarly situated, and do not have the means to litigate the issues against the County. Having come so far, and having a case that clearly presents these issues for purposes of damages, they request the court continue to consider their declaratory and injunctive relief causes of action under the authority of the cases holding that claims which are "capable of repetition, yet evading review," (see Roe v. Wade, 410 U.S. 113, 125 (1970)), or where there has been a "voluntary cessation" of the challenged conduct (see F*riends of the Earth, Inc. v. Laidlaw Environmental Sciences*, 528 U.S. 167, 174 (2000)) may still be litigated even if they are in some sense moot.

The chances that another individual will have both the wherewithal and the motivation to challenge the fence ordinance, permit and red tag procedures seems unlikely. The court has noted that it has not seen case like this before. Accordingly, this does seem to be a paradigm case for declaratory and injunctive relief that would benefit all the citizens of the County.

IV. CONCLUSION

For reasons stated above, the court should deny defendants' motion in its entirety and permit the matter to go forward to trial on all issues.

Dated: March 11, 2010

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Case Name: Elan and Reverend Oracle v. Santa Cruz County Planning Department et al
Case Number: 5:09-cv-00373-JF
Filer: Elan and Reverend Oracle
Document Number: 42

Docket Text:
Memorandum in Opposition re [30] MOTION for Summary Judgment *DEFENDANTS MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR MOTION FOR SUMMARY ADJUDICATION* filed byElan and Reverend Oracle. (Pierce, Andrew) (Filed on 3/12/2010)

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