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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION
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<p>11 ELAN AND REVEREND ORACLE,</p> <p>12 Plaintiffs and Petitioners,</p> <p>13 v.</p> <p>14 SANTA CRUZ COUNTY PLANNING DEPARTMENT, TOM BURNS, SANTA 15 CRUZ COUNTY, ELLEN PIRIE, JAN BEAUTZ, NEAL COONERTY, TONY 16 CAMPOS, MARK W. STONE and DOES 1-25, 17 inclusive,</p> <p>18 Defendants and Respondents.</p>	<p>Case No. C09-00373 JF</p> <p>DEFENDANTS' REPLY TO PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS</p> <p>(FRCP 12(b)(6))</p> <p>Date: March 27, 2009 Time: 9:00 a.m. Dept: 5 (Hon. Jeremy Fogel)</p>
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21 **INTRODUCTION**

22 Plaintiffs' opposition fails to point to specific *facts* in the complaint that justify the individual
23 members of the Board of Supervisors remaining as defendants in this case. Plaintiffs also fail to
24 provide a reasonable basis in the facts or the law for their first five causes of action. Accordingly,
25 the County requests that the Court grant this motion to dismiss in its entirety, subject to an order
26 allowing plaintiffs to amend the complaint to remedy whatever defects may be curable.

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1 ARGUMENT

2 I.

3 PLAINTIFFS HAVE FAILED TO STATE A CLAIM AGAINST THE
4 INDIVIDUAL MEMBERS OF THE BOARD OF SUPERVISORS

5 In their opposition, plaintiffs endeavor to explain *the reasons why* they are suing the
6 individual members of the Board of Supervisors, but it is simply undeniable that the complaint itself
7 fails to state facts justifying their inclusion in this lawsuit. Plaintiffs are suing the County because
8 Planning staff recorded a Red Tag on their property and did not grant them the permit they originally
9 requested. There are no facts in the complaint indicating that the individual members of the Board
10 of Supervisors had anything to do with these acts. There are no facts in the complaint indicating that
11 the Board of Supervisors had discretion to intervene in the code compliance or permit process in any
12 respect, that they were asked to do so, or that they have any obligations that they failed to fulfill.
13 The County understands that it has the burden to demonstrate that the complaint fails to state a claim
14 against these individuals. But the County is not charged with creating a straw man just to knock it
15 down. If plaintiffs have sufficient facts to include these individuals in the lawsuit, they should
16 articulate them. So far, they have not done so.

17 Without pointing to a specific reference in the complaint, in their opposition plaintiffs
18 identify several alleged “deprivations” that they contend create a basis for action against the
19 individual members of the Board of Supervisors. (Opposition, pp. 5:18-6:2.) However, these alleged
20 “deprivations” either do not relate to the harm plaintiffs claim to have suffered or there is no
21 connection between them and the individual members of the Board of Supervisors sufficient to
22 include them as defendants. For instance, plaintiffs argue that the individual members of the Board
23 of Supervisors belong as defendants because they enacted the ordinance that allowed Planning staff
24 to record the red tag. In addition to being incorrect (none of these individual members enacted that
25 ordinance and there are no facts alleged to that effect), the argument does not make sense. It is akin
26 to a plaintiff suing individual members of the Legislature because the State passes a law that
27 authorizes actions that the plaintiff claims violate constitutional principles. In that situation, it is the
28 entity and actors responsible for the allegedly offending conduct (the State and its employees) that

1 gets sued, not the legislators. Likewise, plaintiffs fail to explain how the Board's "failing to provide
2 for an appeals board," "concealing the existence of the appeals board," or failing to adopt specified
3 provisions of the Code of Regulations has anything to do with the alleged harm that they suffered in
4 this case. In any event, if it is important enough for plaintiffs to have the individual members of the
5 Board of Supervisors as named defendants in this case in addition to the County itself, they should at
6 the very least be required to identify, in their complaint, specific facts indicating why the Board
7 members are being sued in this case. Again, so far, they have not done so.

8 **II.**

9 **THE FIRST THREE CAUSES OF ACTION ARE MOOT BECAUSE**
10 **PLAINTIFFS CONCEDE THAT THE RED TAG HAS BEEN EXPUNGED**

11 In their first three causes of action, plaintiffs are asking the Court to order the County to
12 expunge the red tag and issue the requested permit. Both items have already been done. Thus, the
13 Court should dismiss these three causes of action because they are moot.

14 The court has "no jurisdiction to hear a case that is moot, that is, where no actual or live
15 controversy exists." (*Foster v. Carson* (9th Cir. 2003) 347 F.3rd 742, 745; *Cook Inlet Treaty Tribes v.*
16 *Shalala* (9th Cir. 1999) 166 F.3rd 986, 989.) An action is moot if the court cannot grant any effective
17 relief. (*Sierra Club v. United States Forestry Service* (9th Cir. 1996) 93 F.3rd 610, 614.) "If there is
18 no longer a possibility that an appellant can obtain relief for his claim, that claim is moot and must
19 be dismissed for lack of jurisdiction." (*Foster v. Carson, supra*, 347 F.3rd at 745.) The County is not
20 aware of any legal authority that would allow the Court to entertain a moot claim because plaintiffs
21 argue that damages or attorney fees flow from the moot claim.

22 Here, it is undisputed that the red tag has been expunged and undisputed that plaintiffs have
23 been issued the permit for their over-height fence. Plaintiffs specifically state in their Opposition at
24 page 7:21-22 that the "Notice of Expungement explains that the red tag was expunged. . . ." To the
25 extent there is any confusion on this, the County has attached to this brief a copy of the recorded
26 "Cancellation of Notice of Violation." There is nothing left to do with regard to the red tag. In
27 addition, plaintiffs concede that the permit for their over-height fence has been granted. (Opposition,
28 p. 7:19-27.) Although plaintiffs claim that that the issued permit contains conditions they are not

1 happy with, plaintiffs provide no authority for the proposition that they can bypass their
2 administrative remedies with the agency (appeal the conditions) and come straight to this Court
3 seeking a writ of mandate without having received a final decision. Moreover, it appears that
4 plaintiffs are now arguing that they *do not even need* the permit they requested and received, so it
5 remains unclear why they are even asking the Court to order the County to issue it, with or without
6 conditions.

7 The Court should dismiss the first three causes of action in the complaint because further
8 litigation on those issues would be meaningless.

9 **III.**

10 **PLAINTIFFS HAVE FAILED TO STATE A CAUSE OF ACTION UNDER**
11 **GOVERNMENT CODE SECTION 815.6**

12 Government Code section 815.6 provides for a state cause of action for the failure to perform
13 a mandatory duty. A three-prong test must be satisfied to establish a basis for liability under this
14 section: 1) an enactment must impose a mandatory, not discretionary, duty; 2) the enactment must
15 intend to protect against the risk of the kind of injury suffered by the plaintiff; and 3) the breach of
16 the mandatory duty must be a proximate cause of the plaintiff's injury. (*Haggis v. City of Los*
17 *Angeles* (2000) 22 Cal.4th 490, 498; *Sutherland v. City of Fort Bragg* (2000) 86 Cal.App.4th 13, 19.)

18 It is well established that a claim under section 815.6 must specifically allege the particular
19 enactment relied on that creates the mandatory duty. (*Lehto v. City of Oxnard* (1985) 171
20 Cal.App.3rd 285, 292-293.) Claims that do not specifically allege a particular enactment are subject
21 to dismissal. (*See, e.g., Washington v. County of Contra Costa* (1995) 38 Cal.App.4th 890, 896-899;
22 *Lopez v. City of Oxnard* (1989) 207 Cal.App.3rd 1, 13; *Sullivan v. City of Sacramento* (1987) 190
23 Cal.App.3rd 1070, 1080; *Searcy v. Hemet Unified School Dist.* (1986) 177 Cal.App.3rd 792, 801-
24 802.)

25 In their opposition, plaintiffs assert that the Court should not dismiss their cause of action
26 under section 815.6 because notice pleading suffices. Plaintiffs are confusing notice pleading rules
27 with the requirement that a cause of action *contain allegations sufficient to state a cause of action*.
28 In order to state a claim under section 815.6, plaintiffs are required to identify a particular

1 enactment. California courts are clear that this identification is an essential element of the cause of
2 action itself and that the absence of specific identification of an enactment means that the cause of
3 action is not sufficient to withstand dismissal. Plaintiffs cannot evade the requirement that they state
4 facts sufficient to state a cause of action by relying on a “notice pleading” standard.

5 Plaintiffs argue in the alternative that they have identified plenty of specific enactments at
6 other points in their complaint that provide the basis for the “mandatory duties” set forth in
7 paragraph 72 of their complaint. Plaintiffs are mistaken. None of the cited enactments set forth in
8 plaintiffs’ opposition or at other areas in their complaint create a “mandatory duty” that defendants
9 advise plaintiffs that no permit was necessary, to grant plaintiffs a building permit, to refrain from
10 issuing a notice of violation, etc.

11 Breaking it down, what plaintiffs are really arguing is that they had a “right” to obtain the
12 permit they sought exactly they way they wanted it, and that the County had a “mandatory duty” to
13 issue the permit as requested. However, plaintiffs ignore all of the legal authority provided by
14 defendants that demonstrate that a section 815.6 claim cannot be based on such an argument. The
15 bottom line is that plaintiffs’ have failed to specifically identify any enactment that gives rise to the
16 mandatory duties that they allege exist. Accordingly, the Court should dismiss this cause of action.

17 **IV.**

18 **PLAINTIFFS HAVE NO CAUSE OF ACTION UNDER GOVERNMENT CODE**
19 **SECTION 66020 FOR REFUND OF EXCESSIVE REGULATORY FEES**

20 Plaintiffs’ fifth cause of action is based on an assertion that California Government Code
21 section 66020 authorizes them to obtain a refund of “excessive and improper fees.” However, the
22 California Supreme Court has determined that no such remedy exists under that statutory scheme.
23 (*Barratt American, Inc. v. City of Rancho Cucamonga* (2005) 37 Cal.4th 685, 694-700.) Plaintiffs
24 ignore *Barratt* in their opposition and provide an unintelligible argument for why the Court should
25 allow them to pursue the claim. The Court should reject plaintiffs’ argument and dismiss this cause
26 of action with prejudice.

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Exhibit A



2008-0042392

Recorded at the Request of:
County of Santa Cruz
Planning Department

Recorded REC FEE 12.00
Official Records
County of CC CONFORMED C 2.00
Santa Cruz
GARY E. HAZELTON
Recorder

Return recorded document to:
Planning Department
County of Santa Cruz
Attn: Code Enforcement
701 Ocean Street, 4th Floor
Santa Cruz, CA 95060

DLA
10:41AM 15-Oct-2008 Page 1 of 2

ORIGINAL

APN: 037-161-27

Cancellation of Notice of Violation

THIS PAGE ADDED TO PROVIDE ADEQUATE SPACE FOR RECORDING INFORMATION
(CALIFORNIA GOVERNMENT CODE §27361.6)

EXHIBIT A, Page 1 of 2

RECORDED AT REQUEST OF:
The County of Santa Cruz

WHEN RECORDED MAIL TO:
Code Compliance
Santa Cruz County Planning
701 Ocean Street, 4th Floor
Santa Cruz, CA 95060

NOTICE OF EXPUNGEMENT OF RECORDED NOTICE OF SANTA CRUZ COUNTY CODE VIOLATION

Notice is hereby given pursuant to Santa Cruz County Code Section 19.01.090 that the notice of code violation previously recorded in/ as **2007-0046813** of the Official Records of the County of Santa Cruz on that property below identified is expunged.

OWNER(S): Elan and Oracle Co-Trustees

MAILING

ADDRESS: P.O. Box 969
Aptos, CA 95001

VIOLATION
ADDRESS: 396 Tolak Road
Aptos, CA

ASSESSOR'S PARCEL NUMBER: 037-161-27

VIOLATION EXPUNGED BY THE FOLLOWING ACTION:

A permit has been issued to allow fence/hedge abutting Tolak Road.

Based on the findings of my investigation, the recorded violation of Santa Cruz County Code Notice above has been corrected and shall be expunged.

DATED: 10/15/08

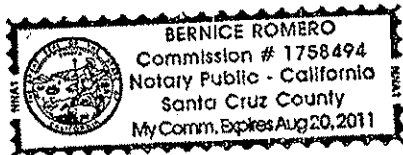
Ken Hart
Ken Hart
Principal Planner

State of California, County of Santa Cruz

On October 15 2008, before me, Bernice Romero, Notary Public, personally appeared Ken Hart, Principal Planner, County of Santa Cruz Planning Department, who proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her authorized capacity, and that by his/her signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.



Bernice Romero
(Signature of Notary Public)