

Tentative Rulings –June 22, 2006

To request a hearing on any matter on this calendar, you must call the Court at (209) 223-6360 by 4:30 p.m. today. Notice of the intention to appear must also be given to all other parties. If the clerk is not notified of a party's intention to appear, there will be no hearing and the tentative ruling becomes the order of the court.

Lubenko v. Crocker, et al.: 04CV3377

Preliminarily, all parties are ordered to appear for a Case Management Conference at 3:15 p.m. on June 22, 2006. However, the parties must notify the court and opposing parties of any intention to contest this tentative ruling.

Defendant City of Plymouth moves for judgment on the pleadings as to the fourth, fifth, and sixth causes of action of Plaintiff's Amended Complaint.

1. Fourth Cause of Action: Preemptory Writ of Mandate to Compel City to Enforce Chapter 70 of the Building Code, Section 19.06.190 of the City Code and Conditions of Approval on the Parcel Map:

Although mandate will not lie to control a public agency's discretion, i.e. force the exercise of discretion in a particular matter, it will lie to correct abuses of discretion. (American Federation of State, County, and Municipal Employees v. Metropolitan Water District of Southern California (2005) 126 Cal.App.4th 247; see also Hutchinson v. City of Sacramento (1993) 17 Cal.App.4th 791 (noting that mandate is not available to compel the exercise of discretion); see also Larson v. City of Redondo Beach (1972) 27 Cal.App.3d 332.)

Whether a statute creates a mandatory or discretionary duty to act is a question of law for the trial court. (Fox v. Fresno (1985) 170 Cal.App.3d 1238, 1242 (noting that the term mandatory refers to an obligatory duty, which the governmental entity is required to perform; whereas, a discretionary duty is a permissive power, which the entity may exercise or not as it chooses).) "In the area of law enforcement, statutes containing shall language are sometimes interpreted as directory or permissive because discretion is inherent in the activity concerned." (Ibid. [internal citations omitted]) In determining whether a duty is mandatory, the court should look to the intent of the statute construed as a whole, the nature and character of the act to be done, and the consequences, which would follow the doing or failure to do an act at the required time. (Id. at 1242-1243.) When the purpose of the statute is to serve a public purpose, the provision should be held directory or mandatory as will best accomplish that purpose. (Ibid.)

For example, Health & Safety Code §17980, which deals with the enforcement of building code violations, was held to impose a discretionary duty to act, despite the extensive use of the word "shall" throughout the statute. (Id. at 1243) One reason for determining that it is a discretionary duty to act is that the statute gives the enforcement agency different options to choose the appropriate action to take upon the discovery of a violation. (Id. at 1243-1244 (stating that if the statute was mandatory, it would be difficult to reconcile the use of the word "shall" with the portion of the statute that gives the agency authority to take "any appropriate action").)

The Uniform Building Code §104.2.1 states:

General. The building official is hereby authorized and directed to enforce all of the provisions of this code. For such purposes, the building official shall have the powers of a law enforcement officer.

Plymouth City Code §19.06.190 deals with grading, excavation, and fill activities. It basically states that it is unlawful to commence grading without a permit to do so. Said permits are obtained via application to the city engineer. The decision of whether to grant a permit lies in the discretion of the city engineer. Other than stating that it is unlawful to grade, etc. without a permit, the City Code provision does not have any enforcement language; nor is there a general enforcement provision, as there is in the Uniform Building Code. Defendant failed to address the City Code in the Motion.

The enforcement of the Uniform Building Code is discretionary. Therefore, the only way for the plaintiffs to prevail on the claim of mandate would be to show that there was an abuse of discretion. Plaintiffs have not pled such facts.

The Plymouth City Code merely states that it is unlawful to commence grading without a permit. There is no strict enforcement procedure. Therefore, the enforcement of the provision would logically be a function of law enforcement power, which is a function of discretion. Therefore, the only way for the plaintiffs to prevail on the claim of mandate would be to show that there was an abuse of discretion. Plaintiffs have not pled such facts.

Therefore, the motion for judgment on the pleadings is granted as to the fourth cause of action with 20 days leave to amend.

2. Fifth Cause of Action: Inverse Condemnation:

A public entity may be liable in an inverse condemnation action for any physical injury to real property caused by a public improvement as deliberately designed and constructed. (Yox v. Whittier (1986) 182 Cal.App.3d 347, 352.) If a plaintiff is unable to demonstrate that the public entity's conduct, although negligent, was in pursuit of a public use, an action based on inverse condemnation must fail. (Ibid.) "Public use within the meaning of California Constitution, article I, section 19, has been defined as a use which concerns the whole community or promotes the general interest in its relation to any legitimate object of government." (Ibid. [internal citations omitted].) The justification for an inverse condemnation action is that the public entity is taking a calculated risk that damage to private property may occur in the pursuit of public objectives. (Id. at 355.)

Ordinarily, the taking of private property to construct a drainage system is a taking for a public use, which entitles the plaintiff to just compensation. (Frustuck v. Fairfax (1963) 212 Cal.App.2d 345, 358.) Such a taking is generally considered to be for public use because it is a means to provide adequate drainage and prohibit flooding. (Ibid.) However, when the defendant did not play an active role in the development of the drainage system, except to approve plans and issue permits, any claim for damages against the public entity must fail. (Yox, supra, at 353.) Drainage systems are only a matter of public policy when they affect the public. (Id. at 354.) If there is no acceptance of a street or the drainage system within it, then there cannot be a public improvement or public use. (Ibid.) Without a public use, there can be no inverse condemnation action. (Ibid.) Approval or acceptance of a street or drainage system does not have to be explicit. (Id. at 354.) The acceptance may be made by extended use of the system or performing maintenance and/or repair work on the system. (Ibid.) Approval of a subdivision map does not rise to the level of acceptance of the property. (Id. at 355.)

In this case, the City did more than simply approve the plans in question. Rather, the City Engineer actually designed and revised the plans in question. This additional action by the City may be sufficient to constitute a public use within the meaning of inverse condemnation law. Therefore, taking the allegations of the complaint as true, the plaintiff has pled sufficiently to state a cause of action in inverse condemnation. Whether there was, in fact, a "public use" is a question to be resolved by the trier of fact. The motion for judgment on the pleadings is overruled as to the fifth cause of action.

3. Sixth Cause of Action: Preemptory Writ of Mandate to Enforce Government Code Section 65940

Government Code §65943 states, in pertinent part:

- (a) Not later than 30 calendar days after any public agency has received an application for a development project, the agency shall determine in writing whether the application is complete and shall immediately transmit the determination to the applicant for the development project.
If the written determination is not made within 30 days after receipt

of the application, and the application includes a statement that it is an application for a development permit, the application shall be deemed complete for the purposes of this chapter....If any application is determined not to be complete, the agency's determination shall specify those portions of the application which are incomplete and shall indicate the manner in which they can be made complete, including a list and a thorough description of the specific information needed to complete the application. The applicant shall submit materials to the public agency in response to the list and description. (emphasis added.)

Plaintiffs submitted an application for a building permit on October 14, 2003. The application requested a grading of a portion of the plaintiffs' real property. Plaintiffs' application was a development "project" within the meaning of Government Code §65943. The City never determined in writing whether the plaintiffs' application was complete. The City was under a duty to make such a determination on or before November 15, 2003. Plaintiffs' request that a writ of mandate issue directing the City to deem the application complete.

Interestingly, the complaint does not state that the application included a statement that it was an application for a "development permit." Therefore, it appears that the provision deeming the application complete upon the expiration of a 30-day time period would not apply.

There are sufficient facts to plead a cause of action in mandate and, therefore, the motion for judgment on the pleadings is overruled as to the sixth cause of action.

Defendant is to prepare an order in compliance with California Rules of Court, Rule 391.