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6 UNITED STATES DISTRICT COURT
7 EASTERN DISTRICT OF CALIFORNIA
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9 EDWARD WARKENTINE, DANIEL
10 TANKERSLEY,

11 Plaintiffs,

12 v.

13 HECTOR J. SORIA, et al.,

14 Defendants.
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Case No. 1:13-cv-01550-MJS

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT;
AND**

**GRANTING IN PART AND DENYING IN
PART PLAINTIFFS' MOTION FOR
PARTIAL SUMMARY JUDGMENT**

(ECF NOS. 84, 86-87)

CASE TO REMAIN OPEN

17 **I. INTRODUCTION AND PROCEDURAL HISTORY**

18 Plaintiffs Edward Warkentine and Daniel Tankersley (jointly, "Plaintiffs") initiated
19 this action on September 25, 2013. They are proceeding on a second amended
20 complaint filed on June 2, 2014, alleging, generally, that Defendants searched, seized,
21 and took Plaintiffs' personal property without any compensation in violation of the Civil
22 Rights Act, 42 U.S.C. § 1983, and the Fourth, Fifth and Fourteenth Amendments. (ECF
23 No. 55.) This matter is before the undersigned for all purposes pursuant to the consent
24 of the parties. (ECF No. 62.)

25 This action proceeds against the following Defendants¹:
26 _____
27

28 ¹ In their opposition to Defendants' motion for summary judgment, Plaintiffs dismiss their claims against Joseph Amador, Leo Capuchino, John Flores, Robert Silva, Joseph Riofrio, Hector Lizarraga, and Bryce

- 1 1. The City of Mendota (“City”);
- 2 2. Mendota City Code Enforcement Officers Hector J. Soria and Daniel
- 3 Gosserand;
- 4 3. Mendota City Police Officers Gerry Galvin, Johnny A. Lemus and Francisco
- 5 Amador;
- 6 4. Mendota City Hearing Officer and City Manager Kristal Chojnacki;
- 7 5. Martin Hernandez and Smitty’s Towing & Auto Dismantling²; and
- 8 6. Abraham Gonzalez, Felipe Gonzalez, and Gonzalez Towing & Tire Shop³.

9 This case is set for a pretrial conference on January 29, 2016, at 1:30 p.m., and
10 a jury trial on March 1, 2016, at 8:30 a.m. (ECF No. 109.)

11 On September 30, 2015, Defendants the City, Soria, Gosserand, Galvin, Lemus,
12 Amador, and Chojnacki (collectively, “the Mendota Defendants” or “Defendants”))
13 moved for summary judgment on all of Plaintiffs’ claims. (ECF No. 84.) Also on
14 September 30, 2015, Plaintiffs moved for partial summary judgment on their procedural
15 due process and taking claims against the City, Gosserand, Soria, and Chojnacki. (ECF
16 No. 87.) Both motions are fully briefed and ready for disposition.

17 **II. UNDISPUTED FACTS**⁴

18 **A. Relevant Background**

19 At issue in this case is the Defendants’ nuisance abatement activity related to the
20 following properties located in Fresno County, California, and owned by Plaintiffs
21 Edward Warkentine and/or Daniel Tankersley: APN 013-192-09, 013-152-27s, 013-116-
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23
24 Atkins. See Pls.’ Opp’n at 23. (ECF No. 90 at 8). Accordingly , these Defendants are dismissed from this
action.

25 ² Default has been entered as to these Defendants. ECF No. 41.

26 ³ Defendants Martin Hernandez, Smitty’s Towing & Auto Dismantling, Abraham Gonzalez, Felipe
27 Gonzalez, and Gonzalez Towing & Tire Shop will be referred to collectively as the “Towing Defendants.”

28 ⁴ All facts set forth here are undisputed unless noted otherwise.

1 13, 013-118-11, and 013-115-10. At the time, three of these properties were located in
2 residential (R-1) zoned districts. Chojnacki Decl. ¶ 2. The other two, APN 013-115-10
3 and 013-152-27s, were located in M-1 (Light Manufacturing) districts. Id.

4 Daniel Tankersley has an ownership interest in APN 013-115-10 and APN 013-
5 152-27s. Tankersley Decl. ¶ 5. He inherited his interest in these properties on June 19,
6 2009, following the final distribution of the Estate of Elbert Davidson.⁵ Tankersley Decl.
7 ¶ 4. On March 11, 2010, new deeds were prepared and notarized for the transfer of
8 these two properties and on April 26, 2010 they were submitted to the Fresno County
9 Recorder's Office. Id. ¶ 5. Since June 6, 2010, when the deeds were recorded, the
10 property's mailing address has been P.O. Box 29, Nubieber, California 96068. Id.
11 During all times relevant to this action, Tankersley received his tax bills for these
12 properties at the Nubieber address. Id. ¶ 8.

13 **B. The Public Nuisance Notices**

14 Enforcement of the Mendota Municipal Code ("the Code") and resolution of any
15 issues related to the manner in which it is enforced is the responsibility of the City
16 Manager. Silva Dep. at 28:15-24; Amador Dep. at 61:6-9.

17 As relevant here, the City Manager gave guidance on the nuisance abatement
18 procedures to the Code Enforcement Officers. Gosserand Dep. at 20:17-24; Soria Dep.
19 at 46:17-20. The City Manager set a priority list for cleaning up certain properties in
20 Mendota; Plaintiffs' properties were on the priority list and at one point were the top
21 priority. Soria Dep. at 33:9-21.

22 The City Council members did not get involved in the enforcement of the Code,
23 instead leaving it to the discretion of the City Manager. See Silva Dep. at 26:8—27:11.

24 On May 15, 2010, Defendant City Code Enforcement Officer Hector Soria mailed
25 five separate public nuisance notices to Edward Warkentine at 1583 Eighth Street,
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27
28 ⁵ Elbert Davidson passed away in 2006. Tankersley Dep. at 39:2-7.

1 Mendota, California, 93640, regarding the properties at issue in this case (“the Public
2 Nuisance Notices”). Joint Statement of Undisputed Facts (“JSUF”) ¶¶ 17. These notices
3 were mailed to the names and addresses shown on the last equalized assessment roll
4 in Fresno County.⁶ Soria Decl. ¶ 2.

5 Each of these notices indicated that the property was in violation of the Mendota
6 Municipal Code, specifically, Sections 8.28.030 (public nuisance) and 8.24.020 (trash
7 and junk). Soria Decl. Ex. A. The notices summarily referred to the following
8 subsections: 6 (accumulation of trash and junk), 8 (attractive nuisance to children), 12
9 (an unpermitted obstruction of or encroachment on public property), 13 (abandoned,
10 inoperative or dismantled vehicle), and 15 (vacant lots not maintained free of weeds,
11 trash, etc.). Defs.’ Req. Judicial Notice (“DRJN”), Ex. A; see also Soria Decl. ¶ 3, Ex. A.

12 Warkentine received at least 4 of the 5 notices.⁷ Soria Decl. ¶ 2; Warkentine Dep.
13 at 26:2-10. Tankersley did not receive these notices and has never received mail at the
14 1583 Eighth Street address. Tankersley Decl. ¶¶ 6, 10.

15 **C. The Abatement Notice and the Notices of Administrative Hearing**

16 On August 3, 2010, Defendant Soria mailed to both Plaintiffs at 1583 Eighth
17 Street, Mendota, California 93640, a “Notice of Intention To Abate and Remove An
18 Abandoned, Wrecked, Dismantled, Or Inoperative Vehicle of Parts Thereof as a Public
19 Nuisance” (“the Abatement Notice”) identifying 10 allegedly abandoned, wrecked,
20 dismantled, or inoperative vehicles on APN 013-152-27s and notifying the Plaintiffs that
21 they had 10 days to abate the alleged nuisance or request a public hearing. JSUF ¶ 18;
22 Soria Decl. Ex. B.

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26 ⁶ Defendants assert that the Court may take judicial notice that these assessment rolls are prepared as
27 of June 30 of each year, see Defs.’ Mot. Summ. J. at 7, but fail to submit a request for judicial notice in
28 support. Nonetheless, absent reason to do otherwise, the Court will proceed on the assumption that this
is true for purposes of the parties’ cross-motions for summary judgment.

⁷ Soria received return receipts signed by Warkentine on all but APN 013-116-13. Soria Decl. ¶ 2.

1 In response to the Abatement Notice, Plaintiffs’ attorney, Diane Anderson,
2 requested a public hearing. JSUF ¶ 19.

3 On November 6, 2010, the City of Mendota mailed five notices—again to 1583
4 Eighth Street, Mendota, California 93640—titled “Notice of Administrative Hearing to
5 Determine the Existence of Public Nuisance and to Abate In Whole Or Part” (“the
6 Notices of Administrative Hearing”). These notices were addressed to:

7 Edward Warkentine and Elbert Davidson concerning APN
8 013-152-27.

9 Edward Warkentine concerning APN 013-115-10.

10 Edward Warkentine concerning APN 013-115-11.

11 Edward Warkentine and John Warkentine concerning APN
12 013-192-09.

13 Edward Warkentine concerning APN 013-116-13.

14 JSUF ¶¶ 20-24. Each of these notices indicated that a hearing would be held on
15 November 16, 2010. See Soria Decl. Ex. C.

16 Tankersley did not receive any of these notices. Tankersley Decl. ¶ 11. Instead,
17 he heard third-hand about a possible hearing on one parcel (865 Naple Street) for a
18 non-nuisance issue. Id.

19 **D. The Administrative Hearing**

20 On November 16, 2010, an administrative hearing was held before Defendant
21 Kristal Chojnacki, the City Manager who was acting as the Hearing Officer. JSUF ¶ 25,
22 Pls.’ Sep. Statement of Undisputed Facts (“PSSUF”) ¶ 1.

23 Both Plaintiffs appeared at the hearing with their attorney. JSUF ¶ 25. The
24 nuisance conditions on all of the properties were considered at the hearing, and both
25 Tankersley and Defendant Soria testified; Warkentine did not testify.

26 Tankersley testified that he cleaned up all oils and tires from the properties and
27 obtained an EPA number for removal of these items. Tankersley Decl. ¶ 14. He stated
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1 that he spent a large amount of money cleaning up the properties, demolishing houses,
2 and relocating personal property in reliance on a prior agreement with the City of
3 Mendota that the properties would be rezoned to M-2. Id. He testified that he is the
4 record owner of APN 013-115-10 and APN 013-010-27s and presented a tax bill with
5 his name and proper address on it. Id.

6 Defendant Soria also testified at the hearing regarding the nuisance conditions
7 on the properties. Soria Decl. ¶ 6. His testimony was based on photographs of the
8 properties. Id. Ex. D.

9 At the conclusion of the hearing, Chojnacki gave Tankersley until December 6,
10 2010, to submit additional evidence or documentation in support of his position.
11 Chojnacki Decl. ¶ 5. No additional documents or evidence was submitted by Tankersley
12 following the hearing. Id. ¶ 8.

13 After the hearing, Chojnacki, Soria and Tankersley drove by each of the
14 properties to observe their present condition. Soria Decl. ¶ 7. Tankersley showed Soria
15 and Chojnacki the conditions on the properties that verified his testimony, including the
16 removal of hundreds of tires as well as the oils from the oil barrels. Tankersley Decl. ¶
17 20. Notwithstanding the removal of the tires, Soria and Chojnacki determined that the
18 properties remained in substantially the same condition as shown in the photographs
19 submitted by Soria. Soria Decl. ¶ 7; Chojnacki Decl. ¶ 7.

20 **E. The Abatement Decision**

21 On March 30, 2011, Chojnacki issued “Findings Regarding Appeal of Notice of
22 Nuisance and to Abate Vehicles” (“the Abatement Decision”) in which nuisance
23 conditions were found to exist on all five parcels. JSUF ¶ 26; Chojnacki Decl. Ex. A. The
24 Abatement Decision ordered that Edward Warkentine (and not Daniel Tankersley)
25 remedy the alleged violations claimed therein, including, to “remove all accumulated
26 materials, junk and trash” and “remove all inoperative vehicles” from certain parcels
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1 within thirty days. JSUF ¶ 27. Each of the Plaintiffs received a copy of the Abatement
2 Decision. Warkentine Dep. at 28:19-22; Tankersley Dep. at 49:8-16.

3 As to the propriety of the notice provided to Plaintiffs, the Abatement Decision
4 found as follows:

5 Mr. Tankersley contended that he did not receive the
6 notices, although he received tax bills for the real property at
7 his Post Office Box 29, Nubieber, California, 96068 address.
8 He did not provide any evidence that the real property was
9 vested in his name or that he was the record owner of the
10 same, other than his oral testimony. Mr. Warkentine did not
11 contest that notice had been given to him. [¶] On the basis of
12 the evidence provided by the City, the Hearing Officer finds
13 that notice had been given, based upon the fact that Mr.
14 Warkentine did not contest notice and Mr. Tankersley is not
15 the record owner of the real property as set forth below. As a
16 result of this finding, notice was properly given and the
17 appeal regarding notice is denied.

18 Chojnacki Decl. Ex. A, ECF No. 84-14 at 3.

19 Chojnacki also found that Tankersley failed to prove any ownership interest in
20 any real or personal property in the City of Mendota:

21 Mr. Tankersley did not provide any documentation that he is
22 the owner of any real or personal property in the City of
23 Mendota. Mr. Tankersley testified that he was the Executor
24 of the Estate of Elbert Davidson. However, there is no
25 evidence in the record that the Estate was ever closed or
26 that Mr. Tankersley had any beneficial interest in any real or
27 personal property. Additionally, there is no showing that any
28 title to any of the real or personal property at issue in this
29 appeal is vested in Mr. Tankersley. A property tax bill is not
30 evidence of ownership, but rather that Mr. Tankersley was
31 paying property taxes, which is consistent with his testimony
32 that he was the Executor.

33 Chojnacki Decl. Ex. A, ECF No. 84-14 at 4.

1 Neither Chojnacki nor the Abatement Decision gave the Plaintiffs any information
2 regarding filing an appeal. See Chojnacki Decl. Ex. A; Chojnacki Dep. at 72:1-11, ECF
3 No. 99 at 6. The Plaintiffs did not appeal the Abatement Decision. Chojnacki Decl. ¶ 11.

4 On May 27, 2011, Soria posted the Abatement Decision on each of the five
5 properties. Soria Decl. ¶ 9. He also mailed the Abatement Decision to:

6 Edward Warkentine and Elbert Davidson at 1583 8th Street,
7 Mendota, California 93640, concerning APN 013-152-27.

8 Edward Warkentine at 1583 8th Street, Mendota, California
9 93640, concerning APN 013-115-11.

10 Edward Warkentine and John Warkentine at 1583 8th Street,
11 Mendota, California 93640, concerning APN 013-192-09.

12 Elbert Davidson at PO Box 29, Nubieber, California 96068,
concerning APN 013-115-10.

13 Edward Warkentine at 1583 8th Street, Mendota, California
14 93640, concerning APN 013-116-13.

15 Soria Decl. ¶ 9, Ex. E.

16 Plaintiffs did not comply with the Abatement Decision.

17 On June 13, 2011, Soria signed five documents for recording entitled “Order of
18 Abatement,” each of which referenced one of the five properties to be abated and had
19 attached to it the Abatement Decision. Soria Decl. ¶ 10, Ex. F. These documents were
20 recorded in the Fresno County Recorder’s Office on June 16, 2011. Id.

21 **C. Removal of Plaintiffs’ Personal Property**

22 **1. APN 013-152-27s**

23 On September 23, 2011, Soria supervised the abatement of APN 013-152-27s,
24 which was an unfenced vacant parcel. Soria Decl. ¶ 12. He did not obtain an inspection
25 warrant to go on the property because he believed it constituted an attractive nuisance
26 to children. Id.

1 Soria determined the items to be removed by reviewing the Abatement Decision
2 and the Municipal Code. Soria Decl. ¶ 13. The inoperable vehicles and parts of vehicles
3 had previously been tagged with 10-day abatement notices pursuant to the Municipal
4 Code. Id. Prior to towing the vehicles, Soria filled out a CHP 180 form for each of the
5 inoperable or junked vehicles to be towed. Id.

6 Defendant Officers Francisco Amador and Johnny Lemus were present at the
7 direction of Defendant Chief of Police Gerald Galvin. F. Amador Decl. ¶¶ 2-6; Lemus
8 Decl. ¶¶ 2-8; Galvin Decl. ¶¶ 2-4. They understood their role to keep the peace and to
9 assist in filling out abandoned and inoperative vehicle report forms. See id.

10 The City contracted with Defendant Gonzalez Towing to remove the offending
11 items from the property. JSUF ¶ 28. Pursuant to the agreement with the City, Gonzalez
12 Towing was given control and possession of the seized property. Chojnacki Decl. Ex. B.

13 **2. The Inspection Warrant for APN 013-115-10, 013-116-13, 013-**
14 **118-11, and 013-192-09**

15 On April 4, 2012, Defendant City Code Enforcement Officer Dan Gosserand
16 submitted a declaration seeking an Inspection Warrant (“the Inspection Warrant”) from
17 the Fresno County Superior Court. JSUF ¶ 29; Gosserand Decl. Ex. A. The declaration
18 provided that the warrant shall only be served and acted upon after the expiration of 24
19 hours from the time of posting of the warrant on each of the affected properties.
20 Gosserand Decl. Ex. A, ECF No. 84-11 at 5.

21 The Inspection Warrant was signed by Superior Court Judge Gary Orozco on
22 April 4, 2012, authorizing the entry upon, and abatement of, the four fenced parcels of
23 property: APN 013-115-10, 013-116-13, 013-118-11, and 013-192-09.⁸ JSUF ¶¶ 29, 30;
24 Gosserand Decl. ¶ 4, Ex. A.

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28 ⁸ Though the Inspection Warrant itself does include a date, Gosserand declares that Judge Orozco
signed it on April 4, 2012. Gosserand Decl. ¶ 4.

1 On April 7, 2012, Gosserand posted the Inspection Warrant and Affidavit on each
2 of the four properties. Gosserand Decl. ¶ 6, Ex. B. Plaintiffs assert that the Inspection
3 Warrant was not served on them. See Tankersley Decl. ¶ 24.

4 The abatement of the properties began on April 9, 2012. Gosserand Decl. ¶ 7.
5 The City contracted with Defendant Gonzalez Towing to remove the items from parcels
6 APN 013-115-10 and 013-192-09. JSUF ¶ 31; Chojnacki Decl. Ex. C. The City also
7 contracted with Defendant Smitty's Towing to remove items from parcels APN 013-116-
8 13 and 013-118-11. JSUF ¶ 31; Chojnacki Decl. Ex. D. Pursuant to these agreements,
9 the Towing Defendants were given control and possession of the seized property.
10 Chojnacki Decl. Exs. C-D.

11 During the abatement of APN 013-115-10, Defendants opened a locked shed
12 and removed tools. Tankersley Decl. ¶ 30. From APN 013-192-09, Defendants seized
13 items from a garage-like structure following discussions with a Code Enforcement
14 Officer. Gonzalez Dep. at 51:5-17.

15 On April 9, 2012 Gosserand affixed 10-day Vehicle Abatement Notices to all
16 inoperable and partially dismantled vehicles situated on the four parcels. Gosserand
17 Decl. ¶ 8. On April 19, 2012, Gosserand filled out CHP 180 forms for the vehicles and
18 portions of vehicles to be towed and took photographs of the condition of the vehicles.
19 Id. ¶ 10.

20 Defendant Officers Francisco Amador and Johnny Lemus were present at the
21 direction of Defendant Chief of Police Gerald Galvin. F. Amador Decl. ¶¶ 2-6; Lemus
22 Decl. ¶¶ 2-8; Galvin Decl. ¶¶ 2-4. They understood their role to keep the peace and to
23 assist in filling out abandoned and inoperative vehicle report forms. See id.

24 On April 20, 2012, the abatements were completed. Gosserand Decl. ¶ 12.

25 The City did not pay the Towing Defendants for the abatements. See Abraham
26 Gonzalez Dep. at 45:6-11. The City did not require the Towing Defendants to retain or
27 store the property. Chojnacki Decl. ¶ 4; Chojnacki Dep. at 94:7-13.

1 **D. Post-Removal Notices**

2 The City did not give written notice to Edward Warkentine or Daniel Tankersley
3 setting forth a procedure for recovery of the personal property removed by the Towing
4 Defendants. JSUF ¶ 32.

5 The City took no action to assess the cost of removing the items against any of
6 the Plaintiffs' properties. JSUF ¶ 33.

7 Plaintiffs value the loss of their personal property at over \$1,500,000.00. Pls.'
8 Opp'n Ex. 6.

9 **III. LEGAL STANDARD**

10 Any party may move for summary judgment, and "[t]he [C]ourt shall grant
11 summary judgment if the movant shows that there is no genuine dispute as to any
12 material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P.
13 56(a). Each party's position, whether it be that a fact is disputed or undisputed, must be
14 supported by (1) citing to particular parts of materials in the record, including but not
15 limited to depositions, documents, declarations, or discovery; or (2) "showing that the
16 materials cited do not establish the absence or presence of a genuine dispute, or that
17 an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ.
18 P. 56(c)(1).

19 The party seeking summary judgment "always bears the initial responsibility of
20 informing the district court of the basis for its motion, and identifying those portions of
21 the pleadings, depositions, answers to interrogatories, and admissions on file, together
22 with the affidavits, if any, which it believes demonstrate the absence of a genuine issue
23 of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (internal quotation
24 marks omitted). The exact nature of this responsibility, however, varies depending on
25 whether the issue on which summary judgment is sought is one in which the movant or
26 the nonmoving party carries the ultimate burden of proof. See Soremekun v. Thrifty
27 Payless, Inc., 509 F.3d 978, 984 (9th Cir. 2007). If the movant will have the burden of
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1 proof at trial, it must demonstrate, with affirmative evidence, that “no reasonable trier of
2 fact could find other than for the moving party.” Id. at 984. In contrast, if the nonmoving
3 party will have the burden of proof at trial, “the movant can prevail merely by pointing
4 out that there is an absence of evidence to support the nonmoving party’s case.” Id.
5 (citing Celotex, 477 U.S. at 323). Once the moving party has met its burden, the
6 nonmoving party must point to “specific facts showing that there is a genuine issue for
7 trial.” Id. (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986)).

8 In ruling on a motion for summary judgment, a court does not make credibility
9 determinations or weigh evidence. See Liberty Lobby, 477 U.S. at 255. Rather, “[t]he
10 evidence of the non-movant is to be believed, and all justifiable inferences are to be
11 drawn in his favor.” Id. Only admissible evidence may be considered in deciding a
12 motion for summary judgment. Fed. R. Civ. P. 56(c)(2). “Conclusory, speculative
13 testimony in affidavits and moving papers is insufficient to raise genuine issues of fact
14 and defeat summary judgment.” Soremekun, 509 F.3d at 984.

15 **IV. PARTIES’ CROSS-MOTIONS FOR SUMMARY JUDGMENT**

16 To succeed on their Section 1983 claims, Plaintiffs must demonstrate that the
17 action (1) occurred “under color of state law,” and (2) resulted in the deprivation of a
18 constitutional or federal statutory right. Leer v. Murphy, 844 F.2d 628, 632-33 (9th Cir.
19 1988) (citations omitted); see also Lugar v. Edmondson Oil Co., 457 U.S. 922, 924
20 (1982). Since the parties do not dispute whether Defendants acted under color of state
21 law, the Court is asked to consider only whether, by their actions, Defendants violated
22 Plaintiffs’ constitutional rights.

23 **A. Search and Seizure**

24 The Fourth Amendment, made applicable to the states by the Fourteenth
25 Amendment, protects “persons, houses, papers, and effects, against unreasonable
26 searches and seizures.” U.S. Const. amend. IV. Lavan v. City of Los Angeles, 693 F.3d
27 1022 (9th Cir. 2012), explains:
28

1 The Fourth Amendment “protects two types of expectations,
2 one involving ‘searches,’ the other ‘seizures.’ A ‘search’
3 occurs when the government intrudes upon an expectation
4 of privacy that society is prepared to consider reasonable. A
5 ‘seizure’ of property occurs when there is some meaningful
interference with an individual's possessory interests in that
property.”

6 Id. at 1027 (quoting United States v. Jacobsen, 466 U.S. 109, 113 (1984)). Whether a
7 search or seizure is at issue, the relevant inquiry under the Fourth Amendment is one of
8 reasonableness—“[t]he Fourth Amendment does not proscribe all state-initiated
9 searches and seizures; it merely proscribes those which are unreasonable.” See Florida
10 v. Jimeno, 500 U.S. 248, 250 (1991) (citations omitted). Whether a seizure is
11 unreasonable under the Fourth Amendment depends upon the particular facts and
12 circumstances. See Miranda v. City of Cornelius, 429 F.3d 858, 862 (9th Cir. 2005).

13 **1. Search and Seizure of Plaintiffs’ Unfenced Property**

14 The Court turns first to Plaintiffs’ claims regarding Defendants’ warrantless entry
15 onto parcel APN 013-152-27s, an unfenced and vacant lot. Absent an exception, the
16 Fourth Amendment generally proscribes warrantless “entr[y] onto private land to search
17 for and abate suspected nuisances.” Conner v. City of Santa Ana, 897 F.2d 1487, 1490
18 (9th Cir. 1990) (citations omitted); Camara v. Municipal Court, 387 U.S. 523, 530
19 (1967); see also Schneider v. County of San Diego, 28 F.3d 89, 91 (9th Cir. 1994).

20 One recognized exception to the warrant requirement pertains to the “open
21 fields” doctrine. In Hester v. United States, 265 U.S. 57 (1924), the Supreme Court held
22 that the right to privacy does not extend to a person's open fields. Id. at 59. The Court
23 instructed that “the special protection accorded by the Fourth Amendment to the people
24 in their ‘persons, houses, papers, and effects’ is not extended to the open fields. The
25 distinction between the latter and the house is as old as the common law.” Id. (citation
26 omitted).

27 The Supreme Court confirmed the continued vitality of the “open fields” doctrine
28

1 in Oliver v. United States, 466 U.S. 170, 177-78 (1984). The Court stated in Oliver: “We
2 conclude, as did the Court in deciding Hester v. United States, that the government’s
3 intrusion upon the open fields is not one of those ‘unreasonable searches’ proscribed by
4 the text of the Fourth Amendment.” Id. at 177.

5 In Oliver, when the officers arrived at Oliver’s farm, “they drove past petitioner’s
6 house to a locked gate with a ‘No Trespassing’ sign.” 466 U.S. at 173. Oliver’s
7 marijuana field was “bounded on all sides by woods, fences, and embankments and
8 cannot be seen from any point of public access.” Id. at 174. The Court held in Oliver that
9 “an individual may not legitimately demand privacy for activities conducted out of doors
10 in fields, except in the area immediately surrounding the home.” Id. at 178 (citation
11 omitted).

12 Here, it is undisputed that the parcel APN 013-152-27s was an unfenced, vacant
13 lot without a residential structure on it. Accordingly, the Court agrees with Defendants
14 that their entry onto this property without a warrant did not violate the Fourth
15 Amendment because Plaintiffs had no reasonable expectation of privacy there. As no
16 genuine issues of material fact remain for trial, the Court will grant summary judgment
17 on Plaintiffs’ Fourth Amendment search claim in favor of Defendants.

18 This finding does not, however, necessarily lead to the conclusion that the
19 *seizure* of Plaintiffs’ property was also reasonable. Removing personal property is a
20 seizure within the meaning of the Fourth Amendment. See e.g., Miranda v. City of
21 Cornelius, 429 F.3d 858, 862 (9th Cir. 2005). A seizure “occurs when there is some
22 meaningful interference with an individual’s possessory interests in that property.”
23 Lavan, 693 F.3d at 1027 (citing Jacobsen, 466 U.S. at 113).

24 In this case, Defendants do not dispute that they seized Plaintiffs’ personal property
25 from APN 013-152-27s without a warrant. Defendants rely on two grounds for arguing
26 that their warrantless seizure of Plaintiffs’ personal property was reasonable.

27 First, they assert that the abatement hearing was sufficient to establish the
28

1 validity and reasonableness of the seizure because Plaintiffs had prior notice that a
2 nuisance was found to exist on the property and that action would be taken. This
3 argument, however, was foreclosed in Conner v. City of Santa Ana, 897 F.2d 1487,
4 1492 (9th Cir. 1990) (“We conclude that the fourth amendment protected the Connors
5 from the City's warrantless entry onto their property and from the warrantless seizure of
6 their automobiles. The warrant requirement applied to the City when, without the
7 Connors' consent, it broke down their fence, entered their property and seized the
8 automobiles, *regardless of how “reasonable” the warrantless search and seizure*
9 *appeared in light of the pre-seizure process afforded the Connors.*”) (Emphasis added.)

10 Defendants also assert that an emergency exception existed to the warrant
11 requirement based on their belief that junk and debris on this unfenced property was
12 accessible to children. The burden, of course, is on Defendants to prove this
13 “emergency” exception. They have not met that burden here. To qualify as an
14 emergency, there must be circumstances indicating “some real immediate and serious
15 consequences if [Defendants] postponed action to get a warrant.” Sims v. Stanton, 706
16 F.3d 954, 961 (9th Cir.), *cert. granted, decision rev'd on other grounds*, 134 S. Ct. 3
17 (2013). Merely hypothesizing about what could happen in the future is not the same as
18 a valid contemporaneous emergency. See e.g., Allen v. Cnty. of Lake, 2014 WL
19 5211432, at *3 (N.D. Cal. Oct. 14, 2014) (in the context of a defendant describing
20 ongoing conditions as an “emergency” for the purpose of an exigency exception, finding
21 that a “mere declaration of an immediate threat does not make it so”) (quoting Sibron v.
22 New York, 392 U.S. 40, 61 (1968)). Here, there are no facts in the record to establish
23 the existence of a real, as opposed to hypothetical, emergency situation. Over one year
24 passed from the time Defendants first gave notice of the nuisance conditions on this
25 property and the abatement of that nuisance. There is nothing before the Court to
26 suggest that some calamity occurred or was imminent during that time or would have
27 occurred had Defendants failed to act when and as they did. The absence of any
28

1 specifically identifiable potential for harm, much less harm itself, from the nuisance
2 belies the need for precipitous action. For these reasons, the Court declines to enter
3 summary judgment for Defendants on Plaintiffs' Fourth Amendment seizure claim
4 related to APN 013-152-27s.

5 **2. Search and Seizure of Plaintiffs' Fenced Properties**

6 Defendants next move for summary judgment on Plaintiffs' Fourth Amendment
7 claims related to the four fenced properties. They claim that the searches and seizures
8 on these properties were authorized by the Inspection Warrant obtained by Defendant
9 Gosserand. Plaintiffs counter that the Inspection Warrant is invalid on its face and that
10 the seizures exceeded the scope of the Inspection Warrant.

11 **a. Validity of Inspection Warrant**

12 Plaintiffs argue that the Inspection Warrant is invalid on its face because: (1) it
13 does not identify the properties on its face; (2) it relies on Penal Code Section 1524 et
14 seq., which relates to search warrants for criminal offenses, not nuisance abatements;
15 (3) it is based on alleged misrepresentations by Gosserand; (4) it fails to satisfy the
16 particularity requirement of the Fourth Amendment; and (5) it is undated. The Court will
17 address each of these grounds in succession.

18 While it is true that the Inspection Warrant does not identify the properties on its
19 face, Plaintiffs do not cite to any provision of any code that requires such identification.
20 To the contrary, California Code of Civil Procedure 1822.51 provides, in relevant part,
21 that "[a]n inspection warrant shall be *supported by an affidavit, particularly describing*
22 *the place, dwelling, structure, premises, or vehicle to be inspected and the purpose for*
23 *which the inspection is made.*" (Emphasis added.) As there is no dispute that
24 Gosserand's affidavit submitted in support of the Inspection Warrant identified the
25 properties to be abated, the Court rejects Plaintiffs' first argument.
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1 Similarly, the Court does not find that the Inspection Warrant is invalid simply
2 because it incorrectly references the Penal Code on its face.⁹ The Inspection Warrant
3 repeatedly references the nuisance conditions on the properties, and, as Plaintiffs
4 concede, Gosserand's affidavit identifies the correct statutory authority under which the
5 warrant would issue. See Pls.' Opp'n at 8 n.2; Gosserand Decl. Ex. A, ECF No. 84-11 at
6 5 ("This warrant is requested consistent with the authority under Code of Civil
7 Procedure 1822.50 et seq. and the case of *Flahive v. City of Dana Point* (1999) 72 Cal.
8 App. 4th 241."). Plaintiffs' second argument is therefore rejected as well.

9 Next, Plaintiffs assert that the Inspection Warrant is invalid because Gosserand's
10 affidavit was based on misrepresentations. That argument too is unavailing. Plaintiffs
11 argue Gosserand falsely represented that the property identified in his declaration was
12 lawfully seizable pursuant to the Abatement Order. His declaration listed tires, for
13 example, even though tires were not included in the Abatement Order. But Plaintiffs do
14 not cite to any authority requiring the Abatement Order specifically to list each and every
15 item that is subject to abatement. Plaintiffs also argue that the affidavit falsely lists
16 Elbert Davidson as the owner of APN 013-115-10, even though Tankersley testified at
17 the Abatement Hearing that he is the owner of that parcel. Given the undisputed fact
18 that Tankersley did not submit documentary evidence of his ownership interest in that
19 parcel during or after the Abatement Hearing, Gosserand's reliance on the Abatement
20 Order's conclusion regarding ownership interest was reasonable and does not
21 undermine the validity of the Inspection Warrant.

22 The Court is also unconvinced that the Inspection Warrant failed to satisfy the
23 Fourth Amendment's particularity requirement. This requirement, which "guards the
24 right to be free from unbounded general searches," United States v. Hillyard, 677 F.2d
25 1336, 1339 (9th Cir. 1982), is satisfied if there is sufficient information included to
26 _____

27
28 ⁹ The Inspection Warrant relies on Penal Code Section 1524 et seq., which relates to search warrants for criminal activity.

1 apprise the issuing judge of the scope of the search. The particularity requirement may
2 be met in the inspection warrant or, if certain conditions are met, in the accompanying
3 affidavit. The inspection warrant may be construed with reference to the affidavit for
4 purposes of satisfying the particularity requirement if (1) the affidavit accompanies the
5 warrant, and (2) the warrant uses suitable words of reference which incorporate the
6 affidavit therein. In re Seizure of Property Belonging to Talk of the Town Bookstore, Inc.,
7 644 F.2d 1317, 1319 (9th Cir. 1981).

8 Plaintiffs argue that these requirements were not met because Gosserand's
9 affidavit was not attached to the Inspection Warrant when posted on the property. In
10 support, they cite to Daniel Tankersley's declaration that he did not see the Inspection
11 Warrant until after the abatement was concluded, and he did not personally observe the
12 affidavit included with the Inspection Warrant on the properties. See Tankersley Decl. ¶
13 24. Defendants, however, have submitted both Gosserand's declaration¹⁰ and
14 photographic evidence that the Inspection Warrant, which was posted on each of the
15 four fenced parcels, was stapled to multiple pages (the affidavit and attachments). See
16 Fike Decl. Ex. B, ECF No. 103-3. The Court finds that the particularity requirement has
17 been met in this regard.

18 Notwithstanding the foregoing, the Court agrees with Plaintiffs that the omission
19 of a date on the Inspection Warrant may render a portion of Defendants' abatement
20 activity unlawful. Pursuant to California Code of Civil Procedure 1822.55, "[a]n
21 inspection warrant shall be effective for the time specified therein, but not for a period of
22 more than 14 days, unless extended or renewed by the judge who signed and issued
23 the original warrant" Gosserand declared that the Inspection Warrant was signed on
24 _____

25
26 ¹⁰ In his declaration, Gosserand stated that he posted the "Inspection and Abatement Warrant and
27 Affidavit" on each of the four properties. See Gosserand Decl. ¶ 6. By referencing only the title of the
28 document signed by Judge Orozco, Plaintiffs suggest that Gosserand's declaration fails to specify that he
also posted his multi-page affidavit. The Court declines to adopt such an overly technical interpretation of
Gosserand's declaration, particularly when the document signed by Judge Orozco incorporates by
reference the affidavit and its attachments.

1 April 4, 2012, and there is no evidence that Defendants sought or received an extension
2 from Judge Orozco after 14 days. Pursuant to Section 1822.55, then, it appears that
3 any abatement occurring after the statutory 14 days—or, after April 18, 2012—would be
4 in violation of the law. Defendants do not address this argument in their Reply. Since
5 the abatement of the four fenced parcels was finalized on April 20, 2012, the Court
6 denies Defendants summary judgment based on the lack of evidence that the warrant
7 remained effective as of the date of the abatement activity.

8 **b. Scope of Inspection Warrant**

9 Plaintiffs also argue that summary judgment should be denied because the
10 scope of the actual abatement activity far exceeded that authorized by the Inspection
11 Warrant and Gosserand’s affidavit.

12 Defendants counter that the Inspection Warrant by its terms did not limit the
13 scope of the abatement. Indeed, Gosserand’s affidavit, incorporated by reference in the
14 Inspection Warrant, stated:

15 It should be noted that the above listed items on the
16 properties are approximations due to the inability to
17 physically enter the property. Actual inventory could vary
18 pending actual physical inspection once a warrant is issued
for inspection and abatement.

19 Gosserand Affid. ¶ 5, ECF No. 8-11 at 5. Defendants thus argue that “the warrant
20 vested the Code Enforcement Officer with inherent discretion to determine how to
21 enforce the abatement warrant.”

22 But this is precisely the sort of discretion that the particularity requirement is
23 intended to foreclose. “The requirement that warrants shall particularly describe the
24 things to be seized makes general searches under them impossible and prevents the
25 seizure of one thing under a warrant describing another. As to what is to be taken,
26 nothing is left to the discretion of the officer executing the warrant.” Stanford v. State of
27 Tex., 379 U.S. 476, 485-86 (1965) (citations omitted).

1 Based on the record, summary judgment cannot be granted to Defendants on
2 Plaintiffs' Fourth Amendment claim relating to the four fenced parcels. There exists a
3 genuine dispute of material fact as to whether the abatement activity on these parcels
4 exceeded the scope of the Inspection Warrant. For example, during the abatement of
5 APN 013-115-10, tools were removed from a locked shed, and during the abatement of
6 APN 013-192-09, items were taken from a garage-like structure. Both of these activities
7 would have violated the Inspection Warrant. See Gosserand Dep. at 86:8—87:12.
8 Furthermore, while Gosserand's affidavit listed certain specific items to be abated,
9 Plaintiffs claim all of their personal property was removed. To illustrate, the Inspection
10 Warrant listed the following items to be seized from APN 013-115-10: "The area to be
11 searched, inspected and abated contains several inoperable vehicles including; 8
12 Trucks/Vehicles, 3 Large Metal Bins, 30 Metal Barrels, 1 Large Empty Metal Tank, 1
13 Trailer, several tons of miscellaneous metal, trash and tires." See Gosserand Decl. Ex.
14 A, ECF No. 84-11 at 12. Per Plaintiffs, the actual items taken include:

15 4 Chevy truck doors new; 1 50 gallon with pump hand
16 1930's oil tank (historic value); 1 Small drill press complete;
17 1 Steel wash bench; 1 Electric well guard for irrigation pump;
18 1 35 gallon oil tank with hand pump 1930's (historic value); 5
19 LP.G. tanks; 4 F.M.C. tracks for boxes of produce; 1 Large
20 drill press with Morris taper; 1 Tire changer; 1 Generator 220
21 volt diesel 15 kilowatts; 1 Weight scales, good condition; 1 4
22 row week cutter P.T.O. driven; 50 Barrel 55 gallon one end
23 removed; 2 Bath tubs; 2 Steel work bench; 1 Pile
24 miscellaneous tires approx.. 20; 1 4 bed sled harrow farm
25 equipment, new condition; 4 Barrel bolts; 1 56 Chevy truck,
26 new condition; 1 64 Chevy car front end with frame new; 4
27 Perkins engine diesel, 54 cubic inch good condition; 2 Truck
28 transmissions; 1 6 v 54 engine, new condition; 1 453 t
engine no head; 1 Van box with tools, parts & supplies; 1
Pile pipe steel & truck parts front fence; 2 Piles pipe & steel
bars rear fence; 1 Piles steel parts pipe & scrap; 1 749
military truck dump, no engine radiator, good condition; 1
Chevy 3/4 t Chevy pickup with locker rear end; 1 Dodge 3/4
ton pickup; 1 Heavy duty 35' cotton trailer; 1 20 ton front out

1 rigger hydraulic for crane; 1 1930 washing machine (historic
2 value); and 1 Steel truck bed 8' x 12'.

3 Pls.' Responses to the City of Mendota's Interrogatories, Set One, ECF No. 97-7 at 25-
4 26. The disparity between the items that the Inspection Warrant specifically authorized
5 for abatement and what was actually abated becomes more pronounced as to APN
6 013-192-09. Compare ECF No. 84-11 at 23 ("The area to be searched, inspected and
7 abated contains several inoperable vehicles including 6 Trucks/Vehicles, 2 Forklifts, 1
8 Tractor, 1 Trailer, miscellaneous metal, parts and trash.") with ECF No. 87-7 at 23-25
9 (over 100 line items of seized property, including 2 3000' roles of cable on steel reels, 4
10 10,000+ gallon tanks, 5 military trucks, and 8 16' pieces of rail road tracks).

11 In light of this evidence, Defendants' motion for summary judgment on Plaintiffs'
12 Fourth Amendment claim will be granted only as to their entry onto APN 013-152-27s.
13 In all other respects, Defendants' motion will be denied.

14 **B. Due Process**

15 **1. Procedural Due Process**

16 Procedural due process imposes constraints on governmental decisions which
17 deprive individuals of 'liberty' or 'property' interests within the meaning of the Due
18 Process Clause of the Fifth or Fourteenth Amendment." Mathews v. Eldridge, 424 U.S.
19 319, 332 (1976); see also MacLean v. Dep't of Homeland Sec., 543 F.3d 1145, 1151
20 (9th Cir. 2008). Mathews "directs us to examine:"

21 first, the private interest that will be affected by the official
22 action; second, the risk of an erroneous deprivation of such
23 interest through the procedures used, and the probable
24 value, if any, of additional or substitute procedural
25 safeguards; and finally, the Government's interest, including
26 the function involved and the fiscal and administrative
burdens that the additional or substitute procedural
requirement would entail.

27 Brittain v. Hansen, 451 F.3d 982, 1000 (9th Cir. 2006) (quoting Mathews, 424 U.S. at
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1 334-35). In a court's "balancing" of the Mathews factors, "the requirements of due
2 process are 'flexible and call for such procedural protections as the particular situation
3 demands.'" Vasquez v. Rackauckas, 734 F.3d 1025, 1044 (9th Cir. 2013) (citing
4 Wilkinson v. Austin, 545 U.S. 209, 224-25 (2005)) (quoting Morrissey v. Brewer, 408
5 U.S. 471, 481 (1972)); see also Wynar v. Douglas Cnty. School Dist., 728 F.3d 1062,
6 1073 (9th Cir. 2013).

7 To proceed, "[w]e analyze a procedural due process claim in two steps. The first
8 asks whether there exists a liberty or property interest which has been interfered with by
9 the State; the second examines whether the procedures attendant upon that deprivation
10 were constitutionally sufficient." Vasquez, 734 F.3d at 1042 (quoting United States v.
11 Juvenile Male, 670 F.3d 999, 1013 (9th Cir. 2012), cert. denied, — U.S. —, 133 S.
12 Ct. 234 (2012) (internal quotation marks and alteration omitted)).

13 **a. Pre-Abatement Procedural Due Process**

14 Plaintiffs claim that Defendants did not provide them the constitutionally required
15 notice or an opportunity to be heard before the abatement activity. Defendants move for
16 summary judgment on the ground that their conduct comported with due process.
17 Because the parties do not dispute that Defendants deprived Plaintiffs of property
18 interests implicating their constitutional rights, the Court turns to the second prong:
19 whether the procedural processes were constitutionally sufficient.

20 Due process requires: (1) "notice," and (2) an "opportunity to be heard at a
21 meaningful time and in a meaningful manner." Schneider, 28 F.3d at 92 (quoting Brock
22 v. Roadway Express, Inc., 481 U.S. 252, 261 (1987)); Mathews v. Eldridge, 424 U.S.
23 319, 333 (1976) ("[t]he fundamental requirement of due process is the opportunity to be
24 heard 'at a meaningful time and in a meaningful manner.'" (quoting Armstrong v. Manzo,
25 380 U.S. 545, 552 (1965))); see also Villa-Anguiano v. Holder, 727 F.3d 873, 881 (9th
26 Cir. 2013). Here, "a meaningful time" describes pre-deprivation because the Supreme
27 Court has repeatedly held that "some form of hearing is required before an individual is
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1 finally deprived of a property interest.” Mathews, 424 U.S. at 333 (citations omitted).

2 Defendants assert that they complied with due process when they mailed the
3 May 2010 Public Nuisance Notices to the names and addresses identified on the last
4 (i.e., June 30, 2009) equalized assessment roll for Fresno County. It is undisputed that
5 Tankersley would not have received these notices at the Nubieber address since they
6 pre-date the recording of his ownership interest in parcels APN 013-115-10 and APN
7 013-152-27s. It is also undisputed that, of the five notices mailed by Defendants,
8 Warkentine received four. But as discussed infra, a reasonable trier of fact could
9 conclude that the procedures employed by Defendants were insufficient in light of the
10 circumstances of this case. Accordingly, the issue of whether Defendants’ notices
11 complied with due process is a question best left to the trier of fact.

12 Turning first to the nuisance notices related to APN 013-115-10 and APN 013-
13 152-27s, Defendants mailed the notices to the owner listed on the June 30, 2009,
14 equalized assessment roll—that is, to Elbert Davidson. Under the circumstances of this
15 case, though, a reasonable trier of fact could conclude that Defendants should have
16 taken additional steps to provide Tankersley with the nuisance notices. As Defendants
17 assert, from and after at least 2007, Tankersley was in regular communication with City
18 officials regarding clean-up efforts on these two parcels. See Defs.’ Mot. Summ. J. at 7;
19 Tankersley Dep. at 43:16—44:5 (“Because over the years, periodically, [City officials]
20 would come and talk to you about an abatement and you would go talk with them and
21 say, ‘Yes, we have an agreement,’ and ‘we’re working at,’ and it would – they would
22 say, ‘Okay. We’ll work with you.’). While Defendants cite these conversations in to order
23 to impute to this Plaintiff knowledge of the nuisance conditions on the properties, a trier
24 of fact could also find that Defendants were aware of Tankersley’s interest in these two
25 parcels before the May 2010 Public Nuisance Notices were mailed and therefore should
26 have taken additional steps to provide him with the nuisance notices to minimize the
27 risk of erroneous deprivation. See Mullane v. Central Hanover Bank & Trust Co., 339
28

1 U.S. 306, 315 (1950) (The notice provided must be “reasonably certain to inform those
2 affected...”).

3 As to the fifth notice mailed to Warkentine concerning APN 013-116-13,
4 Defendants did not receive a signed return receipt from this Plaintiff even though they
5 received one as to each of the four other properties. In Jones v. Flowers, the Supreme
6 Court made plain that when the government sends notice by mail and the notice “is
7 returned unclaimed, the State must take additional reasonable steps to attempt to
8 provide notice to the property owner before [depriving him of his property], if it is
9 practicable to do so.” 547 U.S. 220, 225 (2006); see also Yi Tu v. Nat’l Transp. Safety
10 Bd., 470 F.3d 941 (9th Cir. 2006) (same). A party need not actually receive notice,
11 rather, “due process requires the government to provide ‘notice reasonably calculated,
12 *under all the circumstances*, to apprise interested parties of the pendency of the action
13 and afford them an opportunity to present their objections.” Id. at 226 (quoting Mullane,
14 339 U.S. at 314) (emphasis added). As discussed supra, Defendants claim that they
15 were in regular communication with Plaintiffs regarding the nuisance conditions on the
16 properties. That being so, a trier of fact could reasonably conclude that, under all of the
17 circumstances of this case, additional steps should have been taken to notify
18 Warkentine of the nuisance conditions on APN 013-116-13, particularly when this
19 Plaintiff signed receipts for the four other notices. An additional procedural safeguard—
20 perhaps a second mailed notice—would have been a minor administrative burden on
21 Defendants in comparison to the costs of an erroneous deprivation of Warkentine’s
22 substantial interest in the property on this parcel.

23 Beyond the mere mailing of these notices, a dispute exists as to whether the
24 Public Nuisance Notices themselves complied with the Due Process clause’s notice
25 requirements. Pursuant to Code Section 8.28.050(C), the notices should have included
26 “a description of the conditions which constitute the public nuisance.” These notices did
27 not include any information regarding the specific property and/or conditions that
28

1 constituted a nuisance. They provided only cursory citations to the Mendota Municipal
2 Code and included only a general statement that the property owners “have the right to
3 appeal.” The August 2010 Abatement Notice highlights the deficiencies in the May 2010
4 Public Nuisance Notices. Unlike the earlier notices, the Abatement Notice gave specific
5 citation to the relevant municipal code under which the City deemed a nuisance
6 condition existed, it specifically identified the property that constituted a nuisance, and it
7 gave the following notice regarding the property owners’ right to appeal:

8 As owner of the land which said a vehicle [sic] (or said parts
9 of vehicle) is located, you are hereby notified that you may,
10 within ten (10) days after the mailing of this notice of
11 intention, request a public hearing and if such request is not
12 received by the City Manager of the City of Mendota within
13 such ten (10) day period, the City Manager shall have the
14 authority to abate and remove said vehicles (or said parts of
15 a vehicle) as a public nuisance and assess the cost as
16 aforesaid without a public hearing. You may submit a sworn
17 written statement within such ten (10) day period denying
18 responsibility for the presence of said vehicle (or said parts
19 of vehicle) on said land, with our reasons for denial, and
20 such statement required. You may appear in person at any
21 hearing requested by you or the owner of the vehicle(s) or, in
22 lieu thereof, may present a sworn written statement as
23 aforesaid in time for consideration at such hearing.

24 It was in response to this notice that the Plaintiffs sought an administrative hearing,
25 necessitating the mailing of five additional notices.

26 Even assuming, however, that the May 2010 Public Nuisance Notices satisfied
27 the Due Process clause, a question remains as to whether Defendants provided
28 Plaintiffs with notice of the pre-deprivation hearing and an opportunity to be heard in a
meaningful manner. Examination of the record reveals that there is a genuine dispute of
material fact as to both of these questions.

 As to the first, after the date on which the deeds transferring ownership from
Elbert Davidson were recorded against parcels APN 013-115-10 and APN 013-152-27s,

1 the equalized assessment roll would have identified Tankersley as the property owner
2 of those parcels and shown the properties' mailing address as P.O. Box 29, Nubieber,
3 California 96068. Indeed, the August 2010 Abatement Notice for APN 013-152-27s was
4 mailed to Tankersley "[a]s owner shown on the last equalized assessment roll of the
5 land" See Soria Decl. Ex. B, ECF No. 84-5 at 2. However, the City's November 6,
6 2010, Notice of Administrative Hearing for this same parcel was mailed to Elbert
7 Davidson and not Tankersley. See Soria Decl. Ex. C, ECF No. 84-6 at 2-3. And while
8 each of these notices was mailed to the 1583 Eighth Street, Mendota, California 93640
9 address (an address at which Tankersley has never received mail), the March 2011
10 Abatement Decision (which would have also relied on the owner information in the June
11 30, 2010, equalized assessment roll) was mailed to both the 1583 Eighth Street address
12 (regarding APN 013-152-27) and to PO Box 29, Nubieber, California 96068 (regarding
13 APN 013-115-10). From this one can conclude that Defendants were aware that the
14 Nubieber address was the proper mailing address for at least one of the parcels. Given
15 this inconsistency, a reasonable trier of fact could find that Defendants failed to properly
16 notify Tankersley of the upcoming administrative hearing.

17 As to the second question, Defendants rely on Plaintiffs' presence and
18 Tankersley's testimony at the hearing, and Defendants' invitation to Plaintiffs to present
19 evidence after the hearing, as evidence Plaintiffs had a meaningful opportunity to
20 contest the City's nuisance determination. The Court disagrees. There is a genuine
21 dispute of material fact as to whether Plaintiffs had the opportunity to be heard "at a
22 meaningful time and in a meaningful manner." Pursuant to the Mendota Municipal
23 Code's Abatement Procedures, a party at an abatement hearing has the right "[t]o call
24 and examine witnesses on any matter relevant to the issues of the hearing," "[t]o cross-
25 examine opposing witnesses on any matter relevant to the issues of the hearing," and
26 "[t]o impeach any witness regardless of which party first called him to testify." Mendota
27 Municipal Code § 8.28.050(H)(5). Plaintiffs—at the very least, Tankersley—asserts that
28

1 they were unaware that the hearing's purpose was to consider the nuisance conditions
2 on all of the five properties at issue in this case. A trier of fact could reasonably
3 conclude that, had he known, Tankersley would have called witnesses or prepared
4 adequately to cross-examine Defendant Soria, who also testified at the hearing. The
5 opportunity to submit documentary evidence after the hearing does not remedy the
6 inability to properly prepare, introduce evidence, and/or examine witnesses.
7 Furthermore, as it is undisputed that neither Chojnacki nor the Abatement Decision
8 informed Plaintiffs of their right to appeal the decision to the City Council pursuant to
9 Section 8.28.050(l) of the Mendota Municipal Code. Summary judgment is not
10 warranted on Plaintiffs' pre-deprivation procedural due process claim.

11 **b. Post-Abatement Procedural Due Process**

12 In their moving papers, Plaintiffs seek partial summary judgment on their claim
13 that Defendants denied them post-deprivation procedural due process by failing to
14 inform them how to retrieve their seized property before it was destroyed or donated.

15 Defendants respond that the pre-abatement procedures they followed were all
16 that were required by the Due Process clause and Plaintiffs had to realize that the result
17 of the abatement process was that the property would be destroyed and/or donated.

18 This latter argument is disingenuous. It is premised on the notice to Plaintiffs that
19 certain vehicles could be removed to a scrapyards, an automobile dismantler's yard, or
20 other suitable site for vehicles or parts pursuant to California Vehicle Code Section
21 22662. It is true that the August 2010 Abatement Notice identified 9 vehicles on APN
22 013-152-27s that were deemed a public nuisance pursuant to Section 10.16.090 of the
23 Mendota Municipal Code, and it is also true that, pursuant to Section 10.16.080, those
24 vehicles were subject to destruction. But there is nothing in that notice or in the Mendota
25 Municipal Code that authorizes the destruction and/or donation of any property beyond
26 those 9 identified vehicles; rather, the City Code authorizes only the *removal* of the
27 property. See Mendota Municipal Code § 8.24.160 (trash and junk), § 8.28.050 (public
28

1 nuisance).

2 Furthermore, the Abatement Decision itself found only that “the *present condition*
3 of the real propert[ies]” violated the Municipal Code, not the *items* on the properties
4 themselves. This finding was separate from Chojnacki’s finding that the 9 identified
5 vehicles on APN 013-152-27s were themselves a nuisance. The Ninth Circuit in
6 Schneider addressed a similar scenario. There, the plaintiff owned a 1.4 acre lot where
7 he parked nine buses, two motorhomes, and two automobiles. 28 F.3d at 90. After
8 receiving complaints about the vehicles, the County determined that they constituted a
9 public nuisance. Id. The County failed to persuade the plaintiff to remove the vehicles
10 voluntarily and posted a “NOTICE AND ABATEMENT,” informing plaintiff that his
11 vehicles violated various county nuisance ordinances. Id. at 90-91. These vehicles were
12 thereafter seized and destroyed. Although the Ninth Circuit upheld the seizure of
13 vehicles in Schneider, it also found that their subsequent destruction without notice or
14 the opportunity to be heard constituted a violation of due process. Id. at 93. The court
15 explained that while the County's code provided for the disposal of vehicles that had
16 been declared nuisances, the plaintiff's vehicles had not been so designated. Rather,
17 the *location* and *number* of vehicles was deemed a nuisance and abated when the
18 vehicles were seized and removed:

19 The County did not violate Schneider's due process rights
20 when it abated the nuisance on his property by removing the
21 vehicles. However, the record does not show that the
22 vehicles were themselves nuisances. The hearing officer
23 affirmed the nuisance finding pursuant to Regulatory Code §
24 16.210, on the theory that Schneider's vehicles were parked
25 in violation of county zoning ordinances. This action was
26 binding on the County and Reybro as well as Schneider.
27 Once the vehicles were removed from the property the
28 nuisance abatement was complete and the County was only
authorized “to otherwise proceed pursuant to sections
16.212 through 16.217 of the San Diego Code of Regulatory
Ordinances.” These sections do not authorize the

1 destruction of vehicles; they provide a procedure for
2 recovering the cost of the abatement proceedings.

3 28 F.3d at 93.

4 In this case, once the *condition* of the real properties was realigned with the
5 Municipal Code, the nuisance abatement was complete and the City was only
6 authorized to proceed pursuant to Sections 8.24.160 and 8.28.050, which, as noted
7 supra, did not authorize the destruction or donation of seized personal property. Even
8 assuming then that the pre-deprivation notices were adequate in substance and mailed
9 to the proper individuals, they provided notice only as to the abatement of the nuisance
10 conditions. In other words, other than the 9 identified vehicles on APN 013-152-27s,
11 they provided no notice whatsoever that Plaintiffs would be permanently deprived of
12 their personal property and its value. On these facts, the Court finds as a matter of law
13 that Defendants' destruction and/or donation of Plaintiffs' personal property (other than
14 the 9 identified vehicles) without some form of post-deprivation notice and hearing
15 violated Plaintiffs' due process rights. See Simpson v. City of Roseburg, 2008 WL
16 5262748, at *7 (D. Or. 2008) ("Though plaintiff made no effort to abate the nuisance and
17 was repeatedly told that his possessions would be removed from the Germond property,
18 plaintiff was not informed that he would be permanently deprived of his property or
19 given the opportunity to reclaim it.") Accordingly, Plaintiffs' motion for partial summary
20 judgment will be granted on their post-deprivation procedural due process claim.

21 **2. Substantive Due Process**

22 Defendants also assert that, to the extent Plaintiffs are bringing a substantive due
23 process claim, it fails as a matter of law because the pre-abatement notice Defendants
24 provided was constitutionally sufficient. Although Plaintiffs' operative pleading suggests
25 that Plaintiffs' due process claim is a *procedural* due process claim, see Sec. Am.
26 Compl. ¶ 72 ("The Fourteenth Amendments ... guarantees to citizens of the United
27 States, like Ed and Dan here, freedom from the deprivation of life, liberty and property
28

1 without due process of law (*i.e., notice and an opportunity to be heard*.)” (emphasis
2 added), the complaint can be fairly read to assert a substantive due process claim
3 based on Defendants’ post-deprivation conduct (their destruction and/or donation of
4 Plaintiffs’ seized personal property). Indeed, in their opposition to Defendants’ motion,
5 Plaintiffs confirm that this is the basis of their claim. See Pls.’ Opp’n at 15 (“Ed’s and
6 Dan’s substantive due process claim, however, is based upon the Defendants’ conduct
7 *after* they removed Ed’s and Dan’s valuable personal property from the five parcels.”)
8 (Emphasis in original.) Since Defendants’ motion seeks summary judgment on this
9 claim related to their pre-deprivation conduct, that motion will be denied as inapposite.

10 **C. Takings**

11 The Fifth Amendment of the United States Constitution provides, in relevant part,
12 “Nor shall private property be taken for public use, without just compensation.” U.S.
13 Const. Amend V. The Fifth Amendment applies to the states through the Fourteenth
14 Amendment. See, e.g., Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank, 473
15 U.S. 172, 175, n.1 (1985). The Takings Clause “is designed not to limit the
16 governmental interference with property rights per se, but rather to secure
17 compensation in the event of otherwise proper interference amounting to a taking.”
18 Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 537 (2005).

19 Plaintiffs’ Takings claim is premised on the Defendants’ donation of Plaintiffs’
20 personal property to the Towing Defendants. The Takings Clause, of course, prohibits
21 both the taking of private property for public use without just compensation and the
22 taking of private property for private use. Armendariz v. Penman, 75 F.3d 1311, 1321
23 (9th Cir. 1996). As to the latter, the Constitution forbids a taking executed for no other
24 reason than to confer a private benefit on a particular private party, even when the
25 taking is compensated. Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 245 (1984). But a
26 taking fulfills the public use requirement if it serves any legitimate purpose within the
27 government’s authority. Berman v. Parker, 348 U.S. 26, 32-33 (1954).

1 In this case, Defendants move for summary judgment on the ground that the
2 removal of Plaintiffs' personal property from the five parcels was done pursuant to
3 Defendants' police power. When the government seizes property in the exercise of its
4 police powers, the Takings Clause is not applicable. Acadia Tech., Inc. v. United States,
5 458 F.3d 1327, 1330 (Fed. Cir. 2006). The Court agrees – and Plaintiffs do not dispute
6 – that the *removal* of the personal property falls within the Defendants' police powers.
7 See, e.g., Missud v. California, 2013 WL 450391, at *4 (N.D. Cal. Feb. 5, 2013)
8 (“Towing cars that have accumulated an excessive number of parking tickets is an
9 exercise of police power, not a taking for public purposes within the meaning of the
10 Takings Clause.”); McCain v. Stockton Police Dept., 2011 WL 4710696, at *5 (E.D. Cal.
11 Oct. 4, 2011) (“[A]ny claim that plaintiff's Vehicle was taken ‘without just compensation’
12 fails as a matter of law, because ‘property seized and retained pursuant to the police
13 power is not taken for a ‘public use’ in the context of the Takings Clause’ of the Fifth
14 Amendment.”) (citing AmeriSource Corp. v. United States, 525 F.3d 1149, 1153 (Fed.
15 Cir. 2008)).

16 Plaintiffs' claim, though, takes the issue one step further. They argue that, once
17 their personal property was removed and the nuisance conditions were abated, the
18 City's subsequent donation of that property to the Towing Defendants violated the Fifth
19 Amendment's prohibition against takings for private use. The Court disagrees. “The
20 mere fact that property taken outright ... is transferred in the first instance to private
21 beneficiaries does not condemn that taking as having only a private purpose.” Hawaii
22 Housing Auth., 467 U.S. at 243-44. “[G]overnment does not itself have to use property
23 to legitimate the taking; it is only the taking's *purpose*, and not its mechanics, that must
24 pass scrutiny under the Public Use Clause.” Id. (emphasis added).

25 Plaintiff's reliance on Armendariz v. Penman, 75 F.3d 1311 (9th Cir. 1996) (en
26 banc), overruled in part on other grounds as stated in Crown Point Dev., Inc. v. City of
27 Sun Valley, 506 F.3d 851, 852-53 (9th Cir. 2007), does not require the Court to reach a
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1 different result. There, the defendant city had conducted a series of housing code
2 enforcement sweeps supposedly to reduce “urban blight.” 75 F.3d at 1314. However,
3 the plaintiffs alleged that the actual purpose of this sweep was to deprive plaintiffs of
4 their property so a commercial shopping center developer could acquire it cheaply. Id.
5 Unlike the plaintiffs in Armendariz, the Plaintiffs here do not argue that the City’s
6 nuisance activity was a pretext in order to transfer their property to the Towing
7 Defendants. On this ground, Armendariz is not controlling.

8 Accordingly, summary judgment will be entered for Defendants on Plaintiffs’
9 Takings claim. Plaintiffs’ motion for partial summary judgment will therefore be denied.

10 **D. Equal Protection Clause.**

11 The purpose of the Fourteenth Amendment is to protect individuals from arbitrary
12 and intentional discrimination. Vill. of Willowbrook v. Olech, 528 U.S. 562, 564-65
13 (2000). Plaintiffs have not alleged membership in a protected class. Nonetheless, a
14 successful equal protection claim can be brought by a “class of one” when a plaintiff (or,
15 in this case, two plaintiffs) “alleges that she has been intentionally treated differently
16 from others similarly situated and that there is no rational basis for the difference in
17 treatment.” Id. However, such claims must show that the plaintiff was discriminated
18 against intentionally, rather than accidentally or randomly. N. Pacifica LLC v. City of
19 Pacifica, 526 F.3d 478, 486 (9th Cir. 2008).

20 Disparate classifications can arise through discriminatory state enforcement.
21 SeaRiver Mar. Fin. Holdings Inc. v. Mineta, 309 F.3d 662, 679 (9th Cir. 2002). When a
22 state discriminately enforces a regulation thereby denying a targeted “class of one”
23 equal protection under the law, an unequal enforcement claim can arise. Id. Three
24 elements must be met: (1) selective discriminatory state enforcement, (2) that is
25 “intentional or purposeful” either on its “face” or in “design,” (3) for which “there is no
26 rational basis for the difference in treatment.” Id.; Snowden v. Hughes, 321 U.S. 1, 8
27 (1944); Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000).

1 Here, no reasonable trier of fact would find that Plaintiffs are similarly-situated to
2 the Towing Defendants in the necessary material respects. Unlike the Towing
3 Defendants, the Plaintiffs do not have a junk dealer's license or an auto-dismantling
4 license, and they do not conduct any business in the City.¹¹ See Tankersley Dep. at
5 76:17-25; Warkentine Dep. at 57:10-17. In contrast, the Towing Defendants were
6 licensed auto dismantlers and junk dealers. See A. Gonzalez Dep. at 93:13-15
7 (Question: "Have any of the vehicles on your property received any vehicle abatement
8 warnings?" Answer: "No. The reason why is because they're under a fenced area and
9 we're licensed auto dismantler for the State of California. So we're licensed for that.")
10 While there may be some similarities between Plaintiffs and the Towing Defendants,
11 including proximity of real property and accumulation of similar items on the properties,
12 this does not amount to "an extremely high degree of similarity" necessary for this claim.
13 Plaintiffs are correct that "whether parties are similarly situated is a fact-bound inquiry
14 and, as such, is normally grist for the jury's mill," see Cordi-Allen v. Conlon, 494 F.3d
15 245, 251 (1st Cir. 2007), "[b]ut that does not mean that every case, regardless of the
16 proof presented, is a jury case. Id. Since the undersigned finds that the Plaintiffs have
17 not met their burden as to this element of their Equal Protection claim, Defendants'
18 motion for summary judgment must be granted.

19 **E. Municipal Liability**

20 In Gillette v. Delmore, the Ninth Circuit set out three ways for a plaintiff to
21 establish municipal liability: First, "the plaintiff may prove that a city employee committed
22 the alleged constitutional violation pursuant to a formal governmental policy or a
23 _____
24

25 ¹¹ In opposition to Defendants' motion for summary judgment, Tankersley claims that he and Warkentine were in
26 the business of selling scrap and of towing vehicles, just like the Towing Defendants. Tankersley Decl. ¶¶ 41-42.
27 This, however, contradicts Tankersley's deposition testimony that he does not do any business in the City of
28 Mendota. See Schuyler v. United States, 987 F. Supp. 835, 840 (S.D. Cal. 1997) ("[A] party opposing summary
judgment cannot create a genuine issue of fact by contradicting or repudiating his own sworn deposition
testimony"). Even if true, though, the Court concludes that it does not bridge the gap between Plaintiffs and the
Towing Defendants.

1 longstanding practice or custom which constitutes the standard operating procedure of
2 the local governmental entity.” 979 F.2d 1342, 1346-47 (9th Cir. 1992). Second, “the
3 plaintiff may establish that the individual who committed the constitutional tort was an
4 official with ‘final policy-making authority’ and that the challenged action itself thus
5 constituted an act of official governmental policy.” Id. When there is such “final policy-
6 making” authority, a “single decision” by a municipal policymaker may be enough for
7 Monell liability under certain circumstances. Id. (citing Pembaur v. City of Cincinnati,
8 475 U.S. 469, 480 (1986)). Finally, “the plaintiff may prove that an official with final
9 policymaking authority ratified a subordinate's unconstitutional decision or action and
10 the basis for it.” Id. at 1347.

11 **1. Failure to Train**

12 “Liability for improper custom may not be predicated on isolated or sporadic
13 incidents; it must be founded upon practices of sufficient duration, frequency and
14 consistency that the conduct has become a traditional method of carrying out policy.”
15 Trevino v. Gates, 99 F.3d 911, 918 (9th Cir. 1996), holding modified by Navarro v.
16 Block, 250 F.3d 729 (9th Cir. 2001). However, the Ninth Circuit has “long recognized
17 that a custom or practice can be ‘inferred from widespread practices or “evidence of
18 repeated constitutional violations for which the errant municipal officers were not
19 discharged or reprimanded.”” Hunter v. County of Sacramento, 652 F.3d 1225, 1233-34
20 (9th Cir. 2011) (quoting Nadell v. Las Vegas Metro. Police Dep’t, 268 F.3d 924, 929 (9th
21 Cir. 2001)). “[E]vidence of inaction—specifically, failure to investigate and discipline
22 employees in the face of widespread constitutional violations—can support an inference
23 that an unconstitutional custom or practice has been unofficially adopted by a
24 municipality.” Hunter, 652 F.3d at 1234 n.8 (emphasis in original).

25 More relevant here, courts have found that “in some circumstances a policy of
26 inaction, such as a policy of failing to properly train employees, may form the basis for
27 municipal liability.” Hunter, 652 F.3d at 1234 n.8. “[A] local government's decision not to
28

1 train certain employees about their legal duty to avoid violating citizens' rights may rise
2 to the level of an official government policy for purposes of § 1983.” Connick v.
3 Thompson, 563 U.S. 51 (2011). However, to satisfy § 1983 for a failure to train claim, “a
4 municipality's failure to train its employees in a relevant respect must amount to
5 ‘deliberate indifference to the rights of persons with whom the [untrained employees]
6 come into contact.’ Only then ‘can such a shortcoming be properly thought of as a city
7 “policy or custom” that is actionable under § 1983.” Id. (quoting Canton, 489 U.S. at
8 388). The deliberate indifference standard has been discussed thoroughly by the
9 Supreme Court:

10 “‘[D]eliberate indifference’ is a stringent standard of fault,
11 requiring proof that a municipal actor disregarded a known or
12 obvious consequence of his action.” Thus, when city
13 policymakers are on actual or constructive notice that a
14 particular omission in their training program causes city
15 employees to violate citizens' constitutional rights, the city
16 may be deemed deliberately indifferent if the policymakers
17 choose to retain that program. The city's “policy of inaction”
18 in light of notice that its program will cause constitutional
19 violations “is the functional equivalent of a decision by the
20 city itself to violate the Constitution.” ... [¶]

21 A pattern of similar constitutional violations by untrained
22 employees is “ordinarily necessary” to demonstrate
23 deliberate indifference for purposes of failure to train.
24 Policymakers' “continued adherence to an approach that
25 they know or should know has failed to prevent tortious
26 conduct by employees may establish the conscious
27 disregard for the consequences of their action—the
28 ‘deliberate indifference’—necessary to trigger municipal
liability.” Without notice that a course of training is deficient
in a particular respect, decisionmakers can hardly be said to
have deliberately chosen a training program that will cause
violations of constitutional rights.

Connick, 131 S. Ct. at 1360 (internal citations omitted) (citing Bd. of Cnty. Comm'rs of
Bryan Cnty., Okl. v. Brown, 520 U.S. 397, 410 (1997); Canton, 489 U.S. at 395.).

1 Defendants assert that summary judgment is warranted because there is nothing
2 in the record regarding any official policy on code enforcement training or a failure to
3 train that amounts to deliberate indifference. They also argue that there is no evidence
4 of a causal link between any failure to train and any alleged constitutional injury.

5 The Court agrees with Defendants that summary judgment must be entered on
6 Plaintiffs' failure to train theory of liability. Even assuming, as the Court must, that
7 Plaintiffs are able to establish that the City did not provide sufficient training on nuisance
8 abatement to either the City Manager and/or Code Enforcement Officers, it does not
9 necessarily follow that the City's failure to train "will so obviously [cause its employees
10 to] make wrong decisions that failing to train them amounts to a 'decision by the city
11 itself to violate the Constitution.'" Connick, 563 U.S. at 71 (citing Canton, 489 U.S. at
12 395)). There is simply no showing of deliberate indifference on the facts in the record.
13 To preclude summary judgment, Plaintiffs were required to present some evidence that
14 the City was on notice that, absent additional specified training, it was 'highly
15 predictable' that the City Manager and/or Code Enforcement Officers would violate the
16 constitutional rights of property owners. See id. This showing must be "so predictable
17 that failing to train the [City Manager and/or Code Enforcement Officers] amounted to
18 *conscious disregard* for [Plaintiffs'] rights." Id. (emphasis in original). Plaintiffs have not
19 done that here. Accordingly, their failure to train claim fails.

20 **2. Custom or Policy**

21 Plaintiffs stand on better footing with their theory of liability based on a policy or
22 custom. Policy, in the narrow sense of discrete, consciously adopted courses of
23 governmental action, may be fairly attributed to a municipality either because (1) it is
24 directly "made by its lawmakers," i.e., its governing body, Monell, 436 U.S. at 694, or (2)
25 it is made by a municipal agency, see, e.g., id. at 661 & n.2 (policy of city board of
26 education and department of social services) or official, see Pembaur, 106 S. Ct. at
27 1300-01 (policy decision of county prosecutor), having final authority to establish and
28

1 implement the relevant policy. A municipal agency or official may have final
2 policymaking authority by direct delegation from the municipal lawmaking body, see,
3 e.g., Wellington v. Daniels, 717 F.2d 932, 936 (4th Cir. 1983) (delegation of law
4 enforcement policymaking authority to police chief assumed) or by conferral from higher
5 authority, see, e.g., Pembaur, 106 S. Ct. at 1301 (county prosecutor's authority to act for
6 county conferred by state law). Delegation may be express, as by a formal job-
7 description, see Bennett v. City of Slidell, 728 F.2d 762, 769 (5th Cir. 1984), or implied
8 from a continued course of knowing acquiescence by the governing body in the
9 exercise of policymaking authority by an agency or official, see id. (delegation “by
10 conduct or practice [which] encourage[s] or acknowledge[s] the agent in a policymaking
11 role”).

12 Defendants seek summary judgment on this theory of liability because there is no
13 evidence that the City has a policy regarding nuisance abatements, and it cannot be
14 said that Chojnacki, as the City Manager, was the official with final decision-making
15 authority. They argue that Chojnacki’s exercise of her discretionary authority cannot
16 serve as the basis of municipal liability.

17 Generally, liability may arise “if a particular decision by a subordinate was cast in
18 the form of a policy statement and expressly approved by the supervising policymaker
19 ... [or] if a series of decisions by a subordinate official manifested a ‘custom or usage’ of
20 which the supervisor must have been aware.” Gillette, 979 F.2d at 1347 (9th Cir. 1992)
21 (quoting City of St. Louis v. Praprotnik, 485 U.S. 112, 126 (1988)). However, a
22 policymaker must “approve a subordinate's decision and the basis for it before the
23 policymaker will be deemed to have ratified the subordinate's discretionary decision.” Id.
24 at 1348. “[U]nconstitutional discretionary actions of municipal employees generally are
25 not chargeable to the municipality under section 1983.” Id. Mere authority to exercise
26 discretion while performing particular functions does not make the individual a final
27 policymaker unless the decisions are final and unreviewable and are not constrained by
28

1 the official policies of superior officials. Praprotnik, 485 U.S. at 126-28. Determining who
2 has authority to make final policy is a legal question governed by state law. See Gillette,
3 979 F.2d at 1346-47. Relevant to the inquiry are “statutes, ordinances, regulations, city
4 charters, and other similar enactments.” Coming Up, Inc. v. City and County of San
5 Francisco, 830 F. Supp. 1302, 1308 (N.D. Cal. 1993).

6 In support of their motion, Defendants rely on Section 2.12.050 of the Mendota
7 Municipal Code, which provides that “[t]he city manager shall act as the agent for the
8 city council in the discharge of its administrative functions, *but shall not exercise any*
9 *policymaking or legislative functions whatsoever...*” (emphasis added). Plaintiffs are
10 correct, though, that this is not determinative of the issue. “Though these structural
11 provisions provide a helpful starting point for our analysis, the [City]’s label ... informs
12 but of course cannot determine the result of our functional inquiry.” Goldstein v. City of
13 Long Beach, 715 F.3d 750, 755 (9th Cir. 2013) (citing McMillian v. Monroe Cnty., 520
14 U.S. 781, 792 n.7 (1997) (finding “little merit” in the fact that the sheriff is indicated in the
15 code among “county officials” or “county employees”)).

16 Defendants next claim that Chojnacki cannot be deemed a policymaker because
17 the City Council exercises final authority. But “[a] municipal governing body may not
18 avoid attribution of policy to itself simply by officially retaining unexercised ultimate
19 authority to countermand a policy or to discipline or discharge the policymaker.” Spell v.
20 McDaniel, 824 F.2d 1380, 1386 (4th Cir. 1987).

21 The question here is whether Chojnacki or the City Council “possesses final
22 authority to establish municipal policy with respect to the action ordered.” Penbaur, 75
23 U.S. at 482. Plaintiffs argue that, even if the City Council had final decision-making
24 authority pursuant to the Mendota Municipal Code, the City Council members relied
25 entirely on the City Manager to establish a policy regarding nuisance abatements with
26 no evidence of the exercise of any supervisory powers. See, e.g., J. Amador Dep. at
27 43:16-20 (“[D]irections had been given to the city manager, it’s make sure for health and
28

1 safety reasons, let's address some issues in our community. ... [A]s far as direction
2 policy that's been given to our city managers to address..."); Silva Dep. at 26:3-4
3 ("[Code enforcement] was something [the code enforcement staff] would do on their
4 own."), at 26:13-16 ("I don't know of the intricate ways Code Enforcement does, or city
5 managers, what they're doing, and it's not privy to us and as long as they're doing their
6 job, we don't get involved.") Additionally, the Code Enforcement Officers testified that
7 they relied on the direction of the City Manager in conducting abatements; Defendant
8 Soria testified that he could not remember getting any code enforcement policies and
9 procedures, see Soria Dep. at 46:15-16; and there is otherwise no evidence that
10 Chojnacki's decisions were anything but final, unreviewable, and not constrained by the
11 official policies of superior officials. Construing all evidence in Plaintiffs' favor, summary
12 judgment must be denied because a triable issue of fact exists as to whether the City
13 Council members' hands-off approach to nuisance abatements and the delegation of
14 authority to the City Manager resulted in the latter's de facto policy-making authority,
15 contrary to the directive of Section 2.12.050.

16 **F. Qualified Immunity**

17 "The doctrine of qualified immunity protects government officials "from liability for
18 civil damages insofar as their conduct does not violate clearly established statutory or
19 constitutional rights of which a reasonable person would have known." Mattos v.
20 Agarano, 661 F.3d 433, 440 (9th Cir. 2011) (citing Pearson v. Callahan, 555 U.S. 223,
21 231 (2009) (additional citation omitted)). "Qualified immunity shields an officer from
22 liability even if his or her action resulted from a mistake of law, a mistake of fact, or a
23 mistake based on mixed questions of law and fact." Id. (citation and quotation marks
24 omitted). "The purpose of qualified immunity is to strike a balance between the
25 competing need to hold public officials accountable when they exercise power
26 irresponsibly and the need to shield officials from harassment, distraction, and liability
27 when they perform their duties reasonably." Id. (citation and quotation marks omitted).

1 In determining whether an official is entitled to qualified immunity, courts employ
2 a two-pronged inquiry: first, did the state actor violate the plaintiff's constitutional right; if
3 the answer to that question is "yes," courts must then determine whether the
4 constitutional right was "clearly established in light of the specific context of the case" at
5 the time of the events in question. Id. (citing Robinson v. York, 566 F.3d 817, 821 (9th
6 Cir. 2009) and Saucier v. Katz, 533 U.S. 194, 201 (2001)). Courts are "permitted to
7 exercise their sound discretion in deciding which of the two prongs of the qualified
8 immunity analysis should be addressed first in light of the circumstances in the
9 particular case at hand." Lal v. California, 746 F.3d 1112, 1116 (9th Cir. 2014) (citation
10 omitted), cert. denied, — U.S. —, 135 S. Ct. 455 (2014).

11 "For the second step in the qualified immunity analysis—whether the
12 constitutional right was clearly established at the time of the conduct—the critical
13 question is whether the contours of the right were 'sufficiently clear' that every
14 'reasonable official would have understood that what he is doing violates that right.' "
15 Mattos, 661 F.3d at 442 (quoting Ashcroft v. al-Kidd, 563 U.S. 731 (2011); some
16 internal marks omitted). "The plaintiff bears the burden to show that the contours of the
17 right were clearly established." Clairmont v. Sound Mental Health, 632 F.3d 1091, 1109
18 (9th Cir. 2011). "[W]hether the law was clearly established must be undertaken in light
19 of the specific context of the case[.]" Estate of Ford v. Ramirez-Palmer, 301 F.3d 1043,
20 1050 (9th Cir. 2002) (citation and internal marks omitted). In making this determination,
21 courts consider the state of the law at the time of the alleged violation and the
22 information possessed by the official to determine whether a reasonable official in a
23 particular factual situation should have been on notice that his or her conduct was
24 illegal. Inouye v. Kemna, 504 F.3d 705, 712 (9th Cir. 2007); Hope v. Pelzer, 536 U.S.
25 730, 741 (2002) (the "salient question" to the qualified immunity analysis is whether the
26 state of the law at the time gave "fair warning" to the officials that their conduct was
27 unconstitutional). "[W]here there is no case directly on point, 'existing precedent must
28

1 have placed the statutory or constitutional question beyond debate.” C.B. v. City of
2 Sonora, 769 F.3d 1005, 1026 (9th Cir. 2014) (citing al-Kidd, 131 S. Ct. at 2083). An
3 official's subjective beliefs are irrelevant. Inouye, 504 F.3d at 712.

4 In light of its finding that Defendants are entitled to summary judgment on
5 Plaintiffs’ Takings and Equal Protection claims, the Court will focus its qualified
6 immunity analysis on Plaintiffs’ Search and Seizure and Procedural Due Process
7 claims.

8 **1. Police Officer Defendants**

9 The parties’ analysis regarding the liability of the police officer Defendants is
10 scarce. The only evidence before the Court is that they were present at the abatements
11 in order to keep the peace and to assist the Code Enforcement Officers with filling out
12 forms for inoperative vehicles. Because there is no argument from Plaintiffs in
13 opposition to Defendants’ motion for summary judgment on qualified immunity grounds,
14 the Defendants’ motion will be granted as to the police officer Defendants.

15 **2. Search and Seizure**

16 As noted above, the Fourth Amendment prohibits unreasonable searches and
17 seizures. This law was clearly established at the time of the September 2011 abatement
18 such that no reasonable City Manager and/or Code Enforcement Officer would believe
19 that the warrantless seizure of personal property on APN 013-152-27s, the unfenced
20 parcel, was authorized by the Fourth Amendment. Accordingly, neither Chojnacki nor
21 Soria is entitled to qualified immunity on this claim regarding this abatement activity.

22 Similarly, none of the Defendants are entitled to qualified immunity on Plaintiffs’
23 Fourth Amendment claim regarding the fenced parcels. The law was clearly established
24 that an inspection warrant and/or its accompanying affidavit must particularly describe
25 the items to be seized, leaving no discretion to the executing officer. As discussed in
26 depth supra, “[t]he requirement that warrants shall particularly describe the things to be
27 seized makes general searches under them impossible and prevents the seizure of one
28

1 thing under a warrant describing another. As to what is to be taken, nothing is left to the
2 discretion of the officer executing the warrant.” Stanford v. State of Tex., 379 U.S. 476,
3 485-86 (1965) (citations omitted). Contrary to Defendants’ argument, this “mistake” of
4 vagueness was not reasonable under the circumstances.

5 **3. Due Process**

6 The Court next considers Defendants’ qualified immunity argument related to
7 Plaintiffs’ due process claims. In their moving papers, Defendants focus on their pre-
8 deprivation activity. As for that conduct, qualified immunity is not appropriate in light of
9 the Supreme Court’s clear directive that notice and an opportunity to be heard must be
10 given that is reasonably likely to inform property owners of a property deprivation. Under
11 the circumstances of this case, the reasonableness of Defendants’ pre-deprivation
12 notice is in dispute.

13 For the first time in their reply to Plaintiffs’ opposition, Defendants assert that
14 qualified immunity is also appropriate as to their post-deprivation conduct. The Court,
15 however, will not entertain new arguments raised for the first time in a reply. See Ellison
16 Framing, Inc. v. Zurich American Ins. Co., 805 F. Supp. 2d 1006, 1011 n.1 (E.D. Cal.
17 2011) (noting that “[t]he court typically cannot consider arguments first raised in reply”).
18 Although Defendants do address this issue, briefly, in their opposition to Plaintiffs’
19 motion for partial summary judgment, it is based on generalized recitations of the law
20 and on reference to their moving papers. See Defs.’ Opp’n at 9. Thus, even if the Court
21 did entertain Defendants’ argument, in the absence of adequate briefing on this issue,
22 the Court cannot rule on it.

23 **VI. CONCLUSION**

24 Based on the foregoing, IT IS HEREBY ORDERED that:

- 25 1. Defendants’ motion for summary judgment (ECF No. 84) is GRANTED IN
26 PART and DENIED IN PART as follows:

1 4. This action will proceed against the City, Chojnacki, Soria, Gosserand, and
2 the Towing Defendants on Plaintiffs' Fourth Amendment Search and Seizure
3 claim (but not their Search claim related to APN 013-152-27s) and on their
4 Fourteenth Amendment Due Process claim.
5

6 IT IS SO ORDERED.

7
8 Dated: January 21, 2016

/s/ Michael J. Seng
UNITED STATES MAGISTRATE JUDGE