UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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REVERGE ANSELMO and SEVEN HILLS LAND AND CATTLE COMPANY, LLC,

Plaintiffs,

v.

RUSS MULL, LESLIE MORGAN, Shasta County Assessor-Recorder, COUNTY OF SHASTA, BOARD OF SUPERVISORS OF THE COUNTY OF SHASTA, LES BAUGH, and GLENN HAWES,

Defendants.

CIV. NO. 2:12-01422 WBS EFB

MEMORANDUM & ORDER RE: MOTIONS FOR SUMMARY JUDGMENT

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Plaintiffs Reverge Anselmo and Seven Hills Land and Cattle Company, LLC brought this action against defendants County of Shasta, California ("the County"), the Board of Supervisors of Shasta County ("the Board"), Leslie Morgan, Russ Mull, Les Baugh, and Glenn Hawes arising out of a series of land use disputes beginning in 2007. Plaintiffs seek damages and injunctive relief

under 42 U.S.C. § 1983, as well as a writ of mandate compelling defendants to award plaintiffs a land conservation contract pursuant to the California Land Conservation Act of 1965 ("the Williamson Act"), Cal. Gov't Code § 51200 et seq. The parties both move for summary judgment pursuant to Federal Rule of Civil Procedure 56.

I. Factual & Procedural History

Plaintiffs own and operate two properties in Shasta County that are at issue in this action. Since at least 2006, plaintiffs have owned and operated Home Ranch, a 1200-acre property located in the Inwood Valley. (See Anselmo Decl. ¶ 27 (Docket No. 139-5).) In 2007, plaintiffs purchased Bear Creek Ranch, a 670-acre property located three miles away from Home Ranch, which they planned to utilize for raising cattle. (Id. ¶ 2.)

After purchasing Bear Creek Ranch, plaintiffs began clearing the property of weeds, vines, bushes, and dead or dying trees in order to replant the pasture areas of the property. (Id. ¶¶ 2-3.) California Regional Water Quality Control Board employee Andrew Jensen received a report in October 2007 of potential violations of state and federal water quality laws at Bear Creek Ranch. (Decl. of Andrew Jensen in Supp. of Mot. for Summ. J. ("Jensen Decl.") ¶ 3 (Docket No. 133-1).) Jensen initiated an investigation of the alleged violations and visited Bear Creek Ranch several times. (Id.) On October 15, 2007, Jensen directed Garrett Glauzer, a construction foreman at Bear Creek Ranch, to cease operations. (Id. Ex. 2.) Jensen reiterated this direction to Anselmo the next day, (id.), and

prepared a report documenting his findings and a Cleanup and Abatement Order, which he issued to the County. (Jensen Decl. ¶¶ 3, 6.)

On October 30, 2007, plaintiffs received a letter from James Smith, an Environmental Health Division Manager with the County, stating that plaintiffs had violated the County's grading ordinance by engaging in grading activities without a valid grading permit. (Pls.' Mem. Ex. B. (Docket No. 134-9).) Paul Minasian, an attorney for plaintiffs, sent Smith a letter on November 12, 2007, disputing the finding of a grading violation and contending that plaintiffs' activities were exempt under the County's grading ordinance. (Id. Ex. C.) Smith responded in a letter dated December 20, 2007, that the alleged grading activities were not exempt because they had occurred in and adjacent to a drainage way. (Id. Ex. D.) Minasian sent Smith a response on January 2, 2008, in which he reiterated plaintiffs' position that they had not violated the grading ordinance. (Id. Ex. E.)

In December 2007, Anselmo invited Glenn Hawes, a member of the Board, to Bear Creek Ranch to discuss the grading violation. (Anselmo Decl. ¶ 16.) Anselmo testified that Hawes saw the work that was being done on the property and stated that "he did not understand how it could be claimed that this was grading that required a permit." (Id.) Anselmo avers that Hawes advised him to buy mitigation credits and offer them to the County "in order to end the harassment" and that Hawes "explicitly mentioned his Stillwater Plains Mitigation Bank as a potential candidate for those mitigation credits." (Id.)

Anselmo refused this offer. (Id. ¶ 16.1.) Although defendants contest plaintiffs' narration of these events, they concede that this meeting occurred, (see Hawes Decl. ¶¶ 7-10 (Docket No. 135)), and that Hawes stated that Anselmo "might be able to resolve the violations" by purchasing a conservation easement for the Home Ranch property. (Id. ¶ 8; Defs.' Statement of Undisputed Facts ("Defs.' SUF") ¶ 47 (Docket No. 133-32).)

Anselmo then requested an additional meeting with Hawes, Supervisor Les Baugh, Russ Mull, the Director of the County's Resource Management Department, and Larry Lees, the County Administrative officer. (Anselmo Decl. ¶ 17.) This meeting took place on February 1, 2008, and was also attended by Willy Preston, the legislative aide for then-Assemblyman Doug LaMalfa. (Id.) Anselmo avers that at this meeting, Mull threatened to obstruct his application for a permit to operate a winery at the Home Ranch property if he did not obtain a grading permit. (Anselmo Dep. at 181:12-16.) Although Mull claims that he "did not tell Mr. Anselmo that I would hold up his certificate of occupancy at the Winery Property," he admits that he "told him that . . . a landowner may be denied future discretionary permits if there are outstanding violations on the property." (Decl. of Russ Mull ("Mull Decl.") ¶ 9 (Docket No. 135-2).)

After this meeting, Anselmo called Baugh and asked if there was any other way to cure the grading violation. (Anselmo Decl. ¶ 23; Baugh Decl. ¶ 11 (Docket No. 135-1).) Baugh then contacted Mull and asked what could be done to resolve the grading violation. (Id.; Mull Decl. ¶ 10.) Mull responded that if plaintiffs obtained a hydroelectric permit for the Bear Creek

Ranch property, it could encompass the grading violation. (Id.) Baugh relayed this message to Anselmo, (Baugh Decl. ¶ 12), who interpreted it as a request for a "face-saving measure." (Anselmo Decl. ¶ 24.)

In the meantime, Bridget Dirks, an Associate Planner with the County, sent plaintiffs a letter on January 30, 2008, stating that plaintiffs would need to conduct a "botanical survey" on the Home Ranch property to determine whether a plant known as Ahart's Paronychia was present. (Defs.' Request for Judicial Notice ("Defs.' RJN") Ex. 25 at 35 (Docket No. 133-29).) Anselmo avers that he had the Home Ranch property examined by Tom Benson, a botanist and Natural Resources Conservation Service engineer. (Anselmo Dep. at 206:20-25.) Anselmo avers that Benson wrote a letter to the County's resources management division indicating that plaintiffs' property did not contain hydric soils that could serve as a habitat for Ahart's Paronychia. (Id.) Dirks nonetheless required plaintiffs to conduct the plant study, which plaintiffs contend delayed the approval of their application for a permit for the proposed winery project by several months and cost an additional $5,000. (Id. at 207:2-14; Anselmo Decl. ¶ 26.)

On September 3, 2008, plaintiffs received a letter from Lio Salazar, an Associate Planner with the County, stating that their application for a land conservation contract for the Bear Creek Ranch property ("Williamson Act contract") could not move forward until the grading violations were remedied.[1] (Pls.' Mem.

[1] The Williamson Act authorizes cities and counties in California to offer a land conservation contract to owners of

Ex. H.) Salazar reiterated this position in a letter sent on October 8, 2008. (Id. Ex. J.)

Plaintiffs sent a letter to the Board, Mull, and Michael Ralston, the Shasta County Counsel, on October 14, 2008. (Id. Ex. L.) In this letter, plaintiffs contested the finding of a grading violation, argued that the County failed to serve a Notice of Non-Compliance with the grading violation, claimed that they had been denied an opportunity to appeal the grading violation, and threatened further legal action if the Williamson Act contract was not approved.[2] (Id.) Following this letter, the County Planning Commission unanimously recommended that the Board conduct a public hearing and grant plaintiffs' application for a Williamson Act contract. (Id. Exs. 2-3.)

On December 16, 2008, the Board held a meeting at which plaintiffs' application for a Williamson Act was placed on the agenda. (See Minutes, Shasta Cnty Bd. of Supervisors, Dec. 16, 2008 ("Dec. 16 Minutes") (Defs.' RJN Ex. 7) (Docket No. 133-35).) Before the Board considered the contract, it considered the more

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agricultural land meeting certain statutory requirements. Cal. Gov't Code § 51240. In exchange for agreeing to maintain their property as full-time agricultural land, the owner of land subject to a Williamson Act contract receives favorable tax treatment on that land. Cal. Rev. & Tax. Code § 423.3. The State of California provides subvention payments to cities and counties who enter into Williamson Act contracts in order to offset the lost tax revenue. Cal. Gov't Code § 16142.

[2] Shortly before mailing this letter, plaintiffs filed the precursor to this lawsuit in Shasta County Superior Court on October 2, 2008. (Defs.' RJN Ex. 24.) Plaintiffs named the County, Jensen, and Mull as defendants and also sued Hawes & Baugh as Doe defendants. Id. Plaintiffs and Jensen agreed to a stipulated dismissal of the state court action in June 2009. (Docket No. 139-3.)

general question of whether the County should place a moratorium on all new Williamson Act contracts in light of the possibility that the State of California would discontinue subvention payments. (Id. at 8.) County staff estimated that the County could lose as much as $125,000 per year if these payments ceased. (Id.) Although the Board put this issue up for a vote, it failed by a 4-1 margin. (Id.) Only Supervisor David Kehoe voted in favor of the motion. (Id.)

The Board then considered plaintiffs' application for a Williamson Act contract. (Id. at 9-10.) Hawes and Baugh recused themselves from this vote. (Id. at 9.) While Hawes and Baugh contend that they recused themselves because they had been named as defendants in a suit brought by plaintiffs, (see Hawes Decl. ¶ 12; Baugh Decl. ¶ 15), plaintiffs argue that this "was a bad faith pretext to bring about what they believed would constitute a denial of Plaintiffs' application." (Third Am. Compl. ("TAC") ¶ 55.0 (Docket No. 1-2).) The remaining three Supervisors then considered plaintiffs' application for a Williamson Act contract. (Dec. 16 Minutes at 10.) Supervisors Cibula and Hartman voted in favor of awarding the contract, while Kehoe voted against it and reiterated his earlier concerns about discontinued subvention payments. (Id.) As a result, plaintiffs did not receive a Williamson Act contract for Bear Creek Ranch. (Id.)

Plaintiffs amended their Complaint in February, May, and August 2009 to name Baugh, Hawes, the Board, and Leslie Morgan, the County Assessor-Recorder as defendants and to add allegations arising out of the Board's decision to deny plaintiffs a Williamson Act contract. (See TAC 1.) On May 11,

2012, defendants filed a cross-complaint against plaintiffs for violation of the Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 et seq. and public nuisance, as well as third-party claims against Jensen, Nancy Haley, Matthew Rabbe, and Matthew Kelley for contribution and indemnity. (Docket No. 1-1.) The United States then removed the action to this court pursuant to 28 U.S.C. § 1346(b) on the basis that Haley, Rabbe, and Kelley were federal employees sued for torts arising out of the scope of their employment. (Docket No. 1.)

The court dismissed defendants' third-party claims against Haley, Rabbe, and Kelley on September 21, 2012, (Docket No. 58), and dismissed defendants' third-party claims against Jensen on October 11, 2012. (Docket No. 91.) Defendants then filed separate counterclaims against plaintiffs on December 5, 2012 for public nuisance and violation of the Unfair Competition Law. (Docket No. 102.) On March 18, 2013, the court remanded defendants' counterclaims to Shasta County Superior Court and retained jurisdiction over only plaintiffs' § 1983 and writ of mandate claims. (Docket No. 117.) On September 6, 2013, both parties filed motions for summary judgment on those two claims. (Docket Nos. 133-134.)

II. Legal Standard

Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A material fact is one that could affect the outcome of the suit, and a genuine issue is one that could permit a reasonable jury to enter a verdict in the non-moving party's

favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The party moving for summary judgment bears the initial burden of establishing the absence of a genuine issue of material fact and can satisfy this burden by presenting evidence that negates an essential element of the non-moving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Alternatively, the moving party can demonstrate that the non-moving party cannot produce evidence to support an essential element upon which it will bear the burden of proof at trial. Id.

Once the moving party meets its initial burden, the burden shifts to the non-moving party to "designate 'specific facts showing that there is a genuine issue for trial.'" Id. at 324 (quoting then-Fed. R. Civ. P. 56(e)). To carry this burden, the non-moving party must "do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). "The mere existence of a scintilla of evidence . . . will be insufficient; there must be evidence on which the jury could reasonably find for the [non-moving party]." Anderson, 477 U.S. at 252.

In deciding a summary judgment motion, the court must view the evidence in the light most favorable to the non-moving party and draw all justifiable inferences in its favor. Id. at 255. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . ruling on a motion for summary judgment . . . ." Id.

III. Evidentiary Objections

On a motion for summary judgment, "[a] party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence." Fed. R. Civ. P. 56(c)(2). "[T]o survive summary judgment, a party does not necessarily have to produce evidence in a form that would be admissible at trial, as long as the party satisfies the requirements of Federal Rules of Civil Procedure 56." Fraser v. Goodale, 342 F.3d 1032, 1036–37 (9th Cir. 2003) (quoting Block v. City of Los Angeles, 253 F.3d 410, 418–19 (9th Cir. 2001)) (internal quotation marks omitted). Even if the non-moving party's evidence is presented in a form that is currently inadmissible, such evidence may be evaluated on a motion for summary judgment so long as the moving party's objections could be cured at trial. See Burch v. Regents of the Univ. of Cal., 433 F. Supp. 2d 1110, 1119–20 (E.D. Cal. 2006) (Shubb, J.).

Defendants raise dozens of objections to the evidence offered alongside plaintiffs' Motion for Summary Judgment, (Docket No. 138-1), and the evidence offered alongside plaintiffs' Opposition. (Docket No. 141-1).) Defendants' objections based on compound phrasing are inappropriate because the evidence could be presented in an admissible form at trial, see Burch, 433 F. Supp. 2d. at 1119-20, and the court will overrule them. The court does not rely on any of the evidence that defendants characterize as hearsay, and the court will therefore overrule these objections as moot.

Defendants' objections to evidence on the basis of lack of foundation, speculation, or relevance are all duplicative of

the summary judgment standard itself. See id. A court can award summary judgment only when there is no genuine dispute of material fact. Statements based on improper legal conclusions or without personal knowledge are not facts and can only be considered as arguments, not as facts, on a motion for summary judgment. Instead of challenging the admissibility of this evidence, lawyers should challenge its sufficiency. Objections on any of these grounds are superfluous, and the court will overrule them.

Defendants specifically object to paragraph 11 of Anselmo's declaration, as well as plaintiffs' Exhibit C, consisting of a letter sent by Paul Minasian on November 12, 2007, on the basis that this evidence violates the "sham affidavit" rule. (Defs.' Objections to Pls.' Evidence in Opp'n ¶ 3.) Defendants argue that Anselmo's characterization of this letter as an "appeal" of the grading violation is a sham because it contradicts his earlier deposition testimony that this letter was not intended as an appeal of the County's grading violation. (Id.)

The sham affidavit rule prohibits a party from creating a factual dispute by an affidavit contradicting his prior deposition testimony. Nelson v. City of Davis, 571 F.3d 924, 927-28 (9th Cir. 2009). The sham affidavit rule does not "cover all instances when evidence conflicts with the party's testimony." Id. at 929. Nor does it prohibit a party "from elaborating upon, clarifying, or explaining prior testimony elicited by opposing counsel on deposition; minor inconsistencies that result from an honest discrepancy, a mistake, or newly

discovered evidence afford no basis for excluding an opposition affidavit." Messick v. Horizon Indus., 62 F.3d 1227, 1231 (9th Cir. 1995).

Defendants are correct that Anselmo's affidavit is inconsistent with his prior deposition testimony that the letters sent by Minasian on November 12, 2007, and January 2, 2008, were "not the written appeals . . . sent on [Anselmo's] behalf." (Anselmo Dep. at 152:21-23.) However, Paragraph 11 of Anselmo's affidavit accurately states that Minasian sent defendants a letter on November 12, 2007, and that this letter expressed plaintiffs' position that their conduct did not require a grading permit. (Anselmo Decl. ¶ 11.)

As this Order makes clear, whether or not Minasian's letters constituted a formal appeal of the grading violation is immaterial; what is important is that those letters were received by defendants and that they disputed the County's finding of a grading violation. For this reason--and out of an abundance of caution--the court will sustain defendants' objection as to the words "appealing the determination . . . and" on line 3 of paragraph 11 and will overrule the objection as to the remainder of Anselmo's affidavit and Minasian's letter itself.

IV. Discussion

A. Claims Brought Under 42 U.S.C. § 1983

In relevant part, § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or

other proper proceeding for redress . . . .

42 U.S.C. § 1983. While § 1983 is not itself a source of substantive rights, it provides a cause of action against any person who, under color of state law, deprives an individual of federal constitutional rights or limited federal statutory rights. Id.; Graham v. Connor, 490 U.S. 386, 393-94 (1989).

Plaintiffs bring four claims against all defendants under § 1983 for: (1) deprivation of their property without just compensation in violation of the Fifth Amendment; (2) violation of the Fourteenth Amendment Equal Protection Clause; (3) deprivation of procedural and substantive due process in violation of the Fourteenth Amendment; and (4) retaliation for conduct protected by the First Amendment. (TAC ¶ 60.0.) Plaintiffs seek damages, injunctive relief, and a writ of mandate to compel the award of a contract pursuant to the Williamson Act. (Id.) Defendants seek summary judgment on each of these claims.

1. Takings Clause

The Fifth Amendment prohibits the taking of private property for public use without just compensation. U.S. Const. amend. V. However, "if a state provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 195 (1985). California allows landowners to pursue inverse condemnation remedies in state court. See Cal. Const. Art. I. § 19; San Diego Gas & Elec. Co. v. Superior Court, 13 Cal. 4th 893

(1996). Consequently, a plaintiff alleging a taking of his property without just compensation generally must pursue his claim through state inverse condemnation proceedings before bringing his claim in federal court. See, e.g., Williamson Cnty., 473 U.S. at 196-97; Guggenheim v. City of Goleta, 638 F.3d 1111, 1117 (9th Cir. 2010).

Plaintiffs offer no evidence that they pursued state inverse condemnation remedies prior to bringing this action. Rather, plaintiffs assert that they are not required to bring an inverse condemnation action "as a condition of enforcing their rights to procedural due process and equal protection." (Pls.' Opp'n at 31 (Docket No. 139).) Even so, plaintiffs do not dispute that they must resort to state inverse condemnation remedies prior to bringing a § 1983 claim premised on an unconstitutional taking of their property. Accordingly, insofar as plaintiffs' § 1983 claim is premised on a violation of the Takings Clause, the court must grant defendants' motion for summary judgment.

2. Equal Protection Clause

Plaintiffs argue that defendants violated their rights under the Equal Protection Clause by refusing to grant plaintiffs a Williamson Act contract, even though defendants granted contracts to similarly situated landowners. (Pls.' Mem. at 9-15). The Equal Protection Clause guarantees that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Supreme Court has recognized equal protection claims based the theory that the plaintiff "has been irrationally singled out as a

so-called 'class of one.'" Engquist v. Or. Dep't of Agric., 553 U.S. 591, 601 (2008) (citing Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (per curiam)).

In order to succeed on their "class of one" claim, plaintiffs must show that defendants: "(1) intentionally (2) treated [plaintiffs] differently than other similarly situated property owners, (3) without a rational basis." Gerhart v. Lake County, 637 F.3d 1013, 1022 (9th Cir. 2011) (citing Olech, 528 U.S. at 564). For purposes of a "class of one" claim, a defendant's conduct "comports with equal protection if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." SeaRiver Mar. Fin. Holdings v. Mineta, 309 F.3d 662, 679 (9th Cir. 2002) (citations and internal quotation marks omitted); accord Vance v. Bradley, 440 U.S. 93, 111 (1979) (holding that rational basis scrutiny requires a plaintiff to show that the "facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker").

Defendants have demonstrated a rational basis for the Board's decision to deny it a Williamson Act contract. Rule 9(a) of the County's Administrative Manual provides that "[a]n affirmative vote of three members is necessary for the Board to take action" on any item placed on the Board's agenda. (Admin. Policy 1-101 (Defs.' RJN Ex. 5) (Docket No. 133-34).) Rule 9(b) of the Administrative Manual states that a Supervisor may abstain from voting based on an actual or perceived conflict of interest and that, if he does so, the abstention "shall count as a non-vote." (Id.) Neither party disputes that Hawes and Baugh

recused themselves from voting on whether to approve plaintiffs' application for a Williamson Act contract at the Board's meeting on December 16, 2008. (Dec. 16 Minutes at 9.) As a result, the Board could only approve the Williamson Act contract if the remaining three supervisors voted unanimously to do so.[3]

Plaintiffs' application for a Williamson Act contract failed to receive each of those three votes. (Id. at 10.) It is undisputed that Supervisor David Kehoe voted "no" and that he announced that he would prefer not to accept any new Williamson Act contracts because it was unclear whether the State of California would end subvention payments to local agencies for lands covered by a Williamson Act contract. (Id.) This rationale was consistent with his efforts earlier in the meeting

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[3] Plaintiffs argue that California law requires the abstentions of Hawes and Baugh to be treated as affirmative votes in favor of approving the Williamson Act contract, rather than as non-votes. (Pls.' Mem. at 27-28.) Although plaintiffs are correct that some decisions have presumed that an abstention is treated as an affirmative vote, the Board has adopted rules that require three affirmative votes and treat an abstention as a "non-vote." (See Admin. Policy 1-101 (Defs.' RJN Ex. 5).) These provisions "alter[ed] the ordinary common law rule" by requiring an affirmative vote of three Supervisors, rather than a simple majority of those voting, in order to approve an agenda item. County of Sonoma v. Superior Court, 173 Cal. App. 4th 322, 346 n.11 (1st Dist. 2009).

Plaintiffs' reliance on Dry Creek Valley Ass'n v. Bd. Of Supervisors, 67 Cal. App. 3d 839 (1st Dist. 1977), is misplaced. There, the Board of Supervisors had adopted a rule stating that, in the event that one less than the necessary number of affirmative votes had been cast, an abstention could be counted as a concurrence. Id. at 841. Here, the Board has adopted no such rule; rather, Rule 9(a) specifically requires three affirmative votes in order to take action and Rule 9(b) provides that an abstention "shall count as a non-vote." (See Admin. Policy 1-101 (Defs.' RJN Ex. 5).)

to place a moratorium on all new Williamson Act contracts because of the possibility that subvention payments would be discontinued. (Id. at 8.) Indeed, Richard Simon, the current County Director of Resource Management, avers that the State has reduced subvention payments to "virtually zero," and the County has not approved any new Williamson Act contract since December 16, 2008. (Simon Decl. ¶ 13 (Docket No. 133-15).)

Plaintiffs do not dispute that the State of California had announced that it was considering ending subvention payments. (Pls.' Resp. to Defs.' SUF ¶ 88.) Nor do they dispute that County staff had briefed the board about the status of subvention payments and advised the Board that the County could lose as much as $125,000 per year if the state eliminated these payments. (Id. ¶ 89.) Plaintiffs have therefore not "rebut[ted] the facts underlying defendants' asserted rationale . . . to show that the challenged classification could not reasonably be viewed to further the asserted purpose." Lazy Y Ranch, Ltd. v. Behrens, 546 F.3d 580, 590-91 (9th Cir. 2008).

To the extent that the Board singled out plaintiffs for disparate treatment at all, the evidence shows that Kehoe, whose vote was decisive, failed to approve the application for a Williamson Act contract because of its potential fiscal consequences. (See Dec. 16 Minutes at 8, 10.) The court need not determine whether this concern actually motivated Kehoe or the Board so long as the evidence demonstrates that there was at least a "theoretical connection" between this stated reason for denying the contract and the Board's ultimate decision. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 463 (1981).

Accordingly, to the extent that plaintiffs' § 1983 claim is premised on a violation of the Equal Protection Clause, the court must grant defendants' motion for summary judgment.

3. Due Process Clause

The Fourteenth Amendment provides that no state shall deprive any person of life, liberty, or property without due process of law. U.S. Const. amend. XIV, § 1. In order to bring a procedural or substantive due process claim, a plaintiff must make a threshold "showing of a liberty or property interest protected by the Constitution." Wedges/Ledges of Cal., Inc. v. City of Phoenix, 24 F.3d 56, 62 (9th Cir. 1994) (citing Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972)).

"Property interests are not created by the Constitution but 'by existing rules or understandings that stem from an independent source such as state law . . . .'" Thornton v. City of St. Helens, 425 F.3d 1158, 1164 (9th Cir. 2005) (quoting Roth, 408 U.S. at 577). "In some instances, a person can have a constitutionally protected property interest in a government benefit, such as a license or permit." Gerhart, 637 F.3d at 1019 (citing Roth, 408 U.S. at 577). But a plaintiff who asserts a property interest in a permit or other government benefit cannot simply demonstrate that he had a "unilateral expectation" or an "abstract need or desire" for that benefit; rather, he must demonstrate "a legitimate claim of entitlement to it." Roth, 408 U.S. at 577 (emphasis in original).

Whether plaintiffs have an "expectation of entitlement sufficient to create a property interest . . . depend[s] largely upon the extent to which the statute contains mandatory language

that restricts the discretion of the decisionmaker." Allen v. City of Beverly Hills, 911 F.2d 367, 370 (9th Cir. 1990) (quoting Jacobson v. Hannifin, 627 F.2d 177, 180 (9th Cir. 1980)). "[A]n entitlement to a government permit exists when a state law or regulation requires that the permit be issued once certain requirements are satisfied." Gerhart, 637 F.3d at 1019 (citing Groten v. California, 251 F.3d 844, 850 (9th Cir. 2001)). By contrast, if the decision to grant a permit or other benefit is discretionary, plaintiffs have no property interest in that benefit. Doyle v. City of Medford, 606 F.3d 667, 672 (9th Cir. 2010) (citing Jacobson, 627 F.3d at 180).

Plaintiffs have no property interest in a conditional use permit for a winery at the Home Ranch property. California law provides that "[t]he decision whether to issue a conditional use permit is 'discretionary by definition.'" Kay v. City of Rancho Palos Verdes, 504 F.3d 803, 810 (9th Cir. 2007) (quoting Breakzone Billiards v. City of Torrance, 81 Cal. App. 4th 1205, 1224 (2d Dist. 2000)). Plaintiffs' winery permit is therefore "no[t] a federally protected property interest on which to base a . . . due process claim." Clark v. City of Hermosa Beach, 48 Cal. App. 4th 1152, 1183 (2d Dist. 1996).

Plaintiffs also have no property interest in a Williamson Act contract. The Williamson Act states that "[a]ny city or county may by contract limit the use of agricultural land." Cal. Gov't Code § 51240. A city or county must offer a Williamson Act contract to land located within a designated "agricultural preserve" and cannot offer a contract if the land is not so designated. Cal. Gov't Code §§ 51241-51242. Although

these provisions are not discretionary, the Williamson Act nonetheless commits ultimate discretion to cities and counties by providing that "any city or county . . . may establish an agricultural preserve." Cal. Gov't Code § 51230 (emphasis added).

Although plaintiffs concede that the Bear Creek Ranch property is not located within an agricultural preserve, they contend that defendants lacked discretion not to designate the property as an agricultural preserve. (Pls.' Opp'n 13-14.) This argument is inconsistent with the statutory text, as the Williamson Act's use of "[t]he word 'may' . . . implies some degree of discretion." United States v. Rodgers, 461 U.S. 677, 706 (1983). It is also inconsistent with longstanding precedent that emphasizes the Williamson Act's "discretionary language" and characterizes it as "permissive, not mandatory, legislation." Kelsey v. Colwell, 30 Cal. App. 3d 590, 595 (5th Dist. 1973); see also Sierra Club v. City of Hayward, 28 Cal. 3d 840, 851 (1981) (noting that the Williamson Act "empowers local governments to establish 'agricultural preserves'" and that a "locality may offer to owners . . . the opportunity to enter into . . . contracts that restrict the land to open space").

Plaintiffs contend that even if the Williamson Act itself does not entitle them to a contract, they are nonetheless entitled to one pursuant to the terms of the County's General Plan. (Pls.' Opp'n 13-14.) Section 6.1.4, AG-f of the General Plan states that "[a]ll lands classified as full-time agricultural lands shall be placed in a corresponding agricultural zone district and shall be eligible to enter into a

contract, as provided by the Williamson Act . . . ." (Pls.' Opp'n Ex. X.) However, it is far from clear that the General Plan could give rise to any protected property interest because "[a] general plan is not a law, but a tentative plan, subject to change." Kawaoka v. City of Arroyo Grande, 796 F. Supp. 1320, 1327 (C.D. Cal. 1992) (emphasis in original) (citation omitted); cf. Friends of Lagoon Valley v. City of Vacaville, 154 Cal. App. 4th 807, 816 (1st Dist. 2007) ("Because policies in a general plan reflect a range of competing interests, the governmental agency . . . has broad discretion to construe its policies in light of the plan's purposes.")

Even if the General Plan could theoretically create a protected property interest, Section AG-f of the General Plan does not show that plaintiffs were entitled to a Williamson Act contract because it applies only to properties that are "classified as full-time agricultural lands." (See Pls.' Opp'n Ex. X.) The structure of this provision mirrors that of the Williamson Act itself: although the decision to award a contract is not discretionary once the land has been classified, the underlying decision to classify property as full-time agricultural land is a zoning decision that is ultimately discretionary. See, e.g., Sprint Telephony PCS, L.P. v. County of San Diego, 543 F.3d 571, 580 (9th Cir. 2008) ("A certain level of discretion is involved in evaluating any application for a zoning permit."). Because the decision to classify plaintiffs' property as full-time agricultural land is discretionary, plaintiffs do not have a "right to a particular zoning designation," i.e., as an agricultural preserve, that is

protected by the Due Process Clause. Tyson v. City of Sunnyvale, 920 F. Supp. 1054, 1061 (N.D. Cal. 1996).

Plaintiffs also contend that defendants have routinely declined to require a separate determination of "agricultural preserve" status prior to granting a Williamson Act contract. (Pls.' Opp'n 14:16-18.) Instead, they note, defendants have "treated 'ag[ricultural] preserve' as a status that accompanies the granting of a Williamson Act Contract." (Id. at 14:13-15.) Even so, defendants are not entitled to similar treatment "merely because a wholly and expressly discretionary state privilege has been granted generously in the past." Conn. Bd. of Pardons v. Dumschat, 452 U.S. 458, 465 (1981) (emphasis in original); see also, e.g., Cassidy v. Hawaii, 915 F.2d 528, 531 (rejecting the argument that, because a government agency "generally renews permits," a particular individual has "a legal entitlement to have his permit renewed"). Because the decision to grant a Williamson Act contract or to designate land as an agricultural preserve is ultimately discretionary, plaintiffs cannot have a property interest in a Williamson Act contract. See Doyle, 606 F.3d 672.

Absent an entitlement to a Williamson Act Contract or a conditional use permit, plaintiffs have not shown that the mere notification of a grading violation deprived them of any liberty or property interest. Plaintiffs contend that the issuance of the grading violation deprived them of property and liberty interests in their reputation because it "labeled [them] as polluters." (Pls.' Opp'n at 10:19.) But this sort of stigma "is not sufficient to satisfy the requirement that a constitutionally

protected . . . interest be at stake." WMX Techs., Inc. v. Miller, 197 F.3d 367, 376 (9th Cir. 1999) (en banc). While plaintiffs assert that the Due Process Clause safeguards "a person's reputation in the community," (Pls.' Opp'n at 10:1-2), the authority they cite stands for exactly the opposite proposition. See Paul v. Davis, 424 U.S. 693, 701 (1976) (denying that "reputation alone, apart from some more tangible interests such as employment, is either 'liberty' or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause").[4]

In short, plaintiffs have not identified any liberty or property interest of which they were deprived.[5] Although plaintiffs insist that they were nonetheless entitled to a

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[4] In addition to Paul v. Davis, plaintiffs cite Wisconsin v. Constantineau, 400 U.S. 433 (1971), in support of the proposition that the Due Process Clause "extends . . . to claims affecting a [party's] reputation or character." (Pls. Opp'n 10:9.) However, Paul v. Davis clarified that this holding in Constantineau applies only insofar as that reputational harm deprived the plaintiff of some other liberty or property interest. 424 U.S. at 709-10. Plaintiffs' contention that bare reputational injury is cognizable under the Due Process Clause is therefore incorrect.

[5] Plaintiffs argue that even if they had not suffered any adverse action as a result of the alleged grading violation, defendants' failure to record or enforce the grading violation left them in "limbo" and thereby deprived them of due process. (Pls.' Mem. at 24-25.) A lack of enforcement action does not show that plaintiffs were in limbo. Instead, it shows that plaintiffs had not suffered any cognizable injury as a result of the grading violation. See Guatay Christian Fellowship v. County of San Diego, 670 F.3d 957, 984 (9th Cir. 2011) ("[T]he County's [Notice of Violation] and cease-and-desist order did not themselves deprive the Church of any interests. The County would have had to bring an enforcement action in court to actually enforce the zoning regulations . . . .").

hearing to contest the alleged grading violation, their interest in a hearing is not cognizable under the Due Process Clause because it is an "entitlement to nothing but procedure." Town of Castle Rock v. Gonzales, 545 U.S. 748, 764 (2005). Accordingly, to the extent that plaintiffs' § 1983 claim is premised on a violation of the Due Process Clause, the court must grant defendants' motion for summary judgment on that claim.

4. First Amendment

"The First Amendment forbids government officials from retaliating against individuals for speaking out." Blair v. Bethel Sch. Dist., 608 F.3d 540, 543 (9th Cir. 2010). In order to succeed on their First Amendment retaliation claim, plaintiffs must show that: (1) they engaged in constitutionally protected activity; (2) as a result, defendants subjected plaintiffs to adverse action that would chill a person of ordinary firmness from continuing to engage in the protected activity; and (3) a substantial causal relationship existed between plaintiffs' constitutionally protected activity and defendants' adverse action. Id.

a. Constitutionally Protected Activity

Plaintiffs contend that defendants obstructed their applications for both a conditional use permit and a Williamson Act contract in retaliation for plaintiffs' refusal to obtain a grading permit, attempt to appeal the grading violation, and lawsuits against defendants. (Pls.' Opp'n at 19-20.) This conduct is "protected by [plaintiffs'] right to petition the government" and therefore constitutes constitutionally protected activity. CarePartners, LLC v. Lashway, 545 F.3d 867, 877 (9th

Cir. 2008) (citing BE & K Constr. Co. v. NLRB, 536 U.S. 516, 525 (2002)).

Defendants initially concede that plaintiffs "exercis[ed] their First Amendment right to petition." (Defs.' Mem. at 31:12.) In their Reply, however, defendants argue that plaintiffs' retaliation claim is unfounded because plaintiffs did not actually appeal the County's grading violation. (Defs.' Reply at 17 (Docket No. 141).) Plaintiffs offer several letters sent to County and State officials in 2007 and 2008 in which they disputed the County's finding of a grading violation. (See, e.g., Pls.' Mem. Exs. C, E, L.)

Whether or not these letters constituted a formal appeal of the grading violation, they are protected under the Petition Clause, see 1 Annals of Cong. 738 (1789) (noting that the First Amendment allows individuals to "communicate their will" by writing directly to lawmakers and government officials), as are the lawsuits that plaintiffs filed. BE & K Constr. Co., 536 U.S. at 525. Plaintiffs have therefore shown that they were engaged in constitutionally protected activity.

b. Adverse Action

Plaintiffs offer evidence of three instances of adverse action. First, plaintiffs contend that Mull threatened to withhold a conditional use permit for the Home Ranch winery if they did not obtain a grading permit. According to Anselmo, Mull attended a meeting on February 1, 2008, about the alleged grading violation at which Anselmo, Hawes, Baugh, and two other officials were also present. Anselmo avers that during this meeting, "Mull shrugged his shoulders and said 'Well, if you don't pay me for a

grading permit up here I could hold up your CO [conditional use permit] at the winery." (Anselmo Decl. ¶ 17; Anselmo Dep. at 181:12-16.) Anselmo then avers that after he threatened to sue Mull, Mull responded that "[y]ou can't sue the State of California" because "they have unlimited resources" and "they'll tie you up in court for years." (Id. at 184:8-19.) If these claims were true, Mull's conduct would constitute adverse action. See Brodheim v. Cry, 584 F.3d 1262, 1270 (9th Cir. 2009) ("[T]he mere threat of harm can be an adverse action, regardless of whether it is carried out because the threat itself can have a chilling effect.").

Second, plaintiffs contend that defendants obstructed their application for a winery permit by requiring plaintiffs to conduct a study to determine whether a plant known as Ahart's Paronychia was present. (Anselmo Decl. ¶¶ 22-25.) Plaintiffs received a letter dated January 30, 2008, from Bridget Dirks, an Associate Planner with the County, who indicated that the plaintiffs would need to conduct a "botanical survey" on their property and that this survey "will need to include fish and game approved mitigation measures where appropriate." (Defs.' RJN Ex. 25 at 35.) Plaintiffs contend that this study delayed their application for a winery permit by several months and cost them $5,000. (Anselmo Decl. ¶ 26.)

Third, plaintiffs contend that the County and the Board withheld approval of the Williamson Act contract in retaliation for plaintiffs' protected conduct. (See TAC ¶ 55.0.) Plaintiffs point to a series of letters they received between September 2008 and October 2008 from Lio Salazar, an Associate Planner with the

County, in which he claimed that plaintiffs could not obtain a Williamson Act contract unless they first abated the grading violation. (Pls. Mem. Exs. H, J.) Although the County Planning Commission ultimately recommended that the Board of Supervisors approve the Williamson Act contract, the Board ultimately did not award plaintiffs the contract. (See Dec. 16 Minutes at 10.)

For purposes of this motion, it may be assumed that the denial of either a winery permit or a Williamson Act contract would constitute adverse action even if plaintiffs "[can]not establish a legally protected interest in the permits themselves." Sorrano's Gasco, Inc. v. Morgan, 874 F.2d 1310, 1314 (9th Cir. 1989). However, for the reasons discussed below the court finds that plaintiffs have adduced insufficient evidence to show that they suffered such adverse action in retaliation for exercising their speech and petition rights.

c. Causation

Plaintiffs must show "a substantial causal relationship" between their constitutionally protected activity and defendants' adverse action. Blair, 608 F.3d at 543. In order to do so, plaintiffs must "show that the protected conduct was a 'substantial' or 'motivating' factor in the defendant[s'] decision." Sorrano's Gasco, 874 F.2d at 1314 (citing Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977)).

Because "direct evidence of improper motive . . . will only rarely be available," litigants in First Amendment cases typically rely on circumstantial evidence to explain why defendants acted as they did. Mendocino Envtl. Ctr. v. Mendocino County, 192 F.3d 1283, 1302 (9th Cir. 1999). For instance, a

plaintiff can survive summary judgment by offering evidence of the "proximity in time between the protected action and the allegedly retaliatory . . . decision," evidence that the defendant "expressed opposition to his speech, either to him or to others," or evidence that the defendant's "proffered explanations for the adverse . . . action were false and pretextual." Keyser v. Sacramento City Unified Sch. Dist., 265 F.3d 741, 751-52 (9th Cir. 2001). But circumstantial proof of retaliatory motive requires evidence, and "speculation as to . . . improper motive does not rise to the level of evidence sufficient to survive summary judgment." Karam v. City of Burbank, 352 F.3d 1188, 1194 (9th Cir. 2003) (citing Keyser, 265 F.3d at 751).

i. Mull's Conduct

According to plaintiffs, Mull threatened to "hold up" their application for a winery permit at the Home Ranch property if they did not obtain a grading permit for the Bear Creek Ranch property. (Anselmo Decl. ¶ 17; Anselmo Dep. at 181:12-16.) Plaintiffs argue that Mull then followed through on this threat by ordering the County to require plaintiffs to perform the Ahart's Paronychia study on the Home Ranch property as a condition to obtaining a permit. (See, e.g., Anselmo Decl. ¶¶ 21-22.)

Plaintiffs have offered no evidence in support of their claim that Mull ordered the plant study. Mull denies that he was involved in the decision to require the plant study. (Mull Decl. ¶ 13.) In fact, Mull claims that he was not even aware of this

decision, as "issues regarding CEQA[6] compliance" were made at the staff level and were not brought to his attention unless there was a dispute that required his input. (Id.) Defendants also offer a declaration from Richard Simon, the current County Director of Resource Management, who avers that "Mull had no involvement in the study" and was not "even aware of it at that time." (Simon Decl. ¶ 23.)

Simon avers that Bridget Dirks, not Mull, made the decision to require the plant study because the Department of Fish and Game map indicated that Ahart's Paronychia might be present on the Home Ranch property. (Id.) Dirks, not Mull, initially informed plaintiffs about the study, (see Defs.' RJN Ex. 25 at 35), and then required plaintiffs to perform the study even after Tom Benson, a botanist and Natural Resources Conservation Service engineer, wrote a letter to the County indicating that plaintiffs' property did not contain hydric soils that could serve as a habitat for Ahart's Paronychia. (See Anselmo Dep. at 206:20-207:14.) Plaintiffs have therefore failed to provide evidence sufficient for a fact-finder to conclude that Mull was involved in the decision to impose the plant study, let alone that he ordered the study in retaliation for plaintiffs' exercise of their First Amendment rights.

Nor is plaintiffs' claim that Mull threatened to "hold up" the application for a winery permit sufficient to withstand summary judgment. A defendant's conduct cannot be motivated by a plaintiff's exercise of his First Amendment rights if he is

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[6] CEQA is an abbreviation for the California Environmental Quality Act, Cal. Pub. Res. Code § 21000 et seq.

unaware that the plaintiff exercised those rights. See Allen v. Iranon, 283 F.3d 1070, 1076 (9th Cir. 2002) (citing Keyser, 265 F.3d at 750-51). Therefore, "[t]o survive summary judgment, a plaintiff alleging a First Amendment retaliation claim must produce evidence that the governmental actor had knowledge of his protected speech." Occhionero v. City of Fresno, 386 Fed. App'x 745, 745-46 (9th Cir. 2010) (citing Dietrich v. John Ascuaga's Nugget, 548 F.3d 892, 901 (9th Cir. 2008).

Plaintiffs contend that Mull threatened to hold up their application for a winery permit at a meeting on February 1, 2008. (Anselmo Decl. ¶ 17.) Before that date, plaintiffs' petitions were limited to two letters, dated November 12, 2007, (Pls.' Mem. Ex. C), and January 2, 2008, (id. Ex. E), in which they disputed the County's finding of a grading violation. Neither letter is addressed to Mull. In fact, Minasian's November 7, 2007 letter is addressed to nine separate recipients, none of whom included Mull or any employee of the County's Department of Natural Resources. (See id. Ex. C.)

Plaintiffs have offered no evidence that Mull was aware that they had exercised their right to petition, let alone that Mull threatened to withhold the winery permit in retaliation for doing so. See Occhionero, 386 Fed. App'x 745-46; see also Keyser, 265 F.3d at 750-51 (concluding that summary judgment was appropriate where "there [was] no evidence in the record to contradict [defendant's] statement . . . that he was unaware" of the protected speech). While plaintiffs sent Mull a letter on February 5, 2008, (Pls.' Mem. Ex. G), that letter cannot be the cause of Mull's threat, which they allege occurred four days

earlier. And even if Mull had threatened to withhold a permit for the Home Ranch property, plaintiffs have offered no evidence to dispute Mull's claim that he did so because he witnessed grading on the Bear Creek Ranch property, rather than because of any retaliatory motive. (See Mull Decl. ¶ 7.) Accordingly, to the extent that plaintiffs' First Amendment claim is based on Mull's conduct, the court must grant defendants' motion for summary judgment.

ii. Delay of the Winery Permit

Plaintiffs also contend that the County retaliated against them by requiring them to perform the plant study on the Home Ranch property. (Anselmo Decl. ¶¶ 21-22; Pls.' Opp'n 22:5.) Defendants argue that the County mandated this study not because of plaintiffs' exercise of their First Amendment rights, but because a routine environmental review of their permit application disclosed that Ahart's may be present on the Home Ranch property. (Defs.' SUF ¶¶ 64-67; Simon Decl. ¶¶ 16-17; Dirks Decl. ¶ 5.) Because the State of California lists Ahart's as a "species of concern," the County concluded that the California Environmental Quality Act ("CEQA") required it to mandate the plant study as a condition of obtaining a conditional use permit. (Defs.' SUF ¶ 67; Dirks Decl. ¶ 5.)

Plaintiffs have not shown that this rationale was a pretext for retaliation. Plaintiffs point to deposition testimony from their attorney, Bart Fleharty, (Flaherty Dep. at 52:2-3, 52:10-14), and from plant biologist Richard Lis, (Lis Dep. at 89-91), indicating that the decision to require the plant study was discretionary. Even if plaintiffs were correct that

the plant study was discretionary, that alone is not proof that County officials exercised that discretion in a retaliatory manner. Cf. Rosenbaum v. City & County of San Francisco, 484 F.3d 1142, 1161 (9th Cir. 2006) (holding that city's exercise of discretion in awarding amplified noise permits was not sufficient to show viewpoint discrimination against unsuccessful permit applicants). And while proof of a "lack of clarity and even-handedness in the policy's implementation" may be sufficient circumstantial evidence of retaliation, Coszalter v. City of Salem, 320 F.3d 968, 978 (9th Cir. 2003), plaintiffs offer no such evidence.

Plaintiffs offer deposition testimony indicating that Tom Benson, a botanist and Natural Resources Conservation Service engineer, wrote a letter to the County's resources management division indicating that plaintiffs' property did not contain hydric soils that could serve as a habitat for Ahart's Paronychia. (Anselmo Dep. at 206:20-25.) Anselmo then testified that after receiving Benson's letter, the County nonetheless required plaintiffs to conduct the study, resulting in further costs and delay. (Id. at 207:2-14.)

True as this may be, it is insufficient evidence from which to infer retaliatory motive. Defendants contend – and plaintiffs admit – that Dirks contacted Dr. Lis, who then worked for the Department of Fish and Game, to ask whether Benson's letter was sufficient to satisfy the requirement for a plant study. (Pls.' Resp. to Defs.' SUF, ¶ 71; Dirks Decl. ¶ 6.) Lis then informed Dirks that Benson's letter was not sufficient because he was not a licensed botanist and because Benson's

report did not seem to reflect familiarity with where Ahart's "really grew." (Lis Dep. at 96:3-22.)

Plaintiffs offer no evidence that this reason was a pretext for retaliation. And while plaintiffs characterize the plant study as "burdensome and atypical," (Pls.' Opp'n at 22:5), they provide no evidence showing that the County's environmental compliance policy was not applied in an "even-handed" way to other permit applicants. Coszalter, 320 F.3d at 978.

Plaintiffs offer no other proof of a causal connection between their dispute of the grading violation and the County's decision to require the plant study. Although the County required the plant study only three months after plaintiffs first disputed the grading violation, "mere temporal proximity" is ordinarily not evidence of causation. Clark Cnty. Sch. Dist. v. Breeden, 532 U.S. 268, 273 (2001). Rather, temporal proximity is relevant only as part of the "totality of the facts." Coszalter, 320 F.3d at 978; see also Coszalter, 320 F.3d at 978 ("[T]here is no set time within which acts necessarily support an inference of retaliation."). Absent other evidence of a causal connection between the plant study and plaintiffs' protected activity, a three-month gap in time does not permit a factfinder to infer retaliatory motive.

As explained above, there is also no evidence that Mull ordered the plant study, or that anyone involved in ordering the plant study was aware of plaintiffs' exercise of their First Amendment rights. Accordingly, to the extent that plaintiffs' First Amendment claim is based on the decision to require a study to detect whether Ahart's Paronychia was present, the court must

grant defendants' motion for summary judgment on that claim.

iii. Denial of the Williamson Act Contract

Finally, plaintiffs contend that Hawes and Baugh recused themselves in order to deny plaintiffs two of the three votes needed to obtain a Williamson Act contract. Although Hawes and Baugh contend that they recused themselves because of a conflict of interest, plaintiffs have argued since filing their Third Amended Complaint that this "was a bad faith pretext to bring about what they believed would constitute a denial of Plaintiffs' application." (TAC ¶ 55.0.)

Plaintiffs do not dispute that they sued Hawes and Baugh on October 2, 2008. (See Defs.' RJN Ex. 24.) As a result, Hawes and Baugh rightly recused themselves from voting on plaintiffs' application for a Williamson Act contract.[7] (Baugh Decl. ¶ 12; Hawes Decl. ¶ 15.) Had they not done so, Hawes and Baugh not only would have exposed themselves to charges of bias and partiality, but would have exposed themselves to potential liability had they voted to deny plaintiffs' application. See Stivers v. Pierce, 71 F.3d 732, 750 (9th Cir. 1995) (holding that a licensing board member was liable for voting against plaintiff's license application because his "opposition to [plaintiff's] application was motivated by his own personal bias").

Plaintiffs have not shown that this reason was a "bad

[7] Although it does not use mandatory language, Rule 9(b) of the Board's Administrative Manual specifically contemplates that Supervisors will disqualify themselves in the event of a conflict of interest. (See Admin. Policy 1-101 (Defs.' RJN Ex. 5).)

faith pretext" for retaliation. (See TAC ¶ 55.0.) Plaintiffs offer evidence that Hawes attempted to persuade them to purchase mitigation credits to resolve the grading violation, (Anselmo Decl. ¶¶ 16.0-16.1), and that Baugh informed them that they could resolve the grading violation by obtaining an "administrative permit" for a hydroelectric generator. (Id. ¶¶ 23-24.) Even if these claims were correct, plaintiffs' evidence does not show that Hawes and Baugh recused themselves because plaintiffs refused these overtures, let alone that Hawes and Baugh recused themselves in retaliation for exercising their right to petition.

Finally, Anselmo avers that Hawes and Baugh "stood up with a nod to each other" just before the vote on the Williamson Act contract was set to occur. (Anselmo Dep. at 215:20-21.) This is not evidence of retaliatory motive, of an agreement between Hawes and Baugh, or of anything at all. Plaintiffs' belief that Hawes and Baugh "acted from an unlawful motive, without evidence supporting that belief, is no more than speculation or unfounded accusation about whether the defendant[s] really did act from an unlawful motive." Carmen v. S.F. Unified Sch. Dist., 237 F.3d 1026, 1028 (9th Cir. 2001). To the extent that plaintiffs' First Amendment claim is premised on Hawes' and Baugh's conduct, the court must grant defendants' motion for summary judgment.

Although plaintiffs have shown that they engaged in constitutionally protected activity and that they suffered adverse action, they have failed to provide the evidence crucial to establishing a causal link between the two. Plaintiffs' allegations of retaliation are "entirely speculative," and

"[t]here is no specific, admissible evidence in the voluminous record that the plaintiffs can cite to support their claims that any of the defendants sought to enforce the law on account of a retaliatory animus . . . ." CarePartners LLC v. Lashway, 428 Fed. App'x 734, 735 (9th Cir. 2011). Accordingly, to the extent that plaintiffs' § 1983 claim is premised on a violation of the First Amendment, the court must grant defendants' motion for summary judgment.[8]

B. Writ of Mandate

[8] Although the court does not reach this issue, it is likely that Hawes, Baugh, and Mull would be entitled to qualified immunity even if plaintiffs' evidence were sufficient to survive summary judgment on their First Amendment claim. In actions under § 1983, "qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person should have known." Pearson v. Callahan, 555 U.S. 223, 231 (2009) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

The "clearly established" inquiry "assesses the objective reasonableness of the official's conduct in light of the decisional law at the time." Moss v. U.S. Secret Serv., 675 F.3d 1213, 1222 (9th Cir. 2012). Whether or not plaintiffs could identify a clearly established right that defendants purportedly violated, it is unlikely that the court would conclude that any of the conduct at issue here – including Mull's statement that a permit may be denied because of outstanding grading violation, the imposition of the plant study, or the denial of the Williamson Act contract — is objectively unreasonable. See id.; see also Malley v. Briggs, 475 U.S. 335, 341 (1986) (noting that qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law.").

Even if plaintiffs had evidence sufficient to show retaliatory animus, which they do not, that evidence would not be "sufficient to defeat immunity if the defendant[s] acted in an objectively reasonable manner." Id.; see also Crawford-El v. Britton, 523 U.S. 574, 588 (1998) ("[A] defense of qualified immunity may not be rebutted by evidence that the defendant[s'] conduct was malicious or improperly motivated. Evidence concerning the defendant[s'] subjective intent is simply irrelevant to that defense.").

Under California law, "it is well settled that although a court may issue a writ of mandate requiring legislative or executive action to conform to the law, it may not substitute its discretion for that of legislative or executive bodies in matters committed to the discretion of those bodies." Common Cause v. Bd. of Supervisors, 49 Cal. 3d 432, 445 (1989). "[A]lthough a court may order a local legislative body to perform a nondiscretionary ministerial act, it may not control a local board's discretion." Id. (citing Glendale City Emps. Ass'n, Inc. v. City of Glendale, 15 Cal. 3d 328, 324 (1975)).

As explained above, see infra Part IV.A.3, the decision to award or deny a Williamson Act contract or to designate a parcel of land as an agricultural preserve is discretionary. See Kelsey, 30 Cal. App. 3d at 595. Accordingly, the court must grant defendants' motion for summary judgment with respect to plaintiffs' claim for a writ of mandate to compel the award of a Williamson Act contract.

IT IS THEREFORE ORDERED that plaintiffs' motion for summary judgment be, and the same hereby is, DENIED, and that defendants' motion for summary judgment be, and the same hereby is, GRANTED.

Dated: October 28, 2013

WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE