UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JOSEPH MOHAMED, SR. and SHIRLEY MOHAMED (as Trustees of the Joseph Mohamed Sr. and Shirley Mohamed Charitable Remainder Unitrust II), Plaintiffs, v. COUNTY OF SACRMENTO, a Public Agency; and BRIAN WASHKO (individually and as Chief Building Official for the County of Sacramento); and DOES 1 through 100, inclusive, Defendants.	No. 2:16-cv-01327-JAM-EFB **ORDER GRANTING DEFENDANTS' MOTION TO DISMISS**

Plaintiffs Joseph Mohamed Sr. and Shirley Mohamed filed this § 1983 action against Brian Washko and the County of Sacramento ("Defendants"). ECF No. 1. Defendants move to dismiss under Fed. R. Civ. P. 12(b)(6). ECF No. 5. Plaintiffs oppose the motion. ECF No. 7.[1]

[1] This motion was determined to be suitable for decision without oral argument. E.D. Cal. L.R. 230(g). The hearing was scheduled for September 20, 2016.

I. FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND

Plaintiffs own eighty acres of land in Sacramento County. Compl. ¶ 10. They entered into a land sale contract to sell that property to a third party. Id. An addendum to the contract stated that Plaintiffs would add to the purchase price any costs spent to improve the land. Id. ¶ 12. One improvement involved building a Planned Unit Development ("PUD"). Id. ¶ 13. Plaintiffs named it Alhambra Farms, and the plan included the Alhambra Farms Equestrian Center ("Equestrian Center"). Id.

In 2007, Plaintiffs discussed their PUD with the County of Sacramento ("County"). First, Plaintiffs submitted a pre-application meeting request, which included their proposal to build ten homes, a full-size riding arena, horse stables, a caretaker's home, and a private clubhouse. Id. ¶ 14. Five to six County departments met with Plaintiffs, including the Sacramento County Planning and Building Inspection Department ("PBI"). Id. ¶ 15. The Commissioners recommended that Plaintiffs build sixteen homes, each with five acres, and Plaintiffs amended their PUD proposal accordingly. Id.

Plaintiffs wanted their Equestrian Center to include "agricultural exempt" ("ag exempt") buildings. Sacramento County Code § 16.02.080 governs "ag exempt" building permits. When Plaintiffs applied for these permits, that Section stated, in relevant part, an "agricultural building" shall qualify for an "exempt building permit" if it is located on land with twenty or more acres used primarily for agricultural uses, and the following conditions are met:

A. An Exempt Building Permit is applied for by the

property owner or authorized agent.

B. A plot plan is submitted indicating the proposed building and all existing buildings on the subject parcel and showing for each the size, use, and location on the property in relation to property lines and other buildings.

C. The Director of the Planning and Community Development Department determines that the use and location of the proposed building is permitted by the Zoning Code of Sacramento County.

D. The proposed building is not located on a portion of the parcel that requires a minimum floor elevation (not in a flood plain).

E. A processing fee for the Exempt Building Permit is paid by the applicant to cover the required application, the initial site check, the final project inspection (to verify location of project) and maintenance of related Building Inspection records. The fee basis is 4 hours of a Building Inspector II's time at the current hourly billing rate.

F. Unless otherwise exempted by this Code, separate plumbing, electrical, and mechanical permits will be required (if included with the project) for the above exempted items.*

*If electrical, mechanical, or plumbing permits are required, floor plans describing the size and use of all rooms shall be submitted.

Id.

California Building Code § 202 defines an "agricultural building" as "[a] structure designed and constructed to house farm implements, hay, grain, poultry, livestock, or other horticultural products. This structure shall not be a place of human habitation or a place of employment where agricultural products are processed, treated, or packaged; nor shall it be a place used by the public." Id. (emphasis added).

Five years after their pre-planning discussions with the County, Plaintiffs submitted applications to PBI to receive "ag exempt" permits to construct the following buildings:

1. Hay Barn I
2. Agricultural Barn
3. Horse Stables
4. Riding Arena
5. Hay Barn II

See id. ¶¶ 18, 22.

Then Plaintiffs sent a letter to Roger Fuller, the PBI Inspector, confirming that these five buildings would not involve commercial use. Id. ¶ 24. Plaintiffs also submitted their plot plan. Id. ¶ 21. On October 15, 2012, the County approved Plaintiffs' plot plan and the "ag exempt" permits for all five buildings (the "Original Five"). Id. ¶¶ 21, 25.

Afterwards, Plaintiffs applied for several permits to add electrical and plumbing services. Id. ¶ 26. In addition to adding these services to the Original Five, Plaintiffs requested electrical services for a Restroom Building—a building they did not have a permit to build. Id. ¶¶ 26, 30. Nevertheless, the County issued the electrical and plumbing permits for the

Original Five and the Restroom Building. Id. ¶¶ 27-30.

Soon after, PBI inspectors began conducting final inspections. They started with Hay Barn I, the Agricultural Barn, and the Riding Arena. The inspectors raised questions to Brian Washko—Chief Building Official for the County—about whether these were, in fact, "ag exempt" buildings. Id. ¶¶ 5, 31. Yet, ultimately, the County approved Hay Barn I, the Agricultural Barn, and the Riding Arena. Id. ¶ 31. Then the PBI inspectors focused on Hay Barn II. After their final inspection, PBI inspectors raised the same questions to Washko, but, again, the County approved Hay Barn II as an "ag exempt" building. Id. ¶ 32.

After the County approved most of the Original Five as "ag exempt" buildings, Plaintiffs turned their attention to the Restroom Building. First, they submitted an application to install plumbing—even though, still, they did not have a permit to build the restroom itself. Id. ¶ 34. Then Plaintiffs met with Washko to discuss permits for the Restroom Building. Id. ¶ 35. Plaintiffs told Washko they wanted a permit to build the Restroom Building, and they gave Washko design drawings. Id. ¶¶ 35-36. Washko issued an "ag exempt" permit for the Restroom Building and told PBI personnel to add it to the existing permit for the Horse Stables. Id. ¶ 37.

Plaintiffs and Washko also discussed the Equestrian Center. They reviewed issued permits, Plaintiffs' completed work, and the County's inspections. Id. ¶ 35. Plaintiffs also informed Washko that they had nearly finished building the Original Five. See id.

But, in August 2014, Plaintiffs' Alhambra Farms project came to a halt. Although PBI inspectors had inspected the nearly complete Horse Stables and Restroom Building, Washko inspected the Equestrian Center and reached a new conclusion. Id. ¶¶ 39-40. He sent a letter to Plaintiffs (the "Washko Letter"), revoking permits for the Horse Stables, the Restroom Building, and the Riding Arena because they were intended for public—rather than agricultural—use and so they were not "ag exempt" buildings. Id. ¶¶ 40-41. The County never conducted final inspections for the Horse Stables or the Restroom Building, and all work on these buildings stopped. Id. ¶¶ 42-43. In January 2015, the County issued a "Notice of Violation" and "Stop Work Order" for the Horse Stables, the Restroom Building, and the Riding Arena. Id. ¶ 44.

Plaintiffs initiated the appeals process. First, they filed an administrative appeal with the Building Board of Appeals ("Board"). Id. ¶ 45. The Board upheld Washko's decision to revoke the permits for the Horse Stables, the Restroom Building, and the Riding Arena. Id. Then Plaintiffs appealed to the Sacramento County Superior Court. Id. ¶ 46. The Superior Court affirmed the Board's decision to revoke the "ag exempt" permits for the Horse Stables and the Restroom Building, but reversed the decision to revoke the permit for the Riding Arena. See Exh. U to Compl., Judgment on Writ of Mandate at 2. Plaintiffs appealed the Superior Court's decision regarding the Horse Stables and the Restroom Building to the Third District Court of Appeal. Compl. ¶ 47.

Plaintiffs also own two other properties they claim are at

issue here. The first property is located at Myrtle Avenue ("Myrtle Avenue Property"). Id. ¶ 59. The lot has a metal building (the "Garage"), which does not have a permit, though Plaintiffs allege the seller did not disclose this when they bought it. Id. Plaintiffs discovered the problem when they applied for a permit to add electrical power to the Garage, but the County issued a Notice of Violation. Id. Plaintiffs paid the necessary fees and requested a final inspection. Id. The PBI inspector passed the electrical work on one condition: Plaintiffs had to add slats to a fence. Id. The permit, however, was never finalized because Washko intervened and directed the PBI staff to not final the permits and to issue more notices of violation. Id. The County maintains that the Garage is a commercial building, so the entire property must conform to commercial standards. Id.

The second property is a commercial property ("Power Inn Property"). Id. Plaintiffs leased this property to A-1 Distributing, Inc. ("A-1"). Id. After the lease ended, A-1 did not restore the property to its pre-lease condition. Id. Plaintiffs realized that A-1 made physical changes in the building without obtaining the requisite permits. Id. Plaintiffs worked cooperatively with PBI personnel to receive the necessary permits and made repairs with the understanding that the County would not fine or penalize them. Id. Plaintiffs completed the corrective work and sought a final release from the County, but Washko refused to accept the terms previously agreed to by PBI personnel and Plaintiffs. Id. Washko would not issue final permits or sign off on the property unless Plaintiffs paid

fines and penalties. Id.

Plaintiffs sued Washko and the County in federal court under 42 U.S.C. § 1983. Plaintiffs allege that Defendants denied them procedural due process under the Fourteenth Amendment, retaliated against them for engaging in First Amendment activities, denied them equal protection of the law, and committed an unconstitutional taking under the Fifth Amendment. Defendants move to dismiss.

II. OPINION

A. Section 1983 Claims

Section 1983 vindicates federal rights, but does not itself constitute a substantive right. See Albright v. Oliver, 510 U.S. 266, 271 (1994) (internal citation omitted). To successfully bring a § 1983 claim, a plaintiff must show that "a person acting under color of state law committed the conduct at issue" and "that the conduct deprived the claimant of some right, privilege, or immunity protected by [federal law]." Leer v. Murphy, 844 F.2d 628, 632-33 (9th Cir. 1988). Simply put, § 1983 imposes liability for violating constitutional rights, but not for violating duties arising from tort law. See Baker v. McCollan, 443 U.S. 137, 146 (1979).

To allege a § 1983 claim against a city, a plaintiff must allege facts showing that the city had a custom or policy that caused the plaintiff's constitutional injury. See Monell v. Dep't of Soc. Servs., 436 U.S. 658, 694 (1978). A "policy or custom" under Monell is a "longstanding practice...which constitutes the 'standard operating procedure' of the local

government entity." Ulrich v. City & Cnty. of San Francisco, 308 F.3d 968, 984 (9th Cir. 2002) (internal citation omitted). "[T]he complaint must allege the policy, as well as its causal relationship to the constitutional injury, in sufficient detail." Hass v. Sacramento Cnty. Sheriff's Dep't, No. 2:13-cv-01746, 2014 WL 1616440, at *5 (E.D. Cal. Apr. 18, 2014).

B. Judicial Notice

Defendants ask the Court to take judicial notice of the following: (1) the Sacramento County Superior Court's Judgment on Writ of Mandate (attached to Defendants' Request for Judicial Notice ["RJN"] as Exh. A); and (2) the Superior Court's Ruling on Submitted Matter (Id.). RJN at 1-2. Both documents arise from the state court case. RJN at 2.

A court may take judicial notice of a fact that is not reasonably disputed if it "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2). On a motion to dismiss, courts may consider "matters of public record." Northstar Fin. Advisors Inc. v. Schwab Inv., 779 F.3d 1036, 1042 (9th Cir. 2015) (internal citation omitted). "Matters of public record" include court filings. See Reyn's Pasta Bella, LLC v. Visa USA, Inc., 442 F.3d 741, 746 n.6 (9th Cir. 2006) (courts may take judicial notice of court filings and other matters of public record).

The Court takes judicial notice of the Superior Court's Judgment on Writ of Mandate and its Ruling on Submitted Matter because both constitute matters of public record not subject to reasonable dispute.

C. Analysis

1. Issue Preclusion

Defendants argue that issue preclusion bars Plaintiffs' complaint because the Superior Court decided issues identical here. Mot. at 9-10. This doctrine "bars successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, even if the issue recurs in the context of a different claim." White v. City of Pasadena, 671 F.3d 918, 926 (9th Cir. 2012) (internal citation and quotation marks omitted). Under 28 U.S.C. § 1738, "a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." Id. (internal citation and quotation marks omitted).

To determine preclusive effect, a federal court follows state preclusion rules. See id. In California, issue preclusion applies when (1) the issue sought to be precluded from relitigation is identical to the issue decided in the former proceeding; (2) the issue was actually litigated in the former proceeding; (3) the issue was necessarily decided in the former proceeding; (4) that proceeding resulted in a final decision on the merits; (5) the party against whom preclusion is sought is the same as, or in privity with, the party to the former proceeding; and (6) applying issue preclusion would "[preserve] the integrity of the judicial system, [promote] judicial economy, and [protect] litigants from harassment by vexatious litigation." See Lucido v. Superior Court of Mendocino Cnty., 795 P.2d 1223, 1225-27 (Cal. 1990).

Defendants argue that issue preclusion bars this federal suit because the issues decided in Superior Court are identical to those here, the Superior Court issued a final judgment on the merits, and Plaintiffs were a party in the state case. Mot. at 9-12.

Plaintiffs disagree for two reasons. First, there is no final judgment because Plaintiffs appealed the Superior Court decision to the Third District Court of Appeal. Opp. at 10. Second, the issues raised in Superior Court differ from those here because they involve more constitutional claims. Id. Defendants do not address either point in their reply brief.

The Court agrees with Plaintiffs that issue preclusion does not apply. First, there is no final judgment because Plaintiffs have a pending appeal. Compl. ¶ 47; Opp. at 10. A final judgment exists when "prior adjudication of an issue in another action is...'sufficiently firm' to be accorded preclusive effect." Border Bus. Park, Inc. v. City of San Diego, 142 Cal. App. 4th 1538, 1564 (2006) (internal citations omitted). It is well settled under California law that a trial court judgment pending on appeal is not final. See CAL. CIV. PROC. CODE § 1049 (West 2016) ("An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied."). See also Border Bus. Park, Inc., 142 Cal.App.4th at 1564 (when assessing whether decision final, consider whether decision subject to appeal).

Second, the issues here vary from those raised in Superior Court. Here, Plaintiffs include facts about their Myrtle Avenue

and Power Inn Properties. Compl. ¶ 59. And Plaintiffs allege more constitutional violations (i.e., the First Amendment, the Equal Protection Clause under the Fourteenth Amendment, and the Fifth Amendment). Id. ¶¶ 59, 66, 73. In sum, issue preclusion does not bar Plaintiffs' complaint here.

2. First Cause of Action: Procedural Due Process Under the Fourteenth Amendment

Plaintiffs bring their first § 1983 claim against all Defendants, alleging that the Washko Letter, the County's subsequent "Notice of Violation" and "Stop Work Order," and the Board's administrative hearing denied them due process under the Fourteenth Amendment. Compl. ¶¶ 40-45. Specifically, Plaintiffs challenge Defendants' decision to revoke the "ag exempt" permits for the Horse Stable, the Restroom Building, and the Riding Arena. Id. ¶ 48.

The Fourteenth Amendment provides that "[n]o state shall...deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. To state a procedural due process claim, a plaintiff must allege (1) a protectable liberty or property interest, (2) the government deprived him of that interest, and (3) the government denied him adequate procedural protections. See Foss v. Nat'l Marine Fisheries Serv., 161 F.3d 584, 588 (9th Cir. 1998) (internal citations omitted).

Defendants argue that Plaintiffs have not stated a claim because they have not shown a lack of due process. Mot. at 14. Plaintiffs say they have because the Washko Letter, the County's subsequent notices, and the administrative hearing all occurred

without notice and without a reasonable opportunity to be heard at a hearing. Opp. at 13. Plaintiffs also allege that the hearing's restrictive time frame prevented them from presenting evidence about the County's pre-application involvement with Alhambra Farms or evidence about the County's zoning restrictions. Opp. at 13; Compl. ¶ 45. Defendants maintain that Plaintiffs conceded that the County did not deprive them of a fair hearing when they did not appeal that portion of the Superior Court's decision. Reply, ECF No. 8, at 2.

The Court finds that this claim should be dismissed, but for a different reason than that raised by Defendants. The threshold question under a Fourteenth Amendment claim is whether the claimant has a protectable property interest. Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972). A cognizable property interest is a "legitimate claim of entitlement" resulting from an independent source like federal or state law. Id. The Ninth Circuit has held that procedural due process claims based on discretionary decisions related to land use permit applications cannot be maintained. See Bateson v. Geisse, 857 F.2d 1300, 1305 (9th Cir. 1988) (affirming district court's conclusion that plaintiff did not have legitimate claim of entitlement to approval of his minor plat application). See also Richter v. City of Des Moines, No. C10-461MJP, 2012 WL 8671871, at *3-4 (W.D. Wash. Mar. 1, 2012) (concluding plaintiff lacked protectable property interest in proposed trail construction project because City had discretion whether to grant permit and plaintiff had not shown any local or state law entitling her to permit).

Defendants cited California Building Code § 105.6 as grounds for revoking Plaintiffs' "ag exempt" permits for the Horse Stables, the Restroom Building, and the Riding Arena. That Section provides:

> The Building Official may, in writing, suspend or revoke a permit issued under the provisions of this Code, or other relevant laws, ordinances, rules, or regulations, whenever the permit is issued in error or on the basis of incorrect, inaccurate, or incomplete information, or in violation of any ordinance or regulation of any of the provisions of this Code.

Id. (emphasis added).

Plaintiffs have no protectable property interest in the revoked permits. Section 105.6 uses discretionary language and gives Washko, as Chief Building Official, discretion whether to revoke a permit. Equally important, Plaintiffs have not shown any local or state law entitling them to these permits. Because Bateson squarely forecloses Plaintiffs' procedural due process claim, this Court grants Defendants' motion to dismiss the First Cause of Action.

Dismissal under Rule 12(b)(6) with prejudice and without leave to amend is appropriate "only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001) (citations and internal quotation marks omitted). The Superior Court held that the County improperly revoked Plaintiffs' permit for the Riding Arena, but it did not address whether Plaintiffs acquired a fundamental vested right in that revoked permit. See Exh. U to Compl., Ruling on Submitted Matter at 9. So, it is possible Plaintiffs can prove facts supporting their procedural due process claim as

to the revoked permit for the Riding Arena. The Court therefore dismisses the First Cause of Action with leave to amend.

3. Second Cause of Action: Retaliation in Violation of the First Amendment

Plaintiffs bring a second § 1983 claim against all Defendants, alleging that Defendants unfairly penalized them in "retaliation for, and to inhibit, the exercise of protected First Amendment activities." Compl. ¶ 59. Specifically, Plaintiffs claim Washko acted under County policy or custom when he engaged in retaliatory activities and ratified this treatment on the Myrtle Avenue and Power Inn Properties. Id.

To state a First Amendment retaliation claim, a plaintiff must allege that (1) he engaged in a constitutionally protected activity, (2) defendant's conduct would chill a person of ordinary firmness from future constitutionally protected activity, and (3) defendant's desire to chill plaintiff's speech was a but-for cause of their allegedly unlawful conduct. See Ford v. City of Yakima, 706 F.3d 1188, 1193 (9th Cir. 2013).

Defendants argue that Plaintiffs' claim must be dismissed because they only pled deprivations for which the County provided due process. Mot. at 14-15. They also note that issues related to the Myrtle Avenue and Power Inn Properties are unripe because Plaintiffs never appealed those claims to the County and, so, Plaintiffs have not satisfied the final decision requirement. Id. at 12. And, finally, Defendants contend that the County issued the Notice of Violation and other penalties before Plaintiffs appealed the revoked permits. Id. at 15 (emphasis added).

Conversely, Plaintiffs maintain that they have properly stated a claim. First, they emphasize that Defendants misconstrued their complaint: Plaintiffs included the Myrtle Avenue and Power Inn Properties to support their retaliation claim. Opp. at 11. Second, Plaintiffs explain that there exists a sufficient factual connection between these properties and the Equestrian Center because (1) Washko's refusal to issue a permit for the Myrtle Avenue Property came one month after he inspected the Equestrian Center; and (2) Washko's refusal to issue a permit for the Power Inn Property came nearly 1.5 years after the Washko Letter. Id. at 15 (emphasis added). In their reply brief, Defendants contend that they "[did] not address every argument made by Plaintiffs in their Opposition because they either do not make sense legally, or they were sufficiently addressed in the underlying motion." Reply at 4.

Both parties appear not to have addressed the dispositive issue. The threshold inquiry for a First Amendment retaliation claim involves assessing whether the claimant has engaged in a constitutionally protected activity. See Ford, 706 F.3d at 1193. But, here, Plaintiffs have not identified the activities they claim the First Amendment protects. They simply allege that Defendants violated their civil rights "by penalizing [them] unfairly in retaliation for, and to inhibit, the exercise of protected First Amendment activities." This conclusory allegation cannot survive Rule 8's pleading standard. See Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007) (holding that, to avoid dismissal, plaintiff must allege "enough facts to state a claim to relief that is plausible on its face"). This Court

dismisses this cause of action with leave to amend.

4. Third Cause of Action: Equal Protection Under the Fourteenth Amendment

Plaintiffs bring a third § 1983 claim against all Defendants, alleging that Defendants denied them equal protection of the law when Defendants imposed conditions on them they did not impose on persons similarly situated. Compl. ¶ 66. Plaintiffs also allege that Defendants acted under County policy or custom to ratify this disparate treatment. Id.

The Fourteenth Amendment provides that "[n]o state shall... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. "[T]he purpose of the equal protection clause of the Fourteenth Amendment is to secure every person...against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (internal citation and quotation marks omitted). Where, as here, state action does not implicate a fundamental right or a suspect classification, a claimant successfully brings a "class of one" equal protection claim when he "alleges that [he] has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." Id.

The parties dispute whether Plaintiffs have successfully stated a "class of one" claim. Defendants say that Plaintiffs have not because (i) they do not identify a similarly situated class or disparate treatment and (ii) they provide no factual

support. Mot. at 14. Conversely, Plaintiffs reiterate that Washko arbitrarily and unilaterally established different conditions for them. Opp. at 12. Plaintiffs also emphasize that when a plaintiff brings an equal protection claim based on selective enforcement of valid laws, that plaintiff can show that the defendant's rational basis is pretext for an impermissible motive. Id. at 13. Defendants repeat that they "[did] not address every argument made by Plaintiffs in their Opposition because they either do not make sense legally, or they were sufficiently addressed in the underlying motion." Reply at 4.

The Court agrees with Defendants. Plaintiffs have not stated a "class of one" equal protection claim because they neither identify persons similarly situated nor show any disparate treatment. See Olech, 528 U.S. at 563-65 (concluding plaintiffs successfully stated "class of one" claim after alleging Village required 33-ft easement for plaintiffs but 15-ft easements for similarly situated property owners). See also RUI One Corp. v. City of Berkeley, 371 F.3d 1137, 1156 (9th Cir. 2004) (alleging City treated larger Marina businesses differently from their competitors outside the Marina). The Court dismisses with leave to amend the Third Cause of Action against all Defendants.

5. Fourth Cause of Action: Takings Under the Fifth Amendment

Plaintiffs bring their final § 1983 claim against all Defendants, alleging that revoking the permits and Washko's

interference with the understanding between PBI personnel and Plaintiffs constituted unconstitutional takings. Compl. ¶ 73. Plaintiffs also allege that Defendants engaged in this conduct under County policy or custom that directed Defendants to unjustly implement the County Code. See id.

For a takings claim to be ripe for review, the claimant must satisfy two requirements: the final decision requirement and the compensation element. See Dodd v. Hood River Cnty., 59 F.3d 852, 858 (9th Cir. 1995). The Ninth Circuit has instructed lower Courts to decline to rule on takings claims when the facts show that the property owner has not received a final and definitive decision from a land use regulatory body. See id. Local decision-makers must be given an opportunity for review before a court considers ripe an as-applied challenge to a land use regulation. See id.

A state agency's final decision triggers the second ripeness requirement—the compensation element. A federal court lacks jurisdiction to consider an as-applied takings claim until the state denies "just compensation." See id. "No constitutional violation occurs until just compensation has been denied." Id. at 859 (internal citation and quotation marks omitted). A plaintiff satisfies this element if he pursued remedies available under state law. See id. at 860.

Defendants make two arguments in support of their motion to dismiss Plaintiffs' claim. First, Defendants argue that the takings claim is unripe for review because Plaintiffs never sought compensation from the County. Mot. at 13. Second, even if the claim is ripe, Plaintiffs' "diminution in value" claim

fails because they cannot show that the regulation prohibits all economically beneficial use of land since Plaintiffs concede that these buildings are not commercial properties. Id.

Plaintiffs, on the other hand, contend that their claim is ripe and they have stated a claim because they are seeking compensation now. Opp. at 12 (emphasis added). And Plaintiffs maintain that they have stated a claim because the way Defendants enforced the Sacramento County Code deprived them of all economically beneficial use of property. Id. at 11. Plaintiffs add that "[f]or the County to prevail, proving that the buildings have value, the County would have to change the zoning of the property." Id. at 12.

Defendants repeat in their reply that they "[did] not address every argument made by Plaintiffs in their Opposition because they either do not make sense legally, or they were sufficiently addressed in the underlying motion." Reply at 4.

The Court agrees with Defendants. Plaintiffs' takings claim is unripe for review. As to the revoked permits, Plaintiffs say nothing in their complaint about having sought compensation from the County. And their statement that the County denied them compensation, Opp. at 12, does not save them. A court evaluates a complaint based on its allegations, not new facts or claims raised in a Rule 12(b)(6) opposition brief. See Arres v. City of Fresno, No. CV F 10-1628, 2011 WL 284971, at *18 (E.D. Cal. Jan. 26, 2011) (emphasizing that allegations in opposition papers "are irrelevant for Rule 12(b)(6) purposes"). With respect to the Myrtle Avenue Property, Plaintiffs have not satisfied the final decision requirement because they never raised this issue with a

land use regulatory body. See Dodd, 59 F.3d at 858 (concluding final decision requirement met when Planning Director, County Planning Commission, and the Board of County Commissioners reviewed petition). Because Plaintiffs' takings claim is unripe for review, this Court dismisses with leave to amend the Fourth Cause of Action against all Defendants.

III. ORDER

For the reasons set forth above, the Court GRANTS WITH LEAVE TO AMEND Defendants' Motion to Dismiss. If Plaintiffs elect to submit a First Amended Complaint, they shall file it within twenty days of the date of this Order. Defendants shall file their responsive pleadings within twenty days thereafter.

IT IS SO ORDERED.

Dated: November 7, 2016

JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE