Alvarez et al v. Lake County Board of Supervisors et al Doc. 49

United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

EUREKA DIVISION

FLORIDALMA ALVAREZ,
YOURI BEZDENEJNYKH,

Plaintiffs,

v.

LAKE COUNTY BOARD OF SUPERVISORS,
et al.,

Defendants.
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No. CV 10-1071 NJV

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS (Docket No. 22)

Plaintiffs Floridalma Alvarez and Youri Bezdenejnykh filed their complaint on March 12, 2010, against Defendants Lake County Board of Supervisors, Lake County, Lake County Code Enforcement Manager (i.e., Manager of the County's Code Enforcement Division) Voris Brumfield in her individual and official capacity, and Director of Lake County Community Development Department Richard Coel in his individual and official capacity.[1] Compl. ¶ 29 & Ex. J (Doc. No. 1); Defs.' Request for Judicial Notice ("RJN"), Exs. 9 & 11 (Doc. Nos. 26-11 & 26-13). The Court granted Plaintiffs' motion for leave to proceed *in forma pauperis* ("IFP"), but did not address whether the complaint should be dismissed under 28 U.S.C. § 1915. (Doc. No. 12) The parties consent to the jurisdiction of this Court pursuant to 28 U.S.C. § 636(c). (Doc. Nos. 6 & 21) Defendants now move to dismiss the complaint, or alternatively, move for a more definite statement under Federal Rule of Civil Procedure 12(e). (Doc. No. 22) Plaintiffs have filed their opposition and Defendants have filed their reply. (Doc. Nos. 30 & 36) The parties also submitted

[1] The complaint also refers to Defendant Coel as the Director of the Lake County Planning Department, but it appears that Defendant Coel's correct title is Community Development Director. *See* Compl. ¶ 29; Defs.' RJN, Ex. 11.

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supplemental briefing as required by the Court. (Doc. Nos. 40 & 44) Having considered the arguments of the parties and the papers submitted, and for good cause shown, the Court **grants in part and denies in part** Defendants' motion.

I. BACKGROUND

Plaintiffs owned, but no longer currently own, property located at 10865 Pine Point Road in Cobb, California.[2] Compl. ¶ 6; Defs.' RJN, Ex. 1; Pls.' Opp. at 5 (conceding that Plaintiffs returned the underlying property to the seller). This action is based on Defendant Lake County Board of Supervisors' denial of Plaintiffs' building permit to build a home on their property and the Board's order to abate the nuisance requiring Plaintiffs to remove personal property and a storage facility on this property. Plaintiffs raise the following claims: (1) due process violations; (2) violation of the federal Fair Housing Act, 42 U.S.C. § 3604, for discrimination based on a handicap; (3) violation of Plaintiffs' right to "essential use of land;" (4) taking private property without just compensation, which resulted from Defendants' order to remove and dispose of Plaintiffs' building materials and personal property; (5) violation of Plaintiffs' rights under "land patent law;" (6) request for an order of cease and desist; and (7) intentional infliction of emotional distress. *See* Compl. ¶¶ 31-69. Plaintiffs also request that the Court prohibit Defendants from taking their property and demolishing Plaintiffs' building. Compl. ¶ 67. Though difficult to understand, it appears that Plaintiffs' due process claim is based on allegations that Defendant Board improperly functioned as a court in denying the building permit and issuing a nuisance order; California state judges are corrupt and therefore, this action could not be filed in state court; Plaintiffs were entitled to a jury trial because Defendants Board and County's decisions determined Plaintiffs' legal rights, but Plaintiffs' right to a jury was violated; and that the California Uniform Building Code is vague because it does not identify what buildings are regulated by the code. Compl. ¶¶ 17, 23, 32, 37, 38, 43-44. The Court interprets the complaint to allege only state law claims against Defendants Brumfield and Coel because the complaint does not raise allegations against either individual Defendant in its federal due process or Fair Housing Act claims.

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[2] Defendants have requested that the Court take judicial notice of documents establishing that Plaintiffs no longer own the underlying property, which is discussed in further detail in Sections II.B and II.E below on judicial notice and standing.

United States District Court
For the Northern District of California

Defendants move to dismiss the complaint for lack of subject matter jurisdiction under Rule 12(b)(1) and under Rule 12(b)(6) for failure to state a claim upon which relief can be granted, for lack of standing, failure to exhaust administrative remedies, and immunity. Alternatively, Defendants move for a more definite statement under Rule 12(e) because the complaint is so vague or ambiguous that Defendants cannot reasonably prepare a response.

In their reply, Defendants argue that Plaintiffs did not conform to the local rules and requirements for an opposition. Due to this failure, Defendants argue that Plaintiffs have waived their objections to the motion to dismiss. Defendants raise no other arguments in their reply. Defendants are correct that Plaintiffs' opposition does not conform to the local rules and is inartfully drafted in the format of a responsive pleading (e.g., referring to affirmative defenses, etc.). The Court denies Defendants' request, however, because Plaintiffs are proceeding pro se and courts generally interpret pro se pleadings and briefs liberally. *See, e.g., Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). However inartfully drafted, the Court is able to understand and infer Plaintiffs' arguments in opposition to Defendants' motion to dismiss.

On or about August 30, 2010, Plaintiff Alvarez submitted to the Court three documents: (1) Notice of Reneg of One Plaintiff Youri Ivanovich Bezdenejnykh; (2) Notice of Change of Address; (3) Notice of Unavailability of Plaintiff for the period September 19 through 30, 2010. Because Plaintiffs appear pro se, they may file documents by mail pursuant to the procedures set forth in the Court's Handbook for Litigants Without a Lawyer by mailing the documents, conforming with the requirements of Civil Local Rule 3-4, to the Clerk's Office, United States District Court for the Northern District of California, 450 Golden Gate Avenue, 16th Floor, San Francisco, CA 94102. Plaintiffs did not, however, provide a certificate of service demonstrating that she mailed a copy of these documents to defense counsel as required by Civil Local Rule 5-6. The Court has arranged to have these documents filed on the electronic docket and served electronically to defense counsel. For all future filings, however, the Court admonishes Plaintiffs to follow the Northern District of California's local rules, which are available on the Court's website, and the Federal Rules of Civil Procedure. Failure to comply with the Court's local rules or any applicable Federal Rules may be grounds for imposition of sanctions. Civil L.R. 1-4.

In order for Plaintiff Bezdenejnykh to be removed from this action, he must file a notice of withdrawal indicating whether he withdraws all his claims against Defendants. In the absence of such a notice filed by Plaintiff Bezdenejnykh, the Court will address Plaintiff Bezdenejnykh's withdrawal from the action at the next case management conference on a date to be proposed by the parties pursuant to the July 13, 2010 case management order, ¶ 7.

II. DISCUSSION

A. Legal Standards

A complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). While Rule 8 "does not require 'detailed factual allegations,'" a complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, --- U.S. ----, ----, 129 S.Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007)). Facial plausibility is established "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

In ruling on a motion to dismiss, courts may consider only "the complaint, materials incorporated into the complaint by reference, and matters of which the court may take judicial notice." *Metzler Inv. GMBH v. Corinthian Colleges, Inc.*, 540 F.3d 1049, 1061 (9th Cir. 2008). When matters outside the pleadings are presented on a Rule 12(b)(6) motion and are not excluded by the court, the court must convert the Rule 12(b)(6) motion to a Rule 56 summary judgment motion. Fed. R. Civ. P. 12(d).

We construe the complaint liberally because it was drafted by a pro se plaintiff. *Balistreri*, 901 F.2d at 699. When granting a motion to dismiss, the court is generally required to provide pro se litigants with "an opportunity to amend the complaint to overcome deficiencies unless it is clear that they cannot be overcome by amendment." *Eldridge v. Block*, 832 F.2d 1132, 1135-36 (9th Cir. 1987). In determining whether amendment would be futile, the court examines whether the complaint could be amended to cure the defect requiring dismissal "without contradicting any of the allegations of [the] original complaint." *Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 296 (9th Cir.

1990). Leave to amend should be liberally granted, but an amended complaint cannot allege facts inconsistent with the challenged pleading. *Id.* at 296-97.

1. Dismissal Under 28 U.S.C. § 1915(e)

Once an action is filed IFP, the court "shall dismiss the case *at any time* if the court determines that" the allegation of poverty is untrue, the action is frivolous or malicious, the action fails to state a claim upon which relief may be granted, or the action seeks monetary relief from defendants who are immune from such relief. 28 U.S.C. §1915(e)(2) (emphasis added); *see also Denton v. Hernandez*, 504 U.S. 25, 31-32 (1992), *superseded on other grounds as stated in Cruz v. Gomez*, 202 F.3d 593, 596 (2nd Cir. 2000); *Franklin v. Murphy*, 745 F.2d 1221, 1226-27 (9th Cir. 1984).

Dismissal for frivolousness prior to service under section 1915(e) is appropriate where no legal interest is implicated, i.e., where a claim is premised on an indisputably meritless legal theory or is clearly lacking any factual basis. *Neitzke v. Williams*, 490 U.S. 319, 327 (1989), *superseded on other grounds as stated in Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000).

a. Legal Frivolousness

A complaint lacks an arguable basis in law only if controlling authority requires a finding that the facts alleged fail to establish an arguable legal claim. *See Guti v. INS*, 908 F.2d 495, 496 (9th Cir. 1990) (per curiam). A complaint filed IFP is not frivolous within the meaning of section 1915(e) because it fails to state a claim under Federal Rule of Civil Procedure 12(b)(6). *See Neitzke*, 490 U.S. at 329-31. Under Rule 12(b)(6)'s failure-to-state-a-claim standard -- which is designed to streamline litigation by dispensing with needless discovery and fact-finding -- a court may dismiss a claim based on a dispositive issue of law without regard to whether it is based on an outlandish theory or on a close but ultimately unavailing one, whereas under section 1915(e)'s frivolousness standard -- which is intended to discourage baseless lawsuits -- dismissal is proper only if the legal theory or factual contentions lack an arguable basis. *See id.* at 324-28. Allowing courts to dismiss claims filed IFP for failure to state a claim sua sponte would deny indigent plaintiffs the practical protections of Rule 12(b)(6), namely, notice of a pending motion to dismiss and an opportunity to amend the complaint before the motion is ruled on. *Id.* at 329-30. Legal frivolity in the section

1915(e) context refers to a more limited set of claims than does Rule 12(b)(6), with the understanding that not all unsuccessful claims are frivolous. *Id*. at 329.

b. Factual Frivolousness

Section 1915 also accords judges the unusual power to pierce the veil of the complaint's factual allegations and dismiss those claims whose factual contentions are clearly baseless. *Denton*, 504 U.S. at 32. Examples are claims describing fantastic or delusional scenarios. *Id*. at 32-33. To pierce the veil of the complaint's factual allegations means that a court is not bound, as it usually is when making a determination based solely on the pleadings, to accept without question the truth of the plaintiff's allegations. *Id*. at 32. But, this initial assessment of the IFP plaintiff's factual allegations must be weighted in favor of the plaintiff. *Id*. A frivolousness determination cannot serve as a fact-finding process for the resolution of disputed facts. *Id*. A finding of factual frivolousness is appropriate when the facts alleged rise to the level of the irrational or the wholly incredible, whether or not there are judicially noticeable facts available to contradict them. *Id*. But the complaint may not be dismissed simply because the court finds the plaintiff's allegations unlikely or improbable. *Id*. at 33.

2. Rule 12(b)(1) Subject Matter Jurisdiction

Federal courts are courts of limited jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994). They may only adjudicate cases involving a federal question, diversity of citizenship, or where the United States is a party. A federal court has jurisdiction to determine whether it has subject matter jurisdiction. *See United States v. United Mine Workers of America*, 330 U.S. 258, 292 n.57 (1947).

A complaint must be dismissed if there is a "lack of jurisdiction over the subject matter." Fed. R. Civ. P. 12(b)(1). A jurisdictional challenge under Rule 12(b)(1) may be made either on the face of the pleadings or by presenting extrinsic evidence disputing the truth of the allegations. *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003). The plaintiff bears the burden of demonstrating that subject matter jurisdiction exists over the complaint when challenged under Rule 12(b)(1). *Tosco Corp. v. Communities for a Better Env't*, 236 F.3d 495, 499 (9th Cir. 2001) (per curiam), *overruled on other grounds by Hertz Corp. v. Friend*, --- U.S. ----, 130 S. Ct.

1181 (2010). "'A plaintiff suing in a federal court must show in his pleading, affirmatively and distinctly, the existence of whatever is essential to federal jurisdiction, and, if he does not do so, the court, on having the defect called to its attention or on discovering the same, must dismiss the case, unless the defect [can] be corrected by amendment.'" *Id.* (quoting *Smith v. McCullough*, 270 U.S. 456, 459 (1926)).

3. Rule 12(b)(6) Failure to State a Claim

Dismissal under Rule 12(b)(6) is appropriate if the complaint does not give the defendant fair notice of a legally cognizable claim and the grounds on which it rests. *Twombly*, 550 U.S. at 555. Dismissal of a complaint can be based on either the lack of a cognizable legal theory or the lack of sufficient facts alleged under a cognizable legal theory. *Balistreri*, 901 F.2d at 699. In considering whether the complaint is sufficient to state a claim, the court will take all material allegations as true and construe them in the light most favorable to the plaintiff. *NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). Although the court is generally confined to consideration of the allegations in the pleadings, when the complaint is accompanied by attached documents, such documents are deemed part of the complaint and may be considered in evaluating the merits of a Rule 12(b)(6) motion. *Durning v. First Boston Corp.*, 815 F.2d 1265, 1267 (9th Cir. 1987).

B. Judicial Notice

Defendants request that the Court take judicial notice of various documents. Courts may take judicial notice of facts that are "either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). In summary, the Court (1) grants Defendants' request to take judicial notice of Exhibits 1, 6, 12 and 13; (2) denies Defendants' request to take judicial notice of Exhibits 2, 3, 4, 5, 7, 8, 9, and 10;[3] and (3) concludes that Exhibit 11 is incorporated into the complaint by reference.

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[3] The Court notes that its exclusion of documents that are not properly subject to judicial notice and that are outside the pleadings prevents conversion of this motion to dismiss to a motion for summary judgment under Rule 12(d).

1. Documents Judicially Noticed

The Court grants Defendants' request to take judicial notice of Exhibits 1, 6, 12 and 13. Exhibit 1 comprises documents regarding the ownership of the property underlying this action at 10865 Pine Point Road, California. *See* Defs.' RJN, Ex. 1 (grant deed, deed of trust, quitclaim deeds, notice of pendency of action in state court). These property and court documents are capable of accurate and ready determination. *See* Fed. R. Evid. 201(b).

Exhibit 6 is comprised of various codes and ordinances including Cal. Building Code § 105.1, Lake County Zoning Ordinance § 21-9.3, and Lake County Code Chapter 5 §§ 5-14.1 and 5-14.4. These provisions are capable of accurate and ready determination. *See* Fed. R. Evid. 201(b).

Defendants submitted Exhibits 12 and 13 in response to the Court's order requiring supplemental briefing on Defendants' contention that Defendant Coel is immune from liability under California Government Code Section 820.9. Both Exhibit 12, a minute order of the Board of Supervisors, and Exhibit 13, publicly available documents concerning the Community Development Department, are capable of accurate and ready determination.

2. Denial of Judicial Notice

The Court denies Defendants' request to take judicial notice of Exhibits 2, 3, 4, 8, and 9 as duplicative and/or unnecessary. Exhibit 2 is a copy of the complaint and exhibits attached to the complaint. It is unnecessary for the Court to take judicial notice of the pleadings, which the Court is required to examine in ruling on a motion to dismiss. Exhibit 3 is the parties' stipulation to extend the filing of Defendants' response to the complaint. It is unnecessary for the Court to take judicial notice of this filing. Exhibit 4 is Article 70 § 21-70 of the Lake County Code regarding Reasonable Accommodation, which is already attached and incorporated into the complaint as Exhibit Z to the complaint. Exhibit 8 is the September 2, 2009 Final Notice to Comply addressed to Plaintiffs, which is already attached and incorporated into the complaint as Exhibit E.1 to the complaint. Exhibit 9 is Defendant Brumfield's September 8, 2009 letter to Plaintiffs, which is already attached and incorporated into the complaint as Exhibit J to the complaint.

The Court also denies Defendants' request to take judicial notice of Exhibits 5, 7, and 10 because these documents are not generally known by the Court and are not capable of accurate and

ready determination. *See* Fed. R. Evid. 201(b). Exhibit 5 consists of (1) Defendant Coel's September 22, 2009 internal memorandum to the Board of Supervisors recommending denial of Plaintiffs' fee waiver request; (2) a building inspection notice dated July 28, 2009; (3) various maps; and (4) a September 22, 2009 internal memorandum from the County's Health Services Director to the Board of Supervisors expressing the Director's opposition to Plaintiffs' request to waive environmental health fees. Exhibit 7 consists of Defendants' photographs "evidencing illegal structures and property" at the site of the underlying property. Exhibit 10 is an internal memorandum dated November 6, 2009 from Defendants Coel and Brumfield to the Board of Supervisors regarding the December 1, 2009 nuisance abatement hearing for Plaintiffs. This internal memorandum includes an investigative summary and recommendation for the Board of Supervisors.

These documents are not generally known by the Court and are not capable of accurate and ready determination. *See* Fed. R. Evid. 201(b). In addition, Defendants' internal memoranda in Exhibits 5 and 10 constitute hearsay whose reliability and accuracy have not been established. The Court also notes that Defendants simply attached several photographs in Exhibit 7 without providing any foundation, authenticity, or dates for some of the photographs, which further demonstrates the impropriety of taking judicial notice of these photographs. These types of documents, which are outside the pleadings and are not subject to judicial notice, are more properly presented at the summary judgment stage if Defendants establish the documents' admissibility.

3. Incorporation into the Complaint

Exhibit 11 is Defendant Coel's letter to Plaintiffs dated December 23, 2009, responding to Plaintiffs' letter requesting reasonable accommodation which Plaintiffs attached to the complaint as Exhibit I. The Court concludes that Exhibit 11 is incorporated into the complaint by reference where Plaintiffs specifically allege that Defendants failed to provide reasonable accommodation as required by Article 70 § 21-70 of the Lake County Code, attach to the complaint their letter requesting reasonable accommodation, and attach to the complaint Article 70 § 21-70 regarding reasonable accommodation. *See* Compl. ¶ 40, Exs. I & Z.

C. Dismissal Under 28 U.S.C. § 1915(e)

The complaint does not rise to the level of factual frivolousness to warrant dismissal under § 1915(e) because the facts alleged, while difficult to understand at times, are not clearly baseless, irrational, or wholly incredible. Dismissal for legal frivolousness under § 1915(e) is proper only if the legal theory or factual contentions lack an arguable basis, which is not the case here. *See Neitzke*, 490 U.S. at 324-28. Therefore, the complaint is not frivolous to warrant dismissal under § 1915(e).

Defendants also argue that the complaint should be dismissed under § 1915(e) because it was brought without good faith and with malice, but provide little support for their argument besides stating that Plaintiffs are "disgruntled" and returned the underlying property back to the seller. The Court concludes that the action is not malicious to warrant dismissal under § 1915(e).

D. Subject Matter Jurisdiction

Defendants, without citing to any legal authority, argue that the complaint should be dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) because Plaintiffs failed to comply with Local Rule 3.8. This rule, which is based on 28 U.S.C. § 2403, requires parties to provide notice when the federal or state government, any agency, officer or employee is not a party to the action and the action challenges the constitutionality of a federal or state statute. Defendants are incorrect. First, the failure to provide notice to the federal or state government under 28 U.S.C. § 2403 does not affect whether the court has subject matter jurisdiction over an action. *See, e.g.*, *Tonya K. by Diane K. v. Board of Educ. of City of Chicago*, 847 F.2d 1243, 1247 (7th Cir. 1988); *Wallach v. Lieberman*, 366 F.2d 254, 257-58 (2d Cir. 1966); *Kealey Pharmacy & Home Care Services, Inc. v. Walgreen Co.*, 761 F.2d 345, 350 n. 8 (7th Cir. 1985). Second, Plaintiffs challenge Lake County's municipal Building Code, which is not a state "statute" under 28 U.S.C. § 2403 and therefore, notice is not required here. *See International Paper Co. v. Inhabitants of Town of Jay, Me.*, 887 F.2d 338, 340-41 (1st Cir. 1989). Therefore, Defendants' subject matter jurisdiction argument fails.

E. Standing

Defendants argue that the complaint should be dismissed for failure to state a claim upon which relief can be granted under Rule 12(b)(6) because Plaintiffs lack standing. To establish Article III standing Plaintiffs must show the following elements: (1) injury in fact; (2) causation; and (3) redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Defendants argue that Plaintiffs lack standing because neither Plaintiff currently owns the property that is the subject of this action and the remedies sought can only be pursued by the property owner. Plaintiff Bezdenejnykh transferred his interest in the property to Plaintiff Alvarez on March 1, 2010, which occurred before this action was filed on March 12, 2010. *See* Defs.' RJN, Ex. 1. Plaintiff Alvarez then transferred the entire property back to the seller on March 22, 2010. *See* Defs.' RJN, Ex. 1. Plaintiffs conceded at the hearing that they returned the underlying property to the seller. *See* Pls.' Opp. at 5.

"Generally stated, federal standing requires an allegation of a present or immediate injury in fact, where the party requesting standing has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues.'" *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804 (1985) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). Article III requires the plaintiff not only to allege a "'distinct and palpable injury to himself,'" but must also "maintain a 'personal stake' in the outcome of the litigation throughout its course." *Gollust v. Mendell*, 501 U.S. 115, 126 (1991). Because Plaintiffs no longer have an ownership interest in the property, they lack standing to pursue the Third or Fifth Causes of Action which allege that Defendants violated a right to the "essential use of the land,"and violated Plaintiffs' rights as "land patent" owners. To the extent that the Fourth Cause of Action claims that Defendants violated Plaintiffs' "rights inherent to the Chain of Deeds linking back to the issuance of our Land Grant and no third parties can convert, alter, change, or amend our Deed, or use by deceit, extortion, fear, and threats to amend any Deed, steal any Deed, or convert ownership to public or government use," Plaintiffs lack standing to pursue an inverse condemnation claim because, as they conceded at the hearing on the motion to dismiss, they returned the property to the seller and no longer own the property. Compl. ¶ 60. *See Williams v. Boeing Co.*, 517 F.3d 1120, 1127 (9th Cir.

2008) ("In addition to having standing at the outset, a plaintiff's stake in the litigation must continue throughout the proceedings, including on appeal.") (citing *Employers-Teamsters Local Nos. 175 & 505 Pension Trust Fund v. Anchor Capital Advisors*, 498 F.3d 920, 923 (9th Cir. 2007)). To the extent that the Fourth Cause of Action alleges that Defendants deprived Plaintiffs of their building materials by ordering removal or abatement of those materials, Compl. ¶¶ 3, 60, this claim is subsumed in the First Cause of Action alleging deprivation of property without due process of law, discussed below. The Third, Fourth and Fifth Causes of Action are therefore dismissed for lack of standing, and on the alternative grounds of failure to state a claim as discussed in Section II.F, *infra*.

Furthermore, given that Plaintiffs no longer own the underlying property, Plaintiffs' requests for equitable relief regarding the underlying property (i.e., that the Court prohibit Defendants from taking their personal property, demolishing Plaintiffs' buildings, and engaging in enforcement activities) are moot. Compl. ¶¶ 66-67 ("Sixth Cause of Action"), 73, 75. The requested relief for a "cease and desist" order regarding the underlying property and the Sixth Cause of Action are **dismissed without prejudice**. Paragraphs 66, 67, 73, and 75 are stricken from the complaint.

As to the First, Second and Seventh Causes of Action, however, under the liberal Rule 12(b)(6) pleading standard, Plaintiffs have alleged sufficient injury to establish standing on their claims for due process violations, Fair Housing Act violations and for intentional infliction of emotional distress. *See Lujan v. Defenders of Wildlife*, 504 U.S. at 561 ("[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice" to demonstrate injury for standing); *Williams v. Boeing Co.*, 517 F.3d at 1127. Plaintiffs allege that Defendants wrongfully required Plaintiffs to obtain a building permit then refused to issue a building permit to Plaintiffs and that the refusal to issue the building permit was motivated by racial animus. Compl. ¶¶ 3, 7. Plaintiffs allege that the relevant provision of California Uniform Building Codes adopted by the Lake County government is void for vagueness. Compl. ¶¶ 38 - 44. Plaintiffs further allege that Defendant Board of Supervisors issued an abatement order to remove Plaintiffs' storage building and about $40,000 of building materials. Compl. ¶ 8, 26. Plaintiffs also allege that Defendants discriminated against them on the basis of race, alleging racial animus, and on the basis of disability by denying a dwelling due to Plaintiffs' handicap in violation of the Fair Housing Act

and the Fair Housing Amendments Act of 1988. Compl. ¶ 52. *See Budnick v. Town of Carefree*, 518 F.3d 1109, 1113 and n.5 (9th Cir. 2008) ("The FHAA forbids discrimination in the sale or rental of housing, which includes making unavailable or denying a dwelling to a buyer or renter 'because of a handicap of . . . a person residing in or intending to reside in that dwelling after it is sold, rented, or made available.'") (quoting 42 U.S.C. § 3604(f)(1)(B)). These allegations of injury are sufficient to defeat the motion to dismiss the First, Second and Seventh Causes of Action on the ground of lack of standing.

Defendants contend that Plaintiffs lack standing to assert a claim for the loss of their personal property because they fail to show a sufficient causal connection between Defendants' removal order and Plaintiffs' decision to place "notices on bulletin boards advertising free lumber and building materials," Compl. ¶ 8, and to dispose of the materials rather than store them elsewhere. See Defs.' Suppl. Br. at 3 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. at 560-61). The Ninth Circuit has held, however, that direct, personal participation is not necessary to establish liability for a constitutional violation. *See Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir.1978). Rather, the critical question is whether the violation was reasonably foreseeable. *Wong v. U.S.*, 373 F.3d 952, 966 (9th Cir. 2004). Plaintiffs allege that Defendants acted intentionally to interfere with Plaintiffs' rights to build on their property. Compl. ¶ 13, 14. Construed in the light most favorable to Plaintiffs, the allegations of the complaint are sufficient to allege that Plaintiffs' loss was a reasonably foreseeable result of the abatement order requiring removal of Plaintiffs' personal property, satisfying the causation requirement for standing.

Because Defendants challenge the claims generally for failure to state a claim, as well as on standing grounds, the Court proceeds to address the elements of the cognizable claims.

F. Dismissal Under Rule 12(b)(6) for Failure to State a Claim

1. Cognizable Claims

As to the First Cause of Action, the allegations of due process violations, liberally construed, state a claim under 42 U.S.C. § 1983 for deprivation of property without due process and state a challenge to Section 106.1 of the Building Code as void for vagueness. "To establish a § 1983 claim, a plaintiff must show that an individual acting under the color of state law deprived him of a

right, privilege, or immunity protected by the United States Constitution or federal law." *Levine v. City of Alameda*, 525 F.3d 903, 905 (9th Cir. 2008) (citing *Lopez v. Dept. of Health Servs.*, 939 F.2d 881, 883 (9th Cir.1991)). "To establish a due process violation, a plaintiff must show that he has a protected property interest under the Due Process Clause and that he was deprived of the property without receiving the process that he was constitutionally due." *Id*. (citing *Clements v. Airport Authority of Washoe County*, 69 F.3d 321, 331 (9th Cir.1995)).

> Section 1983 provides, in pertinent part, that '(e)very person who, under color of any statute of any state . . ., subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . .' (42 U.S.C. § 1983.) A person 'subjects' another to the deprivation of a constitutional right, within the meaning of section 1983, if he does an affirmative act, participates in another's affirmative acts, or omits to perform an act which he is legally required to do that causes the deprivation of which complaint is made. (*Sims v. Adams* (5th Cir. 1976) 537 F.2d 829.) Moreover, personal participation is not the only predicate for section 1983 liability. Anyone who 'causes' any citizen to be subjected to a constitutional deprivation is also liable. The requisite causal connection can be established not only by some kind of direct personal participation in the deprivation, but also by setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury.

Johnson, 588 F.2d at 743 -744. Construed in the light most favorable to Plaintiffs, the allegations are sufficient to state a procedural due process claim based on Defendants wrongfully requiring, then denying, a building permit and causing Plaintiffs' loss of personal property allegedly valued at $40,000 in building materials and $42,000 in personal belongings. Compl. ¶ 11. With respect to causation of Plaintiffs' alleged injuries, the "critical question is whether it was reasonably foreseeable" that Defendants' actions would lead to Plaintiffs' loss of property. *Wong v. U.S.*, 373 F.3d 952, 966 (9th Cir. 2004).

Plaintiffs' complaint sufficiently alleges a due process claim under Section 1983 against the Board of Supervisors, but fails to identify what role, if any, the individual defendants Brumfield and Coel had in the denial of the building permit and in the loss of Plaintiffs' property. In their opposition to the motion to dismiss (Doc. No. 30), Plaintiffs allege that Defendant Coel "ordered his personnel to refuse payment for the final building permit being processed by the Plaintiff, an act that constituted discrimination by reason of the interference of Defendants . . . and their wrongful and

unjustified refusal to grant the building permit being demanded by their own departments." Opp. at 3. Plaintiff may not raise new allegations in opposition to a motion to dismiss, but may amend the complaint properly to allege constitutional violations by the individual defendants, including factual allegations, if any, as to whether the individuals knew or reasonably should have known that Plaintiffs would lose their personal property upon denial of the building permit. *See Wong*, 373 F.3d at 967.

The First Cause of Action states a separate claim for relief challenging Section 106.1 of the Lake County Building Code as void for vagueness. To survive a void for vagueness challenge, an ordinance must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). "A law is void for vagueness if persons 'of common intelligence must necessarily guess at its meaning and differ as to its application. . . .' The offense to due process lies in both the nature and consequences of vagueness." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 290 n.12 (1982) (quoting *Aladdin's Castle, Inc. v. City of Mesquite*, 630 F.2d 1029, 1037 (5th Cir. 1980)) (citations omitted). The void for vagueness doctrine protects basic principles of due process. "First, vague laws do not give individuals fair notice of the conduct proscribed. Second, vague laws do not limit the exercise of discretion by law enforcement officials; thus they engender the possibility of arbitrary and discriminatory enforcement. Third, vague laws defeat the intrinsic promise of, and frustrate the essence of, a constitutional regime. We remain 'a government of laws, and not of men,' only so long as our laws remain clear." *Id.* (citations omitted). Liberally construed, Plaintiffs' allegations state a due process challenge to Section 106.1 of the Building Code as unconstitutionally vague as applied to Plaintiffs. *See U.S. v. Other Medicine,* 596 F.3d 677, 682 (9th Cir. 2010) ("[V]agueness challenges to statutes that do not involve First Amendment violations must be examined as applied to the defendant.") (citations omitted).

To the extent that the First Cause of Action purports to state a claim for violation of Plaintiffs' right to jury trial under the Seventh Amendment, Compl. ¶¶ 17, 32-37, the Seventh Amendment challenge is dismissed for failure to state a claim. Plaintiffs allege that Defendant Board improperly functioned as a court in denying the building permit and issuing a nuisance order,

that Plaintiffs were entitled to a jury trial because Defendants' decisions determined Plaintiffs' legal rights, and that Defendants violated Plaintiffs' right to jury trial. *Id*. Plaintiffs also complain that under state court procedures, there is no opportunity for them to present their issues before a jury in state court, alleging further that county governments commonly bribe state judges to influence their decisions. Compl. ¶ 17. The Ninth Circuit has recognized that the Seventh Amendment applies only to proceedings in courts of the United States, and that the creation of administrative remedies may eliminate rights that may have been available in the judicial forum. *Jackson Water Works, Inc. v. Public Utilities Com'n of State of Cal.,* 793 F.2d 1090, 1096 (9th Cir. 1986) (citing *Minneapolis & St. Louis Railroad Co. v. Bombolis*, 241 U.S. 211, 217 (1916); *Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Commission*, 430 U.S. 442, 460 (1977)). *See also City of Monterey v. Del Monte Dunes at Monterey, Ltd.,* 526 U.S. 687, 719 (1999) ("It is settled law that the Seventh Amendment does not apply" to suits brought in state courts) (citations omitted). Plaintiffs' Seventh Amendment claim, as liberally construed by the Court, is therefore **dismissed** for failure to state a cognizable claim.

With respect to the Second Cause of Action, the allegations support a claim under the Fair Housing Act and Fair Housing Amendments Act for race-based discrimination, alleging an anti-Hispanic remark by a member of the Lake County Board of Supervisors. Compl. ¶ 7. *See Budnick*, 518 F.3d at 1113-14 (Title VII discrimination analysis is used to examine claims under the FHAA; thus, a plaintiff may establish discrimination in violation of the FHAA under a theory of disparate treatment or disparate impact). To bring a disparate treatment claim, Plaintiffs must allege the elements of a prima facie case: (1) Plaintiffs are members of a protected class; (2) Plaintiffs applied for a building permit and were qualified to receive it; (3) the permit was denied despite Plaintiffs being qualified; and (4) Defendants approved a building permit for a similarly situated party during a period relatively near the time Plaintiffs were denied their permit. *Gamble v. City of Escondido*, 104 F.3d 300, 305 (9th Cir. 1997). Liberally construed, the complaint sufficiently alleges a claim of disparate treatment based on race in violation of the Fair Housing Act. Compl. ¶ 7 (alleging denial of building permit based on anti-Hispanic motive and alleging that similarly situated owners in the

United States District Court
For the Northern District of California

neighborhood have been issued building permits under similar circumstances regarding lack of a public water system and availability of private water system).

The complaint does not, however, properly allege discrimination on the basis of disability because it does not identify Plaintiffs' disability, to which Plaintiffs referred at the hearing. Though the complaint attaches a November 24, 2009, letter concerning Plaintiff Bezdenejnykh's disabling condition, Compl. Ex. L, Plaintiffs must amend the complaint to allege their disabilities to support a FHAA claim for disability discrimination. The complaint also fails to include factual allegations about specific conduct by individual defendants Coel and Brumfield to support their Fair Housing Act claims. Plaintiffs may amend their complaint properly to allege a disability-based discrimination claim under the FHAA and to include allegations, if any, of discriminatory conduct by individual defendants.

The Seventh Cause of Action alleges a state law claim of intentional infliction of emotional distress. "A cause of action for intentional infliction of emotional distress exists when there is (1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct." *Hughes v. Pair*, 46 Cal.4th 1035, 1050 (2009) (quotations omitted). Liberally construed, the allegations of the complaint are sufficient to state a claim for intentional infliction of emotional distress. The Seventh Cause of Action for intentional infliction of emotional distress is dismissed, however, on the ground of state law immunity, discussed in Section II.H, below.

2. Dismissed Claims

As discussed in Section II.E above, Plaintiffs lack standing to bring their Third through Sixth Causes of Action which are dismissed with prejudice. The Third, Fourth and Fifth Causes of Action are dismissed on the alternative grounds that they fail to state a cognizable claim.

a. Third Cause of Action: "Essential Use of Land"

Plaintiffs allege that Defendants violated Plaintiffs' right to the "essential use of land." Compl. ¶¶ 55-58. Even when liberally interpreting the pleadings given Plaintiffs' pro se status, the

Court cannot discern a valid cause of action from Plaintiffs' allegations. Plaintiffs therefore fail to state a claim upon which relief can be granted. To the extent that Plaintiffs challenge Defendants' abatement of the nuisance, this is subsumed within the First Cause of Action. In addition, Plaintiffs allege the following: "We own the property . . . . We have complete and absolute dominion in our property; which is the union of the title and the exclusive use of it." Compl. ¶ 55. To the extent that this cause of action is based on Plaintiffs' current ownership of the underlying property, it is also properly dismissed because Plaintiffs concede that they no longer own the underlying property. *See* Defs.' RJN, Ex. 1; Pls.' Opp. at 5. The Third Cause of Action is therefore **dismissed without prejudice**.

b. Fourth Cause of Action: "Taking Private Property Without Just Compensation"

Plaintiffs' Fourth Cause of Action is entitled "taking private property without just compensation." *See* Compl. ¶¶ 59-61. Plaintiffs allege that "[t]he county is forbidden to order us to repair, remodel, or demolish our own property according to the dictates of any city or county agent." Compl. ¶ 60. The Court construes this cause of action as an inverse condemnation claim under the Fifth Amendment and concludes that Plaintiffs have failed to adequately plead an inverse condemnation claim. *See* Defs.' Mot. at 10-13.

The Fifth Amendment provides in relevant part that "private property [shall not] be taken for public use, without just compensation." As the Supreme Court has frequently noted, "this provision does not prohibit the taking of private property, but instead places a condition on the exercise of that power." *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 82 U.S. 304, 314 (1987) (citations omitted). An as-applied takings claim is not ripe until the property owner has received a "final decision" from the appropriate regulatory entity as to how the challenged law will be applied to the property at issue and further attempted to obtain just compensation for the loss of his or her property through the procedures provided by the state for obtaining such compensation and been denied. *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 192-95 (1985). Although there is no requirement that a plaintiff exhaust administrative remedies before bringing a § 1983 action, *Patsy v. Florida Board of Regents*, 457

U.S. 496 (1982), a takings claim brought under § 1983 is not ripe until that landowner has pursued compensation through state remedies unless doing so would be futile. *Hacienda Valley Mobile Estates v. City of Morgan Hill*, 353 F.3d 651, 655 (9th Cir. 2003) (citing *Williamson County*, 473 U.S. at 194-95).

Even when viewing the facts in the light most favorable to Plaintiffs, Plaintiffs have failed to plead an inverse condemnation claim because they do not allege that they availed themselves of all the available administrative procedures for just compensation. *Williamson County*, 473 U.S. at 194-95. Therefore, Plaintiffs fail to state a claim upon which relief can be granted and the Fourth Cause of Action is **dismissed without prejudice**.

c. Fifth Cause of Action: "Land Patent Law"

Plaintiffs allege that Defendants violated Plaintiffs' rights as "land patent" owners of the underlying property. Compl. ¶¶ 63-65. Even when liberally interpreting the pleadings given Plaintiffs' pro se status, the Court cannot discern a valid cause of action from Plaintiffs' allegations. Plaintiffs therefore fail to state a claim upon which relief can be granted. In addition, Plaintiffs allege the following: "I am the exclusive holder of the patent to the land and home, which is the subject of this complaint, and thereby have exclusive ownership, right, title, estate and interest in the land and home, which is the subject of this complaint." Compl. ¶ 64. To the extent that this cause of action is based on Plaintiffs' current ownership of the underlying property, it is also properly dismissed because Plaintiffs concede that they no longer own the underlying property. *See* Defs.' RJN, Ex. 1; Pls.' Opp. at 5. The Fifth Cause of Action is **dismissed without prejudice**.

G. Exhaustion - Reasonable Accommodation Regarding Permit Fees

Defendants contend that the complaint should be dismissed because Plaintiffs failed to exhaust their administrative remedies. *See Ritza v. International Longshoremen's and Warehousemen's Union*, 837 F.2d 365, 368-69 (9th Cir. 1988) (failure to exhaust nonjudicial remedies is properly raised as an unenumerated 12(b) motion). Defendants argue that Plaintiffs failed to exhaust because they did not properly submit a request for reasonable accommodation to waive the permit fees as required by the County. Defs.' Mot. at 7. After a proper request is submitted, the County makes a decision on the request and the party may also use the appeals

process to challenge the decision. *See* Compl., Ex. Z (Article 70 § 21-70 of the Lake County Code regarding Reasonable Accommodation); Defs.' RJN, Ex. 11; *see also* Defs.' Mot. at 7.

The Court finds that Plaintiffs failed to exhaust their administrative remedies for reasonable accommodation to waive the County's permit fees because Plaintiffs did not follow the County's requirements for requesting reasonable accommodation under Article 70 § 21-70 of the Lake County Code, and because Defendants provided Plaintiffs with notice of the deficiency in their request. *See* Compl., Exs. I (Plaintiffs' letter requesting reasonable accommodation) & Z (Article 70 § 21-70); Defs.' RJN, Ex. 11 (Defendant Coel's letter dated Dec. 23, 2009). Because Plaintiffs failed to pursue the available administrative remedies, the Court **dismisses** without prejudice Plaintiffs' claim for waiver of permit fees and the Fourth Cause of Action for taking without just compensation. *Williamson County*, 473 U.S. at 192-95.

Defendants are incorrect in arguing that the failure to exhaust remedies for seeking reasonable accommodation justifies dismissing the *entire* complaint. Although the failure to exhaust administrative remedies regarding Plaintiffs' request for permit fee waiver bars Plaintiffs' due process claim for just compensation on those grounds, Plaintiffs are not barred from bringing a claim under the Fair Housing Act for a discriminatory housing practice. *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 103-04 (1979). As the Supreme Court has recognized,

> § 810 [of the Fair Housing Act, 42 U.S.C. § 3610] is not structured to keep complaints brought under it from reaching the federal courts, or even to assure that the administrative process runs its full course. Section 810(d) appears to give a complainant the right to commence an action in federal court whether or not the Secretary of HUD completes or chooses to pursue conciliation efforts. Thus, a complainant under § 810 may resort to federal court merely because he is dissatisfied with the results or delays of the conciliatory efforts of HUD. The most plausible inference to be drawn from Title VIII is that Congress intended to provide all victims of Title VIII violations two alternative mechanisms by which to seek redress: immediate suit in federal district court, or a simple, inexpensive, informal conciliation procedure, to be followed by litigation should conciliation efforts fail.

Id. (footnotes omitted). Thus, the Fair Housing Act does not state an exhaustion requirement for filing an action in federal court: "An aggrieved person may commence a civil action under this subsection *whether or not* a complaint has been filed under section 3610(a) of this title and without regard to the status of any such complaint." 42 U.S.C.A. § 3613(a)(2) (emphasis added). *See*

Milsap v. Cornerstone Residential Management, 2010 WL 427436 at *3 (S.D.Fla. Feb. 1, 2010) ("The clear import of the above-referenced statutory language indicates a complainant may file a complaint and exhaust administrative remedies or, alternatively, commence a civil action.").

H. Immunity

Defendants argue that the complaint should be dismissed under Rule 12(b)(6) because they are entitled to various federal and state law immunities. The Court holds that at the present stage of litigation Defendants are not entitled to immunity under federal law but are entitled to state law immunity against the state law claim for intentional infliction of emotional distress.

1. Federal Immunities

a. Absolute Judicial Immunity

Defendants contend that they are entitled to absolute immunity for administrative officers performing quasi-judicial acts. Defendants argue that because the conduct challenged by Plaintiffs was "performed by quasi-judicial decision makers," all Defendants are entitled to this absolute immunity. Defendants appear to argue that Defendant Brumfield was the quasi-judicial decision maker. The Court holds that absolute judicial immunity does not extend to Defendant Brumfield's determination, as Lake County's Code Enforcement Manager, of a nuisance.

Absolute immunity for judicial and quasi-judicial acts require that the protected conduct "is 'functionally comparable' to that of a judge." *Butz v. Economou*, 438 U.S. 478, 513 (1978). In holding that hearing examiners are entitled to absolute immunity, the Supreme Court reasoned that "the role of the modern federal hearing examiner or administrative law judge [("ALJ")] within this framework is 'functionally comparable' to that of a judge." *Id.* (characteristics of the judicial process rendering an ALJ's role "functionally comparable" to a judge include an adversarial proceeding, a decision-maker insulated from political influence, a decision based on evidence submitted by the parties, and a decision provided to the parties on all of the issues of fact and law). In *Buckles v. King County*, 191 F.3d 1127, 1134 (9th Cir. 1999), the Ninth Circuit held that the three-member regional board created by Washington state law to preside over and rule on petitions challenging a local government entity's compliance with a state law was a quasi-judicial body entitled to absolute immunity. *Id.* ("The Board adjudicates land use disputes and functions as a

quasi-judicial body; its proceedings reflect the same characteristics of the judicial process identified as sufficient in *Butz*."). Unlike the ALJ in *Butz* or the Board in *Buckles*, Defendant Brumfield's conduct is not functionally comparable to a judge and the nuisance determination process is not judicial or quasi-judicial. Defendants simply state that Defendant Brumfield performed her duties under an appointed official and that "the acts complained or were performed by quasi-judicial decision makers." Defs.' Mot. at 8-9. Defendants do not address how Defendant Brumfield's conduct is quasi-judicial or argue that the nuisance determination process shares any of the characteristics of the judicial process, such as those identified by the Supreme Court in *Butz*. Therefore, Defendant Brumfield is not entitled to absolute immunity.

b. Qualified Immunity

Alternatively, Defendants also contend that they are entitled to qualified immunity as public officials who are vested with important discretionary responsibilities. Besides providing the general legal standard and making a conclusory statement that they are entitled to qualified immunity, Defendants provide no argument or analysis in support of qualified immunity. They do not identify which Defendants are entitled to qualified immunity, what conduct by whom is at issue, why the conduct did not violate any constitutional right, or whether any constitutional right was clearly established. The Court therefore denies Defendants' defense of qualified immunity. If the qualified immunity argument is more fully developed, Defendants may raise this defense on summary judgment.

2. State Immunities

Defendants also argue that the complaint should be dismissed under Rule 12(b)(6) because they are entitled to various immunities under state law.[4] The immunities provided under state law shield Defendants from Plaintiffs' state law claims, but do not provide immunity against the claims arising under federal law.

[4] Defendants' motion includes a section entitled "Police Power Immunity," which addresses Plaintiffs' cause of action entitled "taking private property without just compensation," Compl. ¶¶ 59-61, but does not actually address immunity. Defs.' Mot. at 10-13. This cause of action is addressed in Section II.F.2 above.

a. Immunity for Individual Defendants

Under California Government Code Section 820.2, public employees are immune from conduct resulting from the exercise of discretion. Section 820.2 provides that "[e]xcept as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused." While Section 820.2 is broadly phrased and could conceivably apply to most actions taken by public employees, California courts have limited Section 820.2 immunity to "planning level judgments," such as basic policy decisions. *McQuirk v. Donnelley*, 189 F.3d 793, 798-800 (9th Cir. 1999) (citing *Johnson v. California*, 69 Cal. 2d 782 (1968); *Caldwell v. Montoya*, 10 Cal. 4th 972 (1995)). Operational level judgments, such as subsequent acts taken to implement policies, are not entitled to Section 820.2 immunity. *Id*. at 799. For example, "low level decisions [by staff] that d[o] not concern the way in which the [public entity] conduct[s] its business" are operational acts that are not entitled to Section 820.2 immunity. *Id*. at 800.

California courts have held that individuals such as Defendants Coel and Brumfield are entitled to Section 820.2 immunity in analogous situations. *See Ogborn v. City of Lancaster*, 101 Cal. App. 4th 448, 460-61 (2002). In *Ogborn*, the court held that the Director of the Department of Community Development who administered the City's nuisance abatement program was entitled to Section 820.2 immunity. *Id*. The director "conducted the initial hearing at which [the underlying] property was declared a public nuisance, and he sent a letter to [the property owner] to that effect." *Id*. at 461. The court held, however, that a public employee who "actively participated in the implementation of the nuisance abatement program" would not be entitled to Section 820.2 immunity because his or her actions would constitute operational conduct that is not covered by Section 820.2. *Id*.

Here, Defendant Brumfield is the Manager of the County's Code Enforcement Division and Defendant Coel is the Director of the County's Community Development Department. *See* Compl. ¶ 29 & Ex. J; Defs.' RJN, Ex. 11. Plaintiffs do not allege that either Defendant "actively participated in the implementation of the nuisance abatement program." *See Ogborn*, 101 Cal. App. 4th at 461. The complaint only refers to either Defendant in passing and does not actually identify

any specific conduct by either Defendant. *See* Compl. ¶ 29 & Ex. J. A letter from Defendant Brumfield dated September 8, 2009 to Plaintiffs is attached as Exhibit J to the complaint. This letter indicates that Defendant Brumfield reviewed the County's file regarding the underlying property and states that the "file shows significant violations" that warranted the posting of a Notice of Nuisance. Compl., Ex. J. Defendant Coel is referenced in two documents: (1) Plaintiffs' August 12, 2009 letter to Defendant Coel and three other County employees; and (2) Defendant Coel's December 23, 2009 letter to Plaintiffs. Compl., Ex. Y; Defs.' RJN, Ex. 11. Even when read in the light most favorable to Plaintiffs, the Court concludes that the complaint and the attached letters do not identify any specific conduct or active participation by Defendants Brumfield or Coel in the implementation of the abatement process. The complaint presently alleges only state law claims against Defendants Brumfield and Coel. The Court therefore holds that Defendants Brumfield and Coel are entitled to immunity under Section 820.2.

Alternatively, Coel and Defendant Board of Supervisors are immune under California Government Code Section 820.9. Section 820.9 states in relevant part as follows:

> Members of city councils, mayors, members of boards of supervisors, members of school boards, members of governing boards of other local public entities, members of locally appointed boards and commissions, and members of locally appointed or elected advisory bodies are not vicariously liable for injuries caused by the act or omission of the public entity or advisory body. Nothing in this section exonerates an official from liability for injury caused by that individual's own wrongful conduct. Nothing in this section affects the immunity of any other public official.

Defendants have established that Defendant Coel is appointed and that the Community Development Department is an advisory body that reports to the Board of Supervisors. Defs.' Suppl. Br. at 5 (Doc. No. 40) and Suppl. RJN Exs. 12 & 13 (Doc. No. 41). With respect to Defendant Coel, as Director of the Lake County Community Development Department, the California Tort Claims Act provides immunity to members of locally appointed boards and commissions and members of locally appointed or elected advisory bodies for injuries caused by public entities. Here, Plaintiffs allege vicarious liability, rather than any wrongful conduct specific to Defendant Coel.[5]

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[5] Though Plaintiffs refer to specific conduct by Defendant Coel in their opposition, Pls.' Opp. at 3 (Doc. No. 30), this is insufficient to avoid Defendant Coel's immunity because the Court may not consider new factual allegations raised for the first time in a party's briefing.

Accordingly, Plaintiffs' allegations do not state a claim for relief under California law as to Defendant Coel and Plaintiffs' intentional infliction of emotional distress claims against Defendant Coel are **dismissed**.

Section 820.9 does not, however, provide immunity to Defendant Board of Supervisors or Defendant County. On its face, Section 820.9 provides immunity under state law to individual public employees, not the public entity.

Furthermore, the immunities provided under state law do not define the scope of immunity for public employees from claims brought under federal law. *Howlett v. Rose*, 496 U.S. 356, 375-77 (1990). *See also Buckheit v. Dennis*, --- F.Supp.2d ----, 2010 WL 1998767 at *8-9 (N.D.Cal., May 18, 2010). Plaintiffs may, therefore, amend their complaint to include factual allegations, if any, concerning conduct by the individual defendants Brumfield and/or Coel in support of their claims under Section 1983 or the Fair Housing Act and Fair Housing Amendments Act. See *Sosa v. Hiraoka*, 920 F.2d 1451, 1460-61 (9th Cir. 1990). The Court does not decide here whether any Defendants would be immune from liability under federal law against any amended claims alleged against the individual defendants.

Accordingly, Plaintiffs' allegations do not state a claim for relief under California law as to Defendants Brumfield and Coel, and Plaintiffs' intentional infliction of emotional distress claims as to those Defendants are **dismissed**.

b. Immunity for Public Entity Defendants

State law provides immunity for the Board of Supervisors against liability for the conduct alleged in support of Plaintiffs' claim for intentional infliction of emotional distress: the denial of a building permit and the issuance of a nuisance abatement order.

Under California Government Code Section 818.4, public entities are immune for injuries caused by the issuance, denial, suspension, or revocation of any permit, license, certificate, approval, or order. Section 818.4 provides the following:

> A public entity is not liable for an injury caused by the issuance, denial, suspension or revocation of, or by the failure or refusal to issue, deny, suspend or revoke, any permit, license, certificate, approval, order, or similar authorization where the public entity or an employee of the public entity is authorized by enactment to determine whether or not such authorization should be issued, denied, suspended or revoked.

Section 821.2 provides the same immunity for public employees. Cal. Gov. Code § 821.2.

Immunity under Sections 818.4 and 821.2 is limited to discretionary activities and the decision to issue a building permit is discretionary. *See Kay v. City of Rancho Palos Verdes*, 504 F.3d 803, 810 (9th Cir. 2007) (quoting *Richards v. Dep't of Alcoholic Beverages Control*, 139 Cal. App. 4th 304, 318 (2006)); *Thompson v. City of Lake Elsinore*, 18 Cal. App. 4th 49, 57-58 (1993). California courts have held that public employees, such as building inspectors, and public entities are entitled to immunity from liability under Sections 818.4 and 821.2 for the denial of a building permit. *See Burns v. City Council*, 31 Cal. App. 3d 999, 1003-1005 (1973) (building inspector entitled to immunity for denial of a building permit). To the extent that Plaintiffs' state law claims are based on the denial of a building permit, Defendants County and Board are entitled to immunity under Section 818.4 and Defendants Brumfield and Coel are further entitled to immunity under Section 821.2 against claims arising from the denial of a building permit.

Defendants are also immune from liability under state law against claims arising from the issuance of the nuisance abatement order. Defendants contend that under California Government Code Section 818.2, public entities are immune for injuries caused by "adopting or failing to adopt an enactment or by failing to enforce any law," and Section 821 provides the same immunity for public employees. *See* Defs.' Mot. at 15-17. The immunity provision under state law that is more directly applicable to the nuisance abatement at issue here is Section 821.6 which provides that public employees are "not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause." Cal. Gov't Code § 821.6. This section shields Defendants Brumfield and Coel from liability arising from instituting and prosecuting the nuisance proceedings against Plaintiffs. *Ogborn*, 101 Cal. App. 4th at 462-63. Furthermore, Section 815.2(b) provides that "a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability." Cal. Gov't Code § 815.2. Because Defendants Brumfield and Coel are immune from liability for instituting the nuisance proceedings, Section 815.2 shields the public entity Defendants County and Board from liability. *Ogborn*, 101 Cal. App. 4th at 464. These provisions provide immunity to Defendants County and Board, as well

as the individual Defendants Brumfield and Coel, from any claims for injuries resulting from enforcing nuisance abatement laws.

Defendants further state, without analysis, that "[o]ther immunity provisions (or defenses)" apply in this action, citing Sections 3491, 3494, and 3502 of the California Civil Code. Defs.' Mot. at 18. Though these provisions address the abatement of a nuisance, none of them provide for immunity for abatement as Defendants argue.

Because state law shields Defendants Lake County, Lake County Board of Supervisors, Brumfield and Coel from liability from state law claims arising from the denial of the building permit and the issuance of the nuisance abatement order, Plaintiffs' state law claim of intentional infliction of emotional distress stated in the Seventh Cause of Action is **dismissed**.

c. Cal. Government Code Section 818: Punitive or Exemplary Damages

Under California Government Code Section 818, "a public entity is not liable for damages awarded under Section 3294 of the Civil Code or other damages imposed primarily for the sake of example and by way of punishing the defendant." Defendants argue that Section 818 shields the public entity Defendants, the County and Board of Supervisors, from punitive damages for state law claims. Defs.' Mot. at 10. Because the Court dismisses the only cognizable state law claim, namely, intentional infliction of emotional distress, this argument is rendered moot.

I. Rule 12(e) Motion for a More Definite Statement

Alternatively, Defendants move for a more definite statement under Rule 12(e) because the complaint is so vague or ambiguous that Defendants cannot reasonably prepare a response. Because the Court has narrowed the claims and dismissed those which fail to state a claim upon which relief can be granted, the Court denies Defendants' alternative request for a more definite statement.

III. CONCLUSION

The Court **grants in part and denies in part** Defendants' motion to dismiss. In summary, the Court holds the following:

A. Judicial Notice: The Court grants in part and denies in part Defendants' request for judicial notice. The Court (1) grants Defendants' request to take judicial notice of

Exhibits 1, 6, 12 and 13; (2) denies Defendants' request to take judicial notice of Exhibits 2, 3, 4, 5, 7, 8, 9, and 10; and (3) concludes that Exhibit 11 is incorporated into the complaint by reference.

B. IFP Dismissal: The complaint does not rise to the level of factual or legal frivolousness and is not malicious to warrant dismissal under 28 U.S.C. § 1915(e) for actions brought *in forma pauperis*.

C. Subject Matter Jurisdiction: The Court denies Defendants' argument that the complaint should be dismissed for lack of subject matter jurisdiction because providing notice under Local Rule 3.8 does not affect jurisdiction and notice is not required in this action under Local Rule 3.8.

D. Standing: Plaintiffs lack standing to bring their Third, Fourth and Fifth Causes of Action. Plaintiffs' request for relief for a "cease and desist" order and the Sixth Cause of Action are moot and therefore **dismissed without prejudice**. Plaintiffs have standing to bring their due process claims for deprivation of property and void for vagueness challenge to the Building Code provision stated in the First Cause of Action, the race-based discrimination claim under the Fair Housing Act stated in the Second Cause of Action, and the state law claim for intentional infliction of emotional distress in the Seventh Cause of action.

E. Other 12(b)(6) Grounds: Plaintiffs state cognizable claims in the First, Second and Seventh Causes of Action. The Fourth Cause of Action for "[t]aking private property without just compensation" is construed as an inverse condemnation claim and is **dismissed without prejudice** for failure to state a claim upon which relief can be granted. The Third Cause of Action for "violation of our right to the essential use of land" and the Fifth Cause of Action for "[v]iolation of our rights under land patent law" are **dismissed without prejudice** for failure to state a claim upon which relief can be granted where the Court cannot discern a valid cause of action from Plaintiffs' allegations.

United States District Court
For the Northern District of California

F. Exhaustion: The Court finds that Plaintiffs failed to exhaust their administrative remedies for reasonable accommodation to waive the County's permit fees because Plaintiffs did not follow the requirements for requesting reasonable accommodation. The allegations regarding failure to provide reasonable accommodation in waiver of permit fees may not, therefore, support Plaintiffs' due process claim. The failure to exhaust does not, however, bar a claim brought under the Fair Housing Act or Fair Housing Amendments Act.

G. Immunities: Because Defendants are entitled to immunity under state law, the Court **dismisses without prejudice** Plaintiffs' intentional infliction of emotional distress claim against all Defendants. At this juncture, the Court does not find that Defendants are entitled to immunity under federal law.

H. More Definite Statement: Because the Court has narrowed the claims and dismissed those which fail to state a claim upon which relief can be granted, the Court denies Defendants' alternative request for a more definite statement.

Three causes of action remain and will proceed forward: a claim under Section 1983 for deprivation of personal property in violation of due process as stated in the First Cause of Action; a separate due process claim, also stated in the First Cause of Action, raising a void for vagueness challenge to Section 106.1 of the Uniform Building Code; and a claim of racial discrimination in violation of the Fair Housing Act as stated in Second Cause of Action. Plaintiffs are granted leave to amend their claims for due process violations and Fair Housing Act violations against Defendants Brumfield and Coel; as currently alleged, only Defendants Lake County Board of Supervisors and Lake County remain liable for those claims. Plaintiffs are also granted leave to amend the complaint to allege discrimination based on disability in violation of the Fair Housing Amendments Act.

Plaintiffs are ordered to file an amended complaint removing from the original complaint the following: (1) the Third, Fourth, Fifth, Sixth, and Seventh Causes of Action; and (2) paragraphs 73 and 75. Plaintiffs must file an amended complaint by October 22, 2010. Defendants must file an answer or otherwise respond to the amended complaint thirty-five (35) days after Plaintiffs file the amended complaint. After the parties have filed an amended complaint and responsive pleading, the

Court will set a briefing schedule and hearing date to address the remaining claims on a motion for summary judgment or other dispositive motion.

IT IS SO ORDERED.

Dated: September 13, 2010

NANDOR J. VADAS
United States Magistrate Judge

United States District Court
For the Northern District of California