

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DALLAS WOLL,)	
)	
Plaintiff,)	No. C 07-6299 BZ
)	
v.)	ORDER GRANTING IN PART AND
)	DENYING IN PART DEFENDANT'S
COUNTY OF LAKE, et al.,)	MOTION FOR SUMMARY JUDGMENT
)	
Defendants.)	
_____)	

On December 13, 2007, plaintiff Dallas Woll ("plaintiff") sued the County of Lake ("County"), alleging violations of 42 U.S.C. § 1983.¹ Plaintiff's complaint arises from a "Notice of Nuisance" filed and recorded by the County in December 2005 concerning plaintiff's property located in Kelseyville, California. Plaintiff alleges that in late 2005, he was negotiating a large bank loan to enable him to relocate his business, and as a result of the recordation, the bank refused

¹ All parties have consented to my jurisdiction, including entry of final judgment, pursuant to 28 U.S.C. § 636(c) for all proceedings.

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2 to fund the loan. Recording the Notice, plaintiff contends,
3 served as the "functional equivalent" of a prejudgment
4 attachment of his property, amounting to a de facto
5 adjudication of his rights without any prior notice or
6 opportunity to be heard, in violation of his constitutional
7 rights to seek redress and petition; to be free from
8 unreasonable seizures of property; and to be afforded due
9 process of law, respectively.

10 The County has moved for summary judgment arguing, in
11 part, that plaintiff was not deprived of due process of law
12 because he received adequate notice prior to the recordation
13 of the Notice of Nuisance as well as an "informal opportunity"
14 to be heard after the Notice was recorded and before the
15 County took any additional steps to abate or physically
16 "seize" any of plaintiff's property. For the reasons set
17 forth below, defendant's motion is **GRANTED IN PART AND DENIED**
18 **IN PART.**

19 *1. Factual Background:*

20 Certain facts appear undisputed. At all relevant times,
21 plaintiff owned property in Lake County, zoned for
22 agricultural uses. On September 3, 1991, the County received
23 a complaint that plaintiff was operating a "Roto-Rooter"
24 business on his property.² After investigating, the County

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26 ² Plaintiff objects to the consideration of these facts
27 and all others concerning plaintiff's operation of a commercial
28 business. Plaintiff's objections to the facts submitted in the
joint statement of undisputed material facts, which are based
entirely on FRE 401, are **OVERRULED** for the purposes of this
motion. Defendant's objection based on FRE 701 to the second

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2 determined that plaintiff was in fact operating a commercial
3 business on his property in violation of an agricultural
4 zoning ordinance and issued a Notice of Violation. Plaintiff
5 relocated his business, and the case was closed on January 7,
6 1993.

7 On May 19, 2000, the County received another complaint
8 that plaintiff was operating a septic tank pumping business on
9 his property. The County failed to investigate and the case
10 remained inactive until April 2, 2004, when the County visited
11 plaintiff's property and confirmed that a "Roto-Rooter"
12 business was again operating on plaintiff's property. The
13 County then issued and recorded a "Notice of Nuisance" against
14 plaintiff's property, and served plaintiff with the Notice by
15 certified mail. The Notice of Nuisance stated that the
16 operation of a commercial business in an agriculture zoning
17 district constituted a condition of nuisance and gave
18 plaintiff until May 7, 2004 to abate the violation. The
19 Notice of Nuisance also advised plaintiff to "Contact Lake
20 County Planning Department for information regarding correct
21 zoning for Commercial Business Uses." Other than one
22 additional site visit on November 2, 2004, no further action

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24 statement of material fact contained in plaintiff's separate
25 statement of facts is **SUSTAINED**, and to the extent that the
26 statement is a legal conclusion, the Court will treat it as
27 argument. Defendant's objections based on FRE 602 to
28 plaintiff's separate second, fifth, and eighth statements of
material fact are **OVERRULED** for the purposes of this motion, as
all reasonable inferences are to be drawn in favor of
plaintiff, the non-moving party. All other objections based on
FRE 401 made by defendant to plaintiff's separate statement of
facts are **OVERRULED**.

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2 was taken by the County. Plaintiff, however, was negotiating
3 with a bank in 2005 to obtain a large loan secured by his
4 property for the purpose of relocating his business.

5 On December 8, 2005, the County again visited plaintiff's
6 property and observed that plaintiff was still operating a
7 commercial business on his property. That day, the County
8 reviewed its records and determined that no permits had been
9 issued to plaintiff for the operation of a commercial
10 business.

11 On December 16, 2005, the County recorded and mailed to
12 plaintiff a superseding Notice of Nuisance. This superseding
13 Notice was returned due to a wrong address and mailed again on
14 January 11, 2006. A U.S. Postal Service receipt of delivery
15 was received by the County on January 17, 2006.

16 On February 8, 2006, after reviewing its records, the
17 County discovered that plaintiff had yet to apply for an
18 appropriate permit for the operation of a commercial business.
19 On February 9, 2006, a Notice to Abate Nuisance was served on
20 plaintiff, both personally and via certified mail, informing
21 plaintiff that a hearing before the Lake County Board of
22 Supervisors was set for February 28, 2006.

23 The hearing was held on February 28, 2006 and was
24 indefinitely continued to allow plaintiff to apply for a major
25 use permit. Despite plaintiff's efforts to obtain a major use
26 permit, both the Planning Commission and the Board of
27 Supervisors denied plaintiff's application on September 26,
28 2006 and March 9, 2007, respectively. On July 29, 2007,

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2 plaintiff filed a petition for writ of administrative mandamus
3 with the Lake County Superior Court.

4 *2. Alleged Fifth Amendment and Fourteenth Amendment Due*
5 *Process Violations:*

6 It is well-settled that procedural due process is
7 necessitated only if there has been a "taking" or deprivation
8 of a protected interest. Bd. of Regents v. Roth, 408 U.S.
9 564, 569 (1972). For purposes of this motion, the County
10 admits that "the recordation of a Notice of Nuisance is a
11 'taking' of property." Memo p.2, 1.27-p.3, 1.1. The issue
12 then is whether, as a matter of law, plaintiff received
13 adequate due process under the Fourteenth Amendment. The
14 County argues he did because the taking was minor and the
15 various notices plaintiff received prior to December 2005 gave
16 him adequate notice that his business operations were in
17 violation of the local agricultural zoning ordinance. The
18 County also argues that plaintiff received an adequate
19 "informal opportunity" to be heard because both the first and
20 superseding Notices of Nuisance apprised plaintiff of the
21 specific conditions causing the nuisance, gave plaintiff time
22 to correct the nuisance to avoid any potential future
23 abatement procedures, and provided plaintiff with the ability
24 to contact the Lake County Planning Department for information
25 regarding correct zoning for commercial business uses.

26 In Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976), the
27 Supreme Court articulated a flexible framework for analyzing
28 what procedural safeguards are required by due process.

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2 Specifically, the Court held that due process generally
3 requires consideration of three distinct factors: first, the
4 private interest affected by the official action; second, the
5 risk of an "erroneous deprivation" of the private interest
6 through the procedures used, and the probable value, if any,
7 of additional or substitute procedural safeguards; and
8 finally, the significance of the government interest,
9 including the fiscal and administrative burdens that any
10 additional or substitute procedural requirements would entail.
11 See also Connecticut v. Doeher, 501 U.S. 1 (1991).

12 With regard to the first factor, plaintiff has submitted
13 evidence that the recordation of the superseding Notice of
14 Nuisance caused the bank to refuse to fund a loan, which was
15 to be secured by his property, and which he intended to use to
16 relocate his business. While the County disputes the reasons
17 plaintiff was denied the loan, this simply creates a dispute
18 about an issue of material fact which must be resolved at
19 trial. A jury could conclude from plaintiff's evidence that
20 the recorded Notice cause plaintiff substantial harm.³
21 While the County makes much of the fact that an actual
22 abatement never occurred, this argument is beside the point,
23 as the question before me is whether plaintiff's due process
24 rights were violated as a result of the recordation of the

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26 ³ It is not entirely clear from the evidence whether
27 the problem plaintiff encountered is attributable to the 2004
28 recordation, of which he does not complain, or the 2005
recordation, but on summary judgment, I give plaintiff the
benefit of a favorable inference. Matsushita Elec. Indus. Co.
v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

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2 Notice of Nuisance, not what due process plaintiff was or
3 would have been entitled to had the County proceeded with an
4 abatement. For the purposes of summary judgment, I cannot say
5 that the taking in this case was so minor as to require little
6 or no due process. Cafeteria and Restaurant Workers Union,
7 Local 473 v. McElroy, 367 U.S. 886, 895-96 (1961). As the
8 Supreme Court stated in Connecticut v. Doebr, 501 U.S. 1, 12
9 (1991), "temporary or partial impairments to property rights
10 that attachments, liens, and similar encumbrances entail are
11 sufficient to merit due process protection."

12 With regard to the third Eldridge factor, the County's
13 interest in recording the superseding Notice of Nuisance prior
14 to providing plaintiff with a hearing, the only interests
15 advanced by the County are the need to put members of the
16 public on notice that the property was subject to potential
17 litigation and the need to avoid nuisances that may have the
18 effect of reducing property values. For the purpose of this
19 motion, I find these arguments lacking. The superseding
20 Notice was recorded on December 16, 2005 and a hearing, even
21 with the re-mailing of the misaddressed Notice, occurred
22 February 28, 2006. The narrow issue is whether there was a
23 need to record the Notice in the short period prior to giving
24 plaintiff a hearing. The County never explains how the public
25 might be harmed during this short period, or why it could not
26 have scheduled an earlier hearing. The County's asserted
27 sense of urgency is undermined by the County's comparative
28 inaction after it received a complaint in 2000, as well as

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2 after it recorded the first Notice of Nuisance in 2004.

3 Finally, the risk of an erroneous deprivation in this
4 case is of sufficient gravity that the issue cannot be
5 properly resolved on motion for summary judgment. The County
6 asserts that the risk of erroneous deprivation was slight for
7 three reasons: first, plaintiff was provided with a pre-
8 deprivation "informal opportunity" to be heard; second, no
9 actual abatement action was to occur without providing
10 plaintiff with notice and a hearing; and third, significant
11 post-deprivation review was available to plaintiff.⁴ The
12 County's argument that it provided plaintiff with a pre-
13 deprivation "informal opportunity" to be heard is
14 unconvincing. The "informal opportunity" to which the County
15 refers is the instruction on the recorded Notice of Nuisance
16 that advised plaintiff to contact the County for "information
17 regarding correct zoning for Commercial Business uses." Since
18 plaintiff received the Notice on the same day that it was
19 recorded, this "informal opportunity" to be heard occurred
20 after the taking. The County's other arguments, that
21 plaintiff was to receive notice and a hearing before any
22 abatement was to occur, and had available a variety of
23 procedures to review an abatement order, are beside the point.
24 Once again, the taking of which plaintiff complains is the
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26 ⁴ Neither of the cases cited by the County, Machado v.
27 State Water Res. Control Bd., 90 Cal.App.4th 720, 726-28
28 (2001), nor Roth v. City of Los Angeles, 53 Cal.App.3d 679, 689
(1976), are on point, as neither involved the actual
recording of an official notice or order.

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2 recordation of the Notice, not the abatement process. As the
3 Supreme Court has noted, a post-deprivation hearing "would not
4 cure the temporary deprivation that an earlier hearing might
5 have prevented." Doehr, 501 U.S. at 15.

6 Because the County has shown no interest that would
7 offset plaintiff's interest in obtaining a fair hearing or, at
8 a minimum, receiving an opportunity to correct the noticed
9 violations prior to the actual recording of the Notice, see
10 Evers v. County of Custer, 745 F.2d 1196 (9th Cir. 1984), and
11 because the issue of the effect of the recording of the Notice
12 of Nuisance on plaintiff's ability to refinance his property
13 is in dispute, I cannot conclude for purposes of summary
14 judgment that plaintiff received either adequate notice or an
15 adequate opportunity to be heard.

16 *3. Alleged Fourth Amendment Seizure Violation:*

17 Plaintiff argues that his property was illegally "seized"
18 by the County when it recorded the superceding Notice of
19 Nuisance in 2005. Plaintiff asserts that the act of recording
20 the Notice of Nuisance interfered with his ability to use the
21 property as collateral to borrow money, prevented alienation
22 of the property, and substantially reduced the value of the
23 property, thereby constituting a "seizure" of the property in
24 violation of the Fourth Amendment.

25 Plaintiff relies on dicta in United States v. Jacobsen,
26 466 U.S. 109, 133 (1984), that a "seizure" of property occurs
27 when "there is some meaningful interference with an
28 individual's possessory interest in property." However,

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2 plaintiff cites no authority to support his assertion that the
3 recording of a Notice of Nuisance is a "meaningful
4 interference" with his "possessory interest" in property
5 sufficient to constitute a seizure under the Fourth Amendment.

6 In Jacobsen, the Court upheld the validity of a
7 warrantless seizure of drugs by a DEA agent. There was no
8 dispute that the goods were physically seized. In dicta, the
9 Court cited to several prior opinions which recognize that
10 interference with someone's possession of property, such as
11 seizing but not searching a suitcase, can amount to a Fourth
12 Amendment seizure. Jacobsen, 466 U.S. at 144 n.5. Here,
13 plaintiff does not claim that the County restrained his
14 physical possession of his property. See United States v. TWP
15 17 R 4, Certain Real Property in Maine, 970 F.2d 984, 989 (1st
16 Cir. 1992) (finding no "meaningful interference" with
17 defendant's property rights when government posted a warrant
18 of "arrest in rem" on plaintiff's property). The deprivation
19 he suffered can be adequately dealt with under the Due Process
20 Clause, without implicating the Fourth Amendment.

21 The County is entitled to summary judgment on plaintiff's
22 Fourth Amendment claim for relief.

23 *4. Alleged First Amendment Violation:*

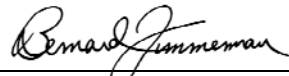
24 In California Transport v. Trucking Unlimited, 404 U.S.
25 508, 510 (1972), the Supreme Court ruled that the submission
26 of complaints and criticisms to nonlegislative and nonjudicial
27 public agencies, such as a county board of supervisors,
28 constitutes petitioning activity protected by the First

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2 Amendment, concluding that "the right to petition extends to
3 all departments of the Government."

4 Here, plaintiff has proffered no evidence that he was
5 denied his First Amendment right to redress or to petition.
6 In fact, it does not appear that plaintiff made any effort to
7 petition the Board of Supervisors about the purported nuisance
8 on his property until early 2006. Instead, it appears that
9 plaintiff exercised his First Amendment right to petition in a
10 series of hearings and appearances before the Board of
11 Supervisors in 2006 and 2007, including one in which he sought
12 a release of the recording of the Notice of Nuisance. The
13 fact that plaintiff had multiple opportunities to use
14 administrative processes to contest the recording of the
15 Notice of Nuisance indicates that plaintiff's First Amendment
16 rights to redress and to petition were not violated.

17 Accordingly, defendant's Motion for Summary Judgment is
18 granted with regard to plaintiff's First Amendment claim for
19 relief. The parties having agreed to accept the Tentative
20 Ruling ordered on October 16, 2008. It is ordered that the
21 hearing scheduled for October 22, 2008 is vacated.

22 Dated: October 21, 2008

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25 Bernard Zimmerman
26 United States Magistrate Judge
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