

1                                    IN THE UNITED STATES DISTRICT COURT  
2                                    FOR THE NORTHERN DISTRICT OF CALIFORNIA

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4 EDWARD VOGT,

No. C 11-2595 CW

5                                    Plaintiff,

ORDER GRANTING  
DEFENDANTS' MOTION  
TO DISMISS

6                                    v.

7 CITY OF ORINDA and EMMANUEL URSU,

8                                    Defendants.  
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11                                    Defendants City of Orinda (the City) and Emmanuel Ursu move  
12 to dismiss Plaintiff Edward Vogt's First Amended Complaint (1AC)  
13 on the ground that he has failed to state a claim upon which  
14 relief may be granted. Plaintiff has filed an opposition and  
15 Defendants have filed a reply. The matter was taken under  
16 submission and decided on the papers. Having considered all the  
17 papers filed by the parties, the Court grants the motion to  
18 dismiss.  
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20                                    BACKGROUND

21                                    On December 6, 2011, the Court issued an Order Granting  
22 Motion to Dismiss and Granting Leave to Amend (Docket No. 29), in  
23 which it held that Plaintiff had failed to allege an equal  
24 protection claim brought by a "class of one" because he had  
25 alleged no fact to support his status as a "class of one" or that  
26 his right to equal protection was violated by Defendants. The  
27 Court explained that, to state such a claim, Plaintiff must plead  
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1 facts showing that he was treated differently than others who were  
2 similarly situated to him, without a rational basis for the  
3 discrepancy. The Court also explained that, to state a claim for  
4 a violation of his right to substantive due process based on the  
5 deprivation of a property right, Plaintiff must allege that  
6 Defendants' actions lacked any substantial relation to public  
7 health, safety or the general welfare. The Court also held that,  
8 to proceed against the City, Plaintiff must allege facts tending  
9 to show that his rights were violated as a result of an identified  
10 City policy or custom and, to state a claim against Ursu  
11 personally, Plaintiff must plead that he violated Plaintiff's  
12 clearly established constitutional rights.  
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14 The following facts are from Plaintiff's 1AC and the  
15 documents of which the Court takes judicial notice.<sup>1</sup> In 2001,  
16 Plaintiff applied to have a "simple" lot line adjustment between  
17 his two adjoining properties located in Orinda. Defendants  
18 refused to perform what was, under California lot line adjustment  
19 law, a simple administrative approval. Instead, Defendants  
20 engaged in delaying tactics such as requesting architect's and  
21 surveyor's drawings, a full topographic survey and map, analysis  
22 of the kind of houses that might be built on the lots, photos of  
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25 <sup>1</sup> The Court grants Defendants' and Plaintiff's requests for  
26 judicial notice. See Fed. R. Civ. P. 12(d); Mir v. Little Co.,  
27 844 F.2d 646, 649 (9th Cir. 1988) (court may take judicial notice  
28 of matters of public record without converting motion to dismiss  
into motion for summary judgment).

1 "story poles" to indicate potential house floors and gables, and  
2 indemnification in the event the City was sued for its approval of  
3 the lot line adjustment.

4 Plaintiff alleges that the requirements imposed by the City  
5 were in violation of California law. In 2006, Plaintiff sued the  
6 City in state court for a writ of mandate to require the City to  
7 obey the law. In 2008, the state court issued its decision  
8 holding that Plaintiff had submitted overwhelming "evidence to  
9 support [his] contention that the [Orinda City] Council sought to  
10 impose conditions on the granting of the lot line adjustment in  
11 direct contravention of Gov't Code section 66412, subdivision  
12 (d).<sup>2</sup> The Respondent's assertion that Petitioner 'voluntarily'  
13 took steps to obtain the water and sewer permits is disingenuous  
14 at best." Vogt v. City of Orinda, Superior Court of Contra Costa  
15 County, Case No. 6-1494, Peremptory Writ of Mandate, September 3,  
16 2008. The court ordered the City to limit its review and approval  
17 of Plaintiff's lot line application to whether it conformed to the  
18 local general plan or any applicable specific plan, zoning or  
19 building ordinances. Id. Plaintiff alleges that, two years after  
20 the court issued this order, Defendants still had not approved the  
21 lot line adjustment and that the Council approved the request only  
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27 <sup>2</sup> California Government Code section 66412(d) exempts lot  
28 line adjustments of four and fewer existing adjoining parcels from  
complying with certain domestic water and sewer requirements.

1 after he threatened to sue the individuals on the Council for  
2 contempt of court.

3 Defendants submit a copy of Orinda City Council Resolution  
4 24-10, an appeal of the Planning Commission's adoption of the  
5 negative declaration for approval of Plaintiff's lot line  
6 adjustment, which indicates that the Orinda City Council approved  
7 the lot line adjustment after preparing a detailed initial study  
8 and issuing a negative declaration in compliance with the  
9 California Environmental Quality Act, California Public Resources  
10 Code section 21000 et seq.

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12 Plaintiff alleges that Defendants' requirements were  
13 arbitrary and unreasonable and were directed at Plaintiff but not  
14 at other people in the City who had, over the years, similarly  
15 asked for lot line adjustments to their properties. Plaintiff  
16 alleges that "these examples are in the files of Orinda and will  
17 be fully revealed by later subpoena." Plaintiff alleges that the  
18 fact that the City approved his request after he threatened to sue  
19 the City Council shows "that there was no substantial relation  
20 between defendants' land use actions and the public health, safety  
21 or general welfare."

22  
23 Plaintiff also alleges that the City has a policy to keep its  
24 "semi-rural" character and this policy is the basis for its  
25 "denial of Plaintiff's constitutional and statutory rights to use  
26 and improve his property reasonably, without arbitrary constraints  
27 and bogus requirements."  
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1 Plaintiff alleges that Ursu is the head of the City's  
2 planning department and is responsible for the enormous delay,  
3 expense, and arbitrary requirements that the City imposed on  
4 Plaintiff for the past ten years. He alleges that Ursu enforces  
5 the City's "semi-urban" policy, even though the policy causes the  
6 City to violate federal constitutional and statutory laws.  
7 Specifically, Plaintiff alleges that Ursu refused to certify  
8 Plaintiff's papers from the City Council so that they could be  
9 recorded because Plaintiff's surveyor's stamp was out of date on  
10 the old papers but, when the surveyor said that his stamp was not  
11 out of date, Ursu certified the papers. Plaintiff also alleges  
12 that Ursu demanded that Plaintiff write a check for thousands of  
13 dollars to the City for an illegal fee, but Plaintiff paid it  
14 because he was anxious to record the lot line adjustment.  
15 Defendants submit that the fee was a mandatory filing fee required  
16 by the California Department of Fish and Game.

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19 LEGAL STANDARD

20 A complaint must contain a "short and plain statement of the  
21 claim showing that the pleader is entitled to relief." Fed. R.  
22 Civ. P. 8(a). When considering a motion to dismiss under Rule  
23 12(b)(6) for failure to state a claim, dismissal is appropriate  
24 only when the complaint does not give the defendant fair notice of  
25 a legally cognizable claim and the grounds on which it rests.  
26 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). In  
27 considering whether the complaint is sufficient to state a claim,  
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1 the court will take all material allegations as true and construe  
2 them in the light most favorable to the plaintiff. NL Indus.,  
3 Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). However, this  
4 principle is inapplicable to legal conclusions; "threadbare  
5 recitals of the elements of a cause of action, supported by mere  
6 conclusory statements," are not taken a true. Ashcroft v. Iqbal,  
7 556 U.S. 662, 129 S. Ct. 1937, 1949-50 (2009) (citing Twombly, 550  
8 U.S. at 555).

#### 10 DISCUSSION

11 Defendants argue that, although Plaintiff's IAC sets forth  
12 the elements of each claim, it is legally insufficient because the  
13 claims are not supported with factual allegations.

#### 14 I. Equal Protection of a Class of One

15 Equal protection claims brought by a "class of one" can be  
16 stated when the plaintiff alleges that he or she has been  
17 intentionally treated differently from others similarly situated  
18 and that there is no rational basis for the difference in  
19 treatment. Village of Willowbrook v. Olech, 528 U.S. 562, 564  
20 (2000). In Olech, the plaintiff's allegations that the Village  
21 intentionally demanded a thirty-three foot easement as a condition  
22 of connecting her property to the municipal water supply when the  
23 Village required only a fifteen-foot easement from other similarly  
24 situated property owners, that the Village's demand was irrational  
25 and wholly arbitrary, and that the Village ultimately connected  
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1 her property after receiving a fifteen-foot easement, were  
2 sufficient to state an equal protection claim. Id. at 565.

3 Plaintiff has not alleged any facts showing Defendants  
4 treated other people who are situated similarly to him  
5 differently. To do this, Plaintiff must allege that Defendants  
6 granted other similar requests for lot line adjustments in a  
7 shorter time and with fewer requirements than in Plaintiff's case.  
8 Plaintiff merely alleges that the names of the people who have  
9 been treated differently from him are in the City's files and he  
10 will obtain them when discovery commences. However, under Rule 8  
11 of the Federal Rules of Civil Procedure, Plaintiff must allege  
12 facts sufficient to show that he is entitled to relief. See Elan  
13 Microelectronics Corp. v. Apple, Inc., 2009 WL 2972374, \*1 (N.D.  
14 Cal.) (Rule 8 does not unlock the doors of discovery for a  
15 plaintiff armed with nothing more than conclusions).  
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18 In fact, allegations in other sections of the IAC support the  
19 contrary conclusion. For instance, Plaintiff alleges that the  
20 policy to keep the City semi-rural "is the basis of Orinda's  
21 reputation as being extraordinarily difficult for permits and  
22 building of any kind, and it is the basis for Orinda's denial of  
23 plaintiff's constitutional and statutory rights to use and improve  
24 his property reasonably." According to this allegation, the City  
25 treats all requests for permits to improve property similarly to  
26 the way it treated Plaintiff's. Furthermore, the newspaper  
27 articles Plaintiff submits in support of his opposition are  
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1 written by property owners who also have had to wait a long time  
2 to receive City approval for permits to improve their property.  
3 Again, this shows that the City treats people attempting to  
4 improve their property similarly to Plaintiff.

5 Defendants' motion to dismiss this claim is granted. Because  
6 Plaintiff has been granted leave to amend this claim and has  
7 failed to do so, it is dismissed without leave to amend.

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9 II. Substantive Due Process Claim

10 Defendants argue that Plaintiff's conclusory allegations  
11 cannot meet the requirements of a substantive due process claim.

12 To state a substantive due process claim challenging a land  
13 use action, a plaintiff must allege that the city's delays in  
14 processing the plaintiff's application did not further any  
15 legitimate government interest. North Pacifica LLC v. City of  
16 Pacifica, 526 F.3d 478, 485 (9th Cir. 2008); Shanks v. Dressel,  
17 540 F.3d 1082, 1088 (9th Cir. 2008). "The Supreme Court has 'long  
18 eschewed . . . heightened [means-ends] scrutiny when addressing  
19 substantive due process challenges to government regulation' that  
20 does not impinge on fundamental rights." Id. When government  
21 action "like a discrete permitting decision is at issue, only  
22 'egregious official conduct can be said to be arbitrary in the  
23 constitutional sense;' it must amount to an abuse of power lacking  
24 any 'reasonable justification in the service of a legitimate  
25 governmental objective.'" Id. Official decisions that are based  
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1 on erroneous legal interpretations are not necessarily  
2 constitutionally arbitrary. Id. at 1089.

3 In Shanks, the plaintiffs alleged that the city improperly  
4 granted a building permit to a third party, which caused their  
5 property to decrease in value. Id. The court held that the  
6 granting of a building permit to a third party was a routine, if  
7 perhaps unwise or legally erroneous decision, which fell short of  
8 being constitutionally arbitrary. Id. The court noted that there  
9 was no suggestion of a sudden change in course, malice, bias,  
10 pretext or anything more than a lack of due care on the city's  
11 part. Id. at 1089. The court also noted that it was "at least  
12 fairly debatable that Spokane rationally furthered its legitimate  
13 interest in facilitating residential housing in a residential  
14 neighborhood by issuing a building permit to the Dressels. When  
15 reviewing a substantive due process challenge, this suffices; our  
16 task is not to balance 'the public interest supporting the  
17 government action against the severity of the private  
18 deprivation.'" Id.

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21 Plaintiff's allegations are, as a matter of law, insufficient  
22 to state a claim that Defendants violated his substantive due  
23 process rights. Like the plaintiffs in Shanks, Plaintiff alleges  
24 that Defendants made a routine decision regarding approval of his  
25 request for a lot line adjustment. Even if Defendants'  
26 application of the law was legally erroneous, under Shanks, this  
27 does not rise to the level of a due process violation.  
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1 Furthermore, Plaintiff himself alleges that Defendants were  
2 motivated by a desire to maintain Orinda's semi-rural character,  
3 thus providing a rational governmental interest to support their  
4 actions. As stated in Shanks, it is not the Court's task, in a  
5 substantive due process claim, to balance the public interest  
6 supporting the government action against the severity of the  
7 private deprivation. It is sufficient that there is a legitimate  
8 governmental interest that is rationally related to Defendants'  
9 action. And, as in Shanks, Plaintiff does not suggest that  
10 Defendants acted out of malice, bias, pretext or anything more  
11 than a lack of due care.

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13 Therefore, Defendants' motion to dismiss this claim is  
14 granted. Because Plaintiff has been granted leave to amend this  
15 claim and has failed to remedy its deficiencies, dismissal is  
16 without leave to amend.

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18 Because Plaintiff has not alleged facts sufficient to state  
19 claims of constitutional violations against Defendants, the Court  
20 does not address Defendants' arguments that these claims must be  
21 dismissed against the City for not stating a policy or practice  
22 and against Ursu for not alleging unconstitutional conduct.  
23 Furthermore, because Plaintiff has not sufficiently alleged  
24 constitutional violations, his request for an injunction "ordering  
25 Defendants to cease obstructing my legal requests and to act in  
26 good faith toward me and to treat me in the future legally and  
27 reasonably and like any other property owner" is denied.  
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CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss Plaintiff's 1AC is granted. Dismissal is without leave to amend.

IT IS SO ORDERED.

Dated: 5/2/2012

  
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CLAUDIA WILKEN  
United States District Judge

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