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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

FLIGHTCAR, INC.,

Plaintiff,

vs.

CITY OF MILLBRAE, and DOE 1 through
DOE 50,

Defendants.

Case No: C 13-5802 SBA

**ORDER GRANTING IN PART
AND DENYING IN PART
DEFENDANT'S MOTION
TO DISMISS**

Dkt. 4

Plaintiff FlightCar, Inc. (“FlightCar” or “Plaintiff”), filed the instant action against the City of Millbrae (“the City” or “Defendant”) to challenge its revocation of FlightCar’s Conditional Use Permit (“CUP”). The parties are presently before the Court on Defendant’s Motion to Dismiss Plaintiff’s Complaint Pursuant to Fed. R. Civ. Proc. 12(b)(6). Having read and considered the papers filed in connection with this matter and being fully informed, the Court hereby GRANTS IN PART and DENIES IN PART Defendant’s motion to dismiss for the reasons set forth below. The Court, in its discretion, finds this matter suitable for resolution without oral argument. See Fed. R. Civ. P. 78(b); N.D. Cal. Civ. L.R. 7-1(b).

1 **I. BACKGROUND**

2 **A. FACTUAL SUMMARY**¹

3 FlightCar is a startup car sharing company which allows vehicle owners to park their
4 cars for free at a FlightCar lot, usually located close to an airport, provided that FlightCar
5 can, in turn, rent out the vehicle while the owner is away. Compl. ¶ 4, Dkt. 1. The
6 company began operating in February 2013 in Burlingame, California. Id. ¶ 5. In need of
7 more space, FlightCar later moved to a vacant lot located at 480 El Camino Real in
8 Millbrae, California (“the Property”). Id. ¶ 5. FlightCar sought a business license from the
9 City in order to conduct business at the new location. Id. ¶ 6. The City advised FlightCar
10 that in order to obtain a business license, the company must first obtain a CUP from the
11 Millbrae Planning Department. Id.

12 FlightCar applied for a CUP in March 2013. Id. ¶ 7. On April 15, 2013, the
13 Planning Department unanimously approved a three-year CUP, subject to the completion of
14 certain alterations of the Property. Id. ¶ 7. Following a public hearing, the Planning
15 Commission unanimously approved a modified CUP on June 3, 2013. Id. ¶¶ 8-9. In
16 reliance on the CUP approval, FlightCar then entered into a one-year lease for the Property,
17 hired staff members and made more than \$10,000 in tenant improvements. Id. ¶ 10. Such
18 improvements included changes necessary to comply with the CUP. Id.

19 In July 2013, FlightCar submitted plans to the Building Department to construct a
20 temporary structure on the Property, as specified in the CUP. Id. ¶ 11. The Building
21 Department rejected the plans, and instead required FlightCar to build a permanent
22 structure. Id. FlightCar complied, and submitted plans for a permanent structure. Id. The
23 plans were accepted by the Building Department, but were rejected by the Planning
24 Commission, which stated that the structure must be temporary. Id. After several weeks of
25 effort by FlightCar, the Building and Planning Departments finally agreed to allow
26 FlightCar to build a temporary structure. Id.

27 _____
28 ¹ The following facts are taken from the Complaint, which, for purposes of this
motion, the Court accepts as true.

1 In August 2013, FlightCar commenced operations and applied for a business license.
2 Id. ¶ 13. The application indicated that approvals from the Planning and Building
3 Departments were necessary before the application could be approved. Id. On September
4 17, 2013, representatives from the City’s Building and Planning Departments visited the
5 Property to ascertain FlightCar’s compliance with the CUP. Id. The inspectors noted about
6 a dozen items requiring correction. Id. ¶¶ 14-15. In response, FlightCar sent the Planning
7 Department a timeline for completing the work to address the City’s concerns. Id. ¶¶ 14-
8 15. However, on October 11, 2013, about a week before FlightCar was scheduled to
9 complete the corrections, the Planning Commission notified FlightCar that it was holding a
10 hearing on October 21, 2013, to consider revoking the CUP. Id. ¶ 16. As a result,
11 FlightCar accelerated its efforts to complete the corrections. Id. The hearing did not
12 proceed on the scheduled date. Id.

13 On October 24, 2013, a City inspector (identified as “Ms. Harris”) visited the
14 Property. Id. ¶ 17. She informed FlightCar that all of the items previously identified by
15 City had been addressed to her satisfaction, except for a small bush that needed to be
16 replaced. Id. FlightCar subsequently replaced the bush, as directed. Id. Ms. Harris then
17 advised FlightCar that it was fully compliant with the CUP. Id. ¶ 18. Shortly thereafter,
18 FlightCar representatives went to a City office to obtain a business license. Id. The
19 representatives were informed that although FlightCar had made all of the necessary
20 corrections, a license could not be issued because the Planning Commission had scheduled
21 a hearing to revoke the CUP for November 4, 2013. Id. FlightCar alleges that it received
22 notice of that hearing on October 28, 2013, three days less than the ten days’ notice
23 required by the Millbrae Municipal Code. Id. ¶ 19.

24 The Planning Commission hearing on the proposed revocation of FlightCar’s CUP
25 took place as scheduled on November 4, 2013. Id. ¶ 20. Kevin Petrovich, one of
26 FlightCar’s founders, was present at the hearing and presented argument to the
27 Commission. Def.’s Request for Jud. Notice (“RJN”) Ex. C, Dkt. 5-4. At the conclusion of
28 the hearing, the Commission voted to recommend the revocation of the CUP. Id. at 32.

1 Specifically, the Commission’s recommendation was based on reasons relating to:
2 “(1) landscape maintenance, (2) maintenance conditions of the property, (3) zoning code
3 requirements, (4) Building permit requirements, (5) [inadequate] number of employees on
4 the premises, (6) employee parking, (7) curb painting, (8) taxes[,] and [(9)] [lack of]
5 business license approval.” Id. ¶ 20.

6 According to FlightCar, it had ten days to appeal the Planning Commission’s
7 recommendation. Compl. ¶ 23. Despite this, on November 12, 2013, two days before
8 FlightCar’s deadline to appeal, the City Council convened to consider the revocation of the
9 CUP. Id. ¶ 24. A non-lawyer representative appeared at the hearing on behalf of FlightCar.
10 RJN Ex. D. Though conceding that FlightCar was compliant with CUP, the City Council
11 voted in favor of revocation. Compl. ¶ 25. The City Council was advised by an attorney
12 from the San Mateo County Counsel’s Office that notwithstanding the revocation of the
13 CUP, FlightCar could be shut down only upon the commencement of an abatement
14 proceeding. Id. ¶ 26. Under the Municipal Code, the initiation of an abatement proceeding
15 would afford FlightCar an opportunity to cure any non-compliance issues. Id. ¶ 26. The
16 City, however, has not commenced an abatement proceeding against FlightCar. Id. ¶ 29.

17 On November 13, 2013, a Sheriff’s Deputy from the County of San Mateo visited
18 the Property. Id. ¶ 27. The Deputy issued a Notice to Appear for a “violation of two City
19 of Millbrae Municipal Code sections” to FlightCar employee Andrei Parenco. Id. ¶ 27.
20 The two citations were for “violation of the City of Millbrae Municipal Code § 7.05.020
21 operating without a business license and § 10.05.2520 zoning non-compliance.” Id. ¶ 27.
22 After the citations were issued, the employee was told that he would go to “jail” if
23 FlightCar did not cease operations. Id. ¶ 27. The Sheriff’s Deputy returned again on
24 November 14, 2013 and issued another unspecified citation. Id. ¶ 28. Since November 12,
25 2013, the Sheriff’s Deputy has returned to the property “every day at least once a day ...
26 making statements that the business should be shut down.” Id. ¶ 29. In total, the San
27 Mateo County Sherriff’s office issued four citations “for failure to have a business license
28 7.05.020 and one citation for non-compliance with zoning 10.05.25.20.” Id. ¶ 29.

1 **B. PROCEDURAL HISTORY**

2 On November 18, 2013, FlightCar filed a “Verified Petition for Writ of Mandate
3 (CCP §§ 1085, 1094.5); Complaint for Damages, Declaratory Relief and Injunctive Relief”
4 (“Complaint”) in San Mateo Superior Court. The Complaint alleges the following claims
5 against the City: (1) writ of mandate pursuant to Cal. Civ. Code § 1085 (“§ 1085”); (2) writ
6 of mandate pursuant to Cal. Civ. Code § 1094.5 (“§ 1094.5”); (3) violation of 42 U.S.C.
7 § 1983 (“§ 1983”) (for violation of the Due Process Clause, the Takings Clause and the
8 Equal Protection Clause); (4) inverse condemnation; (5) declaratory relief; and
9 (6) injunctive relief.

10 On December 16, 2013, the City removed the action to this Court under 28 U.S.C.
11 § 1441(b), based on FlightCar’s claim under 42 U.S.C. § 1983. The City now brings a Rule
12 12(b)(6) motion to dismiss the first claim for ordinary mandamus under § 1085, the third
13 claim for violation of § 1983 and the fourth claim for inverse condemnation. In support of
14 its motion, the City has submitted a Request for Judicial Notice, which contains, inter alia,
15 transcriptions of the Planning Commission and City Council hearings. The motion is fully
16 briefed and ripe for adjudication.²

17 **II. LEGAL STANDARD**

18 Rule 12(b)(6) “tests the legal sufficiency of a claim.” Navarro v. Block, 250 F.3d
19 729, 732 (9th Cir. 2001). A complaint may be dismissed under Rule 12(b)(6) for failure to
20 state a cognizable legal theory or insufficient facts to support a cognizable legal theory.
21 Mendondo v. Centinela Hosp. Med. Ctr., 521 F.3d 1097, 1104 (9th Cir. 2008). “[C]ourts
22 must consider the complaint in its entirety, as well as other sources courts ordinarily
23 examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents
24 incorporated into the complaint by reference, and matters of which a court may take

25 _____
26 ² FlightCar’s opposition exceeds the page limits specified in the Court’s Standing
27 Orders. Although the City’s motion also is oversized, it was filed before the action was
28 reassigned from a Magistrate Judge. In any event, both parties are reminded to comport
with all procedural requirements applicable to any motions and requests filed in this Court,
including the requirement to meet and confer in good faith prior to seeking the Court’s
intervention.

1 judicial notice.” Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322 (2007).
2 The court is to “accept all factual allegations in the complaint as true and construe the
3 pleadings in the light most favorable to the nonmoving party.” Outdoor Media Group, Inc.
4 v. City of Beaumont, 506 F.3d 895, 899-900 (9th Cir. 2007). Where a complaint or claim
5 is dismissed, “[l]eave to amend should be granted unless the district court determines that
6 the pleading could not possibly be cured by the allegation of other facts.” Knappenberger
7 v. City of Phoenix, 566 F.3d 936, 942 (9th Cir. 2009).

8 **III. DISCUSSION**

9 **A. 42 U.S.C. § 1983**

10 To state a claim under § 1983, a plaintiff must allege (1) that a right secured by the
11 Constitution or laws of the United States was violated, and (2) that the alleged violation
12 was committed by a person acting under the color of state law. West v. Atkins, 487 U.S.
13 42, 48 (1988). Section 1983 is not itself a source of substantive rights, but a jurisdictional
14 vehicle for vindicating federal rights elsewhere conferred. See Thornton v. City of St.
15 Helens, 425 F.3d 1158, 1164 (9th Cir. 2008).

16 In this case, Plaintiff’s § 1983 claim is predicated on three underlying constitutional
17 violations: (1) deprivation of property in violation of due process; (2) violation of the
18 Takings Clause; and (3) denial of equal protection. Compl. ¶ 55.

19 **1. Due Process**

20 The Due Process Clause of the Fourteenth Amendment may give rise to claims
21 under § 1983 for violation of (1) substantive due process and (2) procedural due process.
22 Zinerman v. Burch, 494 U.S. 113, 125 (1990). “[T]he Due Process Clause contains a
23 substantive component that bars certain *arbitrary, wrongful government actions* ‘regardless
24 of the fairness of the procedures used to implement them.’” Id. (emphasis added). Such a
25 claim arises from “a government deprivation of life, liberty, or property.” Nunez v. City of
26 Los Angeles, 147 F.3d 867, 871 (9th Cir. 1998). In addition, a “§ 1983 action may be
27 brought for a violation of procedural due process” where the government deprives the
28 plaintiff “of a constitutionally protected interest in ‘life, liberty, or property . . . *without due*

1 *process of law.*” *Id.* (emphasis in original, citation omitted). Notice and a meaningful
2 opportunity to be heard are “the hallmarks of procedural due process.” Ludwig v. Astrue,
3 681 F.3d 1047, 1053 (9th Cir. 2012) (internal quotations and citation omitted).

4 Although there is no dispute that the Complaint alleges a violation of procedural due
5 process, the parties disagree whether a claim for substantive due process also is at issue.
6 The pleadings allege a “denial of due process,” see Compl. ¶ 52, but do not expressly state
7 whether the right violated is procedural or substantive. In its opposition, FlightCar states
8 that it is proceeding on both due process theories. Opp’n at 10. While the City seems to
9 suggest that it was unaware that substantive due process also is at issue, Reply at 5 n.2, the
10 Court finds that the pleadings provide fair notice that FlightCar is alleging claims based on
11 procedural and substantive due process. In particular, the pleadings allege that the City
12 arbitrarily and unjustifiably revoked the CUP. Compl. ¶¶ 17, 18, 25, 39. These allegations
13 challenge *the substance of the City’s actions* and therefore are pertinent to a claim for
14 denial of substantive due process. See Action Apt. Ass’n, Inc. v. Santa Monica Rent
15 Control Bd., 509 F.3d 1020, 1026 (9th Cir. 2007) (recognizing an arbitrary deprivation of a
16 landowner’s right to devote his land to a legitimate use may give rise to a substantive due
17 process claim). In contrast, FlightCar’s allegations that the City scheduled the Planning
18 Commission and subsequent City Council hearings with less notice than required by the
19 Millbrae Municipal Code, see Compl. ¶¶ 19, 23, are pertinent to claim for denial of
20 procedural due process. See Ludwig, 681 F.3d at 1053.

21 In its reply, the City proffers a one-sentence argument that FlightCar cannot pursue a
22 substantive due process claim because the conduct at issue is subsumed by its claim under
23 the Takings Clause. Reply at 2. Because this argument was not presented in the City’s
24 moving papers or adequately briefed, it is not properly before the Court. Zamani v. Carnes,
25 491 F.3d 990, 997 (9th Cir. 2007) (“[a] district court need not consider arguments raised for
26 the first time in a reply brief.”); Indep. Towers of Wash., 350 F.3d at 929. That aside, the
27 City’s argument appears to be misplaced. The Fifth Amendment does not preempt all due-
28 process challenges to a land use regulation: a land use action that causes an arbitrary and

1 irrational deprivation of real property, but does not cause a taking, might be “so arbitrary or
2 irrational that it runs afoul of the Due Process Clause.” Lingle v. Chevron U.S.A., Inc., 544
3 U.S. 528, 542 (2005); accord Shanks v. Dressel, 540 F.3d 1082, 1087 (9th Cir. 2008).

4 Having concluded that the Complaint, in fact, presents claims for violation of
5 substantive and procedural due process, the Court now turns to the specific arguments
6 presented in the City’s motion to dismiss. In particular, the City argues that FlightCar has
7 failed to demonstrate that it possesses a protectable property interest, and has otherwise
8 failed to demonstrate a denial of procedural due process. These contentions are discussed
9 below.

10 *a) Property Interest*

11 To succeed on a procedural or substantive due process claim, the plaintiff “must first
12 demonstrate that he was deprived of a constitutionally protected property interest.” Gerhart
13 v. Lake Cnty., Montana, 637 F.3d 1013, 1019 (9th Cir. 2011). A government benefit, such
14 as a license or permit, may give rise to a protectable property interest where the recipient
15 has a “legitimate claim of *entitlement* to it.” Id. The entitlement generally must be one
16 created by state law. Id.; see Outdoor Media Grp., Inc. v. City of Beaumont, 506 F.3d 895,
17 903 (9th Cir. 2007) (“Vested rights in a land development permit . . . ‘are created and their
18 dimensions are defined by existing rules or understandings that stem from . . . state law.’”) (quoting Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972)).

19 The City does not dispute that a CUP can give rise to a property interest, but argues
20 that such interest “did not vest” because, under the Millbrae Municipal Code, the City
21 remained free to revoke the permit based on FlightCar’s alleged failure to comply with its
22 terms. Mot. at 8. This argument lacks merit. “Once a licensee has acquired a conditional
23 use permit, or has ‘deemed approved’ status, a municipality’s power to revoke the
24 conditional use is limited. . . . If the permittee has incurred substantial expense and acted in
25 reliance on the permit, the permittee has acquired a vested property right in the permit and
26 is entitled to the protections of due process before the permit may be revoked.” Korean
27 Am. Legal Advocacy Found. v. City of Los Angeles, 23 Cal. App. 4th 376, 393 n.5 (1994);
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1 see Kerley Indus., Inc. v. Pima Cnty., 785 F.2d 1444, 1446 (9th Cir. 1986) (“Having
2 granted appellant a permit to operate its plant, the county could not take it away
3 arbitrarily, . . . for improper reasons, or without appropriate procedural safeguards.”)
4 (internal citation omitted).

5 Here, the Complaint expressly alleges that in reliance on the City’s issuance of the
6 CUP, FlightCar entered into a one-year lease to secure the Property, expended over
7 \$10,000 in tenant improvements on its new location, and has paid and continues to pay
8 employees to run its business there. Compl. ¶ 10. Such allegations, taken as true and
9 construed in favor of FlightCar, are sufficient to state a plausible claim that FlightCar
10 acquired a vested property right in the CUP. See Malibu Mountains Recreation, Inc. v.
11 Cnty. of Los Angeles, 67 Cal. App. 4th 359, 368 (1998) (“[T]he grant of a CUP with
12 subsequent reliance by the permittee creates a fundamental vested right”); Trans-
13 Oceanic Oil Corp. v. City of Santa Barbara, 85 Cal. App. 2d 776, 784 (1984) (“When, in
14 reliance [on the issuance of a permit], work upon the Building is actually commenced and
15 liabilities are incurred for work and material, the owner acquires a vested property right to
16 the protection of which he is entitled.”) (internal quotations and citations omitted).³

17 The City counters that FlightCar’s reliance was not in “good faith” because
18 FlightCar allegedly knew it was in violation of the CUP. Reply at 1-2. The flaw in this
19 argument is that FlightCar has alleged the opposite; to wit, that it is fully compliant with the
20 CUP and was informed as such by the City. E.g., Compl. ¶¶ 18, 25. On a Rule 12(b)(6)
21 motion, those allegations must be accepted as true. Moreover, neither of the cases cited by
22 the City suggests, let alone holds, that a permittee’s non-compliance with a permit
23 necessarily vitiates a showing of good faith reliance on a permit. See Avco Comty.
24 Developers, Inc. v. S. Coast Reg’l Comm’n, 17 Cal.3d 785, 793 (1976) (plaintiff could not
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26 ³ The City claims that FlightCar cannot predicate its showing of reliance on
27 obtaining a one-year lease because doing so was a prerequisite for approval of the CUP.
28 Reply at 3 n.1. Because the City provides no supporting citation to the record, the Court
disregards this assertion. See Indep. Towers of Wash., 350 F.3d at 929 (court need not
consider arguments unsupported by citations to the record); Civ. L.R. 7-5(a).

1 show reliance based on expenses incurred *before* the Building permit was issued); Trans-
2 Oceanic Oil Corp., 85 Cal. App. 2d at 783-84 (noting that a permit cannot be arbitrarily
3 revoked by a municipality “where, on the faith of it, the owner has incurred material
4 expense.”) (citation omitted). Accordingly, the Court declines to dismiss FlightCar’s
5 substantive and procedural due process claims for failure to allege the requisite property
6 interest.

7 ***b) Procedural Due Process***

8 “The fundamental requirement of due process is the opportunity to be heard ‘at a
9 meaningful time and in a meaningful manner.’” Mathews v. Eldridge, 424 U.S. 319, 333
10 (1976) (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)). As such, before
11 depriving a party of a property interest, due process requires “notice reasonably calculated,
12 under all the circumstances, to apprise interested parties of the pendency of the action and
13 afford them an opportunity to present their objections.” Robinson v. Hanrahan, 409 U.S.
14 38, 39-40 (1972) (citations omitted). The amount of notice due depends on the context.
15 Morrissey v. Brewer, 408 U.S. 471, 481 (1972) (“[D]ue process is flexible and calls for
16 such procedural protections as the particular situation demands.”). “The purpose of notice
17 under the Due Process Clause is to apprise the affected individual of, and permit adequate
18 preparation for, an impending ‘hearing.’” Memphis Light, Gas & Water Division v. Craft,
19 436 U.S. 1, 15 (1998).

20 FlightCar alleges that it was denied adequate notice of both the Planning
21 Commission hearing at which the Commission recommended revoking the CUP *and* the
22 subsequent City Council hearing where the Council accepted that recommendation. “A
23 section 1983 claim based upon procedural due process thus has three elements: (1) a liberty
24 or property interest protected by the Constitution; (2) a deprivation of the interest by the
25 government; (3) lack of process.” Portman v. County of Santa Clara, 995 F.2d 898, 904
26 (9th Cir. 1993). For the reasons discussed above, FlightCar satisfies the first and second
27 elements of a procedural due process claim based on the revocation of the CUP. As such,
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1 the Court focuses its analysis on the third element, which requires FlightCar to establish
2 that it was denied constitutionally adequate process in the revocation of its CUP.

3 *i. Planning Commission Hearing*

4 The Millbrae Municipal Code provides that the City Council may revoke a CUP for
5 non-compliance. Millbrae Mun. Code § 10.05.2520(I)(1). The first step in the revocation
6 process is a hearing before the Planning Commission. *Id.* § 10.05.2520(I)(2) (“Before the
7 city council considers revocation of any conditional use permit, the planning commission
8 shall hold a duly noticed public hearing thereon after giving written notice thereof to the
9 permittee at least ten days in advance of such hearing . . .”). Within five days of that
10 hearing, “the planning commission shall transmit a report of its findings and its
11 recommendations on the revocation to the city council.” *Id.* The City Council must hold a
12 public hearing on the proposed “revocation of an approved conditional use permit,” with
13 “[n]otice of the public hearing . . . given in the time and manner provided in Article
14 XXIX.” *Id.* § 10.05.2520(F). Article XXIX requires at least ten days’ notice of the public
15 hearing. *Id.* § 10.05.2900.

16 The Complaint alleges that the City violated FlightCar’s due process rights by
17 providing it with only seven instead of ten days’ notice of the Planning Commission
18 hearing. However, a federal due process claim cannot be grounded on the violation of a
19 procedural right created by *state law*. See *Samson v. City of Bainbridge Island*, 683 F.3d
20 1051, 1060 (9th Cir. 2012) (noting that it is the Due Process Clause itself, *not state law*,
21 which determines what process is due). Thus, the fact that FlightCar received less notice
22 than required by the Municipal Code, standing alone, fails to demonstrate a due process
23 violation. *Jenks v. Hull*, 67 F.3d 307 (9th Cir. 1995) (“mere violations of state law do not
24 constitute a violation of due process and do not provide the basis for a § 1983 claim.”);
25 *Walker v. Sumner*, 14 F.3d 1415, 1420 (9th Cir. 1994) (noting that “if state procedures rise
26 above the floor set by the due process clause, a state could fail to follow its own procedures
27 *yet still provide sufficient process to survive constitutional scrutiny.*”) (internal quotations
28 and citation omitted, emphasis added), *overruled on other grounds*, *Sandin v. Conner*, 515

1 U.S. 472, 483-84 (1995)); Wallace v. Tilley, 41 F.3d 296, 301 (7th Cir. 1994) (“The denial
2 of state procedures in and of itself does not create inadequate process under the federal
3 constitution. A violation of state law . . . is not a denial of due process, even if the state law
4 confers a procedural right.”) (internal quotations and citation omitted).

5 The salient question for purposes of procedural due process is whether the party-in-
6 interest had a meaningful opportunity to adequately prepare for the upcoming hearing. See
7 Memphis Light, Gas & Water Div., 436 U.S. at 15. In this case, FlightCar acknowledges
8 that it received actual notice of Planning Commission hearing, and the record shows that it
9 appeared at the hearing to present arguments to challenge the City’s proposal to revoke the
10 CUP. Compl. ¶¶ 19, 24; RJN Exs. C, D. Notably, FlightCar does not allege that the
11 shortened notice in any way impeded its ability to prepare for or undermined its
12 presentation at the Planning Commission hearing. The absence of prejudice is fatal to a due
13 process claim. See Al Haramain Islamic Found., Inc. v. U.S. Dept. of Treasury, 686 F.3d
14 965, 990 (9th Cir. 2012) (holding that a procedural due process claim was properly
15 dismissed where the lack of proper notice was harmless); Power Road-Williams Field LLC
16 v. Gilbert, -- F. Supp. 2d --, 2014 WL 1515141, *6 (D. Ariz. Apr. 18, 2014) (finding that
17 the public entity defendants’ failure to comply with procedural requirements of state law
18 did not violate landowner’s right to procedural due process where “it was provided notice
19 of Defendants’ proposed action and that it was able to appear at multiple public hearings
20 and present evidence”).

21 In view of the foregoing, FlightCar’s § 1983 claim for denial of procedural due
22 process, insofar as it is premised on notice of the Planning Commission hearing, is
23 DISMISSED with leave to amend.

24 *ii. City Council Hearing*

25 FlightCar’s allegations regarding lack of sufficient notice of the City Council
26 hearing also fails to state a claim. According to FlightCar, it had ten days under Municipal
27
28

1 Code § 10.05.2710⁴ to appeal the Planning Commission’s recommendation; however, the
2 City Council met to consider the revocation of the CUP “two days prior to the expiration of
3 the statutory period allow for appeal” Compl. ¶¶ 23-24. This assertion is misplaced.
4 Section 10.05.2710 applies to appeals from “final actions” of the Planning Commission.
5 Here, there was no need for FlightCar to appeal because there was no final decision by the
6 Planning Commission. Rather, in accordance with § 10.05.2520(I)(2), the Planning
7 Commission convened a public hearing for the purpose of preparing a *recommendation* to
8 the City Council on the revocation. As such, the fact the City Council scheduled a hearing
9 on the CUP revocation before FlightCar’s time to appeal expired is inapposite because
10 there was no final decision from which to appeal in the first instance.⁵

11 Setting aside its reliance on the wrong municipal code section, it does appear that the
12 City failed to provide ten days’ notice of the City Council hearing on whether to accept the
13 Planning Commission’s recommendation to revoke the CUP. See Millbrae Mun. Code
14 §§ 10.05.2520(f), 10.05.2900. That being said, the instant claim suffers from the same
15 flaws as FlightCar’s claim based on inadequate notice of the Planning Commission hearing.
16 Nowhere in its Complaint does FlightCar alleges that it was deprived of adequate notice of
17 the City Council hearing, deprived of an opportunity to prepare for the hearing, or denied
18 the opportunity to appear at the hearing to challenge the Planning Commission’s
19 recommendation. To the contrary, the record shows that a representative from FlightCar
20 appeared at the hearing and responded to the City’s arguments for revoking the CUP. RJN
21 Ex. D.

23 ⁴ Section 10.05.2710, entitled “Appeal of Planning Commission action,” states as
24 follows: “Any final action of the planning commission taken at any public hearing on any
25 design review permit, conditional use permit, exception, variance, or other matter for which
26 the commission has final approval authority may be appealed to the city council by any
person, provided such appeal is submitted within ten days of the planning commission
action. (Ord. 726, § 2 (Att. A)).”

27 ⁵ In its opposition, FlightCar tacitly acknowledges that the Planning Commission did
28 not issue a final ruling from which an appeal may be taken by correctly citing
§ 10.05.2520(F). Opp’n at 11 n.5. FlightCar shall rectify its erroneous recitation and
citation to the Municipal Code, consistent with the findings of this Order.

1 In its opposition, FlightCar claims for the first time that it learned of the City
2 Council hearing from a news reporter only a few days prior thereto. Opp'n at 12. As a
3 result, FlightCar contends that it lacked sufficient time to retain legal counsel and was thus
4 forced to appear at the City Council hearing through a non-lawyer spokesperson. Id.
5 While such facts certainly bear upon whether the City's actions deprived FlightCar of a
6 meaningful opportunity to prepare for and be heard at the hearing, the Court cannot
7 consider them at this juncture because they are not alleged in the pleadings. See Schneider
8 v. Calif. Dep't of Corrections, 151 F.3d 1194, 1197 n.1 (9th Cir.1998) (“‘new’ allegations
9 contained in the [plaintiff]’s opposition . . . are irrelevant for Rule 12(b)(6) purposes.”).

10 Accordingly, FlightCar's § 1983 claim for denial of procedural due process, insofar
11 as it is premised on notice of the City Council hearing, is DISMISSED with leave to
12 amend.

13 2. Takings Clause

14 The Fifth Amendment's Takings Clause prohibits the taking of private property for
15 public use without just compensation. U.S. Const. amend. V; see Gammoh v. City of La
16 Habra, 395 F.3d 1114, 1122, amended in part on other grounds, 402 F.3d 875 (9th Cir.
17 2005). There are “physical takings and regulatory takings.” Tahoe-Sierra Preservation
18 Council, 535 U.S. at 321. In the latter type of taking, which is relevant here, the Fifth
19 Amendment is violated if the government regulation “does not substantially advance
20 legitimate state interests *or denies an owner economically viable use of his land.*” Lucas v.
21 S.C. Coastal Council, 505 U.S. 1003, 1016 (1992) (quoting Agins v. Tiburon, 447 U.S.
22 255, 260 (1980)).

23 The City first contends that FlightCar's takings claim fails on the grounds that it has
24 failed to demonstrate a protectable property interest in the CUP or allege that the taking
25 was for “public use.” Mot. at 7-9. These contentions are unavailing. As set forth above in
26 the Court's analysis of FlightCar's due process claim, FlightCar has sufficiently alleged a
27 protectable property interest. With regard to its second contention, neither of the cases
28 cited in the City's brief holds that a plaintiff alleging a *regulatory* takings claim must

1 explicitly allege that the taking was for public use. Mot. at 13 (citing Penn Cent. Transp.
2 Co. v. City of New York, 438 U.S. 104, 123 (1978) and Berman v. Parker, 348 U.S. 26, 31-
3 33 (1954)). In fact, the Supreme Court has held that “neither a physical appropriation *nor a*
4 *public use* has ever been a necessary component of a ‘regulatory taking.’” Tahoe-Sierra
5 Preservation Council, 535 U.S. at 326 (emphasis added). In view of the above, the Court
6 declines to dismiss FlightCar’s § 1983 claim for violation of the Takings Clause.

7 **3. Equal Protection**

8 “The Equal Protection Clause . . . is essentially a direction that all persons similarly
9 situated should be treated alike.” City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S.
10 432, 439 (1985). “To state a claim under 42 U.S.C. § 1983 for a violation of the Equal
11 Protection Clause of the Fourteenth Amendment a plaintiff must show that the defendants
12 acted with an intent or purpose to discriminate against the plaintiff based upon membership
13 in a protected class.” Barren v. Harrington, 152 F.3d 1193, 1194 (9th Cir. 1998). The first
14 step in analyzing an equal protection claim is to identify the group to which the plaintiff
15 claims to be a member. Thornton v. City of St. Helens, 425 F.3d 1158, 1167 (2005). “The
16 groups must be comprised of similarly situated persons so that the factor motivating the
17 alleged discrimination can be identified.” Id.

18 The allegations in support of FlightCar’s equal protection claim are entirely
19 conclusory. Compl. ¶¶ 51-57. In particular, the pleadings fail to identify the particular
20 group to which FlightCar claims membership, and otherwise is devoid of any facts showing
21 that the City acted with the intent or purpose of discriminating against FlightCar based on
22 its membership in such group. In its opposition, FlightCar points to allegations in the
23 Complaint that the City did not follow its notice procedures or abatement ordinance and
24 refused to issue a business license despite its compliance with the CUP. Opp’n at 13. Such
25 allegations, FlightCar maintains, show that it was “treated differently from others similarly
26 situated because the City did not follow procedures that are supposed to be applicable to all
27 persons.” Id. However, for purposes of stating an equal protection claim, it is not enough
28 to conflate “all persons not injured into a preferred class receiving better treatment than the

1 plaintiff.” Thornton, 425 F.3d at 1167 (internal quotations and citation omitted).⁶ In view
2 of the paucity of facts alleged, FlightCar’s equal protection claim is DISMISSED with
3 leave to amend.

4 **B. ORDINARY MANDAMUS UNDER CIVIL CODE § 1085**

5 “The proper method of obtaining judicial review of most public agency decisions is
6 by instituting a proceeding for a writ of mandate.” Bunnett v. Regents of Univ. of Cal.,
7 35 Cal. App. 4th 843, 848 (1995). There are two types of mandamus: ordinary (or
8 traditional) and administrative. See Cal. Civ. Proc. Code §§ 1085, 1094.5. The applicable
9 type of mandate depends on the nature of the administrative action or decision to be
10 reviewed. Tielsch v. City of Anaheim, 160 Cal. App. 3d 570, 574 (1984).

11 “A traditional or ordinary writ of mandate under [§ 1085] is a method for compelling
12 a public entity to perform a legal and usually ministerial duty.” City of Scotts Valley v.
13 Cnty. of Santa Cruz, 201 Cal. App. 4th 1, 23 (2011) (internal quotations omitted). “A
14 ‘ministerial duty’ is one generally imposed upon a person in public office who, by virtue of
15 that position, is obligated ‘to perform in a prescribed manner required by law when a given
16 state of facts exists.’” Flores v. Cal. Dep’t of Corr. and Rehab., 224 Cal. App. 4th 199, 205
17 (2014) (citations omitted). “Thus, ordinary mandate is used to review adjudicatory actions
18 or decisions when the agency was not required to hold an evidentiary hearing.” Bunnett,
19 35 Cal. App. 4th at 848. In contrast, administrative mandamus under § 1094.5 is used to
20 review quasi-adjudicatory acts “in which by law a hearing is required to be given, evidence
21 is required to be taken and discretion in the determination of facts is vested in [an] inferior
22 tribunal, corporation, board or officer” Cal. Civ. Code § 1094.5(a).

23 FlightCar brings claims for a traditional writ under § 1085 to challenge the City’s
24 refusal to issue a business license and its revocation of the CUP, see Compl. ¶¶ 32-46, and

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26 ⁶ The Court notes that “[a] successful equal protection claim may be brought by a
27 ‘class of one,’ when the plaintiff alleges that it has been intentionally treated differently
28 from others similarly situated and that there is no rational basis for the difference in
treatment.” SeaRiver Mar. Fin. Holdings, Inc. v. Mineta, 309 F.3d 662, 679 (9th Cir.
2002). Even so, there are no allegations that any other person or entity similarly situated to
FlightCar received different treatment.

1 for an administrative writ under § 1094.5 also to challenge the revocation of the CUP, see
2 id. ¶¶ 47-50. The City’s motion to dismiss only challenges the claim for a traditional writ.

3 **1. Business License**

4 FlightCar first seeks an ordinary writ to compel the City to issue a business license.
5 “There are essentially two prerequisites to issuance of a writ of mandate under Code of
6 Civil Procedure section 1085: ‘(1) the respondent has a clear, present, and usually
7 ministerial duty to act, and (2) the petitioner has a clear, present, and beneficial right to
8 performance of that duty.’” Eel River Disposal and Resource Recovery, Inc. v. Humboldt,
9 221 Cal.App.4th 209, 239 (2013) (citations omitted). The question of whether a duty is
10 ministerial is a question of statutory interpretation to be decided by the court. Cnty. of Los
11 Angeles v. City of Los Angeles, 214 Cal. App. 4th 643, 653 (2013). Here, the parties
12 disagree whether FlightCar’s challenge to the City’s refusal to issue a business license is
13 cognizable in an ordinary writ proceeding. For the reasons discussed below, the Court
14 concludes that it is not.

15 Chapter 7.05 of the Municipal Code, which governs the City’s issuance of business
16 licenses, provides initially that “[a]ny person starting a new business in the city shall file a
17 written application prior to commencing business and paying the appropriate tax.”
18 Millbrae Mun. Code § 7.05.170. The application requires a completed Business License
19 Approval Form to document the approvals from various City Departments, which “must be
20 completed and submitted with the Business License Application.” RJN Ex. A. If the tax
21 collector rejects or otherwise declines to issue a business license, the applicant may appeal
22 the decision to the city manager within fifteen days of the adverse decision. Millbrae Mun.
23 Code §§ 7.05.370(A), 7.05.380(A). Upon the timely filing of a notice of appeal, the city
24 manager, upon ten days’ notice, conducts a hearing which culminates in the issuance
25 findings and a determination. Id. ¶ 7.05.380(A). “The decision of the city manager shall be
26 final and is reviewable *only* by petition to the Superior Court pursuant to Code of Civil
27 Procedure Section 1094.5.” Id. § 7.05.380(B) (emphasis added).

1 The City contends that FlightCar cannot establish a beneficial right to a business
2 license because it failed to obtain the necessary approvals from the Planning and Building
3 Departments. Mot. at 15. Perhaps so, but the City overlooks a more glaring, fundamental
4 flaw in FlightCar’s claim. Under California law, exhaustion of administrative remedies is a
5 jurisdictional prerequisite to seeking mandamus relief. Leff v. City of Monterey Park, 218
6 Cal. App. 3d 674, 680 (1990) (“Because the rule is jurisdictional, the doctrine is not open to
7 judicial discretion.”). To fully exhaust its claim based on its business license application,
8 FlightCar was required to have filed an appeal with the city manager. Millbrae Mun. Code
9 §§ 7.05.370(A), 7.05.380(A). FlightCar does not allege that it took such an appeal. Absent
10 an appeal, there is no final decision subject to mandamus review. See City of Fillmore v.
11 State Bd. of Equalization, 194 Cal. App. 4th 716, 726 (2011) (“A court may review only a
12 decision by the final administrative decisionmaker” and “cannot interfere in the
13 intermediate stages of the proceeding”). In any event, even if FlightCar had timely
14 appealed the tax collector’s decision and the city manager denied the appeal, FlightCar’s
15 remedy lies in an administrative writ under § 1094.5, not an ordinary writ under § 1085. Id.
16 § 7.05.380(B).

17 In sum, the Court finds that FlightCar has failed to state a claim for ordinary
18 mandamus to challenge the City’s refusal to issue a business license. Therefore,
19 FlightCar’s first claim for relief, to the extent that it challenges the City’s refusal to issue
20 a business license, is DISMISSED without prejudice.⁷

21 **2. CUP**

22 The City next argues that its decision to revoke FlightCar’s CUP involves a quasi-
23 judicial act, as opposed to ministerial duty, and therefore, FlightCar cannot rely on
24 traditional mandamus under § 1085 to challenge the revocation. Mot. at 16-18. As a
25 general matter, a public entity’s decisions relating to CUPs are discretionary in nature and
26 thus properly reviewed under § 1094.5. See City of Monterey v. Carrnshimba, 215 Cal.

27 ⁷ If FlightCar, in fact, appealed the denial of its business license application, it may
28 amend its second claim under § 1094.5 to include such a claim.

1 App. 4th 1068, 1089 (2013) (citing Qualified Patients Ass’n v. City of Anaheim, 187 Cal.
2 App. 4th 734 (2010)). However, “[w]here a petition challenges an agency’s failure to
3 perform an act required by law *rather than the conduct or result of an administrative*
4 *hearing*, the remedy is by ordinary mandate pursuant to Code of Civil Procedure section
5 1085, not by administrative mandate pursuant to section 1094.5.” Conlan v. Bonta, 102
6 Cal. App. 4th 745, 752 (2002) (emphasis added).

7 FlightCar argues that its claim for ordinary mandamus is limited to challenging the
8 City’s failure to comply with the notice and timing requirements applicable to the Planning
9 Commission and City Council hearings, as specified in the Millbrae Municipal Code.
10 Opp’n at 15-16. This assertion is contradicted by the allegations of the Complaint, which
11 clearly allege that FlightCar is seeking ordinary mandamus relief with respect to *both* the
12 City’s decision to revoke the CUP *and* its failure to provide the requisite notice. Compl.
13 ¶¶ 39, 40. Since FlightCar’s challenge to the revocation of the CUP is cognizable only
14 through administrative mandamus under § 1094.5, such claim is DISMISSED from
15 FlightCar’s first claim for relief under § 1085, without leave to amend.

16 In contrast, the Court finds that FlightCar’s remaining claim based on the City’s
17 failure to provide sufficient notice of the Planning Commission and City Council hearings
18 are cognizable in a claim for traditional mandamus because it does not challenge *how* the
19 hearings were conducted or the result of those hearings. Conlan, 102 Cal. App. 4th at 752;
20 see also Pozar v. Dept. of Transp., 145 Cal. App. 3d 269, 271 (1983) (traditional mandamus
21 may be used to compel a public agency to follow its own rules or procedures when it has a
22 ministerial duty to do so).⁸

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27 ⁸ Alternatively, the City contends that “even if FlightCar challenged the ministerial
28 act of not having enough notice, it is irrelevant because it appeared at the hearing.” Reply
at 9. The City cites no legal authority to support this argument. In addition, the City did
not make this argument in its moving papers.

1 **C. INVERSE CONDEMNATION**

2 FlightCar’s claim for inverse condemnation is predicated on the City’s denial of its
3 “vested property rights, including its Conditional Use Permit[.]” Compl. ¶ 59. This claim
4 is based on article I, section 19, of the California Constitution, which states in relevant part:
5 “Private property may be taken or damaged for public use only when just compensation . . .
6 has first been paid to, or into court for, the owner.” The City moves to dismiss FlightCar’s
7 inverse condemnation claim on the grounds FlightCar has neither shown a protectable
8 property interest nor made any allegation of “public use.” Mot. at 19-20.

9 The City has failed to present compelling arguments for dismissing FlightCar’s
10 claim for inverse condemnation. As set forth above, the Court has found that FlightCar has
11 adequately alleged a vested property interest in the CUP. With respect to the City’s latter
12 contention, FlightCar need not specifically allege “public use,” where, as here, the inverse
13 condemnation claim is akin to a regulatory taking. See Smith v. City and Cnty. of San
14 Francisco, 225 Cal. App. 3d 38, 45 (1990) (“To state a cause of action for inverse
15 condemnation based on government regulation amounting to a constitutional taking,
16 appellants must allege facts showing such regulation deprived them of substantially all use
17 of their property.”); see also Del Monte Dunes at Monterey, Ltd. v. City of Monterey, 95
18 F.3d 1422, 1428 (9th Cir. 1996) (stating that where the inverse condemnation claim is
19 premised on the denial or revocation of a land use permit, the plaintiff need only allege that
20 “the City’s actions (1) did not substantially advance a legitimate public purpose; or
21 (2) denied it economically viable use of its property.”). In view of the above, the Court
22 declines to dismiss FlightCar’s claim inverse condemnation.

23 **IV. CONCLUSION**

24 For the reasons set forth above,
25 **IT IS HEREBY ORDERED THAT:**

26 1. Defendant’s Motion to Dismiss is **GRANTED IN PART** and **DENIED IN**
27 **PART**, as set forth above.


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2. Plaintiff shall have twenty-one (21) days from the date this Order is filed to file an amended complaint, consistent with the Court’s rulings. Plaintiff is advised that any additional factual allegations set forth in it amended complaint must be made in good faith and consistent with Federal Rule of Civil Procedure 11. To avoid unnecessary motion practice, the parties shall meet and confer in good faith regarding the sufficiency of Plaintiff’s amended allegations in their forthcoming First Amended Complaint.

IT IS SO ORDERED.

Dated: June 13, 2014


SAUNDRA BROWN ARMSTRONG
United States District Judge