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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

ANDREW CONTASTI, an individual;
ANNETTE CONTASTI, an individual;
and JOE HERNANDEZ, an individual,

Plaintiffs,

vs.

CITY OF SOLANA BEACH,

Defendant.

CASE NO. 09CV1371 WQH (BLM)
ORDER

HAYES, Judge:

The matter before the Court is the Defendant's Motion in Limine to Preclude Evidence, Testimony or Argument Relating to Violation of Substantive Due Process (ECF No. 108).

BACKGROUND FACTS

On January 28, 2010, Plaintiffs filed the First Amended Complaint ("Complaint"), alleging two claims for relief against Defendant City of Solana Beach based upon the decision of the City Council to deny Plaintiffs' application for a development review permit for Lot 10 located at 360 North Granados Avenue in the City of Solana Beach. (ECF No. 15). In the first claim, Plaintiffs assert that the denial of the development review permit was arbitrary and unreasonable, constituting a deprivation of due process in violation of 42 U.S.C. § 1983. In the second claim, Plaintiffs assert that they were treated differently from similarly situated persons when

1 the City Council denied their permit for Lot 10, constituting a deprivation of equal
2 protection in violation of 42 U.S.C. § 1983.

3 On April 29, 2011, Defendant City of Solana Beach filed a Motion for Summary
4 Judgment, or in the alternative, Summary Adjudication of Issues (“Motion for Summary
5 Judgment”). (ECF No. 32). Defendant argued that the Court should grant summary
6 judgment in its favor on Plaintiff’s substantive due process claim because “plaintiffs
7 failed to file a writ of mandate [in a previous state court action], [and] their claim . . .
8 is barred by the doctrines of res judicata and collateral estoppel. *Id.* at 5. Defendant
9 argued that the Court should grant summary judgment on Plaintiff’s equal protection
10 claim “because [the claim] has been adjudicated, and because the City’s decision was
11 rationally related to a permissible state objective.” *Id.*

12 On July 26, 2011, the Court issued an Order granting the Motion for Summary
13 Judgment, or in the alternative, Summary Adjudication of Issues. (ECF No. 36). With
14 regard to the due process claim, the Court stated: “Plaintiffs did not file an opposition
15 to the motion for summary judgment, despite an opportunity to do so. Plaintiffs have
16 not shown that there are genuine issues for trial that preclude summary judgment.” *Id.*
17 at 6. The Court concluded that the claim for violation of due process was barred. With
18 regard to the equal protection claim, the Court found “that Defendant has carried its
19 burden pursuant to Rule 56 and Plaintiffs have not shown that there are genuine issues
20 for trial that preclude summary judgment.” *Id.* at 7.

21 On July 27, 2011, the Clerk of the Court issued a Judgment against Plaintiffs
22 Andrew Contasti, Annette Contasti, and Joe Hernandez. (ECF No. 37).

23 On January 24, 2012, Plaintiff Andrew Contasti filed a Motion for Relief from
24 Judgment pursuant to Federal Rule of Civil Procedure 60(b). (ECF No. 45).

25 On July 9, 2012, the Court issued an Order granting the Motion for Relief from
26 Judgment finding that Plaintiffs had demonstrated excusable neglect and extraordinary
27 circumstances sufficient to warrant relief. (ECF No. 61).

28 On August 6, 2012, Plaintiffs filed an opposition to Defendant’s Motion for

1 Summary Judgment. (ECF No. 69). Plaintiffs argued that they were not precluded
2 from bringing their due process claim in this Court “because Plaintiffs’ § 1983 claim
3 for violation of their right to Substantive Due Process is different from Plaintiffs’
4 application for a permit which was denied by the City Council in the underlying
5 administrative proceeding.” *Id.* at 13. With respect to the equal protection claim,
6 Plaintiffs argued that a triable issue of fact existed “because the claim has not already
7 been adjudicated and the city unjustifiably treated Plaintiffs differently.” *Id.* at 17. On
8 August 13, 2012, Defendant filed a reply in support of the Motion for Summary
9 Judgment. (ECF No. 70).

10 On September 18, 2012, the Court denied Defendant’s Motion for Summary
11 Judgment in its entirety. (ECF No. 71). With respect to Plaintiff’s substantive due
12 process claim, the Court concluded that “the preclusive effect of the City Council’s
13 decision does not extend to the substantive due process claim presented in this federal
14 action.” *Id.* at 10. With respect to Plaintiffs’ equal protection claim, the Court
15 concluded that “there is a triable issue of fact as to whether the Defendant’s alleged
16 justification for denying Plaintiff’s application was ‘based on an improper motive’ and
17 served as a ‘pretext for differential treatment.’” *Id.* at 16 (citation omitted).

18 On May 24, 2013, the Court issued an Order denying Defendant’s Motion for
19 Leave to File Second Summary Judgment Motion on the grounds that a second
20 summary judgment based upon an expanded factual record was not appropriate. (ECF
21 No. 96).

22 The parties subsequently filed motions in limine and on September 6, 2013, the
23 Court held a hearing on the motions in limine. (ECF No. 139).

24 **CONTENTIONS OF THE PARTIES**

25 Defendant contends that, as a matter of law, Plaintiffs were not deprived of a
26 constitutionally protected property interest when the City Council denied their
27 application for a development review permit. (ECF No. 108 at 2). Defendant contends
28 that Plaintiffs should be precluded from presenting evidence, testimony or argument

1 relating to a violation of either substantive or procedural due process. *Id.* at 1.
2 Defendant asserts that: “The permit at issue in this case is not the objective, structure
3 development permit, but the discretionary *development review permit.*” *Id.* at 3.
4 Defendant asserts that the development review permit for Lot 10 was denied “because
5 it did not comply with the special discretionary development criteria as set forth in
6 [SMBC] Section 17.68.040.F.” *Id.* at 4. Defendant contends that the denial of the
7 development review permit based upon discretionary considerations cannot form the
8 basis for a property interest. *Id.* at 7. Because Plaintiffs cannot establish that they had
9 a property interest in the special discretionary permit, Defendant contends that Plaintiffs
10 cannot establish a constitutional violation. *Id.* at 7–8.¹

11 Plaintiffs agree that the due process claim requires that a state actor deprived
12 them of a constitutionally protected life, liberty or property interest. (ECF No. 126 at
13 4). Plaintiffs contend that Defendant “is wrong on its central legal argument, which is
14 that there can be no protected property interest, and therefore no substantive due process
15 violation, simply because the City had the right to exercise discretion in the permitting
16 process.” *Id.* at 5. Plaintiffs assert that typical land use disputes involving alleged
17 procedural irregularities, violations of state law, and unfairness ordinarily do not
18 implicate substantive due process, but that a due process violation is established by the
19 arbitrary or irrational conduct taken in this case. *Id.* at 13. Plaintiffs further contend
20 that they are able to demonstrate the violation of a “vested property right,” on the
21 grounds that Defendant denied their permit for noncompliance with Ordinance 357, not
22 yet in effect of the date the application was “deemed complete” in violation of Cal.
23 Govt .Code § 66474.2(a). *Id.* at 15.

24 **UNDISPUTED FACTS**

25 Plaintiffs Andrew Contasti, Annette Contasti, and Joe Hernandez owned two
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27 ¹Defendant has not been diligent in making this argument. However, Plaintiffs
28 do not assert and this Court cannot find that this case can proceed to trial without
resolving this issue.

1 adjacent lots, Lot 9 and Lot 10, located at 360 North Granados Avenue in the City of
2 Solana Beach. In February 2007, Plaintiffs submitted applications to build homes on
3 two lots that they owned in the City of Solana Beach, Lots 9 and 10. Plaintiffs
4 submitted two applications to the City of Solana Beach for two permits for each lot: (1)
5 a development review permit; and (2) a structure development permit.

6 On July 11, 2007, the City Council held a hearing and approved Plaintiffs' permit
7 application for Lot 9 finding that no adverse effects upon neighboring properties have
8 been identified. Plaintiffs agreed to reduce the 4,031 square footage home proposed for
9 Lot 9 by 230 square feet and submitted revised drawings after the hearing, which were
10 approved by the City Council.

11 The hearing was continued to August 22, 2007 to consider the permit application
12 for the Lot 10 home, which was designed to be 4,387 square feet. After the July 11,
13 2007 hearing, Plaintiffs submitted revised drawings which reduced the size of the Lot
14 10 home by 258.25 square feet. On August 22, 2007, the hearing was continued to
15 September 19, 2007. On September 19, 2007, the City Council denied Plaintiffs'
16 permit application for the 4,387 square foot design of the Lot 10 home.

17 On October 10, 2007, the City Council issued Resolution 2007-125, which
18 formally denied the permit application for Lot 10. The City Council resolution found
19 that the proposed Lot 10 development "*does not* comply with the following
20 development criteria as set forth in Solana Beach Municipal Code Section 17.68.040.F:"

21 a. Relationship with Adjacent Land Uses - The proposed single family
22 residence is designed in a manner that is incompatible with other nearby
23 development because it is not compatible with existing or potential future
24 single family development. Adverse effects upon neighboring properties
25 have been identified from this development. An analysis of the
26 development characteristics of nearby residences was completed to
27 compare the proposed residence with nearby residential development. The
28 area analyzed included lots within the same LMRd Zone that are located
on the east side of North Granados and the west side of Glenmont Avenue
southward to El Viento and northward approximately half way to
Lynnwood Avenue. The average lot size in the area analyzed is
approximately 8,500 square feet and ranges from 8,300 to 16,600 square
feet. The average total floor area of structures is approximately 1,700
square feet and ranges from 947 to 3,721 square feet. The proposed 4,387
square foot (3,987 gross square foot) residence is approximately 2,700

1 square feet larger than the average existing residences. The maximum size
2 of future development, which would be subject to Ordinance 357, would
3 be approximately 3,600 gross square feet. The proposed residence is
approximately 387 square feet larger than the maximum size of future
residences in the area analyzed.

4 b. Building and Structure Placement - The site layout and design of the
5 proposed project do not visually and functionally enhance its intended use
6 as a single-family residence because the bulk and scale of the proposed
project is incompatible with nearby structures.

7 (ECF No. 112 at 23–24). Without a development review permit, Plaintiffs could not
8 obtain a structure development permit pursuant to the Solana Beach Municipal Code
9 (“SBMC”).

10 ANALYSIS

11 The Fourteenth Amendment to the United States Constitution provides that a
12 State shall not “deprive any person of life, liberty, or property, without due process of
13 law.” U.S. CONST. amend. XIV, § 1. Congress has created a federal cause of action
14 pursuant to 42 U.S.C. § 1983 for the “deprivation of any rights, privileges, or
15 immunities secured by the Constitution and laws.” “[A] substantive due process claim
16 must, as a threshold matter, show a government deprivation of life, liberty, or property.”
17 *Action Apartment Ass’n, Inc.*, 509 F.3d 1020, 1026 (9th Cir. 2007) (internal quotation
marks and citation omitted).

18 In *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 755 (2005), Respondent
19 alleged that Petitioner, the town of Castle Rock, Colorado, violated the Due Process
20 Clause of the Fourteenth Amendment to the United States Constitution when its police
21 officers, acting pursuant to official policy or custom, failed to respond properly to her
22 repeated reports that her estranged husband was violating the terms of a restraining
23 order. Respondent claimed a violation of her due process rights “on the ground that
24 she had a property interest in police enforcement of the restraining order against her
25 husband; and that the town deprived her of this property without due process by having
26 a policy that tolerated nonenforcement of restraining orders.” *Id.*

27 The Supreme Court specifically addressed: “whether what Colorado law has
28

1 given respondent constitutes a property interest for the purposes of the Fourteenth
2 Amendment.” *Id.* at 756. The Supreme Court relying upon the analysis in *Board of*
3 *Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972) explained:

4 “To have a property interest in a benefit, a person clearly must have more
5 than an abstract need or desire” and “more than a unilateral expectation of
6 it. He must, instead, have a legitimate claim of entitlement to it.” *Board of*
7 *Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 33
8 L.Ed.2d 548 (1972). Such entitlements are, “‘of course, ... not created by
9 the Constitution. Rather, they are created and their dimensions are defined
10 by existing rules or understandings that stem from an independent source
11 such as state law.’ ” *Paul v. Davis*, 424 U.S. 693, 709, 96 S.Ct. 1155, 47
12 L.Ed.2d 405 (1976) (quoting *Roth, supra*, at 577, 92 S.Ct. 2701); see also
13 *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 164, 118 S.Ct.
14 1925, 141 L.Ed.2d 174 (1998).

15 Our cases recognize that a benefit is not a protected entitlement if
16 government officials may grant or deny it in their discretion. See, e.g.,
17 *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 462-463, 109
18 S.Ct. 1904, 104 L.Ed.2d 506 (1989).

19 *Town of Castle Rock*, 545 U.S. at 756. The Supreme Court stated that this
20 “determination, despite its state law underpinnings, is ultimately one of federal
21 constitutional law.” *Id.* at 756-757.

22 “Although the underlying substantive interest is created by ‘an
23 independent source such as state law,’ *federal constitutional law*
24 determines whether that interest rises to the level of a ‘legitimate claim of
25 entitlement’ protected by the Due Process Clause.” *Memphis Light, Gas*
26 *& Water Div. v. Craft*, 436 U.S. 1, 9, 98 S.Ct. 1554, 56 L.Ed.2d 30 (1978)
27 (quoting *Roth, supra*, at 577, 92 S.Ct. 2701; emphasis added); cf. *United*
28 *States ex rel. TVA v. Powelson*, 319 U.S. 266, 279, 63 S.Ct. 1047, 87 L.Ed.
1390 (1943). Resolution of the federal issue begins, however, with a
determination of what it is that state law provides.

545 U.S. at 575. “We do not believe that these provisions of Colorado law truly made
enforcement of restraining orders *mandatory*.” *Id.* at 760. Relying upon the “deep-
rooted nature of law-enforcement discretion,” the Court concluded that “[t]his is not the
sort of ‘entitlement’ out of which a property interest is created.” *Id.* at 764.

“A threshold requirement to a substantive or procedural due process claim is the
plaintiff’s showing of a liberty or property interest protected by the Constitution. A
protected property interest is present where an individual has a reasonable expectation
of entitlement deriving from ‘existing rules or understandings that stem from an

1 independent source such as state law.” *Wedges/Ledges of Cal., Inc. v. City of Phoenix*,
2 24 F.3d 56, 62 (9th Cir. 1994) (quoting *Roth*, 408 U.S. at 577). “A reasonable
3 expectation of entitlement is determined largely by the language of the statute and the
4 extent to which the entitlement is couched in mandatory terms.” *Id.* (internal quotation
5 marks and citation omitted).

6 In *Thornton v. City of St. Helens*, 425 F.3d 1158, 1164 (9th Cir. 2005), the Court
7 of Appeals for the Ninth Circuit applied the analysis in *Roth* to decide whether an
8 applicant for the renewal of a state operating license had a property interest to support
9 a claim for substantive due process. The Court of Appeals stated:

10 Property interests are not created by the Constitution, but “by existing
11 rules or understandings that stem from an independent source such as state
12 law—rules or understandings that secure certain benefits and that support
13 claims of entitlement to those benefits.” *Bd. of Regents v. Roth*, 408 U.S.
14 564, 577, 92 S.Ct. 2701, 33 L. Ed. 548 (1972). To have a property interest
in a government benefit, such as the right to renew a certificate, “a person
clearly must have more than . . . a unilateral expectation of entitlement to
it.” *Id.*

14 . . .

15 At one pole, a state operating license that can be revoked only ‘for cause’
16 creates a property interest. At the opposite pole, a statute that grants the
17 reviewing body unfettered discretion to approve or deny an application
18 does not create a property right. Whether a statute creates a property
19 interest in the renewal of an existing operating license falls somewhere in
20 the middle of those extremes. The answer to that question depends on the
21 extent to which the governing statute contains mandatory language that
22 restricts the discretion of the reviewing body to deny renewal to applicants
who claim to meet the statutory requirements. In other words, if the
governing statute directs that a license shall be renewed upon compliance
with certain criteria, none of which involve the exercise of discretion by
the reviewing body, the licensee has a property right in the reissuance of
the license. Conversely, an applicant does not have a property interest in
the renewal of a license if the reviewing body has discretion to deny
renewal or to impose licensing criteria of its own creation.

23 *Thornton*, 425 F.3d at 1164–1165 (internal quotation marks and citations omitted). In
24 *Samson v. City of Bainbridge Island*, 683 F.3d 1051 (9th Cir. 2012), the Court of
25 Appeals applied the analysis in *Roth* in the land use context. The Court of Appeals
26 stated: “Property interests derive not from the Constitution but from ‘existing rules or
27 understandings that stem from an independent source such as state- law rules or
28 understandings that secure certain benefits and that support claims of entitlement to

1 those benefits.” *Id.* at 1051. *But see Richter v. City of Des Moines*, No. 12-35370,
2 2013 WL 4406689, at *3 (9th Cir., August 19, 2013) (Ikuta, J., dissenting) (“Expanding
3 *Roth* beyond the limited context of government benefits, and into the traditional realm
4 of core property interests that the state cannot redefine at will, is a constitutionally
5 untenable approach to assessing property rights.”)

6 The Court of Appeals has recognized a protected interest supporting a substantive
7 due process claim where the landowner was granted a building permit or met all the
8 conditions for a building permit. *See e.g., Del Monte Dunes v. City of Monterey*, 920
9 F.2d 1496, 1508 (9th Cir. 1990) (reversing summary judgment for trial of a substantive
10 due process claim where the city council approved a proposed oceanfront development
11 but later rejected the plan); *Bateson v. Geisse*, 857 F.2d 1300, 1303–04 (9th Cir. 1988)
12 (finding a substantive due process claim where a developer had satisfied all conditions
13 to receive a building permit when the city council arbitrarily initiated a zone change that
14 prohibited the proposed project and caused the permit to be denied.). But the Court of
15 Appeals has not found a protected property interest in a landowner’s use of his property
16 without a valid land use permit or in violation of valid land use regulations. In *Gutay*
17 *Christian Fellowship v. County of San Diego*, 670 F.3d 957, 985 (9th Cir. 2011), the
18 Court of Appeals concluded that the Church had no constitutionally protected property
19 interest in use of its building for religious services without a valid Use Permit and in
20 violation of land use regulations. Citing both *Thornton* and *Roth*, the Court stated:

21 Here, the Church has provided no California law or precedent establishing
22 that it had a vested property right in using the building for religious
23 services where it never obtained a permit for doing so and the applicable
zoning ordinance never permitted use of the property for religious services
at any point during the Church’s tenancy.

24 *Id.* at 985.

25 In this case, the Court is required, as a threshold matter, to determine whether
26 Plaintiffs have a protected property interest for the purposes of the Fourteenth
27 Amendment created by “existing rules or understandings that stem from an independent
28 source such as state law.” *Roth*, 408 U.S. at 577. The Court must decide whether

1 Plaintiffs had a “reasonable expectation of entitlement” in the issuance of a
2 development review permit which was denied by the City of Solana Beach stemming
3 from the Solana Beach permitting regulations. *Wedges/Ledges of Cal. Inc.*, 24 F.3d at
4 61–62. The Court must take into consideration the language of the municipal code and
5 the extent to which any entitlement is couched in mandatory terms. *Id.*

6 Pursuant to Solana Beach Municipal Code section 17.68.040.B.2, a structure
7 development permit cannot issue until a development review permit issues: “No
8 building permit or grading permit shall be issued relating to a project for which a
9 development review permit is required by this title until a development review permit
10 is obtained.” SBMC § 17.68.040.B.2. The procedure for a development review permit
11 states in part:

12 Development review permits.

13 A. Purpose and Intent. It is the purpose and intent of these regulations to
14 provide for the review of certain classes of development projects which
15 due to their scale, proximity to environmentally sensitive resource areas,
16 or unique design features as permitted by a zone or specific plan, require
17 special discretionary consideration to insure consistency with the general
18 plan and the intent of the zone in which the property is located. These
19 regulations are intended to encourage site and structural development
20 which (1) respects the physical and environmental characteristics of the
21 site, (2) ensures safe and convenient access and circulation for pedestrians
22 and vehicles, and (3) exemplifies the best professional design practices. It
23 is further the intent of this section to eliminate confusion and processing
24 burdens by the consolidation of all overlay zone and special district
25 requirements into a single permit process.

19 SBMC § 17.68.040.A.

20 The SMBC sets forth the process for obtaining a development review permit:

21 C. Authority to Grant Permit.

22 1. The city council shall have the authority to grant development review
23 permits in accordance with the procedures of this section and to impose
24 reasonable conditions where necessary to achieve consistency with the
25 requirements of this section.

26 ...

27 F. Development Review Criteria.

28 Development plans shall be reviewed for compliance with the following
specific criteria:

1. Relationship with Adjacent Land Uses. The development shall be
designed in a manner compatible with and where feasible, complementary

1 to existing and potential development in the immediate vicinity of the
2 project site. Site planning on the perimeter of the development shall give
3 consideration to the protection of surrounding areas from potential adverse
4 effects, as well as protection of the property from adverse surrounding
5 influences.

6 2. Building and Structure Placement. Buildings and structures shall be
7 sited and designed in a manner which visually and functionally enhances
8 their intended use. Multifamily residential buildings shall be sited to avoid
9 crowding and to allow for a functional use of the space between buildings.
10 ...

11 *G. Public Hearing.*

12 The director of community development shall transmit the application for
13 a development review permit together with a recommendation thereon to
14 the city council when all necessary reports and processing have been
15 completed. The city council shall hold a public hearing on each application
16 for a development review permit and shall render its decision by
17 resolution. The hearings shall be set and notice given as prescribed in
18 SBMC 17.72.030 (Public Hearing and Notice Requirements).

19 *H. City Council Determination and Findings.*

20 The city council may approve or conditionally approve a development
21 review permit only if all of the following findings can be made:

22 1. The proposed development is consistent with the general plan and all
23 applicable requirements of this title, including special regulations, overlay
24 zones, and specific plans.

25 2. The proposed development complies with the development review
26 criteria set forth in subsection F of this section.

27 3. All required permits and approvals, including variances, conditional use
28 permits, comprehensive sign plans, and coastal development permits have
been obtained prior to or concurrently with the development review
permit.

If the above findings cannot be made, the city council shall deny the
development review permit.

J. Finality of Decision.

The decision of the city council on a development review permit or
amendment shall be final.

(ECF No. 112 at 53–56, Def. Exh. H).

The undisputed facts of this case establish that the decision challenged by
Plaintiffs is limited to the decision to deny the development review permit. There is no
facial challenge to the municipal code establishing the development review provisions
or to the application of the development review permit to Lot 10. The express
provisions of the municipal code accord significant discretion to the City Council in

1 approving certain classes of development projects. The municipal code details the
2 “Projects Requiring Development Review Permits” and Plaintiffs make no claim that
3 the project did not require a development review permit. (ECF No. 112 at 54).

4 SBMC § 17.68.040.A provides: “It is the purpose and intent of these regulations
5 to provide for the review of certain classes of development projects which due to their
6 scale, proximity to environmentally sensitive resource areas, or unique design features
7 as permitted by a zone or specific plan, *require special discretionary consideration to*
8 *insure consistency with the general plan and the intent of the zone in which the property*
9 *is located.”* (emphasis added). SBMC § 17.68.040.F provides that “[d]evelopment
10 plans shall be reviewed for compliance with the following specific criteria”:

11 1. Relationship with Adjacent Land Uses. The development shall be
12 designed in a manner compatible with and where feasible, complementary
13 to existing and potential development in the immediate vicinity of the
14 project site. Site planning on the perimeter of the development shall give
15 consideration to the protection of surrounding areas from potential adverse
16 effects, as well as protection of the property from adverse surrounding
17 influences.

18 2. Building and Structure Placement. Buildings and structures shall be
19 sited and designed in a manner which visually and functionally enhances
20 their intended use. Multifamily residential buildings shall be sited to avoid
21 crowding and to allow for a functional use of the space between buildings.

22 (ECF No. 112 at 55). These express provisions of the municipal code accord significant
23 discretion to the City Council within certain classes of development projects, subject
24 to specific review criteria which reflect valid regulatory concerns.

25 The undisputed facts establish that the City complied with the public hearing and
26 notice requirements. The City Council issued City Resolution 2007-125, which
27 formally denied the permit application for Lot 10, making the required findings based
28 upon the development review criteria set forth in the municipal code. The City Council
took into consideration the average lot site and the average total floor area of structures
in the surrounding area. The City Council found that “[t]he proposed 4,387 square foot
(3,987 gross square foot) residence is approximately 2,700 square feet larger than the
average existing residences.” (ECF No.112 at 23). The City Council complied with the
procedural requirements of the regulation and determined that “[t]he proposed single-

1 family residence is designed in a manner that is incompatible with other nearby
2 residences because it is not compatible with existing or potential future single family
3 development. Adverse effects upon neighboring properties have been identified from
4 this development.” *Id.* The City Council concluded that “[t]he site layout and design
5 of the proposed project do not visually and functionally enhance its intended use as a
6 single-family residence because the bulk and scale of the proposed project is
7 incompatible with nearby structures.” *Id.* at 23–24. The undisputed facts establish that
8 the City Council made findings which relied upon valid regulatory concerns.

9 The specific provisions of the municipal code and the findings of the City
10 Council, establish that the City Council was entitled to take into consideration
11 Ordinance 357 but the City Council did not prematurely apply Ordinance 357 in
12 violation of Cal. Govt. Code § 66474.2(a).² The municipal code specifically directs the
13 City Council to review each proposed development plan to determine whether the plan
14 is designed in a manner compatible with “existing and potential development in the
15 immediate vicinity of the project site.” SBMC § 17.68.040.F. The municipal code
16 further requires that the City Council approve a plan only if the proposed development
17 complies with the criteria set forth in SBMC § 17.68.040.F.

18 Under California law, “no protected property interest exists when there is
19 significant discretion accorded the agency by law, regardless of whether or to what
20 degree that discretion is actually exercised.” *Breneric Assoc. v. City of Del Mar*, 69 Cal.
21 App. 4th 166, 183–84 (1998). In *Breneric*, the California Court of Appeal held that a
22 homeowner who was denied an application to build an addition to an existing residence
23 could not assert a cognizable substantive due process claim pursuant to 42 U.S.C. §
24 1983 against the City of Del Mar. *Id.* at 184. The California Court of Appeal
25

26 ²Cal. Govt. Code section 66474.2 provides in part: “[I]n determining whether to
27 approve or disapprove an application for a tentative map, the local agency shall apply
28 only those ordinances, policies, and standards in effect at the date the local agency has
determined that the application is complete pursuant to Section 65943 of the
Government Code.” Cal. Govt. Code § 66474.2(a).

1 concluded that “denial of a discretionary land use permit does not infringe on a
2 constitutionally protected property interest for the purposes of section 1983.” *Id.* at 18;
3 *see also Clark v. City of Hermosa Beach*, 48 Cal. App. 4th 1152, 1180–81 (1996) (“[A]
4 cognizable property interest exists only when the discretion of the issuing agency is so
5 narrowly circumscribed that approval of a proper application is virtually assured. . . .
6 Moreover, the standard focuses on the amount of discretion accorded the issuing agency
7 by law, not on whether or to what degree that discretion is actually exercised. Even if
8 in a particular case, objective observers would estimate that the probability of issuance
9 was extremely high, the opportunity of the local agency to deny issuance suffices to
10 defeat the existence of a federally protected property interest.” (internal quotation marks
11 and citations omitted)).

12 In this case, the municipal code provided the City Council with significant
13 discretion in deciding whether to grant a development review permit. The development
14 permit was limited to certain classes of development projects which require special
15 discretionary consideration. The City Council retained discretion to deny Plaintiffs’
16 application under the existing regulation for valid regulatory reasons set forth in the
17 municipal code. State law provides no protected property interest in the discretionary
18 determination. *See Clark*, 48 Cal. App. 4th at 1181–82 (“[T]he opportunity of the local
19 agency to deny issuance suffices to defeat the existence of a federally protected property
20 interest.”).

21 Applying federal constitutional law, the Court concludes that Plaintiffs had no
22 reasonable expectation of entitlement to the development review permit where
23 discretionary considerations based upon legitimate regulatory reasons form the basis for
24 the denial of the permit. Nothing in the Solana Beach Municipal Code provided that
25 Plaintiffs were entitled to build the home of the size and scale proposed for Lot 10. The
26 City Council was under an obligation to consider “compatib[ility] with . . . existing and
27 potential development in the immediate vicinity of the project site”; “protection of
28 surrounding areas from potential adverse effects”; and the “visual[] and functional[]”


1 design of the proposed structure. (ECF No.112 at 55) The City Council was authorized
2 to approve a permit only if certain specific requirements were met, including the
3 requirement that “the proposed development complies with the development review
4 criteria.” *Id.* at 56. The City Council’s determination that the project “does not
5 comply” met the requirements of the municipal code.

6 No language in the municipal code conferred a right to a permit. To the extent
7 that the municipal code required notice and hearing, the undisputed facts of this case
8 show that the City Council complied with all requirements of the code and rendered a
9 decision which was not favorable to the Plaintiffs based upon criteria set forth in the
10 code. Under the undisputed facts of this case, Plaintiffs would have a federal jury
11 second guess the City Council’s lawful exercise of discretion. Applying the law to the
12 undisputed facts of this case, the Court concludes that the Solana Beach Municipal
13 Code provisions for a development review permit do not create “the sort of entitlement
14 out of which a property interest is created.” *Town of Castle Rock*, 545 U.S. at 764. The
15 undisputed facts and the applicable law establish that Plaintiffs have not established a
16 protected property interest required in order to prevail on the claim for deprivation of
17 substantive due process.

18 IT IS HEREBY ORDERED that Defendant’s Motion in Limine to Preclude
19 Evidence, Testimony or Argument Relating to Violation of Substantive Due Process
20 (ECF No. 108) is granted.

21 IT IS FURTHER ORDERED that the parties may submit further briefing
22 addressing the procedural due process claim and the equal protection claim in light of
23 the ruling in this order no later than November 8, 2013. Any reply may be filed by
24 November 15, 2013.

25 DATED: October 22, 2013

26 
27 **WILLIAM Q. HAYES**
28 United States District Judge