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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

GIL PALACIOS et al., Plaintiffs and Appellants, v. CITY OF SAN LUIS OBISPO, Defendant and Respondent.	2d Civil No. B276395 (Super. Ct. No. 15CV-0150) (San Luis Obispo County)

Appellants Gil Palacios and Micki Howard own a hillside home in respondent City of San Luis Obispo (the City). Down-slope neighbors built a home that is, in appellants' view, too tall. Appellants sued the City for approving the neighbors' plans and issuing a building permit. They assert that the City should have withheld its approval because the house violates guidelines governing the residential development where appellants live.

We conclude that appellants have failed to state a cause of action against the City. (Code Civ. Proc., § 430.10, subd. (e).) The City did not commit a due process violation: appellants were

not entitled to notice before the City approved the neighbors' plans and issued a building permit, an "over the counter" ministerial decision based on fixed, objective guidelines. Appellants have not stated an inverse condemnation claim because the City did not "take" their property for public use and is not liable for a private harm caused by one landowner to a neighboring landowner. Finally, appellants have not shown that they are entitled to extraordinary mandamus relief. We affirm the trial court's dismissal of appellants' lawsuit against the City.

FACTS[1]

Genesis of this Dispute

Since 2002, appellants have lived in Stoneridge, a planned unit residential development meant to resemble a Mediterranean hillside village. Their home situated at the highest elevation in Stoneridge enjoys expansive views of the City and mountains.

In 2012, defendants Morten Nielsen and Hanne Sandsberg (the Nielsens) purchased a vacant lot across the street from appellants.[2] They showed appellants a preliminary architectural design featuring a proposed two-story home to be built on the lot. Appellants supported the Nielsens' proposal.

The Nielsens submitted a design package to the City in 2013. The planning staff approved the submission and the building department issued a construction permit in May 2014. Neither the Nielsens nor the City notified appellants about the design package or the issuance of a permit for a three-story home.

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[1] The facts are derived from appellants' third amended complaint and its exhibits. (*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.)

[2] The Nielsens are not parties to this appeal.

Construction began on the Nielsens' home in August 2014. On December 10, 2014, appellants observed joists for a third floor. When they inquired, the City confirmed that the Nielsens were building a three-story house. Appellants believe that the structure is too tall because its height was measured from a grade created by fill material supported by retaining walls. They allege that height allowances were "historically [ ] calculated from existing grade before grading began."[3]

Rules Governing Construction at Stoneridge

When the City approved Stoneridge by ordinance in the 1990's, it required incorporation of "Design Guidelines" into the project, to mitigate any adverse effects associated with a large hillside development. Homeowners in Stoneridge are subject to a Declaration of Covenants, Conditions and Restrictions (CC&R's). The "Architectural Control" requirement in the CC&R's reads, "No building . . . of any kind shall be erected . . . on any Lot in a manner that is inconsistent with the original architecture of the Stoneridge II Design Guidelines. This shall include . . . location with respect to topography and finish grade elevation." The Design Guidelines are not intended to replace or be used in lieu of the CC&R's, but are an element of them.

Under the CC&R's, the Board of Directors of the Homeowners' Association appoints an Architectural Control Committee to enforce the Design Guidelines. A property owner must submit a complete set of plans for the committee's approval. Once approval is received, the Design Guidelines state that applicants next "must go through a brief 'over the counter' review with City staff. City staff will use an established checklist to

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[3] Homes in appellants' neighborhood may be a "Maximum building height of 25' parallel to finish grade."

review all home plans." If the City and the applicant disagree, the design package may be forwarded to the City's Architectural Review Committee (ARC) for in-depth review and recommendations.

Actions Taken By Appellants

Appellants do not state whether they objected to the Nielsens' submission to the Stoneridge Architectural Control Committee. They did, however, ask the City to investigate the alleged height violation and filed an administrative appeal, on December 12, 2014, questioning the City's use of a height calculated from the grade created by infill.

Appellants asked the City to issue a "stop work" order. The City refused, responding that its approval of the project was appropriate because the height of all houses on appellants' street—including appellants' house—was measured from the "finished grade" as opposed to the natural grade. Appellants pursued a second appeal on January 30, 2015, contesting the City's denial of their request for a stop work order. The City rejected appellants' appeals as untimely or not appealable.

Appellants petitioned for a writ of mandate on March 19, 2015. After a series of demurrers, they filed a third amended complaint against the City and the Nielsens. Against the City, appellants assert causes of action for traditional and administrative mandamus; an unlawful taking of appellants' property; a violation of appellants' civil rights under color of law; and declaratory relief. The trial court sustained the City's demurrers without leave to amend, and entered a judgment dismissing the City from appellants' lawsuit.

DISCUSSION

Appeal lies from the judgment of dismissal after demurrers are sustained without leave to amend. (Code Civ. Proc., §§ 581d, 904.1, subd. (a)(1); *Serra Canyon Co. v. California Coastal Com.* (2004) 120 Cal.App.4th 663, 667.) We review the pleading de novo to determine if a cause of action has been stated; properly pleaded material facts are assumed to be true. (*Committee For Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 42; *Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125.) The contents of attached exhibits take precedence over conflicting facts alleged in the pleading. (*Lueras v. BAC Home Loans Servicing, LP* (2013) 221 Cal.App.4th 49, 56.)

1. Inverse Condemnation Claim

Appellants allege that the City wrongfully allowed the Nielsens to construct a home that violates Stoneridge height restrictions and interferes with appellants' easement for light and air. They contend that the City's conduct violates constitutional prohibitions against taking private property for a public use without just compensation. (U.S. Const., 5th Amend.; Cal. Const., art. I, § 19, subd. (a).)

To prevail on a claim for wrongful taking, the plaintiff must show governmental pursuit of a "public use." (*Yox v. City of Whittier* (1986) 182 Cal.App.3d 347, 352.) A public use "concerns the whole community or promotes the general interest in its relation to any legitimate object of government." (*Bauer v. County of Ventura* (1955) 45 Cal.2d 276, 284.) A public use may be demonstrated if a public entity constructs, maintains, repairs, or exercises dominion and control over an improvement. (*Ullery v. County of Contra Costa* (1988) 202 Cal.App.3d 562, 568.)

No taking arises *without* public use or enjoyment. A city is not liable in inverse condemnation "for injury to private property within a subdivision resulting from completely private construction—privately designed, financed and built—on a private street where the city's sole affirmative action was the issuance of permits and approval of the subdivision map." (*Yox v. City of Whittier, supra,* 182 Cal.App.3d at p. 353 [a city is not liable for approving and issuing permits to construct, in a private development, a drainage system that caused water damage to plaintiffs' property].)

No public use or benefit is involved here. The City permitted the construction of a private home in a private development, where new home specifications are controlled by Design Guidelines incorporated into the CC&R's, and subject to preapproval by an internal Architectural Control Committee. The City performs a brief over-the-counter review of the design package. The constitutional takings clause is not implicated by the City's issuance of a building permit for a private home in a private development.

Appellants rely on inapposite cases. The City did not authorize the permanent physical occupation of appellants' property for cable facilities to benefit the community. (*Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419.) Nor did the City deprive appellants of all economically beneficial use of their property to benefit the public. (*Nollan v. Cal. Coastal Com.* (1987) 483 U.S. 825; *Lucas v. S.C. Coastal Council* (1992) 505 U.S. 1003.)

Appellants claim that the City took their property by infringing on their easement for light, air and views. No such easement can be implied under state law. (*Kennedy v. Burnap*

(1898) 120 Cal. 488, 490-491; *Regency Outdoor Advertising, Inc. v. City of Los Angeles* (2006) 39 Cal.4th 507, 518, fn. 4 [absent an agreement, no one has a right to an unobstructed view to or from his property].) On the other hand, a homeowner may be able to state a claim against a neighbor who is shown to have violated housing tract height restrictions or CC&R's. (*Mock v. Shulman* (1964) 226 Cal.App.2d 263, 269; *Zabrucky v. McAdams* (2005) 129 Cal.App.4th 618, 629.)

The law does not support appellants' inverse condemnation claim. Quite simply, appellants cannot sue the City for an interference with their view. (*Boxer v. City of Beverly Hills* (2016) 246 Cal.App.4th 1212, 1219-1224 [a landowner cannot sue a city for inverse condemnation on a theory that nearby trees infringed on his claimed right to an unobstructed view].)

2. Claim of Civil Rights Violation

Appellants assert that the City, under color of state law, violated their state and federal civil rights. (42 U.S.C. § 1983.) They allege that the City shirked its duties by (1) failing to give notice of its receipt and consideration of the Nielsens' design package, (2) refusing to give appellants an opportunity to appeal its determination that the construction permit does not violate Stoneridge height limitations, and (3) taking their property without compensation. We conclude that the City was not required to give appellants notice or an opportunity to be heard and did not violate their due process rights.[4]

Local agencies engage in three types of land use actions: (1) legislative (enactment of general plans or zoning ordinances); (2) adjudicative (discretionary decisions such as approvals of

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[4] As discussed in Section 1, *ante*, the City did not take appellants' property for a public use.

zoning permits and tentative subdivision maps); and (3) ministerial (nondiscretionary decisions based on fixed and objective standards). (*Calvert v. County of Yuba* (2006) 145 Cal.App.4th 613, 622.) An example of a ministerial action "is the issuance of a typical, small-scale building permit." (*Ibid.*)

"While procedural due process requires reasonable notice and opportunity to be heard before the government may deprive a person of a significant property interest, only governmental decisions that are *adjudicative* in nature trigger procedural due process concerns. [Citations.]" (*Sustainability of Parks, Recycling & Wildlife Legal Defense Fund v. County of Solano Dept. of Resource Management* (2008) 167 Cal.App.4th 1350, 1359; *Horn v. County of Ventura* (1979) 24 Cal.3d 605, 610, 612.)

Ministerial acts do not require notice or an opportunity to be heard. "This is because ministerial decisions are essentially automatic based on whether fixed standards and objective measurements have been met. [Citation.]" (*Calvert v. County of Yuba, supra,* 145 Cal.App.4th at pp. 622-623; *Health First v. March Joint Powers Authority* (2009) 174 Cal.App.4th 1135, 1143 ["A ministerial action involves the application of fixed standards and objective measurements"]; see Cal. Code Regs., tit. 14, §§ 15369, 15268(b)(1) [issuing a building permit is presumed to be a ministerial, nondiscretionary act under CEQA guidelines].)

Here, once the Architectural Control Committee approves a design plan, the City is limited to an over-the-counter review using an established checklist.[5] The City's use of a checklist

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[5] The pleading omits mentioning Stoneridge's approval of the Nielsens' plans; as members of the homeowners' association, appellants have a right to this information. (Civ. Code, §§ 5200, subd. (a)(8), 5205.) The CC&R's and Design Guidelines require

shows its lack of discretion. (*Horn v. County of Ventura, supra,* 24 Cal.3d at p. 616 [public officials' application of non-discretionary objective standards does not trigger due process rights].)

Appellants' pleading states, "The City's issuance of a building permit is a non-discretionary, ministerial act that simply requires a determination as to whether the subject plans comply with the applicable building codes and the Design Guidelines, including the Stoneridge Height Restrictions." We agree that the City's issuance of a permit is a simple, non-discretionary, ministerial act, as alleged. We disagree that approval of the Nielsens' preliminary design package requires notice and a hearing. Appellants cite no authority—whether in state law, local ordinance, the CC&R's, or the Design Guidelines—giving neighbors the right to notice or a public hearing regarding a proposed house.

The Design Guidelines read, "Planning staff decisions may be appealed to the ARC for appropriate action. Should the applicant continue to disagree with the ARC decision, the ARC decision may be appealed to the City Council." Accepting appellants' argument that the first sentence in the quoted guideline applies to them, they have not alleged that they availed themselves of the administrative remedy by *timely* appealing to the ARC before filing suit. (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 291-293 [plaintiff must exhaust administrative remedies before filing suit].)

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property owners to obtain internal approval *before* they apply for a permit from the City. Presumably, the Nielsens complied with their duties under the Stoneridge governing documents.

Under the City's Municipal Code, an appeal must be filed within 10 days of the approval of a permit. (San Luis Obispo Mun. Code, §§ 1.20.20, 1.20.030.) The Design Guidelines indicate that the issuance of a building permit is the final administrative step before a homeowner may begin home construction. Appellants did not allege that they timely appealed the issuance of a permit.[6]

3. Mandamus Claims

Appellants' mandamus claims seek to compel the City to revoke its approval of the Nielsens' plans and building permit. They allege that the City violated procedural due process by (1) failing to give notice about its receipt and consideration of the Nielsens' design package, despite knowing that it could impact appellants and (2) summarily denying their administrative appeal. As discussed in Section 2, *ante*, the pleading (a) does not state a claim that City violated appellants' due process rights, and (b) does not adequately allege that appellants exhausted their administrative remedies with timely appeals to the appropriate City agencies.

Appellants' claims rest on the notion that they did not know what was happening and the City kept them in the dark. Yet the pleading acknowledges appellants' awareness, in early

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[6] Appellants' pleading asserts a substantive due process violation. We need not discuss this at any length because appellants deny making a substantive due process claim in their reply brief. Suffice it to say that land use disputes ordinarily do not implicate substantive due process, and appellants have not alleged "outrageous or egregious conduct constituting 'a true abuse of power[.]'" (*Las Lomas Land Co., LLC v. City of Los Angeles* (2009) 177 Cal.App.4th 837, 856.) At most, they assert an alleged procedural irregularity.

2013, that the Nielsens intended to build a house across the street. Appellants chose to follow a path of civic disengagement. They did not monitor (1) the process of internal approval by the Stoneridge Architectural Control Committee, or (2) the process of City approval of the design package (which could have been appealed to the ARC), or (3) the process of appealing the construction permit issued by the City. The City had no duty to inform appellants that it was carrying out its ministerial duties.

Appellants did not assert their right to participate in the development process for two years. They did not follow the example of the property owners in *Horwitz v. City of Los Angeles* (2004) 124 Cal.App.4th 1344, 1347-1354, who successfully obtained mandamus review: in a series of *timely* administrative appeals, they challenged their neighbor's building permit to add infill dirt to his lot, making his house excessively high, and allowing him to encroach 14 feet into a required front-yard setback. In the *Horwitz* case, city agencies conducted contested hearings in response to the administrative appeals; this created a record and factual findings explaining the agencies' methods, which were reviewable by the courts on a petition for mandamus. None of that occurred here.

As a result of their disengagement, appellants did not avail themselves of their administrative remedies within the mandatory 10-day time limit imposed by City ordinance. Having failed to exhaust their legal remedies, appellants cannot state a claim that they are entitled to extraordinary relief. (Code Civ. Proc., § 1094.5.) There is no act that the City can be compelled to perform, to which appellants are entitled. (*Id.,* § 1085.)[7]

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[7] We do not address the parties' arguments on Government Code section 65009, which were not compelling.

4. Declaratory Relief Claim

Appellants' cause of action for declaratory relief derives from their other claims. Because the other claims are barred, their declaratory relief claim fails. (*Stockton Citizens For Sensible Planning v. City of Stockton* (2012) 210 Cal.App.4th 1484, 1499-1500.)

DISPOSITION

The judgment is affirmed. Respondent is entitled to recover its costs on appeal.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Charles S. Crandall, Judge
Martin J. Tangeman, Judge
Superior Court County of San Luis Obispo

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