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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

LAWRENCE READY et al., Plaintiffs and Appellants, v. CITY OF SIMI VALLEY, Defendant and Respondent.	2d Civ. No. B288519 (Super. Ct. No. 56-2013-00446418-CU-OR-VTA) (Ventura County)

Lawrence and Sharon Ready own two adjacent parcels of commercial property in the City of Simi Valley (City). At a public hearing, the City's Planning Commission approved the Readys' application for three conditional use permits and a tentative parcel map to expand the commercial uses on the property, but denied their request for a hardship waiver of the underground utilities requirement. In what the City describes as a "scrivener's error," Resolution No. SVPC 04-2011, which approved the tentative parcel map, included the waiver. The City Council upheld the Planning Commission's decision.

During construction, City staff informed the Readys that underground utilities would be required. The Readys protested but complied. They brought this action to recover the increased utility costs and other damages. After two pleading amendments, the trial court sustained the City's demurrer to the second amended complaint (SAC) without leave to amend. It determined the SAC failed to state claims for breach of contract/equitable estoppel, due process violations and negligence. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

The Readys operated towing impound and automobile wrecking yards on their property. In 2009, they decided to add a 144-space RV storage facility and contractor storage yard. They consulted with the U.S. Army Corps of Engineers and the California Department of Fish and Game to ascertain what improvements would be required as part of the proposed project. The Readys also applied to the City for permission to subdivide one of their lots into two parcels, to expand the existing uses on the property and to construct the new storage facilities. They requested a hardship waiver under the Simi Valley Municipal Code (SVMC) to avoid having to replace overhead utilities with underground utilities.

Judicially noticed documents confirm that the City's Planning Commission heard the Readys' development application on February 23, 2011. Prior to the hearing, the Department of Environmental Services submitted a staff report advising that "[a]lthough the Planning Commission may find that the waiver from the undergrounding is consistent with the area that has both existing overhead lines as well as undergrounded lines, the Planning Commission may find that continuing the overhead lines is not compatible with producing a desirable area in the future per the finding, and not grant the waiver."

Lawrence Ready appeared at the hearing. According to the minutes, the commissioners asked him some questions and heard evidence from the Readys' representative, the project engineer and representatives of Dave's Towing, All Valleys RV Storage and the Rancho Simi Recreation and Park District. After debating the matter, the five commissioners agreed any approval of the project would require underground utilities. Two commissioners voted against the project, but the majority, in confirming approval, "denied the hardship waiver" and "required [the Readys] to underground utilities." Nonetheless, Resolution No. SVPC 04-2011 states the "findings, for approval, for Tentative Parcel Map TP-S-653 and to waive the requirement to underground utilities, contained in the staff report dated February 23, 2011, and incorporated herein by reference, are hereby adopted." It further states: "Tentative Parcel Map TP-S-653, waiving the requirement to underground utilities, and the Mitigation Monitoring Plan attached hereto as Exhibit B, is hereby approved, subject to compliance with all the conditions, attached hereto as Exhibit C." The document was signed by the Recording Secretary, the Senior Assistant City Attorney, the Deputy Director/City Planner and the Planning Commission's Chairperson, who had voted to approve the project.

The resolutions for the three conditional use permits do not reference the underground utilities waiver, but they state that "[a]ll conditions of Tentative Map TP-S-653 are incorporated herein by reference and are part of this approval."

Two City Council members appealed the Planning Commission's decision. The Department of Environmental Services submitted a staff report to the City Council advising that the approval of the Readys' application was conditioned upon "[u]ndergrounding overhead utility lines." The report did not mention Resolution No. SVPC 04-2011, but explained: "[T]he

Planning Commission found that waiving the undergrounding requirement would not be consistent with the intent and purposes of required waiver finding '(d)', that the waiver [would] be compatible with future area development. This is an improving area with projects, such as the adjacent All Valleys RV Storage facility and the Donley RV facility, which were required to underground their utilities." The City Council upheld the Planning Commission's decision, but there was no change to the resolution.

According to the Readys, the City required them to underground the utilities "[d]espite the resolutions passed by the Planning Commission and City Council waiving the requirements of underground utilities." They claim they raised the issue with City staff, but nonetheless complied with the requirement, which allegedly cost them "hundreds of thousands of dollars more on utilities than they otherwise would have spent."

In May 2013, the Readys filed an administrative claim with the City. They asserted the City's "actions have caused monetary damages, delay damages, additional consultant costs, and legal expenses in refuting staff actions, false claims and accusations by City staff and processing the work, permits and review." The City denied the claim.

The Readys filed this action in December 2013. The complaint alleged causes of action for due process violations, negligence and declaratory relief. A few weeks later they filed a first amended complaint (FAC), which alleged claims for negligence, due process violations and declaratory relief. After a series of trial continuances, the City moved for judgment on the pleadings on the FAC. The trial court granted the motion as to all causes of action with leave to amend.

The Readys' SAC seeks damages for breach of contract / equitable estoppel, due process violations and negligence. They

allege they completed the improvements required by the federal and state agencies, but that a City employee's false allegations delayed the work and caused them to incur unnecessary costs. The Readys also claim they incurred additional costs due to the City's assignment of a new case planner; errors in the City environmental planner's initial study; staff delays in answering questions posed by the Planning Commission; the City's miscalculation of the public works fee; the requirement that a fee be paid before obtaining a zoning clearance; the City's request for multiple revisions to drainage plans; and the prevention of the spreading and sorting of recycled asphalt paving material.

The City demurred to each cause of action. It argued the Readys forfeited their claims by failing to file an administrative mandamus proceeding challenging the City's land use decisions, to meet the 90-day statute of limitations for filing an action under the Government Code and to state a viable cause of action. The City also claimed immunity from liability.

Following a hearing, the trial court sustained the demurrer without leave to amend and entered a judgment of dismissal. A month later, the Readys moved pursuant to Code of Civil Procedure section 472d for "a statement of the specific ground or grounds upon which the order sustaining [the] [d]emurrer was based." They claimed they were surprised the demurrer was sustained in its entirety since the court's tentative decision was to overrule it as to all but the negligence cause of action.

The trial court denied the motion. Although Code of Civil Procedure section 472d requires the court to state its reasons for sustaining a demurrer, "[t]he party against whom a demurrer has been sustained may waive these requirements." The court determined that had occurred here.

II. DISCUSSION

A. Standard of Review

We review an order sustaining a demurrer without leave to amend de novo, exercising our independent judgment as to whether a cause of action has been stated as a matter of law under any legal theory. (*McKell v. Washington Mutual, Inc.* (2006) 142 Cal.App.4th 1457, 1469.) We give the complaint a reasonable interpretation, considering all material facts that are properly pleaded and matters that may be judicially noticed, but not contentions, deductions, or conclusions of fact or law. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 (*Blank*); *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 924.)

Where, as here, "the court sustained the demurrer without leave to amend . . . , we must decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment. [Citation.] If we find that an amendment could cure the defect, we conclude that the trial court abused its discretion and we reverse; if not, no abuse of discretion has occurred. [Citation.] The plaintiff has the burden of proving that an amendment would cure the defect." (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.)

B. Breach of Contract Claim

The Readys allege the resolutions approving their applications for conditional use permits "constituted a contract" between them and the City. They allege the contract "expressly and impliedly provided, among other things, that Plaintiffs had the approval of the City of Simi Valley to construct their improvements and that Plaintiffs would comply with conditions which benefited the City . . . ." The Readys claim the City "has breached the contract by attempting to change its terms and conditions, giving false and inconsistent instructions to Plaintiffs

and substantially delaying the work of Plaintiffs . . . ." They also contend they have stated a claim for equitable estoppel.

In its demurrer to the SAC, the City argued the Readys could not state a claim for breach of contract or equitable estoppel because the trial court did not give them permission to do so when it granted the motion for judgment on the pleadings as to the FAC with leave to amend. The Readys responded that "the Court did not restrict [them] in any way as to causes of action which could be included in an amended pleading." That is not the test.

"'Following an order sustaining a demurrer or a motion for judgment on the pleadings with leave to amend, the plaintiff may amend his or her complaint only as authorized by the court's order. [Citation.] The plaintiff may not amend the complaint to add a new cause of action without having obtained permission to do so, unless the new cause of action is within the scope of the order granting leave to amend.'" (*Zakk v. Diesel* (2019) 33 Cal.App.5th 431, 456 (*Zakk*), quoting *Harris v. Wachovia Mortgage, FSB* (2010) 185 Cal.App.4th 1018, 1023.) In *Zakk*, the trial court sustained the defendants' demurrer to a promissory estoppel claim because it was added to the amended complaint without leave of court. (*Zakk,* at p. 456.) In sustaining the demurrer to the prior complaint with leave to amend, the trial court had only authorized the addition of a quantum meruit claim. (*Ibid.*) The Court of Appeal affirmed, noting "[t]he granting of leave to amend after a demurrer is sustained on one ground does not give the plaintiff a license to add any possible cause of action that might not be subject to dismissal on that ground. Otherwise, there would be virtually no limitation on amendments following the sustaining of a demurrer." (*Ibid.*)

Neither the Readys' original complaint nor the FAC alleged breach of contract/equitable estoppel. There was no court

reporter at the hearing on the City's motion for judgment on the pleadings as to the FAC. The trial court took the matter under submission and later issued a minute order stating "[t]he motion is granted as to all causes of action" with leave to amend. Because the Readys did not obtain leave to file an amended pleading adding the breach of contract/equitable estoppel claim, the trial court did not err by dismissing that cause of action. (See *Zakk, supra,* 33 Cal.App.5th at p. 456.) In any event, we conclude the SAC fails to allege sufficient facts to state a claim based upon an express contract, implied contract or equitable estoppel theory.

1. Express Contract Theory

A public entity's decisions regarding applications for conditional use permits generally are adjudicatory in nature. (*Orange Citizens for Parks & Recreation v. Superior Court* (2016) 2 Cal.5th 141, 155.) The Readys cite no authority suggesting that such decisions result in an express contract between the public entity and the applicant. To the contrary, the resolutions approving the Readys' conditional use permits and tentative map specifically state the "approval does not constitute a vested entitlement or vesting of rights to construct any of the land uses or improvements described in the staff report dated February 23, 2011." (See, e.g., *Scott-Free River Expeditions, Inc. v. County of El Dorado* (1988) 203 Cal.App.3d 896, 913 ["[use] permits were issued by virtue of the County's police power and do not constitute a contract"].)

2. Implied Contract Theory

Alternatively, the Readys allege they have stated a claim for breach of an implied contract. As the City points out, the Government Code establishes the rules for development agreements between municipalities and landowners. (Gov. Code, § 65864 et seq; see *Mammoth Lakes Acquisition, LLC v. Town of*

Mammoth Lakes (2010) 191 Cal.App.4th 435, 442-443.) The SVMC sets forth the specific requirements for the formation of such agreements. (SVMC, § 9-54.010 et seq.) For example, the City must give notice of the proposed development agreement (*id.* § 9-54.030), explicitly find the agreement is consistent with the General Plan (*id.* § 9-54.040) and periodically review the agreement (*id.* § 9-54.060).

In *Katsura v. City of San Buenaventura* (2007) 155 Cal.App.4th 104, we noted "[i]t is settled that 'a private party cannot sue a public entity on an implied-in-law or quasi-contract theory, because such a theory is based on quantum meruit or restitution considerations which are outweighed by the need to protect and limit a public entity's contractual obligations.' [Citation.]" (*Id.* at pp. 109-110.) We reiterated that "'no implied liability to pay upon a quantum meruit could exist where the prohibition of the statute against contracting in any other manner than as prescribed is disregarded.' [Citation.] The reason is simple: ""The law never implies an agreement against its own restrictions and prohibitions, or [expressed differently], 'the law never implies an obligation to do that which it forbids the party to agree to do."" [Citations.] In other words, contracts that disregard applicable code provisions are beyond the power of the city to make. [Citation]." (*Id.* at p. 110, italics omitted; accord *South Bay Senior Housing Corp. v. City of Hawthorne* (1997) 56 Cal.App.4th 1231, 1236.)

The Readys concede that "a development agreement [is] a creature of statute which must be entered into according to various substantive and procedural requirements set out in the . . . statutes and the [SVMC]," but contend they are not alleging such an agreement. The Readys' allegations of an implied contract, however, are based upon the documents conditionally approving their development project and the City's purported

unlawful interference with that project. To the extent there was some type of an enforceable agreement between the Readys and the City, it necessarily involved a development. Indeed, in response to the City's argument that they were required to file their breach of contract claim within the 90-day limitations period set forth in Government Code sections 66499.37 and 65009, the Readys maintained those statutes do not apply to their "claim against a governmental body for breach of a development agreement."

3. Equitable Estoppel Theory

The Readys contend that even if they have not stated a cause of action for breach of an express or implied contract, they have alleged an equitable estoppel claim. As explained in *City of Goleta v. Superior Court* (2006) 40 Cal.4th 270, "'[t]he doctrine of equitable estoppel is founded on concepts of equity and fair dealing. It provides that a person may not deny the existence of a state of facts if he intentionally led another to believe a particular circumstance to be true and to rely upon such belief to his detriment. The elements of the doctrine are that (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel has a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury. [Citation.]' [Citations.] [¶] Equitable estoppel 'will not apply against a governmental body except in unusual instances when necessary to avoid grave injustice and when the result will not defeat a strong public policy.'" (*Id.* at p. 279.) Thus, "[w]here the defendant is a government entity, a fifth element requires that the injury to the plaintiff's personal interest if the government is not estopped outweighs the injury to the public interest if the government is estopped. [Citation.]" (*Golden Day Schools, Inc. v.*

Department of Education (1999) 69 Cal.App.4th 681, 693 (*Golden Day*); accord *Brown v. Chiang* (2011) 198 Cal.App.4th 1203, 1227 (*Brown*).)

In *HPT IHG-2 Properties Trust v. City of Anaheim* (2015) 243 Cal.App.4th 188 (*HPT*), the trial court found that the city was equitably estopped from changing the site plan approved in a conditional use permit after the developers were induced by the city's representations to spend $40 million and to cede property to the city to develop the contemplated project. (*Id.* pp. 201-206.) Specifically, the city issued a conditional use permit approving the construction of two hotels. As part of the approval, the city agreed to build a two-level parking structure near the hotels. (*Id.* at p. 191.)

The city subsequently enacted a new conditional use permit allowing the construction of a surface parking lot instead of the two-level parking structure and modifying other requirements that had benefitted the developers. (*HPT*, *supra*, 243 Cal.App.4th at p. 191.) The Court of Appeal upheld the trial court's decision, agreeing that "without application of equitable estoppel, plaintiffs will suffer a grave injustice." (*Id.* at p. 206.)

The Readys argue that *HPT* is dispositive. We disagree. The grave injustice that was apparent there is not implicated here. The hotel developers spent $40 million in reliance on certain conditions in the city's initial approval of the project. (*HPT*, *supra*, 243 Cal.App.4th at pp. 201-206.) When the city enacted the new conditional use permit changing those conditions, the developers petitioned the trial court for a writ of mandate setting aside that permit. (*Id.* at p. 195.) That petition was granted. (*Ibid.*) There was no claim for damages.

In contrast, the minutes reflect that Lawrence Ready attended the Planning Commission hearing and spoke to the commissioners before they voted to deny the hardship waiver

request and to condition approval of the project on the undergrounding of utilities. The Readys allege that they were entitled to rely on Resolution No. SVPC 04-2011, which states the waiver was granted, and that the City should be estopped from rescinding the waiver. They fail, however, to allege facts demonstrating their reliance was reasonable. (See *Brown*, *supra*, 198 Cal.App.4th at p. 1227 ["In order to invoke the doctrine of equitable estoppel, the reliance must be reasonable"]; *Morrison v. California Horse Racing Bd.* (1988) 205 Cal.App.3d 211, 218 [same].)

When City staff informed the Readys they had to underground the utilities, they complained the demand was contrary to the approvals but elected to comply. That compliance allegedly cost them "hundreds of thousands of dollars more on utilities than they otherwise would have spent." But at the time the Readys learned of the staff's allegedly unlawful demand, they had yet to incur those increased utility costs. Instead of taking action to prevent (or estop) the City's enforcement of a requirement they believed had been waived, the Readys chose to incur those costs and then sue the City for damages.

The City argues that before complying with the staff's directive, the Readys were required to file a petition for writ of administrative mandate under Code of Civil Procedure section 1094.5. It emphasizes that "[r]equiring that parties seek to invalidate permit conditions in administrative mandate proceedings before proceeding with a project 'serves the salutatory purpose of promptly alerting the [agency] that its decision is being questioned' and allows the government to mitigate potential damages." (*Lynch v. California Coastal Com.* (2017) 3 Cal.5th 470, 480; see *Hurwitz v. City of Orange* (2004) 122 Cal.App.4th 835, 846 [exhaustion of administrative remedies "give[s] the government a chance to remedy its land use

determination without paying money"]; *Rezai v. City of Tustin* (1994) 26 Cal.App.4th 443, 453 ["[I]t is important that the landowner not be allowed to proceed with a project which has been scaled back to conform with the community's interest and then seek damages from the public fisc, when a prompt determination concerning the revocation of the prior permit might have quickly resolved any problem"].)

As the Readys point out, Code of Civil Procedure section 1094.5 applies only to challenges to final administrative decisions made in proceedings requiring an evidentiary hearing. (*McGill v. Regents of University of California* (1996) 44 Cal.App.4th 1776, 1785.) Since the Readys are not contesting the land use decisions made by the Planning Commission and City Council, but rather the City staff's subsequent informal demand that they underground the utilities, this statute does not apply. We also are not convinced by the City's alternative argument that an ordinary mandamus proceeding was required. (See Code Civ. Proc., § 1085.) Nonetheless, at a minimum, Lawrence Ready was aware of the conflict between what he heard at the Planning Commission hearing and the statements in Resolution No. SVPC 04-2011. An immediate resolution of that conflict, one way or the other, could have avoided this action for damages.

In any event, it was not reasonable for the Readys to place the City in a "gotcha" situation by willingly spending hundreds of thousands of dollars in increased utility costs and then suing the City to recover those costs. "Equitable estoppel against the government . . . is the exception, not the rule." (*Attard v. Board of Supervisors of Contra Costa County* (2017) 14 Cal.App.5th 1066, 1079.) "[E]stoppel can be invoked in the land use context in only 'the most extraordinary case where the injustice is great and the precedent set by the estoppel is narrow.'" (*Toigo v. Town of Ross* (1998) 70 Cal.App.4th 309, 321; *HPT*, *supra*, 243

Cal.App.4th at p. 206.) The Readys' allegations do not support such a case.

The Readys also have not alleged any facts showing that the "injury to [their] personal interest if the government is not estopped outweighs the injury to the public interest if the government is estopped. [Citation.]" (*Golden Day*, *supra*, 69 Cal.App.4th at pp. 692-693.) The salutary reasons for generally requiring underground utilities are evident, and making the public fisc bear the cost of imposing that requirement does not necessarily advance the public interest. (*Ibid.*)

Finally, it is not clear that damages are available on an equitable estoppel theory, particularly against the government. Typically, the doctrine is invoked to estop a party from taking certain action. (E.g., *HPT*, *supra*, 243 Cal.App.4th at pp. 191-192 [estopping the city from changing a design that was approved in a conditional use permit]; *Wilson v. City of Laguna Beach* (1992) 6 Cal.App.4th 543, 558 [deciding whether the city should be estopped from enforcing a new ordinance]; see also *City of Hollister v. Monterey Ins. Co.* (2008) 165 Cal.App.4th 455, 486 ["When [the doctrine of equitable estoppel] is successfully invoked, the court in effect closes its ears to a point — a fact, argument, claim, or defense — on the ground that to permit its assertion would be intolerably unfair"].)

Alleged Due Process Violations

The Readys' second and third causes of action seek damages for violations of the due process clauses in the United States and California Constitutions. The City contends that an action for damages is not available under our state Constitution, and that the Readys' allegations do not support such a claim under the federal Constitution. We agree on both points.

1. California Due Process Claims

As stated in *Javor v. Taggart* (2002) 98 Cal.App.4th 795, "[i]t is beyond question that a plaintiff is not entitled to damages for a violation of the due process clause or the equal protection clause of the state Constitution." (*Id.* at p. 807; *Katzberg v. Regents of University of California* (2002) 29 Cal.4th 300, 329; *Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 265, fn. 44 ["[T]he California due process clause does not create a private right of action for money damages"]; *City of Simi Valley v. Superior Court* (2003) 111 Cal.App.4th 1077, 1084 [same].) The Readys cite no contrary authority.

2. Federal Due Process Claims

The Readys' federal cause of action seeks damages under 42 United States Code section 1983, which provides a private right of action for a citizen deprived of any right, privilege or immunity secured by the United States Constitution or federal law. (*Stone v. City of Prescott* (9th Cir. 1999) 173 F.3d 1172, 1174.) "The Fourteenth Amendment due process clause states that no state may 'deprive any person of life, liberty, or property without due process of law.'" (*Las Lomas Land Co., LLC v. City of Los Angeles* (2009) 177 Cal.App.4th 837, 852 (*Las Lomas*).) This clause contains both procedural and substantive protections. (*Kavanau v. Santa Monica Rent Control Bd.* (1997) 16 Cal.4th 761, 771.)

(a) Procedural Due Process

"A person seeking a benefit provided by the government has a property interest in the benefit for purposes of procedural due process only if the person has 'a legitimate claim of entitlement to it.' [Citation.]" (*Las Lomas*, *supra*, 177 Cal.App.4th at p. 853, fn. omitted.) "'When analyzing whether a plaintiff presents a legitimate claim of entitlement, we focus on the degree of discretion given the decisionmaker and not on the

probability of the decision's favorable outcome.' [Citation.]" (*Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, 1180 (*Clark*).) "'Under this approach, whether a property-holder possesses a legitimate claim of entitlement to a permit or approval turns on whether, under state and municipal law, the local agency lacks *all* discretion to deny issuance of the permit or to withhold its approval. Any significant discretion conferred upon the local agency defeats the claim of a property interest. . . .'" (*Ibid.*)

In *Las Lomas*, the developer applied to the city for various land use approvals required for a large-scale development project, but the city voted to reject the application before completing a previously commissioned environmental impact report (EIR). (*Las Lomas*, *supra*, 177 Cal.App.4th at pp. 843-844.) The developer sued seeking, among other things, monetary damages because the city deprived the developer of its procedural due process rights by denying the project without completing and considering the EIR. (*Id.* at p. 845.) The trial court sustained the city's demurrer without leave to amend. (*Id.* at pp. 846-847.) The Court of Appeal affirmed, concluding the city's considerable discretion in deciding whether to issue the land use approvals prevented the developer from asserting any "claim of entitlement" to the approvals. (*Id.* at p. 854; see *City of Vallejo v. NCORP4, Inc.* (2017) 15 Cal.App.5th 1078, 1088 ["[L]local authorities . . . are 'endowed with wide-ranging discretion' in formulating land use policy"].)

Here, the Readys obtained three conditional use permits, which are, by definition, discretionary. (*Clark*, *supra*, 48 Cal.App.4th at pp. 1182-1183.) The Readys do not challenge those permits, but allege City staff violated their due process rights by requiring them to underground the utilities and to "re-

stockpile asphalt concrete pavement material that had been spread for gleaning."

The SVMC requires that "[a]ll utilities servicing a new structure or servicing any existing structure located on the same parcel of land as a new structure shall be installed or relocated underground, except as otherwise exempted in this [s]ection." (*Id.* § 9-30.090, subd. (C).) An applicant may request a hardship waiver of this requirement, which the City "may grant" after making certain findings. (*Id.*, subd. (F)(1).)

The Planning Commission denied the Readys' hardship waiver request at the February 22, 2011 hearing. Resolution No. SVPC 04-2011 states otherwise, and the Readys allege they detrimentally relied on that resolution and the City Council's decision upholding it. When City staff informed the Readys they had to underground the utilities, they claimed undergrounding was not necessary under the approvals, but nonetheless complied.

The SVMC grants the City broad discretion to grant or deny an application for a hardship waiver of the underground utilities requirement. (*Id.* § 9-30.090, subd. (F)(1).) To state a claim, the Readys had to allege the granting of their hardship waiver was ""virtually assured."" (*Clark*, *supra*, 48 Cal.App.4th at p. 1180; *Las Lomas*, *supra*, 177 Cal.App.4th at p. 853.) They have not and cannot do so. Nor have they alleged the City lacked discretion to require the re-stockpiling of the pavement material.

The Readys maintain that once the City Council upheld the Planning Commission's decision to grant the hardship waiver, as stated in Resolution No. SVPC 04-2011, City staff lacked discretion to rescind that waiver. The resolution states, however, that "[t]his approval does not constitute a vested entitlement or vesting of rights to construct any of the land uses or improvements described in the staff report dated February 23,

2011." This statement undermines the Readys' allegation of "'a legitimate claim of entitlement'" to the waiver. (*Las Lomas*, *supra*, 177 Cal.App.4th at p. 853.)

We are not persuaded by the Readys' reliance upon our decision in *Cohan v. City of Thousand Oaks* (1994) 30 Cal.App.4th 547. After the planning commission approved a developer's proposed project, the city council appealed the approval to itself and reversed the commission's decision. We determined the appeal violated the developer's procedural due process rights because it was not authorized by the city's own ordinances and rules. (*Id.* at p. 559.) Thus, unlike in this case, the city council had no discretion to take the action it did.

(b) Substantive Due Process

The Readys also contend they have stated a substantive due process claim. "Substantive due process protects against arbitrary government action. [Citation.] . . . A substantive due process violation requires some form of outrageous or egregious conduct constituting 'a true abuse of power.' [Citation.]" (*Las Lomas*, *supra*, 177 Cal.App.4th at pp. 855-856.) "'"[R]ejections of development projects and refusals to issue building permits do not ordinarily implicate substantive due process. [Citations.] Even where state officials have allegedly violated state law or administrative procedures, such violations do not ordinarily rise to the level of a constitutional deprivation. [Citation.] The doctrine of substantive due process 'does not protect individuals from all [governmental] actions that infringe liberty or injure property in violation of some law. Rather, substantive due process prevents "governmental power from being used for purposes of oppression," or "abuse of governmental power that shocks the conscience," or "action that is legally irrational in that it is not sufficiently keyed to any legitimate state interests."' [Citations.]"'" (*Id.* at p. 856.) The Supreme Court has

"emphasize[d] . . . that something more than mere 'bureaucratic bungling' is required." (*Galland v. City of Clovis* (2001) 24 Cal.4th 1003, 1036 (*Galland*).)

In *Las Lomas*, the developer alleged that a city council member made misleading public comments regarding the proposed project's environmental impacts and persuaded the city council to cease all work on the project. (*Las Lomas*, *supra*, 177 Cal.App.4th at p. 845.) The developer further alleged the city initially supported the project and commissioned environmental studies only to stop midstream. (*Ibid.*) Finally, the developer alleged the city violated California law by failing to complete and consider the EIR before rejecting the project. (*Ibid.*) In affirming the trial court's order sustaining the city's demurrer without leave to amend, the court "conclude[d] that these allegations [were] insufficient to establish a substantive due process violation. These allegations, if true, do not amount to an outrageous or egregious abuse of power of constitutional dimension." (*Id.* at p. 857.)

The same is true here. The SVMC generally requires the undergrounding of utilities in new construction projects. (*Id.* § 9-30.090, subd. (C).) The Planning Commission, in its discretion, denied the Readys' hardship waiver request and conditioned its approval on the undergrounding of utilities. The City Council was advised of the denial before it upheld the Planning Commission's decision. The apparent misstatement in Resolution No. SVPC 04-2011 is unfortunate, but, at best, it suggests nonactionable "'bureaucratic bungling.'" (*Galland*, *supra*, 24 Cal.4th at p. 1036.) Given the discrepancies in the documents and Lawrence Ready's presence at the Planning Commission hearing, the City staff's subsequent enforcement of the underground utilities requirement cannot be deemed an outrageous or egregious abuse of power. In addition, the SAC

makes no attempt to explain why requiring the re-stockpiling of the pavement material would constitute such an egregious abuse.

C. Negligence Claim

Government Code section 815.6 subjects public entities to tort liability when the "entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury" and its failure to discharge that duty, or to exercise reasonable diligence to discharge it, proximately causes that kind of injury. (See *Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967-968 (*Aubry*). The Readys allege "the City breached its mandatory duty to Plaintiffs by requiring Plaintiffs to underground the utilities at the Property, contrary to the entitlement conditions of [the conditional use permits and Resolution No. SVPC 04-2011], and the other related permits and plans approved by the City."

It is not clear whether the City had a mandatory duty to enforce "entitlement conditions" that appear to misstate the Planning Commission's actual decision. But even if we assume such a duty, the Readys' alleged injury does not support a claim for relief under Government Code section 815.6. As our Supreme Court has recognized, this statute applies only to an injury "'*of such nature that it would be actionable if inflicted by a private person*.'" (*Aubry*, *supra*, 2 Cal.4th at p. 968, quoting Government Code section 810.8 [defining injury].) In *Aubry*, the plaintiff alleged the hospital district's failure to perform a mandatory duty resulted in workers receiving "less than the prevailing wage while engaged on a public work." (*Ibid.*, italics omitted.) The court determined the tort claim was not actionable because the alleged "injury is one which by its very nature could not exist in an action between private persons; if the defendant [hospital district] were not a public entity, there would be no injury."

(*Ibid.*; accord *Forbes v. County of San Bernardino* (2002) 101 Cal.App.4th 48, 57.)

Here, the Readys allege "[t]he City has authority under the California Government Code and other state and federal statutes" to regulate land use by "impos[ing] entitlement conditions." They claim they incurred increased construction costs due to the City's failure to enforce the Planning Commission's underground utilities waiver set forth in Resolution No. SVPC 04-2011.

Such an increase in compliance costs, however, is not the type of injury that would arise in tort actions between private persons. Public entities, not private persons, are charged with land use decisions. As recognized in *DeVita v. County of Napa* (1995) 9 Cal.4th 763,"'[l]and use regulation in California has historically been a function of local government under the grant of police power contained in California Constitution, article XI, section 7.' [Citation.]" (*Id.* at p. 782; see SVMC § 9-10.020 [The City is responsible for carrying "out the policies of the City of Simi Valley General Plan by classifying and regulating the uses of land and structures within the City"].) Because there is no possibility the Readys' alleged negligence claim could involve a defendant other than a public entity, the City is not subject to liability under Government Code section 815.6.[1] (See *Aubry*, *supra*, 2 Cal.4th at p. 968.)

D. Denial of Leave to Amend

The Readys do not suggest how the SAC could be amended to correct the pleading defects discussed above. The burden of proving a reasonable possibility of amending the complaint to

[1] Since the Readys have failed to state a cause of action for negligence, we do not reach the City's alternative argument that it is immune from liability on that claim.

state a cause of action "is squarely on the plaintiff." (*Blank*, *supra*, 39 Cal.3d at p. 318.) We conclude the trial court did not err by sustaining the City's demurrer without leave to amend.[2]

DISPOSITION

The judgment is affirmed. The City shall recover its costs on appeal.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

YEGAN, Acting P. J.

TANGEMAN, J.

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[2] Given our conclusion, we need not reach the City's contention that the Readys did not comply with the 90-day limitations period for filing an action arising from the Subdivision Map Act. (See Govt. Code, §§ 66499.37, 65009, subd. (c)(1)(E).)

Henry Walsh, Judge
Superior Court County of Ventura

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