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Fax

To: Brigit Barnes Angela Thompson	From: Richard Crabtree
Fax: 916-660-9554 916-486-5959	Pages: 9
Phone:	Date: 9/26/2006
Re: Meadow Vista	CC:

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• Comments:

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 7 Attorney for County of Placer and
 8 County of Placer Planning Department

EXEMPT FROM FILING FEES
 PURSUANT TO GOVERNMENT
 CODE SECTION 6103

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SUPERIOR COURT OF CALIFORNIA

9

COUNTY OF PLACER

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11 MEADOW VISTA PROTECTION,

Case No. SCV 19614

12 Petitioner/Plaintiff,

13 vs.

DEFENDANTS COUNTY OF PLACER AND
 COUNTY OF PLACER PLANNING
 DEPARTMENT'S REPLY TO
 PETITIONER'S OPPOSITION TO
 DEMURRER

14 CHEVREAUX AGGREGATES, INC.;
 15 COUNTY OF PLACER; COUNTY OF
 16 PLACER PLANNING DEPARTMENT; and
 17 DOES 1 through 50, inclusive,

DATE: 10/3/06
 TIME: 8:30 a.m.
 DEPT.: 3

Respondents/Defendants.

18

I

19

THE COUNTY MET AND CONFERRED REGARDING ITS DEMURRER

20

Perhaps aware of its weak position on the merits of its
 21 opposition to demurrer, Petitioner MEADOW VISTA PROTECTION ("MVP")
 22 contends that the Respondents COUNTY OF PLACER and COUNTY OF PLACER
 23 PLANNING DEPARTMENT ("County") did not properly meet and confer prior
 24 to filing their demurrer. However, as the attachments to the
 25 Declaration of Angela C. Thompson plainly reveal, the County did
 26 meet and confer regarding the filing of its demurrer through a letter
 27 from its counsel dated August 1, 2006. (See, Declaration of Angela
 28 C. Thompson in Support of Opposition to County of Placer's Demurrer,

Reply to Opposition to Demurrer to Petitioner's Petition/Complaint

1 Exhibit 1.)

2 This is not a discovery dispute, it is a dispute over whether
3 MVP has an adequate legal basis to bring an action against the
4 County. The parties were not engaging in a meet and confer process
5 over the scope of some discovery disclosure or the timing of a
6 deposition, rather, the parties have a dispute over the merits, or
7 lack thereof, of MVP's Petition against the County.

8 The County's meet and confer letter clearly sets forth the basis
9 of the County's planned demurrer. (Id.) The response from MVP's
10 counsel, which followed a full ten days later, disagreed with the
11 County's legal positions. (Declaration of Angela C. Thompson, supra,
12 Exhibit 2.) Significantly, the letter from MVP's counsel did not
13 reflect any areas of potential compromise or agreement between the
14 parties regarding the County's planned demurrer. (Id.)

15 There is no requirement that the parties extensively argue their
16 respective positions in advance of a demurrer. The County made a
17 good faith effort at notice, and explored the opportunity for
18 compromise. Nothing more is required, especially when there is a
19 such a stark difference between the respective positions of the
20 parties. As confirmed by MVP's opposition to the demurrer, MVP
21 disagrees with every argument presented by the County, requiring that
22 the Court resolve this dispute.

23 Furthermore, MVP falsely indicates to the Court that the
24 County's August 1, 2006 letter was its only meet and confer activity
25 in advance of the subject demurrer. In fact, the parties met and
26 conferred extensively regarding the date and time of the hearing on
27 the demurrer, the time for filing points and authorities in support
28 and opposition to the demurrer, and the page limits which would apply

1 to both points and authorities. These meet and confer efforts
2 resulted in a stipulation, filed herein on August 15, 2006, in which
3 the parties, including the County of Placer, agreed to move the
4 demurrer hearing date to a date more convenient to MVP's counsel, and
5 agreed to certain service requirements and modifications to the
6 normally applicable page limits. Thus, this demurrer received more
7 than the normal amount of pre-filing meet and confer efforts.

8 II

9 MVP HAS NOT ALLEGED SUFFICIENT FACTS TO WITHSTAND DEMURRER

10 MVP concedes that its Petition does not allege a beneficial
11 interest, or the absence of an adequate remedy at law. (MVP's
12 Opposition, 4:17-22.) Instead, MVP contends that these allegations
13 are "inferred." (Id.) These are not merely matters of interest,
14 they are required elements for a mandamus cause of action. (*People*
15 *ex rel. Dept. Of Conservation v. El Dorado County*, 36 Cal.4th 971,
16 986 (2005).) In the absence of facts alleging a beneficial interest,
17 a demurrer to the petition will lie on the ground that it does not
18 state a cause of action. (*Id.*; *Carsten v. Psychology Examining*
19 *Commission*, 27 Cal.3d. 793, 796 (1980).)

20 Furthermore, "The petition must allege specific facts showing
21 that the agency action [or inaction] is invalid. If these facts are
22 not alleged, the petition is subject to general demurrer or the court
23 is justified in denying the petition if an alternative writ is
24 sought." (CEB: *California Administrative Mandamus* (3rd Ed. March
25 2006), Vol. I, section 10.31, p. 370 (emphasis added); *Bell v. City*
26 *of Mountainview*, 66 Cal.App.3d 332, 342 (1977) (Allegations that the
27 acts of the city or county were "arbitrary, capricious, fraudulent,
28 wrongful and unlawful . . . constitute mere conclusions of law which

1 are not to be deemed admitted by a demurrer."); *Ward v. County of*
 2 *Riverside*, 273 Cal.App.2d 353, 358 (1969) ("In order to state a cause
 3 of action the petition for a writ of mandate must set forth facts
 4 showing that the plaintiff is entitled to the relief he seeks.");
 5 *Gong v. City of Fremont*, 250 Cal.App.2d 568, 573 (1967) ("Therefore,
 6 it is necessary for the petition to allege specific facts showing the
 7 entitlement to relief . . . if such facts are not alleged, the
 8 petition is subject to general demurrer.").

9 As MVP has expressly conceded, MVP's petition does not allege
 10 facts which demonstrate a beneficial interest or the absence of an
 11 adequate remedy at law. Thus, the demurrer should be sustained.
 12 (*Id.*)

13 III

14 A MANDAMUS ACTION CANNOT LIE TO COMPEL THE
 15 EXERCISE OF DISCRETION

16 Surprisingly, MVP provides very little argument in support of
 17 its contention its Petition seeks to enforce a mandatory, rather than
 18 discretionary, duty. While MVP cites Placer County Code section
 19 16.62.030, MVP makes absolutely no effort to explain or demonstrate
 20 how or why that section creates a mandatory duty. Moreover, Placer
 21 County Code section 17.62.030 is not referenced in the Petition.
 22 Rather, as discussed in the County's moving papers, the Petition
 23 references only Placer County Code section 17.60.020 and section
 24 17.62.170. As explained in the County's moving papers, neither of
 25 those sections create a mandatory duty or ministerial duty.

26 Placer County Code section 17.62.030, referenced for the first
 27 time in MVP's opposition papers, identifies certain County employees
 28 who have a duty "to enforce the provisions of the Placer County Code
 as specified [in the zoning chapter]." However, the Petition does

1 not allege any facts indicating there is a current violation of the
 2 Placer County Code nor are there any facts alleging failure to
 3 enforce the provisions of the Placer County Code. MVP cites no
 4 authority for its contention that "Where the County possesses the
 5 sole authority to enforce land use permit conditions, that authority
 6 takes the form of a duty, in the interest of protecting the public."
 7 (MVP's Opposition, 6:23-25.) The Court "need not consider an
 8 argument for which no authority is furnished." (*Dabney v. Dabney*,
 9 104 Cal.App.4th 379, 384 (2002).)

10 The Petition references, in the first cause of action and
 11 elsewhere, land use permit "LD-1030." The permit is also attached
 12 to the Petition as Exhibit 1. That permit notes six conditions of
 13 approval. Significantly, MVP has not alleged any specific facts
 14 indicating a violation of any of those conditions of approval. It
 15 appears that the Petition is primarily concerned about possible
 16 future violations of this permit. (See, e.g., Petition, para. 35.)
 17 Clearly, the Court cannot find a mandatory duty for the County to act
 18 to stop an alleged violation of the Zoning Code or County permits
 19 which has not yet occurred.

20 Mandamus will lie to compel action by a public body or official
 21 only if there is a clear, present and ministerial obligation to take
 22 the action. (*Sklar v. Franchise Tax Board*, 185 Cal.App.3d 616, 622
 23 (1986).) Here, MVP has failed to allege facts which demonstrate a
 24 clear, present and ministerial obligation for the County to act.
 25 Accordingly, the demurrer should be sustained and the Petition
 26 rejected.

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IV

MVP'S CHALLENGE IS TIME BARRED

MVP contends that they are not subject to the statute of limitations because they are challenging application of LD-1030 to the project and requesting enforcement of its conditions. However, as plainly revealed in the Petition's prayer for relief, MVP seeks revocation and modification of the permit and its conditions. (See, Petition, 13:1-20.) The 90 day statute of limitations applies to any action to "attack, review, set aside, void, or annul" any decision related to a conditional use pPermit, "or to determine the reasonableness, legality, or validity of any condition attached to a . . . conditional use permit." (Govt. Code §65009(c)(1)(E).)

The California Supreme Court has instructed that "to determine the statute of limitations which applies to a cause of action it is necessary to identify the nature of the cause of action, ie, the gravamen of the cause of action. [Citations.] The nature of the right sued upon and not the form of action nor the relief demanded determines the applicability of the statute of limitations under our code." (*Hensler v. City of Glendale*, 8 Cal.4th 1, 22-23 (1994).) Here, the gravamen of MVP's petition, at least as it relates to the first cause of action, is a time barred challenge to LD-1030. Accordingly, the demurrer should be sustained.

V

MVP MUST EXHAUST ITS ADMINISTRATIVE REMEDIES

MVP presents an absurd argument which would essentially eliminate the requirement of exhaustion of administrative remedies. According to MVP, unless MVP's Petition "discloses an available administrative remedy, a demurrer is not proper on that basis." (MVP

1 Opposition, 7:27-28.) In other words, MVP contends that as long as
 2 it ignores the exhaustion of administrative remedies requirement in
 3 its pleadings, it is exempt from that requirement. In fact, the
 4 opposite is true, MVP must plead facts which demonstrate compliance
 5 with the exhaustion of administrative remedies requirement. (CEB:
 6 California Administrative Mandamus, supra, §10.37, p. 372.) In fact
 7 a conclusory allegation that petitioners have exhausted their
 8 administrative remedies is insufficient to survive demurrer. (Pan
 9 Pac. Prop. v. County of Santa Cruz, 81 Cal.App.3d 244, 251 (1978).)

VI

CONCLUSION

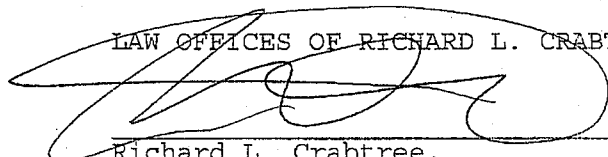
12 For each of the reasons stated above and in the County's moving
 13 papers, the demurrer should be sustained.

14 A mandamus action will not lie to compel exercise of discretion
 15 by the County, thus, mandamus cannot lie to require the County to
 16 make a discretionary determination of a violation of the subject
 17 permits, nor can mandamus lie to require a discretionary decision to
 18 initiate enforcement proceedings. Thus, at least as to the County,
 19 the demurrer should be sustained without leave to amend.

20 DATED:

9-27-06

LAW OFFICES OF RICHARD L. CRABTREE



Richard L. Crabtree,
 Attorney for County of Placer and
 County of Placer Planning Department

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Proof of Service

I am a citizen of the United States and employed in the County of Butte; I am over the age of eighteen years and not a party to the within action. My business address is 1395 Ridgewood Drive, Suite 300, Chico, California 95973. I am readily familiar with the practice for collection and processing of correspondence/documents for mailing with the United States Postal Service and that said correspondence/documents are deposited with the United States Postal Service in the ordinary course of business on the same day.

On September 26, 2006 I served the within Reply to Opposition to Demurrer on the parties below by placing a true copy thereof in a sealed envelope and served same on the parties/counsel, addressed as follows:

Ronald Zumbun
Timothy Kassouni
Angela Thompson (Fax: 916-486-5959)
Zumbun Law Firm
3800 Watt Ave, Ste 101
Sacramento CA 95821

Brigit Barnes (Fax: 916-660-9554)
Brigit Barnes & Associates, Inc.
3262 Penryn Rd, Ste 200
Loomis CA 95650

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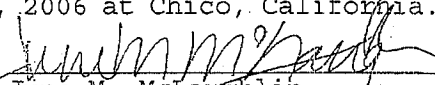
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XXXX FAX

I declare under penalty of perjury that the foregoing is true and correct under the laws of the State of California and that this declaration was executed on September 26, 2006 at Chico, California.


June M. McLaughlin

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