

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA
MODESTO DIVISION

In re) Case No. 09-93249-E-11
MICHAEL KENNETH NEMEE and) Docket Control No. JJE-1
MICHELLE SEOBHAN MCKEE NEMEE,)
Debtor(s).)
_____) Adv. Pro. No. 09-9088
MICHAEL KENNETH NEMEE and)
MICHELLE SEOBHAN MCKEE NEMEE,)
Plaintiff(s),)
v.)
COUNTY OF CALAVERAS,) DATE: April 28, 2010
TIME: 2:30 p.m.
DEPT: E
Defendant(s).)
_____)

(NOT FOR PUBLICATION)
MEMORANDUM OPINION AND DECISION

The court has been presented with the motion filed by the County of Calaveras ("County") to dismiss the Second Amended Complaint for declaratory and injunctive relief filed by Michael Nemees and Michelle Nemees ("Nemees") concerning certain real property located in Calaveras County (the "Nemees Property"). This case was originally filed in the Superior Court of California, County of Calaveras, and was removed to the federal courts after the Nemees filed their Chapter 11 bankruptcy case. A second state

1 court action was also removed to this court, a writ of mandate
2 proceeding addressing the denial of a request of the Nemees to re-
3 zone the Nemees Property. The writ of mandate proceeding was
4 remanded to state court based upon the representations of the
5 County that the matter was set for trial and a prompt determination
6 of that matter would occur in a specially set state court
7 proceeding before a CEQA Experienced Judge.

8 Prior to the removal of the Second Amended Complaint in this
9 action, the County had filed two demurrers seeking dismissal of the
10 action, both of which were granted and the Nemees were given leave
11 to amend. At the time the case was removed to federal court, a
12 third demurrer was pending in state court. The case having been
13 removed, the County has now filed a Motion to Dismiss the Second
14 Amended Complaint in this court pursuant to Rule 12(b)(6), Federal
15 Rules of Civil Procedure, as made applicable to these proceedings
16 by the Federal Rule of Bankruptcy Procedure 7012(b).¹

17 OVERVIEW OF FACTS AS STATED IN THE COMPLAINT

18 When considering a motion to dismiss, the court starts its
19 review with the plain language of the complaint. The United States
20 Supreme Court recently addressed this issue in Ashcroft v. Iqbal,
21 ____ U.S. ____, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). Under
22 Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a
23 "short and plain statement of the claim showing that the pleader is
24 entitled to relief." In its earlier decision, Bell Atlantic Corp.
25 v. Twombly, 550 U.S. 544 (2007), the Supreme Court held that the
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27 ^{1/} Unless otherwise stated, all references to the Federal
28 Rules of Civil Procedure shall be to those rules which have been
made applicable to these proceedings through the Federal Rules of
Bankruptcy Procedure.

1 Rule 8 pleading standards does not require detailed factual
2 allegations, but it demands more than an unadorned, the-defendant-
3 unlawfully-harmed-me accusation. Id. at 555. To survive a motion
4 to dismiss, the complaint must contain sufficient factual matter,
5 except it is true, to state a claim to relief that is plausible on
6 its face. Id. at 570.

7 In Iqbal, the Supreme Court discusses the two underlying
8 principles enunciated in Twombly in determining if a complaint
9 should be dismissed in federal court. First, that while the court
10 must accept all factual allegations in the complaint as true for
11 purposes of a motion to dismiss, the same is not true for legal
12 conclusions. Mere recitals of the elements of a cause of action do
13 not suffice. The second element is that the complaint must state
14 a plausible claim of relief to survive a motion to dismiss. This
15 determination of whether a plausible claim exists is a context-
16 specific task that requires the court to draw on its own judicial
17 experience and common sense.

18 The following alleged facts can be drawn from the Second
19 Amended Complaint filed by the Nemees:

20 1. The Nemees own Real Property located in Calaveras County,
21 California, which for purposes of this Opinion is referenced as the
22 Nemees Property.

23 2. The Nemees Property is zoned agricultural by Calaveras
24 County.

25 3. Owners of property zoned agricultural in Calaveras County
26 may use the property for agritourism activities. (This is a mixed
27 factual-legal allegation.)

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1 4. In addition to an olive orchard on the Nemees Property,
2 the Nemees built a golf course on the Nemees Property in or about
3 2006.

4 5. The Nemees believe and believed that the golf course
5 falls within the existing use for the property as currently zoned.

6 6. The County believes that the golf course is not within
7 the allowed uses for the existing zoning and have so notified the
8 Nemees.

9 7. The Nemees sought to have the zoning changed for the
10 Nemees Property to allow for recreational use, for the creation of
11 a golf resort and other development on the property.

12 8. The County denied the application for a change in zoning,
13 and the administrative process for the requested zoning change has
14 been completed. Upon the rejection of the requested zoning change,
15 the Nemees filed an action to obtain a writ of mandate, which is
16 now pending in the Calaveras County Superior Court.

17 9. After the golf course was constructed, the County
18 increased the property taxes on the Nemees Property based upon the
19 golf course improvements.

20 10. The Nemees, having received the interpretation from the
21 Code Enforcement officers that the golf course was not permitted
22 under the existing zoning, appealed that opinion to the Calaveras
23 County Board of Supervisors. On October 6, 2009, the Board of
24 Supervisors adopted three resolutions, including The Supervisors'
25 Resolution that the golf course on the Nemees Property did not fall
26 within the definition of agritourism.

27 11. The Nemees have exhausted all administrative remedies
28 with respect to the issue of whether a golf course as exists on the

1 Neme Property falls within the definition of agritourism, and
2 received the final decision from the Board of Supervisors adopting
3 the opinion of the County Code Enforcement officers.

4 12. The County confirms in its motion that all administrative
5 remedies have been exhausted with respect to the issue of whether
6 the term agritourism includes a golf course as operated on the
7 Neme Property by the Nemees.

8 13. The County's position is that a commercial golf course is
9 not agritourism and is therefore not a permitted land use on the
10 Neme Property. This position was conveyed in a 2009 staff letter
11 sent to the Nemees after their application was denied and
12 throughout the Nemees' administrative appeal and final
13 determination by the County Board of Supervisors affirming the 2009
14 staff letter.

15 14. The County has expressly notified the Nemees that the
16 current use of the golf course on the Neme Property:

- 17 a. Constitutes a Code violation as an unpermitted use
- 18 as currently zoned.
- 19 b. Must immediately cease.
- 20 c. Constitutes a County Code violation as a public
- 21 nuisance.
- 22 d. Subjects the Nemees to
 - 23 i. Fines of \$50 per day,
 - 24 ii. Penalty assessments,
 - 25 iii. Criminal citation, and
 - 26 iv. Potential penalty of incarceration in county
 - 27 jail.

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RELIEF REQUESTED IN PRAYER OF
SECOND AMENDED COMPLAINT

The Second Amended Complaint requests in its prayer the following relief:

First, for a judicial declaration that the operation of the golf course with less than 75 players at a time is permitted agritourism in an agricultural zone within the County of Calaveras and consistent with its zoning ordinance.

Additionally, that the court issue a temporary restraining order, preliminary injunction, and permanent injunction restraining the County of Calaveras from interfering with, in any way, the Nemees' operation of the olive farm and golf course or requiring the Nemees to attend additional administrative proceedings which challenge the use of the golf course.

In the Motion to Dismiss the County also identifies a further ground by which the Nemees are either seeking relief or supporting the relief requested. Paragraph Thirteen of the Second Amended Complaint, in requesting a judicial determination that the golf course falls within the existing zoning, the Nemees make the disjunctive request that "the County is estopped from denying plaintiff's use of their property as a golf course as 'agritourism'...." While not a model complaint, it is clear that both the County and the court can determine what relief is being sought by the Nemees and the factual basis for which they believe relief is warranted.

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1 **DECLARATORY RELIEF ACTION IS PROPER**
2 **TO DETERMINE THE MEANING OF A LAW**

3 The first question presented to the court is whether a
4 declaratory relief action is proper for the determination of
5 whether the current use of the golf course falls within the
6 existing zoning and language in the zoning ordinance allowing for
7 "agritourism," or as the County contends that the only potential
8 review, if any, is through traditional or administrative mandamus.
9 In federal court, Congress has provided for declaratory relief
10 actions as set forth in 28 U.S.C. sections 2201 and 2202. Section
11 2201 provides:

12 (a) In a case of actual controversy within its
13 jurisdiction, except with respect to Federal taxes
14 other than actions brought under section 7428 of
15 the Internal Revenue Code of 1986, a proceeding
16 under section 505 or 1146 of title 11, or in any
17 civil action involving an antidumping or
18 countervailing duty proceeding regarding a class or
19 kind of merchandise of a free trade area country
20 (as defined in section 516A(f)(10) of the Tariff
21 Act of 1930), as determined by the administering
22 authority, any court of the United States, upon the
23 filing of an appropriate pleading, may declare the
24 rights and other legal relations of any interested
25 party seeking such declaration, whether or not
26 further relief is or could be sought. Any such
27 declaration shall have the force and effect of a
28 final judgment or decree and shall be reviewable as
such.

 (b) For limitations on actions brought with respect to
drug patents see section 505 or 512 of the Federal
Food, Drug, and Cosmetic Act.

 Section 2202 provides, "Further necessary or proper relief
based on a declaratory judgment or decree may be granted, after
reasonable notice and hearing, against any adverse party whose
rights have been determined by such judgment."

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1 The right to declaratory relief action was statutorily
2 codified to allow parties to address an actual dispute which may
3 exist prior to the time that either a claim for affirmative relief
4 has ripened, or where the other party entitled to relief has failed
5 to take the necessary steps to enforce the appropriate remedy. An
6 example of the first would be where the maker of a negotiable
7 instrument which becomes payable at some future date asserts that
8 endorsements were forged and the instrument is unenforceable. The
9 payee may properly presently seek declaratory relief to determine
10 the parties' respective rights, rather than waiting a number of
11 years until the instrument becomes due, and then have to address
12 the issue when memories of the events and evidence of the alleged
13 forgery have faded. The second situation is one in which one party
14 alleges to have certain present rights or alleged violations to
15 assert against another, but fails or refuses to bring the
16 appropriate action so that the alleged claims can be addressed. In
17 such a situation, the party so threatened with alleged violations
18 or breaches can bring a declaratory relief action for a
19 determination of the party's respective rights.

20 The use of declaratory relief action allows parties to
21 minimize damages and address disputes when they arise, even if one
22 of the parties seeks to delay enforcement of his or her rights as
23 a tool to harass or threaten the other. The right to seek
24 declaratory relief works to diminish the threat of future
25 litigation and prosecution being brandished as a weapon of
26 harassment. Japan Gas Lighter Ass'n v. Ronson Corp., 257 F. Supp.
27 219, 237 (D.N.J. 1966).

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1 Similar to a state declaratory relief action, the first
2 requirement in federal court is that the parties meet the
3 constitutional requirement that it be an actual case in
4 controversy. U.S. CONST. art. III, §2; 28 U.S.C. §1202. As stated
5 by the United States Supreme Court in Maryland Casualty Co. v.
6 Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941), a case in
7 controversy exists when "the facts alleged, under all the
8 circumstances, show that there is a substantial controversy,
9 between the parties having adverse legal interest, of sufficient
10 immediacy and reality to warrant the issuance of a declaratory
11 judgment."

12 The fact that there may be another proceeding in which the
13 issue could be decided does not bar a party from seeking
14 declaratory relief. "The tests are whether the issuance of a
15 declaratory judgment will effectively solve the problem, whether it
16 will serve a useful purpose, and whether or not the other remedy is
17 more effective or efficient." Western v. McGehee, 202 F. Supp.
18 287, 294 (D. Md. 1962) (citing Maryland Casualty Co. v. Boyle
19 Constr. Co., 123 F.2d 558, 565 (4th Cir. 1941)); 10B CHARLES ALAN
20 WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE §2758
21 (3rd ed. 1998). The creation of the Statutory Declaratory Relief
22 Act by Congress confers on federal courts unique and substantial
23 discretion in deciding whether to declare the rights of litigants.
24 The propriety of granting declaratory relief depends upon a
25 circumspect sense of the fitness of the procedure to the issues
26 presented. The Declaratory Judgment Act provides an additional
27 remedial procedure for the court, which is used in the exercise of

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1 sound discretion. Wilton v. Seven Falls Co., 515 U.S. 277, 282-283
2 (1995).

3 **A CASE IN CONTROVERSY EXISTS AND THE ISSUE**
4 **OF THE MEANING OF THE TERM AGRITOURISM AS USED**
5 **IN THE COUNTY ORDINANCE IS RIPE FOR DETERMINATION**

6 In its Motion to Dismiss the County contends there is no case
7 or controversy to be presented to the court, and no ripe dispute
8 exists for determination.² Contrary to this contention, from the
9 face of the complaint and the exhibits to the complaint, it is
10 clear that a controversy exists and it is ripe for determination.
11 First, both parties agree that all administrative remedies have
12 been exhausted. In addition to that allegation in the complaint by
13 the Nemees, the County so concurs in the Motion to Dismiss. (County
14 Memorandum of Points and Authorities ("CMP & A") 3:10-12, 7:5-9,
15 Mar. 31, 2010.)

16 The County next argues that there is no present dispute
17 between the parties, merely a potential theoretical dispute. The
18 County's own pleadings, as well as the complaint and exhibits,
19 clearly show that this contention is unsustainable. Starting with
20 the County's pleadings, it asserts in the Motion to Dismiss the
21 following:

22 1. The County's position is that a commercial golf course is
23 not agritourism and is therefore not a permitted land use on

24 ² At oral argument the County indicated that it was not
25 intending to argue that the issue was not ripe given the most
26 recent determinations by the Board of Supervisors. Given that
27 the Points and Authorities expressly address the issue in the
28 context of the demurrers filed prior to the case being removed
and it could be interpreted that the argument is that the issue
is not "ripe" because the Nemees were not pursuing an
administrative mandamus action in state court concerning the
meaning of the ordinance at issue, the court addresses the case
in controversy and ripeness issues in this Motion to Dismiss.

1 plaintiffs' property. (CMP & A, pg. 2:13-17.)

2 2. The County conveyed this position to the Nemees in a 2009
3 staff letter after the Nemees' application to change zoning was
4 denied, as well as throughout plaintiffs' administrative appeal and
5 final determination by the County Board of Supervisors of the 2009
6 staff letter. (CMP & A, pg. 2:13-17.)

7 3. "Their [Nemees'] use [golf course] is currently illegal
8 under the County Code. . . ." (CMP & A 3:2.)

9 4. "On May 15, 2009, Brent Harrington, interim community
10 development director, notified plaintiffs in writing that continued
11 use of their property as a golf course was in violation of their
12 existing zoning." (CMP & A 6:3-5.)

13 5. "The County has always taken the position that a
14 commercial golf course is not allowed in the AP zoning
15 district...." (County Reply 9:7-8, Apr. 22, 2010.)

16 In addition to statements in the County's pleading and the
17 complaint, the parties have also referenced as Exhibit I of the
18 Complaint which is identified as the June 9, 2009, letter from Todd
19 Barr, Calavares County Code Enforcement Officer, to the Nemees
20 which states:

21 6. The use of the Nemees Property as a golf course
22 constitutes a Code violation as an unpermitted use as currently
23 zoned.

24 7. The use of the Nemees Property as a golf course must cease
25 immediately.

26 8. The use of the Nemees Property as a golf course
27 constitutes a County Code violation as a public nuisance.

28 9. Failure to comply with the County's interpretation of the

1 existing zoning for the Nemees Property may result in legal action
2 taken against the Nemees. Failure to comply with the County's
3 interpretation of the existing zoning for the Nemees Property can
4 subject the Nemees to:

- 5 a. Fines of \$50 per day,
- 6 b. Penalty assessments,
- 7 c. Criminal citation, and
- 8 d. Potential penalty of incarceration in county jail.

9 For purposes of the Motion to Dismiss, it appears indisputable
10 that there is a real controversy between the County and the Nemees
11 concerning the existing use of the property as a golf course. The
12 court cannot find the County's arguments persuasive given the
13 County has expressly and unequivocally advised the Nemees that the
14 use of the property as a golf course is illegal, and that by
15 failing to cease to do it the Nemees are subject to civil and
16 criminal penalties, including incarceration. It is also clear that
17 the County contends that the use of the property does not fall
18 within the current zoning restrictions. There appears to be a real
19 controversy over the meaning of the ordinance.

20
21 **DECLARATORY RELIEF IS THE PROPER REMEDY TO OBTAIN
THE DETERMINATION OF THE MEANING OF THIS ORDINANCE**

22 The County argues that because there was an initial
23 determination by a County Code Enforcement Officer, which was
24 subsequently upheld and made final by the County Board of
25 Supervisors after a public hearing, the only recourse available to
26 the Nemees is to seek a writ of mandate. The points and
27 authorities in support of the Motion to Dismiss includes numerous
28 citations to cases holding that a review of the decision making

1 process or a discretionary decision of a county is through a writ
2 of mandate. In all of the cases cited by the County, the issues
3 presented were a review of the process by which the county
4 determined to issue or not issue use permits, zoning changes, or
5 other discretionary processes. The cases also include those in
6 which the plaintiff sought to overturn a determination by the
7 counties, such as the enactment of a general plan. In State of
8 California v. Superior Court of Orange County, 12 Cal. 3d 237, 524
9 P.2d 1281 (1974), the California Supreme Court addressed various
10 contentions by a developer that the California Coastal Zone
11 Conservation Commission's denial of a permit to develop property
12 was improper. The third cause of action in that case sought a
13 declaration from the court that it did not need a permit from the
14 Commission or that it was entitled to a permit because it had a
15 vested right to do so without such a permit. The California
16 Supreme Court upheld the dismissal of the complaint in that case
17 not because the court determined that declaratory relief was the
18 improper procedure, but that the developer had not yet sought and
19 obtained a determination from the Commission whether it concurred
20 that such rights existed. Thus, the claim was not ripe to be
21 determined by the court under the State declaratory relief
22 provisions.

23 A review of other authorities cited by the County demonstrates
24 that the contention a court's jurisdiction is limited to
25 determining the meaning of this law and there may only be a
26 traditional or administrative mandamus proceeding is not accurate.
27 This is further supported by the court's review of *Witkin*,
28 *California Civil Procedure*, 5th Edition. The use of mandamus to

1 review the acts of governmental entities relates to discretionary
2 acts of such agencies and entities. A summary of the cases
3 surveyed in the relevant sections in Witkin addressing such
4 discretionary acts, including:

- 5 a. Compelling mayor to execute contract approved by
6 city council,
- 7 b. Compelling awarding of contract,
- 8 c. Compelling district attorney to institute
9 proceedings to abate public nuisance,
- 10 d. Compelling city officials to perform acts under
11 state law,
- 12 e. Compelling water district to perform contract for
13 water services,
- 14 f. Compelling public officer to issue bonds,
- 15 g. Compelling county to bargain in good faith,
- 16 h. Compelling zoning administrator to enforce planning
17 commission resolution,
- 18 i. Compelling district attorney to commence judicial
19 forfeiture action,
- 20 j. Compelling county to halt connection of water
21 service,
- 22 k. Compelling city to include overtime premium in pay
23 calculation,
- 24 l. Water Resources Board review of regional board
25 decision not to remove prohibition of wastewater
26 discharge from regional plan,
- 27 m. Challenge by developer that city required
28 underground utilities,

- n. Denial of permit application,
- o. University's denial of application to participate in early retirement program,
- p. Award of public works contract,
- q. Denial of tenure at a state university,
- r. Decision not to hire person for civil service job, and
- s. Establishment of regulations,

Witkin California Procedure, 5th Edition, Chapter XII Extraordinary Writs, §§91, 269.

With respect to administrative mandamus proceedings, the nature of such governmental discretionary acts subject to that form of review include:

- a. Whether probationary employee was entitled to a hearing,
- b. Challenge of a registration fee assessed by the Department of Motor Vehicles,
- c. Review of timber harvest plan adopted by governmental agency, and
- d. Challenge of State policy for long-term involuntary mediation of state prisoners.

Id., §268.

The Motion to Dismiss, and the opposition spend much time discussing the denial of the application to re-zone the property as recreational, which is not at the present time before this court. The County attacks many of the factual issues which it asserts either cannot be proven by the Nemees or to which they assert there is overwhelming evidence to the contrary, which "overwhelming

1 evidence" to be weighed and determined is not properly before the
2 court on a motion to dismiss. When all of the clutter of the
3 argument is removed, the question that the Nemees have put before
4 this court is what does the term "agritourism" mean in Calaveras
5 County Code Sections 17.06.0151 and 17.18.020. The court is not
6 being asked to direct the County to engage in any certain conduct
7 and is not being asked to overrule a zoning ordinance or other
8 enactment made by the County. The Nemees are not asking the court
9 to order the County to issue a use permit or otherwise direct that
10 the County engage in any specific conduct with respect to this
11 question. The sole question asked is what is the legal meaning of
12 the word agritourism in the County ordinance.

13 The County further argues that a determination as to the
14 meaning of this law (the Ordinance) has already been made by the
15 County Board of Supervisors, and as such, any determination as to
16 the meaning of this law is beyond the scope of this court's
17 jurisdiction. Rather, the County contends that at best this court
18 would be limited to conducting a review under the administrative
19 mandamus principles to determine if the process used by the County
20 was correct in coming to its conclusion of the legal meaning of the
21 term agritourism.

22 In making such arguments, the County misstates the roles of
23 the various branches of government. The County has enacted a law,
24 the zoning ordinance and the permitted uses for property zoned as
25 agricultural. Within that law, the County permits activities that
26 are agritourism. There now exists a dispute about what that word
27 means. The County Board of Supervisors ultimately has formally
28 spoken on behalf of the County, stating the County's official

1 position to be is that the existing law does not include a golf
2 course as now exists on the Nemea Property.

3 This purported pronouncement of how the Board of Supervisors
4 interprets the law was not the enactment of a zoning ordinance,
5 issuance or denial of a use permit, approval of an alternatively
6 permitted use, or other discretionary act. It is nothing more than
7 a naked statement of how the County (on a 3-2 vote of the
8 Supervisors) believes the law should be interpreted by the judicial
9 branch of the government.

10 Determination of what the law actually states resides in the
11 judicial branch of government not the legislative or executive.
12 While the courts do not interfere in the legislative process by
13 which the County determines its zoning ordinances, except to the
14 extent as required to make sure that the counties comply with the
15 constitutional and statutory requirements, once the legislation has
16 been enacted it is ultimately the courts which make the final
17 determination as to issues of law.

18 The County is correct in its assertion that the California
19 courts have been consistent in holding that the judiciary is to
20 give weight to the agencies' opinion as to the meaning of the
21 zoning ordinance unless it is clearly erroneous or unauthorized.
22 Stolman v. City of Los Angeles, 114 Cal. App. 4th 916, 923-924, 8
23 Cal. Rptr. 3d 178 (2003). In so stating, the California courts are
24 equally clear that an agency's opinion as to what the zoning
25 ordinance means is not determinative. Though the agency
26 responsible for issuing, maintaining, and enforcing the zoning
27 ordinance may well have some of the best information concerning how
28 that ordinance should be interpreted, that opinion is used by the

1 court to determine the substance of the law. Id. at 928.

2 In concluding that a declaratory relief action properly lies
3 in this case to determine the question of the meaning of the term
4 agritourism, that determination is not made through a motion to
5 dismiss on the adequacy of the pleadings. It must be presented to
6 the court using the appropriate procedures in federal court for
7 such issues. Whether the parties believe they need to have a
8 trial, or that the issues may be resolved by summary judgment or
9 other proceeding short of a trial, such is left to the
10 determination of the respective parties.

11 **THE SECOND AMENDED COMPLAINT ADEQUATELY PLEADS**
12 **A PLAUSIBLE CLAIM FOR ESTOPPEL**

13 The County argues further that to the extent that a claim for
14 estoppel is being made by the Nemees, they have failed to
15 adequately plead the elements of estoppel. At this early stage of
16 the pleadings, one has to be careful to distinguish between
17 plausibly pleading a claim for estoppel and whether the Nemees can
18 actually successfully prove a case for estoppel. The County cites
19 to Golden Gate Water Ski Club v. County of Contra Costa, 165 Cal.
20 App. 4th 249, 80 Cal. Rptr. 3d 876 (2008), for a statement of the
21 basic elements for equitable estoppel. The four elements of
22 equitable estoppel as established under California law are as
23 follows:

24 1. The party to be estopped (County) must be apprised of the
25 facts;

26 2. For the County to be estopped, the County must contend
27 that its conduct shall be acted upon or must act in a way that the
28 party asserting the estoppel had a right to believe it was so

1 intended;

2 3. The other parties (Nemees) must be ignorant of the true
3 state of facts, and

4 4. The Nemees must rely upon the conduct to their injury.

5 The Nemees do not contest this statement of California law or
6 that another standard is appropriate under the circumstances.

7 In considering whether the Nemees assert facts such that a
8 claim for equitable estoppel is plausible, the court identifies
9 the following facts alleged with respect to each element of the
10 claim for estoppel.

11 1. The County must be apprised of the facts.

12 a. The County, through its representatives, knew since
13 2003 that the Nemees were in the process of
14 constructing the golf course on the Neme Property.
15 Second Amended Complaint, Paragraph 13.

16 b. The County told the Nemees that they did not need
17 permits to continue with the golf course
18 construction.³ Second Amended Complaint Paragraphs
19 5, 7, and 13.

20 c. Upon construction of the golf course, the County
21 increased the value of the property of the golf
22 course improvements, and increased the amount of
23 tax that was being assessed against the property by
24 the County. Second Amended Complaint, Paragraph
25 13.

26
27 ^{3/} Though the Second Amended Complaint does not expressly
28 state that the permits at issue related to the construction of
the golf course, given the placement and context of this
allegation, it is a fair inference to draw that the permit
referenced is that for the golf course.

1 d. The Calaveras County director of community
2 development attended a meeting or meetings with the
3 potential lenders for the Nemees to promote the
4 obtaining of financing to proceed with the golf
5 course improvements. Second Amended Complaint,
6 Paragraph 13.

7 2. The County must intend its conduct to be acted upon, or
8 must act in such a way that the Nemees had a right to believe such
9 was intended.

10 a. The Calaveras County director of community
11 development attended meetings to promote the
12 obtaining of financing by the Nemees to make the
13 golf course improvements. Second Amended
14 Complaint, Paragraph 13.

15 b. The County was aware of the improvements and was in
16 communication with the Nemees while they were being
17 made. Second Amended Complaint, Paragraphs 7, and
18 13.

19 c. Upon completion of the improvements, the County
20 increased the assessment on the property for the
21 values of the improvements, and thereby increasing
22 the property taxes on the property for the County.
23 Second Amended Complaint, Paragraph 13.

24 d. Unnamed representatives of the County made
25 representations and took actions to allow the
26 Nemees to spend \$7 Million for the development of
27 the golf course during the period of 2003 through
28 2009. Second Amended Complaint, Paragraph 13.

1 3. The Nemees must be ignorant of the true facts.

2 a. The Nemees state they believed that the
3 agricultural zoning of the olive farm would also
4 support their use of the golf course as constructed
5 under agritourism. Second Amended Complaint,
6 Paragraphs 5, 7, and 12.

7 4. The Nemees must have relied upon the representations to
8 their injury.

9 a. The Nemees allege that they have spent \$7 Million
10 for the development of the golf course, which the
11 County now states is illegal and the use of which
12 subjects the Nemees to fines, penalties, criminal
13 incarceration. Second Amended Complaint, Paragraph
14 13.

15 Though not artfully stated, the Nemees allege facts which, if
16 taken as true, support a plausible claim for estoppel. As the
17 County notes in its motion and reply brief, a party may well face
18 daunting odds to establish equitable estoppel against the
19 governmental entity in a land use case. But the fact that there
20 may be daunting odds does not prevent a party from having the
21 opportunity to prove a case for estoppel. From the Second Amended
22 Complaint the County can identify the events and the basis by which
23 estoppel is asserted, when the alleged representations were made,
24 and the parties from the County who made such representations. The
25 specific details are not required in the complaint, but can be
26 promptly and specifically ascertained through discovery.

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1 **THE NEMEES FAIL TO STATE A CLAIM FOR INJUNCTIVE RELIEF**

2 In the caption of the Second Amended Complaint reference is
3 made to injunctive relief being sought. In paragraph 16, the
4 general statement is made that "unless the County is restrained
5 Plaintiffs believe they will have to defend additional
6 administrative proceedings which beg the ultimate question
7 presented in this case." In the prayer, a request is made for
8 injunctive relief restraining the County from "interfering with, in
9 any way, plaintiffs' operation of the olive farm and golf course or
10 requiring plaintiffs to attend additional administrative
11 proceedings which challenge the use of the golf course."

12 Before addressing the specific objection as stated by the
13 plaintiff, the court first notes that the requested relief is not
14 tailored to specific conduct or events. The prayer requests that
15 a permanent injunction be issued to free the Nemees from any action
16 taken by the County with respect to their property. The complaint
17 does not allege any facts or basis by which the Nemees could own
18 the property and be free to use it in any way, at any time, in any
19 manner, for the operation of an "olive farm" and "golf course,"
20 whatever those terms may mean. Additionally, the Nemees request a
21 federal injunction barring the County from ever conducting any
22 administrative proceedings which "challenge" the use of the golf
23 course. The court cannot ascertain from this part of the pleading,
24 to the extent that the prayer of a complaint is part of the
25 affirmative pleading, what allowable injunctive relief the Nemees
26 are requesting.

27 In paragraph 16 of the complaint, the Nemees appear to plead
28 that the court needs to restrain the County from conducting

1 otherwise appropriate administrative proceedings because the Nemees
2 cannot afford to participate in such proceedings. Injunctive
3 relief is not granted based upon the economic ability of a party to
4 participate in appropriate and authorized administrative
5 proceedings. The County may very well have appropriate proceedings
6 to commence concerning the Nemees Property and the use of the
7 property, even if there is a permitted golf course use within the
8 existing zoning.

9 The County's Motion to Dismiss focuses on the fact that the
10 elements for a preliminary injunction are not shown in the
11 complaint. Neither a temporary restraining order nor preliminary
12 injunction are issued based upon the complaint, but a plaintiff
13 must file a separate motion seeking the issuance of a preliminary
14 injunction, and a temporary restraining order if one is necessary
15 pending the hearing on the preliminary injunction.

16 In seeking injunctive relief the plaintiff must show, and
17 plead, the elements for such relief which are:

- 18 1. That the plaintiff has suffered an irreparable injury,
- 19 2. That remedies available at law, such as monetary damages,
20 are inadequate to compensate for that injury,
- 21 3. Considering the balance of hardships between plaintiff
22 and defendant, a remedy in equity is warranted, and
- 23 4. That the public interest would not be disserved by
24 issuance of the injunctive relief.

25 Acumed, LLC v. Stryker Corp., 551 F.3d 1323, 1327 (Fed. Cir. 2008)
26 (quoting eBay, Inc. v. MercExchange, LLC, 547 U.S. 388 (2006));
27 N. Scheyenne Tribe v. Norton, 503 F.3d 836 (9th Cir. 2007).

28 The Second Amended Complaint filed by the Nemees does not

1 directly or indirectly plead facts sufficient for the court to find
2 that a plausible claim injunctive relief is set forth by the
3 Nemees. While the court was able to ferret out from this Second
4 Amended Complaint the various elements according declaratory relief
5 and a theory for equitable estoppel, it cannot ferret out the
6 elements for injunctive relief.

7 Though the complaint can be read to state that the Nemees face
8 and have suffered economic harm, there is nothing in the complaint
9 alleging that they are suffering irreparable injury. As to the
10 second element, again the complaint does not indicate that remedies
11 at law are adequate such that the court should provide the
12 extraordinary equitable remedy of injunctive relief against the
13 County.

14 Third, there is no allegation concerning the balancing of the
15 hardships between the County and the Nemees for injunctive relief.
16 This third element is even harder to decipher since the requested
17 injunctive relief is so open ended it could be read to literally
18 bar the County from ever exercising any of its appropriate
19 authority over the Nemees Property or the Nemees' use of that
20 property so long as that use related in some way to olive farming
21 or the golf course. Finally, with respect to the fourth element,
22 there are no allegations concerning the public interest will be
23 served or subject to a disservice by the granting of the requested
24 injunctive relief.

25 The court grants the motion with respect to a claim for
26 injunctive relief and it is stricken from the complaint. Because
27 this is the Second Amended Complaint, the claim for injunctive
28 relief is stricken without leave to amend, except as may be allowed

1 by the court pursuant to subsequent order.

2 **THE COUNTY FAILS TO ESTABLISH THAT**
3 **THE NEMEES' DECLARATORY RELIEF ACTION**
4 **IS BARRED BY THE STATUTE OF LIMITATIONS**

5 The County's motion based on the expiration of the statute of
6 limitations to challenge the adoption of the agricultural zoning is
7 denied. With a two paragraph argument, the County argues that the
8 90-day statute of limitations in which to challenge that ordinance
9 has long expired since the ordinance to provide for the
10 agricultural zoning for this property was last amended in 2005. As
11 discussed above, the Nemees are not challenging the enactment of
12 the zoning ordinance, but seek a declaration from this court
13 whether the existing use is within the legal meaning of the term
14 agritourism as used in the County ordinance. It may be that this
15 argument was raised by the County out of an abundance of caution,
16 because of the inartful drafting of the complaint, or as a make-
17 weight argument. For whatever reason this basis was given, it is
18 denied.


19 **CONCLUSION**

20 The Motion to Dismiss filed by Calaveras County is denied with
21 respect to the claims for declaratory relief and global estoppel,
22 and the County shall file a responsive pleading to the complaint
23 within 21 days of the issuance of this order on the motion. The
24 motion to strike is granted with respect to any claim for
25 injunctive relief in the Second Amended Complaint, any claim for
26 injunctive relief is stricken, and no leave to amend is granted the
27 Nemees. If further amendments are sought to the complaint by the
28 Nemees, then they shall seek relief from the court to so amend the
complaint as provided under the Federal Rules of Civil Procedure

1 and Federal Rules of Bankruptcy Procedure.

2 The court shall issue a separate order granting in part and
3 denying in part the Motion to Dismiss.

4 Dated: May 18, 2010


RONALD H. SARGIS, Judge
United States Bankruptcy Court