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and The Oscar A. Braun Trust Dated 1996

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

OSCAR BRAUN, ANDREA BRAUN and the
OSCAR BRAUN TRUST DATED 1996, et al.,

Plaintiffs,

vs.

COUNTY OF SAN MATEO,

Defendant.

Case No. CV 03-03415 MJJ

**JOINT PRETRIAL CONFERENCE
STATEMENT**

Date: January 11, 2005

Time: 3:30 p.m.

Dept.: Hon. Martin J. Jenkins

Location: Courtroom 11, 19th Floor

TRIAL DATE: FEBRUARY 14, 2005

Pursuant to the Court's Pretrial Order and Federal Rule of Civil Procedure 16, the parties submit
this Joint Pretrial Conference Statement.

I. INTRODUCTION

On July 23, 2003, plaintiffs Oscar Braun, Andrea Braun and the Oscar A. Braun Trust filed this

1 action for violation of civil rights under 42 U.S.C. § 1983. Plaintiffs' First Amended Complaint for
2 Violation of Civil Rights includes claims for First Amendment, Fourteenth Amendment Equal
3 Protection, and Fourteenth Amendment Due Process violations.¹ The dispute arises out of actions taken
4 by defendant County of San Mateo in the context of a process to legalize certain structures at plaintiffs'
5 property at 1589 Higgins Canyon Road in the unincorporated Half Moon Bay area. Plaintiffs contend
6 that the County took actions in that process which were done in retaliation for Mr. Braun's First
7 Amendment activities, which activities included criticism of the County and County officials. Plaintiffs
8 further contend that the County treated them in a manner that was different from others similarly situated,
9 i.e. the Board of Supervisors fined the Brauns ten (10) times the published investigation fee for Planning
10 and Building permits rather than the traditional practice of two (2) times investigation fees as prescribed
11 by the County's Planning and Building Division fees schedule levied against other residents of San
12 Mateo County who sought to legalize structures on their property .

13 The County contends that it did nothing more than require the Brauns to "legalize" their
14 buildings by ensuring proper code compliance and paying the fees set by ordinance and resolution " and
15 yet the County's contention is factually not supported by the administrative record or published San
16 Mateo County Planning and Building Division fee schedule. The Brauns had agreed to pay the lawful
17 two times the CDP permit fee of \$7440 (two time the normal permit fee of \$3720.). Plaintiffs contend
18 that the County treated them in a manner that was different from others similarly situated in retaliation
19 for criticizing the Board of Supervisors coastal apartheid policies.

20 The legalization process culminated in the denial of permits by the San Mateo County Board of
21 Supervisors on July 23, 2002 and the issuance of an Order of Abatement with no opportunity to cure
22 outside of an administrative mandamus action. The Resolution by the Board of Supervisors denying the
23 permits stated that the requirements for legalization of the septic system for the affordable housing unit
24 (an unpermitted mobile home placed on the property by the Brauns for a tenant) had not been met; that

25 _____
26 ¹ The Second and Third Causes of Action were dismissed by this Court pursuant to Defendants' Motion
27 For Summary Judgment on December 21, 2004, whereas the motion was denied with respect to the First
28 Cause of Action. This Statement therefore assumes that only the First Cause of Action is operative for
trial.

1 the requirements for legalization of the well/water source for the affordable housing unit (again, the
2 mobile home) had not been met; and that the required fees had not been paid in full for issuance of
3 permits for (1) the affordable housing unit, (2) a 720 sq. ft. sun room roof enclosure to the main house,
4 (3) a stable, (4) a tractor shed, (5) an agricultural barn, (6) water tanks, and (7) a storage shed adjacent to
5 the stable. The plaintiff contend that unreasonable new conditions were placed upon the granting of the
6 permits by the Board of Supervisors after the County Planning Commission had conditionally approved
7 them.

8 Plaintiffs subsequently filed a state court action against the County in state Superior Court,
9 seeking, among other things, a declaration that the fees were improper and not required for issuance of
10 the permits for legalization of the various structures on the property. In particular, plaintiffs disputed the
11 amount and timing of the fees imposed by the Board of Supervisors, including the amount and timing of
12 “investigation fees.” Investigation fees are permit fees imposed in cases (such as plaintiffs’) where
13 construction is completed without applying for or obtaining necessary permits, and then permits are
14 sought after the fact to “legalize” completed structures. The fees are designed to compensate the County
15 for the additional work involved in investigating and resolving code violations in completed structures.

16 The County filed a cross-complaint for code enforcement relating to the permit violations detailed
17 above. The state court action was set for trial in July 2004, but was settled in late June 2004.

18 Plaintiffs continued to pursue this action in federal court, alleging that the County’s handling of
19 this matter violated their civil rights.

20 **II. STATEMENT OF ISSUES**

21 **A. PLAINTIFFS’ LEGAL ISSUES**

22 1. Was retaliation for First Amendment activities a motivating factor in the County Board of
23 Supervisor’s actions with respect to the Brauns’ permit applications?

24 2. If the answer to 1 is “yes,” has the County met its burden to prove that regardless of any
25 improper motive, the County would have taken the same course of action?

26 3. If the answer to 2 is “no,” what is the amount of damages due to plaintiff?

27 **B. DEFENDANT’S LEGAL ISSUES**

28 1. Is the Board of Supervisors the “final policymaker”, under a 42 U.S.C.A. section 1983

1 analysis, for matters related to the proceedings with regard to plaintiffs' property at 1589 Higgins
2 Canyon Road, unincorporated San Mateo County?

3 2. Do actions by the Board of Supervisors require a majority vote of their members to constitute
4 action by the "final policymaker" for purposes of analysis under 42 U.S.C.A. section 1983?

5 3. Did the County of San Mateo violate plaintiffs' First Amendment rights of free expression by
6 retaliating against them for their prior exercise of such rights during the process of considering and acting
7 on permits to legalize unpermitted construction on plaintiffs' property at 1589 Higgins Canyon Road,
8 unincorporated San Mateo County?

9 a. Was plaintiffs' speech "public speech" protected by the First Amendment?

10 b. If the answer to issue 3(a) is yes, did the "final policymaker" know of plaintiffs' First
11 Amendment speech?

12 c. If the answer to issue 3(b) is yes, was plaintiffs' speech a substantial or motivating
13 factor in the decision by the "final policymaker"?

14 d. If the answer to issue 3(c) is yes, would the "final policymaker" have made the same
15 decision regardless of plaintiffs' First Amendment speech?

16 e. If the answer to issue 3(d) is yes, was the decision by the "final policymaker"
17 pretextual?

18 **III. PLAINTIFF'S POSITION**

19 **Summary of Legal Contentions**

20
21 Section 1983 of Title 42 of the U.S. Code, enacted by Congress pursuant to § 5 of the Fourteenth
22 Amendment, creates an action for damages and injunctive relief against local governmental bodies,
23 including counties, who deprive a plaintiff of rights, privileges, or immunities secured by the
24 constitution. Section 1983 incorporates the Fourteenth Amendment, which incorporates the Bill of
25 Rights and applies them to the states. Constitutional violations actionable through Section 1983 include
26 violations of the Fourteenth Amendment standing alone, such as procedural due process or equal
27 protection, or violations of the Bill of Rights. First Amendment provisions for Freedom of Speech,
28

1 Freedom of the Press and Freedom to Petition are among the rights applicable to the states through the
2 Fourteenth Amendment.

3 The Brauns' contend that the County, and most particularly its Board of Supervisors, retaliated
4 against them for exercising their First Amendment right to free speech. Specifically, the Brauns contend
5 that the County Board of Supervisors employed unusually draconian measures in addressing an appeal of
6 the Planning Commission's approval of permits to legalize certain structures on their property.
7

8 The Brauns have been outspoken critics of the County of San Mateo and various local no-growth
9 environmental groups for many years. Specifically, Mr. Braun has been alleging for years that officials
10 of the County are enmeshed in a kind of "unholy alliance" with local environmental groups, such as the
11 Committee For Green Foothills, the Sierra Club, the Peninsula Open Space Trust, and others, collectively
12 known as the "Coastal Open Space Alliance" (COSA). Mr. Braun contends that the County and COSA
13 have for many years engaged in certain activities – legal, quasi-legal, and illegal – with the purpose and
14 intent of expanding the interests and property holdings of COSA, at the expense of private residents in
15 the coastal region. The Brauns contend that they are the most recent victims of these activities, most
16 particularly because they are outspoken critics of both the County and COSA.
17

18 Specifically, the Brauns allege that the County Board of Supervisors has engaged in the following
19 retaliatory acts, including, but not limited to:
20

- 21 • Rejecting the ruling and advice of their own Planning Commission and County Counsel
22 by adding additional, onerous conditions to the Braun's permit approval, at the behest of
23 private citizens who were political opponents of the Brauns.
- 24 • Charging planning and building permit fees before any investigation had been conducted
25 to determine what the actual fees should be.
- 26 • Enlarging the County's inquiry into the Braun's property to involve inspections to look
27 for violations which bore no relationship to existing issues, and doing so after the Brauns
28 had already engaged in a protracted and arduous permitting process with the Planning
Commission that had finally been resolved.

- Recording a second Notice of Violation on the Brauns' property when the first notice was already in place, and doing so knowing that this act had the potential to damage the Braun's opportunity to enter into a lucrative contract with Sprint.
- Ultimately denying the Braun's permit applications, and issuing an Order of Abatement directing the Brauns to tear down structures on their property, which Order indicated that the Brauns would have no further opportunity to legalize said structures. This denial of permits was ostensibly done because the Brauns refused to pay fees imposed by the County, in spite of the fact that those fees were in violation of state law.

The Brauns intend to submit evidence at trial to substantiate their claims that these acts were done in retaliation for protected First Amendment activities. The evidence will fall under the following broad categories:

- Evidence of close proximity in time between the Brauns' political speech and the County's various punitive activities against them. Most particularly, the Brauns will establish that they were involved in a contentious process wherein they staunchly opposed the COSA/County plan known as the Devils Slide Project contemporaneous with the Board of Supervisor's hearing of the appeal on the Braun's permit application
- Evidence suggesting that those who opposed the Brauns' permit applications were motivated by a desire to retaliate against the Brauns for protected speech, and that the County was politically aligned with these opponents, and followed their unreasonable recommendations regarding the handling of the permit applications.
- Evidence that the County's purported legitimate reasons for treating the Brauns in the manner that they did are all false and/or pretextual.
- Evidence that members of the County's Board of Supervisors had openly and publicly censured and criticized Mr. Braun, and expressed personal animosity toward him, shortly prior to the Board's rulings regarding the Braun's permit applications.
- Evidence of a financial relationship, in the form of campaign contributions, between Lenore Roberts, the Braun's opponent in the permit process, and members of the Board of Supervisors.
- Evidence that the County has admitted under oath that it took measures against the Brauns that were unprecedented in the County's history, without any explanation as to what characteristics of the Braun's circumstance necessitated such measures.

The Bauns also contend that the County's conduct, from the very first to the very last, has followed a pattern of retaliation. The Brauns contend that the retaliation began in 1998 and has

1 continued up through today. Most recently, the Brauns, through a local political lobby group, sued the
2 County's Local Agency Formation Commission (LAFCO) and obtained a temporary injunction against
3 it. Shortly thereafter, the County settled the Brauns' state court Mandamus action, which was filed to
4 compel the County to issue the Brauns the permits which they contend they should have received in
5 2002.

6
7 In that settlement, the County promised to issue permits to the Brauns within a certain timeframe.
8 The Brauns contend that the County has purposefully dragged its feet in performing its obligations under
9 the mandamus settlement agreement, and has in fact violated the terms of that agreement. This continued
10 reluctance to issue the Brauns their permits, close in time to yet another exercise of First Amendment
11 rights on the part of the Brauns, shows a longstanding pattern of retaliatory conduct that has permeated
12 this entire six-year process.

13 **Statement of Damages**

14
15 The Brauns contend that the County's activities, and most especially their recording of two
16 Notices of Violation and a Notice of Abatement without opportunity to cure, which have clouded the title
17 of the property, have diminished the value of the property over time, and have made it essentially
18 impossible to sell the property while the market was stronger. The Brauns also contend that as a result of
19 the County's actions, they have lost an opportunity to enter into a contract with Sprint to permit the
20 leasing of space for relay towers on their property, which would have resulted in revenues to the Brauns
21 in the millions over a period of several years. Finally, the Brauns are seeking general damages for
22 violation of their civil rights.

23
24 The Brauns damages include the following items:

- 25 1. Diminution in the value of their property.
- 26 2. Lost revenue opportunities.
- 27 3. Costs and expenses associated reappraisal and refinancing of the property.
- 28

1 4. Emotional distress.

2 5. Attorney's fees and costs in prosecuting the Brauns' administrative mandamus action.

3 **Summary of Facts and Certain Key Pieces of Evidence**

4 Plaintiffs Oscar Braun and Andrea Braun (collectively "the Brauns") are citizens of the State of
5 California, residing at 1589 Higgins Canyon Road in the unincorporated Half Moon Bay area of San
6 Mateo County, California (hereinafter the "Property"). At all times relevant to this action, the Brauns
7 have been the beneficial owners of the Property.
8

9 Defendant County of San Mateo (the "County") is a local public entity, located within the
10 jurisdiction of the United States District Court, Northern District of California. The County administers
11 and controls the process for issuance of planning, development, horse stable, affordable housing, envi-
12 ronmental health and building permits in the unincorporated areas of the County of San Mateo.

13 Oscar Braun is the president of the Half Moon Bay Coastside Foundation, aka Save Our Bay
14 (hereinafter "Save Our Bay"), and the Brauns' residence serves as the headquarters for Save Our Bay.
15 Save Our Bay is a community-based, 501(c)(3) nonprofit, environmental-watchdog, charitable
16 corporation, which was established at the personal request of the late United States Secretary of
17 Commerce Ron Brown and was later incorporated on December 23, 1999. Save Our Bay is a recognized
18 member and active participant in the NOAA Water Quality Protection Program aka WQPP, the RWQCB
19 Stormwater Pollution Prevention Program aka STOPPP, the California Coordinated Resource
20 Management Planning Council aka Coastside CRMP Council, and the Coastside Fire Safe Council
21 (representing San Mateo County Coastal Zone which compromises approximately 73% of County's land
22 area). Save Our Bay also founded the Half Moon Bay Chapter of the Surfrider Foundation.
23
24

25 From its location in the heart of the San Francisco Peninsula watershed, the Save Our Bay facility
26 provides early detection fire alert and access to the upper levels of the watershed from the West. Save
27 Our Bay has established the California Watershed Posse, whose members work with landowners and
28

1 other governmental agencies to develop and implement integrated landscape scale Coordinated Resource
2 Management Plans to assure NEPA/CEQA compliance, ecosystem sustainability, and effective Fire Safe
3 landscape and watershed planning.

4 Through his work with Save Our Bay, Oscar Braun has actively sought to establish a
5 comprehensive watershed management program in San Mateo County to avert catastrophic
6 environmental damage to the Peninsula watershed from natural and human-made causes, including
7 environmental terrorism, firestorm and drinking water contamination. In so doing, among other
8 controversial projects, and in criticizing the status quo and drawing attention to the vulnerability of
9 existing neglected and unmanaged watershed conditions in the County, Plaintiffs have taken positions
10 that are politically unpopular with the County and others.

12 Plaintiff Oscar Braun has long been outspoken on issues of public interest. In addition to being
13 the president of Save Our Bay, Oscar Braun is also the online publisher of the California Watershed
14 Posse Town Hall forum, and the co-founder of the San Mateo County rural lands farming community
15 organization, the Coastal Family Alliance. Many of Mr. Braun's written opinions on political matters
16 can be found at the web links: California Watershed Posse aka www.cwposse.org ; Half Moon Bay
17 Coastside Foundation aka Save Our Bay www.saveourbay.org ; "No Apartheid 4.Us "
18 www.noapartheid4.us "; No RICO gov 4 Us at www.noricogov4.us ; No Invasive Species 4 Us at
19 www.noinvasivespecies4.us ; Wise Use 4 Us at www.wiseuse4.us ; The Pebble News at
20 www.thepebble.us Eco-Justice 4 Us Forum at www.ecojustice4.us ; Lake Berryessa Visitors Services
21 Planning Taskfore at www.lbvspt.info ; and Oscar Knows Inc at www.oscarknows.com ; Mr. Braun is
22 also spearheading a drive to incorporate approximately 100,000 acres of unincorporated rural coastal
23 lands in the County, and publishes a website in support of the incorporation project, "Rural Lands Inc" at
24 www.rlinc.org .

27 Mr. Braun has utilized these forums under his First Amendment rights of freedom of speech and
28

1 of the press as a frequent critic of the Board of Supervisors and various County practices, policies and
2 programs, including the Devil’s Slide project and the failure of the County to provide adequate services
3 to coastal residents. He is a frequent speaker before the County Board of Supervisors and other local,
4 state and federal agencies. He uses the website as a clearinghouse for news, reports and other
5 information on public issues concerning coastal San Mateo County. Mr. Braun regularly sends e-mails to
6 a list of recipients that includes local residents, government officials at the local, county, state, and
7 federal level, and members of the press.
8

9 On February 22, 2001, Letter to the Editor: “ Streams, Horses and Money! The Committee for
10 Green Foothills (CGF) Op/Ed piece “Clean steams and healthy Horsekeeping” was vintage Clintonian
11 style lobbyist spin! CGF is the most powerful and successful legislative land use lobbying machine in
12 San Mateo County with a impressive track record for acquiring “Mission Impossible” type Coastal
13 Development Permits (CDP) for those having deep pockets needing CGF political clout. When Chief
14 Lobbyist Roberts proposes, the SMC Planning Administrator and Commission usually rubber stamps the
15 CGF clients development application. CGF lobbying campaign to adopt a special “horsekeeping”
16 ordinance is all about creating a new lucrative revenue stream for CGF and the SMC Planning
17 Department. The SOB Watershed Posse has yet to find a single case of a environmentally threatened
18 stream because of “horsekeeping” in San Mateo County in the seven years we have been testing and
19 monitoring coastal water resources.”
20
21

22 “In 1998 CGF, on behalf of Wildlife Associates, effortlessly obtained County approval to develop
23 a breeding, training and housing center for their sixty wild exotic “Detrimental species” on prime
24 agricultural land adjoining the Arroyo Leon endangered species critical habitat stream area. After
25 receiving a \$50,000 retainer, CGF masterfully crushed the Higgins Canyon Homeowners united
26 opposition to this environmentally detrimental development. The State of California requires a special
27 permit for wild exotic invasive species if they are defined as “Detrimental”! Wildlife Associates holds a
28

1 State Fish & Game Detrimental Species Permit for their exotic wild animals because the State says: “they
2 pose a threat to native wildlife, the agricultural interest of the state or to public health or safety and are
3 termed “detrimental animals” and are designated by the letter “D”. CGF lobbyist Roberts, County
4 Planning Administrator Terry Burnes and Farm Bureau Administrator Jack Olson told the County Ag
5 Advisory Council and Planning Commission that these “wild Detrimental species” should be treated just
6 like any other domesticated farm “livestock” in San Mateo County. WHY? More big bucks for CGF
7 lobbying fees and millions of dollars from CDP fees for the County Environmental Planning Department.
8 When people tell you it isn’t about the MONEY....it’s ALL about the MONEY! Horse lovers hold onto
9 your wallet and participate in the SMC Planning Commission Horse Keeping Ordinance hearing
10 process.”
11

12 March 2, 2001, Save Our Bay received a letter from Joseph W. Cotchett, Esquire to Oscar Braun
13 and John Plock regarding the SOB “Streams, Horses & Money” Op/Ed letter. Mr. Cotchett’s letter stated
14 in part: “ These statements are defamatory per se and are not privileged. There is absolutely no basis for
15 making such false statements. If they persist, our office will take the appropriate legal action-and your
16 continued participation in the distribution of such untruths will result in increased liability to both of you
17 personally.” Sincerely, Joseph W. Cotchett with cc: Mark Delaphine , California Coastal Commission,
18 Marcia Raines, Environmental Management Director, San Mateo County, Zoe Kersteen Tucker, Lennie
19 Roberts, Committee for Green Foothills , Deirdre Holbrook, Half Moon Bay Review.
20
21

22 March 8, 2001, a letter from Maryann Dresner Esquire to Oscar Braun regarding SOB “Streams,
23 Horses & Money” Op/Ed letter on behalf of Wildlife Associates states in part. “Dear Mr. Braun, As I
24 stated previously, you must stop making further false statements regarding Wildlife Associates, the
25 Committee for Green Foothills, the relationship between those two organizations, or either of their
26 relationships with any government agency. I am sure you are aware that either organization or both may
27 obtain a Restraining Order prohibiting further statements attesting to those matters. Very truly yours,
28

1 Maryann Dresner. cc: Steve Karlin for Wildlife Associates, Mark Delaphaine for the California Coastal
2 Commission, Marcia Raines for San Mateo County Environmental Management, Lennie Roberts for the
3 Committee for Green Foothills, Deirdre Holbrook for the Half Moon Bay Review, Joseph W. Cotchett,
4 Esq.”

5 April 25, 2001 letter to Mike Nevin, President, San Mateo County Board of Supervisors, Gail
6 Raabe, San Mateo County Agricultural Commissioner, Marcia Raines, Director of Environmental
7 Services from John Plock, Environmental Director, SOB Watershed Conservation Posse re: San Mateo
8 County Conformance with USDA: Horses are Livestock and stated in part: “ The San Mateo County
9 equestrian community has circulate the following petition (authored by Oscar Braun) and have gathered
10 over 2300 signatures. Petition: Save Our Horses! “Our horse community is under siege and rapidly
11 becoming a candidate for the “endangered species” list. Horse owners throughout the County of San
12 Mateo are fighting a losing battle against the unfair burden of sky rocketing “special” taxes, fees and
13 zoning laws that are destroying the rich historical legacy that these magnificent animals have represented.
14 This State considers horses to be livestock and requires no fees or taxes on these farm animals
15 herbivores...horses, cows, sheep, goats etc. San Mateo County has a special “non-livestock” definition
16 for horses and assess extremely high fees and taxes. Our horse population is literally disappearing from
17 rural San Mateo County. Sign this petition to save our horse heritage. Sign this petition to bring San
18 Mateo County Horse ordinance into conformance with the USDA and California definition of livestock.
19 Sign this petition to end special taxes and fees on horses. Sign this petition to protect the “quality of life”
20 in San Mateo County! It’s a rural legacy worth passing on to our children! (Attached #1 current CDP fee
21 schedule).”

22 January 21, 1998 a letter from Coastside Open Space Alliance (COSA) operative Chuck Kozak to
23 Malcolm Smith of the Mid-peninsula Regional Open Space District (MROSD) re: “MROSD letter to
24 Coastsiders, list of landowners.” Mr. Kozak’s letter lists some of the COSA targeted landowners (

1 primarily the 8000 acre Dean & Dean holdings) and states in part: “ 1. Lennie Roberts suggested
2 including a phrase about Agricultural Lease Back being a set policy for the District (probably in 5th or 6th
3 paragraph), to alleviate any immediate fears of Ag operations being eliminated. 2. Zoe Kersteen-Tucker
4 suggested that the sentence in the 4th paragraph beginning with “Following these discussions, the Board
5 will determine if expansion....” be eliminated and the remaining of the 4th paragraph be combined with
6 the 3rd. The Reason is that phrases likethe Board will determine...” can ruffle feathers (we have
7 some easily ruffled folks over here). Regarding the large landowners list-I only had sketchy notes on
8 that, but this was what I was able to reconstruct (some of these are last names only): Ag folks: Sabasco,
9 Figone, Mueller and Muzzi. Farm Bureau: Betty Stone and Jack Olsen. Developers with large tracts of
10 land: Robert Naify, Keet Nerhan. Lennie also said she had given some names to Mary Davey, so
11 hopefully you have what you need-if we need to, we can do a work session to get all these together along
12 with phone numbers and contacts. Let me know. Thanks for all your help and hard work on this project-
13 we’re all very excited about the District expansion moving forward, and we’re pretty convinced everyone
14 else over here will be, too. Chuck Kozak (650-728-8239 email: cgk@well.com “ Chuck Kozak’s letter
15 had an one page attachment on MROSD stationary regarding in part... “A friendly” condemnation is one
16 in which the seller wishes the District to “threaten” to initiate condemnation proceedings during
17 negotiations to purchase land, in order to take advantage of certain tax benefits that may be accomplished
18 only when condemnation is “threatened” or utilized.
19

20
21
22 On December 2, 1998, Plaintiffs made applications for legalization of a mobile home in which a
23 developmentally disabled farm laborer (Mr. Neves) resided as affordable housing, as well as a stable,
24 tractor shed, agricultural barn and shed, and to replace a code-mandated, but leaking, water tank used for
25 fire suppression. Plaintiffs Braun have a vested interest in maintenance and repair of the water tank by
26 having received a building permit for its original installation and because it is essential for the Plaintiffs’
27 and the public’s safety.
28

1 On November 14, 2001 ,after years of delay, the Braun’s PLN1999-00079 applications were
2 finally unanimously approved and granted by the County’s Planning Commission. The Commissions
3 Executive Summary of Findings for PLN1999-00079 stated: “The proposed project, as conditioned ,
4 complies with all applicable General Plan Policies and Local Coastal Program Policies specifically those
5 related to visual impacts. The Project is also consistent with all applicable Resource Management
6 Coastal Zone and stable regulations.”
7

8 In early December 2001, Lennie Roberts, the Legislative Advocate for the Committee for Green
9 Foothills and Cynthia Giovannoni, co-owner of Half Moon Bay Sealing & Paving, filed their
10 Applications of Appeal to the County’s Board of Supervisors:

11 As Lennie Roberts’ January 15, 2002 testimony before the Board of Supervisors indicated, since
12 January 1998 to the present time, the Appellants and members of the Coastal Open Space Alliance
13 (COSA) have published their political views, ambitions and repeatedly re-defined the nature of their
14 private sector open space enterprise partnerships with elected officials of the County of San Mateo,
15 Mid-Peninsula Regional Open Space District (MROSD) and other public governmental and regulatory
16 agencies; the Appellant’s publications, public speech and proclamations clearly reveals the motives
17 behind their relentless retaliation campaign against the Brauns stable and affordable housing
18 development permits and the unconstitutional (denying Equal Protection & Due Process under the
19 Fourteenth Amendment) basis for their appeals “under the color of law” can be reviewed online at
20 COSA cartel members websites: <http://www.GreenFoothills.Org/news/archive.html> ,
21 www.OpenSpace.Org , <http://www.OpenSpaceTrust.Org> , <http://www.Packard.Org/> ,
22 <http://www.Moore.Org> , <http://www.Surfrider.Org> , <http://LomaPrieta.SierraClub.Org/> ; and Save Our
23 Bay v. MROSD Writ of Mandate e-Administrative Record MROSD Coastal Annexation Project ; or
24 Save Our Bay v. County of San Mateo LAFCO Writ of Mandate e-Administrative Record ; in addition
25 to Oscar Braun and Save Our Bay Devil’s Slide Tunnels Project Coastal Development Appeal e-
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1 Administrative Record; in letters to the Brauns from COSA attorneys Joseph W. Cotchett (Committee
2 for Green Foothills) and Maryann Dresner (Wildlife Associates); in their multiple letters and comments
3 to the County of San Mateo Planning Commission; in their hi-profile coordinated appeal letter writing
4 campaign to the County of San Mateo Board of Supervisors ; also in their well publicized online real
5 estate scheme regarding their targeted Moon Acres Ranch, the “last missing strategic parcel” of the
6 infamous Dean & Dean aka Westinghouse 8,000 acre holdings to complete the \$200 million POST-
7 Packard-Moore Foundation’s County of San Mateo “Save Our Endangered Coast” campaign goal ; and
8 lastly their well orchestrated public protest testimony before the Board of Supervisor’s agenized Braun
9 stable and affordable housing Appeal Hearing on January 15, 2002, alleging that the content of the
10 Braun’s application PLN1999-00079 is not consistent with Save Our Bay’s widely published
11 EnviroBank “Press Releases” announcing the marketing of Moon Acres Ranch to either the County of
12 San Mateo or to the Peninsula’s open space trust community.”
13
14

15 The Appellants decried to the Board that the content of the EnviroBank Press Releases cites
16 Sprint antennae cellular sites, two water wells and a helicopter landing area. Based solely on the
17 contents of these press releases, Appellants asked the Board of Supervisors to order an investigation to
18 search for new code violations on the Brauns property that were unrelated to the matter then before the
19 Board. The following are selected quotations from Appellants’ presentation to the Board:
20

21 “The County has allowed this Applicant to defer payment of the Violation/Investigation fees until
22 the Building Permit Application stage. The CDP should not be granted until the outstanding Application
Violation/Investigation fees are paid.”

23 “The security gate, located adjacent to Higgins Canyon Road, but off Mr. Braun’s property, is not
24 shown on the Site Plan”. “The project plans and description do not include all elements of the project, as
25 described in a Press Release sent by Mr. Braun to various newspapers announcing the sale of the
property (see attached).”

26 “Mr. Braun’s Press Release indicated that the house was approximately ten thousand square feet
27 structure. Mr. Braun refused to answer a question from the Planning Commission as to whether the house
28 was built according to the plans approved by the County. The CDP should not be granted until the
County can verify that the house, as approved by the County in 1991, was built according to the
approved plans.”

1 “Additionally, Mr. Braun’s Press Release includes reference to an agricultural well on the
2 property. Is this well being used for domestic purposes? If so, does it meet water quality standards? The
3 CDP should not be granted until the adequacy of the well(s) to serve the proposed affordable housing
4 unit is determined.”

5 “Condition 15 of the CDP requires that legalization of the septic system shall occur prior to the
6 issuance of the building permit, and that the septic system shall meet current setback requirements. This
7 condition should not be left to the building permit stage, but should be required prior to the issuance of
8 the CDP....It is also unlikely, given his track record, that Mr. Braun will ever comply with the
9 requirements in Condition 15, which carries out Mitigation Measure Number 1 in the environmental
10 document. Only when the Planning Commission (and County Counsel) informed Mr. Braun that his
11 objections to the Mitigation Measure would result in the County’s being unable to approve the Negative
12 Declaration, did he agree to remove his objections, while still claiming he was being “coerced”.

13 “In his Press Release dated April 19, 2001, and accompanying offering entitled Protecting
14 California’s Future, Envirobank: Moon Acres Ranch, Mr. Braun states that his property includes a
15 helicopter landing area. The proposed project (PLN 1999-00079) does not include such an area. We
16 request that Condition 1 be amended to specifically state that no helicopter landing area is permitted.”

17 “In summary, it has taken nearly four years and extraordinary efforts on the part of Building
18 Inspection, Planning Environmental Health , and County Counsel to get Mr. Braun to legalize his
19 buildings. The County has had to go to court to compel Mr. Braun to comply with the County’s zoning
20 and building regulations. He refused to state at the Planning Commission whether the house was
21 constructed according to his CDP. He stated he was being “coerced” into agreeing to the Mitigation
22 Measure. He has not paid his Violation/Investigation fees. We respectfully request the Board to require
23 the Applicant to comply will all of the above-referenced outstanding “issues”, prior to issuance of the
24 CDP.”

25 Appeal of PLN 1999-00079 BOS Appeal Hearing Transcript 01/15/02

26 Lennie Roberts testimony before the Board of Supervisors in part:

27 “While he has proceeded to build numerous structures without permits, he at the same time filed
28 complaints against state parks and county public works department, he has appealed coastal development
permits for Half Moon Bay Grading and Paving and Wildlife Associates which are two properties in the
area in each of these cases there have been unanimous votes to approve the projects of the Planning
Commission, the Board of Supervisors, and the Coastal Commission. He also alleged there was an illegal
and hazardous dump on the Casannelli Ranch property which is now owned by POST. These allegations
have not proven to be correct. He filed a complaint against the storage of hay in a barn on the Casannelli
Ranch. He has also applied to the Assessor’s office to have his property taxes reduced based on these
allegations as to the hazards on adjacent properties. He’s also refused to allow the Planning Commission
to be on site when they went out to visit the property prior to their consideration of this permit, so they
had to look at the property from the road. He also, I think , attempted to intimidate some of the planning
staff throughout the processes. Some of you have actually received copies of e-mails that he sent out or
he called the Planning Administrator the Gestapo (sic). We believe that based on Mr. Braun’s own
widely distributed offering of the subject property through his organizations, Half Moon Bay Coastside
Foundation, dba Save Our Bay, and it’s EnviroBank program, he did not build his house according to
County approved plans. In this offering that he made available to various newspapers and I think,
Supervisor Gordon received a copy of this as well. He describes the house as 10,000 square feet. The
county needs to determine whether the house has in fact been built according to the plans that he
submitted. Because during the planning commission’s deliberation on of the planning commissioners
asked whether the house had been built according to the approved plans and he refused to answer that
question. Given the track record of this applicant, we request that the “Board direct the staff to
investigate, but the staff won’t do it unless the Board does direct this. To investigate whether the
applicant has indeed built the house according to the approved plans and we also, as we said before,

1 request that the violation and investigation fees be paid now, prior to issuance of the coastal permit and
2 not defer it to the building permit stage. I think it may be difficult to get those at that point. Thank you.”
(January 15, 2002 , Board of Supervisors Appeal Hearing PNL 1999-00079)

3 Summary of Planning Commission & Staff Findings & Recommendations: Deny the Appeal of
4 PLN 1999-000 because “The proposed project, as conditioned, complies with all applicable General
5 Plan Policies and Local Coastal Program Policies specifically those related to visual impacts. The
6 Project is also consistent with all applicable Resource Management Coastal Zone and stable regulations”

7 January 16, 2002 , Letter from Board of Supervisors to Appellants re: CDP Appeal Hearing for
8 PNL 1999-00079:

9 “Dear Ms. Roberts and Ms. Giovannoni,

10 The Board of Supervisors continued this matter for ninety (90) days to:

11 Have the applicant pay all fees due for planning, building and environmental health permits and
12 approvals, including all applicable investigation fees and penalties due for construction without permits.

13 Have staff record a Notice of Violation (NOI) , to be released only when all required permits are
14 finalized.

15 Have Environmental Health investigate and clarify sewage disposal and water supply issues and
16 their proposal solution.

17 Have Planning and Building verify that the main house complies with approved plans and
18 determine the appropriate remedy if it does not.”

19 The County has claimed through deposition testimony that they have followed a practice of
20 charging ten times the normal building fees. However, the record reveals that the County has followed a
21 practice and policy for over twenty years (as shown by the 1994 Investigation Fees Memo of Terry
22 Burnes SMC published Planning and Building Fee Schedule) of charging investigative fees of **two times**
23 the normal cost of Planning and Building Permit fees and **ten times the cost only for grading and tree**
24 **cutting violations done without the benefit of a CDP.**

25 The Administrative Record reveals that as a condition to legalize their development, the
26 Brauns agreed to pay the traditional two times investigation fees of \$7440. Also, as noted on the both the
27 1994 memo and June 2004 SMC Planning and Building Fee Schedule attached, there are NO Fees
28 (waived by resolution of the BOS) for farm labor or affordable housing and the fees for the "Confined
Animal Keeping Certificate of Exemption" (for 5 horses or less) is \$114..... not \$20,132.80 or 10 times
anything. Hence, the County charged the Brauns in a manner that was not only illegal under state law,

1 but different from what they had traditionally charged others.

2 July 23, 2002 Notice of Final Local Decision Subject PLN1999-00079 : “Based on the
3 information provided by staff and evidence presented at the hearing, the Board of Supervisors accepted
4 the staff recommendation, made the findings, denied the above referenced permits and adopted
Resolution #065454 as attached.”

5 August 28, 2002 Notice to Abate Building and Zoning Violations 1589 Higgins Canyon Road,
6 Half Moon Bay, California “ Because you were denied the required discretionary planning permits, you
will not be able to apply for any building permits to legalize this work. Therefore, you must obtain
demolition permits to remove the un-permitted and illegal structures.”

7 The County of San Mateo and the Brauns exhausted the Coastal Development Permit application
8 administrative process on August 28, 2002. In October 2002, Oscar and Andrea Braun filed a Writ of
9 Mandate lawsuit against the County of San Mateo in the California Superior Court.

10
11 July 2, 2004 Pre-Trial Settlement Agreement re: Save Our Bay, Bernie Neves, Oscar and Andrea
12 Braun v. County of San Mateo. “Settlement terms stated herein, hereby agree as followed: #8 There is
13 no release of any claims presently pending in the federal action between the parties, entitled Oscar Braun
14 v. San Mateo County, , U.S.D.C. Northern District of California No. 3415 MJJ, which is a civil rights
15 action under 42 U.S.C. Section 1983 (“1983 Action”). Adjudication of the federal claims proceed
without prejudice. #10however, as recited in paragraph #8 above, this Settlement Agreement and this
release do not in any way limit or restrict the arguments Plaintiffs may pursue or the damages Plaintiff
may claim in the 1983 Actions. Thomas F. Casey III , on July, 2004 signed the Settlement Agreement
on behalf of the County of San Mateo.

16 July 22, 2004 Ex Parte Hearing before the Honorable Marie S. Weiner: See City of Half Moon
17 Bay v. Superior Court (Yamagiwa v. California Coastal Commission) 106 Cal. App.4th 795 (1st Dist.
2003) SMC Superior Court, Case Number 402781, Case Name: Joyce Yamagiwa , et al, v. California
18 Coastal Commission et al Re: “Under the doctrine of exhaustion of administrative remedies, where an
19 administrative remedy is provided by statue, relief must be sought from the administrative body and this
20 remedy exhausted before the courts will act.” (Citation) This rule is not a matter of judicial discretion,
21 but is fundamental rule of procedure laid down by the courts of last resort, followed under the doctrine of
stare decisis and binding upon all courts.” (Citation) Exhaustion of administrative remedies is, in short, “a
jurisdictional prerequisite to resort to the courts.” (Citation) “The rationale is the prevention of
interference with the jurisdiction of administrative tribunals by the courts, which are only authorized to
review final administrative determinations. (Citation)”

22 July 27, 2004, San Mateo County Board of Supervisors Agenda Item 13, “ De Novo
23 Administrative Hearing for Consideration of an application for a Coastal Development Permit, a
24 Resource Management Coastal Zone Permit and Stable Permit County File Number: PNL 1999-00079
(Oscar Braun) See Statement and Documents for the record on behalf of Oscar Braun. Ted Hannig
25 protests the County of San Mateo violating the terms of the settlement, changing the condition of
settlement and making their new CDP application appealable to the Coastal Commission. The County of
San Mateo continues to deny and violate the Brauns their Fourteenth Amendment civil rights to Equal
Protection and Due Process under the Constitution of the United States.

26 **IV. DEFENDANT’S POSITION**

27 Defendant contends that the decision to deny the permits was rationally based on the existence of
28 permit violations, and the dispassionate application of the Board’s ordinances and resolutions setting

1 legalization fees; and that accordingly, there is no claim that presents any basis for liability against the
2 County. The Court heard defendant's motion for summary judgment on November 9, 2004, and the
3 motion is currently under submission. The grounds for defendant's motion were that plaintiffs cannot
4 establish the necessary elements of any of their three causes of action, which allege that the County
5 violated plaintiffs' First Amendment rights of free expression, and Fourteenth Amendment guarantees of
6 equal protection and due process. Plaintiffs named only the County as a defendant, but cannot satisfy the
7 requirements for entity liability established by *Monell v. New York City Dept. of Soc. Svcs.*, 436 U.S. 658,
8 98 S.Ct. 2018 (1978), and its progeny — that a "final policymaker" must have committed or ratified a
9 Section 1983 violation for the entity to be liable. There was no dispute in the summary judgment
10 briefing that the Board of Supervisors is the "final policymaker" for the County. The County argued that
11 summary judgment dismissing all of plaintiffs' claims is warranted on the grounds that plaintiffs could
12 not establish the elements necessary to prevail on any of their claims under a *Monell* analysis.

13 **A. Plaintiffs Cannot Establish that the Board of Supervisors' Action Was in Retaliation**
14 **for the Exercise of First Amendment Rights**

15 Plaintiffs allege that actions taken by the County were in retaliation for their exercise of their First
16 Amendment rights of free expression. Because only the County as an entity has been named as a
17 defendant, and because the Board of Supervisors is the "final policymaker" for purposes of the claims
18 asserted, only the actions of the Board are subject to scrutiny.

19 In order to prevail on their First Amendment claim, "plaintiffs must plead and ultimately prove
20 that their conduct was protected by the First Amendment, and, second, that such conduct prompted
21 retaliatory action by the Board [of Supervisors]." *Arroyo Vista Partners v. County of Santa Barbara*, 732
22 F. Supp. 1046, 1055 (C.D. Cal. 1990) (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S.
23 274, 287, 97 S.Ct. 568 (1977)). As part of a prima facie case, a plaintiff must show that the protected
24 conduct was a "substantial" or "motivating" factor in the defendant's decision. *Mt. Healthy*, 429 U.S. at
25 287. A defendant can rebut a prima facie case by showing that it would have made the same decision
26 regardless of plaintiff's First Amendment activity. *Mt. Healthy*, 429 U.S. at 287. If defendant is
27 successful in rebutting the inference of retaliation, the burden again shifts to plaintiff to show that
28 defendant's explanation is merely a pretext. *Miller v. Fairchild*, 797 F.2d 727, 731 (9th Cir. 1986).

1 A plaintiff may establish retaliatory motive by producing (1) evidence that the decision-maker
2 knew of the protected speech, and (2) evidence of at least one of the following: (a) proximity in time
3 between the protected speech and the adverse decision such that a jury could infer retaliation, (b) the
4 decision-maker's expressed opposition to the speech, or (c) false or pretextual reasons for the decision.
5 *Keyser v. Sacramento City Unified Sch. Dist.*, 265 F.3d 741, 751–52 (9th Cir. 2001). Thus, in order to
6 prove that retaliation was a substantial or motivating factor in the decision to deny their permits, the
7 Brauns must necessarily first establish that a majority of Board members were aware of their expressive
8 conduct. However, “mere evidence” of such awareness is not enough. *Keyser*, 265 F.3d at 751–52
9 (plaintiffs must produce more than evidence that employer knew of protected activity); *Strahan v.*
10 *Kirkland*, 287 F.3d 821, 825 (9th Cir. 2002) (evidence of knowledge of protected activity alone not
11 enough). It is defendant's contention that plaintiffs cannot present evidence to establish any of the three
12 types of evidence necessary to establish liability of the part of defendant.

13 First, plaintiffs cannot meet their burden with regard to the “proximity in time” test. According to
14 plaintiffs' own allegations, they have been vigorously engaged in their protected First Amendment
15 activities continuously since at least 1995. Here, the totality of circumstances leads to the conclusion that
16 no “reasonable inference” of retaliation can be drawn from the timing of the Board's action. By
17 plaintiffs' own assertion, their robust exercise of their First Amendment rights has been ongoing for
18 many years.

19 Further, unlike the situation in virtually all employment First Amendment cases, the Board was
20 not in a position to pick and choose the time of its purported retaliatory action; instead, the matter came
21 before the Board in the normal course of events — and even then, only because third parties took an
22 appeal from the Planning Commission. Thus, plaintiffs will not be entitled to a presumption of
23 retaliatory motive merely because of timing.

24 Second, plaintiffs cannot adduce any evidence demonstrating that a majority of Board members
25 expressed opposition to plaintiffs' exercise of their First Amendment rights. Frequently, governmental
26 decision makers are required to make choices that will be embraced by some and decried by others. In
27 this case, there is no evidence to indicate that a majority of Board members expressed opposition to
28 plaintiffs' alleged exercise of their First Amendment rights. Plaintiffs have remote evidence of only *two*

1 members of the Board even having an opinion about Mr. Braun's past speech activities. Plaintiffs are
2 required by *Monell* to adduce evidence that three members of the Board (*i.e.*, a majority, as required by
3 *Monell*) were concerned about Mr. Braun's political activities. Accordingly, plaintiffs will not be able to
4 produce even circumstantial evidence of retaliatory motive on the part of the Board acting through a
5 majority.

6 Finally, plaintiffs will be unable to present evidence of false or pretextual reasons for the
7 decision. The issues before the Board were straightforward: (1) did the structures meet all requirements
8 for issuance of the required permits, and (2) were the plaintiffs willing to pay all fees necessary to secure
9 these permits? Based on evidence presented at the hearing, and the Brauns' unwillingness to pay the fees
10 to legalize the structures, the Board denied the permits (and, in fact, had no option but to deny the
11 permits given its conclusions that the fees were owed by the Brauns). Because plaintiffs provided the
12 Board with this quite adequate non-retaliatory reason to deny legalization, evidence of retaliatory motive
13 is irrelevant. Even if retaliatory motive could be established, defendant can nevertheless prevail if it can
14 establish that the same decision would have been reached anyway. In this case, establishing that the
15 result of the Board of Supervisors hearing would have been the same regardless if plaintiffs' political
16 speech had never been made will be a simple matter. When plaintiffs *refused to pay the fees set by*
17 *ordinance and resolution*, the Board was left with no choice but to decline to issue permits. There is no
18 doubt that the decision would have been the same even without Oscar Braun's history of speech on
19 matters of public interest. By refusing to pay the fees set by ordinance, Mr. Braun made the Board's
20 decision easy, and made the Board's alleged retaliatory motives irrelevant.

21 **B. Plaintiffs' Equal Protection Claim Fails Because They Cannot Establish That They**
22 **Have Been Intentionally and Irrationally Treated Differently**

23 Plaintiffs contend that they have experienced treatment with regard to the processing of their
24 permit applications that was different from other similarly situated persons. They do not claim that their
25 disparate treatment arose from their membership in any protected class, nor do they claim that the County
26 impinged upon any fundamental right. Rather, their claim is solely a selective enforcement claim under
27 *Village of Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S.Ct. 1073 (2000).

28 Where, as here, state action does not implicate a fundamental right or a suspect classification, the

1 plaintiff must establish a “class of one” equal protection claim by demonstrating that it “has been
2 intentionally treated differently from others similarly situated and that there is no rational basis for the
3 difference in treatment.” *Village of Willowbrook*, 528 U.S. at 564. The County legitimately may choose
4 to enforce its laws against plaintiffs rather than other property owners so long as the decision is not
5 arbitrary. *Oyler v. Boles*, 368 U.S. 448, 456, 82 S.Ct. 501, 505 (1962). Additionally, plaintiffs in the
6 Ninth Circuit must do more than simply show arbitrary action — they must show that the named
7 defendant was motivated by animus. *Squaw Valley Dev. Co. v. Goldberg*, 375 F.3d 936, 948 (9th Cir.
8 2004) (“At a minimum, to prevail, Squaw Valley must show that Goldberg’s conduct was motivated by
9 animus.”) In particular, because plaintiffs have elected to sue the government entity under *Monell*,
10 plaintiffs must show that the motivating animus was held by a majority of the Board of Supervisors, as
11 described above. Plaintiffs will not be able to show any of these elements.

12 **C. Plaintiffs Cannot Establish Either a Procedural or Substantive Due Process Claim**

13 Plaintiffs titled their Third Count “Violation of Procedural Due Process.” Despite having pled a
14 procedural Due Process claim, plaintiffs later characterized it as a substantive Due Process claim in their
15 Opposition to Defendant’s Motion for Summary Judgment. However, the Ninth Circuit does not
16 recognize substantive Due Process claims in the land use arena, because such rights are addressed by a
17 more specific provision of the Constitution. *Armendariz v. Penman*, 75 F.3d 1311, 1325–26 (9th Cir.
18 1996) (“We have held that substantive due process claims based on governmental interference with
19 property rights are foreclosed by the Fifth Amendment’s Takings Clause.”)

20 Even if the Court were to recognize a substantive Due Process claim, any substantive due process
21 claim relating to the amount of the fees would be rendered moot by the settlement of the state court
22 lawsuit between the parties. On July 2, 2004, plaintiffs and defendant entered into a Settlement
23 Agreement resolving a state court lawsuit arising out of the same Board action that constituted the basis
24 of this lawsuit. Paragraph 1 of the Settlement Agreement provides: “Plaintiffs will pay the additional
25 amount of \$12,000 to defendant County of San Mateo by July 1, 2004, in advance of a decision on the
26 issuance of planning permits by the County. This will constitute full payment of all permit and
27 investigation fees, for each and every permit which is the subject of this action, including planning
28 permits, building permits and environmental health permits.” All fees have been paid; the Settlement

1 Agreement has never been rescinded, and remains in full force and effect.

2 “The jurisdiction of federal courts depends on the existence of a case or controversy.” *GTE Cali-*
3 *fornia, Inc. v. Federal Communications Comm’n.*, 39 F.3d 940, 945 (9th Cir. 1994). Ordinarily, a “party
4 must maintain a live controversy through all stages of the litigation process.” *Doe v. Madison School*
5 *Dist. No. 321*, 177 F.3d 789, 797 (9th Cir. 1999). The settlement of a plaintiff’s claim moots an action.
6 See *Lake Coal Co. v. Roberts & Schaefer Co.*, 474 U.S. 120, 106 S.Ct. 553 (1985). A case may be moot
7 as to some issues, even though it remains “live” as to others. *Powell v. McCormack*, 395 U.S. 486, 497,
8 89 S.Ct. 1944, 1951 (1969). Here, whether or not other claims are ultimately dismissed, it is clear that
9 the settlement of plaintiffs’ claims for overpayment of fees moots plaintiffs’ substantive Due Process
10 claim.

11 In summary, it is defendant’s position that plaintiffs have taken a dispute over the handling of
12 land use permits that belonged in state court (where an action based on the same facts was in fact filed),
13 and attempted to transform it into a federal civil rights case. While they may be dissatisfied with the
14 results of the process by which land use decisions are made in San Mateo County, plaintiffs will be
15 unable to establish any violation of their constitutional rights on the part of defendant or any evidence
16 that they suffered damages at the County’s hands.

17 **V. WITNESSES**

18 **A. PLAINTIFFS’ WITNESSES**

- 19 1. Oscar Braun, Plaintiff
20 2. Andrea Braun, Plaintiff
21 3. Bernie Neves, farm laborer Moon Acres Ranch
22 4. John Plock, Chair Save Our Bay
23 5. Ted Hannig Esq.
24 6. Gino Magri , farmer
25 7. James Rice, Soil Farm
26 8. Carl Hoffman, Stables, POST tenant
27 9. Roxy Stone-Hoffman, RCD Director, POST tenant
28 10. Chris Andreson, adjoining neighbor
11. Rusty Tate, adjoining neighbor
12. Don & Leatha Pretre, adjoining neighbors
13. Albert “Kitty” Hernandez, adjoining neighbor
14. Michael Thaxton , V.P. Bank of America Loan Officer
15. Charles & Betty Shafae , President HCHA
16. William & Margaret Herndon, HCHA
17. James and Anna Marie Spilker, HCHA

18. Richard Braun, brother and HCHA
19. Douglas Brinkmeier & Kim Hargraves , HCHA
20. John & Catherine Dull, HCHA
21. Charles & Cheryl Curry, HCHA
22. Thomas & Kathleen Ferenz, ,HCHA
23. Walter & Patricia Ferenz, HCHA
24. Kenneth J. Habeeb, Real Estate Appraiser
25. Terry Burnes, former SMC Planning Administrator
26. William Cameron, SMC Building Dept.
27. Jim Eggemeyer, SMC Planning Review Manager
28. Steve Hartsell , Health Dept. Inspector Coastsides
29. Paul Koenig, former Director Environmental Services
30. Dean Peterson, Director Enviro. Health Dept.
31. Anne Jensen, SMC Solid Waste Investigator
32. Gary Warren, SMC Code Enforcement
33. Margaret Hernandez, SMC Code Enforcement
34. Laura Thompson, SMC Planner
35. Kelly Pepper, Sprint PCS
36. Jim Mattison, Green Drake Engineering (Sprint)
37. Cynthia Giovannoni, HMBS&P
38. Lenore Roberts , CGF Lobbyist
39. Marcia Raines , SMC
40. Gary Giovannoni , HMBS&P
41. Steve Karlin, Wildlife Associates
42. Tom Pacheco, former RCD, landfill operator
43. Audry Rust, President POST
44. John Wade, former POST
45. Jack Olson, SMC Farm Bureau
46. Craig Brittan, MROSD
47. Martha Payotos, SMC LAFCO
48. Mary Davey, CGF & MROSD
49. Zoe Kersteen-Tucker, CGF
50. Brian Zamora, Director SMC Health Dept.,
51. James Rourke, RCD
52. Sheriff Deputy John Gonzales
53. Sheriff Sgt. Dal Porto
54. Deputy Counsel Michael Murphy
55. Deputy Counsel Miruni Soosaipillai
56. Mark Delaphaine, CCC
57. Deirdre Holbrook, POST (HMB Review Editor)
58. Gary Arata, farmer
59. Louis Figone, farmer
60. John Mueller, Chair San Francisco RWQCB
61. Robert Naify, E-Top (Dean & Dean)
62. Keet Nerhan, KN Properties (Dean & Dean)
63. Tim Hudson, farmer, PMAC
64. John & Clarence Arata, farmers
65. Chuck Kozak, Coastal Alliance
66. George Mozingo, SAMCAR
67. Michael Murphy, rancher

68. Vince Muzzi Esq.
 69. Ron Sturgeon, farmer
 70. Terry Gossett, California for Property Rights
 71. Nina Pellegrini, Citgizen's for Responsible Open Space
 72. John Silver, SMC Planning Commission
 73. Ralph Nobles, SMC Planning Commission
 74. Bob Vasquez, Former SMC Planning Commission
 75. Dominic Muzzi, famer
 76. ADA Parker Kelly, SMC
 77. John Quinlan, SMC Sheriff
 78. Loretta Barsamian, San Francisco RWQCB
 79. Rosie Slaughter, Director –Examinations TE/GE Div., IRS
 80. Brian Arnold, State Fish & Game
 81. Steve Furrer, U.S. Fish and Wildlife Service
 82. Ging Bill Wong, FHWA
 83. Norman Mineta, U.S. Secretary of Transportation
 84. U.S. Senator Dianne Feinstein
 85. Congressman Richard Pombo
 86. U.S. Senator Charles Grassley , Budget Committee
 87. Susan Gladstone, San Francisco RWQCB
 88. Habte Kifle, San Francisco RWQCB
 89. Ann Crum, San Francisco RWQCB
 90. Walter Moore, VP, POST
 91. Paul Ringgold, POST
 92. Leonard Warren, Granada Sanitation District
 93. April Vargus, CGF
 94. Tim Duff, California Coastal Conservancy
 95. Christopher Thuallog
 96. Catherine Slater Carter
 97. Thomas Huening, SMC Controller
 98. Father Domingo, Our Lady of the Pilar
 99. Robert Smith, Army Corp. of Engineers
 100. David Tom, SMC Election Division
 101. Tim Frahm, SMC Farm Bureau
 102. Peter La Tourrette, President, CGF
 103. Dianne McKenna, Chair POST
 104. Karie Thomson, Chair, POST Coastal Campaign
 105. Susan Packard Orr, Chair Packard Foundation
 106. George Vera, CFO Packard Foundation
 107. Gordon Moore, Founder of Moore Foundation
 108. Lewis W. Coleman, President, Moore Foundation
 109. James Reynolds, RCD Director
 110. Richard Allen, RCD Director, POST tenant

B. DEFENDANT'S WITNESSES

1. Miroo Brewer, former employee of San Mateo County Planning and Building Division
2. Terry Burnes, San Mateo County Planning and Building Division
3. William Cameron, San Mateo County Planning and Building Division

4. Jim Eggemeyer, San Mateo County Planning and Building Division
5. Gary Fitzer, San Mateo County Planning and Building Division
6. Steve Hartsell, San Mateo County Environmental Health Services Division
7. Paul Koenig, former employee of San Mateo County Planning and Building Division
8. Dean Peterson, San Mateo County Environmental Health Services Division
9. Anne Jensen, San Mateo County Environmental Health Services Division
10. Gary Warren, San Mateo County Planning and Building Division
11. Margaret Hernandez, San Mateo County Planning Code Compliance
12. Mark Church, Member of the San Mateo County Board of Supervisors
13. Rose Jacobs-Gibson, Member of the San Mateo County Board of Supervisors
14. Rich Gordon, Member of the San Mateo County Board of Supervisors
15. Jerry Hill, Member of the San Mateo County Board of Supervisors
16. Mike Nevin, Member of the San Mateo County Board of Supervisors
17. Lily Toy, former Planner, County of San Mateo
19. Laura Thompson, former employee of San Mateo County Planning and Building Division
19. Kelly Pepper, Alaris Group (Sprint issue)
20. Jim Mattison (Sprint issue)
21. Cynthia Giovannoni, Brauns' neighbor

VI. EXPERT WITNESSES

A. PLAINTIFFS' EXPERT WITNESSES

Plaintiff does not intend to call any expert witnesses to testify at trial.

B. DEFENDANT'S EXPERT WITNESSES

1. **Monica Ip** will testify that, assuming a finding of liability, the plaintiffs suffered damages in the amount of \$396,995 in connection with the Sprint Site Agreement, and \$62,464 in connection with the delay in refinancing the mortgage on their property; and that if the plaintiffs were to produce an agreement with NexTel similar to the agreement with Sprint, the amount of damages would be similar.

A copy of Ms. Ip's report, with a corrected Exhibit 1, and Ms. Ip's CV are attached to this

1 statement as Exhibit 1.

2 2. **Victor Reizman** will testify that the recorded notices of violation would not have
3 prevented the plaintiffs from being able to list the property for sale with a real estate broker, sell the
4 property, or obtain financing on the property; and that the value of the property would be affected only to
5 the extent of the cost to remedy the violations. A copy of Mr. Reizman's report and CV are attached to
6 this statement as Exhibit 2.

7 **VII. ADDITIONAL MATTERS TO BE ADDRESSED BY THE COURT**

8 **A. Order Establishing A Reasonable Limit On The Time Allowed For Presenting**
9 **Evidence (FRCP 16(c)(15))**

10 Given that the court has set aside 10 court days for the trial of this matter, the parties seek an
11 order limiting each side to four days for the presentation of evidence.

12 **B. Avoidance Of Unnecessary Proof And Of Cumulative Evidence (FRCP 16(c)(4))**

13 1) Defendant seeks a ruling from the court to limit the introduction of evidence which
14 does not relate to actions taken by the County Board of Supervisors (based on *Monell*). In their
15 opposition to defendant's motion for summary judgment, plaintiffs did not oppose defendant's argument
16 that *Monell* limits the case to consideration of only those actions taken by the Board of Supervisors.
17 Such a ruling essentially would limit the relevant time frame to events which occurred from December
18 2001 (when materials were first presented to the Board in connection with the first hearing in January
19 2002) through July 2002 (when the Board made its final decision and sent out notice of that decision).

20 2) Defendant seeks a stipulation from plaintiffs that the Court should take judicial
21 notice of the following documents: the documents attached to defendant's Request for Judicial Notice
22 submitted in connection with its Motion for Summary Judgment (attached hereto as Exhibit 3).

23 3) Defendant seeks a stipulation from plaintiffs to admit into evidence the
24 Administrative Record of hearings before the Board of Supervisors on January 15, 2002, April 16, 2002,
25 June 18, 2002, and July 23, 2002.

26 4) Defendant seeks a stipulation from plaintiffs to admit into evidence the transcripts
27 of the hearings before the Board of Supervisors on January 15, 2002, April 16, 2002, June 18, 2002, and
28 July 23, 2002.

1 5) Defendant seeks a stipulation from plaintiffs to admit into evidence the videotapes
2 of the hearings before the Board of Supervisors on January 15, 2002, April 16, 2002, June 18, 2002, and
3 July 23, 2002.

4 6) Defendant seeks a stipulation from plaintiffs that the Court should take judicial notice
5 of the following document: San Mateo County Ordinance Code, Zoning Regulations, Chapter 1.5
6 (§§ 6105.0 through 6105.4).

7 7) Defendant seeks a stipulation from plaintiffs to admit into evidence the Settlement
8 Agreement, dated July 2, 2004, of the state court action between the parties (San Mateo County Superior
9 Court Case No. 426174).

10 Dated: January 8, 2005
11

12 _____
13 H. Ann Liroff
14 The Hannig Law Firm
15 Attorneys for Plaintiffs
16 OSCAR BRAUN, et al.

17 Dated: January 8, 2005
18

19 THOMAS F. CASEY III, COUNTY COUNSEL
20

21 By: _____
22 Michael P. Murphy, Chief Deputy
23 Attorneys for Defendant
24 COUNTY OF SAN MATEO
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