IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OSCAR A. BRAUN, et al.,

Plaintiffs,

v.

COUNTY OF SAN MATEO,

Defendant.
/

No. C 03-03415 MJJ

**ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**



## INTRODUCTION

In this motion for summary judgment, Defendant County of San Mateo ("Defendant") argues that Plaintiffs Oscar Braun, Andrea Braun, and the Oscar A. Braun Trust Dated 1996 ("Plaintiffs") cannot satisfy the requirements of entity liability against Defendant for any claim and cannot establish claims that Defendant's actions violated Plaintiffs' First Amendment right of free expression and Fourteenth Amendment guarantees of equal protection and due process. For the reasons stated below, the Court **GRANTS IN PART** and **DENIES IN PART** Defendant's motion.

## FACTUAL BACKGROUND

### A. Factual History

Plaintiffs Oscar and Andrea Braun ("the Brauns") own a 70-acre parcel of land in San Mateo County. On March 4, 1998, following a complaint by Cynthia Giovanni, the Brauns' neighbor, Defendant's investigators entered Plaintiffs' property to investigate complained-of code violations. Following this inspection, Defendant told Plaintiffs that they must obtain permits for a stable, tractor shed, agricultural barn, and mobile home. On September 14, 1998, the County issued a citation to

Oscar Braun for these violations while he was in the Planning Department attempting to make a payment. On December 2, 1998, the Brauns filed an application before the Municipal Court and paid $3,720 for all required fees for coastal development, resource management/coastal zone, and stable permits to legalize all structures on the property. On April 5, 2000, the County entered a Notice of Continuing Nuisance against the Brauns' property.

On November 14, 2001, the San Mateo County Planning Commission ("Planning Commission") considered the matter at a hearing and unanimously approved the application, subject to certain conditions of approval. At the hearing, Mr. Braun agreed to comply with all Planning Commission requirements, but noted that doing so did not preclude him from later enforcing his rights. The Planning Commission noted that a permit would not issue and the notice of violation would remain on the record until all conditions of approval had been met. County Planning Administrator Terry L. Burnes stated that the 26 conditions included payment of $7,440 for violation/investigation fees, payment of building investigation fees under section 9041 of the County Building Regulations, obtaining building permits for all structures, compliance with a stable ordinance, legalization of the septic system, and compliance with fire district requirements.

Two people appealed the Planning Commission's decision to the San Mateo County Board of Supervisors ("the Board")[1] with allegations that the Brauns' house did not conform to the specifications stated in his initial building application: Ms. Giovanni and Lenore "Lennie" Roberts, a lobbyist in San Mateo County.[2] In response to the appeal, on December 26, 2001, Mr. Braun sent a letter to the Board requesting that the Board deny the appeal and criticizing the Board for its "anti-growth," "anti-community" agenda.

At a January 15, 2002 hearing, the Board considered the appeal. Planning Administrator

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[1] The San Mateo County Charter provides the Board with certain powers. The Board conducts de novo review of all permit decisions.

[2] Ms. Roberts appeared at the hearing and stated that because of Mr. Braun's political activities, the Board should theissuance of permits and that the Board conduct further investigations of his property. Ms. Roberts had significant ties to the Board and had previously given donations to Supervisors Richard Gordon, Jerry Hill, Rose Jacobs Gibson, and Mike Nevin between 1996 and 2004.

Burnes recommended that the Board affirm the Planning Commission's decision. Mr. Braun noted what he perceived as inconsistent treatment by county citizens seeking to develop their land. Despite Mr. Braun's representations that he paid the appropriate fees, Planning Administrator Burnes stated that Mr. Braun had not paid all applicable fees. The Board ordered that Mr. Braun pay all building fees up front, ordered additional investigation of the property, and ordered another notice of building violation code against the property. In the fifteen years preceding consideration of the Brauns' application, neither the Commission nor the Board had required that fees be paid prior to issuance of a permit.

On March 13, 2002, the County entered a Notice of Violation of Building Code against the Brauns. On April 2, 2002, the County conducted a raid of the Brauns' property. The raid discovered a 720 square foot enclosure of a sunroof following storm damage and a storage shed adjacent to the stable. Following the raid, the County claimed that the Brauns owed $45,073.24, of which $36,543.08 was investigation fees.[3]

The Board conducted additional hearings on April 16, June 18, and July 23, 2002 to clarify outstanding permit issues (including permits for a well and septic system) and disagreements over investigation fees. The County and Plaintiffs' counsel, Ted J. Hannig, could not agree on the appropriate amount of investigation fees. The Board denied Plaintiffs' application on July 23, 2002 by unanimous (4-0) vote.[4] In a subsequent resolution, the Board declared that the reason for denial was that Plaintiffs had not paid the required fees for issuance of permits or met the legalization requirements for the septic system and well. On August 28, 2002, the County issued an abatement order against the Brauns' property that required them to obtain demolition permits and remove the "unpermitted and illegal" structures (the stable, mobile home, tractor shed, barn, and water tanks) by December 31, 2002. Before payment was due, the Brauns filed an action in San Mateo County

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[3] Investigation fees are typically ten times the cost of a permit. This has been the County's practice for over 20 years. Sometime between April 10 and July 17, 2002, the County reduced the investigation fees from $36,543.08 to $20,132.80.

[4] Although the Board has five members, the final motion passed by a 4-0 vote. Supervisor Rose Jacobs Gibson was absent from the hearing.

Superior Court that challenged the amount of permit and investigation fees. On July 2, 2004, the Brauns entered into a settlement agreement with the county and paid $12,000 for all fees.

**B. Present Action**

As executive director of Save Our Bay, Mr. Braun has a long history of criticizing both the Board's actions and the failures of his neighbors to follow relevant laws (including failure to obtain proper permits), both before and during his present dispute with the Board. He has initiated litigation against his neighbors for alleged illegal dumping. Mr. Braun asserts that Board members personally disliked him and that Supervisor Mike Nevin used the term "asshole" to describe him on September 25, 2001. In an August 8, 2000 letter, Supervisor Richard Gordon expressed disagreement with Mr. Braun's opposition to the Devil's Slide tunnel project and accused Mr. Braun of providing "false information" and "misstatements of fact." On January 16, 2004, the Board ordered that Defendant's pay all building permit fees up front, an action never before taken by the Board. On July 23, 2002, the Board unanimously denied Plaintiffs' permit application. Plaintiffs allege that Defendant's conduct occurred "pursuant to a County policy and/or custom under which the County officers and policy makers directed that planning decisions be implemented in a retaliatory and disparate fashion as against the Brauns, based on the Brauns' protected activities, and under which County officers and policymakers ratified such disparate treatment."

## LEGAL STANDARD

Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Federal Rule of Civil Procedure 56(c). The moving party bears the initial burden of establishing that there is no genuine issue of material fact. *Id.*; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

After the moving party makes a properly supported motion, the responding party must present specific facts showing that contradiction is possible. *British Airways Board v. Boeing Co.*, 585 F.2d 946, 950-52 (9th Cir. 1978). It is not enough for the responding party to point to the mere allegations or denials contained in the pleadings. Instead, it must set forth, by affidavit or other admissible evidence, specific facts demonstrating the existence of an actual issue for trial. The

evidence must be more than a mere "scintilla"; the responding party must show that the trier of fact could reasonably find in its favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Accordingly, summary judgment should be granted "[i]f the evidence is merely colorable . . . or is not significantly probative." *Eisenberg v. Insurance Co. of North America*, 815 F.2d 1285, 1288 (9th Cir. 1987). In reviewing a motion for summary judgment, the court must take the responding party's evidence as true and all inferences are to be drawn in its favor. *Id.* at 1289.

## ANALYSIS

Section 1983 "provides a cause of action for the 'deprivation of any rights, privileges, or immunities secured by the Constitution and laws' of the United States." *Wilder v. Virg. Hosp. Ass'n*, 496 U.S. 498, 508 (1990) (quoting 42 U.S.C. § 1983). To state a claim under § 1983, a plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws of the United States was violated and (2) that the alleged violation was committed by a person acting under the color of state law, statute, ordinance, regulation custom, or usage. *See West v. Atkins*, 487 U.S. 42, 48 (1988); *Ketchum v. Alameda County*, 811 F.2d 1243, 1245 (9th Cir. 1987).

### A. Entity Liability

Local governing bodies are persons under section 1983 and are subject to liability for (1) unconstitutional actions officially adopted or promulgated by the body's officers and (2) "constitutional deprivations visited pursuant to governmental custom." *Monell v. Dep't of Social Servs. of the City of New York*, 436 U.S. 658, 690-91 (1978). Under *Monell*, a local government body is subject to section 1983 liability for actions set by the local government's lawmakers "or by those whose edicts or acts may fairly be said to represent official policy." *Id.* at 694. Subsequent cases have held that a plaintiff may prove entity liability by demonstrating (1) a longstanding practice or custom that constitutes standard operating procedure of the local entity,[5] (2) that an

[5] The long-standing practice or custom need not be one of constitutional violations, and could be a practice or custom of ignoring, not investigating, or failing to impose discipline when constitutional violations had occurred. *See Larez v. City of Los Angeles*, 946 F.2d 630, 647 (9th Cir. 1991) (inferring that a policy or custom existed where officials took no steps to reprimand or discharge subordinates for constitutional violations).

official with final policy-making authority delegated that authority or ratified the decision of a subordinate,[6] or (3) that the decision-making official was the final policymaking authority under state law. *Ulrich v. City & County of San Francisco*, 308 F.3d 968, 984-85 (9th Cir. 2002).

Defendant argues that Plaintiffs (1) cannot establish any policy or custom promulgated or implemented by the Board and (2) cannot establish that the Board ratified any unconstitutional acts committed by subordinate County officials.

"Liability for improper custom may not be predicated on isolated or sporadic events; it must be founded upon practices of sufficient duration, frequency and consistency that the conduct has become a traditional method of carrying out policy." *Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996). In *Christy*, the Ninth Circuit considered the plaintiffs' allegations that they were selectively prosecuted because of their outspoken position on the legalization of marijuana. 176 F.3d at 1231. The court held that the plaintiffs could not establish a longstanding policy custom because they alleged that they were singled out for unique treatment. *Id.* at 1235.

Here, Plaintiffs cannot establish a "longstanding" policy or custom of retaliating against outspoken landowners. The Board denied Plaintiffs' permit requests on January 15, April 16, June 18, and July 23, 2002. These four decisions were not of sufficient duration, frequency or consistency to establish a longstanding policy or custom. *See Trevino*, 99 F.3d at 918.

Furthermore, Plaintiffs have not sufficiently alleged that subordinate employees acted with the requisite intent. *See Gillette v. Delmore*, 979 F.2d 1342, 1347 (9th Cir. 1992) (stating that liability can be established by consciously ratifying the conduct of another). For example, Plaintiffs do not have any evidence that County employees acted with animosity towards Plaintiffs. Instead, Plaintiffs' allegations have at all times centered upon the Board's actions. Accordingly, Plaintiffs cannot establish entity liability by showing Board ratification of subordinate employees' acts.

Plaintiffs, however, assert that a majority of the Board acted with the requisite intent in denying Plaintiffs' permit applications. On July 23, 2002, the Board denied Plaintiffs' permit

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[6] A entity may also be liable where it shows deliberate indifference to the actions of subordinates. *Christie v. Iopa*, 176 F.3d 1231, 1240 (9th Cir. 1999).

application by unanimous (4-0) vote. The U.S. Supreme Court has held that one act can suffice for government liability, even if the act is not especially legislative in nature. *See, e.g.*, *Pembaur v. Cincinnati*, 475 U.S. 469, 480 (1986). To establish liability for one act, the act must have been taken by one with final decision-making authority. *Id.* at 480-81. The identification of officials who speak with final decision-making authority on a particular issue and whose decisions represent the local governmental unit is a legal issue to be determined by a court based on state and local law. *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737-38 (1989); *St. Louis v. Praprotnik*, 485 U.S. 112, 124 (1988). Once those officials have been identified, "it is for the jury to determine whether *their* decisions have caused the deprivation of rights at issue by policies which affirmatively command that it occur . . . ." *Jett*, 491 U.S. at 738 (emphasis in the original).

Under California law, the Board is the final decision-making authority for land use regulations as designated by Article XI, section seven of the California Constitution and sections in the California Governmental Code. *See, e.g.*, CAL. GOV'T CODE § 65850. Thus, the Board's action in denying Plaintiffs permits could establish entity liability. A reasonable trier of fact could determine that Plaintiffs can establish the Board's entity liability for the single act of denying Plaintiffs' permits.

However, one member of a Board of Supervisors does not have final authority to establish a County's policy. *Lake Nacimiento Ranch Co. v. San Luis Obispo County*, 841 F.2d 872, 879 (9th Cir. 1987), *cert. denied*, 488 U.S. 827 (1988); *see also Kanaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1239 (9th Cir. 1994) (denying equal protection claim against city where one council member made "insensitive and disturbing" racially prejudicial remarks because no evidence existed showing that the council as a whole took the action with discriminatory intent). Under California law, a board of supervisors may only establish official policy by a majority of the supervisors. *Id.* (citing CAL. GOV'T CODE § 25005). Therefore, Plaintiffs must assert sufficient facts to establish that a majority of the Board harbored the requisite intent required for each claim because an entity may only be liable where the entity acted with the requisite intent. Board actions taken by unanimous vote are

likely to establish entity liability. The Court analyzes each claim in turn, mindful that Plaintiffs must show that a majority of the Board acted with the required intent to establish each claim.

**B. First Amendment Retaliation**

In order to establish a First Amendment Retaliation claim, a plaintiff must prove that her conduct was protected by the First Amendment and that her First Amendment conduct prompted retaliatory action. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977). To prevail under this theory, a plaintiff is required to show that her conduct was constitutionally protected and that it was a substantial or motivating factor for a defendant's actions. *Id.* The burden then shifts to a defendant, who must show that it would have made the same decision absent a plaintiff's First Amendment activity. *Id.*; *see also Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1314 (9th Cir. 1989) (stating that the defendants showing that they could have suspended permits in the absence of protected conduct is not enough to survive summary judgment). Where a defendant rebuts the inference of retaliation, the burden shifts to the plaintiff to show pretext. *Miller v. Fairchild*, 797 F.2d 727, 731 (9th Cir. 1986). A plaintiff may establish a retaliatory motive by demonstrating that the decision-maker knew of the protected speech and evidence of at least one of the following: (1) temporal proximity between protected speech and the adverse decision; (2) the decision-maker's expressed opposition to the speech; or (3) false or pretextual reasons for the decision. *Keyser v. Sacramento City Unified Sch. Dist.*, 265 F.3d 741, 751-52 (9th Cir. 2001).

At oral argument, Plaintiffs enumerated five actions taken by the Board in retaliation for Plaintiffs' exercise of First Amendment rights: (1) conditioning the granting of permits on the up-front payment of all fees; (2) making a determination based upon the allegedly false information that Plaintiffs had not paid any fees; (3) recording a second notice of violation when one was already in effect;[7] (4) denying Plaintiff's permit application; and (5) issuing an abatement order. Defendant

[7] It is difficult to see how this notice even qualifies as an adverse decision since the prior notice remained in place. Although Mr. Braun claims to have been embarrassed by this action, it had no legal effect.

argues that there was no proximity in time between Mr. Braun's protected speech and the Board's actions, that a majority of the Board did not disagree with Mr. Braun's right to express his views, and that Plaintiffs can produce no evidence of pretext. Plaintiffs maintain that there is evidence of: proximity; Supervisor Gordon expressing disagreement with Mr. Braun's opinions; false or pretextual reasons for the Board's decision; disparate treatment; and political alignment on the Board with Ms. Lenore. For the reasons stated below, the Court finds that Plaintiffs have established sufficient circumstantial evidence to raise an inference of retaliatory motive on behalf of the Board.

Regarding temporal proximity, the Ninth Circuit has stated that the proper measurement of time is between when the protected action took place and the time of the adverse action. *Id.* at 752 n.4. There is no per se amount of time that leads to or does not lead to liability. *Coszalter v. City of Salem*, 320 F.3d 968, 977-78 (9th Cir. 2003). *Cozalter* summarized the Ninth Circuit's position as follows:

> A rule that any period over a certain time is per se too long (or, conversely, a rule that any period under a certain time is per se short enough) would be unrealistically simplistic . . . . Retaliation often follows quickly upon the act that offended the retaliator, but this is not always so. For a variety of reasons, some retaliators prefer to take their time: They may wait until the victim is especially vulnerable or until an especially hurtful action becomes possible. Or they may wait until they think the lapse of time disguises their true motivation . . . . We therefore reject any bright-line rule about the timing of retaliation.

*Id.*

The proximity requirement exists to weed out unmeritorious claims of retaliation where there is not a sufficient nexus between the time that a defendant first learned of the protected speech and the time that the adverse action occurred. *See, e.g., Strahan v. Kirkland*, 287 F.3d 821, 826 (9th Cir. 2002). Plaintiffs concede that Mr. Braun's speech began in the early 1990's and continues to the present day. On December 26, 2001, Mr. Braun wrote a letter to the Board and criticized the county on a variety of political issues, including accusations that the county violated several local, state, and federal laws. At a hearing on January 15, 2002, Mr. Braun addressed the Board and discussed his long history of problems with county authorities regarding his property, including his particular difficulties with Board member Mr. Burnes. During this speech, Mr. Braun also expressly referred

the Board to his December 26, 2001 letter. After the hearing concluded, the Board decided to require up front payment of fees and directed staff to record a notice of violation. The Board also voted to deny Mr. Braun's permit applications on July 23, 2002 and issued an order of abatement on August 28, 2002.

The Court finds that sufficient temporal proximity exists between Mr. Braun's protected speech and the Board's adverse decisions to raise an inference of retaliatory motive.[8] Although Defendant argues that the large lapse of time between the Board's initial knowledge of Mr. Braun's speech and the allegedly adverse action in 2002 should defeat a finding of proximity, the Court disagrees. Unlike Defendant's cited cases, wherein the defendant employers took adverse employment actions years after they first learned of the plaintiff's speech, the Board could not have taken any adverse action against Plaintiffs until their appeal came before the Board. *Cf. id.* at 826; *Keyser*, 265 F.3d at 752; *Erickson v. Pierce County*, 960 F.2d 801, 803 (9th Cir. 1992). Here, Mr. Braun can point to his speech criticizing the Board at the hearing on January 15, 2002. Additionally, he can point to his letter criticizing the Board only weeks prior to the hearing. Based on these events, a reasonable trier of fact could infer that the Board's decision to require Mr. Braun to pay fees up front and to deny his permit application occurred because of Mr. Braun's protected speech.[9]

**C. Equal Protection Claim**

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne*

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[8] Mr. Braun had a protected interest in commenting on the actions of the Board. *Morgan*, 874 F.2d at 1314 (9th Cir. 1989) (citing *New York Times v. Sullivan*, 376 U.S. 254, 269-70 (1964)).

[9] It does not matter that it was Mr. Braun, and not the Board, who interjected Mr. Braun's political opinions into the proceedings. Caselaw only requires that a plaintiff show proximity such that a reasonable trier of fact could infer that the adverse action occurred because of the protected conduct. *See Keyser*, 265 F.3d at 751-52. Furthermore, because the Court finds that sufficient temporal proximity exists between Mr. Braun's protected speech and the Board's adverse decisions, the Court need not decide whether a majority of the Board "expressed opposition" to Mr. Braun's viewpoints or whether the Board's stated reasons for its adverse actions were pretextual.

*Living Ctr.*, 473 U.S. 432, 439 (1985) (quoting *Plyler v. Doe*, 457 U.S. 202, 216 (1982)). Where state action does not implicate a fundamental right or a suspect classification, the plaintiff can establish an equal protection claim by demonstrating that he "has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Squaw Valley Dev. Co. v. Goldberg*, 375 F.3d 936, 944 (9th Cir. 2004) (quoting *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000)). A plaintiff may state a claim by showing that she was subjected to treatment that was malicious, irrational, or plainly arbitrary. *Sierra Lake Reserve v. City of Rocklin*, 938 F.2d 951 (9th Cir. 1991). Thus, as a threshold matter, Plaintiffs must show differential treatment and discriminatory motivation to establish an equal protection claim based on selective enforcement. *Benigni v. City of Hemet*, 879 F.2d 473, 477 (9th Cir. 1988).

The Ninth Circuit has admonished equal protection plaintiffs who cannot show specific evidence of differential treatment by reference to similarly-situated persons. *See Squaw Valley*, 375 F.3d 936. In *Squaw Valley*, the plaintiff appealed the district court's grant of summary judgment and claimed that it was being singled out from all others who illegally discharged waste. *Id.* The Court stated that differential treatment could not form the basis of the plaintiff's equal protection claim where the plaintiff could not identify any other dischargers and produced no evidence that other dischargers were of comparable size, had similar histories of non-compliance, or had resisted earlier administrative action. *Id.* at 945.

Here, Plaintiffs' cannot support an equal protection claim because they cannot point to any "similarly situated" permit applicant who was treated differently than Plaintiffs. The Board has not required any other citizen in the past fifteen years to pay permit fees prior to issuance of a permit. Defendant claims that it required up front payments from Plaintiffs because Plaintiffs already built the structures on their property. Therefore, Plaintiffs needed to produce evidence of similarly-situated permit applicants who came before the Board after having already built structures. *See id.* at

945. Plaintiffs produced no such evidence.[10]

Even if Plaintiffs had established different treatment, Plaintiffs have not established a triable issue of fact as to whether Defendant's asserted rational basis was merely a pretext for differential treatment. Under rational basis review, a court must afford governmental decisions a strong presumption of validity and uphold a governmental decision if there is "any reasonably conceivable state of facts that could provide a rational basis" for the allegedly disparate treatment. *Heller v. Doe by Doe*, 509 U.S. 312, 319 (1993). Selective enforcement of valid laws, without more, does not make the defendant's action irrational." *Patel v. Penman*, 103 F.3d 868, 875 (9th Cir. 1996). The explanation proffered by Defendant, that they wanted full payment prior to issuance of any permits, is rational given that Mr. Braun had already built the structures in question. For these reasons, the Court grants summary judgment on Plaintiffs' equal protection claim.

**D. Due Process Claim**

Under Ninth Circuit law, "substantive due process claims based on governmental interference with property rights are foreclosed by the Fifth Amendment's Takings Clause." *Squaw Valley*, 375 F.3d at 949; *Armendariz v. Penman*, 75 F.3d 1311, 1325-26 (9th Cir. 1996) ("Substantive due process analysis has no place in contexts already addressed by explicit textual provisions of constitutional protection, regardless of whether the plaintiff's potential claims under those amendments have merit.")

Despite the fact that Plaintiffs' complaint titled their third count "Violation of Procedural Due Process," Plaintiffs now claim that their third claim is one of substantive due process.[11]

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[10] Further weighing against Plaintiffs' equal protection claim is an absence of evidence that a majority of Board members held animus toward Mr. Braun.

[11] It is not clear whether Plaintiffs pled a procedural or substantive due process claim. On September 4, 2003, Plaintiffs filed a First Amended Complaint that included a count entitled "Procedural Due Process." Several phrases in the Complaint appear to be part of a procedural due process claim. It states that the "County's conduct deprived the Brauns of their right to a fair and impartial decision maker." The text of their claim, however, also states that the "Brauns are entitled to substantive due process." The Complaint states that the "County's conduct was arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."

Plaintiffs claim that they were deprived of property without a rational basis by the Board's decision to charge "punitive" investigation fees in excess of that allowable under state law. Thus, like *Squaw Valley*, Plaintiffs assert that the Board's action in charging investigation fees does not substantially advance state interests because the fees were not authorized by state law. Assuming that Plaintiffs have actually pled a violation of substantive due process, Plaintiffs substantive due process claim is foreclosed by the Takings Clause. *See Squaw Valley*, 375 F.3d at 950 ("[L]and use restrictions that do not 'substantially advance legitimate state interests' or 'deny an owner an economically viable use of his land' effect a taking.") Because Plaintiffs substantive due process claim is foreclosed, the Court grants summary judgment in favor of Defendant on the due process claim.

## CONCLUSION

Based on the foregoing reasons, the Court **GRANTS** summary judgment on Plaintiff's equal protection and due process claims. Because of the temporal proximity between Plaintiffs' protected speech and Defendant's adverse actions, the Court **DENIES** summary judgment on Plaintiffs' First Amendment retaliation claim.

**IT IS SO ORDERED.**

Dated: December 19, 2004

MARTIN J. JENKINS
UNITED STATES DISTRICT JUDGE