Filed 5/18/10 Avery v. County of Santa Clara CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

PRESTON AVERY et al.,

Plaintiffs and Appellants,

v.

COUNTY OF SANTA CLARA, et al.,

Defendants and Respondents.

H033049
(Santa Clara County
Super.Ct.No. CV066922)

This long-standing dispute concerns approximately 6.56 acres of Morgan Hill property located on the east side of Monterey Road at 150 Kirby Avenue (property). The property is owned by Preston and Lois Avery (collectively, the Averys), through their revocable family trust. In 2001, the Planning Commission of the County of Santa Clara voted to revoke a long-existing, oft-modified, use permit for the property. The Averys were successful in reversing that decision through an appeal to the County Board of Supervisors; they objected, however, to the Board's October 2003 decision referring the matter back to the Planning Commission for further consideration of whether the use permit should be revoked, modified, or reaffirmed. In a prior lawsuit (the prior suit), the Averys challenged that Board decision and sought, inter alia, damages for inverse condemnation. Summary judgment was granted in favor of the County and, on appeal,

we affirmed the judgment entered in the County's favor. (See *Avery v. County of Santa Clara* (Jul. 28, 2008, H031157 [nonpub. opn.].)[1]

After the prior suit was filed, and in September 2005, the Planning Commission modified the use permit to describe further the permitted uses of the Property, revise and update conditions for approval, and establish a 10-year time limit. The Averys challenged that decision through an administrative appeal, which was rejected by the Board in April 2006. The Averys then filed this second combined mandate petition and complaint in July 2006 challenging the Board's action. The trial court granted summary adjudication in favor of the County as to the second and third causes of action, and subsequently heard and denied the mandate petition. The Averys appeal from a judgment entered against them.

The Averys argue that the court erred in denying the petition for writ of mandamus. They assert that the Board abused its discretion in rejecting their challenge to the modification of the use permit because its decision was not supported by the findings and the findings were not supported by the evidence. The Averys contend further that because their interest in the use permit constituted a fundamental vested right, the court below should have conducted an independent review of the Board's decision. They also argue that summary adjudication of the second and third causes of action should have been denied; they assert that there was a triable issue as to whether the County's

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[1] Upon the County's motion and pursuant to Evidence Code sections 452, subdivision (d) and 459, subdivision (a), we have taken judicial notice of our opinion in the prior suit. Judicial notice of our prior opinion is appropriate and it "help[s] complete the context of this case." (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 306, fn. 2) Our reliance upon, and citation to, the unpublished appellate opinion in the prior suit, *post*, is permissible in the context of applying the doctrine of res judicata to bar certain claims asserted here by the Averys. (Cal. Rules of Court, rule 8.1115(b)(1).)

modification of the use permit constituted a regulatory taking that supported their claim for inverse condemnation. We conclude that there was no error by the court in its denial of the petition for writ of mandate and its granting of summary adjudication as to the remaining claims. Accordingly, we will affirm the judgment.

FACTUAL BACKGROUND

I. *Use Permit—Grant and Early Modifications*

The Averys acquired the property in 1977. The property is in the County's A-20 Agricultural District, and was in agricultural use prior to the Averys' ownership. The Averys applied for and obtained in December 1977 a special conditional permit for residential occupancy of a mobile home on the property for a limited period; the permit was granted subject to compliance with various conditions, including the Averys' cessation of an "illegal retail use (trailer sales)" on the property. In February 1980, the Averys were notified that the County, following a field inspection, determined that there were a number of illegal uses being made of the property, including the continuation of trailer sales; the operation of construction equipment; maintenance of a material storage yard; using the property for the sale and service of mopeds, boats, trailers, and recreational vehicles; and use of the mobilehome as an office instead of as a residence.

In October 1984, the Averys applied for a use permit for the sale of farm equipment and supplies and the manufacturing of greenhouses and solar systems. After the initial denial by the Planning Commission was appealed by the Averys, the Board of Supervisors granted in July 1985 a temporary use permit for 120 days to allow for the Averys to apply under the Monterey Highway use permit ordinance procedure for a use permit. The Averys submitted a new application in July 1985 for approval of additional uses, namely, the manufacturing, service and sale of recreational vehicles, and operation of a construction business. A field inspection by the County in January 1986 disclosed that there were several additional unapproved uses of the property, including the

operation of an automobile wrecking yard, the leasing of space for auto repairs, sales of camper shells, service of motor scooters, and the conversion of a bus to a motorhome. Although the Planning Commission initially denied the Averys' use permit application, in October 1986, the County granted a one-year use permit for the property "for the manufacture, sales and service of recreation vehicles, greenhouses/solar systems, farm equipment and supplies, and for a general contracting operation . . . ." The next year, the Planning Commission, pursuant to the Averys' applications, modified the use permit to extend its term to five years to permit outside storage and display of vehicles and materials, and to permit a wholesale nursery operation.

In July 1993, upon the Averys' application, the Planning Commission approved the renewal of the use permit, subject to various conditions, including compliance with conditions noted in 1987, and the removal of a bus that may have been used illegally as a dwelling. In June 1995 following an inspection, the County advised the Averys that violations of land use regulations were occurring in that the property was being used as an unauthorized junkyard and for auto auctions.

The County notified the Averys again in March 1999 of land use violations, namely, that the property was being used for automobile sales, automobile auctions, storage of inoperable vehicles, and for the apparent use of recreational vehicles for dwelling purposes. The Averys requested a clarification of their use permit to determine whether sales of automobiles, boats, motorhomes and trailers, and auto and estate auctions were permitted uses of the property. The Planning Commission in August 1999 determined that auctions were not permitted under the use permit and directed that they

cease or that the Averys seek a modification of the use permit so that they could be approved.[2]

II. *Planning Commission's Permit Revocation and Board's Reversal*

In August 2001, the County advised the Averys that because of "a number of unauthorized land use activities . . . including, but not limited to, automotive repair and sales activities, automotive and estate auctions, and the storing of disabled vehicles in a fashion consistent with a wrecking yard," it would place the matter on the Planning Commission's agenda with a recommendation to revoke the use permit "for lack of compliance with the conditions of approval." After a hearing, on November 1, 2001, the Planning Commission revoked the use permit, finding that the Averys had violated certain conditions that had been imposed in granting the permit, and that they had failed to complete other conditions associated with the Architectural and Site Approval (ASA), namely, (1) creation of nine off-street, striped parking spaces; (2) paving of parking spaces and driveways; (3) providing wheel bumper guards for parking areas; and (4) providing landscaping along the Monterey Road frontage. The Averys appealed that determination. According to the County, the hearing on the appeal was deferred at the Averys' request in order to give them additional time to comply with the conditions of the use permit.[3]

In August 2003, Cingular Wireless submitted an application for a modification of the use permit for the purpose of replacing an existing, previously approved 35-foot cell

[2] There is evidence in the record that the Averys, through their counsel, subsequently made inquiries in 2000 about applying to amend the use permit; however, there is no evidence that they followed through in submitting such an application.

[3] The Averys dispute this contention, claiming that they did not ask for a delay in the hearing on their appeal.

tower with a new 55-foot tower (hereafter, the cellular tower application). It was later clarified that the proposed new tower, including antenna, would have a height of 76 feet.

After a noticed hearing on October 28, 2003, the Board of Supervisors voted to grant the Averys' appeal from the August 2001 decision of the Planning Commission. In addition, the Board referred the matter back to the Planning Commission to conduct a further hearing regarding the revocation, modification, or reaffirmation of the use permit. The Board concluded further that the Planning Commission had acted properly in revoking the use permit. The basis for the Board's decision, as reflected in the Board's December 2003 resolution, was that "[w]hile some progress ha[d] been made toward compliance [with the use permit] and the auto auction use has been relocated to another property, staff inspections of the [p]roperty on various occasions have demonstrated that there is still noncompliance with some of the use permit conditions and uses are being conducted on the Property that are not allowed by right or the use permit."

III. *Modification of Use Permit in 2005-2006*

In March 2004, Cingular Wireless provided the County with information justifying the cellular tower application. The County responded the next month with a notice that the application would be deemed complete upon the removal of a portable toilet on the property that did not comply with the County's septic ordinance. In April 2005, the Planning Commission voted to adopt a negative declaration previously prepared relative to the project, grant a use permit modification to permit the construction of a 76- foot cell tower, and to schedule a hearing for July 7, 2005, to consider the revocation, modification, or reaffirmation of the existing use permit.

After the matter was twice continued to allow for additional time to address the issues, the Planning Commission voted on September 1, 2005 to modify the use permit. Specifically, the Commission recited its findings that (1) "the permit conditions [for the property] have been or are being violated," (2) "a public health or safety nuisance ha[d]

been created on the property,"[4] and (3) "the uses that have been and are taking place on the property are not the uses that the Planning Commission intended to allow when it originally granted the [u]se [p]ermit for the property or approved subsequent modifications of the [u]se [p]ermit."[5] The Commission concluded: "In an attempt to avoid future disputes with the property owner regarding what uses are and are not allowed on the property, it is appropriate to modify the use permit to add a condition describing which uses are allowed to be conducted on the property. . . . [¶] . . . The Planning Commission further finds that, due to the long history of noncompliance on the property, a time limitation on the use permit is warranted. When the use permit expires, the owner may apply for a permit renewal . . . ." The permitted uses identified by the Commission consisted of (1) the "[m]anufacture, sale and repair of recreational vehicles, greenhouses, solar systems, farm equipment and supplies"; (2) "[g]eneral contracting operation"; (3) "[o]utside storage and display of recreational vehicles and materials that is ancillary to the uses specified" in (1) and (2), above; and (4) "[w]holesale nursery, including warehousing for processing and distribution of flowers not to exceed 10,000 square feet." The Commission set the term of the use permit for 10 years.

On September 14, 2005, the Averys appealed the Planning Commission's decision. After a hearing on February 28, 2006, in which it considered a lengthy staff report, correspondence from the Averys' counsel, and testimony, the Board of

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[4] The Commission indicated that the public health and safety nuisance included the unpermitted storage of hazardous materials on the property.

[5] As an example in support of the last finding, the Commission noted that "the use of buildings #1 and #3 for automobile body/engine repair and automobile body repair/painting are not included in the list of allowable uses and were never intended to be so included."

Supervisors indicated its intention to deny the appeal and uphold the decision of the Planning Commission, except that the Board voted to exempt the cell tower from the 10-year time limit placed upon the use permit. A formal resolution was adopted by the Board on April 11, 2006.

PROCEDURAL BACKGROUND

I. *Pleadings*

On July 10, 2006, the Averys, as trustees of their revocable family trust, filed in the superior court a petition for writ of mandate and complaint against the County, its Board of Supervisors, and individual defendants. The County[6] filed a demurrer and motion to strike. The court, inter alia, overruled the demurrer to the first cause of action (petition for writ of mandate), and sustained the demurrer with leave to amend as to the second through fourth causes of action.

The Averys filed a first amended petition for writ of mandate and complaint (Complaint), alleging four causes of action. The first cause of action was a petition for writ of mandate pursuant to Code of Civil Procedure section 1094.5;[7] the second, third, and fourth causes of action of the complaint were for inverse condemnation, declaratory relief, and injunctive relief, respectively.

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[6] The individual defendants are Michael M. Lopez, a County employee (Lopez), and the members of the County Board of Supervisors, Donald F. Gage, Blanca Alvarado, Pete McHugh, James T. Beal, Jr., and Liz Kniss. Although the allegations in the original petition and complaint and in the operative first amended petition and complaint referred collectively to the defendants, and the judgment from which this appeal was taken was in favor of all defendants, for purposes of simplicity, we will refer to the chief litigant, the County, as the defendant who prevailed below and is the respondent on appeal herein.

[7] All further statutory references are to the Code of Civil Procedure unless otherwise specified.

The Averys' Complaint contained over 21 pages of allegations that were later incorporated into each of the causes of action. The Averys alleged that they acquired the property in 1977, and that the County granted them a use permit, effective October 17, 1986, that "provided for the manufacture, sales and service of recreation[al] vehicles, greenhouses/solar systems, farm equipment supplies, and a general engineering contracting operation." There was "[c]ontemporaneous site and architectural approval [that] authorized manufacturing, sales and service of boats and motor scooters as well as recreational vehicles." The County Planning Commission modified the use permit on November 10, 1987, "to authorize the outside storage and display of vehicles and materials and the wholesale nursery operation, including warehousing, processing and distribution of flowers within an existing building." The Averys alleged further that "[i]n 1993, the use permit was extended and continues in effect." They averred that they had expended over $100,000 to maintain and improve the property in reliance on the use permit, and that they had also dedicated to the County a section of their property valued at not less than $250,000 to comply with a condition of the permit.

The Averys alleged further that following the recommendation of the County's planning staff, on November 1, 2001, the Planning Commission voted to revoke the use permit. In a letter to Preston Avery dated November 9, 2001, Lopez confirmed that revocation by the Planning Commission, and noted that the Commission had made findings that the Averys had not complied with four conditions of the use permit relating to providing for off-street parking spaces with striping; paved parking spaces and driveways with oil and screenings or better; wheel bumper guards in the parking areas; and landscaping along Monterey Road frontage.

The Averys alleged that their administrative appeal from the Planning Commission's decision did not occur until nearly two years later, on October 23, 2003, notwithstanding the fact that the Averys requested no extensions. They alleged that the

County had "refused to process applications for legitimate uses on [the p]roperty during the pendency of the appeal" because, inter alia, the use permit had been revoked.[8] At the conclusion of the hearing on the appeal, the Board of Supervisors voted to grant the Averys' appeal; however, it held that the prior actions of the Planning Commission were proper and directed "that the use permit should be returned to the Planning Commission for re-evaluation."

The Complaint contained the further allegation that on September 1, 2005, the Planning Commission adopted revisions to the use permit, including a revision placing "an expiration date on it when no such expiration date previously existed . . . ." The Averys averred that this action "violate[d their] vested rights under the use permit," and that the modifications were not justified under any of the rationales stated by the Commission. They appealed the Planning Commission's decision, but the Board of Supervisors, by resolution adopted April 11, 2006, denied the appeal. The Averys allege that the purported grounds that were cited by the County did not justify the decision to modify the use permit.

The County filed a demurrer to each of the causes of action of the Complaint. The court overruled the demurrer as to the first through third causes of action and sustained the demurrer with leave to amend as to the fourth cause of action for injunctive relief. The record does not reflect that the Averys ever filed an amended pleading to renew the fourth cause of action.

II. *Summary Judgment Motion, Trial, and Entry of Judgment*

[8] The Averys also alleged that the application to modify the use permit to allow for the replacement of a smaller cell tower with a 76-foot cell tower "was intentionally delayed . . . based upon unfounded and unsupported claimed violations [*sic*] that the use permit was being violated . . . ."

In October 2007, the County moved for summary judgment, or, in the alternative, for summary adjudication of claims (the summary judgment motion). It argued, inter alia, that the County did not abuse its discretion; none of the actions it took with respect to the use permit constituted a "taking" of the property; and the inverse condemnation claim and the related declaratory relief claim were therefore meritless. The Averys opposed the summary judgment motion. The court denied summary judgment and further denied summary adjudication of the first cause of action. The court granted summary adjudication as to the second and third causes of action of the Complaint.

After the parties submitted extensive briefs, the court conducted a hearing on April 14, 2008, on the Averys' petition for writ of mandate. It denied the petition, finding that "the County's decision was supported by the evidence and did not exceed jurisdiction." The court concluded further that review was not governed by the independent judgment rule, but that even if that rule did apply, its ruling would remain the same.

On April 25, 2008, the court entered judgment on its summary adjudication order and order denying the petition for writ of mandate. The Averys filed a timely notice of appeal.

DISCUSSION

I. *Issues on Appeal*

The issues presented in this appeal, all concerning the propriety of the court's granting summary judgment, are as follows:

1. Whether the court erred in denying the petition for writ of mandate.

2. Whether the Averys' claim for inverse condemnation lacked merit, thereby warranting summary adjudication.

3. Whether summary adjudication of the claim for declaratory relief was proper.

We address each of these contentions below.

II. *Petition for Writ of Mandate*

A. *Standard of Review*

1. *Standard of review generally*

The Averys' first cause of action for administrative mandamus is brought under section 1094.5. Review of an administrative decision by mandamus is appropriate where the hearing in the underlying administrative proceeding was mandatory, evidence was required to be taken in the proceeding, and there was discretion vested in the body determining the matter in deciding contested factual issues. (§ 1094.5, subd. (a).) A court reviewing an agency's decision under section 1094.5 is guided by the following: "The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." (§ 1094.5, subd. (b).)

A challenge to a decision that the findings are not supported by the evidence in the administrative record is reviewed by the trial court under either the substantial evidence standard or the independent judgment standard. (*Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28, 32 (*Strumsky*).) Under the former standard, the trial court will affirm the administrative decision if it is supported by substantial evidence from a review of the entire record, resolving all reasonable doubts in favor of the findings and decision. (*Committee to Save Hollywoodland Specific Plan v. City of Los Angeles* (2008) 161 Cal.App.4th 1168, 1182.) Under this "deferential" standard, the court presumes the correctness of the administrative ruling. (*Patterson Flying Service v. California Dept. of Pesticide Regulation* (2008) 161 Cal.App.4th 411, 419 (*Patterson Flying Service*).) "For this purpose, '. . . substantial evidence has been

defined in two ways: first, as evidence of " ' "ponderable legal significance . . . reasonable in nature, credible, and of solid value" ' " [citation]; and second, as " 'relevant evidence that a reasonable mind might accept as adequate to support a conclusion ' " [citation]' [citation]." (*Desmond v. County of Contra Costa* (1993) 21 Cal.App.4th 330, 335.) By contrast, where the independent judgment standard applies, the trial court must "weigh the credibility of witnesses in determining whether the findings of the agency are supported by the weight, or preponderance, of the evidence. [Citations.]" (*Duncan v. Department of Personnel Admin.* (2000) 77 Cal.App.4th 1166, 1174.)

Where the trial court has reviewed the entire record and determined that there was substantial evidence to support the administrative decision, the appellate court's "scope of review on appeal from such a judgment is identical to that of the trial court. [Citations.]" (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 149 (*Bixby*).) And where the trial court has applied the independent judgment standard to determine whether the weight of the evidence supported the administrative decision, "an appellate court need only review the record to determine whether the trial court's findings are supported by substantial evidence. [Citations.]" (*Id.* at p. 143, fn. 10.)

2. *Whether independent review standard applied*

The Averys argue strenuously that the decision of the Board of Supervisors modifying the use permit was one that substantially affected their vested rights and was thus subject to independent review. At oral argument, counsel clarified that it was the County's imposition of a 10-year term on the permit—where there was previously no term stated—that he contended constituted the act that substantially affected the Averys' vested rights. The County, on the other hand, urges—and maintained at oral argument—that the decision to modify the permit (including the imposition of the 10-year term) is governed by the substantial evidence standard.

Subdivision (c) of section 1094.5 does not identify the cases in which the independent judgment standard, rather than the substantial evidence standard, applies.[9] (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 811; *County of Alameda v. Board of Retirement* (1988) 46 Cal.3d 902, 906.) Our high court has held that the independent judgment standard applies to cases in which "an administrative decision affects a right which has been legitimately acquired or is otherwise 'vested,' and when that right is of a fundamental nature from the standpoint of its economic aspect or its 'effect . . . in human terms and the importance . . . to the individual in the life situation.' " (*Strumsky*, *supra*, 11 Cal.3d at p. 34, quoting *Bixby*, *supra*, 4 Cal.3d at p. 144.) The heightened scrutiny is justified by the rationale that the abrogation of such a fundamental vested right "is too important to the individual to relegate it to exclusive administrative extinction." (*Bixby*, at p. 144.) If the decision "substantially affect[s]" that fundamental vested right, the trial court reviews the decision for legal errors and conducts a limited trial de novo of the evidence presented in the administrative proceeding and any evidence wrongfully excluded by the agency. (*Bixby*, at p. 143 & fn. 10.) "[A] right may be deemed fundamental within the meaning of *Bixby* on either or both of two bases: (1) the character and quality of its economic aspect; (2) the character and quality of its human aspect." (*Interstate Brands v. Unemployment Ins. Appeals Bd.* (1980) 26 Cal.3d 770, 780.) In evaluating the matter, the court looks at whether the individual's right "is a fundamental and basic one, which will suffer substantial interference by the action of the

[9] "Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence. In all other cases, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record." (§ 1094.5, subd. (c).)

administrative agency, and, if it is such a fundamental right, whether it is possessed by, and vested in, the individual or merely sought by him." (*Bixby*, at p. 144.) And courts show a "slighter sensitivity" to the preservation of privileges that are strictly economic ones. (*Id.* at p. 145.) The determination of whether the administrative decision is one that substantially affects fundamental vested rights is made "on a case-by-case basis . . . ." (*Id.* at p. 144.)

Courts have found the existence of a fundamental vested right, thereby requiring independent review of the agency's decision substantially affecting it, in a number of different contexts. These have included cases involving the revocation or suspension of a professional license (*Griffiths v. Superior Court* (2002) 96 Cal.App.4th 757, 767-768 [medical license]; *Clare v. State Bd. of Accountancy* (1992) 10 Cal.App.4th 294, 300 [accountancy license]); the revocation or suspension of certain nonprofessional licenses (*Berlinghieri v. Department of Motor Vehicles* (1983) 33 Cal.3d 392, 398 [driver's license]; *Mann v. Department of Motor Vehicles* (1999) 76 Cal.App.4th 312, 320-321 [vehicle sales license]; *San Benito Foods v. Veneman* (1996) 50 Cal.App.4th 1889, 1895-1897 (*San Benito Foods*) [food processing license]); continued employment with a local governmental agency (*Barber v. Long Beach Civil Service Com.* (1996) 45 Cal.App.4th 652, 658); a regulatory taking of property (*Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 15); and the termination or denial of welfare benefits (*Frink v. Prod* (1982) 31 Cal.3d 166, 178-180).

As the Supreme Court acknowledged in *Bixby*, *supra*, 4 Cal.3d at page 145, and as we have noted in a prior opinion, generally speaking, there is a far less likelihood that a court will conclude that a right is a fundamental and vested one for purposes of applying the independent review standard where the matter "affects purely economic interests." (*JKH Enterprises, Inc. v. Department of Industrial Relations* (2006) 142 Cal.App.4th 1046, 1060 (*JKH Enterprises*); see also 1 Cal. Administrative Mandamus (Cont.Ed.Bar

3d ed. 2010) § 6.137, p. 269.) Agency decisions that "result in restricting a property owner's return on his property, increasing the cost of doing business, or reducing profits are considered impacts on economic interests, rather than on fundamental vested rights." (*E.W.A.P., Inc. v. City of Los Angeles* (1997) 56 Cal.App.4th 310, 325.) Thus, for instance, the substantial evidence standard has been found to apply for the review of agency decisions involving the application of a nuisance ordinance resulting in the reduction of the hours of operation of an adult bookstore (*id.* at p. 325); the required installation of a vapor recovery system to gasoline pumps that increased the cost of doing business (*Mobil Oil Corp. v. Superior Court* (1976) 59 Cal.App.3d 293, 305); the shutdown of a fourth new oil refinery due to permit violations, resulting in a reduction in the company's profits (*Standard Oil Co. v. Feldstein* (1980) 105 Cal.App.3d 590, 603-606); the denial of mobilehome park owners' rent increase requests under rent control laws (*San Marcos Mobilehome Park Owners' Assn. v. City of San Marcos* (1987) 192 Cal.App.3d 1492, 1502); the decision by the New Motor Vehicle Board upholding a manufacturer's termination of a dealership due to alleged breaches of a dealership agreement (*Kawasaki Motors Corp. v. Superior Court* (2000) 85 Cal.App.4th 200, 204); and the denial of an application by an adult club featuring nude entertainment for a conditional use permit to sell alcohol (*SP Star Enterprises, Inc. v. City of Los Angeles* (2009) 173 Cal.App.4th 459, 470).

In this instance, the Averys argue that they were entitled to independent review by the trial court because the Board's decision imposing a 10-year term had a substantial impact upon their fundamental vested rights, namely, their rights in the use permit. We reject that contention.

It cannot be disputed that a denial of a use permit or conditional use permit (CUP), where no previous permit existed, is reviewed under the substantial evidence standard. (*Saad v. City of Berkeley* (1994) 24 Cal.App.4th 1206, 1213; *Smith v. County of Los*

Angeles (1989) 211 Cal.App.3d 188, 199-200.) Likewise, there is little doubt that the revocation of an existing use permit generally constitutes a decision substantially affecting fundamental vested rights and, as such, is reviewed independently by the trial court. (*Malibu Mountains Recreation, Inc. v. County of Los Angeles* (1998) 67 Cal.App.4th 359, 367-368 (*Malibu Mountains*).)[10] And in an appropriate case where the effect of the agency's decision is the destruction of an existing business, a denial of an application to renew a CUP may be subject to independent review by the trial court. (*Goat Hill Tavern v. City of Costa Mesa* (1992) 6 Cal.App.4th 1519, 1530-1531 (*Goat Hill Tavern*).) The circumstances presented here fall squarely between the denial of a CUP in the first instance where no fundamental vested right has been substantially affected (*Saad/Smith*), and the revocation of an existing CUP where a fundamental vested right has, indeed, been substantially affected (*Malibu Mountains*).

The Averys rely on *Goat Hill Tavern*, *supra*, 6 Cal.App.4th 1519, *Malibu Mountains, supra*, 67 Cal.App.4th 359, and *San Benito Foods*, *supra*, 50 Cal.App.4th 1889, in support of their contention that the court below erred in concluding that the Board's decision was subject to a substantial evidence standard of review. None of these cases supports the Averys' argument.

Goat Hill Tavern concerned commercial property in which a business had been established in 1955, before the zoning had been enacted, and had been operating continuously since that time. (*Goat Hill Tavern*, *supra*, 6 Cal.App.4th at p. 1522.) The tavern operated as a legal nonconforming use, and in 1974 a CUP issued allowing for the addition of a beer garden. (*Ibid.*) The tavern was acquired in 1984 by one Ziemer, who spent $1,750,000 in refurbishing the business. (*Id.* at p. 1523.) He applied after-the-fact

[10] At oral argument, the County's counsel conceded this point.

for a permit, and was granted a CUP for a period of only six months. (*Ibid.*) The city ultimately refused to grant one of Ziemer's applications for renewal of the CUP (*ibid.*), and Ziemer sought a writ of mandamus to compel the city to renew the CUP. (*Id.* at p. 1525.) After concluding that the independent judgment test applied, the trial court granted the writ, holding that the city's decision was not supported by the evidence. (*Ibid.*)

The appellate court first acknowledged that "courts have rarely upheld the application of the independent judgment test to land use decisions." (*Goat Hill Tavern*, *supra*, 6 Cal.App.4th at p. 1527.) But the court held that "the rights affected by the city's refusal to renew Goat Hill Tavern's permit are sufficiently vested and important to preclude their extinction by a nonjudicial body." (*Ibid.*) Distinguishing several cases in which the courts held that no fundamental vested rights were affected (see *San Marcos Mobilehome*, *supra*, 192 Cal.App.3d 1492; *Standard Oil Co. v. Feldstein*, *supra*, 105 Cal.App.3d 590; and *Mobil Oil Corp. v. Superior Court*, *supra*, 59 Cal.App.3d 293), the *Goat Hill Tavern* court observed that "the courts held the administrative actions implicated purely economic interests because there were no contentions, nor evidence, that the actions would force the companies out of business or cause them to lose their property. The opposite is true here. The avowed purpose and result of the city's decision is to shut down Goat Hill Tavern." (*Goat Hill Tavern*, at p. 1528.) The court therefore held that it "[could]not conclude *on these unique facts* that Ziemer's right to continue operation of his business is not a fundamental vested right. This is not, as the city so strongly urges, a 'purely economic privilege.' It is the right to continue operating an established business in which he has made a substantial investment." (*Id.* at p. 1529, italics added.)

In *San Benito Foods*, *supra*, 50 Cal.App.4th at page 1892, the plaintiff filed an administrative mandamus action challenging an agency decision to suspend its food

processing license, but staying that suspension on condition that the plaintiff pay $7,560 to a company the agency determined had been damaged because of the plaintiff's wrongful refusal to process its tomatoes. The trial court employed the substantial evidence standard to review the decision. (*Id.* at p. 1895.) We concluded that the plaintiff held a fundamental vested right in the food processing license and that the trial court therefore erred in applying the substantial evidence standard. (*Id.* at p. 1897.) In so concluding, we rejected the argument that the substantial evidence test was applicable because the agency's decision had only an economic effect upon the plaintiff. (*Ibid.*)

Malibu Mountains involved a mandamus proceeding by the property owner to review a decision of the Los Angeles County Board of Supervisors revoking a CUP to operate a tennis ranch that had been issued nearly 20 years earlier in favor of the owner's predecessor in title. (*Malibu Mountains*, *supra*, 67 Cal.App.4th at pp. 362-363.) The trial court upheld the revocation, concluding that there was substantial evidence to support the decision. (*Id.* at p. 366.) The appellate court, relying in part on *Goat Hill Tavern*, *supra*, 6 Cal.App.4th 1519 (*Malibu Mountains*, at p. 368), concluded that the trial court had applied the wrong standard, holding that "the grant of a CUP with a subsequent reliance by the permittee creates a fundamental vested right that subjects a revocation to judicial review under the independent judgment test." (*Ibid.*; see also *id.* at p. 370.)[11]

Here, unlike in *Malibu Mountains*, *supra*, 67 Cal.App.4th 359, we are not dealing with the revocation of an existing use permit. Also, unlike in *Goat Hill Tavern* which

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[11] The Averys also rely on *Barber v. Long Beach Civil Service Com.* (1996) 45 Cal.App.4th 652 (*Barber*), in support of their contention that the court should have independently reviewed the Board's decision. *Barber* concerned the review of a civil service commission's decision to terminate a police officer for misconduct; it has no application here.

was decided on its own "unique facts" (*Goat Hill Tavern*, *supra*, 6 Cal.App.4th at p. 1529), we are not dealing with the denial of an application to renew a long-existing use permit with the consequence of "shut[ting] down" an established business. (*Id.* at p. 1528.) Moreover, unlike *San Benito Foods*, *supra*, *supra*, 50 Cal.App.4th 1889, we are not dealing with the suspension of a license. Rather, the Averys brought the mandamus proceeding to seek review of the Board's decision modifying the use permit. That modification clarified the specific legal uses for which the Property could be utilized. As such, the permit decision at most "result[ed] in restricting the owner's . . . return on the property, a reduction in profits, or an increase in the cost of doing business" for which the substantial evidence standard applied. (*Breakzone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205, 1244.) The modification also placed a 10-year time limit on the use permit. The Board decision specified that the use permit could be renewed or modified upon request. And at the hearing, one Board member stated (without dissent from any other member) that obtaining a renewal of the "use permit in 10 years, as long as [the Averys are] in compliance, should not be a big issue. . . . [¶] . . . [¶] The use permits are there to make sure that folks do what we ask them to do [under the permits] on properties . . . ." The administrative decision was therefore not of the same Draconian nature as occurred in *Malibu Mountains*, *Goat Hill Tavern*, or *San Benito Foods*. And the challenged Board decision, unlike the one in *Goat Hill Tavern*, did not effectively destroy an existing business.

We therefore conclude that the Board decision modifying the use permit was not an act that substantially affected fundamental vested rights under *Bixby*, *supra*, 4 Cal.3d 130. Therefore, the court did not err in applying the substantial evidence standard in its review of the administrative decision.

B. *Review of the Board's Decision*

1. *The Averys' allegations*

In the petition for writ of mandate (first cause of action), the Averys claimed that the Board of Supervisors' decisions concerning the use permit were invalid. Specifically, they claimed that the Board's October 2003 decision granting the Averys' appeal but referring the matter back to the Planning Commission for further evaluation of the use permit was invalid because (1) the Board's findings were not supported by the evidence, including its finding that the Planning Commission's prior revocation of the use permit was founded on substantial evidence; (2) the Board did not have jurisdiction to order further hearings concerning the revocation, modification, or reaffirmation of the use permit; (3) the conclusion that the Planning Commission had acted appropriately was "arbitrary and capricious" and in conflict with its order granting the Averys' appeal; and (4) there was insufficient support for the Board's order requiring further hearings to reevaluate the use permit. The Averys further challenged in their writ of mandate the Board's April 2006 decision denying the Averys' appeal and modifying the use permit, contending, inter alia, that the (1) the findings cited by the Board were not supported by the evidence and the purported reasons given for the modification were not true; (2) the Board acted in excess of its jurisdiction by modifying the use permit "despite the fact that [the Averys] ha[ve] vested [their] rights in said permit and [are] in substantial compliance with its conditions"; (3) the Board's findings of the existence of violations of permit conditions were "vague and ambiguous"; and (4) the Board's "findings [were] unsupported, insufficient and improper as a basis for justification to modify [the Averys'] vested use permit." The Averys alleged that they had exhausted their administrative remedies, and that they would be irreparably harmed if the Board's decision were not stayed, in that the Averys would be forced to engage in further efforts "in responding to

unjustified administrative proceedings and further delays and/or refusals to act on [the Averys] legitimate request for permits to use the property."

2. *Excess of jurisdiction*

The Averys alleged in the Complaint in support of mandamus that "[t]he Board ha[d] acted in excess of its jurisdiction . . . ." They thereby invoked one of the potential challenges to an administrative decision specified section 1094.5, subdivision (b). Although the Averys raise this issue again on appeal, they do so without citation to any authority and in the most cursory of fashions, stating simply that "[t]he Board acted in excess of its jurisdiction in that it ordered modification of [their] use permit despite the fact that [they] vested their rights in the use permit and are in substantial compliance with its conditions."

"It is a fundamental rule of appellate review that the judgment appealed from is presumed correct and ' " 'all intendments and presumptions are indulged in favor of its correctness.' " [Citation.]' [Citation.] An appellant must provide an argument and legal authority to support his contentions. This burden requires more than a mere assertion that the judgment is wrong. 'Issues do not have a life of their own: If they are not raised or supported by argument or citation to authority, [they are] . . . waived.' [Citation.] It is not our place to construct theories or arguments to undermine the judgment and defeat the presumption of correctness. When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived. [Citation.]" (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852, fn. omitted.)

Here, the Averys' bald statement that the Board acted in excess of its jurisdiction without argument or citation of authority does not preserve the issue. Furthermore, since the County zoning ordinance specifically provides that the Planning Commission may revoke, modify, or reaffirm a land use permit either on its own motion or at the Board's

direction, and such a decision is subject to appeal to the Board, there is no merit in any event to the Averys' claim that the Board acted in excess of its jurisdiction. (See County of Santa Clara Zoning Ordinance, § 5.20.210.)[12]

Accordingly we reject the Averys' contention that the mandamus petition should have been granted on the basis that the Board acted in excess of its jurisdiction when it modified the use permit.[13]

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[12] "On its own motion or at the direction of the Board of Supervisors, the Planning Commission may hold a hearing to revoke or modify any discretionary land use permit or approval granted pursuant to this Zoning Ordinance. No formal application is required for the hearing. [¶] A. *Findings.* The Planning Commission may revoke or modify any active land use permit on the basis of evidence and testimony in the administrative record, including evidence submitted at the hearing, if it finds any of the following: [¶] 1. The permit was obtained by fraud; [¶] 2. The permit conditions, including the permitted use of the property and any mitigation measures included as part of an approved mitigation monitoring or reporting program, have been or are being violated; [¶] 3. A public health or safety nuisance has been created by the exercise of the permit, or by changed circumstances from when the permit was approved; or [¶] 4. An inadvertent error or omission made in establishing the original conditions requires modifications or additions to the permit conditions. [¶] B. *Revocation, modification, or reaffirmation of permit.* If the Planning Commission makes one or more of the above findings it may revoke the permit, change conditions or add new conditions as necessary to correct problems or violations relating to its use. The Commission may also modify conditions or add new conditions to preserve the integrity and character of the zoning district or to secure the general purposes of the Zoning Ordinance and the General Plan. [¶] If the Planning Commission does not make any of the above findings, it shall reaffirm the permit. [¶] . . . [¶] D. *Appeal.* A decision to revoke, modify or reaffirm any land use permit or approval may be appealed to the appropriate appeal authority, in accordance with the appeal procedure of Chapter 5.30." (County of Santa Clara Zoning Ordinance, § 5.20.210.)

[13] In its respondent's brief, the County argues that the Averys received a fair trial in the process leading to the administrative decision challenged here. Since the Averys do not make the argument that the modification of the use permit occurred without their having received "a fair trial" (§ 1094.5, subd. (b)), we need not address this strawman argument.

3. *Abuse of discretion*

The Averys argue that the Board abused its discretion because the decision to modify the use permit was "not supported by the findings and the findings [were] not supported by the evidence."[14] The County responds cursorily that there was substantial evidence to support the Board's decision and that the stated findings supported that decision.

As we have concluded (see pt. II.A.2., *ante*), the trial court properly concluded that in its evaluation of whether the Board prejudicially abused its discretion within the meaning of section 1094.5, subdivision (b), the substantial evidence standard applied. Our inquiry on appeal is similarly whether the agency's findings were supported by substantial evidence. (*JKH Enterprises, supra*, 142 Cal.App.4th at p. 1058.) In so doing, the administrative decision is presumed correct (*Patterson Flying Service, supra*, 161 Cal.App.4th at p. 419); the agency's findings are presumed to have been supported by the administrative record (*JKH Enterprises*, at p. 1062); and the appellant challenging the findings has the burden of establishing that the findings are not supported by the record (*ibid.*). We consider the whole record in determining whether there is substantial evidence in the record to support the findings. (*Young v. Gannon* (2002) 97 Cal.App.4th 209, 225.)

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[14] In their petition for writ of mandamus, the Averys also challenged the Board's October 2003 decision granting the Averys' appeal, determining that the Planning Commission had acted properly in revoking the use permit, and ordering further hearings before the Commission concerning revocation, modification, or reaffirmation of the use permit. The Averys, however, do not specifically argue on appeal that their petition should have been granted with respect to their challenge of the October 2003 Board decision. We therefore conclude that any such potential challenge is abandoned. (*Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 216, fn. 4.)

The Supreme Court has held that an agency's adjudicatory decision that is subject to judicial review under section 1094.5 must include findings in support of that decision. (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515 (*Topanga*).) The high court explained that because section 1094.5, subdivision (b) "defines 'abuse of discretion' to include instances in which the administrative order or decision 'is not supported by the findings, *or* the findings are not supported by the evidence' " (*Topanga*, at p. 515), "implicit in section 1094.5 is a requirement that the agency which renders the challenged decision must set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order. . . . By focusing . . . upon the relationships between evidence and findings and between findings and ultimate action, the Legislature sought to direct the reviewing court's attention to the analytic route the administrative agency traveled from evidence to action. In so doing, we believe that the Legislature must have contemplated that the agency would reveal this route." (*Ibid.*) These findings, however, "do not need to be extensive or detailed." (*Environmental Protection Information Center v. California Dept. of Forestry & Fire Protection* (2008) 44 Cal.4th 459, 516.) " ' "[W]here reference to the administrative record informs the parties and reviewing courts of the theory upon which an agency has arrived at its ultimate finding and decision it has long been recognized that the decision should be upheld if the agency 'in truth found those facts which as a matter of law are essential to sustain its . . . [decision].' " ' [Citation.]" (*Id.* at pp. 516-517.)

Here, the Averys make broad, generalized arguments in their attack of the Board's decision and its findings. They contend that the Board's action modifying the use permit "was not supported by the evidence" and that "the evidence was to the contrary." The Averys state that the Board resolution was "not supported by the findings and the findings [were] not supported by the evidence." They make the sweeping assertions that the Board's (1) finding that modifications were necessary because " 'the permit

conditions' including the permitted use of the property have been or are being violated . . . [was] inadequate and unsupported by the evidence in the record"; (2) finding that the "modified conditions are necessary 'to correct problems or violations relating to the use and condition of the property, to preserve the integrity and character of the zoning district, or to secure the general purposes of the zoning ordinance and general plan' was vague and conclus[o]ry"; (3) finding that "modifications 'will eliminate any perceived ambiguity on the part of the property owners regarding precisely what uses are allowed on the property and the conditions that must be met' [was] vague, ambiguous, and, in all events not supported by the evidence in the record"; (4) finding that " 'the new and modified conditions are necessary to correct problems or violations relating to the use and condition of the property, to preserve the integrity and character of the zoning district, or to secure the general purposes of the zoning ordinance and general plan' [was] vague, ambiguous and, in all events not supported by the evidence in the record."

These general contentions, unsupported by further discussion, legal analysis, citation to authority, or citation to the record, are patently insufficient to meet the burden of proof the Averys shoulder as appellants challenging the Board's decision and the findings in support of it. (*Young v. Gannon*, *supra*, 97 Cal.App.4th at p. 225.) Indeed, we may choose to deem the arguments forfeited because of the absence of any such development or elaboration of them. (*Niko v. Foreman* (2006) 144 Cal.App.4th 344, 368 [undeveloped argument may be treated by appellate court " ' "as waived, and [may] pass it without consideration" ' "]; *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246 [same].)

Even assuming the Averys did not forfeit their challenge, we nonetheless find it to be without merit. There was substantial evidence to support the findings recited by the Board in support of its decision to modify the use permit. The Board concluded that there were past or current violations of the permit conditions; modification of the use permit would "eliminate any perceived ambiguity" as to what uses the Averys could

make of the property; and the modifications were "necessary to correct problems or violations relating to the use and condition of the [p]roperty" and to promote general purposes of the zoning laws. As seen from a review of the factual background recited, *ante*, there was a lengthy history of sporadic uses of the property that were not expressly authorized under the use permit, violations of various conditions of the use permit, and disputes concerning permitted uses of the property. This history—as documented in the staff report submitted to the Board prior to its 2006 decision—included (without limitation) evidence that (1) at one time in or before 1993, there was a bus located on the property that had been illegally used as a dwelling; (2) in or about 1999, there were land use violations involving automobile sales and auctions; (3) because of an enforcement action brought by the County regarding automobile sales and auctions, the Averys in 1999 sought a zoning interpretation, the Planning Commission determined that automobile sales and auctions were not permitted uses under the existing use permit, and the Commission advised the Averys to apply for a modification of the permit if they wanted to include these additional uses, an application the Averys never made; (4) when the Commission in 2001 commenced proceedings concerning the possible revocation of the use permit, automobile auctions, sales, repair, and junkyard activities—uses that the County had previously advised the Averys was not permitted—were still being conducted on the property; (5) when the Commission in 2001 considered revoking and ultimately voted to revoke the use permit, there were conditions associated with the ASA and use permit—regarding unapproved signs, off-street parking spaces, paving and striping of parking, bumper guards for parking, an unauthorized driveway access to the property, and landscaping along the Monterey Road frontage—that were being violated; (6) in late 2002 and in mid-2003, field inspections by the County disclosed the existence of unauthorized signs on the property; (7) the unauthorized driveway access previously noted by the County in 2001 was still in existence in August 2003; (8) as of 2003, there

were uses being made of the property (auto body repair and painting, mechanical repair to automobiles, outdoor storage of well drilling equipment, and storage of hundreds of salvaged and disabled vehicles) not allowed under the use permit; (9) based upon prior inspections of the property in late 2004 and early 2005, there continued to be unauthorized uses of the property, namely, automobile body and engine repairs in "Bldg #1," automobile body repair and painting in "Bldg #3," and the storage of approximately 200 operable and inoperable cars near "Bldg #4" at the rear of the property; (10) based upon prior inspections of the property in late 2004 and early 2005, the unauthorized driveway access previously noted still existed; and (11) as of 2005 (when the Planning Commission's proceeding to consider revoking, modifying, or reaffirming the use permit was pending), there was a building code violation present with respect to the storage and use of unpermitted hazardous materials.

We conclude further that the Board's decision was supported by its findings as described above. Those findings, under County of Santa Clara Zoning Ordinance, § 5.20.210 (see fn. 12, *ante*), provided specific authority for the Planning Commission's action to modify the use permit, which action was affirmed by the Board. And while the Averys contend that the Board's findings were vague, ambiguous, or too general, thereby rendering the decision unlawful, we disagree. The findings here adequately "bridge the analytic gap between the raw evidence and ultimate decision" of the Board. (*Topanga*, *supra*, 11 Cal.3d at p. 515.) We therefore find that there was substantial evidence in support of the Board's decision and reject the Averys' claim that the Board committed prejudicial abuse of discretion within the meaning of section 1094.5, subdivision (b), in modifying the use permit.

IV. *Summary Adjudication of Second and Third Causes of Action*

A. *Standard of Review*

"A motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty." (§ 437c, subd. (f)(1).) Like summary judgment, the moving party's burden on summary adjudication is to establish evidentiary facts sufficient to prove or disprove the elements of a claim or defense. (§ 437c, subds. (c), (f).) The moving party "bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850, fn. omitted.) A defendant moving for summary judgment must " 'show[ ] that one or more elements of the cause of action . . . cannot be established' by the plaintiff." (*Id.* at p. 853, quoting § 437c, subd. (*o*)(2).) A defendant meets its burden by presenting affirmative evidence that negates an essential element of the plaintiff's claim. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.) Alternatively, a defendant meets its burden by submitting evidence "that the plaintiff does not possess, and cannot reasonably obtain, needed evidence" supporting an essential element of its claim. (*Aguilar*, at p. 855.)

Since both summary judgment and summary adjudication motions involve pure questions of law, we review the granting of summary judgment or summary adjudication de novo to ascertain from the papers whether there is a triable issue of material fact. (*Chavez v. Carpenter* (2001) 91 Cal.App.4th 1433, 1438; *Travelers Casualty & Surety Co. v. Superior Court* (1998) 63 Cal.App.4th 1440, 1450.) In doing so, we "consider[ ] all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports. [Citation.]" (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.)

In our independent review of the granting of summary judgment, we conduct the same procedure employed by the trial court. We examine (1) the pleadings to determine the elements of the claim, (2) the motion to determine if it establishes facts justifying judgment in the moving party's favor, and (3) the opposition—assuming movant has met its initial burden—to "decide whether the opposing party has demonstrated the existence of a triable, material fact issue. [Citation.]" (*Chavez v. Carpenter*, *supra*, 91 Cal.App.4th at p. 1438; see also *Burroughs v. Precision Airmotive Corp.* (2000) 78 Cal.App.4th 681, 688.) We need not defer to the trial court and are not bound by the reasons in its summary judgment ruling; we review the ruling of the trial court, not its rationale. (*Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 878.)

B. *The Inverse Condemnation Claim*

1. *Allegations of the Complaint*

The second cause of action of the Complaint was captioned as a claim for inverse condemnation. The Averys alleged that the County "refused to process applications for lawful businesses on [the p]roperty on the basis of the Planning Commission action which was timely appealed by [the Averys]."[15] In connection with this allegation, they referred to four paragraphs of the general allegations of the Complaint, which refer to conduct by the County in allegedly (1) failing to process the cellular tower application until uses that were existing for the property were determined to be consistent with those allowed under the use permit; (2) refusing to process applications for legitimate uses of

[15] There is ambiguity in the Complaint insofar as it references "the Planning Commission action which was timely appealed by [the Averys]." It is unclear whether the Averys are referring to the August 2001 decision in which the Commission revoked the use permit, the September 2005 decision in which the Commission modified the use permit, or both decisions.

the property while the Averys' appeal of the 2001 revocation of the use permit was pending; (3) causing an existing auto auction business to relocate away from the property because it was not a permitted use; and (4) intentionally delaying the processing of the cellular tower application. The Averys averred that the County's actions were "without legal basis and result[ed] in a taking and/or damaging of [their p]roperty in violation of [their] rights under the Fifth and Fourteenth Amendments of the United States Constitution, and Article I, Section 19, of the California Constitution."

2. *Insufficiency of appellate argument*

The Averys contend that the court erred in granting the County's motion for summary adjudication of the second cause of action for inverse condemnation. Their brief on this issue consists of little more than a replication of seven pages of their opposition to the summary adjudication motion. (See *Sebago, Inc. v. City of Alameda* (1989) 211 Cal.App.3d 1372, 1387-1388 [criticizing practice of using copied trial submission in appellate briefs].) Even more troubling from the standpoint of our review of the claim of error is the absence of argument in support of the contention that the trial court erred in summarily disposing of the inverse condemnation claim. While there is a fairly lengthy discussion of the law claimed to be applicable, the Averys make no attempt to describe how the facts as presented in the motion apply to the law they cite to yield the conclusion that their claim has merit. Indeed, the Averys' brief contains no record cites whatsoever to any evidence presented in connection with the motion or opposition that suggests that a triable issue existed. Rather, the Averys' brief consists of the most generalized statements without amplification. For instance, they argue without elaboration that the County's actions are "a violation of [their] rights under the Fifth and Fourteenth Amendments to the United States Constitution[,] including rights to procedural and substantive due process, as well as their civil rights." Other unsupported

statements in the Averys' brief—such as that the County engaged in a "course of conduct [that was] arbitrary, [and] unfair"—similarly do nothing to advance their position.

Although the standard of review is de novo, the scope of that review is limited to issues that have been adequately raised and briefed. (*Shamsian v. Atlantic Richfield Co.* (2003) 107 Cal.App.4th 967, 973, fn. 3.) We may therefore choose to deem the legal issues concerning the propriety of granting summary adjudication of the second cause of action—which are raised by the Averys in their brief but not developed to any meaningful extent—as having been forfeited. (*Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6; see also *Niko v. Foreman*, *supra*, 144 Cal.App.4th at p. 368.)

During oral argument, in response to questioning by this court, the Averys' counsel clarified that his position was that it was the modification that resulted in a 10-year term for the use permit that was the act that constituted a taking. He explained that this was the only aspect of the modification that he claimed to be actionable and that the inclusion of a 10-year term was the triable issue of fact that should have resulted in the denial of the summary adjudication motion. Counsel for the County responded at oral argument that there was no dispute that the modification resulted in the imposition of a 10-year term, and that thus the matter was not a disputed issue of fact. The County's counsel replied further that the mere inclusion of a term for the use permit did not constitute a taking that would support an inverse condemnation claim.

We will address below the merits of the Averys' claim that summary adjudication of their inverse condemnation claim was error because they presented sufficient evidence of a taking of their property, notwithstanding the Averys' failure to meaningfully address the merits of their challenge to summary adjudication of the inverse condemnation claim. In so doing, we will consider not only the contentions highlighted in oral argument, but also other contentions raised by the pleadings and motion papers.

3. *Takings claim*

Inverse condemnation is "a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted." (*United States v. Clarke* (1980) 445 U.S. 253, 257.) Under the Takings Clause of the Fifth Amendment of the United States Constitution, private property shall not "be taken for public use, without just compensation." The Fifth Amendment is made applicable to the states through the Fourteenth Amendment. (*Lingle v. Chevron U.S.A. Inc.* (2005) 544 U.S. 528, 536 (*Lingle*).) "The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property. [Citations.]" (*Id.* at p. 537.)

In *Pennsylvania Coal Co. v. Mahon* (1922) 260 U.S. 393 (*Mahon*), the Supreme Court recognized that "government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster . . . ." (*Lingle*, *supra*, 544 U.S. at p. 537.) Justice Holmes noted that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." (*Mahon*, *supra*, at p. 415.) The Supreme Court in *Penn Cent. Transp. Co. v. New York City* (1978) 438 U.S. 104, 124 (*Penn Central*), acknowledged that there is no " 'set formula' " for determining whether property regulation will be deemed a taking, but enunciated three factors important to that determination: "[1] The economic impact of the regulation on the claimant and, [2] particularly, the extent to which the regulation has interfered with distinct investment-backed expectations . . . [and 3] the character of the governmental action. A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, [citation], than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." In order to find a regulatory taking, "neither a physical appropriation nor a public use" is required. (*Tahoe-Sierra*

Preservation Council, Inc. v. Tahoe Regional Planning Agency (2002) 535 U.S. 302, 326.) And a regulatory taking may occur regardless of whether the taking is permanent or temporary. (*First Lutheran Church v. Los Angeles County* (1987) 482 U.S. 304, 318.)

The court has since reiterated the importance of applying *Penn Central*'s three-factor analysis in evaluating regulatory taking cases. (See *Lingle, supra,* 544 U.S. at p. 538; *Palazzolo v. Rhode Island* (2001) 533 U.S. 606, 617.) The three *Penn Central* inquiries "share a common touchstone. Each aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain. Accordingly, each of these tests focuses directly upon the severity of the burden that government imposes upon private property rights." (*Lingle, supra,* at p. 539.) The presence or absence of a regulatory taking is determined from "the character of the action and on the nature and extent of the interference with rights in the parcel as a whole . . . ." (*Penn Central, supra,* 438 U.S. at pp. 130-131.) The fact that the regulatory action has resulted in a diminution in the property's value, of itself, does not yield the conclusion that there has been a taking. (*Id.* at p. 131.) And "[m]ere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are 'incidents of ownership. They cannot be considered as a "taking" in the constitutional sense.' [Citations.]" (*Agins v. City of Tiburon* (1980) 447 U.S. 255, 263, fn. 9 (*Agins*), overruled on another ground in *Lingle,* at pp. 531-532.) Thus, for example, an entity's mistaken assertion of jurisdiction and resultant development delays do not constitute a regulatory taking. (*Landgate, Inc. v. California Coastal Com.* (1998) 17 Cal.4th 1006, 1021.)

Here, according to the allegations of their Complaint, the Averys apparently based their inverse condemnation claim on the County's alleged delay and/or refusal to process the cellular tower application and on the alleged refusal to process other applications for legitimate uses of the Property. In their opposition to the motion, the Averys

characterized their claim more broadly as being based upon the County's "interference with [their] use permit" that was a violation of their constitutional rights. And on appeal, the Averys contend that "[t]he modifications to [their] use permit have taken property rights." Regardless of how the Averys' claim is characterized, based upon the record presented in connection with the motion, the court did not err in granting summary adjudication.

Any claim for inverse condemnation that is based upon any alleged delay or refusal by the County to process the cellular tower application cannot be asserted again by the Averys. In the prior suit, the Averys made the identical claim that the County, by refusing to process the cellular tower application due to the Planning Commission's revocation of the use permit, had resulted in a taking or damaging of their property. (*Avery v. County of Santa Clara* (Jul. 28, 2008, H033157) [nonpub. opn.], pp. 5, 18.) On appeal, we affirmed the judgment entered on the summary judgment order in favor of the County, reasoning in part that the Averys had not presented a viable inverse condemnation claim based upon any delay in the processing of the cellular tower application. (*Avery v. County of Santa Clara* (Jul. 28, 2008, H033157) [nonpub. opn.], p. 19.) "The doctrine of res judicata precludes parties or their privies from relitigating a cause of action that has been finally determined by a court of competent jurisdiction. Any issue necessarily decided in such litigation is conclusively determined as to the parties or their privies if it is involved in a subsequent lawsuit on a different cause of action. [Citations.] The rule is based upon the sound public policy of limiting litigation by preventing a party who has had one fair trial on an issue from again drawing it into controversy." (*Bernhard v. Bank of America* (1942) 19 Cal.2d 807, 810-811; see also § 1908.) "Matters decided by the Courts of Appeal are entitled to res judicata effect." (*Beckstead v. International Industries, Inc.* (1982) 127 Cal.App.3d 927, 934; see also *Grable v. Grable* (1960) 180 Cal.App.2d 353, 359.) The question having been finally

determined in the prior suit, the Averys' takings claim based upon the County's alleged inaction or delay in the processing of the cellular tower application is barred by principles of res judicata.

The Averys' inverse condemnation claim based upon the County's alleged refusal to process other land use applications because of the Planning Commission's 2001 revocation of the use permit is likewise barred. This claim was made in the prior suit, and we concluded on appeal that it was without merit. (*Avery v. County of Santa Clara,* (Jul. 28, 2008, H033157) [nonpub. opn.], pp. 19-20.)

Furthermore, the Averys' inverse condemnation claim fails insofar as it was founded on the Board's 2006 action modifying the use permit. There was no showing that the County's actions in reviewing the status of the use permit and compliance issues associated therewith "interfered with distinct investment-backed expectations" (*Penn Central*, *supra*, 438 U.S. at p. 124) of the Averys with respect to their use of the property. There was no evidence that the Averys suffered the "functional[] equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." (*Lingle*, *supra*, 544 U.S. at p. 539.) The modification of the use permit did not deprive the Averys of their ability to use the property for commercial gain as they had done prior to the Board's action. While it is apparent that the modification clarified the permitted uses of the property—thereby excluding certain prior uses over which there had been controversies (e.g., automobile auctions, sales, and repairs)—this regulatory action did not constitute a taking. Moreover, contrary to the Averys' contention, the modification's imposition of a 10-year term for the use permit, absent any showing that it deprived the Averys of their ability to use their property, was not a taking. Applying the three *Penn Central* factors here—given the absence of a showing of significant economic impact, the lack of direct interference "with investment-backed expectations (*ibid.*), and in light of the character of the Board's action—there was simply

no factual support for a claim that the Board's modification of the use permit constituted a regulatory taking.

4. *Due process, equal protection, civil rights*

In their opposition to summary adjudication of the inverse condemnation claim, the Averys briefly asserted that the County's conduct in interfering with their use permit abridged their constitutional rights, "including rights to procedural and substantive due process, as well as their civil rights." They also asserted that the County's conduct violated their rights, including their right to "equal protection under the law." The Averys repeat these conclusory contentions verbatim on appeal. These assertions are without merit.

First, the Averys do not develop the arguments with citations to the record or analysis demonstrating the evidentiary basis for the claims. Their unsupported incantations—that they have suffered violations of their rights to substantive due process, procedural due process, and equal protection, and that the County's conduct was a violation of their civil rights—do not preserve the issues for appeal. We need not address appellate arguments that have not been adequately developed and therefore not preserved. (*Niko v. Foreman, supra,* 144 Cal.App.4th at p. 368.)

Second, it is readily apparent that each of these contentions is intertwined with the Averys' claim that the County's conduct relative to the use permit constituted a taking of their property for which they are entitled to damages for inverse condemnation. As we have discussed, *ante*, that claim is without merit.

The court properly concluded that there was no triable issue of material fact as to the second cause of action for inverse condemnation. Accordingly, the County's motion for summary adjudication of that claim was properly granted.

C. *Declaratory Relief Claim*

The Averys alleged in the third cause of action that there was an actual controversy between the parties that required resolution. They sought declaratory relief that they had vested rights in the use permit, the County's actions in singling the Averys out were unjustified, and that the County had misused its regulatory power in a manner that had resulted in their property being damaged or taken.

The summary judgment procedure is appropriate to dispose of declaratory relief claims. (*Allis-Chalmers Corp. v. City of Oxnard* (1981) 126 Cal.App.3d 814, 818, fn. 3.) As Division One of the Fourth District Court of Appeal has explained, " ' " '[T]he propriety of the application of [summary judgment to] declaratory relief lies in the trial court's function to render such a judgment when only legal issues are presented for its determination.' " [Citations.]' [Citation.] When summary judgment is appropriate, the court should decree only that [the] plaintiffs are not entitled to the declarations in their favor. [Citations.] Thus, in a declaratory relief action, the defendant's burden is to establish the plaintiff is not entitled to a declaration in its favor. It may do this by establishing (1) the sought-after declaration is legally incorrect; (2) undisputed facts do not support the premise for the sought-after declaration; or (3) the issue is otherwise not one that is appropriate for declaratory relief." (*Gafcon, Inc. v. Ponsor & Associates* (2002) 98 Cal.App.4th 1388, 1401-1402.) Further, "declaratory relief does not lie in a case in which a complaint makes no case on the merits and would merely produce a useless trial. [Citation.]" (*People v. Ray* (1960) 181 Cal.App.2d 64, 67.) An appellate court reviews a trial court's determination of whether declaratory relief is "necessary or

proper" under section 1061 for abuse of discretion. (*Filarsky v. Superior Court* (2002) 28 Cal.4th 419, 433.)[16]

The court below concluded in part that the declaratory relief claim was redundant to the Averys' inverse condemnation cause of action. It also reasoned that "[t]o the extent [that] the action can be read as challenging the validity of the underlying administrative decisions as well, it would also be redundant of the petition for writ of mandate." Finally, the court, citing *Rezai v. City of Tustin* (1994) 26 Cal.App.4th 443, 448-449 (*Rezai*), reasoned that declaratory relief is not the proper mechanism for challenging an administrative decision. In *Rezai*, the court affirmed a judgment entered in favor of the defendant municipality after the granting of judgment on the pleadings, holding, among other things, that the declaratory relief claim based upon the municipality's denial of a CUP was not proper. "Usually, 'a proceeding [for a writ of administrative mandate] under Code of Civil Procedure section 1094.5 is the exclusive remedy for judicial review of the quasi-adjudicatory administrative action of the local-level agency. [Citation.] Unless a party seeks a declaration a statute or ordinance controlling development is facially unconstitutional as applied to all property governed and not to a particular parcel of land, an action for declaratory relief may not be had. [Citations.] An action for declaratory relief is not appropriate to review the validity of an administrative decision. [Citations.] Rather, the proper method to challenge the validity of conditions imposed on a building permit is administrative mandamus under Code of Civil Procedure section 1094.5. [Citations.]' " (*Id.* at p. 448.)

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[16] "The court may refuse to exercise the power [to issue a judicial declaration of the rights and duties of the parties] granted by this chapter in any case where its declaration or determination is not necessary or proper at the time under all the circumstances." (§ 1061.)

Clearly, the request for a judicial declaration that the County's actions effected a taking of the property inferred that the Averys' sought a finding that their inverse condemnation claim was meritorious. Since summary adjudication of that claim was proper, the trial court did not abuse its discretion by refusing to exercise its power under section 1061 because its declaration or determination was "not 'necessary or proper at the time under all the circumstances.' " (See *DeLaura v. Beckett* (2006) 137 Cal.App.4th 542, 545.) And to the extent that the third cause of action constituted a challenge of the County's actions, including the Board's modification of the use permit, we agree with the trial court that under *Rezai, supra*, 26 Cal.App.4th at pages 448-449, the declaratory relief cause of action was not maintainable. Accordingly, summary adjudication of the third cause of action was proper.

DISPOSITION

The judgment entered on the denial of the petition for writ of mandate and the order granting summary adjudication in favor of the County and the individual defendants is affirmed.

_____
Duffy, J.

WE CONCUR:

_____
Bamattre-Manoukian, Acting P.J.

_____
McAdams, J.