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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

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| NEFTALI CANDELARIO RIVERA et al.,<br>Plaintiffs and Appellants,<br>v.<br>COUNTY OF SOLANO et al.,<br>Defendants and Respondents. | A133616<br><br>(Solano County<br>Super. Ct. No. FCS038224) |

Aggrieved by a county ordinance limiting the number of roosters that may be kept in a single parcel, plaintiffs, longtime poultry hobbyists, sued Solano County and its Board of Supervisors (County), as well as the individual members of the Board of Supervisors (Board) (collectively defendants), for declaratory relief, inverse condemnation, regulatory taking, violation of civil rights, and injunctive relief. On appeal, plaintiffs claim the trial court erred in entering judgment in favor of the County and the Board members after sustaining the defendants' demurrer without leave to amend. We affirm.

## I. FACTUAL AND PROCEDURAL BACKGROUND

In 2001, plaintiffs purchased an 80-acre parcel (the property) of agriculturally zoned land in Dixon, with the express purpose of raising chickens. For the next 10 years at the property, plaintiffs raised "chickens for hobby, pleasure, show, poultry, eggs, and [resale]." Plaintiffs housed 60 roosters and 40 hens on the property, which complied with the then-existing land-use regulations permitting up to 100 roosters or " 'crowing fowl' " per parcel.

On April 26, 2011, the County adopted Ordinance No. 2011-1719 (Ordinance), reducing the number of roosters or " 'crowing fowl' " from 60 to four. The stated purpose of the Ordinance is "to limit the number of roosters that may be kept in a single parcel, to eliminate the potential for a public nuisance, illegal cockfighting and the raising of birds to be used for cockfighting and for the protection of the health and safety of the residents of Solano County." The Ordinance expressly states that it does "not apply to commercial poultry ranches whose primary commodity is the production of eggs or meat for sale as permitted by the County . . . or to legitimate poultry hobbyists as approved in writing by the Agricultural Commissioner . . . ." The Ordinance further provides that the "Agricultural Commissioner may establish written regulations and standards necessary to carry out the intent of this chapter and may condition any approval based on compliance with the written regulations and standards."

On July 20, 2011, plaintiffs filed a complaint against the County and the Board members, alleging the Ordinance was facially invalid and invalid as applied to plaintiffs. Plaintiffs sued the County and the Board members for inverse condemnation and regulatory taking. Plaintiffs sought declaratory relief and injunctive relief against both the County and the Board members. As to the County only, plaintiffs alleged an additional cause of action for violation of civil rights.

Plaintiffs alleged the Ordinance was an unconstitutional taking of their property under the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution and sections 1 and 19 of article I of the California Constitution; the Ordinance as applied to plaintiffs resulted in an unreasonable interference with the use of their property that completely deprived plaintiffs of their beneficial use of the property; and the Ordinance was enacted without following the proper statutory procedures and was preempted by state nuisance law. As to the County, plaintiffs alleged the Ordinance deprived plaintiffs of substantive and procedural due process under the state and federal constitutions.

Defendants demurred to the complaint on the grounds that: (1) the Board members were entitled to legislative immunity with regard to all causes of action; (2) claims for inverse condemnation, regulatory taking, declaratory relief, and violation

of civil rights each failed because they were not ripe; and (3) there were no facts to support a claim for injunctive relief.[1]

The trial court agreed with defendants and sustained the demurrer as to all causes of action without leave to amend. The court concluded that the Board members were entitled to legislative immunity as to all causes of action against them. As to the causes of action for inverse condemnation, regulatory taking, violation of civil rights, and injunctive relief, the trial court concluded that these claims were not ripe for adjudication because plaintiffs had failed to plead facts establishing a "prerequisite . . . final decision regarding the application of the regulation to the property at issue" and, even if a taking had occurred, plaintiffs failed to establish a constitutional violation as they did not plead facts to show that they had "been denied just compensation for the taking." With respect to the claim for declaratory relief, the trial court further ruled that while "a declaratory relief action may be available before there has been an actual invasion of rights, there is no actual controversy if the posture of a case may require a court to speculate about unpredictable future events in order to evaluate the merits of the parties' claims." In so ruling, the trial court concluded that there would be no actual controversy for adjudication until and unless the Agricultural Commissioner refused to approve a variance for plaintiffs as " 'legitimate poultry hobbyists' " under the terms of the Ordinance. Finally, the court determined the demurrer should be sustained without leave to amend because there was nothing in the record to suggest that plaintiffs had either sought approval from the Agricultural Commissioner or compensation from the County for the "perceived regulatory taking."

The trial court dismissed the complaint and entered judgment in favor of defendants. Plaintiffs timely appealed.

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[1] Inasmuch as plaintiffs have failed to address their claim for injunctive relief in their appellate briefs, any issue regarding this cause of action has been forfeited on appeal. (See *Sunset Drive Corp. v. City of Redlands* (1999) 73 Cal.App.4th 215, 226.)

## II. DISCUSSION

### *A. Standard of Review*

"When reviewing an order sustaining a demurrer, we review the trial court's ruling de novo, exercising our independent judgment to determine whether the complaint states a cause of action under any legal theory. [Citation.] We accept as true the properly pleaded allegations of facts in the complaint, but not the contentions, deductions or conclusions of fact or law. [Citation.]" (*Ochs v. PacifiCare of California* (2004) 115 Cal.App.4th 782, 788.)

A challenge to the facial validity of an ordinance is reviewed de novo. (*Palos Verdes Shores Mobile Estates, Ltd. v. City of Los Angeles* (1983) 142 Cal.App.3d 362, 368.) All presumptions favor the validity of an ordinance. The court may not declare it invalid unless it is clearly so. (*Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 814-815.)

### *B. Allegations of an Unconstitutional Taking* (*Second, Third and Portion of First and Fourth Causes of Action for Inverse Condemnation, Regulatory Taking, Declaratory Relief, and Civil Rights Violation Respectively*)

Plaintiffs have asserted taking claims under two different theories: first, that the Ordinance completely deprives plaintiffs of their beneficial use of the property, creating an inverse condemnation of the property, and second, that the Ordinance is an unconstitutional exercise of governmental power under the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution and article I, sections 1 and 19 of the California Constitution because it does not substantially advance a legitimate government interest and effectively takes plaintiffs' property ostensibly for public purposes without adequate compensation. Plaintiffs characterize the allegations in the complaint as raising a facial challenge to the Ordinance, as well as a challenge to the Ordinance as it affects plaintiffs.

A facial challenge involves " 'a claim that the mere enactment of a statute constitutes a taking,' " while an as-applied challenge involves " 'a claim that the particular impact of a government action on a specific piece of property requires the

payment of just compensation.' " (*Levald, Inc. v. City of Palm Desert* (9th Cir. 1993) 998 F.2d 680, 686.)

"Both the state and federal Constitutions guarantee real property owners 'just compensation' when their land is 'taken . . . for public use . . . .' (Cal. Const., art. I, § 19; U.S. Const., 5th Amend.) The Fifth Amendment takings clause is made applicable to the states through the Fourteenth Amendment. [Citations.] The California Constitution also requires just compensation when private property is 'damaged for public use.' (Cal. Const., art. I, § 19.) 'By virtue of including "damage[]" to property as well as its "tak[ing]," the California clause "protects a somewhat broader range of property values" than does the corresponding federal provision.' (*San Remo Hotel v. City and County of San Francisco* (2002) 27 Cal.4th 643, 664.) Apart from that difference, however, the California Supreme Court has construed the state clause congruently with the federal clause. (*Ibid.*)" (*Herzberg v. County of Plumas* (2005) 133 Cal.App.4th 1, 12-13 (*Herzberg*).)

The trial court disposed of plaintiffs' action on the ground that none of the causes of action was ripe for adjudication. The ripeness analysis in a regulatory takings case involves a two-step inquiry under the test articulated in *Williamson County Regional Planning Com. v. Hamilton Bank* (1985) 473 U.S. 172, 186, 194 (*Williamson County*). Specifically, a plaintiff must have: (1) obtained a final decision from the governmental authority charged with implementing the regulations (i*d.* at p. 196), and (2) pursued compensation through state remedies unless doing so would be futile. (*Id.* at p. 194.) However, the first prong of the *Williamson County* test—the final decision requirement—does not apply to facial challenges because they, by definition, derive from the ordinance's enactment, not any implementing action on the part of governmental authorities. (*Yee v. City of Escondido* (1992) 503 U.S. 519, 534; *Ventura Mobilehome Communities Owners Assn. v. City of San Buenaventura* (9th Cir. 2004) 371 F.3d 1046, 1052 (*Ventura Mobilehome*).)

Whether the challenge to the Ordinance is construed as a facial or an as-applied takings claim, plaintiffs still must satisfy the second prong of the test in *Williamson*

*County*, *supra*, 473 U.S. 172—exhaustion of available state remedies for compensation unless futile. (*Ventura Mobilehome, supra,* 371 F.3d at p. 1052; *Hacienda Valley Mobile Estates v. City of Morgan Hill* (9th Cir. 2003) 353 F.3d 651, 655.) Plaintiffs argue that the second prong of the *Williamson County* test is merely a "forum-selection limitation, requiring taking claimants to first seek compensation from the state courts by alleging inverse condemnation." Plaintiffs argue that where, as here, the matter is proceeding in state court, the second *Williamson County* prong does not apply. Plaintiffs cite *Hensler v. City of Glendale* (1994) 8 Cal.4th 1 (*Hensler*), as supporting their position, which they characterize as holding that a landowner need not seek a variance or otherwise exhaust administrative remedies where a facial challenge to a regulation is involved.

That is not the holding of *Hensler*, *supra*, 8 Cal.4th 1. That case arose from a city's adoption of an ordinance, enacted pursuant to the Subdivision Map Act (Gov. Code, § 66410 et seq.), prohibiting construction of residential units along the visible upper ridge area of the subject property. (*Hensler* at pp. 7-8.) Instead of challenging the adoption of the ordinance, Hensler developed his land in accordance with the ordinance, then filed an inverse condemnation action against the city for money damages asserting a regulatory taking because he could not develop certain sections of his property as planned. (*Ibid.*) Hensler argued that an action in inverse condemnation seeking damages for a taking could be initiated in the first instance without a challenge to the application of the ordinance to the affected property. (*Id.* at p. 9.) Rejecting this assertion, the court held that a property owner must first exhaust available administrative and judicial remedies before bringing an action for inverse condemnation. (*Id.* at pp. 12-13.) The court further explained that "[a] California landowner, who believes that application of a . . . local ordinance limiting development [or use of] the owner's property works a taking, may not bypass the remedies the state has made available to avoid the taking." (*Id.* at p. 19.) Thus, far from supporting plaintiffs' position, *Hensler* confirms that when restrictions on use of real property are the basis for a takings claim, the owner must pursue any available administrative remedies before challenging the statute or regulation. (*Id.* at pp. 13, 17.)

In the instant case, plaintiffs' claims fail even the most basic requirements of the ripeness doctrine, to which all state and federal claims are subject. "The ripeness requirement, a branch of the doctrine of justiciability, prevents courts from issuing purely advisory opinions. [Citation.] It is rooted in the fundamental concept that the proper role of the judiciary does not extend to the resolution of abstract differences of legal opinion . . . . [T]he ripeness doctrine is primarily bottomed on the recognition that judicial decisionmaking is best conducted in the context of an actual set of facts so that the issues will be framed with sufficient definiteness to enable the court to make a decree finally disposing of the controversy." (*Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 170 (*Pacific Legal*).)

"In *Pacific Legal,* [our] Supreme Court rejected as unripe a claim that the public access guidelines of the California Coastal Commission were facially invalid. (*Pacific Legal, supra,* 33 Cal.3d at pp. 163, 167–175.) Noting that federal courts have frequently addressed the issue of ripeness in the context of 'an attempt to obtain review of the propriety of administrative regulations prior to their application to the party challenging them,' the court adopted a two-pronged ripeness analysis used by the United States Supreme Court in *Abbott Laboratories v. Gardner* [(1967) 387 U.S. 136, 148–149, disapproved on other grounds in *Califano v. Sanders* (1977) 430 U.S. 99, 105], requiring an evaluation of (i) 'the fitness of the issues for judicial decision' and (ii) 'the hardship to the parties of withholding court consideration.' (*Pacific Legal, supra,* 33 Cal.3d at p. 171, italics omitted; see *Abbott Laboratories v. Gardner, supra,* 387 U.S. at p. 149.)" (*PG&E Corp. v. Public Utilities Com.* (2004) 118 Cal.App.4th 1174, 1217.)

Under the first prong of the ripeness test, plaintiffs' takings allegations necessarily fail the fitness requirement. As recognized by our Supreme Court in *Hensler, supra,* 8 Cal.4th 1, "not every land-use restriction . . . results in a compensable taking." Rather, "[c]ompensation need not be paid unless the ordinance or regulation fails to serve an important governmental purpose or 'goes too far' as applied to the specific property that is the object of the litigation. [Citation.]" (*Id.* at p. 12.) Here, the stated purpose of the Ordinance is to eliminate the potential for a public nuisance and illegal cockfighting. It

cannot be disputed seriously that the Ordinance furthers an important governmental interest.

Nevertheless, even assuming arguendo that a taking has occurred, a property owner cannot pursue a takings claim unless and until the property owner has sought and been denied just compensation for the taking. (*Williamson County, supra,* 473 U.S. at p. 186; *Ventura Mobilehome, supra,* 371 F.3d at p. 1052; *Hensler, supra,* 8 Cal.4th at p. 12; *Los Altos El Granada Investors v. City of Capitola* (2006) 139 Cal.App.4th 629, 649.) "The impact of the law or regulation on the owner's right to use . . . the property cannot be assessed until an administrative agency applies the ordinance or regulation to the property and a final administrative decision has been reached with regard to the availability of a variance or other means by which to exempt the property from the challenged restriction. A final administrative decision includes exhaustion of any available review mechanism. Utilization of available avenues of administrative relief is necessary because the court 'cannot determine whether a regulation has gone "too far" unless it knows how far the regulation goes.' [Citations.]" (*Hensler, supra,* at p. 12.)

Plaintiffs have not adequately alleged that they took advantage of the administrative process and that they have been denied compensation. Until plaintiffs seek such a determination, there is no way of knowing if a real case or controversy exists.

As for the second prong of the ripeness test, requiring a showing of hardship, plaintiffs' claims similarly fail. Plaintiffs are not immediately faced with the dilemma of complying with the Ordinance or risking penalties for violating it; that situation will not arise unless and until the Agricultural Commissioner refuses to approve a variance for plaintiffs to be deemed " 'legitimate poultry hobbyists.' " Plaintiffs, however, insist that they were excused from the requirements of the exhaustion doctrine because it would have been futile to seek a variance. We disagree. Exhaustion of an administrative remedy "is a fundamental rule of procedure," "a jurisdictional prerequisite to resort to the courts." (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 293.) The policy behind the doctrine is grounded principally "on concerns favoring administrative autonomy (i.e., courts should not interfere with an agency determination until the agency

has reached a final decision) and judicial efficiency (i.e., overworked courts should decline to intervene in an administrative dispute unless absolutely necessary). [Citations.]" (*Farmers Ins. Exchange v. Superior Court* (1992) 2 Cal.4th 377, 391.) Futility provides an "extremely narrow" exception to this jurisdictional requirement. (See *Toigo v. Town of Ross* (1998) 70 Cal.App.4th 309, 327.)

Plaintiffs misinterpret the scope of the futility exception. This exception is applied only when it can be demonstrated that an agency's decision is *certain* to be adverse. (*George Arakelian Farms, Inc. v. Agricultural Labor Relations Bd.* (1985) 40 Cal.3d 654, 662, overturned on other grounds in *George Arakelian Farms, Inc. v. Agricultural Labor Relations Bd.* (1989) 49 Cal.3d 1279, 1288-1289; see *Ogo Associates v. City of Torrance* (1974) 37 Cal.App.3d 830, 834 (*Ogo*).) Thus, exhaustion of an administrative remedy is required unless the party " '*can positively state* that the [administrative agency] has declared *what its ruling will be in a particular case.*' " (*Sea & Sage Audubon Society, Inc. v. Planning Com.* (1983) 34 Cal.3d 412, 418.) The " 'mere possibility, or even the probability,' " that the County would have denied a variance or refused to approve plaintiffs as legitimate poultry hobbyists is insufficient to trigger the exception. (See *Toigo v. Town of Ross, supra,* 70 Cal.App.4th at p. 327.) What is required is a " 'sort of *inevitability*' " based on official actions of the administrative entity. (*Ibid.*, italics added.)

Plaintiffs rely on *Ogo* to support their contention that the futility exception applies in the instant case, but the facts of that case are dramatically different. In *Ogo,* the court found that the city council rezoned a particular area "because the [*Ogo* plaintiffs] planned to build their project there." (*Ogo, supra,* 37 Cal.App.3d at p. 834.) There, the city municipal code authorized the city council to grant variances from this zoning ordinance whenever practical difficulties and unnecessary hardships would result from its strict enforcement. (*Ibid.*) The court found it "inconceivable [that] the city council would grant a variance for the very project whose prospective existence brought about the enactment of rezoning. This is not a situation where the possibility of relief from a general policy exists because of the unusual circumstances of a particular case; to the contrary, in this instance the circumstances of the particular case gave birth to the

ordinance's general policy. To require [the *Ogo* plaintiffs] to apply to the city council for a variance on behalf of this project would be to require them to pump oil from a dry hole. [Citations.] [¶] We conclude that [the *Ogo* plaintiffs] were not required to pursue futile administrative remedies in order to invoke the jurisdiction of the courts." (*Ibid.*)

Here, unlike the court in *Ogo, supra,* 37 Cal.App.3d 830, we cannot predict how the County would have ruled on a request for a variance to be deemed legitimate poultry hobbyists, because plaintiffs did not give the County an opportunity to officially express its opinion. Plaintiffs' mere speculation that any such request would be denied is insufficient to trigger the futility exception. (See *Toigo v. Town of Ross, supra,* 70 Cal.App.4th at p. 327.) In this regard, plaintiffs' claim for declaratory relief on the ground that the Ordinance results in an unconstitutional taking has not reached the point where " 'the facts have sufficiently congealed to permit an intelligent and useful decision to be made.' [Citation.]" (*Pacific Legal, supra,* 33 Cal.3d at p. 171.)

In sum, the plaintiffs' takings claims fail even the most basic test for ripeness.

*C. Allegations of Violation of Civil Rights under 42 U.S.C. section 1983 (Remainder of Fourth Cause of Action*)

In their fourth cause of action for violation of their civil rights under 42 U.S.C. section 1983 plaintiffs allege, in addition to their takings claim, a plethora of purported "constitutional violations" that they claim "would be present in the vast majority, if not all, cases in which the Ordinance is applied . . . ." Despite the numerous violations alleged in the complaint, plaintiffs failed to address the majority of such claims in opposing the demurrer and only briefly mention them on appeal, raising some for the first time in their reply brief.

1. Substantive and Procedural Due Process

As part of their cause of action for violation of their civil rights under 42 U.S.C. section 1983, plaintiffs allege that defendants' actions violated their substantive and procedural due process rights. They also briefly allege that the Ordinance's definition of rooster is "vague, ambiguous and over-broad as to how to determine if a bird is in violation of the Ordinance."

With respect to their substantive due process claim, plaintiffs have failed to state a valid violation of this constitutional safeguard. Even accepting all allegations of material fact as true and ripe, and construing them in plaintiffs' favor, they cannot style an unsuccessful takings claim as a substantive due process claim. (*Ventura Mobilehome, supra,* 371 F.3d at p. 1054.) Plaintiffs' claim that the Ordinance's restrictions on the number of roosters in a single parcel violate Fourteenth Amendment substantive due process is precluded because " 'the alleged violation is addressed by the explicit textual provision of the Fifth Amendment Takings Clause.' [Citation.]" (*Ventura Mobilehome* at p. 1054.) Moreover, it is clear that the Ordinance is not so arbitrary or irrational so as to violate due process. (*Herzberg, supra,* 133 Cal.App.4th at p 21, fn. 13.)

With respect to plaintiffs' procedural due process claim, not only is it tethered to their unsuccessful takings claim, it is also founded on an erroneous premise. It is "black letter constitutional law that due process requires 'notice and hearing' only in quasi-judicial and adjudicatory settings and not with respect to the adoption of general legislation." (*San Diego Bldg. Contractors Assn. v. City Council* (1975) 13 Cal.3d 205, 211; see also *Horn v. County of Ventura* (1979) 24 Cal.3d 605, 621 (conc. opn. of Newman, J.).) "Legislative action generally is not governed by . . . procedural due process requirements because it is not practical that everyone should have a direct voice in legislative decisions; elections provide the check there. [Citations.] Ministerial action is generally not within this constitutional realm either. This is because ministerial decisions are essentially automatic based on whether certain fixed standards and objective measurements have been met. [Citation.]" (*Calvert v. County of Yuba* (2006) 145 Cal.App.4th 613, 622-623.) Since the enactment of the instant Ordinance was unquestionably a legislative action, as distinguished from an adjudicative action, the procedural due process principles do not apply. (*San Diego Bldg. Contractors Assn. v. City Council, supra,* 13 Cal.3d at p. 211; *Horn v. County of Ventura, supra,* 24 Cal.3d at p. 621 (conc. opn. of Newman, J.).) Thus, plaintiffs are unable to state a viable procedural due process claim.

2. Equal Protection

Plaintiffs also briefly allege that defendants violated their equal protection rights. Plaintiffs, however, did not raise this issue in opposing defendants' demurrer to their fourth cause of action and have submitted no meaningful argument on appeal regarding the substance of this claim. Even if this claim had been preserved for appellate review, the complaint fails to state a colorable equal protection claim. Plaintiffs do not allege that the Ordinance burdens a suspect class or a fundamental interest, and as a result, the Ordinance need only be rationally related to a legitimate state interest. (*Ventura Mobilehome, supra,* 371 F.3d at p. 1055.) Aside from conclusory allegations, plaintiffs have not identified other similarly situated property owners or alleged how they were treated differently. (*Ibid.*) Moreover, as the Ordinance is at least rationally related to a legitimate state interest, there is no cognizable basis for plaintiffs' equal protection claim.

3. Preemption

As part of their cause of action for violation of their civil rights under 42 U.S.C. section 1983, plaintiffs, listing numerous statutes, also appear to suggest that the Ordinance, by "[l]imiting all rooster owners countywide" conflicts with state law addressing public nuisance (see Civ. Code, §§ 3479-3480, 3492-3495; Code Civ. Proc., § 731; Pen. Code §§ 372, 373a, 415) and illegal cockfighting (Pen. Code, §§ 597-597d, 597i-597j, 599aa). On appeal, plaintiffs, in passing, claim that the Ordinance is "preempted, in its entirety, by Civil Code [section] 3482.5." Other than merely stating that the Ordinance is preempted, plaintiffs make no attempt to provide a meaningful discussion on this issue. Even assuming arguendo that this claim is properly before us, it fails on the merits. Civil Code section 3482.5, subdivision (a)(1) provides: "No agricultural activity, operation, or facility, or appurtenances thereof, conducted or maintained for commercial purposes, and in a manner consistent with proper and accepted customs and standards, as established and followed by similar agricultural operations in the same locality, shall be or become a nuisance, private or public, due to any changed condition in or about the locality, after it has been in operation for more than three years if it was not a nuisance at the time it began." For section 3482.5,

subdivision (a)(1) to apply, seven requisites must be satisfied: " 'The activity alleged to be a nuisance must be (1) an agricultural activity (2) conducted or maintained for commercial purposes (3) in a manner consistent with proper and accepted customs and standards (4) as established and followed by similar agricultural operations in the same locality; the claim of nuisance arises (5) due to any changed condition in or about the locality (6) after the activity has been in operation for more than three years; and the activity (7) was not a nuisance at the time it began.' [Citation.]" (*Rancho Viejo v. Tres Amigos Viejos* (2002) 100 Cal.App.4th 550, 567.)

Section 4.120 (a) of the Ordinance provides: "No person shall keep . . . five or more roosters on any property within unincorporated Solano County. This section *shall not apply to commercial poultry ranches* whose primary commodity is the production of eggs or meat for sale as permitted by the County . . . or to legitimate poultry hobbyists as approved in writing by the Agricultural Commissioner . . . ." (Italics added.)

The Ordinance does not conflict with existing state nuisance law, as it clearly exempts commercial poultry ranches from its purview.[2] Moreover, the state law is aimed at protecting agricultural activity maintained for commercial purposes, and does not purport to apply to "poultry hobbyists." Thus, plaintiffs' claim of "raising of chickens for hobby, pleasure, [and] show" would not be within the protective sweep of Civil Code section 3482.5.

4. Other Constitutional Claims

Plaintiffs briefly allege that the Ordinance deprives them of the privileges and immunities owed to them under the United States Constitution and attempts to interfere with and regulate commerce "by passing a bill of attainder and/or ex post facto law." Plaintiffs did not oppose defendants' demurrer to these portions of their fourth cause of action and have submitted no meaningful argument on these issue in their briefs on

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[2] To the extent plaintiffs claim that the Ordinance also is preempted by state laws pertaining to illegal cockfighting, they have presented no such argument on appeal. Accordingly, this issue has been waived on appeal. (See *Sunset Drive Corp. v. City of Redlands, supra*, 73 Cal.App.4th at p. 226.)

appeal. Accordingly, we deem plaintiffs to have abandoned these issues. (*Herzberg v. County of Plumas, supra,* 133 Cal.App.4th at p. 20.)

*D. Allegations for Declaratory Relief* (*Remainder of First Cause of Action*)

In their first cause of action, plaintiffs seek a declaration that the Ordinance is unconstitutional and unenforceable on the grounds that it was improperly adopted by the County without adequate notice or opportunity to be heard (see Gov. Code, § 65854 et seq.) and that it is preempted by Civil Code section 3482.6.

1. Civil Code section 3482.6

Addressing the preemption claim first, we have previously concluded that the Ordinance does not conflict with Civil Code section 3482.5 (agricultural activity) as the Ordinance expressly exempts commercial poultry ranches. The Ordinance similarly does not conflict with Civil Code section 3482.6, addressing the subcategory of "agriculture processing activity." Civil Code section 3482.6, like section 3482.5, pertains to commercial activity, which, we repeat, the Ordinance expressly exempts from the rooster limit.

2. Government Code Claims

As to their Government Code claims, plaintiffs contend that the County failed to follow the procedures and give notice required by sections 65855 and 65856 because it published notice of its April 2011 public meeting before the County received the planning commission's recommendation, and that the County failed to include the planning commission's recommendation in the general explanation of the matter to be considered; plaintiffs maintain that the County never received any such recommendation. Plaintiffs further allege that the published notice on April 18, 2011, regarding its April 26, 2011 meeting was proscribed by Government Code section 65090, which requires notice to be published at least 10 days before the hearing.

Government Code section 65856 reads in relevant part, "(a) *Upon receipt of the recommendation of the planning commission,* the legislative body shall hold a public hearing . . . . [¶] . . . [¶] (b) Notice of the hearing shall be given pursuant to Section 65090." (Italics added.) Section 65090 provides for publication and provides that "the

notice shall be posted *at least 10 days prior to the hearing* " and that the notice shall include the information specified in section 65094. (Gov. Code, § 65090, subds. (a) & (b), italics added.) Section 65094 requires, among other things, that the notice shall include "a general explanation of the matter to be considered . . . ."

"[A] 'general explanation of the matter to be considered' " includes the planning commission's recommendation. (*Environmental Defense Project of Sierra County v. County of Sierra* (2008) 158 Cal.App.4th 877, 888 (*Sierra County*).) "[N]otice of [a] hearing *cannot be given until the planning commission has made a recommendation* on the matter under consideration." (*Ibid.*, italics added.) Consequently, the "10–day notice [under sections 65090 and 65094 must] be given only after the planning commission's recommendation has been received" by the Board. (*Id.* at p. 893.) Only in this way may "the state's policy and Legislature's intent that the public be involved in the planning process and are 'afforded the opportunity to respond to clearly defined alternative objectives, policies, and actions' " be achieved. (*Ibid.*, citing Gov. Code, § 65033 [declaring the Legislature's recognition of "the importance of public participation at every level of the planning process"].)

Here, on April 18, 2011, the County published a notice that it would hold a meeting on April 26, 2011. The notice described the Ordinance. The notice did not indicate the planning commission's recommendation. The notice was also published fewer than 10 days before the meeting.

Clearly, the County's notice violates Government Code sections 65856, 65090, and 65094. The County issued its April 18, 2011 notice without having received the planning commission's "written recommendation" and the notice did not include the planning commission's "recommendation as part of the 'general explanation of the matter to be considered.' " (*Sierra County, supra,* 158 Cal.App.4th at pp. 891, 893.)

Nonetheless, we may not invalidate the defendants' action because of improper notice unless we find that the error was prejudicial, that plaintiffs "suffered substantial injury from that error and that a different result would have been probable" absent the

error. (Gov. Code, § 65010, subd. (b).)[3] Here, plaintiffs do not and cannot allege they were prejudiced as defined by Government Code section 65010, subdivision (b). As discussed, plaintiffs' substantive claims fail even the most basic ripeness test. Thus, plaintiffs cannot demonstrate any injury, let alone a substantial one.

In sum, although the notice was deficient for failure to mention the planning commission's recommendations and was published fewer than 10 days before the meeting (Gov. Code, §§ 65856, 65090 & 65094), plaintiffs fail to allege facts sufficient to demonstrate any prejudice as a result. (Gov. Code, § 65010, subd. (b).)

*E. Immunity*

Plaintiffs argue that the trial court erroneously determined that the Board and its members were immune from liability, because the complaint alleges more than the mere discretionary act of enacting the Ordinance. We need not address whether the Board and its members are entitled to absolute legislative immunity because the complaint fails to allege any viable causes of action.

## III. DISPOSITION

The judgment is affirmed. Defendants are entitled to costs.

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[3] Government Code section 65010, subdivision (b) states: "No action, inaction, or recommendation by any public agency or its legislative body or any of its administrative agencies or officials on any matter subject to this title shall be held invalid or set aside by any court on the ground of the improper admission or rejection of evidence or by reason of any error, irregularity, informality, neglect, or omission (hereafter, error) as to any matter pertaining to petitions, applications, notices, findings, records, hearings, reports, recommendations, appeals, or any matters of procedure subject to this title, unless the court finds that the error was prejudicial and that the party complaining or appealing suffered substantial injury from that error and that a different result would have been probable if the error had not occurred. There shall be no presumption that error is prejudicial or that injury was done if the error is shown."

_____
Sepulveda, J.*

We concur:

_____
Reardon, Acting P.J.

_____
Rivera, J.

* Retired Associate Justice of the Court of Appeal, First Appellate District, Division 4, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.