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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

vs.

CITY OF SACRAMENTO and DOES 1 through 100, inclusive,

Defendants.

Case No.: 23CV008658

Action Filed: September 19, 2023
Trial Date: N/A

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF CITY OF SACRAMENTO'S GENERAL DEMURRER TO PLAINTIFF'S COMPLAINT

Date: January 5, 2024
Time: 9:00 a.m.
Dept: 27
Location: 720 9th Street
Sacramento, CA 95814
Judge: Hon. Jill H. Talley
Reservation No.: A-08658-003

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The City of Sacramento submits the following Memorandum of Points and Authorities in support of its General Demurrer to Plaintiff's Complaint.

I.

INTRODUCTION

Sacramento County District Attorney Thien Ho's Complaint is as surprising as it is novel. But those are not admirable qualities when they lead to a waste of government and judicial resources. This demurrer is necessary to stem further waste of those resources, because underlying the Complaint's novelty is its legal untenability. In short, the Complaint fails as a matter of law because (1) a district attorney lacks authority to bring an action for private nuisance; (2) a district attorney lacks authority to bring an action for inverse condemnation of private property; (3) the Complaint fails to establish the necessary elements for a public nuisance claim, because not only are its allegations of duty vague and ambiguous, but also the City neither caused nor assisted in causing the allegedly criminal acts that are the gravamen of the DA's Complaint; (4) the City enjoys statutory immunities; and (5) the request to the Court for injunctive relief effectively asks the judiciary to breach the separation-of-powers divide by directing either the council to take legislative action or law enforcement to take executive action.

But first, some background.

Homelessness is a humanitarian, political, and economic crisis. Thousands of people are struggling on the street, many of them with mental health and substance abuse challenges. Likewise, cities across California have been struggling to contend with the community effects of widespread homelessness. The crisis in Sacramento has many causes – opioid manufacturers who created a mental health and addiction crises, through their well-documented scheme to make money off the oversupply of drugs; upward-spiraling housing unaffordability; a global pandemic wreaking havoc on vulnerable populations and the housing-insecure; County Health Officer orders preventing homeless camp management; federal court injunctions prohibiting movement of homeless encampments during two summers; and lack of sufficient and focused County resource allocation to aid those in need.

But the City is not a causal agent of the criminal acts alleged to have been perpetrated by persons experiencing homelessness. Indeed, the Complaint does not attempt to suggest the City has caused the existence of homeless encampments, nor assisted unidentified homeless individuals in performing criminal acts against their neighbors. Rather, it contains conclusory allegations that private citizens are "informed and believe" some unidentified City officials, employees, and agents "refuse to address the dangers" of homeless encampments based upon unidentified "express or implied directives/policies" of unidentified city official or leaders. (See, e.g., Complaint, ¶¶ 29, 30, 55, 64, 72, 79, etc.)

That is an unfortunate failure to recognize the City's efforts, which have been numerous, laudable, and contrary to the complaint's vague and ambiguous allegations, including:

- creation of a Department of Community Resources that responds to problem encampments;
- passage of Measure O to facilitate creation of shelter spaces;
- execution of the Partnership Agreement between City of Sacramento-County of Sacramento;
- adoption of a critical infrastructure ordinance, to protect areas of special use;
- adoption of a sidewalk obstruction ordinance, to ensure safe passage along City sidewalks;
- implementation of a Citywide Homeless Response Protocol;
- adoption of Resolution 2023—0254, "Directing the City Manager to Enforce Provisions of the City Code Relating to the Protection of Critical Infrastructure and Wildlife Risk Areas; Sidewalk Obstructions and Pedestrian Interference; Parks, Park Buildings and Recreational Facilities; Storage or Personal Property on Public and Private Property; and Vehicles and Traffic, as well as Provisions of the California Vehicle Code Applicable to Vehicle Encampments."

The homelessness crisis and its effects are not fit for judicial resolution through this lawsuit. This is practically and politically true. Indeed, despite the rhetoric in the Complaint,

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the DA knows this. Here are Sacramento County District Attorney Thien Ho's own words before the United States Supreme Court:

> [T]hrough their inventive interpretation of Powell, the Ninth Circuit thrust the federal judiciary into a realm they are ill-equipped to navigate. Ultimately, the Legislative and Executive branches will be responsible for the multifaceted solutions necessary to combat homelessness. . . . [¶] This Court should . . . return this great social challenge to the Executive and Legislative Branches where it belongs.

(See *City of Grants Pass v. Gloria Johnson and John Logan*, United States Supreme Court Case No. 23-175, Brief of Amicus Curiae District Attorney of Sacramento County in Support of Petitioner City of Grants Pass, at pp. 3-4, found at https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/23-175.html .)

It is also legally true that this lawsuit is inappropriate. The Complaint is a constitutional overreach. Besides the self-evident oxymoronic nature of the DA asserting private claims on behalf of the People, he has exceeded the powers granted to him by the state constitution and the California Legislature. And while a district attorney does have authority to pursue the public nuisance cause of action, here the DA asks this Court to intervene in some indeterminate fashion (as the prayer for relief is notably bereft of any specifics), to mandatorily enjoin the City to "enforce laws," thereby invoking a separation-of-powers problem. The Complaint is also an ill-fated attempt to do an end-run around the statutory immunities granted to the City by the state legislature. Finally, the Complaint is so vague and ambiguous as to what laws or duties the DA claims the City must enforce, that the allegations fail to state a cause of action.

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II.

STANDARD OF DEMURRER

Code of Civil Procedure § 430.10 provides in relevant part as follows:

> The party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in Section 430.30, to the pleading on any one or more of the following grounds:
>
> (e) The pleading does not state facts sufficient to constitute a cause of action.
>
> (f) The pleading is uncertain. As used in this subdivision, "uncertain" includes ambiguous and unintelligible.

Thus, when any ground for objection to a complaint appears on the face of the complaint, the objection may be taken by a demurrer to the pleading. (Code Civ. Proc., § 430.30(a).) The function of the demurrer is to test the sufficiency of the pleadings as a matter of law. (5 Witkin, California Procedure (5th Ed. 2008), Pleading, § 946.) Courts must treat a demurrer as admitting all material facts properly pleaded, but not contentions, deductions, or conclusions of fact or law. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) Moreover, the Court is authorized to consider, as grounds for demurrer, any matter which the court must or may judicially notice under Evidence Code sections 451 or 452. (Code Civ. Proc., § 430.30(a).)

III.

LEGAL ARGUMENT

A. The DA lacks the requisite statutory authority to bring civil claims for private nuisance and inverse condemnation on behalf of the People.

The DA's second claim (private nuisance) and third claim (inverse condemnation) fail as a matter of law because a district attorney is not legislatively authorized to bring them. This Court must stop at the outset the DA's attempt to blatantly exceed the powers of his office and misuse public funds by bringing these unauthorized claims.

"By the specificity of its enactments the Legislature has manifested its concern that the District Attorney exercise the power of his office only in such civil litigation as that lawmaking body has...found essential." (*Safer v. Superior Court* (1975) 15 Cal.3d 230, 236.) In short, "a district attorney has no authority to prosecute civil actions absent specific legislative

authorization." (*Abbot Laboratories v. Superior Court* (2020) 9 Cal.5th 642, 654, quoting *People v. Superior Court (Humberto S.)* (2008) 43 Cal.4th 737, 753.) The district attorney "enjoys neither plenary power nor unbridled discretion" in the civil arena. (*Safer v. Superior Court, supra,* 15 Cal.3d at 236.)

Safer set forth "illustrative statutes which specifically empower a district attorney to bring a civil action; thus he may: defend suits brought against the county and bring actions to collect fines and recognizances (Gov. Code, § 26521); test the validity of laws providing for the payments of county funds and recover any funds illegally paid out (Gov. Code § 26523, 26525); represent judges appearing in their official capacities as parties defendant (Gov. Code, § 26524); sue to abate public nuisances in the name of the People (Gov. Code, § 26528); bring proceedings for the commitment and treatment of incompetent or disturbed persons (Welf. & Inst. Code, § 5114); prosecute parents for disobedience of a child support order (Welf. & Inst. Code, § 11484); bring an action for the declaration of parental relationship (Civ. Code, § 231); and enforce certain business regulation laws (Bus. & Prof. Code, § 16754)." (*Id.* at 236.)

Safer "makes clear that the Legislature's traditional practice has been to affirmatively specify the circumstances in which a district attorney can pursue claims in the civil arena, not the circumstances in which he cannot." (*People v. Board of Parole Hearings* (2022) 83 Cal.App.5th 432, 445, *citing, People v. Superior Court (Solus Industrial Innovations, LLC)* (2014) 224 Cal.App.4th 33, 42.) *Safer* is still controlling, and this court is bound to follow it. (*People v. Board of Parole Hearings, supra,* 83 Cal.App.5th at 445.)

The City can find no legislative authority for the DA's attempt to pursue either a private nuisance cause of action or a private inverse condemnation cause of action. Not surprisingly, the Complaint is entirely silent as to under what authority the DA purports to be acting and the DA failed to identify any such authority during meet and confer efforts. (Declaration of Chance Trimm, paras. 2-5.)

As the DA has no legal authority to pursue these private claims, this Court must sustain the City's demurrer as to the second and third causes of action.

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B. The DA, on behalf of the People of the State of California, cannot bring private nuisance and inverse condemnation claims without claiming ownership of private property.

Should it at all be surprising that the Legislature has not granted district attorneys authority to pursue private nuisance claims or inverse condemnation claims? Consider: the DA, a public official suing on behalf of the People, oxymoronically asserts claims for private "individual victims" that were allegedly harmed (Complaint, ¶ 232), and for supposed damages to "private property" (Complaint, ¶ 236). That he cannot do.

Plaintiff, the People of the State of California, is not a proper party to claims for private nuisance or inverse condemnation. The DA does not claim the People of the State of California own property that is the subject of this litigation. Rather, he alleges "individual victim(s)" own, lease, or occupy a "portion of the house, apartment, or business identified herein." (Complaint, ¶ 232.) However, those "individual victims" are not parties to this litigation.

"To proceed on a private nuisance theory the plaintiff must prove an injury specifically referable to the use and enjoyment of *his or her land.*" (*Koll-Irvine Center Property Oners Assn. v. County of Orange* (1994) 24 Cal.App.4th 1036, 1041, emphasis added.) "To state a cause of action for inverse condemnation, the *property owner* must show there was an invention or appropriation (a 'taking' or 'damaging') of some valuable property right which the *property owner* possesses by a public entity and the invasion or appropriation directly and specially affected the *property owner* to his injury." (*Beaty v. Imperial Irrigation Dist.* (1986) 186 Cal.App.3d 897,903, emphasis added.)

The only Plaintiff in this case is the People of the State of California. Because there are no private plaintiffs there can be no private nuisance. Similarly, because there are no private-property-owning plaintiffs in this case there can be no inverse condemnation. As such, this Court must sustain the City's demurrer to the second and third causes of action.

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C. The City is immune from liability for all claims asserted by the DA.

The DA's claims are predicated on the City's alleged failure to enforce law and local ordinances and "[t]his failure to consistently enforce the law has and continues to convert City parks, sidewalks and streets into rotting cesspools overrun by crime and disease...The people have and continue to suffer injury and the threat of injury as a result of the homeless encampments outside their respective properties." (Complaint, ¶ 229.) The Complaint asserts these are failures by some unidentified City officials, employees, and agents who "refuse to address the dangers" of homeless encampments based upon unidentified "express or implied directives/policies" of unidentified city official or leaders. (See, e.g., Complaint, ¶¶ 29, 30, 55, 64, 72, 79, etc.) Yet such claims are barred by immunities granted to the City under Government Code sections 815, 818.2, 820.2, 820.4, and 821.

Under the Government Claims Act, the City is not liable for injuries arising out of acts or omissions of its employees, except as provided by statute. (Gov. Code §, 815(a).) Moreover, "the liability of a public entity...is subject to any immunity of the public entity as provided by statute." (Gov. Code, § 815(b).) And the City is not liable for injuries resulting from its employee's acts or omissions where the employee is immune from liability. (*Ibid.*)

Applicable here are immunities provided at Government Code sections 818.2 and 820.2. Section 818.2 states: "A public entity is not liable for an injury caused by adopting or failing to adopt an enactment or by failing to enforce any law." Section 820.2 states: "Except as otherwise provided by statute, a public entity is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused."

As the California Supreme Court has explained, Government Code section 818.2 is "intended to provide immunity for legislative and quasi-legislative action and to protect the exercise of discretion by law enforcement officers in carrying out their duties." (*Guzman v. County of Monterey* (2009) 178 Cal.App.4th 983, 996.) In short, "it is not a tort for government to govern." (*Dalehite v. United States* (1953) 346 U.S. 15, 57.) Also, under Government Code section 821, a public employee is immune from liability "for any injury caused by...his failure

to enforce an enactment." (See also Gov. Code, § 820.4 ["A public employee is not liable for his act or omission, exercising due care, in the execution or enforcement of any law."].)

The DA's claims against the City are expressly premised on the alleged failure by the City, which can only act through its employees and officials, to enforce laws and ordinances, and that failure to act has harmed the public. Under Government Code section 821, these unidentified public employees are immune from liability for injuries resulting from their alleged failure to enforce the City's laws and ordinances. (*Halcala v. Bird Rides, Inc.* (2023) 90 Cal.App.5th 292, 305, citing *Sutton v. Golden Gate Bridge, Highway and Transp. Dist.* (1998) 68 Cal.App.4th 1149, 1165.) The City is accordingly immune from liability for its employee's alleged failures as well as for any alleged institutional failures. (Gov. Code, §§ 815.2(b), 818.2.)

As if the foregoing immunities weren't enough, Government Code section 820.8 provides that "[e]xcept as otherwise provided by statute, a public employee is not liable for an injury caused by the act or omission of another person." And truly, this is one of the underlying premises of the DA's Complaint – that City employees' alleged failure to enforce laws indirectly allowed other persons (i.e., persons experiencing homelessness) to commit crimes.

In sum, these various immunities exist for the very purpose of preventing claims against the City like the claims the DA pursues. Lawsuits are not appropriate vehicles to compel cities to govern, enact law, enforce laws, or protect against the criminal or wrongful acts of others.

Furthermore, these immunities apply despite the fact that the DA seeks only injunctive relief, and not monetary damages. As held in *Guzman v. County of Monterey*, *supra,* 178 Cal.App.4th at 460, plaintiffs "may not circumvent the legislative immunity granted by section 818.2 simply by alleging injunctive relief." (*Id.* at 460.) A plaintiff cannot use a claim for equitable and injunctive relief to circumvent the financial protections that immunity provides to a governmental entity. (*Schooler v. State of California* (2000) 85 Cal.App.4th 1004, 1014.) For example, in *Schooler*, the plaintiff invoked Government Code section 814 (like the district attorney does in this case – see Complaint, ¶¶ 234, 238)[1] in attempting to defeat statutory immunities; plaintiff didn't seek damages and only wanted injunctive relief that required the

[1] Notably, the DA does not invoke this same position for the public nuisance cause of action.

State to provide physical support for a bluff. But the court held that such an injunction would impose a financial burden on the state, in contravention to the very legislative purpose of the immunity in Government Code section 831.25. The immunity prevailed. (*Id.* at 1014.)

Because the City is immune from liability for failing to adopt or enforce a law, and that is truly the fundamental allegation against it, this Court must sustain the City's demurrer to the Complaint and each of the causes of action contained therein.

D. The Complaint has insufficient facts to support the causation element for a public nuisance claim.

The first cause of action for public nuisance is the only claim which the DA has statutory authority to bring.

A nuisance is broadly defined as "[a]nything which is injurious to health or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property." (Civ. Code, § 3479.) A public nuisance is "one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal." (Civ. Code, § 3480.) To establish a public nuisance, a plaintiff must show there was either an act or "a failure to act under circumstances in which the actor is under a duty to take positive action to prevent or abate the interference with the public interest." (*In re Firearm Cases* (2005) 126 Cal.App.4th 959, 988.)

But here is where the DA's claim hits a snag: "Liability for nuisance does not hinge on whether the defendant owns, possesses or controls the property, nor on whether he is in a position to abate the nuisance; the critical question is whether the defendant created or assisted in the creation of the nuisance." (*City of Modesto Redevelopment Agency v. Superior Court* (2004) 119 Cal.App.4th 28, 38.)

Here, the DA does not allege the City created the troubling conduct of homeless individuals, nor that the City assisted them in perpetrating that conduct. Quite the reverse, he alleges the City did not suppress the conduct. But, as described above, the City cannot be liable for failing to enforce the law.

The DA alleges "the City's refusal to maintain the public property under its control and to enforce laws and local ordinances thereon facilitates and perpetuates a public nuisance." (Complaint, ¶ 229.) To be clear, Plaintiff – the People of the State of California - allege individuals experiencing homelessness are a nuisance and the City's failure to enforce laws against them creates a public nuisance. An oblique reference to maintenance of public property is not an allegation of cracked sidewalks or broken infrastructure. Rather, the alleged failure to maintain public property solely relates to the presence of homeless individuals existing in and around those spaces. Essentially, the DA alleges the City has a mandatory duty to enforce unidentified laws which would putatively rid the City of its homelessness challenges.

However, a public entity, such as the City, is not liable for injuries arising from an act or omission except as provided by statute. (Gov. Code, § 815(a); *Hoff v. Vacaville Unified School Dist.* (1998) 19 Cal.4th 925, 932.) Government Code section 815.6 provides, "where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty." The "application of Government Code 815.6 requires that the enactment at issue be obligatory rather than merely discretionary or permissive, in its directions to the public entity; it must require, rather than merely authorize or permit, that a particular action be taken or not taken. It is not enough, moreover, that the public entity or officer have been under an obligation to perform a function if the function itself involves the exercise of discretion." (*Haggins v. City of Los Angeles* (2000) 22 Cal.4th 490, 498.) "Whether a particular statute is intended to impose a mandatory duty...is a question of statutory interpretation for the courts." (*Creason v. Dept. of Health Services* (1998) 18 Cal.4th 623, 631.)

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Here, the DA fails to identify what law(s) the City is failing to enforce. Without the identity of the law at issue it is impossible to determine whether the City has breached a duty to enforce a mandatory obligation. The Complaint is therefore deficient in stating a cause of action.

E. The DA's Complaint cannot proceed, as the requested relief would improperly violate the separation of powers.

The essence of the DA's Complaint is that the City has not enforced its laws. (See, e.g., Complaint, ¶¶ 29, 30, 55, 64, 72, 79, etc.). Yet the prayer for relief is so vague and ambiguous one cannot determine what "lawful" remedy is being sought. The DA seeks injunctive/equitable relief, but what possible injunction or relief could be had? Force the City to "enforce the law?" By what means – requiring the police to cite people? Requiring the City Attorney to prosecute City Code misdemeanors? Require the City Council to enact additional ordinances or policies? None of that is possible, as to do so would be an unconstitutional exercise of judicial power.

First, requiring law enforcement to cite persons for violation of the City Code, and thereby initiate possible prosecution by the City Attorney, would improperly invade the City Attorney's prosecutorial discretion.

"The principle of prosecutorial discretion is rooted in the separation of powers and due process clauses of our Constitution, and is basic to our system of criminal justice . . . This discretion, though recognized by statute in California, is founded upon constitutional principles of separation of powers and due process of law.'" . . . An unbroken line of cases in California has recognized this discretion and its insulation from control by the courts...." [¶] . . . This prosecutorial discretion ... arises from '"the complex considerations necessary for the effective and efficient administration of law enforcement."' [Citation.] The prosecution's authority in this regard is founded, among other things, on the principle of separation of powers, and generally is not subject to supervision by the judicial branch." (*Gananian v. Wagstaffe* (2011) 199 Cal.App.4th 1532, 1543 [internal citations and quotation marks omitted].)

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Second, mandating some legislative fix – better ordinances with more teeth or council-adopted policies encouraging stricter enforcement, for example – would violate the separation-of-powers principle. "'It is within the legitimate power of the judiciary, to declare the action of the Legislature unconstitutional, where that action exceeds the limits of the supreme law; but the Courts have no means, and no power, to avoid the effects of *non-action*. The Legislature being the creative element in the system, its action cannot be quickened by the other departments.'" (Citations.)" (*Friends of H St. v. City of Sacramento* (1993) 20 Cal. App. 4th 152, 165.)

Like the plaintiffs in *Friends of H Street* who sought to force the City to control traffic, here the DA asks this Court to force the City to control Sacramento's homeless problems through injunctive relief. As in *Friends of H Street*, this Court should politely refuse.

IV.

CONCLUSION

Sacramento County District Attorney Thien Ho has far exceeded the role of the office to which he was elected by bringing this civil litigation against the City. Some of the grounds upon which this case are brought are so misguided it is surprising a taxpayer lawsuit has not been brought. (See Code Civ. Proc., § 526a.) The remainder of the Complaint, including its prayer for relief, is so vague and ambiguous that it not only fails to state a sufficient cause of action, but it begs this Court to breach the separation-of-powers divide. Therefore, this Court should sustain the City's demurrer in its entirety and if leave to amend is granted, the DA should not take it. The People of the State of California deserve better. The challenges of homelessness are best met through cooperation across all levels of government than through accusations and confrontation. As Mayor Steinberg has aptly stated, "Let's get to work."

DATED: October 16, 2023

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