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CITY OF OAKLAND

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

DANIEL ALWEISS,

Plaintiff,

v.

CITY OF OAKLAND; EAST BAY MUNICIPAL UTILITIES DISTRICT; ALLAN-RAY CAPITAL, LLC; VIKTORIYA VOLZHENINA; SMART SQUARE FEET REALTY, LLC; CHAN T. PEY; RICHARD JOHNSON; VOLODYMYR BELZ; 3716 DELMONT AVENUE, LLC; TRAVIS HILL; AND DOES 1-50,

Defendants.

AND RELATED CROSS-CLAIMS.

Case No. RG19021124

ASSIGNED FOR ALL PURPOSES TO
JUDGE Paul Herbert
DEPARTMENT 20

DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY ADJUDICATION

Date: April 7, 2021
Time: 9:00 a.m.
Dept.: 20
Reservation No.: R-2229898

Complaint filed: May 31, 2019
Trial Date: October 12, 2021

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I. INTRODUCTION

This case arose after the Plaintiff bought an empty piece of land on a hill in Oakland. The hill at issue, located between Delmont and Buena Ventura Avenues ("Chimes Terrace Hill" or "Hill"), contains a large number of empty residential parcels. Ownership of the parcels on the Hill changes frequently, and all are privately owned.

The Plaintiff is Daniel Alweiss, an attorney and real estate investor. He bought, at an online auction, one of the parcels on the Hill for just $75,339, "as is," from Alameda County. After buying it, he discovered the Hill was located in a historic landslide area, and that it would be expensive to develop his parcel. Plaintiff filed a lawsuit; he did not sue Alameda County—the seller—but he is suing his neighbors, anyone who owns an empty lot on the hill, and the City.

Although the entire hill is privately owned, it appears Plaintiff is suing the City because it has several sewer lines installed beneath the Hill, as well as one temporary above-ground sewer line. The City also has a storm water drain at the bottom of the Hill. Plaintiff argues these City assets are causing the landslide. He alleges that the sewer lines have leaked, and that those leaks cause landslides. In reality, the evidence shows the landslide on the Hill is a historic known natural condition of the Hill. Plaintiff argues the City should have disclosed the slide history to him before he bought his parcel. There is a storm drain inlet at the top of the hill that was never accepted by the City, and Plaintiff believes that drain is causing the slide as well.

Before delving into the facts and applicable law, as a preliminary matter it should be noted the Government Claims Act, Cal. Govt. Code §§ 810-996.6, applies to the City. As a result, the vast majority of Plaintiff's motion—issues 1-3 and 5—can be denied as a matter of law based on the preclusive effect § 815 has on actions premised on common law negligence. Issue 4, the only other issue, applies to a separate cause of action for inverse condemnation, which can be denied procedurally and because there are facts that conflict with Plaintiff's evidence.

II. FACTUAL BACKGROUND

A. The Chimes Terrace Subdivision

The Hill at issue is located in the Chimes Terrace subdivision. Chimes Terrace is located

in the Millsmont neighborhood of Oakland, which is southeast of Mills College. (Alweiss Decl. Ex. B, at 1.)[1] In 1925, the owners of a large expanse of property that encompassed the present-day Chimes Terrace subdivision—Edward Ignacio de Laveaga and Alysone Delight Woodbury Laveaga—divided their property into individual lots for sale, and granted to the City of Oakland "the right to construct and maintain sewers . . . upon, in, and under, those strips of land shown upon said map . . . and the right to enter upon or permit to enter upon said strips of land, for the purposes of constructing and maintaining . . ." in the Chimes Terrace subdivision. (*Id.*) The owners dedicated the streets and right of way to the public. (*Id.*) The neighborhood is hilly, but eventually many homes were built on the hillsides.

B. Landslides on the Chimes Terrace Hill

The "Hill" is an undeveloped portion of one of the hillsides in the Chimes Terrace Subdivision. (Quirk Decl. Ex. D.) The Hill is made up of nine contiguous rectangular-shaped parcels of private property. (Roubos Decl. Ex. A.) Four of those parcels are located on the top half of the hill, the other five are on the bottom. There has been an "active landslide" on the Hill since at least 1947. (RSUF 7.) The landslide condition is moderately stable, although City records indicate that around 2008 there was landslide movement such that property owners on the Hill applied for permits for emergency retaining wall work. (Bayham Decl. at ¶¶ 15-16.) The landslide is caused by "natural causes including natural sloping terrain, zones of geologic weakness, seasonal changes from precipitation, and subsurface water leading to instability." (RSUF 6.) The landslide is a matter of public record. (RSUF 39.) For example, Plaintiff's expert analyzed the landslide for a neighbor in 2003. (*Id.*; Quirk Decl. Ex. C.)

C. City sewer lines on the Hill and drain inlet on Buena Ventura Ave.

There are two different sewer lines on the Hill that are at issue in this case. The first line runs across the middle of the Hill, between the properties. (SUF 7.) Plaintiff has called this the "Middle Hill" sewer. This sewer line was abandoned sometime before 1996. (RSUF 14.) There is no evidence of anyone reporting that it ever leaked before or after it was plugged. (*Id.*)

[1] Factual citations will be to Plaintiff's separate statement ("SUF"), the City's response to Plaintiff's separate statement ("RSUF"), or the related declarations.

The other sewer line at issue runs up and down the hill, and is located on Lot 51, which is the parcel south of Plaintiff's property. (SUF 19.) In November 2017, the City received report of a broken sewer pipe on Lot 51 and repaired it with a temporary above-ground line. (RSUF 20.) The City has no record indicating the presence of "hydrauger" pipes on Lot 51. (RSUF 25.)

There is a storm drain inlet located on Buena Ventura Avenue, below the Hill. (SUF 35.) It is noted on the City's storm water maps, and the City owns it. (RSUF 34.) It is connected to the City's storm water system, and the City routinely cleans it. (*Id.*) There is a storm drain inlet located on Delmont Avenue, above the Hill. (RSUF 27-28.) It is of relatively recent construction, but it is *not owned* by the City and was *not installed* by the City. (*Id.*) It is not connected to the City's storm water system. (SUF 28.)

Below is a photo of Lot 50. Although somewhat difficult to see, the small square shape near the arrow at the top of this photo shows the placement of the private inlet.

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In the photo above, the City's drain is at the bottom, denoted by the small square below the Hill. The larger rectangle is an approximation of Lot 50's property lines. The City's sewer lines on the Hill are seen in Exhibit B to the Jeff Roubos Declaration filed with this opposition.

D. Plaintiff buys "Lot 50" in 2017 from Alameda County

On March 20, 2017, Plaintiff bought Lot 50 "from the Tax Collector of Alameda County, through the county's auction website process." (Quirk Decl. Ex. A (Plaintiff's Complaint at ¶ 15).) Before bidding, Plaintiff received a "terms of sale" sheet, which stated "Prospective purchasers are urged to examine the title, location and desirability of the properties . . . **ALL PROPERTIES ARE SOLD AS IS.** The County of Alameda makes no guarantee . . . relative to the title, location or condition of the properties." (*See* Quirk Decl. Ex. B at Pltf.00123 (emphasis in original).) The "terms of sale" sheet further states "**The burden is on the purchaser to thoroughly research, before the sale, any matters relevant to his or her decision to purchase**." (*Id.* at Pltf. 00125 (emphasis in original).) Plaintiff bid on Lot 50, won the auction, and the purchase price was $75,339. (Alweiss Decl. Ex. A.) The complaint initiating this case was filed approximately two years later, on May 31, 2019.

III. ARGUMENT

A. Legal Standard

Code of Civil Procedure § 437c(f)(1) sets the standard for motions for summary adjudication, providing as follows:

> A party may move for summary adjudication as to one or more causes of action within an action, one or more affirmative defenses, one or more claims for damages, or one or more issues of duty, if that party contends that the cause of action has no merit or that there is no affirmative defense thereto, or that there is no merit to an affirmative defense as to any cause of action, or both, or that there is no merit to a claim for damages, as specified in Section 3294 of the Civil Code, or that one or more defendants either owed or did not owe a duty to the plaintiff or plaintiffs. 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*.

(emphasis added). A motion for summary adjudication proceeds in all procedural respects as a motion for summary judgment. (C.C.P. § 437c(f)(2).) The motion may be granted only if "there is no triable issue as to any material fact." (C.C.P. § 437c(c).) "The affidavits of the moving

party are strictly construed and those of his opponent liberally construed, and doubts as to the propriety of summary judgment should be resolved against granting the motion." *Flait v. North American Watch Corp.*, 3 Cal.App.4th 467, 472 (1992). As set forth in detail below, when this standard is applied to the facts, Plaintiff's motion must be denied.

B. Plaintiff's MSA as to issues 1-3 fails because Plaintiff is attempting to move for adjudication on a legally impermissible cause of action for "negligence" against the City, a public entity

1. The Government Claims Act prohibits common law negligence claims against the City.

Government Code § 815(a) provides that a "public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person," "*except as otherwise provided by statute*."[2] The Legislative Committee Comment to § 815 goes on to state: "This section abolishes all common law or judicially declared forms of liability for public entities, except for such liability as maybe required by the state or federal constitution . . . In the absence of a constitutional requirement, public entities may be held liable only if a statute (not including a charter provision, ordinance or regulation) is found declaring them to be liable . . . [T]he practical effect of this section is to eliminate *any* common law governmental liability for damages arising out of *torts*." (emphasis added).

California courts consistently uphold the preclusive effect of Government Code § 815 on actions premised on common law theories of negligence. *See, e.g., Branch v. State of California ex rel. Dep't. of Transportation*, 159 Cal.App.3d 340, 344 (1984) ("[T]ort claims against public entities are *wholly statutory in nature* and are permissible only when the requirements of enabling legislation have been satisfied.") (emphasis added). Plaintiff's "second cause of action for negligence" against the City, which forms the basis of Plaintiff's issues 1-3, lacks any valid statutory basis, as required by the Government Claims Act. Therefore, the court must deny Plaintiff's MSA as to issues 1-3.[3]

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[2] Under the Government Claims Act, injury includes "death, injury to a person, damage to or loss of property, or any other injury that a person may suffer to his person, reputation, character, feelings or estate, of such nature that it would be actionable if inflicted by a private person." Gov. Code § 810.8.

[3] Defendant will file a motion for judgment on the pleadings as to Plaintiff's negligence claims, and request the Court to take judicial notice of its ruling on Plaintiff's MSA as a basis for

2. Plaintiff cannot identify an applicable statutory duty for vicarious liability-negligence because City employees are immune from liability for injuries caused by public property.

Plaintiff's complaint titles his second cause of action against the City as "Negligence-Vicarious Liability," and appears to be alleging that liability is arising under the Government Claims Act, under § 820(a). (Compl. at ¶¶ 39-45.) The Complaint alleges various duties of "City of Oakland Employees," and that those employees violated their duties in the course "owning," "building," or "maintaining" public property. However, Plaintiff cannot bypass the prohibition on common law negligence claims against a public entity by attempting to allege vicarious liability of a City employee here.

Under Gov. Code § 815.2(a), a public entity is liable for the negligence of an employee only "if the act or omission would . . . have given rise to a cause of action against the employee." But per the Government Claims Act, a public entity's *employee* cannot be "liable for injury caused by a condition of *public property* where such condition exists because of any act or omission of such employee within the scope of his employment." Gov. Code § 840 (emphasis added). Thus, as a matter of law a governmental entity cannot be held vicariously liable under § 815.2 for an act for which a public employee is immune under § 840.

The case of *Van Kempen v. Hanwood Park, etc.*, 23 Cal.App.3d 822 (1972), illustrates the rule. The plaintiffs in *Van Kempen* sought to impose liability upon a city for negligence based on Gov. Code § 815.2 where a minor plaintiff was struck by a falling bench in a park. The plaintiffs argued the trial court erred when it refused to instruct the jury on a common law "attractive nuisance" negligence theory. The court of appeal disagreed, and held the plaintiffs could not sue for negligence based upon Gov. Code § 815.2:

> "[P]ublic entity liability for property defects is not governed by the general rule of vicarious liability provided in § 815.2, but instead by the specific provisions set forth in sections 830-835.4 . . . [¶] Section 840 makes it explicit that except as provided in article 3 (§§ 840-840.6) a public employee is not liable for injury caused by a condition of public property where such condition exists because of any act or omission of such employee within the scope of his employment. The Law Revision Commission also emphasizes that the liability of a public entity for a condition of public property must be grounded upon article 3 and upon no other

dismissing Plaintiff's improper tort claims.

> Statute. Since the public entities' liability is a vicarious one, it cannot be held liable for an employee's act or omission where the employee himself would be or is immune."

Id. at 825; *see also Longfellow v. County of San Luis Obispo*, 144 Cal.App.3d 379 (1983) (affirming trial court's order sustaining demurrer, and holding that public entity was not liable for a dangerous condition because the public entity could not be held liable for the negligent acts of its employees in the scope of their employment as they were immune per Gov. Code § 840); *Hilts v. County of Solano*, 265 Cal.App.2nd 161 (1968) (jury instructions on both negligence and dangerous condition was error). The basis for Plaintiff's MSA-issues 1-3 is the complaint's second cause of action for negligence, which alleges the City was negligent in its administration of City assets. This common law theory of negligence cannot form the basis of a claim against the City, and thus Plaintiff's MSA as to issues 1-3 fails.

3. Plaintiff's MSA as to issues 1-3 must be denied because Plaintiff's MSA is premised on a theory of duty not reflected in the pleadings.

Another reason why Plaintiff's MSA cannot be granted as to issues 1-3 is because his complaint and his MSA contradict each other as to why a duty is supposedly owed. The Complaint alleges that "*employees*, contractors or other individuals for which" the City is responsible "own" or maintain Delmont Avenue and Buena Ventura Avenue, drain inlets on those streets, and sewer lines on the Hill. (Compl. at ¶¶ 39-45 (emphasis added).) These allegations appear more consistent with a vicarious liability theory—which is what Plaintiff titled his second cause of action: "Negligence-Vicarious Liability"—and in places, Plaintiff's MSA appears to follow this idea by citing the relevant portions of the Government Claims Act regarding vicarious liability for torts of public entity employees. (MSA at 12:20-24.)

But Plaintiff's MSA also goes on to state the *City* "*owns* the sewer pipe and easement," "*owns* Delmont Avenue," "*owns* the street drain on Buenaventura," and argues generally that "*Oakland has a duty* . . . to inspect maintain and repair." (MSA at 8, 9, 10, 14 (emphasis added).) In other words, under the Complaint, the duties would supposedly stem from traditional tort law through employee ownership or control of property, but the MSA assumes a duty owed directly by the City itself. Plaintiff's argument headings state "Oakland Owed Duties," "Oakland Owed

Plaintiff Duties of Due Care," and the "Scope of Oakland's Duty." (MSA at 2 (table of contents).)

Neither argument is proper for the reasons explained above, but as to Plaintiff's arguments that the *City owed duties,* Plaintiff cannot move for summary adjudication because that theory of duty was not pleaded in the complaint. *See FPI Dev., Inc. v. Nakashima*, 231 Cal.App.3d 367, 38 (1991) (motion for summary judgment or summary adjudication is limited to the issues raised by the pleadings).

To the extent Plaintiff is trying to argue the City owes duties to Plaintiff, the City will next argue why the legal authority he relies upon is inapplicable.

4. Because no negligence cause of action can exist against the City, Plaintiff cannot move for summary adjudication on the "duty" element of negligence, and Plaintiff's appeals to authority regarding a duty of care are inapplicable.

Plaintiff cites the *Vournas, Parsons,* and *Merrill* decisions for the proposition that in "a negligence action, the existence of a duty of care owed by a defendant . . . is particularly amendable to resolution on summary judgment." (MSA at 11:22-23.) As explained above, due to the Government Claims Act, technically it is impossible for this to be considered a common law negligence case against *the City*. *See Hilts*, 265 Cal.App.2nd at 161.

The *Vournas*, *Parsons,* and *Merrill* cases all involved traditional tort claims for negligence against *private parties*. *Vournas v. Fid. Nat. Title Ins. Co.*, 73 Cal.App.4th 668, 671 (1999); *Parsons v. Crown Disposal Co.*, 15 Cal.4th 456, 465 (1997); *Merrill v. Navegar, Inc.*, 26 Cal.4th 465, 473 (2001). None of the defendants in those cases were public entities, and thus their holdings regarding "duty" are not applicable to this matter against the City, where liability claims must derive from the Government Claims Act.

Plaintiff also relies upon four other cases involving public entities to support his contention that *the City* owes a common law duty of care to Plaintiff. Those cases are distinguishable because they analyze *distinct duties owed to others by public entity employees*, not public entities. As explained above, although Plaintiff's complaint alleges statutory respondeat superior liability, Plaintiff's MSA is arguing a duty owed by the City itself, not a

specific duty owed by an employee. Thus, *Hart* has no bearing on Plaintiff's arguments because it was decided on the basis of a duty of ordinary care owed by individual school personnel, not a public entity. *C.A. v. William S. Hart Union High Sch. Dist.*, 53 Cal.4th 861, 865 (2012). *Williams* is similarly inapplicable. There, the issue was whether an individual "highway patrolman" owed a personal affirmative duty of care to preserve evidence for an injured or stranded motorist after stopping to provide aid. *Williams v. State of California*, 34 Cal.3d 18, 21 (1983). The plaintiff in *Leger* sued his school principal, coach, and the school district itself, but as to the district he was unquestionably pursuing the public entity only "on a theory of respondeat superior." *Leger v. Stockton Unified Sch. Dist.*, 202 Cal.App.3d 1448, 1461 (1988). Finally, *Bastian* was another respondeat superior case where the plaintiff was suing a county and one of its deputy sheriffs after the sheriff placed a bottle of alcohol by the body of an accident victim, which was photographed and publicized—that officer was found to have created a duty to warn to the plaintiff because the officer placed the plaintiff in peril. *Bastian v. Cty. of San Luis Obispo*, 199 Cal.App.3d 520, 529-31 (1988). The court's comment in *Bastian* that duty is determined on a "case-by-case" basis was in reference to individuals, not public entities. *Id.* at 530. The actions of the deputy sheriff in *Bastian* have no similarity to this case.

Plaintiff's reliance upon Civil Code § 1714 to establish a duty of care for the City in relation to the "management of his or her property" is similarly misplaced. Our Supreme Court has held that "the provisions of Civil Code section 1714" do not "extend the liability of a public entity in this setting beyond the usual reach of the 'dangerous condition' provisions of Government Code section 835." *Zelig v. Cty. of Los Angeles*, 27 Cal.4th 1112, 1132 (2002). Because the Government Claims act essentially abolished all common law tort claims against public entities for conditions caused by public property—replacing those actions with a statutory dangerous condition of public property framework—Plaintiff's citations to common law negligence cases are not applicable here.

Additionally, Plaintiff's argument that Civil Code § 845 establishes a common law duty or basis for a right of action against a public entity for maintenance of easements is misplaced. MSA 13:19-22. "Nothing in § 845 authorizes a tort private right of action." *Stamas v. Cty. of*

Madera, No. CV-F-09-0753-LJO-SMS, 2009 WL 2513470, at *17 (E.D. Cal. Aug. 17, 2009). Moreover, Civil Code § 845's "statutory duty" applies to private parties, not public entities. Indeed, nearly all of the cases cited by Plaintiff regarding application of Civil Code § 845 involve the duties owed by private property owners. *See Colvin v. S. Cal. Edison Co.*, 194 Cal.App.3d 1306, 1312 (1987) (abrogated by *Ornelas v. Randolph*, 4 Cal.4th 1095 (1993)) (easement owned by private utility company); *McManus v. Sequoyah Land Assocs.*, 240 Cal.App.2d 348, 349 (1966) (easement for road owned by a private corporation); *Dunn v. Pac. Gas & Elec. Co.*, 43 Cal.2d 265, 273 (1954) (easement owned by private utility company).

Finally, *Reinsch*, the one case involving a public entity that Plaintiff cites in support of his theory that Civil Code § 845 should apply, does not even refer to, much less authorize, Civil Code § 845 as a statute applicable to public entities. *Reinsch v. City of Los Angeles*, 243 Cal.App.2d 737, 742 (1966). The plaintiff in *Reinsch* had not sustained any injury to his property due to a dangerous condition, but rather sought a declaration of rights regarding land obtained by the City through a prescriptive easement. *Id.* at 738. And even though it was not a "negligence" case, the facts in *Reinsch* occurred in the late 1950s, and thus predated the Government Claims Act. *Id. Reinsch* is not applicable to this case—it is a fundamental rule of legal construction that "a decision is not authority for a proposition it does not consider and resolve." *Ellis v. McKinnon Broad. Co.*, 18 Cal.App.4th 1796, 1806 (1993).

To the extent Plaintiff is arguing Civil Code § 845 should apply to the City, a public entity, that argument is preempted by the Government Claims Act, which provides the "dangerous condition of public property" claim as the means of pursuing a cause of action for injuries or damage stemming from public property.

In summary, Plaintiff cannot allege a "negligence" cause of action against the City on the basis that the City "negligently" created a condition or allowed public property to harm him. If Plaintiff alleges the City's property damaged him or his property, his exclusive remedy is under Gov. Code § 835. The Court cannot find a legal "duty" as to a cause of action that the Government Claims Act does not permit. The MSA as to issues 1-3 must be denied.

C. Plaintiff's MSA as to issue 4 fails because evidence shows the City did not cause the landslide condition or damage to Lot 50, and because Plaintiff's MSA as to issue 4 does not completely dispose of the inverse condemnation cause of action

1. Plaintiff's MSA does not establish "there is no triable issue" the alleged damage to Lot 50 was substantially caused by an inherent risk presented by a deliberate public improvement.

a. The inverse condemnation standard

Plaintiff argues there is a "rule of absolute liability for interference with land stability, caused by a public project deliberately designed or constructed." (MSA at 22:15-16 (citing *Albers v. Los Angeles Cty.*, 62 Cal.2d 250 (1965)).) That standard was clarified by our Supreme Court in 2019: To prove liability in a cause of action for inverse condemnation, a plaintiff must show "the damage to private property must be *substantially caused* by an *inherent risk* presented by the *deliberate* design, construction, or maintenance of the public improvement." *City of Oroville v. Superior Ct.*, 7 Cal.5th 1091, 1105 (2019) (emphasis added). In *City of Oroville*, the Supreme Court noted the holding in *Albers*—the standard upon which Plaintiff relies—presented "potential confusion," and thus the inverse condemnation liability standard evolved to one of "substantial causation." *Id.* at 1104. Plaintiff's MSA may be granted only if "there is no triable issue as to *any* material fact." (C.C.P. § 437c(c) (emphasis added).)

b. The City's assets did not "substantially cause" the landslide

i. The pipe on the City's "middle hill" easement was abandoned and there is no evidence it ever leaked

The "middle hill" sewer line was abandoned sometime before 1996. (RSUF 14.) The City has no evidence that it ever leaked, and neither does Plaintiff. (*See id.*) Plaintiff's arguments to the contrary are based on pure speculation: Plaintiff's pipe expert has conceded he never examined the pipe, and that he "will need to physically examine" it, and his "opinions may change to the extent pipe examinations are conducted." (Flett Decl. at ¶ 12.) The City's easement grants it a "right" to construct and a "right to enter" strips of land—it does not have a possessory interest in the land on which the easement is located, and it is not responsible for any private property on the easement: land, retaining walls, or otherwise. (RSUF 15; Alweiss Decl., Exh. B at p. 3.) Geotechnical engineering expert Ted Bayham has examined the Hill, and

concluded that the slides are attributed to "natural causes including natural sloping terrain, zones of geologic weakness, seasonal changes from precipitation, and subsurface water leading to instability," and that "sewer lines" do not cause the landslide. (RSUF 11 (Bayham Decl. at ¶¶ 9, 11-13).) Re-activation of the slide "is caused by seasonal conditions including periods of heavy rainfall." (*Id.*) The middle hill pipe did not "substantially cause" the landslide, and thus Plaintiff has not shown "there is no triable issue." *See City of Oroville*, 7 Cal.5th at 1105.

ii. The City's "Lot 51" easement

In November 2017, the City received report of a broken sewer pipe on Lot 51 and repaired it with a temporary above-ground line. (RSUF 20.) Since that date, the City has returned to the temporary line to respond to random reports of loosening of the pipe or complaints about leaks. Each time, the City has responded appropriately, and there is no evidence any of the pipes on Lot 51 are leaking continuously. (Mach Decl. at ¶ 10.) There are also no records indicating that "hydrauger" pipes were actually installed or left to remain within Lot 51. (RSUF 25.) Plaintiff relies only on statements contained in an undated map to prove hydraugers are still there, which is hearsay. (RSUF 42.) In any event, the slide is caused by natural causes, not sewer lines; it is the unsupported slide on private property that is damaging the City's assets. (RSUF 11 (Bayham Decl. at ¶¶ 9, 11-13).)

iii. The Delmont inlet is not owned by the City

There is a storm drain inlet located on Delmont Avenue, above the Hill, but it is *not owned* by the City and was not installed by the City. (RSUF 27-28.) The City does not consider the inlet at the top of the Hill to be part of its storm water system. (Roubos Decl. at ¶ 11.) The inlet was likely recently "installed by a private property owner." (*Id.*) These facts regarding private control of the inlet rebut liability because inverse condemnation damages must be substantially caused by a "public improvement." *City of Oroville*, 7 Cal.5th at 1105; *cf. Ruiz v. Cty. of San Diego*, 47 Cal.App.5th 504, 522-23 (private pipe was not converted into a public work even where it was "part of a public drainage system"). Moreover, "storm drains" are not the cause of the landslide. (Bayham Decl. at ¶ 12.) Plaintiff cannot prove inverse condemnation liability sufficient to prevail on a motion for summary adjudication.

iv. The Buena Ventura inlet

The storm drain inlet located on Buena Ventura Avenue, below the Hill, is noted on the City's storm water maps, and the City owns it. (*See* Roubos Decl. Exs. A-B; RSUF 34.) It is connected to the City's storm water system, and the City routinely cleans it. (*Id.*) Civil Engineer Jeff Roubos reviewed the City's "Cityworks system, which tracks requests for storm drain service, and the maintenance records," and found that the City routinely responds "to requests for maintenance of the inlet on Buena Ventura Avenue." (Roubos Decl. at ¶ 16.) Copies of those maintenance records, and corresponding requests for service, are attached to the declaration of Jeff Roubos as Exhibit C. Geotechnical engineering expert Ted Bayham examined the Hill and concluded "storm drains located around the Hill," such as the Buena Ventura inlet, are not causing the landslide, and that the cause of the slide is due to the "natural sloping terrain, zones of geologic weakness, seasonal changes from precipitation, and subsurface water leading to instability." (RSUF 11 (Bayham Decl. at ¶¶ 9, 11-13).) Plaintiff has not shown the Buena Ventura inlet "substantially caused" the landslide. *See City of Oroville*, 7 Cal.5th at 1105.

2. Plaintiff's request for a ruling on inverse condemnation liability without proof of damages does not completely dispose of the inverse condemnation cause of action.

Plaintiff's MSA argues the Court should grant its MSA as to its cause of action for inverse condemnation because "undisputed facts show Oakland's public projects caused the landslide." (MSA 22:13-14.) As to this cause of action, Plaintiff's MSA seeks a ruling on liability, but not damages. (Notice of MSA at 3:19 ("summary adjudication as to Oakland's liability for inverse condemnation"). "However, 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." C.C.P. § 437c(f)(1).

As explained in *Hindin v. Rust*, 118 Cal.App.4th 1247, 1256 (2004), prior to 1990, a party could move for summary adjudication of issues. But in "1990, the statute was amended to limit—and still limits—summary adjudication motions to the disposition of one or more causes of action, affirmative defenses, claims for damages, or issues of duty . . . . The purpose of this amendment, as stated by the Legislature, was to stop the practice of adjudication of facts or

adjudication of issues that do not completely dispose of a cause of action or a defense." *Raghavan v. Boeing Co.*, 133 Cal.App.4th 1120, 1135 (2005) (internal quotation marks and citations omitted).

Here, Plaintiff's MSA-issue 4 seeks a ruling only on liability as to Plaintiff's first cause of action. (Notice of MSA at 3:19.) It is not directed toward an entire cause of action, leaving unresolved the question of compensatory damages, an essential element of the claim. Thus, the Court cannot grant Plaintiff's MSA as to this issue. *See Hood v. Superior Court*, 33 Cal.App.4th 319, 323 (1995) (1990 amendments to §437c(f) intended to "stop the practice of adjudication of facts or adjudication of issues that do not completely dispose of a cause of action or defense"); *Dep't of Indus. Rels. v. UI Video Stores, Inc.*, 55 Cal.App.4th 1084, 1097 (1997) (error for trial court to grant summary judgment on question of defendant's liability leaving damages to be determined in a later proceeding).

D. Plaintiff's MSA as to issue 5 fails for the same reason it fails as to issues 1-3: Plaintiff is attempting to move for summary adjudication on a legally impermissible cause of action for "negligence" against the City, a public entity; moreover, there was no employee "duty to disclose" the known landslide condition where the property was sold by Alameda County

"It is settled law that [public entities] are immune from tort liability arising from *any misrepresentations made in conjunction* with the tax sale of the property." *Craland, Inc. v. State of California*, 214 Cal.App.3d 1400, 1405 (1989) (emphasis added) (noting government immunity and holding plaintiff could not "state a nonstatutory cause of action" against public entity in relation to undisclosed landslide at tax sale); *see also Routh v. Quinn*, 20 Cal.2d 488, 490 (1942) ("The fundamental principle from which springs the reasons why a purchaser at a delinquent tax sale may not recover damages suffered as a result of the alleged negligence of the assessor in the computation of the amount of tax, is that in tax sales the doctrine of caveat emptor applies in all its vigor."). Nonetheless, the City now turns to Plaintiff's final MSA argument, regarding "issue 5," to explain why the MSA must be denied.

Plaintiff's complaint labels his fourth cause of action against the City as "Negligence-Vicarious Liability for Employees' Failure to Disclose," and appears to be arguing that liability for this cause of action arises under the Government Claims Act, under § 820(a), alleging that

"City of Oakland Employees had a duty to reasonably disclose" the landslide and "its leaking sewer pipe" to Plaintiff. (Compl. at ¶¶ 47-49.) But Plaintiff's MSA argues that "Oakland had a duty to disclose the landslide at its tax lien sale," an assertion that runs afoul of the Government Claims Act. (MSA at 23:17.) For a variety of reasons, this alleged duty to disclose does not exist.

1. The Government Claims Act does not permit a tortious "duty to disclose" claim against the City.

As discussed above, the Government Claims Act effectively eliminated common law public entity liability for damages arising out of torts. While the Complaint alleges that "City of Oakland Employees had a duty to reasonably disclose," the MSA states that "Oakland had a duty to disclose." (*Compare* Compl. at ¶ 49 *with* MSA at 23:17.) A common law negligence claim for breach of a duty to disclose, premised on a duty owed by the City, is precluded by the Government Claims Act. Gov. Code § 815.2(a) (public entity not liable for common law torts "whether such injury arises out of an act or omission of the public entity or a public employee"); *see Branch v. State of California ex rel. Dep't. of Transportation*, 159 Cal.App.3d 340, 344 (1984) ("[T]ort claims against public entities are wholly statutory in nature and are permissible only when the requirements of enabling legislation have been satisfied.")

And to the extent Plaintiff is attempting to argue that a City employee failed to disclose any condition on Plaintiff's parcel, as his Complaint alleges, the Government Claims Act unequivocally states that the City cannot be "liable for an injury caused by misrepresentation by an employee of the [City], whether or not such misrepresentation be negligent or intentional." Gov. Code § 818.8; *Craland*, 214 Cal.App.3d at 1405 ("It is settled law that [public entities] are immune from tort liability arising from any misrepresentations made in conjunction with the tax sale of the property."); *see Masters v. San Bernardino Cty. Emps. Ret. Assn.*, 32 Cal.App.4th 30, 43 (1995) ("the immunity of a public entity for misrepresentation by its employee, whether intentional or negligent, is absolute"); Gov. Code § 860.2 ("Neither a public entity nor a public employee is liable for an injury caused [by] [i]nstituting any judicial or administrative proceeding or action for or incidental to the assessment or collection of a tax . . . [or] [a]n act or

omission in the interpretation or application of any law relating to a tax"); Gov. Code § 860 ("As used in this chapter, "tax" includes a tax, assessment, fee or charge."); *see also Nadon v. City of Los Angeles*, 104 Cal.App.3d 487, 490 (1980) ("Government Code expressly denies" claim against public entity and its employee for failure to give notices in relation to tax sale).

The Government Claims Act does not permit Plaintiff to plead a cause of action for negligence premised on a common law "duty to disclose," and thus Plaintiff's MSA as to issue 5 must be denied.

2. Plaintiff's cause of action for "Vicarious Liability for Employees' Failure to Disclose" suffers from the same procedural deficiencies as Plaintiff's other negligence cause of action.

Despite public entity immunity for misrepresentation by employees, Plaintiff alleged that "City of Oakland Employees had a duty to reasonably disclose" the landslide and "its leaking sewer pipe" to Plaintiff. Compl. at ¶¶ 47-49. It appears this was done in attempt to bypass the Government Claims Act's strict elimination of common law negligence claims, through the Government Code § 815.2(a) exception, where a public entity can be liable for the negligence of an employee "if the act or omission would . . . have given rise to a cause of action against the employee." For reasons discussed above, this exception would not apply because employees are immune as well. *See* Gov. Code § 860.2 ("Neither a public entity nor a public employee is liable for an injury caused [by] [i]nstituting any judicial or administrative proceeding or action for or incidental to the assessment or collection of a tax . . . [or] [a]n act or omission in the interpretation or application of any law relating to a tax").

Nonetheless, as with Plaintiff's arguments on MSA issues 1-3, the MSA's argument on liability for a "duty to disclose" speaks only to the *City's* alleged duty. The MSA argues that "Oakland had a duty to disclose," "Oakland was a lienholder," "Oakland knew the landslide," "Oakland did not disclose," and that "Oakland had a heightened duty." (MSA at 23:17, 24:15, 19, 25-26, 25:13.) Similar to Plaintiff's arguments regarding negligence, Plaintiff is conflating who owes a duty. Plaintiff cannot move for summary adjudication on a theory that the City owed a duty, because that theory was not pleaded in the complaint. *See FPI Dev., Inc. v. Nakashima*, 231 Cal.App.3d 367, 38 (1991) (motion for summary judgment or summary

adjudication is limited to the issues raised by the pleadings).

3. There was no "duty to disclose" for the City or a City employee.

a. Public entities are immune from liability related to tax sale disclosures

Plaintiff bought his parcel, Lot 50, "from the Tax Collector of Alameda County, through the county's auction website process." (Compl. at ¶ 15.) Even though the City did not sell Lot 50 to Plaintiff, he argues, without evidence, that "Oakland instructed Alameda County (trustee) to conduct a tax-lien foreclosure sale to enforce its liens." (MSA at 24:23-24.)

"It is settled law that [public entities] are immune from tort liability arising from *any misrepresentations made in conjunction* with the tax sale of the property." *Craland,* 214 Cal.App.3d at 1405; *see also Wiechmann Engineers v. State of California ex rel. Dep't Pub. Wks.*, 31 Cal.App.3d 741, 749 (1973) ("Generally, fraudulent concealment gives rise to an action in tort; however, such an action for misrepresentation against public agencies is barred by Government Code section 818.8.")

This legal truism applies to all public agencies that *sell* property at tax sales—in this case, Alameda County—and thus it applies with even more logical force to the City in this case, where it never owned Lot 50, and was not involved in the County's tax sale proceedings.

b. The City did not own Lot 50, it did not sell Lot 50, it did not initiate a sale of Lot 50, and there was no transaction between the City and Plaintiff

Even if the Government Claims Act did not exist, and notwithstanding the discrepancies between the pleadings and the MSA, there was no duty to disclose in this instance. Assume, for the sake of argument, that the City was not a public entity. Even under that assumption, there is no duty for the hypothetical "non-public" City to disclose to a bidder at a County tax sale.

Although it is not disputed that the Tax Collector of Alameda County sold Lot 50 to Plaintiff, Plaintiff argues the City told the Tax Collector of Alameda County to sell the property. The City's inspections manager has explained that the "City does not 'request' or ask Alameda County to conduct tax foreclosure sales. It did not do so for Plaintiff's purchase of 'Lot 50,' from a March 30, 2017 tax sale by Alameda County. The City does not take 'action to foreclose

its liens.' Those proceedings are initiated by Alameda County." (Low Decl. ¶ 15.) Specifically, § 3691 of the California Revenue and Taxation Code grants the County Tax Collector with "the power to sell," and that the County Tax Collector "shall attempt to sell in accordance with Section 3692 all or any portion of tax-defaulted property that has not been redeemed." *See also* Gov. Code § 38773.5 ("the property may be sold after three years by the tax collector for unpaid delinquent assessments").

The facts show Alameda County's Tax Collector, not the City, decided when to conduct the tax foreclosure sale that led to Plaintiff's purchase of Lot 50.

The fact the City was not the seller of Lot 50 is relevant to Plaintiff's argument that a duty to disclose existed. Plaintiff argues the case of *Karoutas v. HomeFed Bank*, 232 Cal.App.3d 767 (1991) supports his argument that Oakland owed him a "duty to disclose," because "a beneficiary under a deed of trust selling property pursuant to a power of sale may owe a common law duty to prospective bidders to disclose known facts materially affecting the value of the property." (MSA 24:7-9 (quoting *Karoutas*, 232 Cal.App.3d at 771).)

There are several reasons why *Karoutas*'s holding does not apply here. First, *Karoutas* was not a *tax* foreclosure case. The plaintiff in *Karoutas* had bought a home *from a beneficiary-bank* that was "selling property" after the prior owners defaulted on their mortgage, and sued the bank for negligent nondisclosure after it learned of soil defects on the property. *Id.* at 770. Thus, the defendant in that case was unable to avail itself of the protections offered by the Government Claims Act, and the "common law" duty discussed in *Karoutas* is not applicable. Second, *Karoutas* involved a dispute between a buyer—the new homeowner—and the bank that oversaw the sale of the home. As explained above, the City had no involvement in the sale of Lot 50. Third, a "deed of trust" to a bank, which secures a mortgage, is distinct from the abatement liens in this case, which did not secure any loan to the City. Fourth, the decision did not create a mandatory to disclose for private parties; it held that a bank "may" owe a common law duty to disclose.

c. The landslide was not a material fact "known only" to the City

Plaintiff argues the City "had a duty to disclose the landslide" because "a cause of action

for non-disclosure of material facts may arise [when] . . . the facts are known or accessible only to defendant." (MSA 23:17-79 (quoting *Warner Constr. Corp. v. City of Los Angeles*, 2 Cal.3d 285 (1970)).)

The *Warner* case does not support Plaintiff's argument. Even though he is foreclosed from bringing a negligence claim against the City, Plaintiff's "duty to disclose" argument is based in tort. *Warner* was a breach of contract case, and the *Warner* decision even noted that "tort actions for misrepresentation against public agencies are barred by Government Code section 818.8." *Id.* at 293-94. The plaintiff in *Warner* nonetheless "retain[ed], however, a cause of action in contract," and consequently the court analyzed the "non-disclosure of material facts" in the context of a contract between two parties. *Id.*

Even though *Warner* is not a negligence case, it appears Plaintiff recognized *Warner* is distinguishable based on the buyer-seller relationship upon which it was decided, because Plaintiff's MSA goes on to argue that "there does not need to be privity of contract for this duty to apply, and it may be owed to a buyer downstream in the chain of commerce." (MSA 23:22-23.) For this proposition, Plaintiff relies on the case of *Barnhouse v. City of Pinole*, 133 Cal.App.3d 171, 191 (1982). However, Plaintiff's citation to *Barnhouse* is also misplaced. In *Barnhouse*, the plaintiffs were homeowners who sued private developers, the city where plaintiffs' homes were located, and the state. *Id.* at 177. One of the plaintiffs bought his home not directly from the developer-defendant, but from the prior owner who purchased directly from the developer-defendant. *Id.* at 191. In this context, the *Barnhouse* court analyzed the question of whether privity of contract was necessary for an "action for deceit" by the plaintiff against *the private developer*—not the public entities. *Id.* As discussed above at length, these type of tort actions are not applicable against the City, a public entity. Nor is an "action for deceit" even alleged against the City in this case.

Notwithstanding that Plaintiff's legal authority is not applicable, the facts establish the landslide on the Hill was not "known only" by the City.

The landslide condition on the Hill goes back over 70 years. (Bayham Decl. ¶ 9.) Publicly available aerial photos of the Hill from 1947 show lineation and landslide scarp on the

lower portion of the Hill in 1947. (*Id.*) Publicly available landslide maps from 1969 and 1975 show the Hill continued as an active landslide condition during that period. (*Id.* ¶ 10.) Publicly available records from the City show that in 2008, debris flows from Plaintiff's portion of the Hill extended into the public right of way. (*Id.* ¶ 16.) In fact, Plaintiff's own expert has stated that a photo "dated April 8, 1953 . . . indicates that a landslide formed on the uphill portion of Buenaventura Avenue." (Kropp Decl. ¶ 15.) Plaintiff's expert states that "photographs of the subject area indicate frequent movement of the landslide from the time of the City records of 1953 . . . through the time the city records . . . begin (2001)." (*Id* ¶ 17.)

To be clear, the City never sold Lot 50 to Plaintiff, but because the nature of the landslide was publicly known—and because Plaintiff bought Lot 50 from the County at a tax foreclosure sale—this matter is most similar to the *Craland* case. In finding a public entity not liable in relation to nondisclosure of a landslide at a tax foreclosure sale, the court in *Craland* noted that "[u]ndoubtedly, plaintiff could have learned of the existence of the landslide prior to the tax sale through the same investigation of public records that led to the discovery three years later," and held that the "burden should be on buyers at tax sales at public auction, *in advance of the sale*, to take all steps necessary to assure themselves" regarding "use and development of the property." *Craland,* 214 Cal.App.3d at 1408 (emphasis added). The MSA as to issue 5 must be denied.

IV. CONCLUSION

Plaintiff's MSA raises five issues. Issues 1-3 and 5 fail because Plaintiff's negligence causes of action are not permitted by the Government Claims Act. Issue 4 fails because there are disputed issues regarding causation and because Plaintiff does not provide evidence of damages that would allow the Court to dispose of the entire cause of action. The City respectfully requests that the Court deny Plaintiff's motion for summary adjudication.

Dated: March 24, 2021

BARBARA J. PARKER, City Attorney

By: _____

MICHAEL QUIRK, Deputy City Attorney
Attorneys for Defendant
CITY OF OAKLAND

PROOF OF SERVICE
Alweiss vs. City of Oakland, et al
Alameda County Superior Court Case No. RG19021124

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is City Hall, One Frank H. Ogawa Plaza, 6th Floor, Oakland, California 94612. On the date set forth below, I served the within documents:

DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY ADJUDICATION

☐ **By United States mail**. I enclosed the documents in a sealed envelope or package addressed to the persons at the address(s)es listed below and *(specify one)*:

- ☐ Deposited the sealed envelope with the United States Postal Service, with the postage fully prepaid.
- ☐ Placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the City of Oakland's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

☐ **By messenger service.** I served the documents by placing them in an envelope or package addressed to the persons at the address(es) listed below and providing them to the professional messenger service for service.

☐ **By overnight delivery.** I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the address(es) listed below. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

☐ **By fax transmission**. Based on an agreement of the parties to accept service by fax transmission, I faxed the documents to the persons at the fax numbers listed below. There was no error reported by the fax machine that I used. Attached is a copy of the record of the fax transmission.

☑ **By e-mail transmission**. Based on an agreement of the parties to accept service by electronic transmission, I e-mailed the documents to the persons at the e-mail address(es) listed below. No error was reported sent by email.

☐ **By personal delivery.** I personally delivered the document(s) to the person(s) at the address(es) listed below.

Scott E. Jenny, Esq. Jenny & Jenny, LLP 736 Ferry Street Martinez, CA 94553 Phone: (925) 228-1265 Fax: (925) 228-2841 Email: sejlawoffice@cs.com Email: richardkjenny@hotmail.com ***Attorneys for Plaintiff(s)***	Anastasios G. Konstantin The Konstantin Law Firm, Inc. 420 3rd Street, Suite 250 Oakland, CA 94607-3843 Telephone: (510) 839-0945 Fax: (510) 839-0947 Email: agk@konstantinlaw.com ***Attorneys for Defendant Chan T. Pey***

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on March 24, 2021 at Oakland, California.

Carma Carden