Stephen E. Velyvis (SBN 205064)
E-mail: svelyvis@bwslaw.com
Gail E. Kavanagh (SBN 154705)
E-mail: gkavanagh@bwslaw.com
BURKE, WILLIAMS & SORENSEN, LLP
1901 Harrison Street, Suite 900
Oakland, CA 94612-3501
Tel: 510.273.8780 Fax: 510.839.9104

Attorneys for Defendant
DIABLO COMMUNITY SERVICES DISTRICT

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF CONTRA COSTA

ROBERT TIERNAN, *et al.*,

Plaintiffs,

v.

DIABLO COMMUNITY SERVICES DISTRICT, *et al.*;

Defendants.

Case No. MSC 17-02529

Honorable Charles S. Treat, Dept. 12

NOTICE OF ENTRY OF ORDER GRANTING DEFENDANT DIABLO COMMUNITY SERVICES DISTRICT'S MOTION FOR JUDGMENT ON THE PLEADINGS ON PLAINTIFFS' THIRD CAUSE OF ACTION, AND GRANTING LEAVE TO FILE SECOND AMENDED COMPLAINT WITH NEW CAUSE OF ACTION

Action Filed: December 21, 2017

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on October 30, 2018, the Court entered its Order Granting Defendant Diablo Community Services District's Motion for Judgment on the Pleadings and Granting Leave to File Second Amended Complaint With New Cause of Action, a copy of which is attached hereto as **Exhibit 1.**

Dated: November 1, 2018

BURKE, WILLIAMS & SORENSEN, LLP

By: _____
Stephen E. Velyvis
Gail E. Kavanagh
Attorneys for Defendant
DIABLO COMMUNITY SERVICES DISTRICT

SF #4828-9841-3690 v1

Stephen E. Velyvis (SBN 205064)
E-mail: svelyvis@bwslaw.com
Gail E. Kavanagh (SBN 154705)
E-mail: gkavanagh@bwslaw.com
BURKE, WILLIAMS & SORENSEN, LLP
1901 Harrison Street, Suite 900
Oakland, CA 94612-3501
Tel: 510.273.8780 Fax: 510.839.9104

Attorneys for Defendant
DIABLO COMMUNITY SERVICES DISTRICT

FILING FEE EXEMPT PURSUANT TO GOVERNMENT CODE § 6103

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF CONTRA COSTA

ROBERT TIERNAN, *et al.*,

Plaintiffs,

v.

DIABLO COMMUNITY SERVICES DISTRICT, *et al.;*

Defendants.

Case No. MSC 17-02529

Honorable Charles S. Treat, Dept. 12

~~[PROPOSED]~~ AC

ORDER GRANTING DEFENDANT DIABLO COMMUNITY SERVICES DISTRICT'S MOTION FOR JUDGMENT ON THE PLEADINGS ON PLAINTIFFS' THIRD CAUSE OF ACTION, AND GRANTING LEAVE TO FILE SECOND AMENDED COMPLAINT WITH NEW CAUSE OF ACTION

Action Filed: December 21, 2017

This matter came before the Court on regular notice on October 5, 2018. Moving Defendant Diablo Community Services District ("the District") appeared by and through its counsel of record, Stephen Velyvis and Gail Kavanagh, and Plaintiffs appeared by and through their counsel of record, Dominic Signorotti. The Court having considered the moving, opposition and reply papers and the arguments of counsel at the hearing, and good cause appearing therefor, GRANTS the Motion for Judgment on the Pleadings on the Third Cause of Action of the First Amended Complaint for the reasons stated in the Tentative Ruling, attached hereto as Attachment A, as follows:

1. The District is entitled to a judicial declaration that that the District does not have the authority to prevent the "general public, including . . . bicyclists, vehicles and pedestrians" from using Calle Arroyo in Diablo.

2. Plaintiffs' request for leave to amend the Third Cause of Action in the First Amended Complaint is DENIED.

3. For the reasons stated on the record at the hearing, Plaintiffs' request for leave to amend their Complaint to allege a new cause of action for declaratory relief as to the alleged duty of the District to prevent people from using certain entrances into Diablo which Plaintiffs allege are unauthorized pursuant to the District's Ordinance Code is GRANTED. Plaintiffs shall file and serve a Second Amended Complaint alleging such a new cause of action on or before November 4, 2018 (*i.e.,* within 30 days of the October 5, 2018 hearing).

IT IS SO ORDERED.

Dated: October 9, 2018

CHARLES S. TREAT

Judge of the Superior Court

APPROVED AS TO FORM:

BUCHMAN PROVINE BROTHERS SMITH, LLP

HELD 10 DAYS PER LOCAL RULE 12

By: _____
Dominic V. Signorotti
Attorneys for Plaintiffs Robert Tiernan et al.

Attachment A

8. TIME: 9:00 CASE#: MSC17-02529
CASE NAME: TIERNAN VS. DIABLO COMMUNITY SERVICES
HEARING ON MOTION FOR JUDGMENT ON 3rd CAUSE OF ACTION
FILED BY DIABLO COMMUNITY SERVICES DISTRICT
**** TENTATIVE RULING: ****

Defendant Diablo Community Services District moves for judgment on the pleadings as to the third cause of action. The motion is **granted without leave to amend**. The Court concludes that the District does not have the authority to prevent the "general public, including... bicyclists, vehicles and pedestrians" from using Calle Arroyo road in Diablo.

The Court notes that this motion was filed *before* the First Amended Complaint was filed. However, the parties are in agreement that this motion may apply to the FAC even though the documents were filed in the reverse order.

The Court also notes with disapproval that the District has not submitted a declaration showing compliance with the meet and confer requirement for a motion for judgment on the pleadings. (See Code of Civil Procedure §439.) The attorneys should pay attention to this requirement in any future proceedings. For the present motion, however, the Court will overlook the omission. This is a binary, yes-or-no legal issue, with no real room for compromise and no nuances of any missing allegations that might be added. It is unlikely, therefore, that any meet-and-confer would be fruitful.

The District's motion for judgment on the pleadings is distinctly different from its previous demurrer that challenged the sufficiency of the complaint. A motion for judgment on the pleadings, like the District's motion, admits "as true all of the well-pleaded facts alleged in appellant's complaint" and seeks a "particular declarations of the rights and duties of the parties as set forth in the notice of motion with respect to the admitted allegations of the amended complaint." (*Wilson v. Board of Retirement of Los Angeles County Employees Retirement Asso.* (1957) 156 Cal.App.2d 195, 200.)

Unlike a demurrer, a motion for judgment of the pleadings in a declaratory relief action can rule on the merits of the declaratory relief claim alleged in the complaint. (See *Wilson,* 156 Cal.App.2d at 200-01.) "'The indicated procedure would be for defendant to move on the pleadings for judgment that the declaration be made, but that it be made in favor of the defendant. This would seem to reach the procedural problem where no triable issue is presented.'" (*Id.* at 201, quoting from *Strauss* v. *University of State of New York*, 282 App.Div.

593 [125 N.Y.S.2d 821].) Thus, unlike the demurrer, this motion properly tees up the merits of the dispute in the third cause of action for decision.

The District argues Plaintiffs cannot obtain a declaration in their favor on the third cause of action. In the third cause of action, Plaintiffs "seeks a judicial determination of the [District's] duties and obligations under the Ordinance Code with respect to securing Calle Arroyo from unauthorized use by the general public, including but not limited to by bicyclists, vehicles and pedestrians, and policing it to ensure that unauthorized user[s] stop trespassing on Calle Arroyo." (FAC ¶46.) In the prayer, Plaintiffs ask for "a declaration by the Court that the [District] has an obligation under the Ordinance Code to provide security for the homeowners on Calle Arroyo and take steps to police the roadway to prevent unauthorized bicyclists, vehicles or others from using Calle Arroyo." (FAC prayer 3.)

For this motion, the District assumes that Calle Arroyo is a private road and that the general public has no right to use it. Thus, whether or not the general public has the right to use Calle Arroyo is not at issue in this motion. Instead, the question whether the District has the ability to prevent the general public from using the road assuming the public does not have the right to use Calle Arroyo.

The District is an independent special district formed in 1969 under Government Code §§ 61000 et seq. (FAC ¶22.) The District is a creation of statute and "as a creation of statute, has only such powers as are bestowed on it by the Legislature. [Citation.]" (*Placer County Local Agency Formation Com. v. Nevada County Local Agency Formation Com.* (2006) 135 Cal.App.4th 793, 804; see also *Zack v. Marin Emergency Radio Authority* (2004) 118 Cal.App.4th 617, 632.)

Government Code § 61100 lists 32 powers that are given to a special district. Of these, however, the only one plaintiffs adduce as supporting the District's power to exclude outsiders from Calle Arroyo is § 61100(j): "Provide security services, including, but not limited to, burglar and fire alarm services, to protect lives and property." Plaintiffs argue that the District has the authority to prevent the general public from using Calle Arroyo under subdivision (j) because the District is providing security services.

Even looking only at the plain language of this subdivision, it would be a considerable stretch to read § 61100(j) as including a power to exclude people (such as motorists, bicyclists, or pedestrians) from using a roadway. The actual grant of authority is to "provide security services". The term is not self-defining, but guidance is found in the specific examples given, and the purpose stated – "burglar and fire alarm services, to protect lives and property". Those bear scant if any resemblance to excluding road users, which is more matter of avoiding congestion and promoting privacy and convenience. Granted, too-heavy traffic might pose something of a safety hazard; but it is apparently agreed all around that the District has the power to act for roadway safety, such as by enforcing the Vehicle Code.

The maxim *ejusdem generis* is applicable here. "*Ejusdem generis* (literally, 'of the same kind') [citations], means that where general words follow specific words, or specific words follow

general words in a statutory enumeration, the general words are construed to embrace only things similar in nature to those enumerated by the specific words. [Citation.]" (*California Farm Bureau Federation v. California Wildlife Conservation Bd.* (2006) 143 Cal.App.4th 173, 189.) In subsection (j) examples of providing security services are listed "burglar and fire alarm services". Such services are different than preventing the general public from using a road.

If § 61100(j) is unclear, however, Government Code § 61105(g) is not – and it provides the definitive answer to the present question. Section 61105(g) is the only statute that actually addresses the very issue here, namely whether a special district does or does not have the authority to exclude the general public from roadways. By its own terms, it expressly grants that very authority – but *only* to seven specifically named districts. This District is not one of them.

Section 61105 is, by its own recitation, a legislative vehicle for specific grants to specific districts of powers that special districts generally do not enjoy. Subdivision (a) says so (emphasis added): "The Legislature finds and declares that the unique circumstances that exist in certain communities justify the enactment of special statutes for specific districts. In enacting this section, the *Legislature intends to provide specific districts with special statutory powers to provide special services and facilities that are not available to other districts*."

Among the special powers granted only to particular districts is the power to exclude the general public from using roads. In subdivision (g), seven specified districts "may, for roads owned by the district and that are not formally dedicated to or kept open for use by the public for the purpose of vehicular travel, by ordinance, limit access to and the use of those roads to the landowners and residents of that district." The District is not one of the districts listed.

Section 61105(g) would be pointless and superfluous if, as plaintiffs argue, all special districts in the state already have the power to exclude the public from roadways under § 61000(j). The narrower statute must be taken as the Legislature's recognition and intent that the seven listed districts, and *only* those districts, have that authority.

Plaintiffs recognize that there is no mention of the District in Government Code § 61105(g). They argue that "[t]his means nothing more than the fact that the [District] Board, as it existed in 2005 [when section 61105 was last amended], apparently found it unnecessary to petition the California State Legislature to specifically memorialize the manner in which it was exerting its authority." (Oppo p. 9.) (Nor, the Court adds, has the District Board apparently found it necessary to request such power from 2005 to 2018 either.) Given the clarity of § 61105(g), that observation might be taken as undermining what plaintiffs claim about the 50-year history here. Be that as it may, however, the fact remains that whether the District "found it necessary" or not, it did not seek to include itself in the list of districts with this statutory power. (Nor, of course, is there any presumption one way or the other as to whether the Legislature would have granted that power if sought.)

Plaintiffs argue that they are not trying to limit access just to landowners and residents and that they are not trying to preclude all "non-residents" from using Calle Arroyo. It is true that in

addition to residents and their guests, Plaintiffs also want to allow access to individuals that have "legitimate business" in Diablo – though they give scant guidance as to how the District's police officers are supposed to determine that vague criterion, especially without violating the Fourth Amendment. But this slightly broader group of individuals with access does not somehow give the District authority to limit access to the road.

Plaintiffs argue that the District's current position upends over 50 years of historical practice. The District disputes the recitation of history, but it is irrelevant in any case. If it be true that the District has been excluding outsiders for 50 years, that means only that the District has been exceeding its statutorily granted powers for 50 years.

As framed in the third cause of action, plaintiffs' claim focuses on the District's own ordinances, which plaintiffs characterize as representing exactly the kind of attempted exclusion they seek here – a characterization that the District does not contest. But the District correctly points out that the ordinances are invalid, as *ultra vires*, to the extent that they purport to exercise a power that § 61100 does not grant to the District. This admittedly puts the District in the anomalous position of arguing for the illegality of its own ordinances. But the District is correct, and the Court is thus put in the position of agreeing with that confession of illegality.

The District can enforce the ordinances only to the extent that they do not conflict with state law. In *City of Lodi v. Randtron* (2004) 118 Cal.App.4th 337, 358-59, the court explained that "[a]s an administrative agency, DTSC is not empowered to authorize a city to enact an ordinance which conflicts with state law. An administrative agency has only that authority conferred upon it by statute and any action not authorized is void. [Citations.] Administrative regulations that exceed the scope of or are inconsistent with the governing statute are unenforceable."

Under the Government Code, the District can only adopt ordinances "for the administration, operation, and use and maintenance of the facilities and services listed in Part 3 (commencing with Section 61100)." (Gov. Code § 61060.) Thus, local ordinances should be used to implement the powers given to the District in Part 3. Part 3 includes both sections 61100 and 61105. Therefore, to the extent the local ordinance give the District power to limit access to Calle Arroyo it conflicts with the powers given to the District in section 61100, et seq. and is therefore void.

Plaintiffs include a generic request for leave to amend. They do not suggest any manner in which this cause of action could be rescued by amendment, however, and the Court cannot see any either. If plaintiffs contest this tentative to seek leave to amend, they should come to the hearing prepared to advance specific proposals for amendment, and to explain how they would suffice.

Evidentiary Issues

The parties' requests for judicial notice are granted, with some exceptions. Judicial notice as to plaintiffs' items 1 and 2 is unnecessary, as those are pleadings in this Court's file. The Court nevertheless appreciates the courtesy of convenient presentation.

CONTRA COSTA SUPERIOR COURT

MARTINEZ, CALIFORNIA
DEPARTMENT: 12
HEARING DATE: 10/05/18

The Court rejects plaintiffs' proffered item 3, the Tiernan declaration. The declaration is already in the Court's file; so if it were properly cognizable on this motion, it would not be necessary to take judicial notice of it. It is not so cognizable. This is a motion for judgment on the pleadings, on which plaintiffs cannot offer testimony. Apparently they conceive the Tiernan declaration to be judicially noticeable as a species of legislative history, in that it recites Mr. Tiernan's subjective intention as to the meaning of certain language in the District's founding documents. But an author's or legislator's after-the-fact statements about the meaning of such language, in the form of a declaration (or, for that matter, in live testimony), is proper neither in form nor in substance.

PROOF OF SERVICE

I, Christine Shores, declare:

I am a citizen of the United States and employed in San Francisco County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 101 Howard Street, Suite 400, San Francisco, California 94105. On November 1, 2018, I served a copy of the within document(s):

ORDER GRANTING DEFENDANT DIABLO COMMUNITY SERVICES DISTRICT'S MOTION FOR JUDGMENT ON THE PLEADINGS ON PLAINTIFFS' THIRD CAUSE OF ACTION, AND GRANTING LEAVE TO FILE SECOND AMENDED COMPLAINT WITH CAUSE OF ACTION

☒ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, the United States mail at Oakland, California addressed as set forth below.

☐ by placing the document(s) listed above in a sealed GSO Overnight Delivery envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a GSO Overnight Delivery agent for delivery.

☐ by transmitting via e-mail or electronic transmission the document(s) listed above to the person(s) at the e-mail address(es) set forth below.

Dominic V. Signorotti
BUCHMAN PROVINE BROTHERS SMITH, LLP
2033 No. Main Street, Suite 720
Walnut Creek, CA 94596
Tel.: (925) 944-9700
Fax: (925) 944-9701
Email: dsignorotti@bpbsllp.com

Attorneys for Plaintiffs

Mark D. Epstein
Wendel, Rosen, Black & Dean LLP
1111 Broadway, 24th Floor
Oakland, CA 94607
Tel.: (510) 834-6600
Fax: (510) 808-4724
Email: MEpstein@wendel.com

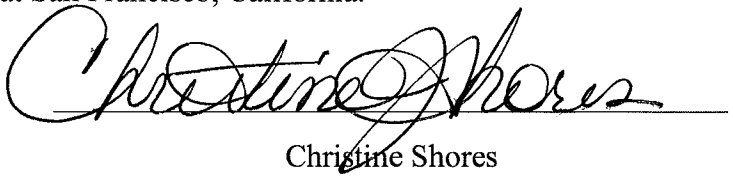
Attorneys for Defendant DIABLO COUNTRY CLUB

William S. Weisberg WEISBERG & MILLER 665 Chestnut Street, 3rd Floor San Francisco, CA 94133 Tel.: (415) 296-7070 Fax.: (415) 296-7060 Email: wweisberg@wmlawfirm.com	*Attorneys for Defendants* JOSHUA D. FREEMAN and CHELSEA J. FREEMAN, Trustees of the Joshua D. and Chelsea J. Freeman Family Revocable Trust, U/D/T dated July 22, 2005
Justin Schnitzler RING HUNTER HOLLAND & SCHENONE, LLP 985 Moraga Road, Suite 210 Lafayette, CA 94549 Tel.: (925) 226-8251 Fax.: (925) 262-2507 Email: jschnitzler@rhhslaw.com	*Attorneys for Defendants* GERARD S. CLANCY and DONNA M. CLANCY, Co-Trustees of the Gerard S. Clancy and Donna M. Clancy AB Living Trust dated January 13, 2003
Kyle R. Smith Michael O. Stephenson Bay Area Bicycle Law 44 Montgomery Street, Suite 1610 San Francisco, CA 94104 Tel: (415) 466-8717 Fax: (888) 563-7661 Email: k.smith@bayareabicyclelaw.com; m.stephenson@bayareabicyclelaw.com	*Attorneys for Defendant/Intervenor BIKE EAST BAY*

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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

Executed on November 1, 2018, at San Francisco, California.



Christine Shores