

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

CURRIER BUILDERS, INC., et al.,)
)
Plaintiffs)
)
v.)
)
TOWN OF YORK, MAINE,)
)
Defendant)

Docket No. 01-68-P-C

RECOMMENDED DECISION ON DEFENDANT’S MOTION TO DISMISS

The defendant, the Town of York, Maine, moves to dismiss this action which it removed to this court from the Maine Superior Court (Kennebec County). The complaint alleges that a zoning ordinance adopted by the residents of the town in August 2000 both on its face and as applied violates Maine’s “home rule” statute, 30-A M.R.S.A. § 4352(2); violates the federal and state constitutional guarantees of due process and equal protection; represents an unconstitutional taking; and violates 30-A M.R.S.A. § 4356(1), which allows building permit moratoriums to be imposed by municipalities only under certain conditions. The plaintiffs, Currier Builders, Inc., Cape Neddick Estates, Inc., and Home Builders Association, Inc., all Maine corporations, object vigorously to the motion. I recommend that the court grant the motion in part and deny it in part.

I. Applicable Legal Standard

The motion to dismiss invokes Fed. R. Civ. P. 12(b)(6). Defendant’s Motion to Dismiss, etc. (“Motion”) (Docket No. 3) at 4. “When evaluating a motion to dismiss under Rule 12(b)(6), [the court] take[s] the well-pleaded facts as they appear in the complaint, extending the plaintiff every

reasonable inference in [his] favor.” *Pihl v. Massachusetts Dep’t of Educ.*, 9 F.3d 184, 187 (1st Cir. 1993). The defendant is entitled to dismissal for failure to state a claim only if “it appears to a certainty that the plaintiff would be unable to recover under any set of facts.” *Roma Constr. Co. v. aRusso*, 96 F.3d 566, 569 (1st Cir. 1996); *see also Tobin v. University of Maine Sys.*, 59 F.Supp.2d 87, 89 (D. Me. 1999).

II. Factual Background

The complaint includes the following relevant factual allegations.

Plaintiff Currier Builders, Inc. (“Currier”) builds affordable housing in York, Maine. Complaint (attached to Notice of Removal of Defendant, Docket No. 1) ¶ 2. Currier typically purchases individual building lots that do not require subdivision approval on which it builds houses that sell for \$125,000 to \$140,000. *Id.* ¶ 3. Currier typically applies for a building permit, arranges financing, builds a house and then sells it. *Id.* ¶ 4. Currier purchased lots (presumably in York) for this purpose before the ordinance at issue was adopted. *Id.* ¶ 6.

Plaintiff Cape Neddick Estates, Inc. (“Neddick”) was formed to develop one or more subdivisions in York. *Id.* ¶ 12. Since September 1999 Neddick has been involved in the development of an 8-unit subdivision on nine acres in York. *Id.* ¶ 13. It has invested \$50,000 in development and site work on this land. *Id.* ¶¶ 14-15. It began this work in September 1999 and sought subdivision approval in or about April 2000. *Id.* ¶ 16. It received no building permits before the ordinance at issue was adopted and has been unable to obtain any since that time. *Id.* ¶¶ 16-17. The waiting list for building permits is backed up for at least one year. *Id.* ¶ 17.

Plaintiff Home Builders Association, Inc., d/b/a/ Home Builders and Remodelers Association of Maine (“Home Builders”), a Maine non-profit corporation with headquarters in Augusta, Maine, has approximately 330 members, including general contractors, building suppliers, subcontractors, and

providers of home building ancillary services, some of whom do business or plan to do business in York. *Id.* ¶ 20.

The population of York is between 13,000 and 14,000. *Id.* ¶ 22. The town has issued the following numbers of residential building permits in the years shown:

1980	142	1987	95	1994	92
1981	105	1988	66	1995	85
1982	105	1989	89	1996	110
1983	122	1990	65	1997	117
1984	210	1991	65	1998	145
1985	324	1992	86	1999	160
1986	422	1993	77		

Id. ¶ 23. Under the town charter, an ordinance may be proposed by petition, with adoption by general referendum after a public hearing. *Id.* ¶ 24. On May 22, 2000 a petition was circulated and signed by some York residents to enact a residential growth ordinance. *Id.* ¶ 25. On July 10, 2000 a public hearing was held on the proposed ordinance. *Id.* ¶ 26. On August 26, 2000 the ordinance was adopted by a special general referendum. *Id.* The ordinance stated that it was retroactive to May 22, 2000. *Id.* The town required building permit applicants to sign a building permit application addendum providing that any permit issued after May 22, 2000 might be revoked. *Id.*

Applicants seeking approval for subdivision development projects in York must first obtain approval from the planning board of a sketch plan, a preliminary plan and a final plan. *Id.* ¶ 27. They may then apply for residential building permits. *Id.* The ordinance provides that no more than seven building permits for residential dwellings may be issued in one month. *Id.* ¶ 28. Four of these permits are earmarked for non-subdivision dwelling units. *Id.* Each unit within a multi-family dwelling must obtain a permit before the building may be built. *Id.* No more than two applications for dwelling units within the same multi-family residence may be submitted per month. *Id.* ¶ 33. Applications for no more than two dwelling units per subdivision may be authorized per month. *Id.* ¶ 32. If more than four

non-subdivision applications and three subdivision applications are received in a given month, permits are assigned by a blind lottery and the remaining applications are assigned to a subsequent month. *Id.* ¶ 28. In practice, however, the town has placed every application submitted in a given month in a blind lottery and placed it in line in the order selected to receive a permit at some time in the future. *Id.* ¶ 30. A non-subdivision application submitted February 1, 2001 can receive a permit no earlier than May 2002 and a subdivision application submitted on that date can receive a permit no earlier than August 2001. *Id.* ¶ 31.

A subdivision with 3 to 6 potential units is allowed to have one permit application pending at any time. *Id.* ¶ 32. A subdivision with 7 to 10 units is allowed to have two pending applications and a subdivision with 11 or more units is allowed three. *Id.*

The ordinance exempts from its requirements only elderly housing proposed by the York Housing Authority. *Id.* ¶ 35.

On May 22, 1999 the York board of selectmen adopted the York Comprehensive Plan. *Id.* ¶ 37.

The town assesses an impact fee of \$1,700 for new residences with three bedrooms and \$3,400 for new residences with more than three bedrooms. *Id.* ¶ 54. Proceeds of the fee amounted to approximately \$120,000 in 1999. *Id.*

III. Discussion

Initially, the defendant notes that the plaintiffs failed to serve a copy of their complaint in this action on the Maine attorney general as required by 14 M.R.S.A. § 5963. Unremedied, this oversight would require dismissal of this action. *Ferraiolo Constr. Co. v. Town of Woolwich*, 714 A.2d 814, 816-17 (Me. 1998). However, the plaintiffs have belatedly complied with the statutory requirement, Exh. A to Opposition to Defendant's Motion to Dismiss ("Opposition") (Docket No. 13), and, in the

absence of any showing of prejudice, no purpose would be served by a dismissal for this reason at this time.

A. Count V

Count V alleges that the annual residential building permit limit of 84 units set by the ordinance at issue constitutes a *de facto* moratorium that fails to comply with 30-A M.R.S.A. § 4356(1), making the ordinance illegal. Complaint ¶¶ 94-99. The defendant contends that the ordinance is not a *de facto* moratorium as a matter of law, citing *Home Builders Ass'n of Maine, Inc. v. Town of Eliot*, 750 A.2d 566 (Me. 2000). Motion at 5. The plaintiffs respond that the complaint's allegation that this limit on the number of permits is unreasonable, Complaint ¶ 95, is sufficient to overcome the motion to dismiss because reasonableness is an issue of fact that cannot be determined in connection with a motion to dismiss. Opposition at 2-3.

In *Home Builders*, the Law Court held that a growth management ordinance that did not prevent all development would not amount to a moratorium under applicable statutes. 750 A.2d at 571 (limit of 48 new housing starts per year). Obviously, the ordinance at issue here, which permits 84 starts per year, does not prevent all development. The plaintiffs rely on the Law Court's dictum to the effect that "an unreasonable limit on development could, in certain circumstances, constitute a *de facto* moratorium." *Id.* at 572. That statement is followed by the observations that the limit imposed by the ordinance at issue had been reached only five times in twenty years and that the ordinance had been amended twice during that period to increase the cap "as the Town's growth permitted." *Id.*¹ The plaintiffs conclude that their allegation that applications for permits in the defendant town had exceeded 84 in number sixteen times since 1980, when the ordinance at issue was not in effect, means

¹ The Law Court also suggested that allegations that permits had been granted in a discriminatory or unfair manner might have demonstrated the existence of a *de facto* moratorium. 750 A.2d at 572 n. 6. No such allegations are made in the complaint in this action.

that they have alleged the kind of circumstances under which the Law Court would allow a factfinder to determine that a *de facto* moratorium existed. That conclusion places too much weight on the dictum. The Law Court’s holding in *Home Builders* is what matters for purposes of the motion to dismiss, and that holding is fairly clear. The dictum does not specify conditions that would create a *de facto* moratorium that are sufficiently similar to those alleged in this case to allow this court to conclude that such an exception to the Law Court’s holding might exist here. Accordingly, because the ordinance in permitting 84 residential building permits a year clearly does not foreclose all development, I conclude that it does not constitute a *de facto* moratorium as a matter of law. As a result, the defendant is entitled to dismissal of Count V.

II. Count I

Count I of the complaint alleges that the ordinance at issue is void because it is inconsistent with the defendant’s comprehensive plan, in violation of 30-A M.R.S.A. § 4352(2), and that the defendant is applying the ordinance in violation of other unspecified sections of Maine’s statutory home rule provisions. Complaint ¶¶ 67, 69. The defendant argues that comparison of the ordinance with its comprehensive plan, a copy of which it has provided,² demonstrates that the ordinance could have been found by the voters to have been in basic harmony with the plan, and that this is all that is required under Maine law. Motion at 6-7. The defendant’s argument with respect to the “as applied” attack on the ordinance is less clear, but it apparently contends that the ordinance “had to be crafted” as it was in order to achieve its objectives and to provide equal treatment to all applicants and that, by the terms of the ordinance, every applicant will be assigned a specific month in which a permit will be issued. *Id.* at 7-8 (emphasis omitted). In response, the plaintiffs assert that the facial attack on the

² A copy of the ordinance is attached to the complaint. Although a copy of the comprehensive plan is not attached, it is “explicitly relied upon in the complaint,” and the court may therefore consider it in connection with the motion to dismiss. *Blackstone Realty LLC v. FDIC*, 244 F.3d 193, 195 n.2 (1st Cir. 2001).

ordinance raises a factual issue inappropriate for resolution in the context of a motion to dismiss, identify sections of the plan they believe to be in conflict with the ordinance, and contend that the defendant's argument with respect to application of the ordinance is based on factual assertions that "have no place in a motion brought under Rule 12(b)(6)." Opposition at 3-8.

The defendant and the plaintiffs both cite *Adelman v. Town of Baldwin*, 750 A.2d 577 (Me. 2000), in support of their respective positions. In that case, the Law Court upheld summary judgment that had been entered in favor of a town against a plaintiff who had argued that an amendment to the town's land use ordinance was inconsistent with the town's comprehensive plan. When a plaintiff contends that a zoning ordinance is inconsistent with a comprehensive plan and therefore violates 30-A M.R.S.A. § 4352(2), the court will "review the record to determine whether the Town's legislative body . . . could have found the [ordinance] to be in basic harmony with the comprehensive plan. [The court] will not substitute [its] judgment for that of the legislative body." *Adelman*, 750 A.2d at 585 (citation omitted). This type of review is more appropriately performed at the trial or summary judgment stage of a proceeding; it is not consistent with the standard applicable to motions to dismiss, which asks only whether it appears to a certainty that the plaintiffs would be unable to recover on their claims under any set of facts. While the facts necessary to resolve this claim may be present in the ordinance and the comprehensive plan, that circumstance does not make resolution of the ultimate legal question with respect to this count appropriate at this stage of the proceedings. It is enough for purposes of a motion to dismiss that the allegations pleaded in the complaint may reasonably be construed to claim that York voters could not have found the ordinance to be in basic harmony with the comprehensive plan. The arguments made by the parties on this issue demonstrate that application of the standard set out by the Law Court will require consideration of the language of both documents within themselves as a whole and in relation to each other, as well as the reasonableness of the

respective interpretations of that language urged by the parties. The question whether a legal standard has in fact been met by a document or any other form of evidence should not, in most cases, be resolved in the context of a motion to dismiss.

The defendant's motion to dismiss the "as-applied" challenge to the ordinance in Count I presents essentially a factual argument. The defendant contends that the plaintiffs have misconstrued the terms of the ordinance and that the language of the ordinance itself "refutes the plaintiffs' claims that the Town is not applying the ordinance correctly." Motion at 8. How an ordinance is applied is essentially a factual question; by definition, it cannot be determined from a review of the language of the ordinance. As best I can understand it, the defendant's argument is that it is applying the ordinance correctly. That assertion is not supported by the allegations in the complaint and accordingly cannot provide a basis for dismissal of this claim. Nothing in *Begin v. Inhabitants of the Town of Sabattus*, 409 A.2d 1269 (Me. 1979), the only case cited by the defendant in connection with this issue, requires a different result. Dispositive there was a facial challenge to the constitutionality of an ordinance limiting permits for mobile home parks and the quantum of proof necessary to establish such a claim at the summary judgment stage of the proceedings. *Id.* at 1275-76. *Begin* is not helpful to a consideration of the adequacy of the plaintiffs' pleading of such a claim in this case.

C. Counts II, III and IV

Count II of the complaint alleges a denial of due process under both state and federal constitutions. Count III alleges a denial of equal protection under both constitutions. Count IV alleges an unconstitutional taking of property. The claims are brought under 42 U.S.C. § 1983. The defendant contends that its arguments concerning federal constitutional standards are equally applicable to the state claims, Motion at 19 n. 9, and the plaintiffs do not disagree. Accordingly, I will address only federal constitutional law in my discussion of these issues.

The defendants argue that the plaintiffs may not bring any of these claims because they have not alleged that they have applied for permits under the ordinance.³ Motion at 9. The plaintiffs respond that application for a permit is not a necessary prerequisite to a facial constitutional challenge to the ordinance. Opposition at 8-9. As the plaintiffs note, the constitutionality of the ordinance is not a question that may be determined by the town agency that issues building permits, so resort to the application process would not only delay resolution of this issue but would be futile. *See Minster v. Town of Gray*, 584 A.2d 646, 648 (Me. 1990). *See also Weinberger v. Salfi*, 422 U.S. 749, 761-62 (1975) (exhaustion of administrative remedies not required for constitutional attack on statute); *Patsy v. Board of Regents of State of Florida*, 457 U.S. 496, 512 (1982) (general rule is that federal courts may not require exhaustion for § 1983 claims); *Northwestern Indiana Tel. Co. v. FCC*, 872 F.2d 465, 470 n.3 (D.C. Cir. 1989) (facial constitutional arguments generally not subject to exhaustion requirements). The defendant properly cites *Tisei v. Town of Ogunquit*, 491 A.2d 564, 569 (Me. 1985), for the proposition that “slow growth” ordinances may be constitutional, but that hardly means that any particular constitutional attack on a “slow growth” ordinance must fail at the pleadings stage. Contrary to the defendant’s position, Motion at 10, a motion to dismiss does not provide the proper forum for determination of the question whether the ordinance in question passes constitutional muster under *Tisei*.

1. *The Takings Claim (Count IV)*. The defendant contends that Count IV must be dismissed “because the plaintiffs have not proceeded with a state inverse condemnation proceeding.” Motion at 10. A state inverse condemnation claim is a prerequisite to the federal claim set forth in Count IV, *Williamson County Reg’l Planning Comm’n v. Hamilton Bank*, 473 U.S. 172, 195 (1985), but under Maine law the allegation of a taking in state court, which the plaintiffs did make in this case by

³ In fact, paragraphs 16-17 of the complaint could be construed to allege that at least Neddick has applied for a building permit and (continued on next page)

bringing this action in state court and alleging a taking under the state constitution, Complaint ¶ 90, constitutes an inverse condemnation proceeding, *see generally Larrabee v. Town of Knox*, 744 A.2d 544, 545-46 (Me. 2000). Under Maine law, both state and federal takings claims may be brought in a single action. *MC Assoc. v. Town of Cape Elizabeth*, 2001 ME 89 (June 15, 2001) ¶¶ 9-10. *Gilbert v. City of Cambridge*, 932 F.2d 51 (1st Cir. 1991), cited by the defendant, does not require a different result in federal court. In that case, the First Circuit required that a party challenging an ordinance as unconstitutional on takings grounds comply with state statutory procedure for such claims before bringing a federal claim. *Id.* at 63-65. Here, the plaintiffs have complied with the requirements of Maine law. *See also Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 736 n.10 (1997) (facial challenges to ordinances generally ripe the moment the ordinance is passed). The defendant is not entitled to dismissal of Count IV.⁴

2. *Due Process Claim (Count II)*. The defendant argues that the complaint fails to state a claim for relief sounding in procedural or substantive due process. Motion at 11, 13-17. In response, the plaintiffs contend only that they have adequately pleaded a claim for violation of their right to substantive due process. Opposition at 13-18. Accordingly, to the extent that Count II of the complaint might reasonably be construed to raise a procedural due process claim, the plaintiffs have waived any opposition to the motion and it should be granted.

The defendant asserts that the plaintiffs' substantive due process claim in this case is "controlled" by *Creative Environments, Inc. v. Estabrook*, 680 F.2d 822 (1st Cir. 1982). Motion at 11. In fact, *Estabrook* does not direct the outcome of the defendant's motion to dismiss on this count. In *Estabrook*, the trial court had granted summary judgment against the plaintiff on many counts,

has been unable to obtain one. The plaintiffs do not make this argument, however.

⁴ The defendant argues in a footnote that Count IV must also be dismissed because "the plaintiffs cannot demonstrate that they have any property right that has been taken without just compensation." Motion at 11 n.7. For purposes of the motion to dismiss, the court (*continued on next page*)

including a procedural due process claim. *Id.* at 823, 829-33. The First Circuit stated that a claim that a town’s rejection of a proposed subdivision development violated the due process clause “is too typical of the run of the mill dispute between a developer and a town planning agency . . . to rise to the level of a due process violation.” *Id.* at 833. The substantive due process claim raised in Count II in this case is not a “run of the mill dispute” but rather a facial challenge to the constitutionality of an ordinance. It is not a mere “relabeling,” Motion at 12, of a state-law zoning claim to allege a due process violation. The due process claim in Count II stands on its own and is adequately pleaded as such.

The defendant next contends that the plaintiffs “must show that they have a property interest defined by state law” in order to avoid dismissal of this claim. *Id.* In fact, the complaint does allege that Currier and Neddick own property that is affected by the ordinance. Complaint ¶¶ 9, 14. These allegations are sufficient, should the defendant’s position be correct, a matter that the court need not decide.

The defendant’s third argument with respect to substantive due process is based on case law holding that no separate claim for violation of substantive due process rights may be brought where a claim is also made under the takings clause of the Constitution. Motion at 15-16. In the Ninth Circuit, “a plaintiff is precluded from asserting a substantive due process claim instead of, or in addition to, a takings claim.” *Buckles v. King County*, 191 F.3d 1127, 1137 (9th Cir. 1999). Contrary to the defendant’s suggestion, Motion at 15, *Villas of Lake Jackson, Ltd. v. Leon County*, 121 F.3d 610 (11th Cir. 1997), does not hold that a substantive due process claim based on a zoning ordinance must always be subsumed within a takings claim. While the Eleventh Circuit does note that it “in recent decisions has . . . abandoned the distinction between takings claims and a due process takings theory,”

must focus on the pleadings, not on the question whether the plaintiffs can prove their allegations.

it also states that a separate claim for arbitrary and capricious deprivation of substantive due process may exist. *Id.* at 614. In *Texas Manufactured Hous. Ass’n, Inc. v. City of Nederland*, 101 F.3d 1095, 1105-06 (5th Cir. 1996), the court considered, without comment, both a takings claim and a substantive due process claim against the enforcement of a zoning ordinance. The First Circuit, while it has not ruled definitively on this issue, appears to favor the view of the Ninth Circuit. *Parella v. Retirement Bd. of Rhode Island Employees’ Retirement Sys.*, 173 F.3d 46, 58 (1st Cir. 1999) (“other recent decisions suggest that when faced with multiple, potentially relevant constitutional provisions, courts should invoke the provision that treats most directly the right asserted”); *South County Sand & Gravel Co. v. Town of South Kingstown*, 160 F.3d 834, 835 (1st Cir. 1998) (“When a specific provision of the Constitution protects individuals against a particular kind of physical intrusion by government actors, individuals seeking redress for such an intrusion must assert their claim under that particular constitutional rubric instead of invoking the more generalized notion of substantive due process.”). Given the similarity of these statements to the reasoning in *Buckles*, I conclude that the First Circuit would hold that the plaintiffs’ substantive due process claim in this action is precluded by their takings claim.⁵ Accordingly, the defendant is entitled to dismissal of Count II.

3. *Equal Protection Claim (Count III)*. The defendant’s argument with respect to Count III is most often stated in terms more appropriate to summary judgment than to a motion to dismiss. To the extent that its arguments focus on the pleadings, the defendant appears to contend that the plaintiffs must allege both that they applied for permits and were denied or unreasonably delayed and that they were subjected to discrimination based on an invidious classification or the application of fundamentally unfair procedures, and that they have failed to allege either. Motion at 18. The plaintiffs respond that

⁵ In *Smithfield Concerned Citizens for Fair Zoning v. Town of Smithfield*, 907 F.2d 239 (1st Cir. 1990), the First Circuit considered both takings and substantive due process claims in an action asserting a facial attack on a zoning ordinance, but there is no indication that the question whether both claims were properly before the court had been raised.

they do not claim that the ordinance burdens a suspect class or a fundamental interest, but only that the ordinance treats similarly situated individuals differently in a way that is not rationally related to a legitimate governmental interest. Opposition at 18. They identify developers of multi-family “and other affordable housing,” as opposed to other developers, as the similarly situated individuals so treated. *Id.* at 19.

With respect to the defendant’s first argument, exhaustion of administrative remedies is not required for a facial challenge to an ordinance based on an equal protection theory. *Hager v. City of West Peoria*, 84 F.3d 865, 870 (7th Cir. 1996); *see also I.A.M. Nat’l Pension Fund Benefit Plan C v. Stockton Tri Indus.*, 727 F.2d 1204, 1209-10 (D.C. Cir. 1984), and *Minster*, 584 A.2d at 648. The defendant’s second argument also fails. In order to state an equal protection claim, the plaintiffs need only plead unequal treatment of similarly situated individuals in a manner that is not rationally related to a legitimate government interest. *HBP Assoc. v. Marsh*, 893 F. Supp. 271, 280 (S.D. N.Y. 1995). This the complaint does. Complaint ¶ 84. The complaint need not allege the existence of an affected fundamental right or suspect class. *Forseth v. Village of Sussex*, 199 F.3d 363, 370-71 (7th Cir. 2000). Accordingly, the defendant is not entitled to dismissal of Count III.

D. Standing of Home Builders

The defendant seeks dismissal of Home Builders as a party on the ground that the complaint fails to allege that any of its members own property in York or otherwise have sufficient interest to create standing. Motion at 19-20.

[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the

interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977). The defendant's argument addresses only the first of these requirements. "The association must allege that its members, *or any one of them*, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit." *Playboy Enter., Inc. V. Public Serv. Comm'n of Puerto Rico*, 906 F.2d 25, 34 (1st Cir. 1990), quoting *Warth v. Seldin*, 422 U.S. 490, 511 (1975) (emphasis in original). The complaint includes such allegations. Complaint ¶¶ 20, 70, 85. Nonetheless, the defendant contends, only an allegation that one or more members of Home Builders currently owns property in York will do. This assertion is contrary to Maine law, which provides that those engaged in a business directly affected by a zoning ordinance have standing to challenge the validity of the ordinance, whether or not they own property that would be subject to the ordinance. *Halfway House, Inc. v. City of Portland*, 670 A.2d 1377, 1381 (Me. 1996). My research has located no reported decision in which the First Circuit has addressed this issue, but the Ninth Circuit agrees with the Law Court. *Construction Indus. Ass'n of Sonoma County v. City of Petaluma*, 522 F.2d 897, 903 (9th Cir. 1975). To the extent that federal law rather than state law governs the question of standing in this case, I find the reasoning of the Law Court to be persuasive for those purposes as well. The defendant's motion to dismiss Home Builders as a party for lack of standing should be denied.

IV. Conclusion

For the foregoing reasons, I recommend that the defendant's motion to dismiss be **GRANTED** as to Counts II and V and otherwise **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Date this 20th day of July, 2001.

David M. Cohen
United States Magistrate Judge

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