Filed 6/15/15 County of Humboldt v. McKee CA1/5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

COUNTY OF HUMBOLDT et al., Plaintiffs, Cross-defendants and Respondents, v. ROBERT C. MCKEE et al., Defendants, Cross-complainants and Appellants;	A140074 (Humboldt County Super. Ct. No. DR020825)

In 2000, Robert C. and Valery McKee and Buck Mountain Ranch Limited Partnership (separately and collectively McKee) purchased property in Humboldt County (the Preserve), which was subject to agricultural preserve regulation under the Williamson Act (Gov. Code, § 51200 et seq.).[1] Since 2002, McKee has been engaged in litigation with Humboldt County (County) about whether his use and subdivision of the Preserve complied with the act's restrictions, applicable County guidelines (see § 51231),[2] and contract terms specifically governing the Preserve (see § 51240; hereafter Contract).

After a bench trial, an appeal to this court, and a second bench trial on remand, the trial court found McKee violated County guidelines and the Contract. The court imposed

[1] Undesignated statutory references are to the Government Code.

[2] Local guidelines adopted pursuant to section 51231 may also be referred to as rules or regulations.

monetary penalties, but declined to nullify transfers of parcels within the Preserve that had been subdivided by McKee, or to impose more severe penalties that were sought by County. McKee appeals, contending the trial court erred in dismissing civil rights cross-claims for selective prosecution and denial of due process as untimely; rejecting an affirmative defense as barred by law of the case; finding cessation of livestock grazing on the Preserve violated the Contract and County guidelines; and imposing penalties pursuant to a County ordinance and the unfair competition law (UCL; Bus. & Prof. Code, § 17200 et seq.). We affirm.

We hold that McKee's civil rights cross-claims set forth in his fourth amended cross-complaint were timely asserted, but were fully litigated and adversely decided as affirmative defenses to the County's complaint. The issue is therefore moot. We also hold that our disposition in the prior appeal barred McKee's affirmative defense that certain County guidelines were void because they conflicted with County's general plan; the Williamson Act does not require local governments to permit temporary nonuse of agricultural preserves; the Contract and County guidelines did not permit McKee's specific activities on the Preserve during cessation of livestock grazing; and the Williamson Act does not preclude local governments from imposing fines or penalties for violations of the act or violations of local guidelines and contracts adopted pursuant to the act.

I. BACKGROUND

A. *The Williamson Act*

"The Williamson Act is a legislative effort to preserve agricultural and open space land and discourage premature urban development. (§ 51220.) It authorizes local governments to establish 'agricultural preserve[s],' which consist of lands devoted to agricultural and compatible uses. (§ 51230.) The preserves 'shall be established for the purpose of defining the boundaries of those areas within which the city or county will be willing to enter into contracts pursuant to this act.' (§ 51230.) Local governments are required to adopt rules governing the administration of agricultural preserves and apply those rules uniformly throughout the preserve. (§ 51231.)

"After establishing agricultural preserves, the local government may enter into contracts with landowners with respect to land within a designated preserve and devoted to agricultural use. (§§ 51240, 51242.) These contracts must limit the land to agricultural and compatible uses for the duration of the contract, and, in return, 'the landowner is guaranteed a relatively stable tax base, founded on the value of the land for open space use only and unaffected by its development potential.' " (*County of Humboldt v. McKee* (2008) 165 Cal.App.4th 1476, 1487–1488, fn. omitted (*McKee I*).)

B. *The Preserve and County Guidelines*

As discussed in detail in *McKee I*, guidelines governing administration of agricultural preserves within the County's borders were adopted in 1973 (1973 Guidelines). The Preserve, originally part of a ranch owned by Arthur Tooby, was established in 1977 by County resolution (the Tooby Guidelines).[3] County signed the Contract with Tooby, which incorporated the Tooby Guidelines and granted associated tax benefits. The 1973 Guidelines were in effect at the time the Contract was executed. (*McKee I*, *supra*, 165 Cal.App.4th at pp. 1483–1484.)

The 1973 Guidelines and Contract provided that the Preserve could not be subdivided into parcels of less than 160 acres. (*McKee I*, *supra*, 165 Cal.App.4th at p. 1484.) The Tooby Guidelines also prohibited the Preserve from being divided " 'if, as a practical matter, it would result in the reduction of land devoted to the production of agricultural commodities for commercial purposes,' " unless the parcels " 'are of such size, shape and other physical characteristics that they are capable of producing agricultural commodities and if as a practical matter the amount of land devoted to agricultural uses will not be reduced,' " and further required that any subdivisions comply with local ordinances. (*McKee I*, at p. 1483.) In 1978, County revised and replaced the 1973 Guidelines (1978 Guidelines) and provided, "Land within a Class B preserve and

[3] The Tooby Guidelines established a 12,580-acre Class B preserve on Tooby's 13,106-acre ranch located to the south and east of Garberville in southern Humboldt County. 10,520 acres of the property were enrolled in the Williamson Act program.

under contract shall not be divided into parcels smaller than *600 acres*." (*Id.* at p. 1484, italics added.)

McKee bought the Preserve in 2000 and divided and sold much of the land. Though each parcel sold was larger than 160 acres, most parcels were smaller than 600 acres.[4] In 2002, County sued McKee and the transferees for violation of the Williamson Act, breach of the Contract, and violation of the UCL, among other causes of action.[5] McKee filed a cross-complaint against County and its assessor (Assessor), alleging Assessor improperly continued to assess McKee property taxes for the transferred parcels. The trial court ruled in favor of McKee. Relying on the contract clauses of the state and federal Constitutions (U.S. Const., art. I, § 10; Cal. Const., art. I, § 9), it ruled that the 1978 Guidelines could not be applied to a Williamson Act contract executed in 1977. (*McKee I*, *supra*, 165 Cal.App.4th at p. 1482.) County and Assessor appealed.

In *McKee I*, we reversed and held as a matter of statutory interpretation that the 1978 Guidelines were intended to apply to preserves under contract before 1979, including the Contract. (*McKee I*, *supra*, 165 Cal.App.4th at pp. 1489–1490.) We further held that "by *renewing* a Williamson Act contract on each anniversary date, the parties enter[] into a *new* contract each year," and when "the parties to the [Contract] entered into a new 10-year contract on February 1, 1979, all applicable laws and ordinances then in existence, including the 1978 Guidelines, became part of the [Contract]." (*Id.* at pp. 1496, 1497.) Thus, "the 600-acre minimum applied to all subsequent transfers of the [Preserve]," and "McKee breached the [Contract] by transferring parcels smaller than 600 acres." (*Id.* at p. 1500.) We expressly declined to decide whether nullification of the improper transfers was an appropriate remedy and remanded to the trial court for further proceedings. (*Id.* at pp. 1500–1501.)

[4] The court found that 28 of 30 parcels transferred were less than 600 acres.

[5] Claims against the transferees are not before us in this appeal.

Our opinion acknowledged that the acreage limit on subdivision was not the only issue in the case. County had also alleged that "(1) McKee failed to maintain commercial agricultural production on the [Preserve], (2) the transfer of parcels reduced the amount of land devoted to commercial agricultural production, and (3) the resulting parcels were not capable of commercial agricultural production," and County argued on appeal "that substantial evidence does not support the judgment . . . in favor of McKee as to these issues." (*McKee I*, *supra*, 165 Cal.App.4th at p. 1500, fn. 15.) We did not reach these issues in our opinion: "Because we conclude that reversal of the judgment is required based on the court's erroneous conclusion that the 1978 Guidelines could not be applied to the [Contract], it is unnecessary to address these additional grounds for reversal." (*Ibid.*) Our disposition stated: "The judgment on County's complaint and [McKee]'s related cross-complaint and the order awarding costs are reversed. The matter is remanded with instructions to the trial court to (1) vacate its order applying the contract clauses to preclude application of the 1978 Guidelines to the [Contract], (2) issue a new order finding that the 1978 Guidelines do apply to the [Contract] and that the division and sale of parcels less than 600 acres violate the guidelines, and (3) impose an appropriate remedy for any such violation." (*Id.* at pp. 1501–1502.)

C. *Remand*

After *McKee I*, the parties disputed whether a retrial was appropriate. County petitioned for a writ of mandate, and we clarified that "[w]hile this court's opinion [in *McKee I*] includes specific instructions regarding post-remand proceedings on transfers of parcels less than 600 acres [citation], the judgment was reversed in its *entirety*. That reversal embraced [the trial court's] conclusions on issues concerning, among other things, land use issues (i.e., whether the [Preserve] and parcels transferred therefrom met certain commercial agricultural production requirements). This court articulated no limitations or directions regarding post-remand proceedings on the land-use issues. [¶] Thus, with the exception of claims for which this court provided specific instructions on remand, this court's disposition [in *McKee I*] amounts to an 'unqualified reversal' so

as to require a 'new trial' . . . ." (*County of Humboldt v. Superior Court* (Apr. 29, 2009, A123830) [order issuing alternative writ of mandate].)

County filed a third amended complaint. The causes of action against McKee included claims that transfers of parcels of less than 600 acres and reduction in the amount of land devoted to agricultural use violated the Williamson Act and breached the Contract; a declaratory relief claim alleging McKee violated County regulations; a UCL claim; and claims for injunctive relief and penalties and damages. McKee's answer asserted as affirmative defenses that the 1978 Guidelines were void because they conflicted with the general plan and violated McKee's right to due process, and that County's claims were barred by the doctrine of promissory estoppel. He also asserted that County's actions violated the equal protection clause of the United States Constitution.

McKee filed a third amended cross-complaint that included cross-claims that the 1978 Guidelines were void because they conflicted with the County's general plan. The trial court sustained a demurrer to these cross-claims without leave to amend.

A fourth amended cross-complaint (the operative cross-complaint during the retrial) asserted cross-claims for improper tax assessment on parcels that had been transferred, equitable estoppel, and constitutional violations (selective prosecution & violation of procedural due process) pursuant to section 1983 of title 42 of the United States Code (civil rights cross-claims). The trial court aptly described McKee's selective prosecution cross-claim as based on "three 'separate and distinct' violations:
(1) [County's] allegedly singling McKee out for prosecution under the Williamson Act on the basis of his conveying one or more parcels in sizes less than 600 acres . . . ;
(2) [County's] allegedly singling McKee out for prosecution under the Williamson Act on the basis of his causing the [Preserve] to be used in a manner allegedly inconsistent with the agricultural use mandate of the Williamson Act . . . ; and (3) [County's] allegedly singling McKee out as one who would not be afforded the administrative process [County] regularly uses to allow alleged violators to cure their Williamson Act violations." The court also aptly described the procedural due process cross-claim as

based on County's "refusal to provide McKee the administrative process it provides to others."

A demurrer to the first two parts of the selective prosecution cross-claim was sustained without leave to amend on the ground that those aspects of the cross-claim were time-barred. Demurrer to the estoppel cross-claim also was sustained without leave to amend on the ground that it was barred by law of the case. As discussed *post*, the court later granted a motion for judgment on the pleadings with respect to the remaining civil rights cross-claims.[6]

After a bench trial, the court issued a statement of decision. It ruled that McKee breached the Contract and violated the 1978 Guidelines by transferring parcels of less than 600 acres; violated the Tooby Guidelines by reducing the amount of land in the Preserve that was devoted to agricultural use; and violated the Tooby Guidelines by temporarily halting grazing on the Preserve. It ruled that violations of the 1978 Guidelines and Tooby Guidelines also established violations of the UCL, and it rejected all of McKee's affirmative defenses, including his due process and equal protection claims.

On the affirmative defenses, the court found that County "proved that the 'singling out' of [McKee] was not for an irrational or arbitrary reason" and that McKee "failed to establish that those treated more favorably by [County] were similarly situated in relation to the size of the property and the manner in which it was divided, among other reasons." It held that no constitutional principle required County to provide McKee with administrative process and any argument that McKee is entitled to such a process because others received one fails "because [County] had a rational basis for its actions" and "others were not shown to be similarly situated."

[6] The only cross-claims that went to trial were challenges to the tax assessments. McKee prevailed on these cross-claims against County and the Humboldt County Assessor. Neither County nor Assessor has appealed the trial court's judgment as to these issues.

On the issue of appropriate remedies, the trial court expressly weighed the equities of the case. "[McKee] can be credited for openly and honestly presenting [his] plan for the [Preserve] to [County], demonstrating [his] belief that [his] intentions were lawful. The problem, as we now know, is that [his] plan for the [Preserve] was illegal on its face, and [he] had already embarked on that plan unilaterally: [McKee] had already purchased and presold portions of the [Preserve] (at least two sales of which unlawfully totaled less than 600 acres) before consulting [County's] planning department. [¶] [County] can be credited for realizing prior to this situation that [its] Williamson Act program was in need of strengthening, and for acting to clarify and improve its local laws to that effect, including adapting its program in response to the inadequacies this situation made apparent. The problem on [County's] end is that its planning department had grave concerns about the facial illegality of [McKee's] plans for the [Preserve], and chose not to share those concerns with [McKee]. . . . [T]he same reasons [McKee] believed [his] plan was lawful were the reasons that [County] initially declined to escalate its concerns about the facial illegality of the plan. [¶] . . . [¶] . . . [McKee is] liable for [his] unlawful transfers of land, but the remedies imposed must reflect the reality that [McKee] had a reasonable basis for believing [his] actions were lawful."

Under Humboldt County Code section 112-5, the court imposed $16,500 in penalties for transfers of parcels that were under 600 acres or that reduced the amount of land devoted to agricultural use or both ($500 for each of 25 transfers; $1,000 for each of 4 transfers) and $25,050 in penalties for the temporary cessation of grazing on the Preserve ($50 for each of 501 days). Under the UCL, the court imposed an additional $132,500 in penalties for the transfers ($2,500 for each of 53 violations) and an additional $25,050 for the cessation of grazing ($50 for each of 501 days). The penalties totaled $199,100. The court rejected nullification of the transfers as a remedy and denied County's requests for stiffer penalties. The court found for McKee on the tax assessment cross-claims. McKee appeals.

II. DISCUSSION

A. *Civil Rights Cross-Claims*

McKee argues the trial court erred in finding his civil rights cross-claims for selective prosecution and due process were time-barred. County argues the cross-claims were both time-barred and inadequately pled. While some of the cross-claims may not have been time-barred, we find the issue moot. The same claims were litigated as affirmative defenses to County's third amended complaint and resolved adversely to McKee. McKee does not challenge the trial court's rulings on the affirmative defenses, and the cross-claims may not be relitigated.

1. *Background*

The procedural history here is somewhat convoluted. As noted, McKee asserted cross-claims for selective prosecution and denial of procedural due process. County demurred, and on June 11, 2012, the court ruled that two of McKee's selective prosecution theories were time barred; however, because the court could not conclude that McKee's withheld administrative process theory was time-barred, it overruled the demurrer to both the selective prosecution and denial of due process causes of action. County then moved for judgment on the pleadings as to these cross-claims and as to McKee's affirmative defense alleging discriminatory enforcement. On July 20, 2012, after argument, the court took the matter under submission.

In a July 6, 2012 order, the trial court held that County's claims against McKee, including the claims for civil penalties, were equitable in nature, and that McKee was not entitled to a jury trial on those claims or on his defenses to them. McKee does not challenge this ruling. The court found that McKee was entitled to a jury trial on his remaining cross-claims—i.e., the civil rights cross-claims—and McKee had not waived that right by failure to deposit jury fees. However, "to minimize the demands made upon a jury in this matter," the court said that it would conduct a bench trial "on all issues

triable as such, including on all of [County's] claims, prior to initiating a jury trial on McKee's [civil rights cross-claims]."[7]

Following the bench trial on June 7, 2013, the court made rulings on several matters where decision had been deferred, including County's motion for judgment on the pleadings on the fourth amended cross-complaint. The court found McKee's civil rights cross-claims were barred by the applicable limitations period and dismissed both, denying leave to amend.

2. *Analysis*

"Complications arise when legal and equitable issues (causes of action, requested remedies, or defenses) are asserted in a single lawsuit." (*Hoopes v. Dolan* (2008) 168 Cal.App.4th 146, 156.) " 'It is well established that, in a case involving both legal and equitable issues, the trial court may proceed to try the equitable issues first, without a jury . . . and that if the court's determination of those issues is also dispositive of the legal issues, nothing further remains to be tried by a jury.' " (*Id.* at p. 157.) " 'Just as the parties are bound by collateral estoppel where issues are litigated in a prior action, so, too, do issues decided by the court in the equitable phase of the trial become "conclusive on issues actually litigated between the parties." ' [Citation.] While the comparison to collateral estoppel is inexact [citation], there are solid policy reasons for giving one fact finder's determinations binding effect in a mixed trial of legal and equitable issues. The rule minimizes inconsistencies, and avoids giving one side two bites of the apple." (*Id.* at p. 158.)

It is clear that the same constitutional claims were presented in McKee's fourth amended cross-complaint and in his due process and equal protection affirmative defenses to County's third amended complaint. In his cross-claim for selective prosecution, McKee alleged that County violated the equal protection clause when it "deliberately singled out and prosecuted" McKee for violating the Williamson Act and

[7] The court also declined to exercise its discretion to convene an advisory jury for the first phase of trial.

County guidelines and denied McKee access to an established administrative process. Twenty-seven similarly-situated property owners allegedly were not prosecuted for these offenses and were afforded the administrative process instead. The selective prosecution, he alleged, was "intentional, based on invidious criterion and/or discriminatory design, purposefully discriminatory, arbitrary, capricious and unreasonable, having no real or substantial relation to the public health, safety, morals or general welfare and without any rational basis."[8] The cross-claim for denial of due process alleged that McKee was not afforded established administrative procedures available to other alleged Williamson Act violators. In opposition to County's motion for judgment on the pleadings, McKee was explicit about his intention to assert selective enforcement under his equal protection affirmative defense as a "complete defense" to County's claims at trial.

It is equally clear that the parties actually litigated the issues in the bench trial. McKee argued in posttrial briefing that the affirmative defenses precluded County's claims, and that selective enforcement and denial of otherwise available administrative procedures violated his right to equal protection and due process. McKee concedes in briefing here that "evidence was adduced at trial concerning the County's constitutional violations in light of McKee's affirmative defense based on such violations," and asserts that "the testimony of several witnesses, including County witnesses, supported the position that the County violated McKee's constitutional rights."[9] McKee specifically cited to that testimony in the defense posttrial brief.

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[8] County argues the claim was inadequate because McKee did not allege an invidious basis for the alleged selective prosecution. The United States Supreme Court has "recognized successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." (*Village of Willowbrook v. Olech* (2000) 528 U.S. 562, 564.) McKee's allegation that County's selective prosecution of McKee was "arbitrary, capricious and unreasonable, having no real or substantial relation to the public health, safety, morals or general welfare and without any rational basis" satisfies this standard.

[9] McKee argues that he did not affirmatively present his cross-claims based on these violations, and thus did not fully present these issues a trial.

Finally, it is abundantly clear that the trial court decided McKee's affirmative defenses. In its statement of decision, the court specifically addressed the merits of the affirmative defenses, writing: "Equal Protection [County] proved that the 'singling out' of [McKee] was not for an irrational or arbitrary reason. Further, the Court finds that [McKee] failed to establish that those treated more favorably by [County] were similarly situated in relation to the size of the property and the manner in which it was divided, among other reasons. [¶] Due Process The Court is unaware of any constitutional principle under which [County] was obliged to provide [McKee] an administrative process. If the argument is that [McKee is] entitled to such a process because one was provided to others, then the claim fails because [County] had a rational basis for its actions and said others were not shown to be similarly situated." McKee has not challenged these rulings on appeal.

McKee complains that he was denied his right to a jury trial on these cross-claims. He was not. The court's determination of the constitutional defenses is also dispositive of the legal issues in McKee's cross-complaint. McKee was not deprived of his right to a jury trial because the action " 'present[ed] a case of mutually exclusive claims where trial of equitable issues . . . eliminate[d] the need for a jury trial.' " (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1240.) "Just as the parties are bound by collateral estoppel where issues are litigated in a prior action, so, too, do issues decided by the court in the equitable phase of the trial become 'conclusive on issues actually litigated between the parties.' " (*Id.* at p. 1244.)

B. *Affirmative Defense that Guidelines Conflicted with General Plan*

McKee argues the trial court erred in ruling that the law of the case doctrine barred his affirmative defense that the 1978 Guidelines were void because they conflicted with County's general plan. County argues the affirmative defense was barred not only by law of the case but also by the statute of limitations and McKee's judicial admissions, and further argues the defense fails on the merits. We conclude the affirmative defense was barred by the specific directions we included in the disposition of *McKee I, supra,* 165 Cal.App.4th 1476, and need not address the other arguments.

Because this issue presents a pure question of law, we review it de novo. (*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 800.) A reviewing court's remittitur, which incorporates the court's orders as set forth in the disposition of the court's opinion, restricts the jurisdiction of the lower court on remand. (*Hampton v. Superior Court* (1952) 38 Cal.2d 652, 655; *Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 701.) "The trial court is empowered to act only in accordance with the direction of the reviewing court; action which does not conform to those directions is void." (*Hampton*, at p. 655.) This rule, unlike the law of the case doctrine, is jurisdictional. (See *Searle v. Allstate Life Ins. Co.* (1985) 38 Cal.3d 425, 434–435.)

The disposition of *McKee I* instructed the trial court to "issue a new order finding that the 1978 Guidelines do apply to the [Contract] and that the division and sale of parcels less than 600 acres violate the guidelines, and . . . impose an appropriate remedy for any such violation." (*McKee I, supra,* 165 Cal.App.4th at pp. 1501–1502.) In response to County's subsequent petition for writ of mandate, we clarified that "this court's opinion on appeal includes specific instructions regarding post-remand proceedings on transfers of parcels less than 600 acres" and a new trial could take place "*with the exception of* claims for which this court provided specific instructions on remand." (*County of Humboldt v. Superior Court, supra,* A123830, italics added.) McKee's claim that the 1978 Guidelines, the source of the 600-acre restriction, are void because they conflict with the general plan is a claim the 600-acre restriction does *not* apply to the Contract, and County therefore is *not* entitled to a remedy for the transfers. Because our disposition required the trial court to impose a remedy for any violation of the 600-acre restriction it found, McKee's affirmative defense is inconsistent with the disposition and the trial court would have exceeded its jurisdiction on remand had it entertained the defense on the merits.[10] McKee could have petitioned for rehearing if he

[10] McKee claims in his reply brief that on remand "County re-tried every aspect of its case, including the claims that McKee was liable for . . . violating the 600-acre minimum." The trial court, however, did not reach its own conclusion about whether such transfers violated applicable Guidelines, but simply applied *McKee I*: "The Court of

believed our disposition was too narrowly drawn, but he did not. (See *English v. Olympic Auditorium, Inc.* (1935) 10 Cal.App.2d 196, 201 ["[i]f a court of review inadvertently omits to include in its instructions to a trial court . . . essential elements within the issues necessarily determined on the appeal, the aggrieved party has his remedy in a petition for rehearing"].)

The trial court properly refused to consider McKee's affirmative defense that the 1978 Guidelines were void because they conflicted with County's general plan.

C. *Cessation of Agricultural Use*

McKee does not dispute that he temporarily terminated cattle grazing on the Preserve. At trial, McKee contended that the Preserve was an "ecological disaster" prior to his purchase and presented evidence that McKee and the parcel purchasers made substantial improvements to the Preserve, repairing and replacing old fences, building roads and water tanks, installing and upgrading the water system, putting in culverts, and draining unusable ponds, all in order to promote a collective grazing operation. McKee alleged that he advised County that cattle would be temporarily removed from the Preserve, and the land would lie fallow while the improvements were made. County presented evidence that the Preserve was a viable commercial cattle ranch prior to McKee's purchase, with the entire property used for grazing, and that the purpose of the improvements were to convert the Preserve into a rural residential development. The court found that the Preserve was neither engaged in an "agricultural use" nor a "compatible use" between December 15, 2000, and April 30, 2002—a total of 501 days. It imposed penalties totaling $50,100 under County guidelines ($50 per day) and under the UCL ($50 per day).

Appeal has already determined that sales of land units totaling less than 600 acres both breached the 1977 Contract and violated the 1978 [Guidelines]. [(*McKee I*, 165 Cal.App.4th at pp. 1501–1502.)] . . . Of the 30 transfers at issue, 27 involved land units totaling less than 600 acres. . . . In addition, [in] the 1100-acre transfer . . . the amount of preserve land transferred was less than 600 acres. . . . Thus, 28 total transfers violated the 600-acre transfer minimum of the 1978 Resolution."

McKee argues the trial court erred in imposing penalties for cessation of grazing because County never pled such a theory of liability and because the Williamson Act, County guidelines, and the Contract do not require continuous agricultural use. We disagree with all of McKee's arguments.

1. *Adequacy of Pleading*

McKee first argues County failed to include its cessation of grazing claim in the operative pleadings. McKee objected when County pursued the claim at trial. The trial court requested posttrial briefing on the issue and concluded the claim was adequately pled in light of County's discovery disclosures. We conclude the trial court did not err.

As noted *ante*, we ordinarily review the adequacy of pleadings on review of orders sustaining demurrers or granting motions for judgment on the pleadings, applying de novo review. The Code of Civil Procedure, however, provides that at the time of trial "[n]o variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits." (Code Civ. Proc., § 469; *Garcia v. Roberts* (2009) 173 Cal.App.4th 900, 909.) Thus, the trial court's decision on this issue is reviewed for abuse of discretion. (See *Duchrow v. Forrest* (2013) 215 Cal.App.4th 1359, 1363.)

" ' "The rule in this state with respect to the construction of a pleading, for the purpose of determining its effect, is that its allegations must be liberally construed, with a view to substantial justice between the parties. [Citation.] . . . [I]f the averments themselves may, without a strained construction, or without doing violence to language, be held clearly to imply or state a fact essential to the statement of a cause of action or to the support of the theory upon which reliance must be had to make out a case or a defense, then the rule of the code should be invoked and the pleading construed with a view to the promotion of substantial justice between the parties to the action." ' [Citation.] . . . [Citation]: 'A party is entitled to any and all relief which may be appropriate under the scope of his pleadings and within the facts alleged and proved, irrespective of the theory upon which the facts were pleaded, [or] the title of the pleading

. . . .' " (*Cooper v. State Farm Mutual Automobile Ins. Co.* (2009) 177 Cal.App.4th 876, 904.)

Most of the allegations in County's complaints described reductions in rather than a cessation of agricultural use. However, each of County's complaints also included allegations that McKee breached the contract by "failing to continue agricultural uses," and that grazing was the specific agricultural use permitted by the Contract. In its discovery responses before the first trial, County stated that McKee violated laws when, among other acts, he "ceased agricultural operations on" the Preserve. At the 2006 trial, a County planner testified, and counsel for County argued, that McKee was one of the county's most egregious Williamson Act violators because he had ceased all grazing on the Preserve. In the prior appeal, County identified McKee's cessation of grazing as one of his Williamson Act violations and, in discovery after remand, County specifically cited McKee's cessation of grazing as a basis of its claims. County also identified this specific violation in briefs it filed before the retrial. The trial court concluded that County "adequately pled the ultimate fact of [McKee's] liability for 'use violations,' which . . . [is] sufficient only in light of certain discovery responses disclosing the cessation 'theory.' "

On this record, we agree with the trial court that County adequately pled and disclosed its cessation of grazing theory of its Williamson Act and Contract claims. McKee argues information disclosed during discovery is irrelevant to whether a cause of action was adequately pleaded, but his authorities do not support the argument. For example, in *Hughes v. Western MacArthur Co.*, the plaintiff sued several defendants for the wrongful death of her husband by asbestosis, but failed to allege that the basis of liability for the defendant Western MacArthur Co. was its position as successor to her husband's employer. Although the plaintiff obtained confirmation of the company's successor status during discovery, the court held the discovery disclosure was inadequate where no allegation in the pleading established the legal connection between this defendant and the entities that allegedly caused her husband's death. (*Hughes v. Western MacArthur Co.* (1987) 192 Cal.App.3d 951, 953–954, 956.) Here, County alleged in its

complaints that McKee "fail[ed] to continue agricultural uses," and simply elaborated on that allegation in later proceedings. The complaint need only "set forth the ultimate facts constituting the cause of action, not the evidence by which plaintiff proposes to prove those facts." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 212, superseded by statute on other grounds as stated in *Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 227.)

We conclude the trial court did not abuse its discretion in entertaining the merits of the cessation of grazing claim.

2. *Application of the Williamson Act, County Guidelines, and Contract Terms*

McKee argues the trial court erred in ruling that his temporary cessation of grazing on the Preserve violated the Tooby Guidelines. He argues a temporary cessation of agricultural use is not inconsistent with the Williamson Act, and that neither the Tooby Guidelines nor the Contract prohibited the hiatus. The trial court ruled that a hiatus in the use of the land for livestock grazing was unlawful under the act unless the activity on the land during the hiatus qualified as either an agricultural use or a designated "compatible use" under the Tooby Guidelines. Because the court found that it did not, it concluded the cessation of grazing was unlawful. We affirm the trial court's ruling that the cessation of grazing violated the Tooby Guidelines.

We review questions of statutory and contractual interpretation de novo. (*Woo v. Superior Court* (2000) 83 Cal.App.4th 967, 974; *Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865–866.)

a. *Williamson Act and Continuous Agricultural Use*

McKee argues, "No California case holds directly or indirectly that the Williamson Act is violated, or any Williamson Act contract is breached, because of a temporary cessation of agricultural production. Further, the Williamson Act itself makes no mention of any prohibition on temporary cessation of agricultural use. Finally, ancillary authority . . . in addition to common sense . . . fail to support [such] a conclusion . . . ." We conclude the Williamson Act does not require local governments to allow a

temporary cessation of agricultural use, and a local prohibition on such cessations is not inconsistent with the act.

The section of the California Constitution that permits reduced taxation of Williamson Act agricultural land requires such land to be "*enforceably restricted*, in a manner specified by the Legislature, *to . . . production of food or fiber*." (Cal. Const., art. XIII, § 8, italics added.) The Williamson Act itself requires each contract to "[p]rovide for the *exclusion* of uses other than agricultural, and other than those compatible with agricultural uses, for the duration of the contract" (§ 51243, subd. (a), italics added), and requires that land under contract be "*devoted to agricultural use*" (§ 51242, subd. (a), italics added). The Williamson Act defines " 'agricultural use' " as "use of land, including but not limited to greenhouses, for the purpose of *producing* an agricultural commodity for commercial purposes." (§ 51201, subd. (b), italics added.) Consistent with these provisions, the Contract provided that the Preserve "shall not be used for any purpose other than agricultural uses, as defined by [the Williamson Act], or those 'compatible uses' as set forth in the [Tooby Guidelines]."

The Tooby Guidelines state in part, "WHEREAS, the land to be included within the agricultural preserve is, *and will continue to be, used for the purposes of producing agricultural commodities* for commercial purposes and uses compatible with agriculture; . . . [¶] . . . [¶] NOW, THEREFORE, BE IT RESOLVED . . . [¶] . . . [the Preserve] is hereby designated and established as an agricultural preserve." (Italics added.) The guidelines identify permissible compatible uses, some of which require a use permit. Compatible uses that do not require a use permit include residences essential for agricultural operations; noncommercial guest houses; field, row, tree, berry and bush crops; timber growing and harvesting; raising and grazing horses, cattle, sheep and goats; dairies; and nurseries, greenhouses, aviaries, apiaries, and mushroom farms. Compatible uses that require a use permit include poultry, rabbit, beaver, fish, frog and hog farms; fruit and vegetable storage, packing, or sales at wayside stands; grain storage; dog kennels; excavation of soil for agricultural purposes; and animal feed yards. The Tooby Guidelines do not expressly address inactivity.

The trial court construed section 51243, subdivision (a) as "requiring that Williamson Act land be at all times subject to activities that either fall under the definition of 'agricultural use' or 'compatible use.' So the relevant question is not whether the Williamson Act allows a hiatus, but rather whether the uses of the land made by [McKee] during the hiatus had been designated by [County] as a compatible use." Because the court concluded that McKee's activities on the Preserve were not compatible uses, it found the cessation of grazing violated the Tooby Guidelines.

McKee acknowledges that the Williamson Act provides that contracts may *limit* use of agricultural land so as to preserve the land (§ 51240), and to *exclude* uses *other than* agricultural and compatible uses, but insists that nothing in the Tooby Guidelines or the act affirmatively require continuous agricultural activity. (§ 51243, subd. (a).) Even the statutory requirement that the land be "devoted to agricultural use" (§ 51242), he claims, allows for leaving the land fallow. McKee argues it would be contrary to legislative intent to interpret the Williamson Act to require (or to allow local governments to require) continuous agricultural use of lands in an agricultural preserve. He claims the intent of the act is to prevent urbanization (see §§ 51220, subds. (a), (c), (d), 51240), and this intent is not undermined, and may be advanced, by a temporary cessation of agricultural use. He cites circumstances in which temporary cessations would be not only consistent with the act's purposes but essential to preservation of the agricultural economy, such as temporary cessations when market prices do not cover the costs of production or the practice of leaving land fallow for purposes of land improvement.

We are not persuaded. The intent of the Williamson Act is not only prevention of urbanization, but also "maintenance of the agricultural economy of the state," "assurance of an adequate, healthful and nutritious *food* [*supply*]," and "preservation *in agricultural production*." (§ 51220, subds. (a), (d), italics added.) These latter goals would be undermined if land preserved under the act were reserved for, but not required to be used for, agriculture. While McKee stresses farmers' need for flexibility in responding to market or ecological demands on their agricultural operations, and decries County's

attempts to micromanage agricultural operations as government infringement of farmers' entrepreneurial freedom, we agree with the trial court that the "compatible uses" provision allows for the needed flexibility without forfeiting County's ability to require that the land remain primarily in agricultural use. The "compatible uses" provision allows local governments that are familiar with the particular circumstances of each preserve to define compatible uses, which might include temporary nonuse. Leaving land to lie fallow, if not itself an "agricultural use," could certainly be classified as a compatible use in appropriate circumstances. Weathering an unusual market downturn might also be so classified. Neither question is truly before us in this appeal. We simply hold that local governments may define a temporary nonuse as a compatible use, or otherwise permit temporary nonuse, but are *not required* to do so in all circumstances.

b. *County Guidelines and Contract Terms Regarding Nonuse*

McKee argues that the language of the Contract and the applicable County guidelines did not sufficiently advise him that a hiatus in agricultural use would be deemed a contract violation.

As noted *ante*, the Contract simply required that the land "not be used for any purpose other than" an agricultural or compatible use. In contrast, other counties have sought to ensure continuous agricultural use by requiring, for example, that income from agricultural production on a preserve equal at least 50 percent of its agricultural production capability. (See 56 Ops.Cal.Atty.Gen. 160, 163 & fn. 2 (1973).) The 1978 Guidelines, which were in effect during the period of no grazing, similarly included no express prohibition of nonuse, whereas guidelines adopted by County in 2002 and 2005 specifically provided that "[f]ailure to maintain lands in commercial agricultural production shall be grounds for the County to consider initiating enforcement action" unless the Board of Supervisors found good cause not to do so.

We agree that the 1978 Guidelines and Contract are less than entirely clear about whether a cessation of agricultural use of the Preserve would be a violation. Indeed, the trial court found that a County representative had told McKee that a hiatus in grazing was

reasonable,[11] and no County representative specifically told him before the lawsuit that the cessation was unlawful. Nevertheless, we agree with the trial court on the sole point that the court needed to decide: that McKee's actual use of the Preserve during the period when grazing was suspended was not permitted by, and thus was a violation of, the Tooby Guidelines.

c. *Preserve Use During Cessation of Grazing*

McKee argues the Preserve grazing "hiatus was used to improve the land and capacity for grazing which is in and of itself 'for the purposes of producing agricultural commodities' or a 'use compatible with agriculture.' Indeed, it is indisputable that the improvement of livestock management systems, and the practice of allowing rangeland to lie fallow, are activities which are not only 'compatible' with commercial ranching, but consistent with best practices." He argues that the "significant improvements" made to the Preserve resulted in the property once again becoming viable for grazing, which continues on the Preserve along with other agricultural uses, such as the commercial growing of crops and raising of livestock.

While the trial court did not directly resolve the conflicting testimony on the necessity of the hiatus in grazing, its statement of decision expressly found that McKee "violated the [Tooby Guidelines] by temporarily halting grazing of the land they held" (capitalization omitted). The court also found that the cattle ranching operation underway on the Preserve at the time McKee purchased the property was viable and profitable, and that a leased grazing operation would be substantially less profitable than development of the land. The court also found that "McKee is a sophisticated land developer who purposely and permanently unraveled a 10,520-acre agricultural preserve . . ." and whose "vision . . . was a collection of small, self-sufficient farms," not a rejuvenated cattle ranching or grazing operation. It therefore implicitly rejected McKee's

[11] For reasons set forth in our prior opinion, County is not estopped by this representation from seeking penalties for McKee's cessation of grazing. (See *McKee I, supra,* 165 Cal.App.4th at pp.1493–1494.)

claim that the Preserve was deteriorated when he purchased it and that he improved its condition for cattle ranching or grazing during the hiatus.

The court reasonably found that McKee's use of the Preserve during the 501-day hiatus in cattle operations was neither an agricultural use, permitted compatible use, nor allowable nonuse of the property under the terms of the Contract and 1978 Guidelines.

D. *Penalties*

McKee argues the trial court erred by imposing penalties pursuant to County ordinance and the UCL. He argues that Williamson Act remedies are wholly contractual, that guidelines adopted by County did not apply to him except as incorporated terms of the Contract, and that, as a matter of contract interpretation, County never intended to subject McKee to extra-contractual penalties for violations of the Contract. We affirm the penalties.

Again, we review questions of statutory and contractual interpretation de novo. (*Woo v. Superior Court, supra,* 83 Cal.App.4th at p. 974; *Parsons v. Bristol Development Co., supra,* 62 Cal.2d at pp. 865–866.)

1. *Williamson Act*

McKee argues the Williamson Act restricts remedies for violations of the act to contractual remedies and does not provide for penalties. The trial court implicitly rejected the argument. We agree.

Section 51251 provides in part, "The county, city, or landowner may bring any action in court necessary to enforce any contract, including, but not limited to, an action to enforce the contract by specific performance or injunction." Section 51251 *authorizes* a breach of contract suit to enforce a Williamson Act contract, but does not *limit* a contracting party's remedies to contract remedies. Section 51231 requires local governments interested in entering into Williamson Act contracts to adopt "rules governing the administration of agricultural preserves," which must include "[r]ules

related to compatible uses" and must "be applied uniformly throughout the preserve."[12] (See § 51201, subd. (e).) We find nothing in the act precluding local governments from providing for, and implementing, enforcement mechanisms for lands under contract. Indeed, another provision of the Williamson Act recognizes the "enforcement authority of cities and counties including the authority conferred upon them by this chapter to administer agricultural preserves and contracts." (§ 51250, subd. (a).) In the same statute, the Legislature expressly declares its intent "to encourage cities and counties . . . [to] consider any additions or improvements that would make local enforcement more effective . . . ." (§ 51250, subd. (t).) These provisions of section 51250 suggest that the Legislature intended local governments to include enforcement mechanisms in their section 51231 guidelines and to use the full range of their enforcement powers to ensure compliance with Williamson Act contracts.

McKee invokes the principle *expressio unius est exclusio alterius* to argue that section 51251's authorization of contractual remedies implies that noncontractual remedies are not available under the Williamson Act. This canon of statutory interpretation, however, is merely one of many, all of which must be taken into consideration when construing a statute. The case McKee cites, for example, relies not only on this principle but also on the legislative history of the statute at issue. (*Gikas v. Zolin* (1993) 6 Cal.4th 841, 852.) Here, considering the plain language of section 51251 in the context of the overall statutory scheme, we conclude the act does not preclude noncontractual remedies.

McKee suggests we have already held that Williamson Act remedies are solely contractual. In *McKee I*, we wrote, "The Williamson Act does not require any specific remedy for breach of a Williamson Act contract. (§ 51251.) Instead, section 51251 provides in part, 'The county, city, or landowner may bring any action in court necessary to enforce any contract, including, but not limited to, an action to enforce the contract by

[12] McKee argues section 51231 is a procedural statute and does not authorize substantive preserve regulations. We have already rejected this argument. (*McKee I, supra,* 165 Cal.App.4th at p. 1491, fn. 11.)

specific performance or injunction.' " (*McKee I, supra,* 165 Cal.App.4th at p. 1501.) McKee argues this analysis is "*consistent with* the notion that a party suing under the Williamson Act is limited to contractual remedies" (italics added), thus acknowledging that we did not so hold. Indeed, the context of the quoted statement demonstrates that we did *not* assume that Williamson Act remedies are wholly contractual because in the same paragraph we directed the trial court to consider whether to impose the equitable remedy of nullification on remand. (*Id.* at p. 1501.)

McKee also suggests that the Attorney General has concluded that Williamson Act remedies are solely contractual, citing dicta that "the [Williamson] Act's mechanisms are wholly contractual. Although a city or county could through exercise of its police power bind all purchasers by zoning the land for 'agricultural and compatible uses,' the [Williamson] Act does not draw on that source of power but rather relies solely on the power of local government to make 'contracts' . . . . The [Williamson] Act incorporates accepted principles of contract and property law throughout—to determine, for example, . . . enforcement methods, [§ 51251]."[13] (51 Ops.Cal.Atty.Gen. 80, 85 (1968).) The scope of a local government's remedies for breach of a Williamson Act contract was not at issue in the case. Instead, the Attorney General considered whether the beneficiary under a prior deed of trust on property must consent to a Williamson Act contract in order for a purchaser at foreclosure to be bound by restrictions in the contract. (*Id.* at pp. 83, 87–88.) Relying in part on his understanding of the Williamson Act regime as "wholly contractual," the Attorney General applied contract and real property law in responding to the question. (*Id.* at p. 85.) We do not consider the opinion persuasive authority regarding a county's available remedies for breach of a Williamson Act contract.

Finally, McKee argues that certain language in County guidelines adopted in 2002 and 2005 demonstrates that County understood its remedies under the Williamson Act to

[13] The Attorney General's opinion cites former section 51252, which became current section 51251 and was subsequently amended in ways not relevant to this case. (See Stats. 1969, ch. 1372, § 24, p. 2813; Stats. 1971, ch. 1784, § 2, p. 3850; Stats. 1978, ch. 1120, § 9, p. 3430.)

be solely contractual: "The County shall take necessary actions to restrain breach of contracts or compel compliance with the terms of the contract as authorized by Section 51251 . . . , which may include instituting an action to seek specific performance or an injunction." Like section 51251 itself, this language authorizes County to seek contract remedies but does not restrict it to doing so.

In sum, we reject McKee's argument that the Williamson Act restricts remedies for breach of the act to those available in contract.

2. *County Ordinance and UCL Remedies*

McKee argues penalties could not be imposed pursuant to Humboldt County Code section 112-5, which provides: "Whenever in this Code or in any other ordinance of the County or in any rule or regulation promulgated pursuant thereto any act is prohibited or made or declared to be unlawful or an offense, . . . where no specific penalty is provided, the violation of such provision of this code or any other ordinance, rule or regulation of the County shall be punished by a fine not exceeding [$1,000] and/or imprisonment . . . ." McKee does not dispute that the Tooby Guidelines were an "ordinance of the County or . . . any rule or regulation promulgated pursuant thereto." Rather, he argues County guidelines do not directly govern McKee's conduct, but apply to him only as incorporated into the Tooby Contract, as to which the only available remedies, logically, are contractual. The trial court rejected McKee's argument expressly as to the 1978 Guidelines and implicitly as to the Tooby Guidelines. We agree with the trial court.

We previously held that the 1978 Guidelines "became part of the [Contract]" upon Tooby's renewal of the Contract in February 1979. (*McKee I, supra,* 165 Cal.App.4th at p. 1497.) McKee argues this language implies that the 1978 Guidelines were binding *only* as contract terms and not as freestanding County regulations, but he misreads our opinion. In holding that the 1978 Guidelines "became part of the [Contract]," we cited *Castillo v. Express Escrow Co.* (2007) 146 Cal.App.4th 1301, 1308, which in turn cited a treatise for the proposition, "[A]ll laws in existence when the agreement was made become part of the contract." (See 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 752, p. 842.) This rule does not mean that the laws are no longer

enforceable against the contracting parties independent of the contract. In *McKee I*, the issue was whether County could effectively amend the Contract (by adopting new guidelines) without the landowner's consent. We held that Tooby had provided consent to the 1978 Guidelines when he allowed the Contract to automatically renew after those new guidelines had been adopted, thus obviating the need to determine whether imposition of the 1978 Guidelines would have otherwise been barred by the contract clauses of the federal and California constitutions. (*McKee I*, at pp. 1494, 1498–1499.) We neither held nor implied the guidelines that were thereby incorporated into the Contract could thereafter only be enforced against Tooby by way of a contract action. Indeed, we wrote that the "Williamson Act expressly contemplates regulation of agricultural preserves by local government resolutions, *as well as* by contract. (§§ 51231, 51240.)" (*McKee I*, at pp. 1498–1499, italics added.) Moreover, it is hardly novel for a contracting government agency to sue for both breach of contract and statutory violations arising from the same underlying conduct. (See, e.g., *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1173 [suit for breach of contract and violations of a city wage ordinance, Labor Code wage provisions, and UCL]; *Thompson Pacific Construction, Inc. v. City of Sunnyvale* (2007) 155 Cal.App.4th 525, 532 [suit for breach of public works contract, Subletting and Subcontracting Fair Practices Act, and California False Claims Act].)

McKee contends, "After reviewing every one of the approximately 84 published Williamson Act decisions within this jurisdiction, McKee and his counsel did not locate any awarding penalties under [the UCL] or a local ordinance." However, he does not cite or discuss even a single exemplary case. Here, the trial court discussed at some length the complex considerations that informed its choice of remedies, and we cannot assume that the cases reviewed by McKee presented similar circumstances.

In sum, we hold the trial court properly imposed penalties pursuant to the County ordinance for violations of the 1978 Guidelines. Violations of County ordinances in turn support imposition of UCL remedies. (*Paulus v. Bob Lynch Ford, Inc.* (2006) 139 Cal.App.4th 659, 681 ["violations of local ordinances may be 'borrowed' to establish

a UCL claim based upon 'unlawful' acts or practices"].) Therefore, all of the penalties are affirmed.

III. DISPOSITION

The judgment is affirmed. McKee shall pay County's costs on appeal.

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BRUINIERS, J.

WE CONCUR:

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JONES, P. J.

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SIMONS, J.