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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

DARREN GARDNER et al.,

Plaintiffs and Appellants,

v.

SCOTT MAAS et al.,

Defendants and Respondents.

D064257

(Super. Ct. No. 37-2012-00058916-
CU-NP-NC)

APPEAL from a judgment of the Superior Court of San Diego County, Robert P. Dahlquist, Judge. Affirmed.

The Markow Law Group and Gregory Markow for Plaintiffs and Appellants.

Coast Law Group, Marco A. Gonzalez and Chris C. Polychron for Defendants and Respondents.

Darren and Caroline Gardner sued their neighbors, Scott and Gina Maas, for building a home addition without undertaking the design review process the Gardners contend was required by local ordinance and for misrepresenting to the Gardners the

scope of proposed work to prevent the Gardners from opposing developmental approval of the project. The Gardners appeal the trial court's granting of the Maases' motion to strike the Gardners' operative complaint under the anti-SLAPP statute,¹ which argued the Gardners' suit arose from the Maases' protected activity of petitioning the city for development approval and lacked a probability of prevailing on the merits. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In May 2012, the Maases applied to the City of Encinitas (City) for a building permit to construct a 336 square foot, single-story addition (the Project) to their existing 720 square foot home. The City approved the application and issued a building permit in July 2012.

The Gardners live next door to the Maases in a two-story, 4,122 square foot house. The Gardners contend that sometime in August 2012, after work had begun on the Project, Scott Maas misrepresented to Darren Gardner the scope and impact of the Project "for the purpose of ensuring that the Gardners did not exercise their rights under the City of Encinitas Municipal Code" (EMC). The Gardners acknowledge that Scott sent an e-mail to Darren on August 22 that corrected the alleged misrepresentations, but contend that by then the damage had already been done—the addition's walls and roof had already been constructed.

In September 2012, the Gardners complained to the City that, in addition to a building permit, the EMC required that the Maases also obtain a coastal development

¹ Code of Civil Procedure, section 425.16. All further statutory references are to the Code of Civil Procedure unless otherwise specified.

permit (CDP)² and submit the Project for a design review process. The City agreed that a CDP was required and issued a stop-work order, which allowed the Maases to secure the Project from inclement weather but permitted no additional work.

In October, the Maases submitted to the City a form "Administrative Permit Application" used for requesting a variety of City permits and reviews, including CDP's and design reviews. The Maases' application requested a CDP, but not a design review.

In November, the Gardners submitted to the City an extensive written objection to the Maases' application. They argued, among other things, the EMC required that the Project undergo a design review. The City's planning and building director approved the application over the Gardners' objections, specifically concluding the Project was exempt from design review.

The Gardners appealed the director's determinations to the city council. The city council held a public hearing, took evidence, and approved the Maases' application for a CDP, affirming that the project was exempt from design review.

The Gardners filed this action on December 6, 2012. Their first amended complaint (Complaint) asserted four causes of action: one for fraud based on Scott Maas's alleged misrepresentations in August, and three based on the Maases' alleged

² The City requires a homeowner to obtain a CDP if an existing residence will not remain habitable during construction of an addition. The Maases' home had become uninhabitable during the course of the Project.

violation of the EMC by failing to submit the Project for design review.³ The Gardners sought, among other remedies, injunctive relief and damages of \$500,000 for diminution in the value of their property due to an obstructed view.

In January 2013, the Maases demurred to the Complaint on the basis that the Gardners' claims were barred by the City's determination that the Project was exempt from design review, which the Gardners had not set aside by way of mandamus. The following month, the Gardners filed a separate mandamus action against the City seeking to set aside the building permit and CDP on the basis that the Project was not exempt from design review.⁴

In February 2013, the Maases filed a special motion to strike the Complaint under section 425.16. The motion argued (1) the Complaint arose from the Maases' protected

³ The Gardners' second cause of action was for "Violation of [EMC], Ordinances and Regulations (Government Code[,] § 36900[, subd.](a))." Their third cause of action was for "Conspiracy to Defraud and Violate Statutes," and their fourth was for "Quasi-Contract/Assumpsit [*sic*]." The Gardners acknowledge their third and fourth causes of action are "derivative" of the second, as they also "arise from" and are "based on" the Maases' alleged violation of the EMC as alleged in the second cause of action. We will refer to the second, third, and fourth causes of action collectively as the code-based claims.

⁴ We previously denied the Maases' request that we take judicial notice of events in the mandamus action that postdate the rulings challenged here. We do, however, accept the Gardners' concession that the court hearing the mandamus action has not set aside the City's determination and that the Gardners have sought to abandon their specific challenge concerning the Project and instead challenge the EMC's "routine misapplication." The Gardners therefore represent that the issues remaining in the mandamus action are "not relevant to this appeal." (*Hernandez v. City of Pomona* (2009) 46 Cal.4th 501, 506 ["[W]e may properly treat plaintiffs' representations regarding the facts as factual concessions, and we base both our statement of facts and our substantive analysis on these conceded facts."].)

activity of petitioning the City for approval of the Project, and (2) the Gardners could not establish a probability of prevailing on their claims. The trial court granted the motion to strike and, therefore, found it unnecessary to reach the demurrer. The Maases subsequently moved, successfully, for attorney fees as the prevailing party on their anti-SLAPP motion. (§ 425.16, subd. (c)(1).) The court entered judgment in the Maases' favor, and the Gardners timely appealed.

DISCUSSION

I

GUIDING LEGAL PRINCIPLES AND STANDARD OF REVIEW

Section 425.16, the anti-SLAPP statute, is designed to deter and quickly dispose of frivolous litigation arising from a defendant's exercise of the right of petition or free speech under the United States or California Constitution. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 311-312.) The Legislature has commanded that the anti-SLAPP statute "be construed broadly." (§ 425.16, subd. (a).) In ruling on an anti-SLAPP special motion to strike, the trial court follows a two-step analysis that involves shifting burdens. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) The moving defendant carries the initial burden of showing the challenged cause of action arises from protected free speech or petitioning activity. (*Ibid.*) This burden is satisfied by demonstrating that the conduct underlying the plaintiff's claim fits into a category of protected activity set

forth in section 425.16, subdivision (e).⁵ In analyzing the plaintiff's claim, "[w]e look for 'the *principal thrust* or *gravamen* of the plaintiff's cause of action.' [Citation.] We 'do not evaluate the first prong . . . solely through the lens of a plaintiff's cause of action.' [Citation.] The 'critical consideration' is what the cause of action is *based on*.'" (*Hecimovich v. Encinal School Parent Teacher Organization* (2012) 203 Cal.App.4th 450, 465.)

If the court finds the defendant has made the requisite showing, the burden then shifts to the plaintiff to "demonstrate[] a probability of prevailing on the claim." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88.) This requires the plaintiff to " 'demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.' " (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821; *Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 906.)

"Whether section 425.16 applies, and whether the plaintiff has shown a probability of prevailing, are both questions we review independently on appeal." (*Kashian v. Harriman, supra*, 98 Cal.App.4th at p. 906; *Flatley v. Mauro, supra*, 39 Cal.4th at

⁵ The categories are: "(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) *any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law*, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e), italics added.)

p. 325.) In doing so, we consider both parties' pleadings and admissible evidentiary submissions, but we do not weigh credibility or the comparative strength of the evidence. (*Kashian*, at p. 906.)

II

WHETHER THE GARDNERS' CLAIMS FALL WITHIN THE SCOPE OF THE STATUTE

The Gardners acknowledge, generally, that "the process of applying for and issuing permits involves petitioning the government and that challenge[s] to the issuance of permits, or that arise from statements made in connection with such applications, can fall within the ambit of the anti-SLAPP statute." They argue, however, that their code-based claims do not fall within the scope of the anti-SLAPP statute because they arose not from the Maases petitioning the City, but from the Maases' *failure to* petition the City in the required manner. Specifically, the Gardners contend their code-based claims arose from the Maases' independent violation of EMC section 23.080.20A, which makes it "unlawful for any person to construct . . . , alter, remodel or otherwise modify the exterior of any structure, when such activity is required . . . to have a Design Review Permit." The Gardners assert the Project was not exempt from design review and, therefore, it was the Maases' commencement of construction without a design review permit—not any petitioning activity to the City—that gave rise to their code-based claims.

The trial court disagreed, ruling as follows:

"[T]he court finds that the principal thrust or gravamen of the plaintiffs' entire complaint is that the defendants improperly obtained the discretionary approval of the City of Encinitas for a home addition by submitting incomplete or false information to the City and by failing to follow the appropriate administrative process for

obtaining all necessary City approvals for the project. The Court finds that defendants' actions in obtaining discretionary City approvals for their home addition project are protected 'right to petition' activities under . . . section 425.16, [subdivision] (b)(1).

"In this regard, this case appears to [be] analogous to reported appellate cases involving parties seeking or obtaining land development approvals from local government agencies. E.g., *M.F. Farming Co. v. Couch Distributing Co., Inc.* (2012) 207 Cal.App.4th 180, 195 . . . (involving publication of allegedly false maps submitted to a city in connection with the city's permitting process); *Midland Pacific Building Corp. v. King* (2007) 157 Cal.App.4th 264, 272 (involving the submission of a tract map to a local planning commission and city council)."

We find the trial court's reasoning persuasive. While the Gardners frame their code-based claims as centering on the Maases' construction activities divorced from any petitioning conduct, the "principal thrust" of the Gardners' claims is that, although the Maases petitioned the City for some development approvals (a building permit), they did not petition for the right approvals (a design review permit). Notably, the Gardners did not sue the Maases when they initially applied for a building permit in May 2012, started construction in July, or even in August when they discovered Scott Maas's description of the Project was allegedly fraudulent (and, according to the Gardners, when "the damage was done"). Instead, the Gardners only sued after the City—upon the Maases' petition—found explicitly that the Project was exempt from design review. Our reading of the allegations of the code-based claims, on the whole, together with the timing of the lawsuit, lead us to conclude the Gardners' claims are based on the Maases' protected activity of petitioning the City.

The Gardners' reliance on this court's decision in *Wang v. Wal-Mart Real Estate Business Trust* (2007) 153 Cal.App.4th 790 is misplaced. In that case, the Wangs sold a portion of their land to Walmart, but then sued for breach of contract and fraud after Walmart processed development permits and obtained a city resolution that eliminated street access to the Wangs' remaining property, contrary to the Wangs' understanding of the deal. The trial court granted Walmart's anti-SLAPP motion, but we reversed. Based on a two-year escrow period during which the Wangs worked with Walmart and its consultants to obtain a number of discretionary and ministerial approvals while the Wangs remained nominal titleholders, we concluded the "overall thrust of the complaint challenge[d] the manner in which the parties privately dealt with one another, on both contractual and tort theories, and [did] not principally challenge the collateral activity of pursuing governmental approvals." (*Id.* at pp. 809, 807-808.) There is no similar " 'purely business type event or transaction' " that forms the basis of the claim against the Maases here. (*Id.* at p. 806, quoting *Blackburn v. Brady* (2004) 116 Cal.App.4th 670, 677.) Rather, the manner in which the Maases petitioned the City is central to the Gardners' claims.

Next, the Gardners argue that even if their code-based claims would otherwise fall within the scope of the anti-SLAPP statute, those claims are nonetheless exempt from the statute as an enforcement proceeding. We disagree. First, although the anti-SLAPP statute contains an express carve-out for enforcement actions, it only applies to those "brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor." (§ 425.16, subd. (d).)

That is not the case here. Second, the cases the Gardners cite that recognize a nonstatutory enforcement-action exemption—*USA Waste of California, Inc. v. City of Irwindale* (2010) 184 Cal.App.4th 53 and *Graffiti Protective Coatings, Inc. v. City of Pico Rivera* (2010) 181 Cal.App.4th 1207—are distinguishable because they involve actions to enforce laws *against government entities*. (*USA Waste*, at p. 65 ["efforts to challenge governmental action would be burdened significantly" if challengers were subject to anti-SLAPP motions]). Finally, that the Gardners sought \$500,000 in damages undermines their characterization of their lawsuit as an effort to enforce a City ordinance.

As for their fraud claim, the Gardners argue Scott Maas's misrepresentations could not have been protected by the anti-SLAPP statute because he made them at a time when there was no "issue under consideration or review by" the City—the City had already issued a building permit and the Gardners had not yet filed a formal complaint. We are not persuaded. First, instead of construing the anti-SLAPP statute broadly as the Legislature has commanded (§ 425.16, subd. (a)), the Gardners seek to isolate a series of related events in a fluid permitting process that occurred over about six months. Second, even if there were no issue then under review by the City, it is sufficient for purposes of the anti-SLAPP statute that Scott Maas made his statements in connection with an *anticipated* proceeding. (*Siam v. Kizilbash* (2005) 130 Cal.App.4th 1563, 1570 ["Communications that are preparatory to or in anticipation of commencing official proceedings come within the protection of the anti-SLAPP statute."]; *Neville v. Chudacoff* (2008) 160 Cal.App.4th 1255, 1266 [statements made " 'in connection with' " or " 'reasonably relevant' " to an anticipated proceeding are within the anti-SLAPP

statute].) The very theory of the Gardners' fraud claim is that Scott Maas made misrepresentations in an effort to avoid what otherwise would have been an inevitable—i.e., anticipated—public proceeding. We thus conclude the Gardners' fraud claim also falls within the scope of the anti-SLAPP statute.

III

PROBABILITY OF PREVAILING ON THE MERITS

Because we have concluded the Maases have satisfied the first prong by showing the Complaint arises out of protected activity, the burden shifts to the Gardners to "demonstrate[] a probability of prevailing on the claim." (*Navellier, supra*, 29 Cal.4th at p. 88.) The trial court found the Gardners failed to make such a showing.

The trial court concluded the Gardners' code-based claims were barred by the City's determination that the Project was exempt from design review. The court ruled that if the Gardners were dissatisfied with that determination, their "remedy is to seek a writ of mandate concerning the City's decision to permit the project without design review," not to sue the Maases for damages. (See, e.g., *City of Santee v. Superior Court* (1991) 228 Cal.App.3d 713, 718 ["[A] proceeding under . . . section 1094.5 is the exclusive remedy for judicial review of the quasi-adjudicatory administrative action of the local-level agency."].) As to their fraud claim, the court concluded the Gardners failed to present any admissible evidence of detrimental reliance because they had, in fact, "actively opposed the Maases' project in the City's administrative processes." And because the City determined the Project was exempt from design review, the trial court

concluded Scott Maas's alleged misrepresentations had not caused the Gardners any damage.

The Gardners contend the trial court erred by concluding their exclusive remedy was to challenge the City's determination via a mandamus action. They assert the EMC creates an independent basis of liability upon which to sue the Maases, Government Code section 36900 provides an independent procedural mechanism through which to sue,⁶ and case law empowers them to elect between suing the Maases and suing the City. But even if all that were true, we still would conclude the judgment was not reached in error because the Gardners failed to exhaust their judicial remedies as a predicate to pursuing their claims against the Maases. As we explain below, that is because, unless set aside by mandamus, the City's determination that the Project is exempt from design review is entitled to preclusive effect in the Gardners' subsequent litigation on that same issue.

We begin with the Gardners' characterization of their code-based claims. The overarching theme of the Gardners' appeal is that the trial court misconstrued their code-based claims as challenging the *City's* permitting decisions as opposed to the *Maases'*

⁶ Government Code section 36900, subdivision (a) provides, in pertinent part, that "[t]he violation of a city ordinance may be prosecuted by city authorities in the name of the people of the State of California, or redressed by civil action." We will assume, without deciding, that this statute allows the Gardners to sue the Maases for a violation of the EMC. (See *Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2005) 129 Cal.App.4th 1228, 1264 [statute "expressly provides that a violation of a city ordinance may be redressed by civil action"]; but see 60 Ops. Cal. Atty. Gen. 83, 88, 89-90 (1977) [suggesting, based on legislative history, that "redressed by civil action" means a civil action by a city].)

independent violation of the EMC, a distinction they contend is supported by the following subdivisions of EMC section 23.08.020:

"A. Without first having obtained a Design Review Permit, it shall be unlawful for any person to construct, grade for, relocate, alter, remodel or otherwise modify the exterior of any structure, when such activity is required by this Chapter to have a Design Review Permit. (Ord. [No.] 2003-10).

"B. No building permit, grading permit or other development permits shall be issued relating to a structure or site development for which a Design Review Permit is required until the Design Review Permit is obtained. (Ord. [No.] 2003-10)."

The Gardners contend these subdivisions, when read together, create two alternatives from which the Gardners may select: (A) a damages action against the Maases under subdivision A for "alter[ing]" or "remodeling" their residence "[w]ithout first having obtained a Design Review Permit," or (B) a mandamus action against the City under subdivision B for issuing a building permit without first having issued a design review permit. The Gardners maintain that because they elected in this action to pursue option A, the trial court erred by concluding they were limited to pursuing a mandamus proceeding against the City, which they assert would only be true if they elected option B. There are two fundamental problems with this theory.

First, the Gardners' interpretation of EMC section 23.08.020 reads out a critical limitation. Subdivision A applies only when the challenged "activity is required by this Chapter to have a Design Review Permit," and subdivision B restricts the issuance of a building permit only for projects "for which a Design Review Permit is required." In

other words, whether under subdivision A or B, EMC section 23.08.020 creates liability only for projects that are required to undergo design review.

This limiting concept is echoed in the subsequent EMC provision, section 23.08.030, which addresses exemptions from design review as follows:

"A. All buildings, grading, landscaping or construction projects, whether they require any other City permit or not, are subject to design review *unless exempted by this Chapter*. (Ord. [No.] 2003-10). (Italics added.)

"B. When in compliance with all other City ordinances and regulations, *the following projects are exempted* from the other provisions of this Chapter: [listing exemptions]." (Italics added.)

Taken together, EMC sections 23.080.020—when read in full, with its limiting language—and 23.080.030 provide that the Gardners may only pursue a direct claim against the Maases under section 23.080.020A *if the Project is not exempt from design review*. But the City concluded the Project *was exempt*, which leads to the second problem with the Gardners' theory.

The Gardners assert that under *State Board of Chiropractic Examiners v. Superior Court* (2009) 45 Cal.4th 963, 976 (*Arbuckle*) and *Runyon v. Board of Trustees of California State University* (2010) 48 Cal.4th 760, 774, "there [is] no need to bring a writ proceeding" when "there is an express statutory cause of action for damages" like that provided in Government Code section 36900. The Gardners' problem is that while *Arbuckle* and *Runyon* may assist them on the issue of *exclusive* remedy, the cases are fatal on the issue of *exhaustion* of remedies. The *Arbuckle* court noted the general rule "that writ review of an adverse administrative decision is a necessary step before

pursuing other remedies that might be available." (*Arbuckle*, at p. 975.) Otherwise, the court explained, "if the administrative proceeding possessed the requisite judicial character [citation], the administrative decision is binding in a later civil action brought in superior court." (*Id.* at p. 976.) On the record before it, the *Arbuckle* court ultimately concluded the general rule was inapplicable because the statute at issue contemplated potentially simultaneous administrative and superior court proceedings, yet the Legislature gave no indication it intended that findings in the administrative proceeding would have a preclusive effect in the court action. (*Ibid.*) Following *Arbuckle*, the *Runyon* court reached the same conclusion regarding a different statute that similarly contemplated parallel administrative and superior court proceedings. (*Runyon*, at pp. 763, 774; see also *Fahlen v. Sutter Central Valley Hospitals* (2014) 58 Cal.4th 655, 679-680 [specific language of hospital whistleblower statute "envisions that hospital peer review proceedings against physician . . . and the physician's . . . whistleblower action . . . might coexist simultaneously"].)

The Gardners acknowledge *Arbuckle* and *Runyon* are distinguishable in that "in those cases the money damages and the question of the writ proceeding were contained within the same statute, and here the money damages are found in one statute, and the question of writ proceedings arises from case law," but contend "this [is] not a difference that makes a difference." We disagree, as has our Supreme Court. In *Murray v. Alaska Airlines, Inc.* (2010) 50 Cal.4th 860, the Supreme Court declined to deviate from the general rule giving preclusive effect to administrative findings not set aside by mandamus because, unlike *Arbuckle*, the deviation was not compelled by the specific language of the

statute at issue. (*Murray*, at p. 877, fn. 8.) Absent specific language in either Government Code section 36900 or EMC section 23.080.020 suggesting we should do otherwise, we see no reason to deviate from the general rule here, either.

The next question, then, is whether the general rule's criteria are satisfied here. The Gardners do not dispute that the City's "administrative proceeding possessed the requisite judicial character" so as to bring it within the general rule.⁷ (*Arbuckle, supra*, 45 Cal.4th at p. 976.) Nor do they dispute the finality of the City's determination or that they failed to set it aside by way of mandamus. (See fn. 4, *ante*.) Instead, they argue the City's exemption determination should not have preclusive effect in this action because neither the parties nor the issues are the same. We are not convinced. Although the City is not a party to this action, the Gardners and the Maases (as real parties in interest) were parties and active participants in both the City's administrative process and in this action. We find this overlap sufficient. (See, e.g., *Mola Development Corp. v. City of Seal Beach* (1997) 57 Cal.App.4th 405, 413 ["The preclusive effect of the administrative ruling prevents [plaintiff] from litigating its civil rights action, not only against the city, but against the individually named defendants as well. Since these individuals have been sued solely because of their involvement in the process, the unreviewed administrative findings prevent [plaintiff] from asserting inconsistent claims against them."].)

⁷ Indeed, their verified petition in the mandamus action alleged the City's process satisfied all the requisites for an administrative mandamus proceeding under section 1094.5.

The Gardners argue the issues in the City's administrative process and this action are different because the City considered whether the Project was exempt from design review when the Maases applied for a CDP in October 2012, not when the Maases initially began construction three months earlier in July. Before addressing this point, we note the Gardners' first mention of the City's exemption determination—an issue critical to the parties' briefing below and the trial court's ruling—is in their reply brief. This, standing alone, would justify our rejection of the Gardners' new argument. (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764 [" "Obvious considerations of fairness . . . demand that the appellant present all of his points in the opening brief." "].)

But even if the Gardners had properly raised the issue, we still would find no merit to it. The Gardners' argument ignores, once again, the practical reality that the Maases' October application was a continuation of the ongoing petitioning process that began with the initial building permit application in May and the issuance of a building permit and commencement of construction in July. While the Gardners argue it is "entirely speculative" that the Project was the same in October 2012 (or January 2013, when the city council ultimately denied the Gardners' appeal) as it was in May or July 2012, City staff disagreed—their agenda report to the city council stated "the project as represented on the CDP application and plans submitted therewith is unchanged from the project as represented on the building permit application which received approval and for which a building permit was issued," with the exception that the Maases' home had not maintained habitability. We disregard the Gardners' references in their reply brief to statements the Maases allegedly made to the city council regarding changes to the Project

because the assertions are not supported by citations to evidence in the record before us. (*Duarte v. Chino Community Hospital* (1999) 72 Cal.App.4th 849, 856.) We thus conclude there was sufficient identity of the exemption issue in the City's administrative process and in this action so as to give it preclusive effect here. When given that effect, the City's exemption determination prevents the Gardners from establishing a probability of prevailing on their code-based claims.

The preclusive effect of the City's exemption determination also disposes of the Gardners' fraud claim. Because the Project was exempt from design review, the Gardners could not have been harmed by misrepresentations that sought to keep the Gardners from attempting to force the Project into design review. Nor did the Gardners rely on the misrepresentations, in any event—the misrepresentations did not induce the Gardners to refrain from opposing the Project; to the contrary, they complained in September, opposed the CDP application in November, and appealed to the city council in December. Moreover, the Gardners concede Scott Maas's August 22 e-mail corrected any alleged misrepresentations he made earlier that month. The Gardners' theory that "by then damage was done" because "it is substantially unlikely that any court or municipality will force the Maases to remove the structure and start the process again" is speculative and unsupported. In fact, the EMC authorizes the City to declare a violation of the EMC a public nuisance and to abate the nuisance at the owner's expense. (EMC, §§ 1.08.030B, 1.08.070; see also *Scott v. City of Del Mar* (1997) 58 Cal.App.4th 1296, 1306 [city had authority to abate public nuisance at owner's expense].)

Based on our independent review, we conclude the Gardners have failed to establish a probability of prevailing on any of their claims. Accordingly, the trial court did not err in striking the Complaint under the anti-SLAPP statute.

DISPOSITION

The judgment is affirmed. The Maases are awarded costs on appeal.

BENKE, Acting P. J.

WE CONCUR:

McDONALD, J.

McINTYRE, J.