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*EXEMPT FROM FILING FEES PURSUANT
TO GOVERNMENT CODE SECTION 6103*

6 Attorneys for Defendant
CITY OF DANA POINT
7

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF ORANGE, CENTRAL JUSTICE CENTER

10
11 CENTER FOR NATURAL LANDS
MANAGEMENT, a non-profit organization,
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Plaintiff,
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vs.
14 CITY OF DANA POINT, and DOES 1-50,
15
Defendant.
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Case No. 30-2021-01219668-CU-OR-CJC

*Assigned For All Purposes To:
Hon. Michael J. Strickroth; Dept. C15*

**CITY OF DANA POINT’S NOTICE OF
DEMURRER AND DEMURRER TO
SECOND AMENDED COMPLAINT;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF,
AND SUPPORTING DECLARATION OF
JENNIFER FARRELL**

*[Filed Concurrently with (1) Notice of Motion
and Motion to Strike and (2) Request for Judicial
Notice]*

Reservation No. 73737238

Hearing:

Date: August 8, 2022
Time: 1:45 p.m.
Dept.: C15

Date Action Filed: September 7, 2021
Trial Date: None


1 **TO THE INTERESTED PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that on August 8, 2022, at 1:45 p.m., or as soon thereafter as the
3 matter may be heard in Department C15 of the above-entitled court located at 700 W Civic Center
4 Drive, Santa Ana, CA 92701, Defendant CITY OF DANA POINT (“City” or “Defendant”) will and
5 hereby does demur to the First and Second Causes of Action in the Second Amended Complaint
6 (“SAC”) filed by Plaintiff CENTER FOR NATURAL LANDS MANAGEMENT (“CNLM” or
7 “Plaintiff”).

8 This Demurrer is based upon this Notice of Demurrer, Demurrer, the attached Memorandum
9 of Points and Authorities, the accompanying Motion to Strike to Plaintiff’s Second Amended
10 Complaint and the Memorandum of Points and Authorities in Support Thereof, the attached
11 Declaration of Jennifer J. Farrell regarding efforts to meet-and-confer on these issues, the City’s
12 Request for Judicial Notice, the pleadings and records on file in this case, and upon such additional
13 argument as may be presented at the hearing.

14
15 Dated: April 12, 2022

RUTAN & TUCKER, LLP
A. PATRICK MUÑOZ
JENNIFER J. FARRELL

17 By: 
18 Jennifer J. Farrell
19 Attorneys for Defendant
20 CITY OF DANA POINT

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DEMURRER

Defendant CITY OF DANA POINT (“City” or “Defendant”) hereby demurs to the Second Amended Complaint (“SAC”) filed by Plaintiff CENTER FOR NATURAL LANDS MANAGEMENT (“CNLM” or “Plaintiff”) as follows:

DEMURRER TO FIRST CAUSE OF ACTION

(Trespass)

Plaintiff’s First Cause of Action is subject to demurrer pursuant to Code of Civil Procedure Section 430.10 (e) on each of the following separate grounds because:

- i. The First Cause of Action fails to state a cause of action for trespass because it fails to allege a statutory basis for liability against the City. (Gov. Code § 815).
- ii. The First Cause of Action fails to state a cause of action for trespass because Plaintiff has not plead that it has filed a pre-litigation claim with the City (and has not filed one) as required by the California Government Claims Act. (Gov. Code §§ 810–996.6).


DEMURRER TO SECOND CAUSE OF ACTION

(Civil Code § 815 [sic])

Plaintiff’s Second Cause of Action is subject to demurrer pursuant to Code of Civil Procedure Section 430.10 (e) because Plaintiff has not filed a pre-litigation claim with the City as required by the California Government Claims Act. (Gov. Code, §§ 810–996.6).

Dated: April 12, 2022

RUTAN & TUCKER, LLP
A. PATRICK MUÑOZ
JENNIFER J. FARRELL

By: 

Jennifer J. Farrell
Attorneys for Defendant
CITY OF DANA POINT

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 This demurrer presents two well settled legal issues. First, it is axiomatic that a city may
4 only be sued on a legal theory that is established by a statute allowing for such a suit. (Gov. Code
5 §815, see also, *Zuniga v. Housing Authority of the City of Los Angeles* (1995) 41 Cal.App.4th 82,
6 92; *City of Rialto v. United States DOD* (C.D.Cal. Aug. 16, 2005, No. EDCV 04-00079-VAP
7 (SSx)). The purported First Cause of Action of Plaintiff CENTER FOR NATURAL LANDS
8 MANAGEMENT’s (“CNLM” or “Plaintiff”) Second Amended Complaint alleges trespass against
9 Defendant CITY OF DANA POINT (“City” or “Defendant”). The demurrer should be granted
10 because no statute authorizes a city to be sued for trespass.

11 Second, it is equally well-established that a mandatory, jurisdictional prerequisite to seeking
12 damages against a City in litigation, is the filing of a pre-litigation government claim. (Gov. Code,
13 §§ 905, 911.2, 945.4.) Plaintiff sues the City for damages in connection with its Trespass Cause of
14 Action, as well as its Second Cause of Action under Civil Code Section 815; yet, it has failed to file
15 (or even allege that it filed) a pre-litigation government claim.

16 The above deficiencies cannot be corrected by an amended pleading. Accordingly, the
17 demurrer to the First and Second Causes of Action should be sustained without leave to amend.

18 **II. FACTUAL BACKGROUND**

19 This is a dispute between CNLM and the City regarding public access to what is known as
20 the Nature Trail and Overlook Areas located in the Dana Point Preserve (“Preserve”). Plaintiff owns
21 and manages the Preserve, subject to a conservation easement granted by CNLM to the City
22 (“Conservation Easement”). (SAC, ¶¶ 1, 8.) The Conservation Easement was created as part of the
23 entitlements for the development of the Dana Point Headlands. These entitlements, and the
24 Conservation Easement, grant the City, and the public, the right of access to the Nature Trail and
25 Overlook Areas.

26 Attached to the accompanying Request for Judicial Notice (“RJN”) as Exhibit A is a copy
27 of the Conservation Easement. The Conservation Easement has two distinct physical/geographical
28 components: (1) the Conservation Park dedicated to preservation of flora and fauna, and (2) the

1 Nature Trail and Overlook Areas dedicated to the public for passive recreation purposes. The Nature
2 Trail and Outlook Areas, depicted by a dotted line on Exhibit B to the Conservation Easement, form
3 a “U- shaped” trail that is, generally speaking, located on the outer perimeter of the Conservation
4 Park. The Conservation Park comprises the remainder of the Preserve, upon which the Nature Trail
5 and Outlook Areas are not located.¹

6 The Conservation Easement provides, as an expressly permitted use, the right for the public
7 to use the Nature Trail and Outlook Areas for passive recreational use, such as walking, hiking,
8 jogging and bird watching. (*See*, RJN, Ex. A, § 5.2 [“Permitted Uses”]; §5.2(d) [“Public Access”].)
9 The Conservation Easement additionally contains a provision that prevents CNLM from imposing
10 restrictions on the Preserve that would interfere with the public’s expressly granted right to passive
11 recreation use of the Nature Trail and Outlook Areas. (*See*, RJN, Ex. A, §5.1(n) [providing CNLM
12 may only impose restrictions on use at the Preserve that, among other things, are “not expressly
13 permitted or reserved by this Conservation Easement.”].)

14 The Nature Trail and Outlook Areas were opened to the public beginning in April 2010.
15 From that time until about March 13, 2020, Plaintiff’s management of the Preserve was such that
16 the Nature Trail and Outlook Areas were open to the public on a daily basis from 7:00 AM until
17 sunset, seven (7) days a week. In contrast, the public has always been prevented from accessing the
18 Conservation Park by fencing on both sides of the Nature Trail and Outlook Areas. This
19 management practice was never in dispute, and was consistent with the Conservation Easement,
20 which both prohibits uncontrolled public access during “non-daylight hours,” and makes clear that
21 the expressly permitted right of public access during daylight hours to the Nature Trail and Outlook
22 Areas for passive recreation uses does not give the public the right to access to the Conservation
23 Park. (RJN, Ex. A, § 5.1(o) [“Prohibited Uses”]; § 5.2(d) [“Permitted Uses”/“Public Use and
24 Access”].)

25 The instant dispute arose when CNLM unilaterally began to refuse to allow the required
26 public access. This led the City to issue numerous administrative citations to CNLM in an effort to
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28 ¹ Attached to the RJN as Exhibit B is an aerial photograph that depicts the Preserve, in which
the Nature Trail and Outlook Areas as well as the Conservation Park can be seen.

1 gain compliance with the entitlements and the Conservation Easement. CNLM appealed these
2 citations. Three hearings were held before an administrative law judge. The administrative law
3 judge ruled against CNLM on each of its three appeals. CNLM appealed these adverse rulings by
4 filing the underlying Complaint after the first hearing. The Complaint has been amended twice to
5 reflect its appeal of the second and third adverse rulings by the administrative law judge. The
6 operative pleading is now the Second Amended Complaint (“SAC”).

7 The SAC not only appeals the adverse rulings from the administrative law judge, but also
8 includes as the First Cause of Action allegations of trespass, and a Second Cause of Action under
9 Civil Code Section 815, both seeking damages against the City. CNLM’s purported causes of action
10 ignore two the basic principles of litigation against public entities, *to wit*: (1) a public agency can
11 only be sued for a cause of action created by statute. (Gov. Code § 815 [“Except as otherwise
12 provided by statute: (a) A public entity is not liable for an injury, whether such injury arises out of
13 an act or omission of the public entity or a public employee or any other person.”]); and, (2) prior
14 to suing a city for damages, a jurisdictional prerequisite is the filing of a government claim. (Gov.
15 Code, §§ 905, 911.2, 945.4.)

16 **III. ARGUMENT**

17 **A. Standard of Review**

18 “A demurrer tests the sufficiency of the allegations in a complaint as a matter of law.”
19 (*Mez Industries, Inc. v. Pacific Nat. Ins. Co.* (1999) 76 Cal.App.4th 856, 864.) As such, a demurrer
20 to a cause of action is properly sustained where the plaintiff fails to plead facts sufficient to show
21 the existence of each element of that cause of action. (Code Civ. Proc., §§ 430.10(e) and 430.30;
22 *Rakestraw v. California Physicians’ Service* (2000) 81 Cal.App.4th 39, 43.) Likewise, failure to
23 comply with (or pled compliance with) the claim requirements related to public agencies subjects a
24 complaint to demurrer. (*State of California v. Superior Court* (2004) 32 Cal.4th 1234, 1243 [“In
25 light of this overwhelming case law and history, we conclude that a plaintiff must allege facts
26 demonstrating or excusing compliance with the claim presentation requirement. Otherwise, his
27 complaint is subject to a general demurrer for failure to state facts sufficient to constitute a cause of
28 action.”].) Where a complaint fails as a matter of law to state facts establishing a cause of action, a

1 demurrer should be sustained without leave to amend. (*Lawrence v. Bank of America* (1985) 163
2 Cal.App.3d 431, 436–437.)

3 **B. The Demurrer to the First Cause of Action Should be Sustained Without Leave**
4 **to Amend**

5 The First Cause of Action of the SAC is for trespass. The City’s demurrer to the
6 First Cause of Action should be sustained without leave to amend for two reasons. First, because it
7 fails to state a claim since there is no statutory basis of liability against public entities for trespass.
8 (Code Civ. Proc, § 430.10(e); Gov. Code, § 815.) Second, because it fails to state a claim since
9 Plaintiff did not file a pre-litigation claim with the City pursuant to the California Government
10 Claims Act, and the time for filing such claim has expired. (Code Civ. Proc, § 430.10(e); Gov.
11 Code, §§ 905, 911.2, 945.4; *State of California v. Superior Court, supra*, 32 Cal.4th at 1239, 1243.)

12 Public entities like the City may only be liable in tort when liability is expressly
13 provided by statute. (Gov. Code, § 815; *Zuniga v. Housing Authority of the City of Los Angeles*
14 (1995) 41 Cal.App.4th 82, 92.) No such statutory basis exists for Plaintiff’s trespass claim, nor is
15 one alleged in the SAC. (*City of Rialto v. United States DOD* (C.D.Cal. Aug. 16, 2005, No. EDCV
16 04-00079-VAP (SSx)) 2005 U.S.Dist.LEXIS 26941, at *30 [no statutory basis for government
17 trespass liability].) Accordingly, Plaintiff has failed to plead facts sufficient to constitute a cause of
18 action for trespass against the City as a matter of law. (*Gregory Village Partners, L.P. v. Chevron*
19 *U.S.A., Inc.* (N.D. Cal. 2011) 805 F.Supp.2d 888, 902 [complaint against local sanitary district failed
20 to state a claim for trespass due to immunity under Government Code section 815]; *Odello Bros. v.*
21 *County of Monterey* (1998) 63 Cal.App.4th 778, 793, *as modified* (June 1, 1998) [no government
22 liability for trespass].) The First Cause of Action should be dismissed without leave to amend.
23 (Code Civ. Proc, § 430.10(e).)

24 Separately, the First Cause of Action fails to plead facts sufficient to constitute a
25 cause of action because Plaintiff has failed to plead that it has complied with the California
26 Government Claims Act (Gov. Code, §§ 810–996.6) (and, in fact, it has not done so). The California
27 Government Claims Act requires that a pre-litigation claim be filed with a government entity before
28 a suit for money or damages may be filed against it, and it is an element of a proper plead complaint

1 to allege compliance with this requirement. (Gov. Code, §§ 905, 945.4; *State of California v.*
2 *Superior Ct., (Bodde)* (2004) 32 Cal. 4th 1234, 1243 [“We conclude that failure to allege facts
3 demonstrating or excusing compliance with the claim presentation requirement subjects a claim
4 against a public entity to a demurrer for failure to state a cause of action.”].) The time for filing the
5 requisite pre-litigation claim has expired. (Gov. Code, § 911.2.) Because Plaintiff has failed to
6 plead compliance with the California Government Claims Act, the First Cause of Action is subject
7 to demurrer. (Code Civ. Proc., §430.10(e).)

8 The City’s demurrer to the First Cause of Action should be sustained without leave
9 to amend since the above deficiencies cannot be cured by an amendment. (*Lawrence, supra*, 163
10 Cal.App.3d at 436–437.)

11 **C. The Demurrer to the Second Cause of Action Should be Sustained Without**
12 **Leave to Amend**

13 The Second Cause of Action is for “Civil Code § 815.” While the SAC refers to
14 Civil Code Section 815, it quotes Civil Code Section 815.7(c), to support its allegations for damages
15 against the City for purported impairments to the Conservation Easement. (Civ. Code, § 815.7(c);
16 SAC, ¶¶ 50, 52.) As with the First Cause of Action, Plaintiff has failed to plead that it has filed a
17 pre-litigation claim against the City (and in fact it has not), and the time to file such claim has
18 expired. (Gov. Code, §§ 905, 911.2, 945.4.) Because Plaintiff has failed to plead compliance with
19 the California Government Claims Act, the Second Cause of Action is subject to demurrer. (Code
20 Civ. Proc., §430.10(e).)

21 The City’s demurrer to the Second Cause of Action should also be sustained without
22 leave to amend since the above deficiency cannot be corrected by an amendment. (*Lawrence, supra*,
23 163 Cal.App.3d at 436–437.)


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1 **IV. CONCLUSION**

2 For the reasons stated above, the City respectfully requests that the Court sustain the
3 demurrer to First and Second Cause of Action in the SAC without leave to amend.

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5 Dated: April 12, 2022

RUTAN & TUCKER, LLP
A. PATRICK MUÑOZ
JENNIFER J. FARRELL

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7 By: 
8 Jennifer J. Farrell
9 Attorneys for Defendant
CITY OF DANA POINT

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DECLARATION OF JENNIFER J. FARRELL

I, Jennifer J. Farrell, declare as follows:

1. I am an attorney at the law firm of Rutan & Tucker, LLP, counsel of record for Defendant, City of Dana Point in this action. I am a member in good standing of the State Bar of California. I make this Declaration in support of the City’s Demurrer to Plaintiff’s Second Amended Complaint. I have personal knowledge of the facts set forth in this Declaration and, if called as a witness, could and would testify competently to such facts under oath.

2. On or about March 22, 2022, I met-and-conferred with opposing counsel regarding the basis upon which we intended to demurrer and/or file a motion to strike in this action. We had a follow up conversation on the meet and confer on Wednesday, April 6, 2022.

3. The parties have not reached an agreement resolving the objections raised in the City’s demurrer.

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

Executed on April 12, 2022, at Irvine, California.


JENNIFER J. FARRELL

1 **PROOF OF SERVICE**

2 ***Center For Natural Lands Management v. City of Dana Point***
3 **OCSC CASE NO. 30-2021-01219668-CU-OR-CJC**

4 **STATE OF CALIFORNIA, COUNTY OF ORANGE**

5 I am employed by the law office of Rutan & Tucker, LLP in the County of Orange, State
6 of California. I am over the age of 18 and not a party to the within action. My business address is
7 18575 Jamboree Road, 9th Floor, Irvine, CA 92612. My electronic notification address is
8 mslobodien@rutan.com.

9 On April 12, 2022, I served on the interested parties in said action the within:

10 **CITY OF DANA POINT’S NOTICE OF DEMURRER AND DEMURRER TO SECOND**
11 **AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN**
12 **SUPPORT THEREOF, AND SUPPORTING DECLARATION OF JENNIFER FARRELL**

13 as stated below:

14 (BY MAIL) by placing a true copy thereof in sealed envelope(s) addressed as shown on
15 the attached service list.

16 In the course of my employment with Rutan & Tucker, LLP, I have, through first-hand
17 personal observation, become readily familiar with Rutan & Tucker, LLP’s practice of collection
18 and processing correspondence for mailing with the United States Postal Service. Under that
19 practice, I deposited such envelope(s) in an out-box for collection by other personnel of Rutan &
20 Tucker, LLP, and for ultimate posting and placement with the U.S. Postal Service on that same
21 day in the ordinary course of business. If the customary business practices of Rutan & Tucker,
22 LLP with regard to collection and processing of correspondence and mailing were followed, and I
23 am confident that they were, such envelope(s) were posted and placed in the United States mail at
24 Irvine, California, that same date. I am aware that on motion of party served, service is presumed
25 invalid if postal cancellation date or postage meter date is more than one day after date of deposit
26 for mailing in affidavit.

27 (BY E-MAIL – ELECTRONIC SERVICE through One Legal, LLC) Based on the Court’s
28 requirements that documents must be filed electronically in this action, the parties must
also serve documents and accept service of documents electronically from all other parties
which are not required to be personally served. I affected electronic service by submitting
an electronic version of the document(s) to One Legal, LLC, through the user interface at
www.onelegal.com, which caused the documents to be sent by electronic transmission to
the person(s) at the electronic service address(es) listed on the attached Service List.

Executed on April 12, 2022, at Irvine, California.

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

26 Mia R. Slobodien
27 (Type or print name)


28 (Signature)

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SERVICE LIST

Center For Natural Lands Management v. City of Dana Point
OCSC CASE NO. 30-2021-01219668-CU-OR-CJC

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