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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

ARAM SOHIGIAN et al., Plaintiffs and Appellants, v. CITY OF OAKLAND et al., Defendants and Respondents.	A103031 (Alameda County Super. Ct. No. 2002-065397)

Here we consider for the second time the City of Oakland's ordinance authorizing forfeiture of cars used in soliciting prostitution or purchasing controlled substances. We previously concluded the ordinance was not preempted by state law in *Horton v. City of Oakland* (2000) 82 Cal.App.4th 580 (*Horton*). In the current appeal, Aram Sohigian and Sam and Carolyn Horton renew the preemption question and raise additional challenges to the forfeiture law. We decline to reconsider the preemption question. We conclude appellants adequately alleged Excessive Fines Clause violations, but appellants' claims regarding a right to a prompt post-seizure hearing are now moot. We reverse in part and remand for further proceedings.

BACKGROUND

Oakland Municipal Code, Ordinance 9.56 (the Ordinance) was enacted in 1997. It authorizes the seizure, forfeiture and sale of vehicles used to solicit prostitution, purchase drugs or in an attempt of either offense. (Oak. Mun. Code, § 9.56.010; *Horton, supra,* 82 Cal.App.4th at p. 584.)

Appellants sued the City of Oakland (the City) as taxpayers under Code of Civil Procedure section 526a. They challenged the constitutionality of the Ordinance on its face and as applied. The City's demurrer to the first amended complaint was sustained with leave to amend as to four causes of action challenging the Ordinance as unconstitutional in its application. The demurrer to all other causes of action was sustained without leave to amend. Appellants filed no amendment and appealed the resulting judgment entered in favor of the City.

We granted appellants' request to submit supplemental briefs on the preemption issue and the continued viability of *Horton* in light of the recent Supreme Court decision in *American Financial Services Assn. v. City of Oakland* (2005) 34 Cal.4th 1239.[1] We also permitted the parties to brief potential procedural barriers to addressing the preemption issue on the merits. We turn first to those threshold issues.[2]

ANALYSIS

I. Preemption

The City argues appellants are collaterally estopped from relitigating preemption because *Horton* resolved that issue. Appellants counter that collateral estoppel does not apply because neither Carolyn Horton nor Aram Sohigian was a party, or in privity with a party, in *Horton*.[3] Appellants are incorrect.

"Generally, collateral estoppel bars the party to a prior action, or one in privity with him, from relitigating issues finally decided against him in the earlier action." (*City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 64.) Here, although two of the

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[1] Appellants' supplemental brief ranges considerably beyond those discrete points. We decline to consider their arguments and authorities that fall beyond the scope of our order.

[2] This court previously deferred ruling on several requests for judicial notice by both parties seeking notice of documents ranging from court records and opinions to press releases and news articles. These requests are granted only to the extent the specific materials for which judicial notice is sought are relevant to the legal issues at hand and otherwise appropriate matters for judicial notice. (Evid. Code, §§ 451, 452; *Mangini v. R. J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063.)

[3] Appellant Sam Horton was also an appellant in *Horton.*

plaintiffs in the subsequent suit are new, both this case and *Horton* were brought as taxpayer suits. The rule is settled: "Where the plaintiff in the prior action commenced the action, as a citizen and taxpayer on behalf of himself and others similarly situated, to determine a matter of general public interest, and where a different plaintiff in the succeeding action commenced that action as a citizen and taxpayer to determine the same matter of public interest, there is identity of parties" for purposes of collateral estoppel. (*Gates v. Superior Court* (1986) 178 Cal.App.3d 301, 307; *Citizens For Open Access Etc. Tide, Inc. v. Seadrift Assn.* (1998) 60 Cal.App.4th 1053, 1069, 1073.) Thus, although they did not participate in the *Horton* litigation, Ms. Horton and Mr. Sohigian have a sufficient identity of interest with the *Horton* parties and are in privity with them for purposes of the application of collateral estoppel.

Appellants urge we should not apply the doctrine because this case involves an issue of substantial public importance. They rely upon an exception to application of collateral estoppel that provides " 'when the issue is a question of law rather than of fact, the prior determination is not conclusive either if injustice would result or if the public interest requires that relitigation not be foreclosed.' " (*City of Sacramento v. State of California, supra*, 50 Cal.3d at p. 64.) The exception does not apply in this case. "The public interest exception [to collateral estoppel] is an extremely narrow one; we emphasize that it is the exception, not the rule, and is only to be applied in exceptional circumstances." (*Arcadia Unified School Dist. v. State Dept. of Education* (1992) 2 Cal.4th 251, 259.) In *Arcadia,* the Supreme Court approved application of the exception because, in part, if the action were barred, "the state of the law on a matter of statewide importance would remain permanently unclear and unsettled." (*Ibid*.) Similarly, in *City of Sacramento*, the exception applied where the state was the only party legally affected by a decision that had immense ramifications to taxpayers and California employers. So, application of the doctrine would have foreclosed any further consideration of an important legal question. (*City of Sacramento, supra*, at p. 64.)

There is no danger the issues presented by this case will go unaddressed if the plaintiffs are estopped from relitigating the preemption issue. The Supreme Court

granted review of *O'Connell v. City of Stockton* (2005) 128 Cal.App.4th 831, review granted September 7, 2005, S135160, a case from the Third District presenting precisely the same issue presented here. The court specifically directed the parties to brief the preemption question. There is no basis upon which to invoke the "public importance" exception to application of collateral estoppel in this case.

II. *First and Fifth Causes of Action: The City's Pecuniary Interest*

Under the forfeiture ordinance, the police department splits the net proceeds from the sale of any forfeited vehicle with the district or city attorney.[4] Appellants assert this provision violates due process by vesting the Oakland Police Department and Oakland City Attorney with a pecuniary interest in forfeitures. They contend this creates a " 'built-in' conflict of interest" by placing the city attorney and the police department "in a position where the 'smell of money' has the potential to skew their discretionary decisions . . . tempting them to improperly use forfeiture to generate revenue for their agencies."

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[4] In its current state, section 9.56.090 provides: "In all cases where vehicles seized pursuant to this chapter are forfeited to the city, the vehicles shall be sold, or at the city's option a settlement based on the monetary value of the vehicle may be arranged in lieu of forfeiture of the vehicle. The proceeds of any sale or settlement shall be distributed and appropriated as follows: [¶] A. To the bona fide or innocent purchaser, conditional sales vendor, mortgagee or lien holder of the property, if any, up to the amount of his or her interest in the property, when the court or Prosecuting Agency declaring the forfeiture orders a distribution to that person. [¶] B. To the Prosecuting Agency for all expenditures made or incurred by it in connection with the publication of the notices set forth in Section 9.56.070, and the sale of the vehicle, including expenditures for any necessary repairs, storage, or transportation of any vehicle seized under this chapter. [¶] C. The remaining funds shall be distributed as follows: [¶] 1. Fifty (50) percent to the local law enforcement entities that participated in the seizure distributed so as to reflect the proportionate contribution of each agency; [¶] 2. Fifty (50) percent to the Prosecuting Agency. [¶] D. All the funds distributed to the local law enforcement entities or Prosecuting Agency pursuant to subsection (C) of this section shall not supplant any funds that would, in the absence of this subdivision, be made available to support the law enforcement and prosecutorial efforts of these agencies. [¶] For the purposes of this section, 'local governmental entity' means any city, county, or city and county in this state. (Ord. 12684 (part), 2005)." (Oak. Mun. Code, § 9.56.090.)

A. *Facial Challenge to the Ordinance*

Appellants' first cause of action facially challenges the Ordinance because of the above-described "built in conflict of interest" that is alleged to taint the objectivity of the police department or the city attorney. In considering this claim, the City urges that the Ordinance is constitutional if, in light of distribution of seized assets to prosecuting agencies, it is merely possible for a citizen to receive adequate notice and opportunity to be heard. Appellants counter that the proper test for whether the Ordinance is facially valid is that announced by our Supreme Court in *American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307 (*American Academy of Pediatrics*) and *California Teachers Assn. v. State of California* (1999) 20 Cal.4th 327 (*California Teachers Assn*.), under which a plaintiff need only establish an ordinance would be unconstitutional in "the vast majority of its applications" or "in the generality of cases."

The rule announced in *American Academy of Pediatrics* and *California Teachers Assn.* governs our analysis. In order to succeed, appellants must be able to show that the prospect for overzealous enforcement offered by the financial return of assets to the prosecuting agencies generally taints the exercise of prosecutorial discretion in the vast majority of cases.

In support of their argument, appellants rely primarily on a series of cases where the prosecutors also represented private parties who were interested in the prosecutors' official actions, or where the prosecutors were compensated based upon the results achieved in prosecutions.[5] These cases presented situations of direct professional or financial conflicts of interest, and are thus distinguishable and unpersuasive.

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[5] *Young v. U.S. ex rel. Vuitton et Fils S.A.* (1987) 481 U.S. 787 [private attorney acting as special prosecutor in contempt proceeding against his opponent in related civil action]; *Ganger v. Peyton* (4th Cir. 1967) 379 F.2d 709, 712-715 [prosecutor also represented the defendant's wife in a divorce action based on the same alleged criminal assault]; *People ex rel. Clancy v. Superior Court* (1985) 39 Cal.3d 740 [attorney representing city earned double hourly rate if he prevailed in nuisance abatement actions]; *Baca v. Padilla* (N.M. Sup. Ct. 1920) 190 P. 730 [contingent fee dependent on conviction]; *Price v. Caperton* (Ky. App. 1864) 62 Ky. 207, 208 [same].

The case most instructive for our purpose is *Marshall v. Jerrico, Inc.* (1980) 446 U.S. 238 (*Marshall*). In *Marshall*, the United States Supreme Court considered whether a statutory scheme violated due process where civil penalties imposed by the Secretary of Labor for violations of child labor laws were returned to the agency as reimbursement of the enforcement program. It was claimed that the prospect for reimbursement created an "impermissible risk and appearance of bias" (*id*. at p. 241) on the part of the prosecuting official. The Supreme Court rejected this contention. (*Id.* at p. 252.) The claim in this case is the same.

Just like *Marshall*, this case does not involve an allegation that a *judicial officer* is tainted by the prospect of financial return, but rather that the police and prosecuting attorney are: "The rigid requirements . . . designed for officials performing judicial or quasi-judicial functions, are not applicable to those acting in a prosecutorial or plaintiff-like capacity. Our legal system has traditionally accorded wide discretion to criminal prosecutors in the enforcement process . . . and similar considerations have been found applicable to administrative prosecutors as well. . . . Prosecutors need not be entirely 'neutral and detached.' [Citation.] In an adversary system, they are necessarily permitted to be zealous in their enforcement of the law. The constitutional interests in accurate finding of facts and application of law, and in preserving a fair and open process for decision, are not to the same degree implicated if it is the prosecutor, and not the judge, who is offered an incentive for securing civil penalties." (*Marshall, supra,* 446 U.S. at pp. 248-249.)[6]

While a "scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions" (*Marshall, supra,*

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[6] Appellants rely upon dicta that suggest prosecutors occupy a quasi-judicial role, and urge the adoption of a more stringent standard than articulated in *Marshall*. Although there may be specific duties of a quasi-judicial nature that may be vested in prosecutorial or police agencies from time to time, we are not inclined to so generally recharacterize the traditional role of prosecuting agencies as a quasi-judicial one for purposes of this conflict of interest analysis.

446 U.S. at pp. 249-250), we cannot say that is happening here as a general matter. Just as in *Marshall*, no individual here stands to profit financially from vigorous enforcement, and the prospect for improper influence as a general matter is too remote to nullify the Ordinance.

We also are not persuaded that the analysis of *People v. Eubanks* (1996) 14 Cal.4th 580 has significant bearing upon our decision that the Ordinance is facially valid. While it is true that *Eubanks* points out that institutional financial interests, as well as personal ones, may give rise to disqualification, *Eubanks* is different than this case in two important respects. First of all, *Eubanks* considered the statutory disqualification of a prosecutor under Penal Code section 1424, not as a matter of due process. But more importantly, as *Eubanks* points out, "Such a conflict is demonstrated, in this factual context, only by a showing the private financial contributions are of a nature and magnitude likely to put the prosecutor's discretionary decisionmaking within the influence or control of an interested party. In each case, the trial court must consider the entire complex of facts surrounding the conflict to determine whether the conflict makes fair and impartial treatment of the defendant unlikely." (*Eubanks, supra,* at p. 599.) The rule of *Eubanks* is one of individual application and does not lend itself readily to a wholesale declaration that an ordinance is facially invalid.

The trial court properly sustained the demurrer to the first cause of action.

B. *Challenge to the Ordinance in Application*

Appellants also make a claim that the financial incentive embedded in the Ordinance violates due process in application. This kind of challenge seeks relief from the application of a facially valid law to an individual or group impermissibly restrained or disabled by the way in which the law is applied or the circumstances in which it is invoked. An as applied challenge may also seek to enjoin future application of the law in an impermissible manner. Such a challenge requires analysis of the particular facts to consider whether the application violated protected rights. (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084, 1089 (*Tobe*).) In a lawsuit seeking to enjoin impermissible

applications of a facially valid law, the plaintiff must show a pattern of impermissible enforcement. (*Id.* at pp. 1084-1085.)

There are aspects of enforcement of the Ordinance that may raise significant constitutional questions. Appellants allude to a prevalence of settlement practices in varying fact patterns that arise in forfeiture cases to argue for the requirement that the prosecutor must be as financially disinterested in the outcome of forfeiture proceedings as a judge ought to be, and claim that innocent owners may suffer forfeiture. They also claim impermissible bias based upon the gross number of vehicles seized and the gross amount of monies realized by the City. But there needs to be considerably more factual context for successful pleading of these claims.

Eubanks points out that a crucial inquiry in cases such as these is whether the "nature and magnitude" of a potential conflict makes "fair and impartial treatment of the defendant unlikely." (*People v. Eubanks, supra*, 14 Cal.4th at p. 599.) The allegations regarding overall numbers of vehicles and monies generated do not relate the amounts realized by the enforcing entities to their overall budgets or to the overall costs of the forfeiture program. The influx of any additional money will always allow an agency to do more than it otherwise could do, and appellants make no allegations regarding how monies received as a result of forfeitures has affected the budgets of the prosecutorial agencies or the budgeting and appropriations process. (See generally Gov. Code, § 29002 et seq.) The influx to a substantial government agency of $250,000 over a number of years does not in and of itself compel a conclusion that the prospect of financial return skews the exercise of prosecutorial discretion. Similarly, conclusory allegations of settlements arising in different factual contexts, sometimes in lieu of seizure, and the theoretical potential of innocent owners suffering forfeiture do not set forth sufficiently pled claims to conclude that a prosecutorial conflict of interest is generally the impetus for action in forfeiture cases. Plaintiffs made no factual allegations that a prosecutorial conflict of interest is occurring or has occurred. The state of the pleadings here thus does not support a conclusion that the Ordinance is invalid in application. (*Tobe, supra,* 9 Cal.4th at pp. 1084-1085.)

Perhaps from a desire to strike the Ordinance in its entirety, rather than secure an injunction aimed at specific practices or provisions, appellants chose not to amend this fifth cause of action, even though they were allowed to do so by the trial court. That is their right. But their refusal to amend precludes our ability to allow them to proceed with their due process challenge as pled in this case.

The fifth cause of action as pled in the complaint before us suffers another critical flaw. As the City observes, the fifth cause of action seeks to enjoin not improper applications of a facially valid ordinance, but *all* further enforcement of the Ordinance "until the pecuniary incentives are removed." This petition is, in fact, a facial attack on the statute as written, not to its application to particular circumstances or particular groups. (See *Tobe, supra,* 9 Cal.4th at p. 1084.) It therefore mirrors the first cause of action and fails for the same reasons.[7]

The Ordinance is not facially invalid because of an imbedded prosecutorial conflict of interest, and the state of the pleadings does not allow for plaintiffs' applied challenge for prosecutorial conflict to proceed. The court properly sustained the demurrer to the fifth cause of action.

III. *Prompt Post-Seizure Hearing*

When one may suffer irreparable injury because property has been taken by the government, due process requires that the party be given the opportunity to challenge the deprivation either before it happens or promptly thereafter. (*Commissioner v. Shapiro* (1976) 424 U.S. 614, 629; *Krimstock v. Kelly* (2d Cir. 2002) 306 F.3d 40, 51.)

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[7] Considerations of judicial restraint and remedy also influence our approach to the adequacy of the as applied challenge to the Ordinance. When considering a constitutional flaw in a statute, courts should "limit the solution to the problem," and "enjoin only the unconstitutional applications of a statute while leaving other applications in force." (*Ayotte v. Planned Parenthood of Northern New England* (2006) ___ U.S. ___ [126 S.Ct. 961, 967].) "Accordingly, the 'normal rule' is that 'partial, rather than facial, invalidation is the required course,' such that a 'statute may . . . be declared invalid to the extent that it reaches too far, but otherwise left intact." (*Id.* at p. 968.) Appellants' refusal to amend or limit the relief prayed for in their complaint also works against them on the record before us.

Appellants contend the City's failure to provide for a prompt method to challenge a vehicle seizure violates due process. The trial court sustained the City's demurrer to appellants' facial and as applied due process challenges to the Ordinance on this ground.

A. *Pre-Amendment Provisions Regarding Post-Deprivation Process*

Under the Ordinance in effect when the trial court considered the demurrer, a vehicle could be seized without process if (1) the seizure was subject to an arrest or search under a search warrant, or (2) there was probable cause to believe the vehicle was used to solicit an act of prostitution, purchase a controlled substance, or in an attempt of either crime. (Oak. Mun. Code, §§ 9.56.010, 9.56.040.) If facts warranted seizure, the district or city attorney was to file a petition for forfeiture (*id*., § 9.56.070(A)) "as soon as practicable, but in any case within one year of the seizure." (*Id*., § 9.56.070(B).) The district or city attorney was required to serve notice of the seizure and intended forfeiture proceedings on any interested party. There were no time limits on how soon after the seizure notice must be given. (*Id*., § 9.56.070(C).) Nor were there time limits for ascertaining the identities of interested parties, although the police department was required to conduct an investigation of record owners and send notice "forthwith" once it determined a party has an ownership interest in the vehicle. (*Id*., § 9.56.070(D).)

Any person who claims an interest in the seized vehicle had 10 days from the date of notice to file a claim with the superior court. (Oak. Mun. Code, § 9.56.080(A).) Once a claim was filed, "the forfeiture proceeding shall be set for hearing on a day *not less than* thirty (30) days therefrom." (*Id*., § 9.56.080(B).)[8] (Italics added.) Notably, the Ordinance did not provide an *outer* time limit for holding the hearing. Appellants acknowledge the Ordinance theoretically allowed a hearing to take place within 60 to 70 days after the initial seizure. However, they assert that, since implementation, no hearing

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[8] The City describes section 9.56.080(B) as "requir[ing] that a judicial hearing on a claim opposing forfeiture be heard *30 days after* the claim is filed." (Italics added.) Careful reading reveals the Ordinance imposes a *minimum,* not a maximum, time frame of 30 days for the hearing. The City's misreading of the provision is troubling, particularly given that the error was called to its attention in the trial court.

has occurred in less than six months, and "many have occurred more than 1 year after the seizure." Because the Ordinance provided no procedure to secure release of a vehicle pending the forfeiture hearing, a person whose vehicle was seized could suffer deprivation for a substantial period before afforded an opportunity to challenge the seizure.

Whether a similar scheme violates minimum due process guarantees is currently pending before our Supreme Court in *O'Connell v. City of Stockton*, *supra,*128 Cal.App.4th 831, review granted September 7, 2005, S135160. In *O'Connell,* the Third District concluded that a Stockton vehicle forfeiture ordinance almost identical to the Ordinance here violates due process because it fails to provide an opportunity to promptly test the validity of a seizure before the forfeiture hearing.

B. The Post-O'Connell Amendments

In June 2005, following the Third District's decision in *O'Connell,* the City amended the Ordinance to include a post-seizure hearing process to determine whether seizures are supported by probable cause. The amended ordinance further provides that "If the hearing officer finds that probable cause does not exist, the hearing officer may recommend release of the property pending trial under conditions that preserve the City's interest in the property. The hearing officer may consider the existence of any affirmative defense to the forfeiture if the claimant has filed a claim in accordance with section 9.56.080. The hearing officer shall also consider whether it would be inappropriate for the property to remain in possession of the City under the circumstances of a particular case based upon a showing of extreme hardship."[9] (Oak. Ord. No. 12684 CMS; Oak. Mun. Code, § 9.56.060(b).)

The threshold question before us is whether the amendment renders moot appellants' challenge to the absence of a prompt post-seizure challenge process in the original Ordinance. The City argues that it does because the amended provisions contain a post-seizure hearing process. Appellants, on the other hand, argue their due process

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[9] We granted judicial notice of the amended ordinance on February 8, 2006.

claim is ripe because (1) the City is under no legal compulsion to retain the post-seizure hearing process in the Ordinance, and (2) the issue is likely to arise again in litigation concerning similar local ordinances. We agree that the due process challenge to the adequacy of the post-seizure remedy is moot, and we will not decide the question.

"Because the current version of an ordinance controls, the issues raised by an appeal may be rendered moot by an amendment which either repeals or significantly modifies the portion of the ordinance to which the challenge is directed." (*Bravo Vending v. City of Rancho Mirage* (1993) 16 Cal.App.4th 383, 393; *Building Industry Assn v. City of Oxnard* (1985) 40 Cal.3d 1, 3; *Callie v. Board of Supervisors* (1969) 1 Cal.App.3d 13, 18-19.) The post-judgment amendment significantly changed the ordinance by allowing for a post-seizure hearing. It would be meaningless for us to pass on the validity of the superseded version. Moreover, the grant of review in *O'Connell* cautions us that our high Court will soon address the issue. For this reason, we also view with some skepticism appellants' claim that the city may simply reinstitute its original provision if we do not reach the constitutional issue in this case. (*Cf. Marin County Bd. of Realtors, Inc. v. Palsson* (1976) 16 Cal.3d 920, 929-930.) There is no continuing controversy over the issues posed by the superseded law. The due process challenge to the original Ordinance is moot.

While appellants advance several reasons they believe the amended Ordinance is constitutionally flawed, they do not ask us to address its constitutionality and, in fact, concede they have not fully addressed the due process issues related to the amendment. Such issues should be addressed in the first instance in the trial court.

The judgment is reversed as to the second and seventh causes of action with direction to the trial court to dismiss them as moot. (See *Callie v. Board of Supervisors*, *supra*, 1 Cal.App.3d at pp. 13, 19.)

IV. *Excessive Fines*

Finally, appellants assert their third and sixth causes of action state viable claims for relief on the grounds that the Ordinance, on its face and as applied, violates state and

federal Excessive Fines Clauses.[10] (U.S. Const., 8th Amend; Cal. Const., art. I, § 17.) We conclude the Ordinance falls under the Excessive Fines limitations, and that the complaint makes out a sufficient allegation that, as applied, the Ordinance violates those limitations.

A. *The Excessive Fines Clause*

The Eighth Amendment to the United States Constitution states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." A forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of the offense. (*United States v. Bajakajian* (1998) 524 U.S. 321, 334, 336-337.)

B. *Application of the Clause*

The City contends the clause is inapplicable because the Ordinance is strictly remedial. But in *Austin v. United States* (1993) 509 U.S. 602, the United States Supreme Court applied the Excessive Fines Clause to a federal statute authorizing civil forfeiture of property used to facilitate drug offenses. (*Id.* at pp. 604, 619-620.) Rejecting contentions much like the City's here, the court explained: "The Excessive Fines Clause limits the government's power to extract payments, whether in cash or in kind, 'as *punishment* for some offense.' [Citation.] . . . 'It is commonly understood that civil proceedings may advance punitive as well as remedial goals, and, conversely, that both punitive and remedial goals may be served by criminal penalties.' " (*Id.* at pp. 609-610.) The critical inquiry, accordingly, "is whether forfeiture serves *in part* to punish, and one need not exclude the possibility that forfeiture serves other purposes to reach that conclusion." (*Id.* at p. 618, fn. 12.) In view of the "historical understanding of forfeiture as punishment" (*id.* at p. 621), the legislative choice to tie forfeiture directly to the commission of a crime, and the legislative history of the provision there at issue, the court held the forfeiture statute was subject to the Excessive Fines Clause.

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[10] While appellants rely primarily on authorities construing the federal clause, the state provision has been interpreted to impose an essentially identical restriction. (*City and County of San Francisco v. Sainez* (2000) 77 Cal.App.4th 1302, 1321.)

The City attempts to distinguish *Austin* on the ground that the Ordinance does not contain an "innocent owner" defense, a factor the court in *Austin* found indicative of a punitive purpose. (See *Austin v. United States, supra,* 509 U.S. at pp. 621-622.) This, it maintains, is proof that the Ordinance serves only the remedial purpose of nuisance abatement. *Austin* cautions, however, that the existence of a nonpunitive purpose does not exclude the possibility that the forfeiture serves punitive ends as well. (*Id. at* pp. 609-610.) Here appellants' allegations raise serious questions as to whether abating nuisance can indeed be the sole purpose of the Ordinance. The underlying nuisance addressed by the Ordinance is the facilitation of prostitution and drug trafficking. A vehicle is a neutral object that is not inherently a nuisance. The vehicle is legitimately declared a nuisance only when it becomes a tool used in connection with those crimes. The right to vehicle possession is declared forfeited because of the improper use. Thus, the forfeiture is permitted as a consequence, and possibly to punish the improper use.

While the provision's stated purpose is nuisance abatement, seizure does nothing to stop offenders from engaging in the same activities using other vehicles. Appellants allege the vast majority of seized vehicles are quickly released pursuant to monetary settlements. Also relevant are the historical nature of forfeiture as punitive (*Austin v. United States, supra,* 509 U.S. at p. 618) and the Ordinance's linkage of forfeiture to the commission of a criminal offense (*id.* at p. 620). Treating the factual allegations of the complaint as true (*Stanton Road Associates v. Pacific Employers Ins. Co., supra,* 36 Cal.App.4th at pp. 340-341), appellants have adequately alleged the forfeiture scheme falls within the application of the Excessive Fines Clause.

C. *Violation of the Excessive Fines Clause*

Appellants fare less well in arguing that the Ordinance violates the Excessive Fines Clause on its face. " '[A] punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense.' " (*City and County of San Francisco v. Sainez, supra,* 77 Cal.App.4th at pp. 1321-1322, quoting *United States v. Bajakajian, supra,* 524 U.S. at p. 334.) Pointing to the relatively minor penalties for the crimes of soliciting prostitution and purchasing or attempting to purchase small

quantities of controlled substances, appellants urge that the forfeiture of an automobile fails this test. As a facial challenge, their position fails. The value of a vehicle may range from minimal to substantial. A drug sale can involve a small quantity of marijuana or great quantities of narcotics. This facial attack fails to show that forfeiture under the Ordinance is grossly disproportionate to the underlying offense either "in the 'vast majority of its applications' " or " ' "in the generality of cases." ' " (*Kasler v. Lockyer* (2000) 23 Cal.4th 472, 502, citing *American Academy of Pediatrics, supra*, 16 Cal.4th at p. 343, and *California Teachers Assn., supra,* 20 Cal.4th at p. 347.) The trial court properly sustained the demurrer to this cause of action.

We turn to appellants' sixth cause of action, their as applied challenge under the Excessive Fines Clause. The complaint alleges the forfeiture statute has been employed only in conjunction with "sting" operations in which police officers offer to sell targets extremely small quantities of contraband for $5 to $20, or solicit sexual acts for prices ranging from $10 to $50. In drug cases, vehicles worth over $25,000 have been seized in these small "stings" and released only upon settlements in the $10,000 range. In prostitution cases, the complaint alleges the City has seized cars worth over $20,000 and released them for settlement amounts of over $9,500. When, as in the majority of cases, the city attorney reaches a monetary settlement with the vehicle owner under either scenario, the amount of the settlement is based almost exclusively on the value of the vehicle and the owner's affluence, rather than the gravity of the offending conduct.

Taking these factual allegations as true for purposes of the appeal and giving the complaint a reasonable interpretation (*Stanton Road Associates v. Pacific Employers Ins. Co., supra,* 36 Cal.App.4th 333; *White v. Davis* (1975) 13 Cal.3d 757, 765), these allegations, while not a model of specificity, are sufficient to withstand demurrer. Reasonably interpreted, they allege a practice of seizing vehicles of substantial value for relatively minor offenses and releasing them only upon the payment of thousands of dollars with the amount based not upon the gravity of the offense but on the value of the

vehicle and the owner's ability to pay. These assertions are sufficient to state a cause of action that the Ordinance, as applied, violates the Excessive Fines Clause.[11]

DISPOSITION

The court erred in sustaining the demurrer as to the sixth cause. The judgment is reversed as to that claim. The judgment as to the second and seventh causes of action is reversed and remanded with directions to the trial court to dismiss those claims as moot. In all other respects, the judgment is affirmed. Appellants' motion for sanctions is denied. Each party is to bear its own costs on appeal.

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Siggins, J.

We concur:

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McGuiness, P.J.

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Parrilli, J.

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[11] The City makes an extremely cursory assertion that the entire judgment should be affirmed on the bases of standing, res judicata, lack of irreparable harm, and the statute of limitations. It has waived these grounds by failing to provide legal argument and authority for its position on appeal, choosing instead to merely "direct" this court to its trial court brief in support of the demurrer. (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 594, p. 627.) Given the number and complexity of the issues at hand, the length and number of briefs and motions submitted, and the parties' demonstrated understanding of their right to seek leave to submit supplemental briefs if they deem it necessary, this is an inappropriate case in which to turn a blind eye to this failure. (Cf. *Balesteri v. Holler* (1978) 87 Cal.App.3d 717, 720.)