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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

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| CHINESE GOSPEL CHURCH, ET AL.,<br>Plaintiffs and Appellants,<br>v.<br>CITY AND COUNTY OF SAN FRANCISCO, ET AL.,<br>Defendants and Respondents. | A150092<br><br>(City & County of San Francisco Super. Ct. No. CGC-16-551486) |

## I. INTRODUCTION

Chinese Gospel Church and several individuals (appellants) contend that the installation and maintenance of a "pissoir" in Mission Delores Park constitute an illegal expenditure of public funds, entitling them to injunctive and declaratory relief. (Civ. Proc. Code § 526a.)[1] Rejecting this contention, the trial court sustained without leave to amend a demurrer to appellants' first amended complaint (Complaint) and entered judgment in favor of respondents, the City and County of San Francisco and the General Manager of its Recreation and Parks Department (the City). In this court, appellants argue the demurrer should have been overruled because the allegations in their

[1] Statutory references are to the Code of Civil Procedure, unless otherwise indicated. Section 526a states: "An action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a county, town, city or city and county of the state, may be maintained against any officer thereof, or any agent, or other person, acting in its behalf, either by a citizen resident therein, or by a corporation, who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax therein. . . ."

Complaint, if accepted as true, establish that the City violates at least seven laws by installing and maintaining the pissoir. Our standard of review is de novo. (*Rufini v. CitiMortgage, Inc*. (2014) 227 Cal.App.4th 299, 303–304 (*Rufini*).)[2] We affirm the judgment.

## II. FACTUAL AND PROCEDURAL BACKGROUND

### A. The Complaint Allegations

The pissoir that gave rise to this litigation is described in an introductory section of the Complaint as "a three-inch hole in the center of a three-foot diameter concrete base for public urination," which the City installed in Mission Delores Park at some unspecified time. Appellants allege they brought this action to "prevent the continued illegal and wasteful expenditure of public funds to install and maintain the pissoir."

General allegations in the Complaint include the following: Mission Delores Park is a 16.1-acre city park "primarily used for active and passive recreation, as well as various public events, including concerts, outdoor movie nights, performances, political rallies, and other events." The City implemented a rehabilitation project at Mission Delores Park, which was funded by a general obligation bond approved by voters in 2008. As part of the project the City installed two new restrooms "for a total of 34 fixtures (toilets) at the park." In addition, temporary portable toilets are added for larger events. The City also installed a pissoir in the "southwestern quadrant, by the entry plaza and next to the Muni tracks." It is a "2–4 minute walk" from the pissoir to the new restrooms.

Appellants attach photographs of the pissoir to their Complaint and describe several of its features in this way: "The pissoir has a semi-circular screen constructed of wire fencing. Underneath the wire fencing is a mesh-type material that is transparent in nature. Plaintiffs are informed and believe and thereon allege that the material is a vinyl

[2] An abuse of discretion standard of review applies to the denial of leave to amend a complaint. (*Rufini, supra,* 227 Cal.App.4th 299, 304.) Here, appellants do not directly challenge that aspect of the trial court's ruling, acknowledge any defects in their pleading or articulate how such defects could be cured. Accordingly, they forfeited any claim that the trial court abused its discretion by denying leave to amend.

mesh coated polyester or perhaps polypropylene. Behind that there is a white material, the composition of which is unknown to Plaintiffs." Appellants also allege that a drain in the concrete base of the pissoir is equipped with a "fine mes[h] grate" and a one-way valve. There is no signage identifying the pissoir as a place for urination, or specifying whether it is for male, female or unisex use. Nor is there any signage regarding disability access. Slopes leading to and from the pissoir are "steep and dangerous to persons with disabilities."

Appellants allege that a person using the pissoir is not "completely blocked" by its screen even if the user chooses to face that screen when urinating. People in the park, on its perimeter, in a public right of way near Church Street, or inside some nearby residences can see "persons urinating into the pissoir." Appellants also allege that the pissoir is unsanitary and spreads disease because it has no amenities such as soap, running water or towels. Furthermore, they allege that the pissoir is objectionable because public urination is indecent and offensive to the senses.

The Complaint purports to state eight cause of action against the City for violations of: (1) the constitutional right to privacy; (2) prohibitions against sex-based discrimination; (3) state health and hygiene policies; (4) the Americans with Disabilities Act, 42 U.S.C. § 12101, et seq. (the ADA); (5) the Rehabilitation Act of 1973, 29 U.S.C. § 701, et seq. (the Rehabilitation Act); (6) the Unruh Civil Rights Act, Cal. Civ. Code § 51, et seq. (the Unruh Act); (7) the California Plumbing Code, 24 Cal. Code Reg., tit. 24, part 5 (the Plumbing Code); and (8) public policy by enabling a public nuisance. Appellants allege "standing as taxpayers" to bring each of these claims and to obtain declaratory and injunctive relief pursuant to section 526a.

**B. The Demurrer**

On August 4, 2016, the City filed a demurrer claiming appellants fail to state facts to constitute a cause of action. (§ 430.10, subd. (e).) The City argued appellants do not have standing to bring this case and that the Complaint allegations do not demonstrate that the City violated any law by installing the pissoir. The City maintained it made a valid decision to install the pissoir as a way to combat the persistent problem of public

urination at Mission Delores Park by providing a "safe, open-air location for urination that contains a sewer drain and a partial privacy screen," so that people who are "already inclined to urinate publicly" would be encouraged to do so in a specific area that the City could "clean and maintain."

As support for its demurrer, the City produced a copy of a March 2013 Schematic Design Report for the Mission Delores Park Rehabilitation Project (The Park Report).[3] The Park Report outlined several goals and elements of the project, including installation of a new playground, which had already been completed. The Park Report also summarized data and other information collected at meetings and public workshops held by the City to help identify and develop key elements of the improvement plan. During this process, the concept of a pissoir was discussed many times as a way to combat the problem of patrons using a specific area of the park near a Muni line as an open-air restroom. The idea of installing a pissoir was controversial, raising concerns about maintenance, operation, utility changes, lack of public understanding, accessibility, and potential security issues, such as using any structure incorporated into the design as a hiding place. The Park Report contained an extensive discussion of such issues, and the process the City undertook to evaluate the benefits of installing a pissoir (reduce urination in landscape and against park walls; reduce public health problems in existing areas; serve park visitors who do not need/want to visit restroom to urinate; lower restroom demand during peak times), and the concerns voiced by opponents (could validate and worsen outdoor urination; would offend some patrons).

On September 30, 2016, the trial court held a hearing and then sustained the City's demurrer without leave to amend. In an order signed that day, the court stated: "Plaintiffs have failed to allege any claim for which they could be entitled to the relief that they seek. The installation and maintenance of the pissoir does not contravene any of

[3] The City filed two requests for judicial notice in support of its demurrer. Appellants also filed a request for judicial notice in support of their opposition. As best we can tell, the trial court did not grant any of these requests. Nor has either party filed a request for judicial notice in this court. On our own motion, we take judicial notice of the Park Report. (Evid. Code § 459(a).)

the constitutional provisions, statutes or common law rules cited by plaintiffs nor, even if it did, would there be any basis to issue the requested injunctive relief. A cause of action under CCP § 526a is improper when the challenged governmental conduct is legal. (*Coshow v. Escondido* (2005) 132 Cal.App.4th 687, 714; see *Humane Society of the United States v. State Board of Equalization* (2007) 152 Cal.App.4th 349, 361 [(*Humane Society*)].) 'Section 526a does not allow the judiciary to exercise a veto over the legislative branch of government merely because the judge may believe that the expenditures are unwise, that the results are not worth the expenditure, or that the underlying theory of the Legislature involves bad judgment.' (*Sundance v. Municipal Court* (1986) 42 Cal.3d 1101, 1138 [(*Sundance*)].)"

## III. DISCUSSION

### A. Preliminary Considerations

Seeking reversal of the judgment, appellants claim their Complaint "properly pleads seven causes of action."[4] In framing our discussion, we do not adopt appellants' conception of the Complaint. In our view, appellants attempted to allege seven bases for liability under section 526a, not seven separate causes of action.

"In framing the existence of a cause of action, California subscribes to the primary rights theory." (*Coachella Valley Unified School Dist. v. State of California* (2009) 176 Cal.App.4th 93, 125–126 (*Coachella*).) Under this theory, " ' "a cause of action consists of 1) a primary right possessed by the plaintiff, 2) a corresponding primary duty devolving upon the defendant, and 3) a delict or wrong done by the defendant which consists in a breach of such primary right and duty." ' " (*Miller v. Collectors Universe, Inc*. (2008) 159 Cal.App.4th 988, 1004 (*Miller*).) "Thus, the invasion of one primary right gives rise to but a single cause of action." (*Coachella* at p. 126.) By the same token, " ' "two actions constitute a single cause of action if they both affect the same primary right." ' " (*Miller* at p. 1004, italics omitted.) Furthermore, if only one right and

[4] As noted, the Complaint purports to plead eight causes of action. Thus, appellants have now abandoned their theory that the City violated the Rehabilitation Act by installing the pissoir.

one injury are alleged, there is only one cause of action even if the plaintiff relies on more than one legal theory or seeks more than one form of relief. (*San Diego Unified School Dist. v. County of San Diego* (2009) 170 Cal.App.4th 288, 305.)

In this case, appellants have alleged that the City breached a duty owed to them as taxpayers by using public funds to install a pissoir. The Complaint does not identify any other primary right or allege facts to justify characterizing appellants' various bases for liability as distinct causes of action against the City. Thus, the issue on appeal is whether appellants have alleged a single valid cause of action under section 526a.

Appellants also contend that in determining whether they stated a cause of action, this court must accept as true, and construe liberally, all allegations in their Complaint. In conducting our de novo review to determine whether the complaint states facts sufficient to constitute a cause of action, "[w]e construe the complaint 'liberally . . . with a view to substantial justice between the parties' " (*Rufini, supra,* 227 Cal.App.4th at p. 304.) We treat the demurrer as "admitting all material facts properly pleaded," but we "do not assume the truth of contentions, deductions or conclusions of law." (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865.) We may also consider evidentiary facts stated in exhibits attached to the complaint and matters that have been judicially noticed. (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 672; *Satten v. Webb* (2002) 99 Cal.App.4th 365, 375.) Thus, in conducting our review, we will not accept conclusory allegations in the Complaint as true. Nor will we impute material facts to support those conclusory allegations.

With these clarifications, we turn to the issue whether the Complaint contains properly pleaded material facts sufficient to constitute a cause of action under section 526a.

**B. Section 526a**

"Section 526a permits a taxpayer action to enjoin illegal governmental activity or the illegal expenditure or waste of public funds." (*Lyons v. Santa Barbara County Sheriff's Office* (2014) 231 Cal.App.4th 1499, 1502 (*Lyons*).) "A public expenditure is a waste of public funds, and thus subject to a taxpayer's suit under . . . section 526a, if it is

'totally unnecessary' or 'useless' or 'provides no public benefit.' " (*County of Ventura v. State Bar* (1995) 35 Cal.App.4th 1055, 1059 (*County of Ventura*).) "An expenditure of public funds is not a waste merely because there is a cheaper way. If there is a public benefit, the expenditure is not actionable, even if there is an alternative that is not only less expensive but more efficient." (*Id.* at p. 1060.) Thus, courts will not "interfere" with a "legislative judgment" on the ground that the public funds in question "could be spent more efficiently." (*Sundance, supra*, 42 Cal.3d at p. 1139.)

Moreover, "[c]ase law has made clear that 'waste' does not encompass discretionary governmental action. '[A] taxpayer is not entitled to injunctive relief under . . . section 526a where the real issue is a disagreement with the manner in which government has chosen to address a problem. . . .' [Citation.] Thus, ' "[t]he term 'waste' as used in section 526a means something more than an alleged mistake by public officials in matters involving the exercise of judgment or wide discretion." ' " (*California DUI Lawyers Assn v. Department of Motor Vehicles* (2018) 20 Cal.App.5th 1247, 1258–1259 (*DUI Lawyers*).)

"Cases that challenge the legality or constitutionality of governmental actions fall squarely within the purview of section 526a." (*DUI Lawyers, supra*, 20 Cal.App.5th at p. 1261.) However, "[a] taxpayer action does not lie where the challenged governmental conduct is legal." (*Lyons, supra*, 231 Cal.App.4th 1499, 1503.) Applying these rules, courts have held that " '[c]onduct in accordance with regulatory [or statutory] standards "is a perfectly legal activity" and beyond the scope of section 526a.' " (*Ibid.*) By the same token, however, section 526a permits a taxpayer challenge to a governmental action when the plaintiff has alleged the government acted pursuant to a law or regulatory scheme that is itself illegal. (*DUI Lawyers*, at p. 1262–1263; see e.g. *Tobe v. City of Santa Anna* (1995) 9 Cal.4th 1069, 1086 [section 526a can be used to challenge enforcement of an allegedly unconstitutional local ordinance].)

These principles establish two potential ways for appellants to state a claim under section 526a: (1) by showing that the City wastes money by installing and maintaining a pissoir that has no use or beneficial value; or (2) by showing that the City violates the law

by installing and maintaining the pissoir. The Complaint does not allege facts to demonstrate that the pissoir has no beneficial value. Furthermore, appellants appear to concede on appeal that their social and moral objections to the pissoir are not relevant here. On this point, they acknowledge that the City "has considerable discretion in its design and placement of public facilities to combat the problem of public urination." Appellants insist, however, that the Complaint allegations demonstrate that "installation and maintenance of the pissoir violate[] specific laws . . ." (Italics omitted.) Thus, we frame our analysis to consider the specific laws appellants contend the City violated by installing and maintaining a pissoir at Mission Delores Park.

**C. Analysis**

**1. Privacy Laws**

Appellants have attempted to allege that the City violates the privacy rights of two groups of people by installing a pissoir at the park: those who use the pissoir; and those who watch other people use it.

An invasion of privacy in violation of the state constitutional right to privacy requires proof of three elements: "(1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy." (*Hill v. National Collegiate Athletic Assn* (1994) 7 Cal.4th 1, 39–40 (*Hill*).)

According to the Complaint, pissoir users have a right to "[s]eclusion in bodily evacuation," which "is a societal norm and constitutes one of the most basic expectations for privacy." The City allegedly violated this right of pissoir users, who are "required" to expose their bodies and suffer the shame of urinating in public. This alleged invasion of a protected privacy interest is worse for women, appellants contend, because no matter how a woman positions herself to use the pissoir "she will be exposing much of her body to the public."

"Whether a legally recognized privacy interest is present in a given case is a question of law to be decided by the court." (*Hill, supra*, 7 Cal.4th at p. 40.) Here, the only privacy interest of pissoir users that is alleged in the Complaint is the right not to

have to expose oneself to the public in order to urinate. However, appellants have not alleged facts to prove the City requires people to use the pissoir. Instead, they expressly allege that restroom facilities are somewhere between a two and four-minute walk away from the pissoir.

In this court, appellants contend that they are not required to prove that the City compels people to expose their private parts in order to establish a violation of the constitutional right to privacy. Appellants reason that, while consent may be a factor to consider, it does not always excuse an intrusive, unnecessary invasion of a protected privacy right. (Citing *Sheehan v. San Francisco 49ers, Ltd*. (2009) 45 Cal.4th 992, 1001 (*Sheehan*).) This argument misses the mark.

The issue in *Sheehan* was whether plaintiffs stated a claim that their constitutional right to privacy was violated by a policy of the National Football League (NFL) requiring all patrons at NFL games to submit to a patdown search before entering the stadium. (*Sheehan*, *supra*, 45 Cal.4th at p. 996.) Concluding that the trial court erred by sustaining a demurrer to the plaintiffs' complaint, the *Sheehan* court observed that "in order to establish a reasonable expectation of privacy, the plaintiff 'must have conducted himself or herself in a manner consistent with an actual expectation of privacy, i.e., he or she must not have manifested by his or her conduct a voluntary consent to the invasive actions of defendant. If voluntary consent is present, a defendant's conduct will rarely be deemed "highly offensive to a reasonable person" so as to justify tort liability.' [Citation.] But the validity of the consent theory depends on the totality of the circumstances, which this record does not establish." (*Id*. at p. 1000.)

*Sheehan*, *supra*, 45 Cal.4th 992, is inapposite because there was no dispute in that case that patrons were required to submit to a patdown search. Thus, the issue was not whether a protected privacy right was affected, but whether the plaintiffs consented to that intrusion. Here, by contrast, the issue is whether appellants allege facts to support their pleaded theory that the City violates a cognizable privacy right by *requiring* pissoir users to expose their private parts. Therefore, it was incumbent on them to allege facts to support this theory, which they have not done.

Wording this right slightly differently, appellants contend that park patrons have a cognizable privacy right "in a toilet facility protected from public view." First, their authority for this proposition is inapposite. (*York v. Story* (9th Cir. 1963) 324 F.2d 450 [assault victim who was required to undress and allow an officer to take photographs of her in indecent positions alleged a violation of her federally protected right to privacy]; *Loder v. City of Glendale* (1997) 14 Cal.4th 846 [urinalysis drug testing of employees violated right to privacy, but testing job applicants did not].) Second, even if such a right exists, appellants do not allege facts to prove that it was violated. Instead, the Complaint's allegations establish that toilet facilities protected from public view are located somewhere between a two and four-minute walk of the pissoir.

As noted, appellants have also alleged that the privacy rights of people who happen to come upon a person using the pissoir are abridged because they are unwillingly or unexpectedly exposed to the " 'private parts' " of the pissoir user. As authority for this theory, appellants rely on section 154 of the San Francisco Police Code (section 154).

Section 154 is an ordinance that bars nudity in specified areas absent certain exceptions. Subdivision (a) of the ordinance codifies findings by the Board of Supervisors, including that "a person's public exposure of his or her private parts (1) invades the privacy of members of the public who are unwillingly or unexpectedly exposed to such conduct . . ." Subdivision (b) bars a person from exposing "his or her genitals, perineum, or anal region on any public street, sidewalk, street median, parklet, plaza, or public right-of-way . . ., or in any transit vehicle, station, platform, or stop of any government operated transit system in . . . San Francisco." Subdivision (c) codifies exceptions to this rule when the person is under the age of 5 years old or when the exposure occurs at a "permitted parade, fair, or festival held under a City or other government issued permit." Subdivision (d) states that a violation of section 154 constitutes an infraction punishable by a $100 to $200 fine.

Appellants posit that section 154 codifies the right of park patrons not to be "unwillingly" or "unexpectedly" exposed to the "private parts" of pissoir users. We disagree. Section 154 is a mechanism for police officers to enforce public order. It was

not intended to, and it does not, establish an individually enforceable right to privacy. Nor does it impose any obligation on the City or otherwise restrict its authority to install a pissoir to address the problem of public urination at Mission Delores Park.

Arguing otherwise, appellants cite *Hightower v. City and County of San Francisco* (N.D.Cal 2014) 77 F.Supp.3d 867 (*Hightower*). In that case, two public nudity advocates filed a class action against the City alleging that enforcement of section 154 violated their First Amendment rights. The district court rejected plaintiffs' facial challenge to the ordinance but found that they alleged facts to support their claim that the ordinance was unconstitutional as it had been applied to them. (*Id*. at pp. 874–875.) In the present case, appellants contend that the City's defense of section 154 in *Hightower* constitutes an admission that this ordinance creates an enforceable privacy interest in not being unwillingly or unexpectedly exposed to the private parts of another person. We disagree. The claims against the City in *Hightower* were grounded in the First Amendment rather than the right to privacy. Furthermore, in dismissing claims that enforcement of section 154 imposed impermissible restrictions on expressive conduct, the *Hightower* court found that restrictions on public nudity are within the traditional police power of the City and that the government has a legitimate interest in protecting the unsuspecting passerby from nudity. (*Id*. at p. 881.) These findings reinforce the conclusion that section 154 is enforceable by the City alone.

Finally, even if section 154 could be construed as codifying a privacy right, appellants have not alleged facts to prove that installing the pissoir violates that right because the Complaint allegations, even if taken as true, would not show that anybody is forced to look at the "private parts" of a pissoir user as that term is defined in section 154, subdivision (b). Appellants' conclusory assertion to that effect is unsupported by material factual allegations. In fact, the pissoir appears to be specifically designed so that users can shield their private parts from public view. Absent allegations demonstrating that pissoir users are required to expose their private parts to public view in order to use the pissoir, appellants fail to establish a causal link between the installation of the pissoir and the privacy interest they claim is violated.

**2. Sex-Based Discrimination**

According to the Complaint, the City committed sex-based discrimination in one of two alternative ways. First, appellants allege on information and belief that the pissoir was installed for the exclusive use of men. If this is so, they argue, then the City discriminated against women who cannot use the facility. Second, appellants allege that if the pissoir was not installed for male-only use, then it subjects women who use the pissoir to a loss of privacy that is greater than the loss experienced by men who use it.

For purposes of this appeal, we accept appellants' contention that the pissoir was installed solely for male use. Thus, we need not address their alternative theory that women users suffer a proportionally greater exposure than male users. We note however, that this alternative theory rests on the same false premise as appellants' privacy claims because nobody is compelled to use the pissoir against their will.

As support for their theory that a male-use only pissoir violates the law, appellants invoke what they call a "potty parity rule," which is allegedly codified in section 422.1 of the Plumbing Code and incorporated by reference into Health and Safety Code section 118505.

Plumbing Code section 422.1 (section 422.1) requires a minimum number of plumbing fixtures in a building or structure, which is calculated in terms of use and occupancy. Section 422.1 incorporates a table for calculating the minimum number of fixtures (water closets, urinals, lavatories, etc.) based on the "type of building occupancy" (theatre, restaurant, arcade, sports facility, office, home, etc.). Section 422.1 also states: "The minimum number of fixtures shall be calculated at 50 percent male and 50 percent female based on the total occupant load. Where information submitted indicates a difference in distribution of the sexes such information shall be used in order to determine the number of fixtures for each sex. . . ."

Health and Safety Code section 118505 states, in part: "(a) Publicly and privately owned facilities where the public congregates shall be equipped with sufficient temporary or permanent restrooms to meet the needs of the public at peak hours. [¶] (b) In

conformity with the State Plumbing Code, and except as otherwise provided in this section, standards shall be adopted in order to enforce this section . . ."

The Complaint allegations, if accepted as true, would not establish that the City violated either of these statutes by installing the pissoir. First, appellants have not alleged facts to establish that the pissoir is in a building or structure, such that section 422.1 applies. Second, they have not alleged that the City failed to calculate properly or install at Mission Delores Park the "minimum number" of "fixtures" required by the Plumbing Code, or that 50 percent of the minimum number of these fixtures were not allocated for the use of female visitors. Finally, appellants have not alleged that women who use the park are denied adequate restroom facilities during peak hours or at any other time. Beyond these defects, neither of these statutes explicitly or implicitly precludes the City from installing a male-only use pissoir as a separate mechanism for combatting the problem of public urination in the park.

**3. Lack of Hand-Washing Facility**

In their Complaint, appellants contend there is an established public policy for washing hands after toilet use that has been embraced by virtually every relevant regulatory body, from California schools, to the California Department of Public Health, to the World Health Organization. Appellants further allege that the City violated this policy by installing an "open-air place for urination [that] has no sink with running water and soap."

Accepting as true that washing one's hands after toilet use is a sound public policy would not prove that the City violated the law by using public funds to install a pissoir. As discussed above, policy considerations of this nature implicate legislative discretion and courts will not use section 526a to interfere with a discretionary decision. (*Sundance*, *supra*, 42 Cal.3d at p. 1138; *Humane Society*, *supra*, 152 Cal.App.4th at p. 361.)

In this court, appellants argue for the first time that this hand-washing policy is incorporated into the Plumbing Code, which requires that public restrooms constructed for use by the transient public must contain a sink. As support for this argument, appellants cite section 403.4 of this state's 2013 Plumbing Code, which states: "Self-

closing or self-closing metering faucets shall be installed on lavatories intended to serve the transient public, such as those in, but not limited to, service stations, train stations, airports, restaurants, and convention halls."

Preliminarily, we note that the current Plumbing Code does not contain a section 403.4, but section 407.4 contains essentially the same regulation. However, appellants misconstrue the substance of this regulation. The Plumbing Code uses the word "lavatory" to refer to a sink, not to a restroom as appellants appear to assume. (Plumbing Code § 214.0 [a lavatory is a "plumbing fixture used for washing the hands, arms, face and head"].) Thus, former section 403.4 does not require that all public restrooms contain a sink, but rather that sinks in places serving the transient public must have a certain type of faucet. Appellants do not identify any provision of the Plumbing Code requiring the City to install a sink as a precondition for installing a pissoir.

**4. The ADA**

In the Complaint, appellants contend that the City violated section 12132 of the ADA, which states in part: "[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." (42 U.S.C. § 12132.)

Appellants have not alleged facts to show that installing the pissoir violated this provision of the ADA. The record shows that the pissoir is only one of several options for urinating while using Mission Delores Park. Appellants have not alleged facts to establish that the City failed to provide equally beneficial options for disabled individuals. Nor have they alleged any facts to show that restroom facilities at the park considered as whole violate the ADA in any way.

In this court, appellants contend that the City intentionally disregarded ADA requirements when it designed the pissoir, quoting a snippet from the Park Report which states: "An initial review with RPD's accessibility coordinator has raised ADA concerns." Appellants contend that this statement (1) must be deemed as true because the

Park Report was an exhibit to the Complaint, and (2) is sufficient to state a cause of action against the City for violating the ADA by installing the pissoir.

For clarification, the Park Report is not an exhibit to the Complaint. However, this evidence is in the appellate record because both parties filed requests for judicial notice of it. As noted earlier, this court takes judicial notice of the Park Report on our own motion. We do so because the document itself is affirmative proof that the City made an informed and reasoned decision, as the local legislative body with regulatory authority over the park, to install the pissoir to combat the problem of public urination. The specific statement from the report that appellants attempt to invoke here—even if considered in isolation—reinforces our conclusion by demonstrating that the City considered the ADA during its design process. This evidence, if accepted as true, does not alter our conclusion that appellants failed to allege material facts to show that the pissoir actually installed in the park violates the ADA.

**5. The Unruh Act**

In the Complaint, appellants contend the City violated the Unruh Act, which guarantees persons with disabilities "full and equal accommodations, advantages, facilities, privileges, or services." (Civ. Code, § 51, et. seq.) Specifically, appellants allege that the City fails to "operate its services on a nondiscriminatory basis" by "failing to ensure that persons with disabilities have nondiscriminatory access to the Mission Delores Park pissoir."

The Unruh Act provides that "[a]ll persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, or sexual orientation are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." (Civ. Code § 51, subd. (b).)

In the present case, appellants appear not to have alleged facts sufficient to establish that the City was acting as a "business establishment" within the meaning of the Unruh Act when it installed the pissoir. Our Supreme Court has construed this statutory

language broadly to cover " 'all business establishments of every kind whatsoever,' " but has also recognized its limits by finding that a defendant may qualify as a business establishment with respect to some of its activities but not as to others. (*Curran v. Mount Diablo Council of the Boy Scouts* (1998) 17 Cal.4th 670, 696). The *Curran* court found that the Boy Scouts of America qualifies as a business establishment with respect to its " 'regular business transactions with nonmembers,' " but not "with regard to its membership decisions" because those actions are "unrelated to the promotion or advancement of the economic or business interests of its members." (*Id.* at pp. 696–697.)

Applying *Curran*, courts have recognized other limits on the Act's definition of a business establishment. For example, a city is not a business establishment under the Unruh Act when it enacts or amends legislation. (*Harrison v. City of Rancho Mirage* (2015) 243 Cal.App.4th 162, 173–176; *Qualified Patients Assn. v. City of Anaheim* (2010) 187 Cal.App.4th 734, 764–765.) Further, in *Carter v. City of Los Angeles* (2014) 224 Cal.App.4th 808, 825, the appellate court opined, albeit in dicta, that a city did not violate the Unruh Act by failing to install ramps or cutouts on street curbs because "a public entity providing sidewalks and curbs to its citizens does so as a public servant, not a commercial enterprise."

Here, appellants do not allege facts to establish the City was acting in its capacity as a business establishment when it installed the pissoir; they do not allege that the pissoir was installed to advance a commercial or economic interest. Instead, the record shows that the pissoir was installed after the City conducted an extensive study for the express purpose of addressing a public health issue. This undisputed evidence undermines appellants' unsupported assumption that the City was acting as a business establishment when it installed the pissoir.

Citing *Curran*, appellants contend that the definition of a business establishment is sufficiently broad reaching to embrace this case because Mission Delores Park is a place "of public accommodation or amusement." Pertinent to this issue, the *Curran* court stated that "the very broad 'business establishments' language of the Act reasonably must be interpreted to apply to the membership policies of an entity—even a charitable

organization that lacks a significant business-related purpose—if the entity's attributes and activities demonstrate that it is the functional equivalent of a classic 'place of public accommodation or amusement.' " (*Curran, supra,* 17 Cal.4th 670 at p. 697.) The court found, however, that the Boy Scouts organization is not the functional equivalent of a traditional place of public accommodation or amusement notwithstanding its nonselective admission policies because its primary function is not that of a public recreation facility, but rather "the inculcation of a specific set of values in its youth members." (*Ibid*.)

Similarly, we doubt that the City acts as the functional equivalent of a classic place of public accommodation or amusement here, where it has installed and maintained the pissoir for public health, rather than commercial reasons. Operating a commercial recreational facility is not the City's primary function either in a general sense or in the context of this case. Appellants do not allege otherwise. They do not contend that installation and maintenance of the pissoir was a commercial decision, or that the pissoir (as distinguished from the park) is a place of public accommodation rather than a public health measure installed pursuant to the City's police power and regulatory authority.

Most importantly, even if appellants could establish the Unruh Act applies in this context, they do not allege material facts to support their conclusory allegation that the failure to ensure that persons with unspecified disabilities have nondiscriminatory access to the pissoir constitutes a violation of the Act. As discussed, appellants have never argued that the conventional restroom facilities at the park are inadequate, discriminatory or otherwise illegal. The Park Report shows that the pissoir was constructed as a public health measure for addressing the problem of public urination. Appellants concede (at least implicitly) that public urination was a pre-existing problem. Yet they do not allege facts to prove the City's solution to this problem was discriminatory within the meaning of the Unruh Act.

**6. The Plumbing Code**

According to the Complaint, the City violated the Plumbing Code in two ways. First, appellants re-argue their theory that installing the pissoir violated the so-called potty parity rule. According to this version of the argument, the pissoir is a drain, which

is a fixture within the meaning of the Code and, therefore, installing this fixture at the park violated section 422.1, which "mandates the minimum number of plumbing fixtures to be 50 percent male, and 50 percent female." As discussed above, section 422.1, which sets forth guidelines for calculating the minimum number of required plumbing fixtures in a building or structure, also states that "[t]he minimum number of fixtures shall be calculated at 50 percent male and 50 percent female based on the total occupant load." Since Mission Dolores Park is neither a "building" nor a "structure" as those terms are commonly understood, we are not convinced that section 422.1 has any bearing on this case. But even if the code provision applies, appellants have not alleged a violation of this regulation because they do not allege any facts to show that the City either miscalculated the minimum number of fixtures or failed to actually install those fixtures at Mission Delores Park.

The second theory in the Complaint is that the pissoir "does not meet the requirements for a restroom facility under the Plumbing Code for design, fixtures, and amenities." Appellants' characterization of the pissoir as a restroom is not supported by any allegation of material fact or by reference to a pertinent provision of the Plumbing Code. The pissoir described in the Complaint and depicted in photographs attached thereto is not a room of any kind, but an outdoor receptacle of urine. Implicitly acknowledging this defect in its pleading, appellants contend that a map attached as an exhibit to their Complaint constitutes an admission by the City that the pissoir is a restroom. We disagree. A substantially similar version of this map was included in the Park Report as a depiction of the "Site Rehabilitation Plan." In both documents, the map is accompanied by a key that identifies amenities according to general headings, such as "1. Renovated Entry Plaza," and "2. 19th Street Promenade." Under the heading "5. Restrooms," the key identifies the locations of three amenities: A) two restroom buildings; B) portable toilets; and C) the pissoir. By itself, this key is not interpreted reasonably as an admission of anything. Moreover, the Park Report's substantive discussion of the "Restroom Design Concept" for the park clearly shows that the City planned to install two restroom buildings. The pissoir was not included in that plan or

discussed in that part of the report. Thus, it is clear from this record that the City never conceived of the pissoir as a restroom or described it as such.

Appellants contend for the first time on appeal that the pissoir does not meet the Plumbing Code requirements for "nonwater urinals." According to this theory, the City admitted the pissoir is a nonwater urinal in a "pissoir report" that was attached to the Park Report and, therefore, the City "must meet its obligations under Plumbing Code § 403.3.1 for waterless urinals."[5]

The Park Report is a lengthy document addressing many components of the improvement project at Mission Delores Park. A "pissoir report" prepared by the City's design team was incorporated as Appendix F to the Park Report. Adopting the term "pPod" to describe the pissoir, the design team's report "introduces the concept, provides a matrix of benefits and concerns, locates a proposed design in the landscape and reviews the issue of public urination at Delores Park." One of several questions the team addressed was whether the pPod would "be a maintenance reducer or a maintenance burden." In delineating ways that the pPod was expected to reduce the maintenance burden in the park, the team stated: "The pPod will function like a large waterless urinal. It will deploy a liquid seal cartridge that allows the urine through and captures all odor without flushing. In fact, eliminating water and the flushing action reduces the spread of odor and the need for maintenance."[6]

Contrary to appellants' argument here, the pissoir report is not evidence that the pissoir is a urinal regulated by the Plumbing Code, but rather that the design team intended for it to function like a nonwater urinal in terms of its maintenance needs. Thus, this evidence does not satisfy the requirement of pleading facts to show that the City violated the Plumbing Code.

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[5] The current Plumbing Code does not contain a section 403.3.1, but its substance appears in Plumbing Code section 412.1.3.

[6] The City's design team identified several other maintenance benefits. It also reported that the most significant maintenance need would be from misuse of the pPod "for public defecations," and it suggested ways to deter this misuse such as placing the pPod in a "prominent, active location."

**7. Public Nuisance**

"A nuisance is statutorily defined as anything 'injurious to health' or 'indecent or offensive to the senses, or an obstruction to the free use of property' that interferes 'with the comfortable enjoyment of life or property. . . .' (Civ. Code, § 3479.) 'A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.' (Civ. Code, § 3480.) As the California Supreme Court has explained, 'public nuisances are offenses against, or interferences with, the exercise of rights common to the public.' [Citation.] The interference must be both substantial and unreasonable." (*Melton v. Boustred* (2010) 183 Cal.App.4th 521, 542, italics omitted.)

In their Complaint, appellants do not expressly allege that the City created a public nuisance. Instead, they allege the City violated public policy by installing a pissoir that "creates the conditions for a public nuisance." As support for this policy argument, appellants allege in conclusory terms that enabling public urination (1) "is injurious to health," (2) promotes "indecent" conduct, and (3) "is offensive to the senses." As noted at the outset of our discussion, allegations that the City violates public policy are not adequate to state a claim under section 526a; a cause of action under this statute requires proof that the challenged action is either a complete waste of taxpayer funds or is illegal. Further, in this court, appellants have conceded that social and moral objections to the City's course of action are not relevant in light of the City's discretionary authority to take measures to address the problem of public urination. They also contend, however, that their Complaint (if it is given a proper liberal construction) states facts to prove that the City created a public nuisance.

To establish that installing and maintaining the pissoir creates a public nuisance, appellants would have to allege and prove that: (1) the City created a condition that interfered with the comfortable enjoyment of life or property; (2) the condition affected a substantial number of people; (3) an ordinary person would be unreasonably annoyed or disturbed by the condition; (4) the seriousness of harm outweighs the social utility of the

City's conduct; (5) appellants did not consent to the conduct; (6) appellants suffered harm that was different from the type of harm suffered by the general public; and (7) the City's conduct was a substantial factor in causing appellants' harm. (See *Birke v. Oakwood Worldwide* (2009) 169 Cal.App.4th 1540, 1548 (*Birke*); *Department of Fish & Game v. Superior Court* (2011) 197 Cal.App.4th 1323, 1352.)

Appellants contend they have stated facts to prove these elements because the Complaint alleges that people use the pissoir to evacuate bodily fluids, do not wash their hands, and then spread their germs by mingling with other patrons in the park or on Muni, thus causing wide-spread injury to the public health. There are several holes in this theory.

First, appellants do not allege facts to show that public urination in the park is a condition of the City's making, or that alleged annoyances associated with public urination are attributable to the installation of the pissoir. As discussed, the City maintains that the pissoir was installed for the express purpose of mitigating public urination. The City's position is supported by the Park Report, which shows that urination in the park's open space was identified by the City as a persistent pre-existing problem in Mission Delores Park. The Park Report also shows that installation of the pissoir was a carefully considered and evaluated measure to reduce or eliminate this problem. Appellants have never disputed these facts, which undermine the unstated assumption in the Complaint that the City created the condition that allegedly interferes with the public's comfortable enjoyment of life or property.

Appellants contend that the fact that third parties engage in public urination is not fatal to their claim because a condition on the City's property attracts and/or invites this offensive third-party conduct. (Citing *Benetatos v. City of Los Angeles* (2015) 235 Cal.App.4th 1270 (*Benetatos*).) According to appellants, "by design and purpose the pissoir provides an invitation to men to urinate in public." First, *Benetatos* is inapposite as that case involved a restaurant owner's violations of a local zoning code, which expressly provided that the owner's conduct constituted a nuisance in that context. Second, the restaurant owner in *Benetatos* failed to take any steps to mitigate the harm-

causing conduct of its patrons, whereas here the City installed the pissoir specifically to ameliorate the harm caused by public urination in the park. That is, the "design and purpose" of the pissoir is not so much to invite "men to urinate in public," as to invite men already inclined to urinate in public to do so in a manner less destructive to others' enjoyment of the park. The harm associated with urinating into an open public space is not the same as the harm associated with urinating into a pissoir.

A second problem with appellants' nuisance theory pertains to their failure to allege facts to demonstrate that the pissoir causes more harm than benefit, element (4) listed above. (*Birke, supra,* 169 Cal.App.4th at p. 1548.) The Park Report shows that urination in the park's open space was identified by the City as a persistent pre-existing problem in Mission Delores Park. The Park Report also shows that installation of the pissoir was a carefully considered and evaluated measure to reduce the harm from this conduct. These undisputed facts preclude appellants from establishing that the pissoir constitutes a public nuisance absent some material factual allegation to demonstrate that the seriousness of the alleged harm they attribute to the pissoir outweighs the social utility of the City's conduct. The complaint makes no attempt to allege such facts. Appellants effectively ask the court to second-guess the City's weighing of the relative harms and benefits associated with the pissoir, which a taxpayer action does not allow us to do. (*County of Ventura, supra,* 35 Cal.App.4th at p. 1059 ["public expenditure is a waste of public funds, and thus subject to a taxpayer's suit . . . if it . . . 'provides no public benefit' "]; *Humane Society, supra,* 152 Cal. App.4th at pp. 361–362 ["a section 526a action 'will not lie where the challenged governmental conduct is legal' "].)

A third, independent flaw in appellants' theory pertains to their failure to establish a private right to require the City to defend their public nuisance challenge. "A public nuisance may be abated by civil or criminal actions brought by public officers . . ., but a private person has no direct remedy unless the public nuisance is specially injurious to him or her." (*13 Witkin, Summary of Cal. Law* (11th ed. 2017), *Equity*, §§ 154, 179 (*Witkin*).) This special injury requirement is an element of a private cause of action for a public nuisance, as noted above. (*Birke supra,* 169 Cal.App.4th at p. 1548.) To meet this

requirement, appellants must allege facts to demonstrate that the pissoir has caused them to suffer a special injury, different *in kind* from that suffered by the public. (*Venuto v. Owens-Corning Fiberglas Corp.* (1971) 22 Cal.App.3d 116, 125; *Baker v. Burbank-Glendale-Pasadena Airport Authority* (1990) 220 Cal.App.3d 1602, 1610.)

Appellants contend they alleged facts to establish a special injury because one of them lives directly across the street from the pissoir and can see it from his kitchen and dining room windows. For purposes of the demurrer, we accept with some qualms the allegation that one of the appellants is required to watch a person use the pissoir when he looks out of his window. However, this harm is not a special injury because it is the same kind of injury allegedly suffered by people on the street who see someone using the pissoir and must grapple with the fact that the person is urinating. Moreover, as a matter of law, an obstructed view is not by itself a special injury under the public nuisance law. (*Wolford v. Thomas* (1987) 190 Cal.App.3d 347, 356–357.)

In their briefs, appellants present a theory not expressly alleged in the Complaint, which is that they can bring this action to enjoin a public nuisance because public urination is a public nuisance as a matter of law. "Activities or conduct declared by law to be nuisances are nuisance per se, and may be enjoined without proof of their injurious nature." (*Witkin, supra, Equity*, § 164.)

Although appellants do not explicitly invoke the nuisance per se doctrine, they take the position that allegations the pissoir is used for public urination are sufficient to prove that the City created a public nuisance. As authority for this argument, appellants cite *People v. McDonald* (2006) 137 Cal.App.4th 521, 533–535 (*McDonald*). The *McDonald* appellant was convicted of a drug offense based on evidence recovered from his person after he was detained by a police officer for urinating in a parking lot near a busy public street. (*Id*. at pp. 525–528.) On appeal, he argued he was detained unlawfully because public urination is not a crime under California law. (*Id*. at p. 528.) Rejecting this contention, the *McDonald* court concluded the appellant's detention was proper because the officer had a reasonable suspicion that he was committing a public nuisance in violation of Penal Code section 370 by urinating in public. In reaching this

conclusion, the court found that public urination on a busy commercial street in a populated area constitutes a criminal public nuisance because it is (1) injurious to health, indecent and offensive to the senses; (2) interferes with the comfortable enjoyment of life or property; and (3) affects a considerable number of people. (*Id.* at pp. 535–540.)

*McDonald* does not assist appellants here. The *McDonald* court held that a specific individual violated a criminal nuisance law by urinating on a busy public street. It did not hold that public urination constitutes a public nuisance as a matter of law. Furthermore, in analogizing this case to *McDonald*, appellants ignore factual distinctions between urinating in open spaces and urinating into a pissoir, referring to both situations as "public urination." The issue in this case is not whether urinating in a parking lot near a busy public street can constitute a nuisance. The issue is whether the Complaint's allegations are sufficient to prove that the City created a public nuisance by installing a pissoir.

Moreover, appellants cannot invoke Penal Code section 370 to avoid having to satisfy all the elements of a public nuisance under the Civil Code because a taxpayer action under section 526a cannot be used to enjoin violations of the criminal law. (*Leider v. Lewis* (2017) 2 Cal.5th 1121, 1130–1132; see *Animal Legal Defense Fund v. California Exposition & State Fairs* (2015) 239 Cal.App.4th 1286.) Courts have recognized an exception to this rule when the conduct complained of "constitutes a nuisance as declared by the legislature." (*Nathan H. Schur, Inc. v. Santa Monica* (1956) 47 Cal.2d 11, 17.) Penal Code section 370 establishes that a public nuisance is a crime, but it does not declare that public urination constitutes a public nuisance.

Finally, appellants contend they allege facts to establish the City created a public nuisance under San Francisco Municipal Code section 581(b)(2). The text of the provision quoted in appellants' brief actually appears in San Francisco Health Code section 581(b), which declares that certain conditions on premises or real property within the jurisdiction of the City constitute a public nuisance, including: "Any matter or material which constitutes, or is contaminated by, animal or human excrement, urine or other biological fluids." Appellants assume, without discussion, that their Complaint

alleges facts to establish that the pissoir constitutes a public nuisance within the meaning of this Health Code provision. We disagree. The Complaint does allege that the pissoir is used for urination, but if that fact were sufficient then any toilet or urinal would constitute a nuisance. Appellants do not allege that the City fails to clean, service, or maintain the pissoir, nor do they allege any other facts to support a finding that the pissoir is contaminated. Thus, we conclude the Complaint does not state facts to demonstrate that the City violated its own Health Code by installing and maintaining the pissoir.

For these reasons, we conclude that appellants do not allege facts to state a cause of action against the City under section 526a, based on their pleaded theories that installing and maintaining the pissoir are an illegal expenditure of public funds.

## IV. DISPOSITION

The judgment is affirmed.

_____
Tucher, J.

We concur:

_____
Streeter, Acting P.J.

_____
Lee, J.*

*Judge of the Superior Court of California, City and County of San Mateo, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.