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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

ROBERT CULP et al.,

Plaintiffs and Appellants,

v.

CITY OF LOS ANGELES et al.,

Defendants and Respondents.

B208520

(Los Angeles County
Super. Ct. No. BC375234)

APPEAL from a judgment of the Superior Court of Los Angeles County. John Shepard Wiley, Jr., Judge. Reversed.

Wasserman, Comden, & Casselman, David B. Casselman, and Mark S. Gottlieb for Plaintiffs and Appellants.

Rockard J. Delgadillo, City Attorney, Laurie Rittenberg, Assistant City Attorney, and John A. Carvalho, Deputy City Attorney, for Defendants and Respondents.

Robert Culp and Aaron Leider (appellants) appeal following the entry of summary judgment against them in their taxpayer action against John Lewis, the director of the Los Angeles Zoo, and the City of Los Angeles (respondents). Appellants sought to enjoin the zoo from maintaining its current elephant exhibit, and from building a new, larger elephant exhibit. We reverse the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The Los Angeles Zoo (Zoo) has maintained an elephant exhibit since 1966. The Zoo is licensed by the United States Department of Agriculture (USDA) and accredited by the American Zoo and Aquarium Association (AZA). In 2005, the Office of the City Administrator conducted an analysis to determine whether elephants should remain on exhibit at the Zoo and the size and elements required for such an exhibit.¹ The result of the analysis was a recommendation that elephants remain at the Zoo in an enlarged elephant exhibit. In April 2006, the Los Angeles City Council voted to construct a new elephant exhibit to be called the “Pachyderm Forest,” with yard space between 2.5 to 3 acres.

¹ The analysis was initiated at the request of Los Angeles Mayor Antonio Villaraigosa. In an August 2005 letter to the City Administrative Officer, the mayor wrote:

“Questions have been raised about the appropriate amount of space required to house elephants in captivity. As you know, space standards for elephants vary across the United States. For example, the Phoenix Zoo dedicates 1.4 acres, the Atlanta Zoo provides 5 acres, the Oakland Zoo dedicates 6 acres and the San Diego Wild Animal Park provides a total of 6 acres as well. In addition, some zoos are even reaching the conclusion that they cannot provide an appropriate space to meet the needs of elephants at all (i.e., San Francisco, Detroit, Milwaukee and others). [¶] Nonetheless, the Los Angeles Zoo Master Plan would increase the current space dedicated to the City’s elephants from .25 to 2 acres. While this is a measurable increase that will cost at least \$4 million, it is not clear that this will significantly improve the living conditions of our elephants. [¶] With these concerns in mind, I request your assistance in conducting an analysis of the housing and health needs for elephants at the Los Angeles Zoo.”

In August 2007, appellants filed suit against respondents, as taxpayers under Code of Civil Procedure section 526a (section 526a). Appellants contended respondents were engaging in illegal expenditures, waste of public funds, and injury to public property, by abusing Zoo elephants. Appellants sought an injunction closing the existing elephant exhibit and enjoining construction of the new exhibit, as well as declaratory relief. The complaint alleged the Zoo subjects its elephants to cruel and abusive treatment in violation of Penal Code section 596.5. According to the complaint, the Zoo provides inadequate space for the elephants, and the elephant enclosures contain hard surface conditions that cause the elephants to suffer arthritis, foot problems, and in some cases, premature death. The complaint charged that the proposed new exhibit would continue to subject the elephants to abuse because it would also provide insufficient space for the elephants and would include damaging hard ground surfaces that would cause the elephants serious medical problems. The complaint further alleged inadequate monitoring and veterinary care would cause the elephants to suffer and die, resulting in the waste of taxpayer dollars. The complaint anticipated the Zoo would spend more funds to replace elephants that died, causing additional waste.

In September 2007, respondents filed a motion for summary judgment of the complaint. Respondents argued appellants were not challenging illegal activity at the Zoo, but were instead contesting the city's lawful discretionary spending and policy decisions. Respondents further asserted there was no evidence to support the allegations that the Zoo had abused or tortured elephants, or managed them unlawfully. In support of the motion, respondents included the declaration of Jeffrey Briscoe, the Zoo's principal animal keeper and elephant manager. Briscoe declared that since he became the elephant manager in 1995, none of the elephants had ever been disciplined in a manner that violated Penal Code section 596.5. Briscoe stated that in his 27 years at the Zoo, he knew of only one employee who engaged in inappropriate behavior toward an elephant, and that employee left the Zoo over 20 years earlier.

Respondents also offered the declaration of Michael Dee, the Zoo's general curator, who declared the Zoo meets or exceeds the standards set by the AZA for the management and care of elephants. Further, a Zoo veterinarian, Cora Singleton, declared that she had examined Billy, the Zoo's only elephant at present,² and found that he was in excellent health and did not show any signs of abuse. Singleton opined that a behavior Billy exhibits—repeated head bobbing—was “anticipatory in some situations,” as when he was waiting for food from his handlers. She also declared the current temporary exhibit and the proposed exhibit would exceed the AZA's requirements for elephant exhibit size. Singleton opined that “with a proper health and husbandry program, there is no reason to believe that an elephant cannot live a healthy life here at the L.A. Zoo.”

In opposition to the motion for summary judgment, appellants offered declarations from David Hancocks, a specialist in zoo design and planning and the former director of several zoos; Joyce Poole, an elephant researcher who has spent 32 years studying wild elephants; and Les Schobert, the former animal collection curator for the Zoo from 1992 to 1996, who also possesses over 30 years of experience in the handling and care of elephants. Appellants' opposition also included the declaration of Gary Kuehn, a former staff veterinarian at the Zoo from 1974 to 1997.³ These declarants opined that the current and proposed elephant exhibits had and would cause Zoo elephants serious injuries.

² When the Los Angeles City Council approved the construction of the Pachyderm Forest in April 2006, there were three elephants at the Zoo, two females named Gita and Ruby, and one male, Billy. In June 2006, Gita died. At a February 2008 hearing, appellants represented to the trial court that Ruby had been transferred to an elephant sanctuary.

³ Both sides filed objections to the opposing side's evidence offered in connection with the summary judgment briefing. However, the parties did not secure rulings from the trial court on their evidentiary objections. The objections are therefore deemed waived on appeal. We view the evidence as having been admitted as part of the record for purposes of appeal. (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 670, fn. 1, superseded by statute on another point as stated in *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 767-768; *Demps v. San Francisco Housing Authority* (2007) 149 Cal.App.4th 564, 575-579.)

They provided several reasons for these conclusions. Each declared that due to the exhibits' relatively small area, the elephants walk over the same ground repeatedly, turning it into a hard, compacted surface that causes the elephants serious foot and joint problems. Poole, Schobert, and Hancocks declared that due to elephants' large size and the need for humans to control them, physical abuse had occurred and was likely to recur at the new exhibit. Poole, Schobert, and Hancocks further declared that the elephants would be lonely, bored, and insufficiently stimulated in spaces any smaller than an elephant sanctuary.

Kuehn's declaration offered his personal knowledge of direct physical abuse of elephants at the Zoo in the past.⁴ Kuehn also opined that the hard surfaces on which the Zoo elephants were forced to stand caused them serious health problems, including Gita, one of the elephants Kuehn treated when he worked at the Zoo. Kuehn declared:

“In the Los Angeles Zoo environment, the animals have no room to travel almost any distance at all. Enlargement of the facility by as much as several acres will not change the effect of the limitations inherent in their confinement. The physical risks are exacerbated dramatically by the nature of the ground on which these animals must stand day and night. Major portions of the barns and adjacent areas are concrete, and the remainder of the elephant facility is made up of decomposed granite and other soil materials. The elephants' massive size and the nature of their feet, rapidly compact their pens, rendering them almost as hard as concrete. The net effect of their confinement and the hard ground on which they stand is extremely detrimental to their legs and feet. [¶] As a result, I observed numerous problems with various elephants pertaining to their legs and feet. Some of the elephants developed deep abscesses in their feet, which involved pus-filled pockets which required multiple medical procedures. These problems caused great pain to the animals with little chance of a successful resolution. Once an elephant suffers serious injury to its foot of this kind, most often they die in pain, prematurely. [¶] . . . Gita had a history of decades of joint and foot problems. She had

⁴ For example, according to Kuehn, he observed Zoo staff abuse the elephants, including with a bull hook, a training tool “consisting of a wooden handle, with a metal head and a pointed hook.” Kuehn declared that he personally observed an employee “systematically brutaliz[e]” a small male calf elephant, and that he was aware of elephants being subjected to prolonged electric shocks.

cracked/split/underrun soles, abscesses and toe cracks. [¶] . . . [¶] . . . Gita also suffered for years from ongoing arthritis which developed into Degenerative Joint Disease. In my opinion, Degenerative Joint Disease was caused by the hard ground on which she was forced to stand.”

According to Kuehn, even the planned expansion of the exhibit would not be sufficient to attend to the Zoo elephants’ physical needs or prevent debilitating physical injuries.

Appellants also challenged respondents’ explanation of Billy’s head bobbing. Appellants’ expert Poole opined that head bobbing such as Billy’s is an abnormal, “neurotic” behavior “uniquely developed in captivity. Confined in small spaces, without autonomy of movement and behavior, and kept in socially deprived conditions, elephants become dysfunctional, unhealthy, depressed, and aggressive.”

The trial court granted respondents’ motion for summary judgment. In a thoughtful ruling, the court reviewed the evidence offered by both sides and summarized it as presenting two sharply contrasting and competing philosophies about elephant management. The court, relying on *Humane Society of the United States v. State Bd. of Equalization* (2007) 152 Cal.App.4th 349 (*Humane Society*), and *Sundance v. Municipal Court* (1986) 42 Cal.3d 1101 (*Sundance*), concluded the conflict was not justiciable and presented issues that should be directed to public officials and voters rather than a judge.

This appeal followed.

DISCUSSION

I. The Appeal Is Not Moot

As an initial matter, we reject respondents’ argument that the appeal is moot. Both appellants and respondents have filed motions requesting that this court take judicial notice of Los Angeles City Council postjudgment legislative acts or enactments. (Evid. Code, § 452, subs. (b) & (c).) Respondents request that we take judicial notice of documents from the Los Angeles City Council file purporting to show that no taxpayer monies will be used in the construction of the Pachyderm Forest, and further that the city considered appellants’ arguments and alternatives to the Pachyderm Forest exhibit. Respondents assert these documents demonstrate that the instant appeal is moot.

Appellants oppose the request and have submitted their own requests for judicial notice. The first requests that we take judicial notice of a 2008 report submitted to the city council. Respondents represent the report indicates that due to increased construction costs for the Pachyderm Forest, taxpayer monies will be required to complete the construction, therefore the appeal is not moot. The second asks this court to consider documents relating to USDA investigations of the Zoo, including an investigation connected to Gita's death that was terminated by a settlement in January 2008.

Although this court generally will not consider matters that occur postjudgment, we may do so if such matters render the appeal moot. (*Reserve Insurance Co. v. Pisciotta* (1982) 30 Cal.3d 800, 813.) That is not the case here. Appellants' complaint raises two issues: the maintenance of the current elephant exhibit and the construction of a new exhibit. Even if no taxpayer dollars were to be used in the construction of the Pachyderm Forest, appellants would still have standing to challenge alleged ongoing illegal expenditures in the operation of any existing exhibit. Moreover, appellants' argument about the construction of the Pachyderm Forest has less to do with construction expenditures than the *operation* of a new exhibit which they argue will be as illegal and wasteful as the current and past exhibits. We have no indication from respondents that taxpayer funds will not be used to operate the Pachyderm Forest once it is built.

As the appeal is not rendered moot by apparent changes in the source of funding for the construction of the new exhibit, we deny the requests for judicial notice.⁵

⁵ To the extent appellants' July 31, 2009 request for judicial notice was intended for purposes other than demonstrating that the appeal is not moot, we also reject the request because we find the materials not particularly relevant to the dispositive issues on appeal. (*Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 544, fn. 4; *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1089, fn. 4.) Moreover, we may, in our discretion, decline to take judicial notice of materials that were not presented to the trial court. (*Brosterhous v. State Bar* (1995) 12 Cal.4th 315, 325.) Appellants claim respondents deliberately withheld the USDA investigation and associated documents in discovery below, however we have no ability to assess this contention.

II. Appellants Raised a Triable Issue of Fact as to Illegal Expenditures

A. Standard of Review

“ ‘ “A defendant is entitled to summary judgment if the record establishes as a matter of law that none of the plaintiff’s asserted causes of action can prevail.” [Citation.] The pleadings define the issues to be considered on a motion for summary judgment. [Citation.] As to each claim as framed by the complaint, the defendant must present facts to negate an essential element or to establish a defense. Only then will the burden shift to the plaintiff to demonstrate the existence of a triable, material issue of fact. [Citation.]’ [Citation.] ‘There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.’ [Citation.] We review orders granting or denying a summary judgment motion de novo. [Citations.] We exercise ‘an independent assessment of the correctness of the trial court’s ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law.’ [Citation.]” (*Sturgeon v. Bratton* (2009) 174 Cal.App.4th 1407, 1417-1418 (*Sturgeon*)). We “strictly construe the moving party’s evidence and liberally construe the opposing party’s evidence. [Citation.]” (*Sababin v. Superior Court* (2006) 144 Cal.App.4th 81, 88; *Blair v. Pitchess* (1971) 5 Cal.3d 258, 285 (*Blair*)).

B. Section 526a

Section 526a provides: “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 . . . who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax therein.”

“Section 526a gives citizens standing to challenge governmental action and is liberally construed to achieve that purpose.” (*Daily Journal Corp. v. County of Los Angeles* (2009) 172 Cal.App.4th 1550, 1557.) “ ‘The purpose of this statute . . . is to

permit a large body of persons to challenge wasteful government action that otherwise would go unchallenged because of the standing requirement. [Citation.]’ ” (*Humane Society, supra*, 152 Cal.App.4th at p. 355.) “[S]ection 526a is properly used where ‘some illegal expenditure or injury to the public fisc is occurring or will occur.’ [Citation.] Other appellate courts have phrased the necessary predicate for the application of the statute as being when the state is ‘guilty of illegally spending public funds’ [citation] or where the complaint endeavors to ‘control[] illegal governmental activity’ [citation] or attack an alleged ‘illegal expenditure of funds.’ [Citations.] Put another way, a section 526a action ‘will not lie where the challenged governmental conduct is legal.’ [Citation.]” (*Id.* at p. 361.)

A taxpayer has standing under section 526a to challenge an “illegal expenditure” when it is alleged that paid employees of a public entity are spending their time engaging in illegal conduct. (*Citizens for Uniform Laws v. County of Contra Costa* (1991) 233 Cal.App.3d 1468, 1473 (*Citizens*) [taxpayer challenging a county ordinance as preempted had standing even though enforcement of the ordinance did not require augmentation of enforcement agency or additional expenditure of funds]; *White v. Davis* (1975) 13 Cal.3d 757, 763 (*White*) [section 526a may be used to challenge the legality of ongoing police investigatory activities alleged to be illegal]; *Blair, supra*, 5 Cal.3d at pp. 268-269 [section 526a injunction could issue to keep county officials from carrying out an unconstitutional law]; *Wirin v. Horrall* (1948) 85 Cal.App.2d 497, 504-505 [the expending of time of paid Los Angeles City police officers in performing illegal and unauthorized acts constituted unlawful use of funds subject to a section 526a injunction].) “This approach is consistent with the policy of construing the taxpayer standing rule liberally to achieve the remedial purpose of enabling citizens to attack governmental action which would otherwise go unchallenged because of standing requirements. [Citation.]” (*Citizens, supra*, 233 Cal.App.3d at p. 1473; see also *County of Santa Clara v. Superior Court* (2009) 171 Cal.App.4th 119, 130-131 [taxpayers’ complaint was sufficiently specific under section 526a to withstand demurrer where complaint alleged

defendant cities were spending public funds to enforce specific policies and practices that violated state statutes].)

However, “ ‘[r]egardless of liberal construction, the essence of a taxpayer action remains an illegal or wasteful expenditure of public funds or damage to public property. [Citation.] The taxpayer action must involve an actual or threatened expenditure of public funds. [Citation.] [¶] General allegations, innuendo, and legal conclusions are not sufficient [citation]; rather, the plaintiff must cite specific facts and reasons for a belief that some illegal expenditure or injury to the public fisc is occurring or will occur. [Citations.]’ ” (*Humane Society, supra*, 152 Cal.App.4th at p. 355, quoting *Waste Management of Alameda County, Inc. v. County of Alameda* (2000) 79 Cal.App.4th 1223, 1240.)

Further, courts are cautious not to allow suits under section 526a that serve no purpose other than to challenge the lawful exercise of governmental discretion. In the context of a claim of alleged governmental waste, the California Supreme Court in *Sundance* explained that 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. To hold otherwise would invite constant harassment of city and county officers by disgruntled citizens and could seriously hamper our representative form of government at the local level. Thus, the courts should not take judicial cognizance of disputes which are primarily political in nature, nor should they attempt to enjoin every expenditure which does not meet with a taxpayer’s approval. On the other hand, a court must not close its eyes to wasteful, improvident and completely unnecessary public spending, merely because it is done in the exercise of a lawful power.’ [Citation.]” (*Sundance, supra*, 42 Cal.3d at pp. 1138-1139, quoting *City of Ceres v. City of Modesto* (1969) 274 Cal.App.2d 545, 555.)

Similarly, in *Coshov v. City of Escondido* (2005) 132 Cal.App.4th 687, 714, the court explained that “[a] cause of action under [section 526a] will not lie where the challenged governmental conduct is legal. [Citation.] Conduct in accordance with regulatory standards ‘is a perfectly legal activity.’ [Citation.] Further, 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 because a successful claim requires more than ‘an alleged mistake by public officials in matters involving the exercise of judgment or wide discretion.’ [Citation.]”

C. Penal Code Section 596.5

In pressing their illegal expenditure claim, appellants do not argue that it is illegal per se for the Zoo to operate an elephant exhibit, or to build a new elephant exhibit. Instead, appellants charge it is the alleged ongoing Zoo practice of subjecting the elephants to various forms of mistreatment that violates Penal Code section 596.5, and will continue in the Pachyderm Forest.⁶ Thus, under appellants’ theory, it is the ongoing expenditure of public funds to operate the current and proposed elephant exhibits in a manner that violates Penal Code section 596.5 that constitutes an alleged illegal expenditure. Appellants allege two categories of illegal conduct: direct physical abuse of elephants, and mistreatment arising out of the physical characteristics of the Zoo’s existing and proposed elephant enclosures.

Under Penal Code section 596.5:

“It shall be a misdemeanor for any owner or manager of an elephant to engage in abusive behavior towards the elephant, which behavior shall include the discipline of the elephant by any of the following methods:

- (a) Deprivation of food, water, or rest. [¶]
- (b) Use of electricity. [¶]
- (c) Physical punishment resulting in damage, scarring, or breakage of skin. [¶]
- (d) Insertion of any instrument into any bodily orifice. [¶]
- (e) Use of martingales. [¶]
- (f) Use of block and tackle.”

⁶ On appeal, appellants allege for the first time that the Zoo is violating or will violate Penal Code sections 597 and 597.1. This allegation did not appear in the complaint or the briefing on summary judgment in the trial court. On appeal from an order granting summary judgment, the pleadings frame the issues. (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1252, overruled on another point in *Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 498; *Sturgeon, supra*, 174 Cal.App.4th at pp. 1417-1418.) Since the complaint did not allege violations of Penal Code section 597 or 597.1, and the theory was never raised below, we do not consider it for the first time on appeal. (*Beroiz v. Wahl* (2000) 84 Cal.App.4th 485, 498, fn. 9.)

We start first with the observation that Penal Code section 596.5 proscribes two types of actions—abusive behavior toward an elephant in general, and inappropriate discipline of the nonexhaustive types listed.

Appellants in part allege the Zoo abuses its elephants in violation of Penal Code section 596.5 by physically abusing them with bull hooks and electric shocks. However, assuming appellants proved these allegations were true and ongoing, the proper remedy under Code of Civil Procedure section 526a would be an injunction prohibiting the Zoo from engaging in such illegal abuse. But, this is not the relief appellants seek. They instead demand that the court enjoin the Zoo from operating the current elephant exhibit and from proceeding with the Pachyderm Forest project. Such relief would only be warranted if the exhibits themselves, or the mere fact of their operation were “abusive behavior” and thus, violated Penal Code section 596.5. Only appellants’ second category of alleged abusive conduct—keeping the elephants in unfit and damaging enclosures—fits with appellants’ requested injunctive relief. Given the ultimate request for relief in this case, we focus on this second category of alleged illegal conduct to determine whether appellants raised a triable issue of material fact as to illegal expenditures.

D. Appellants Raised a Triable Issue of Material Fact

In their motion for summary judgment, respondents offered evidence sufficient to state a prima facie case that the Zoo is not engaged in ongoing abusive conduct in violation of Penal Code section 596.5. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*).) The declarations from Zoo staff provided evidence that at least in recent years, elephants have not been subject to abusive disciplinary behavior, and further that Billy is in excellent health and shows no signs of abuse.⁷ In addition, respondents’ declarations provided evidence that the proposed exhibit would far exceed

⁷ In addressing the allegation that the Zoo has violated or will violate Penal Code section 596.5, respondents focused on the statute’s list of specific prohibited disciplinary behaviors. To counter the allegation that the Zoo provided inadequate physical space or substrate materials in the elephant enclosures, respondents primarily argued that no law sets requirements for how large an elephant enclosure must be, and further that the issue is one of governmental discretion and is not justiciable.

zoo industry standards for the required size of an elephant exhibit, and soft soils and sand would make up the substrate in the enclosure. The Zoo veterinarian further opined that an elephant could live a healthy life at the Zoo.

In response, appellants offered declarations from Kuehn, Schobert, Hancocks, and Poole, as previously described above. Hancocks, Schobert, Kuehn, and Poole all declared that physical conditions in the existing exhibit and at the Pachyderm Forest are and would be extremely harmful to the elephants, causing them medical problems, physical pain, and death. According to Kuehn, the former Zoo veterinarian, the small size of past elephant exhibits resulted in physical deterioration of the elephants, including foot problems that caused elephants to die prematurely and in pain. He further opined that the proposed expansion of the exhibit would not solve these problems.

Schobert similarly declared that the Zoo's proposed expansion of the elephant exhibit would not solve the physical problems of a relatively small space—specifically foot problems caused by ground that has been compacted by the elephants treading upon it, and emotional distress of the elephants caused by lack of space. Schobert acknowledged that the Zoo's proposed use of sand as a primary substrate might solve some problems. However, he also indicated he was familiar with other facilities that had used sand in elephant enclosures, and he stated that zoo facilities using sand report the same “debilitating and life-threatening foot and leg problems when they maintain elephants in small areas where they must traverse the same ground and compact the area day in and day out.”

Appellants further offered evidence that called into question just how large the proposed exhibit would be, and how much space each elephant would have. The Zoo currently has only one elephant. But appellants offered the deposition testimony of Zoo director Lewis which suggested that the Zoo's initial plan would be to have three elephants, but the barn portion of the exhibit would be built to house up to 11 elephants.

Penal Code section 596.5 does not set standards or guidelines for how much space elephants must be given, or what kind of soil substrate must be used in an elephant enclosure. Moreover, it is clear that Penal Code section 596.5 does not render keeping an elephant in captivity illegal per se. But the statute does make it illegal for an elephant manager or owner to engage in “abusive behavior towards the elephant.” Although the statute sets forth a list of abusive disciplinary behaviors, the language and structure of the statutory scheme suggests the list is not exclusive. We conclude that “abusive behavior” may include the physical characteristics of the enclosure in which elephants are kept. Whether keeping an elephant in any particular enclosure rises to the level of abusive behavior is of necessity a factually intensive inquiry that depends on the particularities of each case.

In this case, appellants have raised a triable issue of material fact on this point. They have offered expert declarations indicating that in spaces that are insufficiently large and composed of certain materials, the elephants suffer pain, chronic serious medical problems, and premature death. These declarations further suggest that the current and proposed elephant exhibits fall into this category of enclosure. We neither weigh the evidence at this stage nor express any opinion as to the ultimate conclusion of this case. (*Cates v. California Gambling Control Com.* (2007) 154 Cal.App.4th 1302, 1308; *Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832, 840.) But we find that appellants have raised a triable issue of material fact as to whether the physical characteristics of the existing and proposed exhibits are such that keeping the elephants in such enclosures would violate Penal Code section 596.5. This in turn raises a triable issue of material fact as to illegal expenditures under Code of Civil Procedure section 526a.

**E. Whether Respondents Are or Will Engage in Illegal Expenditures
Is Justiciable**

Respondents argue this case as a whole reflects a dispute between two disparate philosophical views—the view that elephants should not be held in captivity other than within an elephant sanctuary, and the opposing view that elephants may be humanely held and cared for in a properly managed zoo. Respondents rely on *Sundance* to contend

the dispute cannot be decided in court.⁸ However, *Sundance* concerned alleged waste, not illegal expenditures. We disagree that the *Sundance* court’s reasoning renders appellants’ claims of illegal expenditures under section 526a not justiciable.

In *Sundance*, the taxpayer plaintiff argued that criminal enforcement of a public drunkenness statute constituted a waste of public funds because civil detoxification was less expensive than prosecuting chronic alcoholics, and was more effective in rehabilitating them. (*Sundance, supra*, 42 Cal.3d at p. 1137.) Our Supreme Court concluded that criminal enforcement of the statute was not “totally unnecessary spending,” and there were no findings that enforcing the statute provided no public benefit. (*Id.* at pp. 1138-1139.) As a result, the court determined waste was not at issue, only an alleged mistake in a matter involving the exercise of governmental discretion or judgment. The matter was therefore a dispute in which the court would not interfere. (*Id.* at p. 1139.)

⁸ The trial court also relied on *Humane Society, supra*, 152 Cal.App.4th 349, for the proposition that the dispute is not justiciable. It is true that the court in *Humane Society* concluded that pleas for government action to address mistreatment of chickens should be directed to the Legislature, not the judiciary. However, we do not find the case dispositive in this context. Here is why: in *Humane Society*, the plaintiffs sought to keep the government from allowing a tax exemption for certain farm equipment. The tax exemption could be used in connection with “battery cages,” which are small enclosures for chickens. The plaintiffs alleged that allowing the exemption was an illegal expenditure under Code of Civil Procedure section 526a because keeping chickens in battery cages is illegal animal cruelty. The Court of Appeal rejected the claim—affirming an order sustaining a demurrer to the complaint—because the government itself was not engaged in the alleged illegal activity. Even if keeping the chickens in battery cages was illegal, it was third party poultry farmers who were using them. The primary basis for the opinion was that the government was only applying a neutral tax exemption that happened to apply to poultry/egg producers buying battery cages, as well as to farmers buying other equipment. The actions appellants complain about here are actually the city’s actions. This case is thus distinguishable—not only because a government action is alleged—but also because the Legislature has passed a specific statute to address the mistreatment of elephants with Penal Code section 596.5.

Sundance does not address justiciability in the context of alleged illegal expenditures under section 526a. However, cases decided before *Sundance* discussed justiciability more broadly. In *Harman v. City and County of San Francisco* (1972) 7 Cal.3d 150 (*Harman*), the California Supreme Court determined that a taxpayer had standing to bring suit under section 526a, then addressed whether the issues in her complaint “raise[d] questions amenable to judicial redress.” (*Harman*, at p. 160.) The court explained:

“ ‘A taxpayer may sue a governmental body in a representative capacity in cases involving fraud, collusion, ultra vires, or failure on the part of the governmental body to perform a duty specifically enjoined.’ [Citation.] This well-established rule ensures that the California courts, by entertaining only those taxpayers’ suits that seek to measure governmental performance against a legal standard, do not trespass into the domain of legislative or executive discretion. [Citations.] This rule similarly serves to prevent the courts from hearing complaints which seek relief that the courts cannot effectively render; the courts cannot formulate decrees that involve the exercise of indefinable discretion; their decrees can only restrict conduct that can be tested against legal standards. [Citations.]” (*Harman*, *supra*, 7 Cal.3d at pp. 160-161.)

While section 526a has been construed more liberally to allow actions in situations other than fraud, collusion, ultra vires, or failure of the government to perform a mandatory duty, the reasoning behind this rule for taxpayers’ suits remains relevant. When there is no illegal conduct to enjoin, and no waste, as in *Sundance*, the matter may be one of governmental discretion and the court properly declines to get involved. But when there are allegations of illegal expenditures, these allegations may be analyzed using a legal standard. In short, a court may determine whether a governmental body is engaging in, or is poised to engage in, illegal expenditures, without trespassing upon legislative or executive discretion. Governmental bodies do not have the discretion to act illegally.

Here, appellants’ illegal expenditure claims are justiciable. Appellants seek to restrict conduct they claim violates Penal Code section 596.5, thus there is a legal standard by which the alleged governmental conduct may be tested. Penal Code section

596.5 renders this issue subject to judicial determination because it provides a framework that takes the issue beyond one of mere governmental discretion. (*White, supra*, 13 Cal.3d at p. 763 [challenge to alleged illegal police conduct constituted a justiciable controversy, requiring the court to determine the constitutional validity of the governmental activity]; *San Miguel Consolidated Fire Protection Dist. v. Davis* (1994) 25 Cal.App.4th 134, 145.)

Summary judgment may not be granted if there is a triable issue as to any material fact. (*Aguilar, supra*, 25 Cal.4th at p. 850; *Johnson v. Superior Court* (2006) 143 Cal.App.4th 297, 304.) Appellants have raised a triable issue of material fact as to illegal expenditures under section 526a. We therefore need not consider appellants' remaining arguments and reverse the order granting respondents' motion for summary judgment.

DISPOSITION

The judgment is reversed. Each party to bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BIGELOW, J.

We concur:

RUBIN, Acting P. J.

FLIER, J.