City of Oakland v. 955 57th LLC
City of Oakland Administrative Appeal Hearing
Appeal of Order to Abate Habitability Conditions
Hearing Date: May 23 and 24, 2023

CITY OF OAKLAND'S POST HEARING BRIEF

I. INTRODUCTION

At the administrative hearing held on May 23 and 24, 2023, the City of Oakland ("the City") established violations of the Oakland Building Maintenance Code ("Building Code") were documented at 5655 Lowell Street aka 955 57th Street ("the Property"), owned by 955 57th Street, LLC ("Appellant") without action taken by the Appellant to abate the issues. The Appellant does not contest that the violations of the Building Code, rather, they argue that the City should have halted all enforcement action until an appeal of a Planning Commission decision related to the matter was resolved. There is no provision in state or local law allowing Appellant to request a delay of enforcement. Although the Appellant had the opportunity to request a stay from the courts, no such action was taken. As of the date of the hearing, the Building Code violations documented at the Property have not been abated and the Appellant's appeal should be denied.

II. FACTS AND PROCEDURAL HISTORY

City staff visited and inspected the Property multiple times from 2013 to 2015, and in 2020. During inspections of the Property, the City staff observed violations of the Building Code, Oakland Municipal Code ("OMC") §15.08 et seq. (Hearing Testimony ("HT") Miles, Candell). Following the inspections, the City notified the owner of the violations observed in multiple Stop Work Orders, Notices of Violations ("NOVs") and Re-inspection Notices in 2013-2015 and 2020, documenting work performed without the required permits at the Property, which included:

- alterations to windows involving openings reframed, interior walls removed, and new walls framed;
- construction of a loading dock, door, and canopy;
- installation of refrigeration equipment with associated electrical, mechanical, building, and plumbing work;

- refrigeration units installed on rooftop with electrical, plumbing, and mechanical work;
- installation of air circulation/distribution system with electric motor units, hoses, and ducts attached to the building rafters, posts, and on masonry wall along the property line;
- and installation of sump and pump drain at loading; and exterior alterations windows changed

(Ex. A, C, H, I). OMC §§ 15.08.050; 15.08.120; 15.08.140; 15.08.340(A)(C)(E)(F)(G); 17.65.020; 17.65.110.

On October 20, 2014, the City and the Appellant signed a compliance plan to resolve the outstanding Building Code violations at the Property (Ex. C). As part of the compliance plan, the Appellant agreed to obtain the necessary permits to legalize or remove the following unpermitted improvements: the steel canopy structure; cargo container break room under canopy; pallet racks throughout warehouse; new walls and doors in warehouse; mechanical refrigeration equipment; electrical alterations and repairs in the warehouse; new loading dock and plumbing; vehicle entry gate and fence; new windows framing and exterior changes on the second floor; reconfigured second story walls of break room and storage room; front entry security gate; alterations to create second story kitchen, bathroom, and half bathroom; and final approval of CMU sound wall with additional load of the canopy (*Id.)*.

To satisfy the compliance plan requirements, the Appellant sought clearance from the City's bureau of planning for a conditional use permit ("CUP") for the unpermitted canopies, minor variance to reduce side yard setback, and regular design review for unpermitted canopies, loading dock, and entry sliding gate/fence (Appellant's Ex. 2). The application was partially approved and partially denied by the City's zoning manager on February 7, 2018 (*Id.)*. On February 19, 2018, the Appellant appealed this decision to the City's planning commission; the planning commission

reversed the decision of the zoning manager and denied the Appellant's plan in its entirety on December 18, 2019 (Appellant's Ex. 3). The Appellant subsequently filed a writ of mandamus pursuant to Code of Civil Procedure §1094.5 appealing the Planning Commission's decision; the Superior Court and Court of Appeal denied the writ and affirmed the Planning Commission's decision (Ex. K).

On January 13, 2020, the City issued a letter to the Appellant stating the Planning Commission's decision voided the compliance plan (Ex. H). The notice further informed the Appellant that the Property continued to be in violation of the Building Code as a result of unpermitted improvements, and the City would proceed with code enforcement actions necessary to bring the Property into compliance (*Id*.). On March 4, 2020, the City again sent a letter to the Appellant notifying it the Property continued to be in violation of planning and building codes and the City would proceed with enforcement (Ex. I). The letter also included an updated Re-inspection notice with a full list of violations and a compliance deadline of March 19, 2020 (*Id*.). The letter informed the Appellant that fines will begin to accrue after this deadline as well as other enforcement actions (*Id*.). No action was taken by the Appellant to abate the violations. On October 4, 2021, the City issued the *Order to Abate – Habitability Hazards* ("*Order to Abate*") citing the previously documented issues with unpermitted construction; unpermitted electrical, plumbing, and mechanical work; and use of faulty materials of construction (Ex. C). OMC §§ 15.08.050; 15.08.120; 15.08.140; 15.08.220; 15.08.230(D)(E)(G)(N); 15.08.240; 15.08.250(A); 15.08.260(A)(B)(C); and 15.08.340(D)(E)(F)(I)(N). The Appellant appealed the *Order to Abate*, resulting in the current administrative appeal hearing (Ex. G).

III. THE CITY PROVED BY A PREPONDERANCE OF THE EVIDENCE THAT THE BUILDING CODE VIOLATIONS DOCUMENTED IN THE ORDER TO ABATE HAD NOT BEEN CORRECTED.

Local agencies are charged with the day to day administration and enforcement of state and local building codes. *Baum Electric Co. v City of Huntington Beach* (1973) 33 Cal.App.3d 573, 580. The City is authorized to issue notices ordering property owners to abate violations of state and local building codes within a reasonable time. Health and Safety Code §17980. The City may elect to pursue enforcement of such orders through the administrative process. Health and Safety Code §17980.8. The Building official and their designees are authorized to enforce all provisions of the Building Code and to order abatement of violations. OMC §15.08.080. It is unlawful for anyone to maintain any building, structure, portion thereof, or real property or cause or allow the same to be done in violation of the Building Code. OMC §15.08.110. At the administrative hearing, the City has the burden of proof by a preponderance of the evidence. OMC §15.04.1.125(C).

At the hearing, the City proved, by a preponderance of the evidence, that the violations contained within the *Order to Abate* exist on the Property. The City inspected the Property multiple times between 2013-2015 and 2020 and documented work performed without permits; the City also notified the Appellant about the work done without permits in multiple stop work orders, NOV's and re-inspection notices prior to issuing the *Order to Abate* (Ex. A, F, H, I). The City called two witnesses, former Specialty Combination Inspector and current Inspection Supervisor David Miles and Inspector Chris Candell. Both witnesses testified that they had personally inspected the Property on the dates identified in the City's notices and records, and that the notices accurately reflected the conditions on the Property and violations observed during their inspections (HT Miles, Candell. Ex. A, F, H, I.) While testifying, Mr. Miles went through photographs he had

taken during his inspections and identified Building Code violations that he later documented in his notices, including: a new electrical conduit indicating electrical work done without permits; a sump and pump drain showing plumbing work done without permits; pallet racks and a door frame showing construction without permits; and refrigeration and ventilation equipment indicating work performed without a mechanical permits (HT Miles. Ex. H). The inspectors also testified they kept contemporaneous records of their inspections in City records managements systems, which were accurately reflected in the "Record Comments" for the Property (HT Miles, Candell. Ex F.) These comments include:

- "7-25-13 sit visit verified window removed and openings reframed, interior wall covering and partition wall removed."
- "10-9-13 permits have not been issued for this work."
- "11/25/13…issued a stop work order…Building a steel building, and a loading dock, 10' gate, and 7 new windows;"
- "12-26-213 Visited site w/ Chris Candell to follow up on complaint, verified that|there are 2 recently installed, refrigeration units, and associated|fans blowers, and lighting, electrical, installed steel frames and electric doors. These areas have walls built or installed some kind of insulated siding to the entire area. I also verified that the concrete along 57th Street is broken and in need of repair. A pump that has been recently installed is not connected to drain pipe under the sidewalk directing the water to the gutter. The existing ammonia container and hook up has been removed without, contacting fire, air quality control, no permits were obtained. All above work must be added to previous noted work. All work has been done without approvals permits or inspection. I have now issued another STOP WORK NOTICE with 4x fees field check and plans are needed." (Ex. F).

The Appellant called Tim Low, the City's Inspection Manager, to testify regarding the permit history for the Property. Mr. Low testified about the permits the Appellant had obtained from 2012 to the present, and how work done at the Property either exceeded the scope acquired permits or was done without permits (HT Low. Ex. J). After reviewing the permit history for the Property

and comparing it to the *Order to Abate*, Mr. Low concluded that the Appellant had yet to apply for the proper building, electrical, mechanical, and plumbing permits to correct the Building Code violations (*Id*.).

The Appellant also submitted documentation and witness testimony regarding obtaining permits for the exterior windows of the Property (HT Jara). However, the City's witnesses testified this did not address most of the violations in the *Order to Abate*, including unpermitted structures; unpermitted electrical, mechanical, and plumbing work; and faulty use of construction materials (HT Miles, Low. Ex. A, C, J). The Appellant's witness Craig Miers, an architect, testified that when he inspected the Property, he observed new construction, including walls and doors, but he did not know the permit history of the property or if the construction had been done with the proper permits (HT Miers). He also testified that he spoke with the Appellant after the first day of hearing, and that the Appellant instructed to begin the process of legalizing the Property addressing the items listed in the compliance plan (*Id*.). This testimony admits the violations documented by the City exist on the Property and have not been corrected. Even though the record supports the City's issuance of the *Order to Abate*, the Appellant argues that the City should have stayed enforcement of the Building Code violations.

IV. THERE IS NO AUTHORITY GRANTING A DELAY OF ENFORCEMENT OF THE BUILDING CODE AND THE APPELLANT FAILED TO RAISE THE ISSUE IN THEIR APPEAL.

The Appellant contends that the City's enforcement actions should have been stayed pending the resolution of their appeal of the Planning Commission decision; however, there is no authority supporting this in state or local law. There is no provision within the Health and Safety code or the Oakland Building Code authorizing the City to stay enforcement of hazardous conditions at the Property or for the Appellant to request a delay of enforcement for the violations documented at the Property. Had the state legislature or City of Oakland intended there be a way to delay

enforcement of state and local building codes, it would have been contained within the Health and Safety Code.[1] The absence of a mechanism to delay enforcement supports the strong public policy favoring the timely abatement of building hazards.

The City also notes that the Appellant failed to raise this argument in their appeal. OMC § Section 15.04.1.125(C) limits the scope of the administrative appeal hearing to "only those technical matters or issues specifically raised by the appellant in the request for administrative hearing shall be considered." Although the Appellant erroneously alleged that the City wrongfully withheld permits in a discriminatory manner in its appeal, at the hearing the Appellant's attorney, Steve Hassing, testified that even though the Appellant could have applied for permits to remedy the building violations he advised the Appellant to wait and see the outcome of the Planning Commission's appeal before remedying the violations by seeking permits (HT Hassing. Ex. G, I). He testified that the City should have waited until the appeal of the Planning Commission decision was resolved before issuing the *Order to Abate*. (HT Hassing.). The appeal of the *Order to Abate* submitted by Mr. Hassing does not specifically raise the defense that the City's *Order to Abate* should be stayed pending the outcome of a related appeal (Ex. G.). Because this issue was not raised on appeal, it should not be considered now.

V. APPELLANT FAILED TO SEEK AN ORDER FROM THE COURTS STAYING THE CITY'S ENFORCEMENT OF THE BUILDING CODE.

The Appellant failed to follow the procedure for obtaining a stay pending appeal, and the courts never issued an order staying enforcement of the building code. The Appellant filed a writ of mandamus pursuant to Code of Civil Procedure ("CCP") §1094.5 to appeal the Planning Commission Decision. Ex. K. CPP §1094.5(g) states

[1] The Health and Safety Code § 17980.12 does specifically grant a delay of enforcement of five years for enforcement actions against accessory dwelling units only (ADU's). This section is inapplicable here because the violations do not involve an ADU.

> "the court in which proceedings under this section are instituted may stay the operation of the administrative order or decision pending the judgment of the court, or until the filing of a notice of appeal from the judgment or until the expiration of the time for filing the notice, whichever occurs first. However, no such stay shall be imposed or continued if the court is satisfied that it is against the public interest. The application for the stay shall be accompanied by proof of service of a copy of the application on the respondent. Service shall be made in the manner provided by Title 4.5 (commencing with Section 405) of Part 2 or Chapter 5 (commencing with Section 1010) of Title 14 of Part 2. If an appeal is taken from a denial of the writ, the order or decision of the agency shall not be stayed except upon the order of the court to which the appeal is taken."

The initial stay of proceedings is not automatic or absolute; the party requesting the stay must submit and serve an application and the court must make a determination weighing the public interest in staying the proceedings before issuing an order. *Sterling v. Santa Monica Rent Control Bd.* (1985) 168 Cal.App. 3d 176, 187. The statute "unequivocally requires that the superior court weigh the public interest in each individual case" before granting a stay order. *Id*. Further, the stay order is limited to only to the matter before the court; the court cannot stay other pending or future matters. *Id*. [2]

There is nothing in the record showing the Appellant submitted an application for a stay order nor is there evidence in the record that the courts granted such an order. Had the Appellant requested a stay of enforcement, it would have been required to show that such an order was not against the public interest. It is important that the courts make a determination on whether the stay is against the public interest. The courts have observed there is a public interest in the enforcement of zoning, health, and building codes. *See Currier v. City of Pasadena* (1975) 48 Cal.App.3d 810, 815. However, no such determination was made or order given by the courts, and the Appellant cannot now retroactively ask to impose a stay on the City's enforcement.

[2] Even if the Appellant had filed an application for a stay, it is not likely the order would have prohibited enforcement of the building code via the *Order to Abate* because it is separate matter from the Planning Commission decision. The Planning Commission is separate entity within the City with its own appeals process. If denied for being overbroad, the Appellant could have sought an injunction as an alternative remedy.

The Appellant cannot argue that it failed to seek an order staying enforcement either from the courts due to ignorance of the City's potential enforcement actions. Immediately following issuance of the Planning Commission decision on December 18, 2019, the City informed the Appellant it would enforce the Building Code in the January 13, 2020 and March 4, 2020 letters and March 4, 2020 Re-inspection Notice (Ex H, I.). The Appellant was aware enforcement was forthcoming and the appropriate course of action was to request a stay order from the courts.

Assuming arguendo, and that the courts would have granted a stay had the Appellant bothered to ask for such an order, it would ultimately not matter because as of the current appeal's hearing date, permits had not been obtained (HT Miles, Low. Ex. J.). Even if the *Order to Abate* was tolled until either the decision date (December 28, 2022) or its remittitur (March 3, 2023), the Appellant would have been required to submit a compliance plan within 30 days and submit a complete application for rehabilitation with payment of permit fees within 60 days, neither of which occurred by May 23, 2023 (HT Miles, Low. Ex. C).

VI. CONCLUSION

The City established by a preponderance of the evidence that the Property had work done without permits, and as of the date of the hearing, the Appellant had not applied for the permits necessary to correct the Building Code violations. The Appellant's own evidence admits that they are still in the process of applying for proper permits. Appellant's defense rests on the argument that the City should have waited to pursue any enforcement action until the Appellant exhausted its appeal of the Planning Commission. There is nothing in state or local law allowing the Appellant to delay enforcement of its Building Code violations. The Appellant had the opportunity to ask the courts for an order to stay the City's enforcement while pursuing their writ on appeal

but did not make the effort. No order from a higher court staying the City's enforcement was introduced on the record. Accordingly, the appeal of the *Order to Abate* should be denied.

Respectfully Submitted,

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City of Oakland v. 955 57th LLC
City of Oakland Administrative Appeal Hearing
Appeal of Notice of Declaration of Public Nuisance
Hearing Date: October 19, 2023

CITY OF OAKLAND'S POST HEARING BRIEF

I. INTRODUCTION

At the administrative hearing held on October 19, 2023, the City of Oakland ("the City") showed the violations of the Oakland Building Maintenance Code ("Building Code") previously documented at 5655 Lowell Street aka 955 57th Street ("the Property"), owned by 955 57th Street, LLC ("Appellant") continued to exist without significant action taken by the Appellant to abate the violations. These violations constitute a public nuisance. As of the date of the hearing, the Appellant has only taken the initial steps to address the building violations previously documented by the City and upheld in Hearing Officer Roush's July 6, 2023 decision. The Appellant has failed abate the Building Code violations despite years of compliance efforts from the city, including multiple notices and orders, a voided compliance plan, and an additional compliance plan being offered. The City must now seek civil penalties to ensure compliance. Civil penalties are necessary to ensure the conditions are finally completely addressed, and the appellant's appeal of the City's *Notice of Declaration of Public Nuisance* ("DPN") should be denied. Accordingly, the City requests an assessment of $1000 per day from the period of July 7, 2022, the compliance deadline through the date of the hearing, totaling $469,000.

II. FACTS AND PROCEDURAL HISTORY

City staff visited and inspected the Property multiple times from 2013 to 2015 and in 2020. During inspections of the Property, the City staff observed violations of the Building Code, Oakland Municipal Code ("OMC") § 15.08 et seq. (Hearing Testimony ("HT") Miles, Candell). Following the inspections, the City notified the owner of the violations observed in multiple Stop Work Orders, Notices of Violations ("NOVs") and Re-inspection Notices in 2013-2015 and 2020.

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City staff documented work performed at the Property without the required permits, which included:

- alterations to windows involving openings reframed, interior walls removal, and new walls framed;
- construction of loading dock, door, and canopy;
- installation of refrigeration equipment with associated electrical, mechanical, building, and plumbing work;
- refrigeration units installed on rooftop with electrical, plumbing, and mechanical work;
- installation of air circulation/distribution system with electric motor units, hoses, and ducts attached to the building rafters, posts, and on masonry wall along the property line;
- installation of sump pump drain at loading; and exterior alterations windows changed

(Ex. A, C, H, I). OMC §§ 15.08.050; 15.08.120; 15.08.140; 15.08.340(A)(C)(E)(F)(G); 17.65.020; 17.65.110.

On October 20, 2014, the City and the Appellant signed a compliance plan to resolve the outstanding Building Code violations at the Property (Ex. C). As part of the compliance plan, the Appellant agreed to obtain the necessary permits to legalize or remove the following unpermitted improvements: the steel canopy structure; cargo container break room under canopy; pallet racks throughout warehouse; new walls and doors in warehouse; mechanical refrigeration equipment; electrical alterations and repairs in the warehouse; new loading dock and plumbing; vehicle entry gate and fence; new windows framing and exterior changes on the second floor; reconfigured 2nd story walls of break room and storage room; front entry security gate; alterations to create 2nd

story kitchen, bathroom, and half bathroom; and final approval of CMU sound wall with additional load of the canopy (*Id.).*

To satisfy the compliance plan requirements, the Appellant sought clearance from the City's Bureau of Planning for a conditional use permit ("CUP") for the unpermitted canopies, minor variance to reduce side yard setback, and regular design review for unpermitted canopies, loading dock, and entry sliding gate/fence (Ex. 2). The application was partially approved and partially denied by the City's zoning manager on February 7, 2018 (*Id.).* On February 19, 2018, the Appellant appealed this decision to the City's Planning Commission; the Planning Commission reversed the decision of the Zoning Manager and denied the Appellant's plan in its entirety on December 18, 2019 (Appellant's Ex. 3). The Appellant subsequently filed a writ of mandamus pursuant to Code of Civil Procedure § 1094.5 appealing the Planning Commission's decision; the Superior Court and Court of Appeal denied the writ and affirmed the Planning Commission's decision (Ex. K).

On January 13, 2020, the City issued a letter to the Appellant stating the Planning Commission's decision voided the compliance plan (Ex. H). The notice further informed the Appellant that the Property continued to be in violation of the Building Code as a result of unpermitted improvements, and the City would proceed with code enforcement actions necessary to bring the Property into compliance (*Id.*). On March 4, 2020, the City again sent a letter to the Appellant notifying it the Property continued to be in violation of planning and building codes and the City would proceed with enforcement (Ex. I). The letter also included an updated Re-inspection Notice with a full list of violations and a compliance deadline of March 19, 2020 (*Id.*). The letter informed the Appellant that fines will begin to accrue after this deadline as well as other potential enforcement actions (*Id.*). No action was taken by the Appellant to abate the

violations. On October 4, 2021, the City issued the *Order to Abate – Habitability Hazards* ("*Order to Abate*") citing the previously documented issues with unpermitted construction; unpermitted electrical, plumbing, and mechanical work; and use of faulty materials of construction (Ex. C). OMC §§ 15.08.050; 15.08.120; 15.08.140; 15.08.220; 15.08.230(D)(E)(G)(N); 15.08.240; 15.08.250(A); 15.08.260(A)(B)(C) 15.08.340(D)(E)(F)(I)(N). The Appellant appealed the *Order to Abate* and Hearing Officer Roush denied the appellant's appeal (Hearing Decision).

On June 27, 2022, the City declared the Property a public nuisance due to failure to abate the previously documented Building Code violations (Ex. L). The DPN informed the Appellant that if the conditions on the Property were not abated within 10 days the City would begin assessing civil penalties of $1000 per day totaling $365,000 per calendar year until Code Enforcement confirmed the Building Code violations were abated (*Id*.). The DPN also offered the Appellant the right to contact Tim Low, the City's Inspection Manager, and develop a compliance plan to abate the conditions (*Id*.). The Appellant did not attempt to develop a compliance plan and instead filed this appeal.

III. THE BUILDING CODE VIOLATIONS DOCUMENTED IN THE DECLARATION OF PUBLIC NUISANCE REMAIN UNABATED.

Local agencies are charged with the day to day administration and enforcement of state and local building codes. *Baum Electric Co. v City of Huntington Beach* (1973) 33 Cal.App.3d 573, 580. The City is authorized to issue notices ordering property owners to abate violations of state and local building codes within a reasonable time. Health and Safety Code § 17980. The City may elect to pursue enforcement of such orders through the administrative process. Health and Safety Code §17980.8. The Building official and their designees are authorized to enforce all provisions of the Building Code and to order abatement of violations. OMC § 15.08.080. It is

unlawful for anyone to maintain any building, structure, portion thereof, or real property or cause or allow the same to be done in violation of the Building Code. OMC §15.08.110. The City may, by ordinance, declare what conduct constitutes a public nuisance. Government Code § 38771; *Beck Development Co. v. Southern Pacific Transportation Co.* (1996) 44 Cal.App. 4th 1160, 1206. When considering a public nuisance declared by City ordinance, the function of the adjudicator is to determine whether such a violation in fact exists, without any independent assessment of the danger caused by the violation. *City of Bakersfield v. Miller* (1966) 64 Cal.2d 93, 100.

At the hearing on the *Order to Abate*, the City established that the Building Code violations existed at the Property (Hearing Decision). The City inspected the Property multiple times between 2013-2015 and 2020 and documented work performed without permits; the City also notified the Appellant about the work done without permits in multiple Stop Work Orders, NOV's, Re-Inspection Notices, and an *Order to Abate* prior to issuing the DPN (Exs. A, F, H, I, L). At the prior hearing, the City called two witnesses, former Specialty Combination Inspector and current Inspection Supervisor David Miles and Inspector Chris Candell. Both witnesses testified that they had personally inspected the Property on the dates identified in the City's notices and records, and that the notices accurately reflected the conditions on the Property and violations observed during their inspections (HT Miles, Candell. Exs. A, F, H, I). While testifying, Mr. Miles went through photographs he had taken during his inspections and identified Building Code violations that he later documented in his notices, including: a new electrical conduit indicating electrical work done without permits; a sump and pump drain showing plumbing work done without permits; pallet racks and a door frame showing construction without permits; and refrigeration and ventilation equipment indicating work

performed without a mechanical permits (HT Miles. Ex. H). The inspectors also testified they kept contemporaneous records of their inspections in City records managements systems, which were accurately reflected in the "Record Comments" for the Property (HT Miles, Candell. Ex F). These comments include:

> "7-25-13 [site] visit verified [w]indow removed and openings reframed, interior wall covering and partition wall removed."
> "10-9-13 permits have not been issued for this work."
> "11/25/13…issued a stop work order…Building a steel building, and a loading dock, 10' gate, and 7 new windows;"
> "12-26-213 Visited site w/ Chris Candell to follow up on complaint, verified that|there are 2 recently installed, refrigeration units, and associated|fans blowers, and lighting, electrical, installed steel frames and|electric doors. These areas have walls built or installed some kind of|insulated siding to the entire area. I also verified that the concrete|along 57th Street is broken and in need of repair. A pump that has|been recently installed is not connected to drain pipe under the|sidewalk directing the water to the gutter. The existing [ammonia container] and hook up has been removed without, contacting fire, air|quality control, no permits were obtained. All above work must be|added to previous noted work. All work has been done without approvals|permits or inspection. I have now issued another STOP WORK NOTICE with 4x fees field check and plans are needed."

(Ex. F).

At the hearing on the *Order to Abate*, the Appellant called Tim Low to testify regarding the permit history for the Property. Mr. Low testified about the permits the Appellant had obtained from 2012 to the present, and how work done at the Property either exceeded the scope of the acquired permits or was done without permits (HT Low. Ex. J). After reviewing the permit history for the Property and comparing it to the *Order to Abate*, Mr. Low concluded that the Appellant had yet to apply for the proper building, electrical, mechanical, and plumbing permits to correct the Building Code violations (*Id*.).

The Appellant submitted documentation and witness testimony regarding obtaining permits for the exterior windows of the Property on the second floor (HT Jara). However, the City's witnesses testified this did not address most of the violations in the *Order to Abate*, including

unpermitted structures; unpermitted electrical, mechanical, and plumbing work; and faulty use of construction materials (HT Miles, Low. Ex. A, C, J). At the current hearing on the DPN, the City called Inspector David Carillo to testify regarding his permit inspections of the Property related to the exterior windows on the second floor. Inspector Carillo testified that his inspection of the Property solely related to work performed on the second floor and his inspection were finalized in the spring of 2023 (HT Carillo). Inspector Carillo testified that he did not perform any inspections related to unpermitted construction of the canopy, loading dock, warehouse, CMU wall, or front gate and did not inspect any electrical, plumbing, or mechanical work outside of the second floor (*Id*.).

The Appellant's witness Craig Miers, an architect, testified regarding the status of the efforts to abate the work not finalized by Inspector Carillo. Mr. Miers testified that he, on behalf of the Appellant, submitted to the City plans for a 1) metal canopy 2) sliding driveway gate and 3) loading dock in September 2023 (HT Miers). However, Mr. Miers also testified that the plans submitted would require zoning approval from the City's planning department before construction could start (*Id*.). Although the Property could be legalized by returning it to its former use, Mr. Miers testified that the Appellant was not interested in pursuing that route to address building violations (*Id*.). The Appellant previously tried to legalize the Property in this manner, and the Zoning Manager partially denied the application and on appeal the Planning Commission completely denied the application (HT Miers, Miles. Exs. 2, 3;). Furthermore, Mr. Miles testified that his department does not consider applying for permits enough to abate a violation, stating that it is common for property owners to never start work after submitting plans or abandon the project midway through (HT Miles). The City requires a property owner to finalize and complete permits to wholly and permanently abate a Building Code violation (*Id*.).

The Appellant argued that the building violations on the Property did not actually endanger the health, safety, and welfare of occupants or neighbors and the City should not be able to seek civil penalties; however, this is contrary to existing precedent. *Miller* (1966) at 100; *City of Monterey v Carrnshimba* (2013) 215 Cal.App.4th 1068, 1087-1088 (violation of the City's zoning ordinance was a nuisance per se); *Clary v. City of Crescent City* (2017) 11 Cal.App.5th 274, 290-292 (City ordinance declaring weeds to be a public nuisance not overbroad). The Oakland Building Code's purpose is "to provide minimum standards to safeguard life or limb, health, property, and public welfare by regulating and controlling the use occupancy, locations, and maintenance of all residential and nonresidential buildings, structures, portions thereof and real property within the City of Oakland." OMC § 15.08.020. Pursuant to OMC §1.08.020(A), the City declared that ***all*** violations of OMC Chapter 15.08 are public nuisances subject to administrative civil penalties.[1] Because violations of Oakland's Building Code exist at the Property, the City may assess civil penalties to abate the conditions. As noted in the previous decision, "the legislative determination that the failure of a property owner to comply with the provisions of its Building Construction Code is *prima facie* evidence of an existing and continuing hazard to the public health, safety, and welfare." (Hearing Decision).

IV. THE CITY WAS NOT PROHIBITED FROM DECLARING THE PROPERTY A PUBLIC NUISANCE BECAUSE THE APPELLANT APPEALED THE PLANNING COMMISSION DETERMINATION VIA WRIT OF MANDATE.

The Appellant argued that the City was prohibited from declaring the Property a public nuisance until their appeal of the Planning Commission determination was completed. However,

[1] The City declared the Property a public nuisance pursuant to OMC Chapter 1.08 but has not yet declared it "public nuisance-substandard" pursuant to OMC §15.08.350. Pursuant to OMC §§15.08.370(A) and 15.08.380, failure to comply with a "public nuisance-substandard" declaration makes a property subject to demolition and orders to vacate the premises. OMC Chapter 1.08 allows the assessment of civil penalties to result in the abatement of code violations deemed a public nuisance pursuant to OMC §1.08.020. The City is not prohibited from assessing penalties pursuant to OMC Chapter 1.08 prior to making a "public nuisance-substandard" declaration, and the City is not asking for an order to demolish the property or vacate the premises.

Code of Civil Procedure §1094.5 requires a party to file a request to stay operation of the administrative decision pending the judgment of the court or appeal, and a no stay order will be imposed if it is against the public interest. As noted in the hearing decision "there was no evidence that the Appellant sought, let alone obtained, such an order." (Hearing Decision). Accordingly, the City was not prohibited from declaring the Property a public nuisance.

V. THE COMPLIANCE PLAN WAS VOIDED.

The Appellant argued that because there was compliance plan with issues that were on appeal, the City was barred from seeking enforcement by assessing civil penalties. However, the compliance plan was voided by the Planning Commission's decision (Ex. H). This issue was previously ruled upon by Hearing Officer Roush in his July 6, 2023, determination, finding "it was reasonable for the Inspection Manager to conclude that the continuing violations on the [Property] would not be corrected as contemplated in the Compliance Plan and that voiding the Plan was necessary." (Hearing Decision). Thus, the compliance plan does not bar the City from assessing civil penalties.

VI. THE CIVIL PENALTIES ARE NOT EXCESSIVE AND ARE NECESSARY TO ENSURE ABATEMENT OF THE BUILDING CODE VIOLATIONS.

The City's civil penalty assessment is not "excessive" as recognized by the courts. *Hale v. Morgan* (1978) 22. Cal.3d 388, 404. Courts determine the validity of a penalty assessment by considering a number of factors, including the identity of the recipient and intended uses of the penalties; the nature of the defendant's conduct; the harm or potential harm to protected parties, such as tenants and the public; the income generated by the defendant from the penalized conduct; and the defendant's net worth. C*ity & County of San Francisco v. Sainez* (2000) 77 Cal.App. 4th 1302, 1310. Courts have upheld civil penalty assessments in excess of those requested by the City, including a finding that a daily penalty of $2,500 totaling over 2 million

dollars in civil penalties for violations of a local ordinance, was not excessive. *People v. Braum* (2020) 49 Cal.App.5th 342 (See also *People v. Overstock.Com, Inc* (2017) 12. Cal.App.5th 1064, 1087-1088 (the Court upheld a trial award consisting of daily penalties of $2,000 per day for a total $6,828,000 in civil penalties)). Additionally, courts hold that civil penalties can continue to be assessed daily after the notice is issued and do not stop accruing until the nuisance is abated or a decision is reached. *Braum* (2020) at 354-355, 365; *Overstock* (2017) at 1072-1074, 1090. In *Braum*, the Court upheld a daily assessment of civil penalties for a period investigating the violations until the court issued an injunction stopping the nuisance. *Braum* at 354-355, 365. In *Overstock*, the Court upheld a daily assessment of civil penalties for continuing violations over six years: three years prior to the filing of the lawsuit and the three years it took for the matter to be decided at trial. *Overstock* at 1090. In finding that the civil penalties were not excessive, the Court of Appeal noted that despite knowledge of the enforcement investigation and ongoing litigation "[Overstock] chose to continue the offending practices." *Id*.

The City, via the City Manager (Administrator) or their designee (the Responsible Department - here the Department of Planning and Building), is authorized to assess civil penalties administratively. OMC §§ 1.08.030(C) & 1.08040(B). The City may issue an assessment notice imposing penalties up to $1,000 a day for each day a public nuisance exists, with the assessment commencing on the date of the initial occurrence of the violation and totaling $365,000 per year. OMC § 1.08.040(A)(D); 1.08.050(B). Like the *Sainez* factors, the City's assessment must be based on the duration and recurrence of the violation, the detrimental effects on the occupants of the Property and surrounding neighborhood, the history of compliance efforts by the appellant to correct the major violation wholly and permanent, the viability of the civil penalty to effect abatement of the major violation wholly and permanently,

and other factors that serve justice. OMC § 1.08.060(E). The assessment of civil penalties will cease when the violations are wholly and permanently corrected. OMC § 1.08.060(D).

Based upon the *Sainez* factors and OMC §1.08.060(E), an assessment of $1000 per day starting on July 7, 2022, is not excessive and is necessary to ensure compliance. As of the date of notice, the violations existed at the Property for a decade (HT Miles, Candell, Low; Exs. A, C, J, K). The civil penalties assessed were for violations of the Building Code, which not only endanger the occupants of the building but also pose a risk to the surrounding neighborhood due to unpermitted construction, mechanical, plumbing, and electrical work (HT Miles, Candell, Low; Exs. A, C, F, H, I, J). Although the Appellant initially agreed to a compliance plan with the City, upon receiving an unfavorable decision from the Planning Commission the Appellant abandoned efforts to abate the Building Code violations requiring the City to escalate enforcement and subsequently declaring the Property a public nuisance (HT Miles, Miers; Exs. 2, 3, C, L). The City's DPN offered the Appellant the opportunity to enter a compliance plan; the Appellant failed to take the City's offer for a new compliance plan (HT Miles. Exs. L). The civil penalties are necessary to abate the nuisance, as previous notices and orders from the City failed to result in immediate action from the Appellant (Exs. A, C, H, I). The Property is being used for commercial purposes as a meat distribution plant – the Appellant profits from having employees work in hazardous conditions (HT Miles, Candell). The Appellant provided no evidence or testimony regarding its net worth or ability to pay the civil penalties. *Sainez* is instructive on this appeal, as it also involved a city (San Francisco) seeking daily civil penalties for public nuisance stemming from violations of its building code. *Sainez* (2000) 77 Cal.App.4th at 1305-1307. In upholding the assessment of civil penalties in *Sainez,* the Court of Appeal wrote the following, which is applicable to the current appeal:

> "Despite warning and extensions of the correction or abatement periods, defendants delayed, failed to respond and had made only partial progress even by the time of trial. Judge Munson impliedly found that defendants had their own intransigence to blame for the $663,000 in accumulated penalties. Defendants had it within their control first to prevent and then to stop the accumulation of penalties."

Id. at 1316. The City's request for an assessment of civil penalties of $1,000 per day is not excessive given the circumstances or contrary to existing law. *Braum* (2020*)* 49 Cal.App.5th at 365; *Overstock* (2017) 12. Cal.App.5th at 1090

VII. CONCLUSION

The City established by a preponderance of the evidence that the Property had work done without permits, and as of the date of the hearing, the Appellant had not applied for the permits necessary to correct the Building Code violations. As previously decided by Hearing Officer Roush, the City was not prohibited from enforcing its Building Code to abate the existing violations (Hearing Decision). The City deemed these violations to be public nuisances and subject to civil penalty assessment. The City exhausted all other enforcement options prior to assessing civil penalties – these efforts failed to get the Appellant to fix the violations of the Building Code. It is uncertain that the Appellant's current plans to legalize the Property will be approved by the Planning Commission, as the Commission previously denied the application and its decision was affirmed on appeal to the courts. The Appellant had 8 years to bring the Property into compliance and failed – it is abundantly clear that a strong penalty assessment is necessary to ensure that the Appellant follows through with abatement in a timely fashion.

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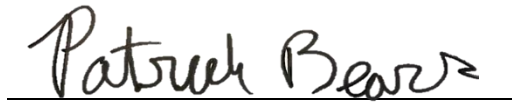
Accordingly, the appeal should be denied and civil penalties of $1000 per day at 469 days should be assessed against the Appellant, totaling $469,000. The City also asks for the determination to state that civil penalties can be assessed until the violations are wholly and permanently abated.

Dated: November 30, 2023 Respectfully Submitted,

By: 

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