CITY OF OAKLAND—OFFICE OF THE CITY ADMINISTRATOR

COUNTY OF ALAMEDA

DECISION OF THE INDEPENDENT HEARING OFFICER

In re: 955 57th Street, Oakland, California	)	**Code Enforcement Case No. 1303769**
	)	
Appellant:	)	Hearing Officer: Michael H. Roush
	)	
955 57th LLC	)	
955 B 57th Street	)	
Oakland, CA 94608	)	*Hearing Dates*: October 19, 2023
	)	
Property Address	)	*Location*: Via Videoconference
	)	
955 57th Street, Oakland, CA 94608	)	

I

INTRODUCTION

The instant appeal concerns whether the City of Oakland's Planning and Building Department, Bureau of Buildings, erred or abused its discretion by issuing to the owner of real property located at 955 57th Street, Oakland, California ("the Subject Property") a Declaration of Public Nuisance based on the existence of certain conditions in and on the Subject Property. The appeal was heard on October 19, 2023 and conducted via videoconference before the undersigned independent hearing officer.

The Subject Property is owned by Appellant 955 57th LLC ("Appellant"). Appellant was represented at the hearing by Michael McGrew, a law clerk with the law offices of Stephen J. Hassing. The City was represented by Deputy City Attorney Patrick Bears. David Carillo, Specialty Combination Building Inspector, and David Miles, Inspection Supervisor, testified on behalf of the City. Fred Miers, architect, testified on behalf of the Appellant. In addition to the live testimony received during the hearing, Appellant and the City submitted documents which were received into evidence. Moreover, the parties agreed that the hearing officer could take judicial notice of the testimony and exhibits that had been received in evidence in a prior administrative hearing concerning Appellant's appeal of an Order to Abate Habitability Hazards at the Subject Property. Those exhibits previously received in evidence include City Exhibits A through K and Appellant's Exhibits 2, 3, 6, 7, 9, 10, 12, 15, 16, 17, 18, 19, 22, 23, and 24.

At the conclusion of the hearing, it was agreed that the parties would submit post hearing briefs. The hearing officer received those briefs on November 30, 2023.

II

FACTUAL FINDINGS

Appellant owns the Subject Property. In 2013 and 2014, then Specialty Combination Inspector David Miles from the City's Bureau of Buildings inspected the Subject Property. He observed work performed at the Subject Property that in his determination required permits from the City. This work included alterations to windows, the removal of interior walls, the construction of new walls, construction of a loading dock, door and canopy, installation of refrigeration equipment with associated electrical, mechanical, and plumbing work, refrigeration units on the rooftop, installation of air circulation/distribution system, installation of a sump and pump drain at the loading area, and alterations to exterior windows. Mr. Miles found no permits for this work in City records. Without the required permits for this work, he determined the work violated various sections of the City's Building Maintenance Code.

Based on that determination, the City issued Appellant a Notice of Violation. (City Exhibit A.) Thereafter, in 2014, the City and Appellant entered into a Rehabilitation Schedule—Work Plan ("Compliance Plan" [City Exhibit B]). The purpose of the Compliance Plan was to resolve the violations on the Subject Property. As part of the Compliance Plan, Appellant agreed to obtain the necessary permits to legalize or remove work that had not been permitted. In addition, to satisfy the Compliance Plan's requirements, the Appellant agreed to apply for a conditional use permit for those improvements for which the Planning Department's approval was necessary, for example a reduction to the side yard setback, design review for the canopies and loading dock, etc. (Appellant's Exhibit 2.) Appellant retained an architect, Fred Miers, to assist in obtaining these planning approvals. (See Appellant's Exhibits 6, 7, 9.) Ultimately, however, the Planning Commission denied Appellant's application. (Appellant's Exhibit 3.) Appellant filed a petition in the Superior Court for the County of Alameda for a writ of mandate to overturn the Commission's decision.

Following further inspections of the Subject Property by Inspector Candell, in January 2020, the City issued a letter to Appellant advising that (i) the Commission's decision rendered the Compliance Plan void, (ii) the violations of the Building Code on the Subject Property still existed and (iii) the City would proceed with code enforcement. (City Exhibit H.) Three months later, the City sent Appellant a follow up letter to the same effect. (City Exhibit I.) The letter included an updated reinspection notice with a list of violations, a compliance deadline, and advised Appellant that fines would accrue and other enforcement action taken if the deadline was not met. *(Id.)*

When Appellant did not apply for any of the permits by the City's deadline, on October 4, 2021, the City's Planning and Building Department, Bureau of Buildings, issued an Order to Abate—Habitability Hazards ("Order to Abate" [City Exhibit C].) The Order to Abate identified unpermitted work, cited to various sections of the Oakland Municipal Code that were violated due to that unpermitted work, set forth what was necessary to abate the violations, and ordered the Appellant to do a number of things, such as within 30 days execute a new Compliance Plan and obtain all necessary permits. (City Exhibit C).

Appellant filed a timely administrative appeal to the Order to Abate. (City Exhibit G.) The appeal set forth numerous reasons why it was an error or an abuse of discretion for the City to have issued the Order to Abate. The appeal stated, for example, that no habitable conditions exist on the Subject Property that constitute a threat to the health, safety or welfare of the occupants and the public; the

Subject Property is neither a substandard building nor a public nuisance; and permits have been applied for and/or attempted to be applied for but the permits have been wrongfully withheld in a discriminatory, retaliatory and vindicative manner. (City Exhibit G.)

Concerning the Planning Commission's decision to deny Appellant's planning application, the Superior Court denied Appellant's petition for a writ of mandate and Appellant filed a Notice of Appeal in the First District Court of Appeal.

On June 27, 2022, the City's Planning and Building Department, Bureau of Buildings, declared the Subject Property a public nuisance by issuing a Declaration of Public Nuisance ("DPN") due to the property owner's failure to abate the previously documented Building Code violations. (City Exhibit L.) The DPN informed the property owner that if the conditions cited in the DPN were not abated timely the City would assess civil penalties in the amount of $1000/day until the violations were abated. The DPN offered the property owner the opportunity to contact the City to develop another Compliance Plan.

Appellant filed a timely appeal to the DPN. As with the appeal Appellant filed as to the Order to Abate, the appeal stated various grounds why the City erred or abused its discretion in issuing the DPN including that permits that had been applied for had been wrongfully withheld, the challenged denial of Appellant's conditional use permit was pending in the First District Court of Appeal, there were no habitable conditions on the property that endanger health, safety or welfare, and the civil penalties imposed were excessive. On January 5, 2023, Appellant amended its appeal on grounds that an amended Notice of Public Nuisance, dated March 2, 2022, had not been served on Appellant and that on April 12, 2022, the City had granted Appellant written permission for a sidewalk encroachment.

The Court of Appeal in March 2023 affirmed the decision of the Superior Court denying Appellant's petition for a writ mandate. (Appellant's Exhibit K.)

At this hearing, Inspector Carillo testified that his recent inspection of the Subject Property concerned the exterior windows on the second floor but that he did not inspect the canopy, loading dock, warehouse, or the front gate—all of which had unpermitted work—nor did he inspect (other than on the second floor) any electrical, plumbing, or mechanical work, which work the City had indicated had been performed in violation of the Building Code.

Architect Miers testified that Appellant had retained his services to assist Appellant in obtaining the necessary planning approvals and building permits to bring the Subject Property into compliance with the City's Codes. At the time of the hearing, however, Appellant had not obtained such approvals or permits.

On October 18, 2023, the undersigned hearing office heard Appellant's appeal of the Declaration of Public Nuisance.

III

DISCUSSION

City argues there was neither error nor abuse of discretion in the City's issuing the Declaration of Public Nuisance on June 22, 2022 and therefore the appeal should be denied. The City also requests that a penalty assessment of $1000/day be imposed, beginning July 7, 2022, and argues that such penalties

are permissible and justified. In support of its request that the appeal be granted, Appellant makes several arguments why it was error or an abuse of discretion for the City to have issued the DPN. Both parties' arguments will be addressed below.

A. Legal Authority for a City to Declare Property a Public Nuisance.

As a preliminary matter, under the State Constitution as well as under the City's municipal police power, the City is authorized to "make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." *City of Monterey v. Carrnshimba* (2013) 215 Cal. App. 4th 1068, 1086, *citing* Cal. Const. art XI. Section 7. State law authorizes a city to issue notices to property owners to abate violations of state and local building codes. Health and Safety Code, section 17980; cities may elect to enforce such orders through administrative procedures. Health and Safety Code, section 17980.5. Under the Oakland Municipal Code, sections 15.08.120 and 15.08.140, repairs or modifications to buildings or structures within the City are to be performed only with an applicable permit, and such work is subject to inspection. (Hereafter, all references to Section numbers are to the Oakland Municipal Code unless otherwise noted.) It is unlawful for any person to maintain any building, structure, or real property, or cause or allow the same to be done in violation of the Building Code. Section 15.08.110. The Building Official and code enforcement inspectors are authorized to enforce all provisions of the Building Code and to order abatement of violations. Section 15.08.080.

In addition, a city may, by ordinance, declare what conduct constitutes a public nuisance. Government Code, section 38771; *Beck Development Co. v. Southern Pacific Transportation Co.* (1996) 44 Cal. App. 4th 1160, 1206. The City of Oakland has adopted such an ordinance. Section 1.08.020 A [All violations of Chapter 15.08 are public nuisances]. When there is an appeal concerning whether property constitutes a public nuisance, the administrative hearing officer determines whether or not a violation exists without independently assessing whether the violation creates a danger. *City of Bakersfield v. Miller* (1966) 64 Cal. 2d 93, 100 ("*Bakersfield*").

B. It was Neither Error Nor an Action Taken in Bad Faith for the City's Inspection Manager to Have Rendered Void the October 20, 2014 Compliance Plan.

Appellant argues the City acted in bad faith when its Inspection Manager rendered void the 2014 Compliance Plan and therefore it was error for the City to have issued the DPN.

In October 2014, Appellant and City entered into a Compliance Plan (City Exhibit B.) The purpose of the Plan was to mitigate the impact of the operation of the business on nearby properties and to address the unpermitted property improvements. (*Ibid.*) As to the latter, concurrent with the execution of the Compliance Plan, Appellant agreed to submit (a) a planning permit application (design review, variance and conditional use permit) to legalize building and site improvements that had been installed on the property without permits and (b) an application for building or specialty permits to legalize any improvements or repairs for which planning approvals were not required. (*Id.*) The Compliance Plan further provided that no later than 60 days following planning permit approval, Appellant was to submit a complete application for construction permits to address the unpermitted improvements. (*Id.*)

Appellant did submit the planning permit application as set forth in the Compliance Plan but prior to January 2020 there was no evidence that Appellant submitted any applications for the permits to legalize the improvements or repairs at the Subject Property for which planning approvals were not

required. The Planning Commission denied Appellant's planning permit application in October 2019. Without approval of such application, Appellant could not receive construction permits to address the unpermitted improvements for which planning approval was necessary.

The City's Inspection Manager notified Appellant in January 2020 that the October 2014 Compliance Plan was voided. Appellant submits that action was wrongful or in bad faith because the Inspection Manager had no authority to do so "based on Planning Commission decision which didn't even address the Plan and instead addressed a Planning Application for design review, conditional use permit, and variance."

Appellant misreads the purpose of a Compliance Plan. As set forth in the Compliance Plan, there is a clear and obvious nexus between planning approvals and legalizing work on the Subject Property for which planning approval is required. For example, without planning approval, the steel canopy structure and the new loading dock that had been installed without building permits would need to be removed. Accordingly, without planning approval, any corrective work on the Subject Property for which planning approval was required could not proceed. In addition, as of January 2020—six years after Appellant had been informed that it must obtain building permits for unpermitted work--there was no evidence Appellant had applied for any permits concerning the unpermitted improvements on the Subject Property for which planning approval was not required.

Six years after the parties had entered into the Compliance Plan, its terms and conditions had not been satisfied either because Appellant had not pursued obtaining permits for work that did not need planning approval or because the Planning Commission had denied the planning approvals. In light of that, it was reasonable for the Inspection Manager to conclude that the continuing violations on the Subject Property would not be corrected as contemplated in the Compliance Plan and that voiding the Plan was necessary. Under the broad authority vested in the Inspection Manager (Section 15.08.080), it was neither an abuse of discretion nor an action taken in bad faith for the Inspection Manager to have voided the 2014 Compliance Plan in 2020.

C. <u>The City Did Not Act in Bad Faith When It Did Not Provide a Compliance Plan to Appellant After the City Issued the Declaration of Public Nuisance.</u>

The DPN (City Exhibit L) provided an option for Appellant to meet with City representatives to develop a Compliance Plan for the rehabilitation of the Subject Property. Appellant contends that because the City did not provide a Compliance Plan to Appellant, the City acted in bad faith and therefore it was error or an abuse of discretion for the City have issued the DPN. Not so.

The DPN provided a time frame in which Appellant must abate the violations on the Subject Property but also states, "If you wish to completely and permanently abate the nuisances at the Property, but you cannot do so within the time frame of the [DPN], you may request to meet with the Building and Planning Department and develop a compliance plan to abate the violations. ...To request a meeting for a compliance plan, please email TLow @oaklandca.gov."

The City unilaterally does not issue or provide a Compliance Plan. A Compliance Plan is a mutually agreed upon document by which a property owner and the City set forth a list of corrective work to be accomplished and timetable in which that work is to occur. It would be an empty exercise for the City to issue a Compliance Plan without input and concurrence from the property owner. Indeed, Appellant and

the City had entered into such a Plan in 2014 but only after discussing and agreeing on the terms of the Plan. (City Exhibit B.)

Appellant has not demonstrated in what manner the City acted in bad faith concerning the Compliance Plan. The DPN was clear that meeting with the City to develop a Compliance Plan was an option and there was no evidence of anything that prevented Appellant from contacting Mr. Low and then meeting and discussing with the City a new Compliance Plan. Nor was there any evidence that the City refused to engage in discussions with Appellant about the terms and conditions of such a Plan.

Although the City would have been required to negotiate the terms and conditions of the Compliance Plan in good faith, the City at no time took no steps to stymie Appellant from entering into a new Compliance Plan in order to accomplish the corrective work at the Subject Property. Furthermore, it is apparent that in reaching agreement that led to the 2014 Compliance Plan, the City had engaged in good faith negotiations. There was no evidence to suggest the City would have engaged in different conduct had Appellant taken steps to engage the City in that process.

D. Appellant Waived its Argument that the City was Prohibited from Issuing the Declaration of Public Nuisance by Reason of Appellant's Filing a Petition for a Writ of Mandate or Filing a Notice of Appeal to the Judgment Denying the Writ and, in any event, the City was not so Prohibited.

One of the grounds upon which Appellant filed its appeal to the DPN was that by reason of its filing a petition for a writ of mandate following the decision of the City's Planning Commission to deny its application for a conditional use permit, variance and design review, and/or by its filing an appeal from the judgment of the Superior Court that denied the petition, all enforcement matters concerning the Subject Property were automatically stayed until the Appellate Court issued its remittitur in March 2023; therefore the City was without authority to issue the DPN in June 2022 while these legal proceedings were pending. Appellant did not submit any argument in support of that reason for its appeal and therefore that ground for appeal is waived. Moreover, there is no legal authority to support that contention.

Appellant filed its petition for a writ of mandate under Code of Civil Procedure ("CCP) Section 1094.5. Under that section, a court may stay operation of the administrative decision pending the judgment of the court or until the filling of a notice of appeal but no such stay shall be imposed if the court is satisfied that it is against the public interest. CCP, Section 1094.5 (g). Such stay is not automatic; an application for such a stay must be filed (*Ibid.*) There was no evidence that Appellant filed such an application or that the Superior Court issued such a stay. Moreover, if an appeal is taken from the denial of the writ, the decision of the agency shall not be stayed except upon an order of the court to which the appeal has been taken. (*Id.*) Again, there was no evidence that Appellant sought, let alone obtained, such an order.

Accordingly, the City was not prohibited from issuing the DPN by reason of Appellant's either filing its petition for a writ of mandate or its filing a notice of appeal from the trial court's denial of the writ.

E. Appellant Waived its Argument that the City was Required to Prove the Violations Endangered Health, Safety or Welfare Before Issuing a Declaration of Public Nuisance and in any event, the City was not Required to do so.

Another ground upon which Appellant filed its appeal was that at the time the DPN was issued there was no evidence to show that (a) the Subject Property had hazardous conditions that endangered the health, safety and welfare of the occupants and the public, (b) that the Subject Property was substandard and (c) the Subject Property did not constitute a public nuisance. Appellant, however, did not submit an argument supporting that ground for appeal and therefore that ground for appeal is waived. Nevertheless, that ground for appeal fails because the Oakland Building Construction Code and the Oakland Building Maintenance Code provide otherwise.

First, the City has adopted an ordinance declaring that all violations of Chapter 15.08 constitute a public nuisance. Second, the Oakland Building Construction Code provides that all materials, fixtures, equipment, and installations thereof in buildings and structures shall be so installed and maintained as to reduce and minimize all safety and health hazards. Section 15.04.1.115 A. Failure to comply with the provisions of the Code, including failure to obtain or maintain valid permits or failure to repair or rehabilitate unsafe materials or equipment are declared to be prima facie evidence of an existing and continuing hazard to life or limb, property or public welfare. Section 15.04.1.115 C. Third, by adopting the Oakland Building Maintenance Code, whose purpose is to establish minimum safeguards to public health, safety and welfare by regulating the maintenance of non-residential structures in the City, the City has determined that violations of the Maintenance Code, per se, renders a structure substandard and hazardous. Sections 15.08.010, 15.08.020, and 15.08.340.

Accordingly, because the inspector determined that work requiring a building permit had been done on the Subject Property but for which no building permit had been obtained, that work constituted prima facie evidence of a hazard to the public health, safety or welfare, that faulty materials of construction had been used, and that maintenance violations existed, thereby rendering the Subject Property substandard and a public nuisance. *Bakersfield, supra.,* 64 Cal. 2d at 98-99.

In *Bakersfield*, the City found that a hotel constituted a fire hazard within the meaning of a uniform code it had adopted and that under the terms of that code the hotel was a public nuisance. *Ibid.* The owner did not deny the ordinance had been violated but contended that the city exceeded its legislative powers in declaring as a matter of law that the violations were a public nuisance and that the trial court was required to make an independent finding as to whether the hotel was a public nuisance under state law. *Id.*.

The Appellate Court rejected that argument, holding that where a legislative body has determined a defined condition as a nuisance, it is a usurpation of legislative power for a court to arbitrarily deny enforcement just because the court it its independent judgment concludes the danger caused by the violation was not significant. (*Bakersfield, supra.,* 64 Cal. 2d, at 99). Rather, the Appellate Court stated the court's role is limited to determining whether a violation exists and whether the code in question is constitutional. (*Ibid.*)

Appellant's ground for appeal would have this hearing officer do the same as was requested by the trial court in *Bakersfield*, i.e., to exercise its independent judgment and determine that the Subject

Property had no hazards or deteriorated conditions that jeopardized the health, safety or welfare of the occupants or the public, that the Subject Property was neither substandard nor a public nuisance.

But as *Bakersfield* holds, the hearing officer may not engage in that exercise. As to these contentions, the hearing officer is bound by 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 and that violations of the Building Maintenance Code renders a building substandard and a public nuisance. The hearing officer's role is limited to determining whether violations exist and whether the Codes in question are constitutional. *Bakersfield, supra.,* 64 Cal. 2d, at 100. As discussed in the next section, there is no question that violations of the Code existed on the Subject Property at the time the DPN was issued in June 2022 and Appellant has not argued that the Codes are unconstitutional.

Accordingly, even if Appellant had argued why it was error or an abuse of discretion for the City to have issued the DPN on grounds that the City did not prove the Subject Property endangered health, safety or welfare, the argument would be rejected.

F. The Preponderance of the Evidence Supports the City's Issuance of the Declaration of Public Nuisance; the Violations Had Not Been Abated at the Time of the Hearing; and the Violations Referenced Applied to the Subject Property as a Non-Residential Building.

Beginning in 2013, the City inspected the Subject Property numerous times and documented that work had occurred on the Subject Property without the proper building permits or planning approvals, in violation of the Municipal Code. The City put Appellant on notice of these violations numerous times prior to the issuance of the DPN. (City Exhibits A, F, H, and I). The evidence was uncontradicted that at the time the City issued its June 2022 DPN (Exhibit L), City inspectors had personally visited the Subject Property several times over several years, had documented the conditions, and entered records relative to their inspections, all of which demonstrated that unpermitted work existed at the Subject Property in violation of the Municipal Code. See, for example, City Exhibit I finding violations of subsections A, C, E, F, and G of Section 15.08.340; 15.08.050; 15.08.120; 15.08.140; 15.08.220; subsections D, E, G, and N, Section 15.08.230; Section 15.08.240; subsection A or 15.08.250; and subsections A, B, and C of Section 15.08.260. Some of those sections and subsections were also set forth in the DPN (Exhibit L), along with the necessary corrective action for these violations.

Appellant contends that even if there were Building Code violations on the Subject Property when the DPN was issued in June 2022, the appeal should be granted because the violations have been abated by the time of the administrative hearing. The evidence does not support that contention.

Prior to the City's issuing the DPN in June 2022, the City inspected the Subject Property and confirmed the violations of numerous sections of the City's Municipal Code—Sections 15.08.050, 15.09.120, 15.08.340 A, C. E, F, and G. At the hearing, Inspector Carillo did testify that some of unpermitted work on the second floor had been corrected but other unpermitted work, for example, as to the canopy, loading dock, warehouse, CMU wall, front gate and other electrical, plumbing and mechanical work still needed permits and corrections. Architect Miers testified that he had prepared and submitted plans to the City in September 2023 concerning the canopy, sliding driveway gate, and loading dock but these plans would need approval from the Planning Department before work could begin and no such approvals had been granted.

Submitting plans or building permit applications to correct or abate Building Code violations is a step in the right direction but such submittals do not constitute correction or abatement of the violations.

Appellant also contends the DPN was issued in error because it referenced violations of the Municipal Code that refer only to residential structures and the Subject Property is not a residential structure.

The City declared the Subject Property a public nuisance, citing to Section 1.08.020 (A)(1), which section of the Municipal Code permits the declaration of a public nuisance and the assessment of civil penalties to affect the abatement of violations of Chapter 15.08 of the OMC. (DPN, p. 1). The DPN states the violations of Chapter 15.08 have created a nuisance since July 25, 2013 and that the owner (Appellant herein) has failed to abate the violations despite numerous notices and orders to do so. Concerning the July 2013 inspection, the DPN references violations of Sections 15.08.050 and 15.08.120; it references violations of those and other sections of the Code (15.08. 340 A, C, E, F, and G) found in subsequent inspections in 2013. Inspections in 2015 and 2020 found the violations had not been abated.

Prior to issuing the DPN in June 2022, there was a further inspection of the Subject Property. That inspection "confirmed the violations of OMC Sections 15.08.050, 15.08.120, and 15.08.340 A, C, E, F, and G remain unabated at the property." (DPN, p. 2).

Citing to Sections 15.08.170 and 15.08.190, Appellant contends the City committed error in issuing the DPN because it misapplied residential habitability standards to the Subject Property but the Subject Property is non-residential. This contention is without merit. For this contention, Appellant cites to sections of the Oakland Municipal Code that were referenced in the Order to Abate, not the DPN; the sections of the Oakland Municipal Code referenced in the DPN that are said to be violated apply to non-residential structures such as the Subject Property.

Appellant cites to the definition of "Habitable Space (Room")" in Section 15.08.170 that references "space in a residential building or structure intended or used for living, sleeping, eating, or cooking" and to Section 15.08.190 that provides that Article V of Chapter 15.08 (Habitable Space) applies to all residential buildings and structures and to non-residential buildings and structures as specifically indicated. Based thereon, Appellant argues Sections 15.08.220, 15.08.230 D, E, G, and N, and Section 15.08.240 do not apply to the Subject Property and it was error for the City to have found violations of those sections because of the inapplicability of those section to the Subject Property. In its argument, however, Appellant references the Order to Abate, not the DPN, concerning the section references. (Appellant's Closing Argument, at p.10.) Accordingly, the argument is irrelevant as to this appeal.

But even if it were relevant to this appeal, it is clear that some of those sections are applicable to the Subject Property. For example, there is no suggestion in subsections D, E, and G of Section 15.08.230, which set forth sanitary standards (plumbing fixtures, water closes compartments, and sanitary facilities, respectively) that the standards do not apply to non-residential structures. Moreover, Section 15.08.240 (Security) specifically references residential and non-residential buildings and structures.

With respect to the violations referenced in the DPN—15.08.050 (General Standards), 15.08.120 (Permits) and 15.08.340 A, C, E, F, and G (Substandard Buildings)—there is nothing in those sections to suggest that they do not apply to non-residential buildings, such as the Subject Property.

Accordingly, the City has established by the preponderance of evidence that the violations cited in the DPN existed at the time the City issued the DPN and it was neither error nor an abuse of discretion for the City to have issued the DPN.

G. The Fines and Penalties Assessed Against Appellant Are Considerable But Permitted by Law.

Under the Municipal Code, the Department of Planning and Building is authorized to assess civil penalties administratively, including imposing penalties up to $1,000/day for each day a public nuisance exists. Sections 1.08.030 (C), 1.08.040 (A), (B) and (D); 1.08.040 (A) and (D). The penalty assessment must be based on the duration of the violations and the history of compliance (or lack thereof) by the property owner to correct the major violations. Section 1.08.060 (E). Penalty assessments end whent he violations have been permanently corrected. Section 1.08.060 (D).

The evidence is clear that the violations have existed on the property since at least 2013 and that Appellant has made no significant effort to come into compliance, thereby justifying the assessments that the City has imposed. Appellant has been provided notice time and time again that its failure to abate the violations would result in penalties but Appellant has largely failed to act in response to the notices.

The fines and penalties that have been, and will continue to be, assessed against Appellant for its failure to abate the violations at the Subject Property are considerable—currently totaling nearly $500,000 and counting--but permitted by law. See *Hale v. Morgan* (1978) 22 Cal. 3d 388, *City and County of San Franciso v. Sainez* (2000) 77 Cal. App. 1302; *People v. Braum* (2020) 49 Cal. App. 5th 342. Moreover, Appellant has not argued that the fines and penalties are excessive, or that Appellant is not able to pay the assessments, just that they should not have been assessed in the first place, an argument that this Hearing Examiner has rejected.

H. Appellant's Other Grounds for Its Appeal Have Been Waived.

To the extent that Appellant has submitted other grounds for its appeal, for example, that an amended Notice of Public Nuisance was not served on Appellant or that the City granted written permission to allow a sidewalk encroachment, Appellant submitted no arguments in support of those grounds and therefore they are waived.

IV

CONCLUSION

Based on the foregoing, the City's issuance of the June 22, 2022 DPN is CONFIRMED and Appellant's APPEAL is DENIED. City shall recover any unpaid amounts assessed to date, including its administrative expenses in investigating this matter and costs associated with the instant appeal.

Michael H Roush

Dated: December 13, 2023

Michael H. Roush, Independent Hearing Officer