



# AGENDA REPORT


**TO:** Jestin D. Johnson  
City Administrator

**FROM:** William Gilchrist  
Director, Planning and  
Building Department

**SUBJECT:** 955 57<sup>th</sup> St./5655 Lowell St. "Appeal  
to Council" by Property Owner with  
Complaint Number 1303769 for  
Parcel Number 037A-2746-028-00

**DATE:** May 22, 2024

City Administrator Approval

  
Jestin Johnson (May 23, 2024 15:37 PDT)

Date: May 23, 2024

## RECOMMENDATION

**Staff Recommends That The City Council Conduct A Public Hearing And, Upon Conclusion, Adopt A Resolution Denying the Appeal of Appellant 955 57<sup>th</sup> LLC And Upholding The Decision Of The Independent Hearing Officer Regarding The Declaration of Public Nuisance at 955 57<sup>th</sup> Street/5655 Lowell Street.**

## EXECUTIVE SUMMARY

This is an appeal of a decision rendered by an Independent Hearing Officer upholding a Declaration of Public Nuisance and assessment of civil penalties issued by the Building Official against the owner of 955 57<sup>th</sup> Street/5655 Lowell Street (hereinafter "the Subject Property"). The Appellant, 955 57<sup>th</sup> LLC, is the owner and operator of the property. The Building Official declared the property a public nuisance in 2022 and the Appellant exercised their right to request a hearing. After an evidentiary hearing, an Independent Hearing Officer issued a written decision upholding the Declaration of Public Nuisance and assessment of civil penalties based on the witness testimony, documentary evidence, and legal arguments presented at the hearing. Appellant now exercises their right to appeal the Independent Hearing Officer's decision to the City Council. However, the appeal should be denied because the Appellant cannot meet their burden of establishing that there was no substantial evidence in the record to support the Hearing Officer's decision or that the decision was based on an error of law.

## BACKGROUND

The Subject Property is a commercial property which houses Suprema Meat Co., a meat distribution company. Code Enforcement inspected the property in 2013 and 2014 and issued Notices of Violation and Stop Work Orders (**Attachment A**). On October 20, 2014, the Appellant entered a Compliance Plan on October 20, 2014 (**Attachment B**). As part of the compliance plan, the Appellant agreed to obtain the necessary permits to legalize or remove 13 unpermitted improvements including the following: steel canopy structure, cargo container break room under the canopy, pallet racks throughout warehouse, new walls and doors in warehouse, mechanical refrigeration equipment, electrical alterations and repairs in warehouse, new loading

City Council  
June 4, 2024

dock (including plumbing), vehicle entry gate and fence, new windows framing exterior changes at the 2<sup>nd</sup> story office; reconfigured 2<sup>nd</sup> story walls of break room and storage room; alterations to create 2<sup>nd</sup> story kitchen, bathroom and half bathroom, front entry security gate, and concrete masonry unit sound wall. (**Attachment B**). To fulfill some of 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. On February 7, 2018, the application was partially approved and partially denied by the City's zoning manager. The Appellant appealed this decision to the City's Planning Commission. On December 18, 2019, the Planning Commission reversed the Zoning Manager's prior determination and denied the conditional use permit and variance for the Subject Property (**Attachment C**).

Due to the Planning Commission's decision, Code Enforcement issued two notices, one on January 13, 2020, (**Attachment C**) and one on March 4, 2020, (**Attachment D**), informing the Appellant that the compliance plan was voided and that the Appellant must take immediate steps to abate the violations or the City would escalate enforcement. Aside from applying for a permit to legalize the 2<sup>nd</sup> floor windows on the 2<sup>nd</sup> story on August 21, 2020, the owner made no other efforts to legalize the Subject Property. On October 4, 2021, the Building Official issued an Order to Abate – Habitability Hazards ("Order to Abate")(Attachment E). On October 31, 2021 the Appellant, through its legal counsel, submitted an Appeal of the Order to Abate. (**Attachment F**).

After nearly a year passed with the Appellant taking no additional action to abate the violations, on June 27, 2022, the Building Official issued a Declaration of Public Nuisance. (**Attachment G**). On July 18, 2022, the Appellant appealed of the Declaration of Public Nuisance and requested an evidentiary hearing (**Attachment H**). The Appellant also exercised their right to appeal the Declaration of Public Nuisance.

Two separate appeal hearings were held before an independent Hearing Officer. On May 23<sup>rd</sup> and 24<sup>th</sup>, 2023, an hearing was held to determine whether Code Enforcement erred or abused its discretion in issuing the Order to Abate. The independent Hearing Officer upheld the Order to Abate, in a decision dated July 6, 2023 (**Attachment I**). The Appellant did not appeal the determination made by the independent Hearing Officer on the Order to Abate within the fourteen (14) day deadline to appeal, as codified in Oakland Municipal Code (O.M.C.) § 15.04.1.125G (**Attachment J**).

On October 19, 2023, a separate hearing was held to determine whether Code Enforcement had erred or abused its discretion in issuing the Declaration of Public Nuisance. The independent Hearing Officer upheld the Declaration of Public Nuisance in a decision dated December 13, 2023, mailed to Appellant's legal counsel on January 24, 2024 (**Attachments K & L**). On February 8, 2024, the Appellant filed this appeal, requesting City Council review of the Independent Hearing Officer's decision. (**Attachment M**).

## **ADMINISTRATIVE RECORD**

The administrative record upon which Council must base its decision consists of all of the records related to the appeal of the Order to Abate as well as all of the records related to the appeal of the Declaration of Public Nuisance including evidence entered into the record at the hearings, briefs and written closing arguments, and the two Decisions of the Independent Hearing Officer. All records are attached to this report including:

- A. June 28, 2022 Record Comments – July 24, 2013 to June 27, 2022
- B. October 20, 2014 Compliance Plan
- C. January 13, 2020 Notice and Supporting Documentation
- D. March 4, 2020 Notice and Re-Inspection Notice
- E. October 4, 2011 Order to Abate – Habitability Hazards
- F. October 31, 2021 Appellant Appeal of Order to Abate
- G. June 27, 2022 Declaration of Public Nuisance
- H. July 18, 2022 Appellant Appeal of Declaration of Public Nuisance
- I. July 6, 2023 Hearing Officer Decision – Order to Abate
- J. November 1, 2023, Notice – Hearing Officer Decision – Order to Abate
- K. December 13, 2023 Hearing Officer Decision – Declaration of Public Nuisance
- L. January 24, 2024 Notice – Hearing Officer Decision – Declaration of Public Nuisance
- M. February 8, 2024 Appellant Appeal of Declaration of Public Nuisance - Order to Abate and Declaration of Public Nuisance Post-Hearing Briefs
- N. City - Order to Abate and Declaration of Public Nuisance Hearing - Additional Exhibits
- O. Order to Abate Hearing – Appellant Exhibits
- P. Declaration of Public Nuisance Hearing - Appellant Exhibits
- Q. City - Order to Abate and Declaration of Public Nuisance Post-Hearing Briefs

The Administrative Hearing on the issuance of the Order to Abate occurred on May 23<sup>rd</sup> and May 24<sup>th</sup>, 2023. On July 6, 2023, both the Appellant and City submitted documentary evidence consisting of photographs of the Subject Property and past correspondence between the parties, along with witness testimony from Principal Inspection Supervisor David Miles, Inspector Chris Candell, Principal Civil Engineer Tim Low, the owner's general manager, the owner's architect, and the owner's agent of the Subject Property. documentary evidence submitted at the hearing included but was not limited to: Stop Work Orders, Notices of Violation, Re-Inspection Notices, the Order to Abate, a Compliance Plan agreement between the parties including list of unpermitted improvements, email communications, and record comments showing the inspection history of the Subject Property. The independent Hearing Officer issued a Hearing Decision finding that no error or abuse of discretion by the City had occurred in the issuance of the October 4, 2021 Order to Abate The Appellant did not appeal the decision in that matter within fourteen days of service of the Notice of Decision, mailed to the Appellant's counsel on November 1, 2023 (**Attachment J**).

The Hearing on the issuance of the Declaration of Public Nuisance occurred on October 19, 2023, with the same independent Hearing Officer. At the hearing, the City requested the Hearing Officer to take judicial notice of the record of the prior hearing, including all documentary evidence, witness testimony, and the decision. Appellant and the City also submitted additional documentary evidence in advance of and during the single day Hearing, including photographs of the Property, additional witness testimony from David Miles and Permit Inspector David Carillo. After review and consideration of the documentary evidence, arguments

of the parties, testimony from both sides' witnesses, and the record from the prior hearing, the Hearing Officer issued a Decision on December 13, 2023, denying the appeal. The Notice of Decision concerning the Declaration of Public Nuisance was mailed to the Appellant on January 25, 2024, along with the previous Notice of Decision concerning the Order to Abate and an invoice for \$12,344.37 (**Attachment L**).

On February 8, 2024, the Appellant's counsel filed an Appeal of the Hearing Officer's decision (**Attachment M**) in the Declaration of Public Nuisance matter and requested to have the matter heard before the Oakland City Council. The Appellant's counsel also indicated that the Appellant would like to appeal the decision in the Order to Abate. However, the Notice of Decision provided to the Appellant from the Order to Abate Hearing was mailed to them on November 1, 2023 (**Attachment J**); therefore, the Appellant missed the deadline to timely appeal this decision.

Appellants with Building Maintenance Appeals are eligible to appeal the decision of the independent Hearing Officer within 14 days of receipt of the Notice of Decision pursuant to O.M.C. § 15.04.1.125G. Having submitted an Appeal on February 8, 2024, well after the appeal filing deadline, Appellant's counsel has exhausted all administrative remedies to potentially have the Order to Abate decision reversed.

### **Appeal to City Council**

As the grounds for the Declaration of Public Nuisance Appeal of the independent Hearing Officer's decision, which was submitted by the deadline (**Attachment M**), the Appellant alleges that, "there is no substantial evidence in the record to support the Hearing Officer's decision," and "the Hearing Officer's decision is based on an error of law".

Specifically, the Appellant appeals the decision of the independent Hearing Officer on the following grounds:

- 1) These two matters, the Order to Abate – Habitability Hazards and the Declaration of Public Nuisance are combined within the complaint, and as such the arguments put forth in all three of the hearing dates are applicable, May 23 and 24th, 2023 and October 19th, 2023.
- 2) The City failed to issue a Compliance Plan.
- 3) Permits had been applied for and obtained, prior to 2021.
- 4) There are factual errors on the Declaration of Public Nuisance and the Order to Abate – Habitability Hazards. Permits are currently under review to correct the unpermitted work on the loading dock, canopy and driveway gate (Permits BW23002670 and BW23003601 filed 7/20/23 and 9/26/23 respectively).

Based on the findings of the independent Hearing Officer, and the Appellant's failure to demonstrate how the City erred in issuing the Declaration of Public Nuisance, staff recommends

that the City Council adopt a resolution denying the appeal and upholding the independent Hearing Officer's Decision.

**Applicable Law:**

- O.M.C. § 15.08.020 establishes standards to safeguard life or limb, health, property, and public welfare by regulating and controlling the use occupancy, locations, and maintenance of residential and non-residential buildings, structures, portions thereof and real property within the City.
- O.M.C. § 15.08.140 provides that buildings, structures, real property, and all construction or work for which a permit is required shall be subjected to inspection by the City. O.M.C. § 15.08.080 established §§ authority to the Building Official and designees to enforce all of the provisions of the Code.
- O.M.C. § 15.08.410 establishes that access to an Administrative Hearing is a right for any person adversely affected by an order, decision, or determination made under Section 15.08.350 of this Code. Such parties may appeal by requesting an administrative hearing before a Hearing officer following the procedures set forth in O.M.C. § 15.04.1.125.
- O.M.C. § 15.04.1.125 establishes Administrative Hearing procedures to appeal orders, decisions, or determinations made by the Building Official relative to the application and interpretation of the non-administrative (technical) requirements of this Code. Any person adversely affected by the order, decision, or determination may request an administrative hearing with an independent Hearing officer.
- O.M.C. § 15.04.1.125(C) establishes the Scope of Hearing. The administrative hearing before a Hearing Officer shall be an evidentiary hearing. Only those technical matters or issues specifically raised by the appellant in the request for administrative hearing shall be considered. The appellant and the City may present witnesses and such documentary evidence as are relevant to the issues. The Hearing Officer shall have the power to administer oaths. Upon a showing of good cause by the appellant or the City, the Hearing Officer may request that the City Clerk issue subpoenas under the seal of the City for a witness to appear and testify or to produce documents. Willful failure to appear to testify or to produce documents under subpoena may be punished as an infraction or as an administrative citation. The City has the burden of proof by a preponderance of the evidence.
- O.M.C. § 15.04.1.25(D) determines that the Hearing Officer shall not be an employee of the City and shall be qualified by experience and training to decide on building construction and other matters pertaining to this Code.
- O.M.C. § 15.04.1.25(F) describes that the validity of the Hearing Decisions of the Hearing Officer in all instances shall be final and conclusive unless the appellant files an appeal.

- Appeals of Hearing Officer Decision to Appeals Board (City Council) is described in O.M.C. § 15.04.125(G). Only appeals based on a substantive violation of Chapter 15.04, Chapter 15.08 or the California Building Standards Code may be appealed. This includes Building Code violations, Substandard/Public Nuisance determinations, and orders to abate.
- The appellant must file the appeal within fourteen (14) calendar days of service of the Hearing Officer's determination. The appellant shall file the appeal on a form, under such procedures, and at such location as may be established by the City Administrator. The appellant must state the basis for the appeal and how the decision by the Hearing Officer was in error. The appellant shall pay a fee established for appeals to the Appeals Board in the Master Fee Schedule. O.M.C. § 15.04.1.25(G)(3).
- The Appeals Board's consideration shall be limited to the record established by the Hearing Officer. The Appeals Board shall not consider new evidence unless the proponent shows that the evidence is both newly discovered and material; and could not, with reasonable diligence, have been produced at the hearing before the Hearing Officer. If, the Appeals Board makes such determination, it may hear the additional evidence at a continued hearing, allowing the opposing party to respond, or may remand the matter to the Hearing Officer to consider the new evidence. O.M.C. § 15.04.1.25(G)(4).
- The Appellant shall have the burden of demonstrating that there is no substantial evidence in the record to support the Hearing Officer's decision, or that the decision is based on an error of law. O.M.C. § 15.04.1.25(G)(5).
- The Decision of the Appeals Board shall be final. The limitation period provided pursuant to California Code of Civil Procedure Section 1094.6 shall apply to all petitions filed seeking judicial review of administrative determinations made by the Appeals Board. O.M.C. § 15.04.1.25(H).

### **ANALYSIS AND ALTERNATIVES**

"The appellant must state the basis for the appeal and how the decision by the Hearing Officer was in error." "The appellant shall have the burden of demonstrating that there is no substantial evidence in the record to support the Hearing Officer's decision, or that the decision is based on an error of law" O.M.C. § 15.04.1.125(G).

#### ***Appellant's Arguments and Staff Responses:***

- 1) **Appellant Argument:** These two matters, the Order to Abate – Habitability Hazards and the Declaration of Public Nuisance are combined within the complaint, and as such the arguments put forth in all three of the hearing dates are applicable, May 23 and 24th, 2023 and October 19th, 2023.



**Staff Response:** Although the matters are related due to subject matter, they are legally distinct. The Appellant received separate notices with separate deadlines, filed separate appeals, had separate appeal hearings, and had separate decisions. The Appellant exhausted administrative remedies by not appealing the decision of the Order to Abate to City Council in a timely manner. The Appellant also fails to provide any authority to extend the deadline to file the appeal of the Order to Abate.

**2) Appellant Argument:** The City failed to issue a Compliance Plan.

**Staff Response:** There is nothing within the Municipal Code requiring Code Enforcement to enter compliance plans. Prior to issuing the declaration of public nuisance, the City and Appellant entered a compliance plan in 2014. In the Declaration of Public Nuisance, Code Enforcement did offer the Appellant the ability to meet to discuss a compliance plan if they could not completely and permanently abate the violations before the assessment of civil penalties. The Appellant made no attempt to meet with Code Enforcement to discuss a compliance plan. The Appellant provides no other legal authority showing the City committed an error of law by failing to issue a compliance plan.

**3) Appellant Argument:** Permits had been applied for and obtained, prior to 2021.

**Staff Response:** The Declaration of Public Nuisance states that civil penalties will not stop until the violations have been "completely and permanently" abated. Permit B2002151 was filed on August 21, 2020; however, City records and the testimony of David Carrillo showed that the permit had not been "finalized" until April 4, 2023, after the issuance of both the Order to Abate and Declaration of Public Nuisance. Additionally, permit B2002151 was limited to windows and exterior finishes on the second floor and did not include work related to the canopy, loading dock, warehouse, CMU wall, or front gate and did not include electrical, plumbing, or mechanical work outside of the second floor. Permits BW23002670 and BW23003601 are subject to planning review and were not final by the date of the decision. The violations were not completely and permanently fixed by the date of the decision.

**4) Appellant Argument:** There are factual errors on the Declaration of Public Nuisance and the Order to Abate – Habitability Hazards.

**Staff Response:** No relevant factual errors were identified that would change the outcome of the decision. A factual error by itself is not sufficient to overturn a decision on appeal; the Appellant must show there is not substantial evidence in the record supporting the decision. The "errors" cited by the defendant are not relevant to the outcome (for example, misstating the architects first name) or errors but rather a different analysis of the evidence. The Appellant cites as an error that the hearing decision states they had not obtained permits; however, the record shows that permits had not been "finalized" by the date of the issuance of the Declaration of Public Nuisance. David Miles testified that a violation is not completely and permanently abated until the work is completed and the permit is final and that permits were not complete for violations in the Declaration of Public Nuisance. The Appellant also contends that there

was no evidence for electrical, plumbing, or mechanical work outside of the second story alteration, but this is contrary to the record where the City documented these violations in its Notices of Violations, photographs, Stop Work Orders, witness testimony, and City record of inspections. The Appellant, by their own submissions, admits that permits are still outstanding meaning the underlying violations have not been fixed. Substantial evidence supports the independent Hearing Officer's decision because the violations have not been wholly and permanently abated despite the Appellant having the better part of a decade to fix them.

- 5) Appellant Argument:** Permits are currently under review to correct the unpermitted work on the loading dock, canopy and driveway gate (Permits BW23002670 and BW23003601 filed 7/20/23 and 9/26/23 respectively).

**Staff Response:** This argument contradicts the Appellant's contention that the hearing was not based on substantial evidence as it admits the above stated permits are not final. The Appellant's architect testified that these permits are subject to Planning review. The Appellant already had prior plans denied by the Planning Commission and there is no guarantee that these permits applications will lead to the abatement of the violations. The civil penalties are necessary to ensure the Appellant finalizes the permits.

### ***Policy Alternatives***

The following options are available to the City Council:

1. Deny the appeal and uphold the Hearing Officer's decision finding that the City did not err or abuse its discretion in issuing the June 27, 2022, Declaration of Public Nuisance, thereby allowing the City to proceed with its standard enforcement procedures.
2. Partially grant the appeal as to one or more of the violations being appealed and remand to the Hearing Officer to make findings consistent with Council's ruling.
3. Grant the appeal as to all of the stated grounds for appeal, and remand to the Hearing Officer to make findings consistent with Council's ruling.

### **FISCAL IMPACT**

The total cost of the appeal of the independent Hearing Officer's Decision in the Declaration of Public Nuisance case, including the filing fee, processing fee, and fee for the Hearing Officer services, amounts to \$6,899.00, the Appellant has paid \$3,486.00 of these fees, with \$3,413.00 still outstanding. A breakdown of the costs is included below in **Table 1**. If the Hearing Officer decision is upheld, Appellant will remain responsible for the remaining balance. If the appeal is granted and the Hearing Officer decision is overturned, the City will be responsible for the remaining balance, and will be required to reimburse Appellant for the fees already paid.



Funding is available, in Planning and Building Department Fund  
1.2415.84469.53719.1001024.NB3, if the independent Hearing Officer's decision is overturned.

**Table 1: Cost of Administrative Appeal**

<b>Cost Category</b>	<b>Amount</b>
Appeal Fee	\$ 119.00
Hearing Processing Fee	\$ 922.00
Hearing Officer Invoice	\$ 2,375.00
Appeal to City Council Fee	\$ 2,902.00
Rec & Tech	\$ 581.00
<b>Declaration of Public Nuisance due:</b>	\$ 6,899.00
<b>Fee paid:</b>	\$ 3,486.00
<b>Final Declaration of Public Nuisance due:</b>	\$ 3,413.00

### **PUBLIC OUTREACH / INTEREST**

No outreach was deemed necessary for the proposed policy action beyond the standard City Council agenda noticing procedures because the case is an individual appeal of Building Maintenance violations and does not impact the public.

### **COORDINATION**

This staff report was reviewed by Planning and Building Department, Bureau of Building, the Budget Bureau, and the City Attorney's Office.

### **SUSTAINABLE OPPORTUNITIES**

#### ***Economic:***

There is no impact in economic sustainable opportunities.

#### ***Environmental:***

Code Enforcement activities have environmental benefits by enforcing codes designed to protect the environment, promote safe living conditions, and reduce hazards such as those associated with unsafe electrical wiring, unpermitted construction, and other noncompliant housing elements.

#### ***Race & Equity:***

NA

**ACTION REQUESTED OF THE CITY COUNCIL**

Staff Recommends That The City Council Conduct A Public Hearing And, Upon Conclusion, Adopt A Resolution Denying the Appeal of Appellant 955 57<sup>th</sup> LLC And Upholding The Decision Of The Independent Hearing Officer Regarding The Declaration of Public Nuisance at 955 57<sup>th</sup> Street/5655 Lowell Street.

For questions regarding this report, please contact Michael Johnson, Administrative Analyst II, (510) 238-6497.

Respectfully submitted,



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William Gilchrist,  
Director, Planning and Building Department

Reviewed by:  
Sylvia Ford,  
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Reviewed by:  
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Jestin D. Johnson, City Administrator

Subject: 955 57<sup>th</sup> St./5655 Lowell St. "Appeal to Council" by Property Owner with Complaint  
Number 1303769 for Parcel Number 037A-2746-028-00

Date: May 22, 2024 Page 11

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Attachments (17):

- A. June 28, 2022 Record Comments – July 24, 2013 to June 27, 2022
- B. October 20, 2014 Compliance Plan
- C. January 13, 2020 Notice and Supporting Documentation
- D. March 4, 2020 Notice and Re-Inspection Notice
- E. October 4, 2011 Order to Abate – Habitability Hazards
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