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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

APARTMENT OWNERS ASSOCIATION
OF CALIFORNIA et al.,

Plaintiffs and Appellants,

v.

CITY OF OAKLAND, HOUSING
RESIDENTIAL RENT AND
RELOCATION BOARD,

Defendant and Respondent.

No. A131253

Alameda County Super. Ct.
No. RG09481765)

The question before us is whether the City of Oakland’s Housing Residential Rent & Relocation Board (the Board) had authority to promulgate a regulation setting requirements for evicting tenants from rental units taken off the market due to code violations. The trial court decided the Board had such authority, and denied a petition for writ of mandate and declaratory and injunctive relief brought by the Apartment Owners Association of California (AOA), Michael Wallin, and Jonathan Bornstein (appellants) making a facial challenge to the regulation. We shall affirm the judgment.

I. BACKGROUND

A. Measure EE

The City of Oakland’s Just Cause for Eviction Ordinance was adopted in the November 2002 general election as initiative Measure EE.¹ (*Rental Housing Assn. of Northern Alameda County v. City of Oakland* (2009) 171 Cal.App.4th 741, 749 (*Rental Housing Assn.*)) Measure EE, by its terms, was intended to prohibit a landlord from terminating a tenancy without good cause, and to “protect[] tenants against arbitrary, unreasonable, discriminatory, or retaliatory evictions” According to the Ordinance, the eviction protections “would strengthen and effectuate existing rent control in Oakland” The Ordinance provides that a landlord may not evict a tenant except for one of the grounds enumerated therein. (Measure EE, § 6(A).)

Most pertinent to this case, one of the grounds for eviction is that “[t]he owner of record, after having obtained all necessary permits from the City of Oakland on or before the date upon which notice to vacate is given, seeks in good faith to undertake substantial repairs that cannot be completed while the unit is occupied, and that are necessary either to bring the property into compliance with applicable codes and laws affecting health and safety of tenants of the building, or under an outstanding notice of code violations affecting the health and safety of tenants of the building.” (Measure EE, § 6(A)(10).) This provision goes on: “(a) Upon recovery of possession of the rental unit, owner of record shall proceed without unreasonable delay to effect the needed repairs. The tenant shall not be required to vacate pursuant to this Section, for a period in excess of three months; provided, however, that such time may be extended by the [Board] upon application by the landlord. The [Board] shall adopt rules and regulations to implement the application procedure.” (Measure EE, § 6(A)(10)(a).) The owner is required to offer the tenant the first right to return to the premises and to provide the tenant notice of his or

¹ Measure EE is codified at Oakland Municipal Code (OMC) chapter 8.22.300 et sequitur. We will occasionally refer to Measure EE as the Ordinance. We will refer to its provisions by the section numbers designated in the initiative measure rather than in the municipal code.

her right to do so and of the estimated time to complete the repairs. (Measure EE, § 6(A)(10)(b) & (c).) Landlords are prohibited from recovering possession of a rental unit unless one of the enumerated good causes is stated in the notice and is the landlord's dominant motive to recover possession. (Measure EE, § 6(B)(2).)

Measure EE also sets forth the amount of notice a landlord must give before evicting a tenant. When the cause for eviction is the tenant's nonpayment of rent, violation of a term of the tenancy, refusal to execute a lease extension, willful damage to premises, disorderly conduct, or use of the property "for an illegal purpose including the manufacture, sale, or use of illegal drugs," the landlord must give three days' notice according to the process established in Code of Civil Procedure section 1161. (Measure EE, § 6(B)(3) & (A)(1)-(6).) Where, on the other hand, the landlord seeks to evict a tenant because the tenant has denied the landlord access to the unit, the landlord seeks to use the unit as a principal residence for himself, herself, or a relative, the landlord seeks to undertake repairs to bring the property into compliance with applicable codes or to respond to a notice of code violations, or the owner seeks to remove the property from the rental market under the Ellis Act,² the landlord must give 30 days' notice according to the process established in Civil Code section 1946. (Measure EE, § 6(B)(3) & (A)(7)-(11).) In the case of evictions to allow the landlord to cure code violations (Measure EE, § 6(A)(10)), the landlord must offer the displaced tenant any other available unit. (Measure EE, § 6(C)(1).) Where a landlord recovers possession, or seeks to do so, in violation of section 6(A), the tenant or Board may recover money damages of not less than three times actual damages. (Measure EE, § 7(A)(2).)

B. Regulation 10b

The Board enacted Regulation 8.22.360, entitled "Good Cause Required for Eviction," and in 2009, amended the Regulation to include the provisions at issue here, related to "Removal of Unit(s) or Change of Use Required by Housing, Building or

² The Ellis Act, Government Code section 7060 et sequitur, allows landlords to withdraw residential rental property from the market, subject to certain restrictions.

Planning Code Violation.” Section A.10.b (Regulation 10.b) of that Regulation provides in part: “i. Purpose. The City of Oakland or other regulatory agency may require a Landlord to make repairs or corrections, or cease renting a unit or units in a building because the unit or building has housing, building, or planning code violations. In such cases, often the landlord is unwilling to make such repairs or corrections, or the corrections cannot be feasibly made without taking the unit(s) or building off the market, converting the unit(s) or building to another use, or demolishing the unit(s). This Regulation 8.22.360A(10)(b) applies to foregoing circumstances. Before this Regulation 8.22.360A(10)(b) was enacted, landlords would often evict tenants citing Regulation 8.22.360A(6) herein, which applies to circumstances where a tenant has committed an illegal act on the premises, such as selling controlled substances. In those cases, while the purpose of the eviction was through no fault of their own, tenants were only given three days[’] notice to vacate, and the evictions were often reported to credit reporting agencies as being related to illegal uses of the premises. This Regulation 8.22.360A(10)(b) is intended to provide landlords with an appropriate mechanism for evicting a tenant where a unit is being taken off the rental market due to housing, building, or planning code violations.”³ (Underscoring omitted.)

To effectuate this purpose, Regulation 10b provides that if a building is cited by the City of Oakland or another regulatory agency for housing, building, or planning code violations, the landlord is unable or unwilling to repair or correct the problems, and the landlord can withdraw all of the units from the market under the Ellis Act Ordinance (OMC Reg. 8.22.400 et seq.), then the landlord must follow the procedures in the Ellis

³ The Board also revised section A.6 of Regulation 8.22.360, which dealt with evictions due to illegal use of the premises, to add the provisions that “c. Where a unit has been cited for housing, building, or planning code violations, and the landlord is unwilling or unable to make the necessary repairs or corrections, the tenant will not be deemed to have ‘committed an illegal act on the premises’ pursuant to this Regulation 8.22.360 A.6. Where a unit is being taken off the rental market due to housing, building, or planning code violations, the landlord must follow the procedures found in Regulation 8.22.360 A.10(b) herein to evict the tenant.”

Act Ordinance; if fewer than all units are withdrawn from the market, the landlord must use the procedures in Regulation 10b. (Reg. 8.22.360(A)(10)(b)(ii) & (iii).) Under those procedures, where the landlord cannot or will not make the necessary corrections and will take a unit off the market, the landlord must, among other things, provide a 30-day or 60-day notice period under Civil Code sections 1946 and 1946.1. (Reg. 8.22.360(A)(10)(b)(v)(a).)⁴

C. Trial Court Proceedings

Appellants brought this action for a writ of mandate, declaratory relief, and injunctive relief. According to the petition, AOA is a trade association of housing providers dedicated to preserving and protecting the rights of property owners, Wallin is a tenant and resident of Oakland, and Bornstein is an attorney practicing in the area of landlord-tenant law. Appellants alleged Regulation 10b violated their legal and constitutional rights because, among other things, it was ultra vires and contrary to law. The trial court denied the petition, ruling that Measure EE expressly gave the Board authority to establish procedures for good cause eviction for code violations where a unit would have to be vacant more than three months for needed repairs, and it was “well within this authority that the Rent Board established a process for good cause eviction due to code violations in the rental unit where repairs or corrections are needed, but can never, or will never, be completed.”

II. DISCUSSION

A. Justiciability

Before reaching the merits of this dispute, we must decide if it is justiciable. While expressing its preference that we resolve this matter on the merits, respondent

⁴ Under Regulation 10b, if the city or other public agency has issued a 72-hour notice to vacate because of an imminent hazard, however, the provisions of the Just Cause Ordinance do not apply. (Reg. 8.22.360(A)(10)(b)(iv).)

draws our attention to the question of whether this case is ripe for resolution and whether appellants have standing to bring the action.⁵

Respondent contends this controversy is not ripe for adjudication because the petition does not allege that either AOA's members or the individual appellants own illegal units in Oakland or seek to evict a tenant who occupies such a unit, and that appellants lack standing because the petition does not specify any actual or threatened action that would injure them. The petition alleges that AOA is dedicated to "correcting the injustices of eviction and rent control," that it "seeks to protect the rights of rental property owners against unfair and burdensome regulations," and that the regulations at issue "affect AOA and its members' constitutional and statutory interests with respect to their status as owners of residential rental property in the City of Oakland," but does not allege that any of AOA's members or any other appellant owns rental property that violates applicable codes.

The court in *Sherwyn v. Department of Social Services* (1985) 173 Cal.App.3d 52, 57-58 (*Sherwyn*), explained that "ripeness . . . means that a controversy 'has reached, but has not passed, the point that the facts have sufficiently congealed to permit an intelligent and useful decision to be made. [Fn. omitted.]" [Citation.] Its purpose is to prevent courts from issuing purely advisory opinions. [Citation.] In this regard, 'the ripeness doctrine is primarily bottomed on the recognition that judicial decisionmaking is best conducted in the context of an actual set of facts so that the issues will be framed with sufficient definiteness to enable the court to make a decree finally disposing of the controversy. On the other hand, the requirement should not prevent courts from

⁵ Respondent sought judgment on the pleadings on this ground. The trial court denied the motion. We reject appellants' apparent suggestion that we should not consider the issue of justiciability because the court's ruling on this motion was never appealed and is therefore final. An order denying a motion for judgment on the pleadings is not separately appealable. (*Fraser-Yamor Agency, Inc. v. County of Del Norte* (1977) 68 Cal.App.3d 201, 207.) In any case, lack of standing may be raised at any time in the proceedings. (*Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2006) 136 Cal.App.4th 119, 128 (*Apartment Assn.*).

resolving concrete disputes if the consequences of a deferred decision will be lingering uncertainty in the law, especially when there is widespread public interest in the answer to a particular legal question.’ [Citation.]” In deciding whether a challenge to a law is ripe, we also look at whether its resolution requires the court to speculate about how a public agency will interpret and carry out the law; in *Environmental Defense Project of Sierra County v. County of Sierra* (2008) 158 Cal.App.4th 877, 887, the court noted that a county had made clear how it would interpret certain notice provisions of California’s Planning and Zoning Law, and thus “ ‘there [wa]s a reasonable expectation that the wrong, if any, [in providing inadequate notice of a hearing] [would] be repeated . . . ,’ and the controversy [did] not present only an ‘academic question.’ [Citation.]”

To decide whether the controversy before us is justiciable, we look not only to ripeness but also to the intertwined concept of standing, which considers whether a plaintiff has a cause of action. (*Sherwyn, supra*, 173 Cal.App.3d at pp. 57-58.) In *Apartment Assn., supra*, 136 Cal.App.4th at pp. 122, 127-129, the court rejected a standing challenge in a declaratory relief action that sought to invalidate a rent control ordinance. The plaintiff associations had pleaded they had members who owned dwellings subject to the ordinance, but pleaded no actual or imminent injury. (*Id.* at pp. 124-125, 127.) The court noted that a landlord faced potential treble damages and criminal liability for violating the ordinance, and that declaratory relief had been used in California to test the validity of both penal and nonpenal statutes. (*Id.* at p. 128.) The court went on: “Further, ‘ ‘[a]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.’ ” [Citation.]’ [Citation.] Here, the association plaintiffs satisfy all three criteria. Their individual members could have challenged the validity of the 2002 Ordinance in their own right, the right to a fair rent is germane to the association plaintiffs’ organizational purpose and their facial challenge to the validity of

the ordinance does not require the participation of any individual members.” (*Id.* at p. 129.)

We conclude the controversy before us is likewise justiciable. The petition adequately alleges that AOA has members who own rental property in Oakland, and the procedures to be followed in evicting a tenant are germane to AOA’s organizational purpose. The issues in this facial challenge to Regulation 10b do not require the participation of any individual members. Their resolution does not require speculation; under Regulation 10b, a landlord who wishes to evict a tenant due to cited code violations must comply with notice requirements that appellants contend are illegal and unconstitutional, and the landlord faces potential liability for treble damages and attorney fees for recovering a rental unit unlawfully. (Measure EE, § 7(A)(2).) In the present circumstance, the ripeness and standing requirements are met, and accordingly we will reach the merits of this dispute.

B. The Board’s Authority to Adopt Regulation 10b

Appellants contend Measure EE did not confer on the Board authority to adopt Regulation 10b. Rather, they argue, the Board could properly adopt regulations pertaining to only three procedures specifically mentioned in Measure EE: a hearing procedure for tenants claiming to be members of a protected class in connection with an owner move-in eviction (Measure EE, § 9(g)); an application procedure for landlords claiming disability or hardship in connection with owner move-in evictions (Measure EE, § 9(h)); and an application procedure for landlords seeking an extension of time beyond 90 days to complete repair projects after tenants have temporarily vacated the premises (Measure EE, § 10(a)). As they point out, although Measure EE specifically directs the Board to adopt rules and regulations to implement these hearing and application procedures, it does not include general language authorizing the Board to adopt

regulations to implement the Ordinance. In the absence of any further authorization, they argue, the Board could not properly adopt the regulation at issue here, Regulation 10b.⁶

A regulation that is not within the scope of the authority conferred is void. (*Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 108.) Our function in reviewing the legality of a regulation is to decide whether it is within the scope of the conferred authority, and whether it is “ ‘reasonably necessary to effectuate the purpose of the statute.’ ” (*Agricultural Labor Relations Bd. v. Superior Court* (1976) 16 Cal.3d 392, 411.) These questions “ ‘ come to this court freighted with the strong presumption of regularity accorded administrative rules and regulations.’ ” (*Ibid.*) “An administrative agency’s view of its governing legal authority is entitled to great weight and will be followed unless it is clearly erroneous or unauthorized.” (*Communities for a Better Environment, supra*, 103 Cal.App.4th at p. 109, fn. omitted.)

Moreover, it is well established that “ ‘[a]n administrative agency is not limited to the exact provisions of a statute in adopting regulations to enforce its mandate. “[T]he absence of any specific [statutory] provisions regarding the regulation of [an issue] does not mean that such a regulation exceeds statutory authority” [Citations.]’ [Citation.] The agency is authorized to “ ‘ “fill up the details” ’ ” ’ of the statutory scheme. [Citations.]” (*Association of California Ins. Cos. v. Poizner* (2009) 180 Cal.App.4th 1029, 1047-1048.) The agency “ ‘ “may exercise such additional powers as are necessary for the due and efficient administration of powers expressly granted by statute, or as may fairly be implied from the statute granting the powers.” ’ ” (*Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 824.)

⁶ Another ordinance, the Rental Adjustment Program ordinance, OMC Reg. 8.22.010 et sequitur (the RAP ordinance), which appellants assert was enacted in 1980, regulates rents on certain residential rental properties in Oakland. The RAP ordinance authorizes the Board to develop or amend regulations, subject to city council approval. (OMC Reg. 8.22.040(D)(2).) “Regulations” are defined in the RAP ordinance to mean “the regulations adopted by the board and approved by the City Council for implementation of this chapter” (OMC Reg. 8.22.020.)

Applying these principles, we conclude Regulation 10b was within the Board's powers. Measure EE establishes grounds for eviction and requires either three-day or thirty-day notice to a tenant, depending on the cause of the eviction. (Measure EE, §§ 6(A)(1)-(11) & 6(B)(3).) It specifically contemplates that tenants might need to be displaced if a rental property has been cited for code violations affecting the tenants' health and safety, provides for extensions of the amount of time a tenant may be displaced if more than three months are needed to complete the repairs, and directs the Board to develop implementing regulations for these extensions. (§ Measure EE, § 6(A)(10).) In the case of such evictions, Measure EE requires at least 30 days' notice to be given. (Measure EE, § 6(B)(3).)

What Measure EE does not explicitly address, however, is the amount of notice to be given if repairs cannot or will not be made. Appellants contend that because of that omission, the Board lacks authority to ensure that tenants living in units in which code violations cannot be cured receive the same amount of notice as those living in units in which the violations can be cured. Rather, appellants argue, tenants living in a unit that has been cited for code violations are thereby using the unit for an illegal purpose and thus are entitled to only three days' notice—the same notice provided to tenants who sell, manufacture, or use illegal drugs on the premises, or to those who fail to pay rent, violate a term of the tenancy, damage the premises, or engage in disorderly conduct. (Measure EE, § 6(B)(3).) This result is plainly at odds with the intent of Measure EE to ensure adequate notice to tenants displaced due to code violations. In these circumstances, Regulation 10b falls within the rule that an agency may enact regulations to fill in the details of the statutory scheme and that it may exercise powers that may be fairly inferred from that scheme.

Our conclusion is bolstered by *Rental Housing Assn.*, in which our colleagues in Division Three of this court considered a variety of challenges to Measure EE. (*Rental Housing Assn.*, *supra*, 171 Cal.App.4th 741.) In rejecting the contention that certain provisions requiring a warning notice and an opportunity to cure the offending conduct were void for vagueness, the court reasoned that any arguable vagueness in the Ordinance

had been cured by regulations enacted by the Board specifying the amount of time a tenant would be given to cure a violation. (*Id.* at pp. 763-764.) The court specifically rejected the argument “that the Board lacked authority to adopt regulations to aid in the efficient administration of Measure EE.” (*Id.* at p. 764, fn. 18.)⁷

Appellants advance a number of other arguments to support their contention that Regulation 10b was improper. We find none of them persuasive. They contend that Regulation 10b impermissibly adds a twelfth cause for eviction, in conflict with the 11 grounds established in Measure EE. Not so. One of the grounds for a landlord to recover possession of a rental unit is the existence of cited code violations. (Measure EE, § 6(A)(10).) Regulation 10b likewise provides for a landlord to recover possession if there are cited code violations, but fills in the gaps of Measure EE by establishing procedures to be used where the unit is to be taken off the market due to those violations.

Appellants argue Measure EE, which requires a landlord to plan repairs in good faith and give the tenant notice of the expected date that the unit will be ready for habitation, is inconsistent with Regulation 10b, which contemplates that the unit will be taken permanently off the market and that this inconsistency violates due process. (Measure EE, § 6(A)(10)(c).) Regulation 10b, however, also requires the landlord to give the tenant notice that if the unit is restored to the market, the tenant must be given the

⁷ In doing so, the court noted that the Board had authority through its originating ordinance (apparently the RAP ordinance) to develop rules and procedures to implement the ordinance, subject to city council approval. (*Rental Housing Assn.*, *supra*, 171 Cal.App.4th at p. 764, fn. 18.) The city council had approved the regulations at issue in *Rental Housing Assn.* and had stated that “ ‘the Just Cause Ordinance authorizes the Rent Board to adopt regulations implementing the Just Cause Ordinance, without approval by the City Council.’ ” (*Ibid.*) Thus, the court in *Rental Housing Assn.* appears to have relied in part on the Board’s general authority under the RAP ordinance to adopt regulations to implement that ordinance. Appellants argue that the Board’s general authority to adopt regulations under the *RAP* ordinance (OMC Reg. 8.22.020 & 8.22.040(D)(2)) does not confer on the Board authority to promulgate general regulations under a later-enacted Ordinance, Measure EE. Even if we accept their view, however, we are confident that the regulation at issue here lies within the Board’s power under Measure EE.

opportunity to return. (Reg. 8.22.360(A)(10)(b)(v)(B)(4).) Rather than conflicting with Measure EE, Regulation 10b fills in its details—specifically, the detail of how a landlord may recover possession of a property where there are code violations that cannot or will not be cured.

Appellants also suggest that tenants themselves may create a code violation by using a commercial or industrial property for residential purposes in violation of their lease agreements and City codes, and thus should be entitled to no more than the three days’ notice provided to tenants who use a property for illegal purposes. This conjectural possibility appears to us to be an illegal use covered by Regulation 8.22.360A(b), but even if it is not, it is not a sufficient basis for invalidating Regulation 10b in its entirety. The Board did not exceed its authority in adopting Regulation 10b, and we will not second-guess its judgment.

III. DISPOSITION

The judgment is affirmed.

RIVERA, J.

We concur:

RUVOLO, P.J.

REARDON, J.