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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

NOB HILL ASSOCIATION et al.,

Plaintiffs and Respondents,

v.

CITY & COUNTY OF SAN FRANCISCO

et al.,

Defendants and Appellants;

CALIFORNIA MASONIC MEMORIAL
TEMPLE,

Real Party in Interest and Appellant.

A132779

(San Francisco County
Super. Ct. No. CPF10510365)

Defendants City and County of San Francisco, Board of Appeals for the City and County of San Francisco, and zoning administrator for the City and County of San Francisco (hereafter collectively referred to as the city), and real party in interest California Masonic Memorial Temple (the Temple), separately appeal from a June 28, 2011, judgment granting a peremptory writ of mandate concerning the use of the Nob Hill Masonic Center (Center), which is owned by the Temple. We agree with appellants that the trial court erred in setting aside a finding purportedly made in the zoning administrator's letter of determination (LOD), dated September 10, 2009. Accordingly, we will reverse the judgment and direct the trial court to vacate its writ of mandate and enter a new judgment denying the petition for writ of mandate.

In a writ petition filed in the trial court, respondents Nob Hill Association and other neighborhood groups challenged a board of appeals decision upholding the zoning

administrator's LOD, dated September 10, 2009, which was issued at the request of the Temple regarding its current operation of the Center. The zoning administrator found the Center's operation as a commercial assembly and entertainment venue was a legal nonconforming use. The zoning administrator also commented that "if [the Temple] desires to enlarge or intensify the nature of the existing operations in a manner that would preclude . . . authorization under Section 185(e),^[1] it may be appropriate to seek Conditional Use authorization through the process described in Section 182(b)(1).^[2] [The Temple has] not requested, nor are we opining on any specific changes in operation to the Center that may constitute intensification, and therefore jeopardize the existing nonconforming status."

In its statement of decision, the trial court found that there was substantial evidence to support the zoning administrator's finding that the Center's operation was currently a legal nonconforming use, which determination is not at issue on this appeal. However, the trial court determined that the zoning administrator had erred "in *finding* that the proposed renovation for the Center could be approved through the conditional use authorization pursuant to [Planning Code] section 182 (b)(1) because the contemplated use is not permitted in the Polk Street NCD." (Italics added.) In its judgment, the trial court directed the issuance of a writ, remanding the proceedings to the city and commanding it to set aside that portion of the zoning administrator's LOD, "*finding* that the proposed renovation of the Masonic Memorial Temple could be approved through conditional use authorization pursuant to Planning Code Section 182(b)(1), and/or allowing a conditional use application for the Masonic Memorial Temple pursuant to Planning Code Section 182(b)(1)." (Italics added.)

¹ San Francisco Planning Code section 185, subdivision (e), authorizes the Planning Commission to approve continued operations in their current nonconforming use.

² Pertinent to this appeal, San Francisco Planning Code section 182, subdivision (b)(1), "authorizes the Planning Commission to change the nonconforming assembly and entertainment use to a conforming 'Other Entertainment' use (because the property is located within 1/4 mile of a neighborhood commercial district [NCD]) and then consider a conditional use [application] to enlarge or intensi[f]y the Other Entertainment use."

We agree with appellants that the trial court erred in setting aside a portion of the zoning administrator's LOD regarding a prospective change in the use of the Center. At the time of the issuance of the LOD there was no proposed change in use of the Center under consideration by the zoning administrator. Rather, the zoning administrator merely commented that if the Temple wanted to enlarge or intensify the Center's existing operations it might be appropriate to submit a conditional use application as described in San Francisco Planning Code section 182(b)(1). The zoning administrator made no finding that such a conditional use application would or should be allowed or approved by the Planning Commission, which has the exclusive jurisdiction to hear and decide such requests, subject to later review by the board of supervisors. (San Francisco Charter, section 4.105.) Thus, the trial court should not have issued a writ, commanding the city to set aside a finding not made by or within the jurisdiction of the zoning administrator. (See generally *Sierra Club v. San Joaquin Local Agency Formation Com.* (1999) 21 Cal.4th 489, 510 ["[a]dministrative agencies must be given the opportunity to reach a reasoned and final conclusion on each and every issue upon which they have jurisdiction to act before those issues are raised in a judicial forum".])³

We therefore reverse the judgment granting writ relief, and on remand, we will direct the trial court to vacate its writ of mandate and enter a new judgment denying the petition for a writ of mandate.⁴

³ In light of our determination, we do not need to address the parties' other contentions.

⁴ The Temple requests that we take judicial notice of two public documents - the "San Francisco Board of Appeals Agenda for Regular Meeting of December 9, 2009," and the "San Francisco Board of Appeals Agenda for Regular Meeting of January 13, 2010." Because the documents are not necessary to resolve this appeal, we deny the request as moot.

We deny the parties' joint motion to vacate the trial court's judgment pursuant to the requirements for a stipulated reversal of judgment under Code of Civil Procedure, section 128, subdivision (a)(8). After the filing of the briefs on this appeal, the parties informed us they had entered into a settlement agreement concerning the operation of the Center. However, they agree, and we concur, that the settlement agreement does not render the appeal moot. We have therefore decided the appeal on its merits.

DISPOSITION

The judgment is reversed. On remand the trial court shall vacate its writ of mandate and enter a new judgment denying the petition for a writ of mandate. The parties are to bear their own costs on appeal.

Jenkins, J.

We concur:

McGuinness, P. J.

Pollak, J.