

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

BRUDER, LLC,

Plaintiff and Appellant,

v.

CITY OF OAKLAND,

Defendant and Respondent.

A136256

(Alameda County
Super. Ct. No. RG10550660)

Plaintiff Bruder, LLC (Bruder) is the owner of real property in the City of Oakland (City). Prior to Bruder's purchase of the real property, the City had declared it a public nuisance, but the previous owner had done little to abate the problems. Following the purchase, Bruder filed an administrative appeal of all regulatory actions taken by the City with respect to the property. The hearing officer affirmed the City's finding of a public nuisance and found Bruder liable for charges assessed against the prior owner, but he limited Bruder's civil penalty to \$3,000. Claiming the hearing officer's decision was intended to limit its financial liability to \$3,000, Bruder tendered this amount to the City when seeking the permits necessary for further abatement. When the City insisted on the payment of other charges, Bruder filed a petition for a writ of mandate to require the City to accept its tender. The trial court sustained a demurrer to the petition. We affirm.

I. BACKGROUND

Bruder's "Third Amended Petition for Writ of Mandate" (petition), filed after the trial court had sustained two prior demurrers with leave to amend, alleged Bruder is the owner of a parcel of real property in Oakland (the property). In 2009, Bruder filed an

administrative appeal challenging “any and all citations” filed by the City against the property, which the City had found to contain “undesirable conditions” and to constitute a nuisance.

The petition attached a copy of the hearing officer’s written decision (decision). In the decision, the hearing officer first summarized the documentary evidence presented at the hearing. This evidence demonstrated the City inspected the property in March 2007, prior to Bruder’s purchase of it, in response to a complaint of unapproved alterations and improper occupancy of an office space. The inspection confirmed the unlawful occupancy and found “an overgrowth of vegetation and inoperable vehicles.” For several months, the then-owner of the property took no action to abate the violations and resisted the City’s attempts to inspect further. In August, the property was cleaned by a “City contractor,” but no further progress was made through the end of the year and into April 2008 in correcting the substandard conditions. In May 2008, a City inspection found the “[f]ront building, formerly the office,” was being used as a habitation, unpermitted modifications had been made to the electrical system, bathroom, and windows, and the garage roof was deteriorated. The City ordered the property to be vacated in October 2008 and began making financial charges against the owner. In October 2009, the City requested that PG&E terminate utility service to the property. By this time Bruder was the owner, having purchased the property in April 2009.

Two city inspectors testified at the hearing in support of the City’s finding of a public nuisance. A representative of Bruder, Athan Magganas, testified that the office building had been demolished, leaving only the garage.¹ Magganas disputed whether any conditions remained at the property requiring abatement, contending none had ever existed to his knowledge, asserting demolition of the front building had cured any violations that might have existed, and claiming confusion over which building the alleged continuing violations referred. An inspector testified Bruder would be required to

¹ The relationship between Bruder and Magganas was not explained in the decision, but it is clear Magganas claimed a proprietary interest in the property, presumably through Bruder.

pay the assessed fees and penalties and enter into a “Compliance Plan” before any further permits would be issued to cure the continuing violations. Magganas said he had been told he would be required to pay \$365,000 in charges, although the City’s estimate at the hearing was \$35,000.

It is not possible from the decision to determine the nature and extent of the financial charges made by the City against the property. Although the decision expressly mentions City letters imposing charges of \$7,000 in October 2009 and \$2,000 in May 2010, there is no indication a detailed explanation was provided for the City’s estimate of \$35,000 in total charges owing. Bruder does not appear to have challenged any specific assessments by the City, instead taking the position none were valid because Bruder should not be held responsible for assessments predating its ownership and had cured existing violations with the demolition.

The decision was highly critical of Magganas, finding not credible his claim he was unaware of the existence of violations when he purchased the building. Because the hearing officer believed Bruder’s purchase price for the property reflected the presence of these violations, he rejected Magganas’s argument that the imposition of “fines and fees” for preexisting violations was improper. The hearing officer held that property purchasers must take financial responsibility for preexisting violations, including payment of “the assessed fees which the conditions caused.”

The hearing officer also found Magganas had engaged in “either subterfuge or studied ignorance” in his testimony regarding the continuing existence of code violations, concluding Magganas either was not “genuinely confused” about the existence of violations or was confused only because he was unfamiliar with the property and “kept his eyes closed to avoid seeing any problems while he was there.” According to the hearing officer, photographs of the remaining building, taken in 2010, showed evidence of occupancy and various violations, “notwithstanding [Magganas’s] denial or claim of ignorance.”

The hearing officer ultimately found that several violations existed in 2008, and affirmed the City’s finding that the property constituted a public nuisance. He set the

“Civil Penalty” at \$3,000 “through the date of mailing of this Decision” and imposed a further civil penalty of \$200 per day after 75 days if Bruder had not entered into a compliance plan. That penalty increased to \$500 per day after 100 days.

The decision did not address the payment or validity of any specific charges other than the civil penalty. In discussing his decision regarding the imposition of a civil penalty, however, the hearing officer stated: “At times, it seemed as if [Magganas] vowed he would not enter into a Compliance Plan, which will require his payment of fees. . . . The Hearing Officer hopes he does. Further civil penalties are stayed from accruing for 75 days, which should be sufficient for [Magganas] to recover from his injured pride and to act to protect his economic interests. . . . [Magganas], given his expressed attitude, will require additional time and cogitation to overcome his objection in ‘principle’ to paying the necessary fees. Increased civil penalties are imposed if it takes even longer for [Magganas] to stop objecting and take appropriate action.”

Following issuance of the decision, the petition alleged, Bruder had “attempted to comply with the Decision by promptly tendering the \$3000 [civil penalty] to the City and further tendering a compliance plan.” The City refused to accept the check, taking the position the decision left in place nonpenalty charges against the property, which amounted to nearly \$30,000.

The petition sought an order requiring the City to accept a payment of \$3,000 as satisfaction for Bruder’s debt in connection with the property, to reimburse to Bruder payments allegedly paid “through taxes,” and to preclude the City from imposing certain other charges. The petition also sought damages for loss of use of the property and attorney fees.

In its demurrer to the petition, the City argued the decision did not reverse any nonpenalty charges, leaving the City free to insist on their payment. Bruder’s opposition argued the hearing officer intended to overturn all charges other than the \$3,000 civil penalty. The trial court sustained the demurrer without leave to amend and entered judgment for the City, explaining the petition “fails to sufficiently allege facts to support

that the City has violated a duty to comply with the Administrative Decision by refusing to accept only the \$3,000 offered by Petitioner.”

II. DISCUSSION

Bruder argues the trial court erred in sustaining the demurrer to its petition because the hearing officer’s decision limited its total financial liability to the City in connection with the property to the \$3,000 civil penalty and the City was legally mandated to accept that amount.

“On review from an order sustaining a demurrer, ‘we examine the complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory, such facts being assumed true for this purpose. [Citations.]’ [Citation.] We may also consider matters that have been judicially noticed.” (*Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 42.) “While the ‘allegations [of a complaint] must be accepted as true for purposes of demurrer,’ the ‘facts appearing in exhibits attached to the complaint will also be accepted as true and, if contrary to the allegations in the pleading, will be given precedence.’ ” (*Brakke v. Economic Concepts, Inc.* (2013) 213 Cal.App.4th 761, 767.)

“A writ of mandate ‘may be issued by any court . . . to compel the performance of an act which the law specifically enjoins, as a duty resulting from an office, trust, or station’ (Code Civ. Proc., § 1085, subd. (a).) The petitioner must demonstrate the public official or entity had a ministerial duty to perform, and the petitioner had a clear and beneficial right to performance. [Citations.] . . . [¶] Generally, mandamus is available to compel a public agency’s performance or to correct an agency’s abuse of discretion when the action being compelled or corrected is ministerial. [Citation.] ‘A ministerial act is an act that a public officer is required to perform in a prescribed manner in obedience to the mandate of legal authority and without regard to his [or her] own judgment or opinion concerning such act’s propriety or impropriety, when a given state of facts exists.’ ” (*AIDS Healthcare Foundation v. Los Angeles County Dept. of Public Health* (2011) 197 Cal.App.4th 693, 700.)

We agree with Bruder that if the hearing officer limited Bruder’s financial liability to the \$3,000 civil penalty, the City had a ministerial duty to issue Bruder appropriate permits for correction of the remaining substandard conditions on the property upon tender of that amount and an appropriate compliance plan. Given the standard of review for a demurrer, we exercise our independent judgment in determining whether the hearing officer’s decision actually imposed such a duty.

Pursuant to the Oakland Municipal Code (OMC), the City has the authority to declare any building “to be Substandard and a Public Nuisance” upon finding the structure is unsafe. (Oak. Mun. Code, § 15.08.340, subd. (A).) When the City declares a building to be a public nuisance, it must “commence proceedings to cause the vacation and either the repair and rehabilitation or demolition of the building,” and the City must secure the building against unauthorized entry. (*Id.*, §§ 15.08.350, subd. (A), 15.08.380, subd. (B).)

When the City finds a violation of the building code, the “violator shall be liable for such costs, expenses, disbursements, and attorneys’ fees paid or incurred by the City . . . in the correction, abatement and prosecution of the violation.” (Oak. Mun. Code, § 15.04.030, subd. (B).) If the City is required to incur costs in the abatement of code violations, “[t]he fees and costs incurred and the penalties assessed and the interest accrued . . . in repairing, cleaning, remediating, removing, or demolishing a building . . . shall be charged against the property and owners.” (*Id.*, § 15.08.130, subd. (A).) The City may also impose fees for “[p]ermit, plan review, processing, investigation, [and] abatement,” among “other relevant” matters. (*Id.*, § 15.04.065.)

In addition, the City can impose a civil penalty to effect the abatement of a public nuisance. (Oak. Mun. Code, §§ 1.08.020, subd. (A)(3), 1.08.030, subds. (A), (B), 1.08.040, subd. (A).) Under the OMC, “[c]ivil penalties . . . are in addition to any other administrative or legal remedy which may be pursued by the city to address violations of the codes and ordinances identified in this chapter.” (*Id.*, § 1.08.020, subd. (B); see also § 1.08.090.)

A building owner can seek an administrative hearing to appeal the City's determination that a building is a public nuisance. (Oak. Mun. Code, § 15.08.410, subd. (A).) The scope of any such hearing is limited to “[o]nly those matters or issues specifically raised” by the petitioner's request. (*Id.*, § 15.08.430.)

With this background, we have no hesitation in concluding the hearing officer did not intend to limit Bruder's financial liability to the \$3,000 civil penalty. Initially, there is no question the OMC treats civil penalties as distinct from the other types of fees and costs that might be charged against the owner of a property declared to be a public nuisance. The OMC states the City is entitled to charge a property owner for any expenses incurred by the City in acting to abate the nuisance and the costs of any proceedings, in addition to ordinary permit and other fees. (Oak. Mun. Code, §§ 15.04.030, subd. (B), 15.04.065, 15.08.130, subd. (A).) These are expressly stated to be independent of any civil penalty that might be imposed to cause the owner to effect abatement. (*Id.*, § 1.08.020, subd. (B).) Because the OMC clearly and unambiguously distinguishes between fees, costs, and penalties, there is no reason to assume the hearing officer intended to address the payment of fees and costs when he discussed the applicable civil penalty.

The hearing officer's decision manifests an awareness of the distinction between fees and costs and the civil penalty. As noted above, in discussing his limitation of the civil penalty, the hearing officer, after noting compliance would require the payment of fees, stated Magganas “will require additional time and cogitation to overcome his objection in ‘principle’ *to paying the necessary fees. Increased civil penalties are imposed* if it takes even longer for [Magganas] to stop objecting and take appropriate action.” (Italics added.) The hearing officer again referred to both fees and penalties in his concluding paragraph, stating Magganas “should not view the *fees and fines* as personal.” (Italics added.) Plainly, the hearing officer did not view the two as interchangeable.

Bruder argues the City has never distinguished between civil penalties and other types of fees imposed on the property, but the record contradicts this assertion. Attached

as an exhibit to the petition is an accounting provided by the City to Bruder of outstanding charges associated with the property. Out of total charges of \$29,492.60, the only penalty assessed is the \$3,000 found by the hearing officer. The remaining charges are all described as nonpenalty fees and costs.

Bruder's argument that the hearing officer did not intend to require it to pay fees and other charges in addition to the civil penalty is contradicted by the language of the decision itself. The hearing officer twice states that Bruder will be required to pay fees in addition to the civil penalty. The discussion quoted in the preceding paragraph expressly anticipates that proceeding with the cleanup of the property "will require [Bruder's] payment of fees." Further, in rejecting Bruder's contention that it should not be responsible for the prior owner's violations, the hearing officer held that Bruder must pay "the assessed fees which the conditions caused."

It is true, as Bruder argues, the hearing officer did not expressly evaluate the validity of any particular fee or cost, despite Bruder's intent to challenge every action the City had taken in connection with the property. This is a result of Bruder's approach to the appeal, rather than a lack of diligence by the hearing officer. Bruder does not appear to have challenged the validity of any specific fee or cost at the administrative hearing. Instead, Magganas argued Bruder had remediated the property by demolishing the office building and should not be held responsible for any charges incurred by the prior property owner. When the hearing officer rejected these positions, there was nothing further for him to address in connection with the charges that had been imposed. In the absence of evidence that particular charges were improper, the hearing officer's rejection of Bruder's general arguments necessarily required the conclusion that all outstanding charges were properly imposed.

Because the decision clearly requires Bruder to pay outstanding nonpenalty charges, we find no abuse of discretion in the trial court's denial of leave to amend. Bruder has stated no set of facts that could be alleged to cure the defect in its pleading.

Finally, we note that all nonpenalty fees and costs became finally determined when no timely challenge was filed to the hearing officer's decision. The time has passed

for any further challenge to the fees and costs outstanding at the time of Bruder's administrative hearing. (Oak. Mun. Code, §§ 15.08.450, 15.08.460.)

III. DISPOSITION

The judgment of the trial court is affirmed.

Margulies, Acting P.J.

We concur:

Dondero, J.

Sepulveda, J.*

* Retired Associate Justice of the Court of Appeal, First Appellate District assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.