Filed 4/30/19 Messick v. County of Yuba CA3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yuba)

JON A. MESSICK et al., Plaintiffs and Respondents, v. COUNTY OF YUBA et al., Defendants and Appellants.	C080758 (Super. Ct. No. YCSCCVPT15000421)

A Yuba County code enforcement official determined that a public nuisance existed on real property belonging to Jon and Amy Messick. He issued an order to abate the nuisance, informing the Messicks of their right to request an abatement hearing and a hearing to determine administrative penalties, but the Messicks did not request a hearing. Following an accounting hearing, the Yuba County Board of Supervisors (Board) ordered that $15,974.51 in administrative costs and penalties be assessed against the Messicks' property, and that a notice of abatement lien be recorded. The Messicks filed a petition for writ of administrative mandamus challenging the Board's decision. The trial court

granted the petition and ordered the County, the Board, and individual supervisors (collectively defendants) to set aside the Board's decision.

Defendants now contend (1) the trial court lacked jurisdiction to consider the merits because the Messicks failed to exhaust their administrative remedies, (2) substantial evidence supports the Board's findings, and (3) even if the trial court had jurisdiction, it exceeded the scope of its review.

We conclude that although the Messicks did not participate in an abatement hearing or a hearing to determine administrative penalties, they did participate in an accounting hearing that was broad enough to permit consideration of the reasonableness of the administrative costs and penalties. Nevertheless, it appears from this record that the Board did not realize it had discretion to consider the reasonableness of the administrative costs and penalties. Under the circumstances, the trial court was correct in directing defendants to set aside the Board's decision, but we will further direct the trial court to remand the matter to the Board so that it may exercise its discretion in accordance with sections 7.36.665 and 7.36.760, subdivision (c) of the Yuba County Ordinance Code.[1]

BACKGROUND

The Messicks owned real property in Yuba County which they rented to tenants. The tenants planted marijuana on the property. Code Enforcement Officer John Jacenich observed marijuana plants growing over a fence and told the tenants to remove the plants.

When the plants were not removed, Code Enforcement Officer Jeremy Strang issued to the Messicks and their tenants a notice and order to abate a public nuisance (the order to abate). The order to abate said the use and condition of the property violated

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[1] Undesignated ordinance references are to the Yuba County Ordinance Code.

Yuba County ordinances because there were more than six mature marijuana plants, the plants were in public view, and the plants were located within the setback.

The order to abate required the Messicks and their tenants to correct or remove all code violations by a specified date. It informed them that administrative penalties in the amount of $2,800 per day had begun to accrue and would continue to accrue until compliance was verified by the enforcing officer. It added that they could file a written request for a hearing within 10 days to contest the existence of a public nuisance or the imposition of administrative penalties. In addition, the order to abate said that if the Messicks failed to request a hearing, the County would assert, in a judicial proceeding to enforce the order of abatement, that the Messicks had waived any defenses. The Messicks did not file any written request for a hearing.

Officer Strang subsequently inspected the property and confirmed that the marijuana plants had been removed. He issued a notice of hearing, asking the Messicks to appear before the Board to show cause why costs and penalties should not be assessed against their property and why an abatement lien should not be recorded. The notice said the Messicks would be heard on whether the accounting of the costs and penalties was accurate and reasonable and whether such costs and penalties should be assessed and a lien recorded.

Officer Strang testified at the hearing that the County permitted six marijuana plants to be planted outdoors, but 32 mature marijuana plants were observed at the Messicks' property. According to Officer Strang, the marijuana plants were in public view and within the mandatory setbacks. According to Officer Strang, no one requested a hearing on the issue of whether a public nuisance existed.

Mr. Messick received the order to abate and when he went to serve his tenants with eviction papers, the tenants had already removed the marijuana plants. He admitted that sometime before he received the order to abate, he received a letter from the County informing him that his tenants were building a fence consistent with marijuana

cultivation, but Mr. Messick did not ask his tenants about it, did not visit the property, and did not know the tenants were growing marijuana. Mr. Messick said he forwarded the County's letter to his tenants and told them that if they planned to grow marijuana they had to be aware of the County ordinances. Mr. Messick said he did everything he could after he received notice of the code violations and should not be penalized. He said by law he could not correct the code violations and it took time to evict a tenant. He also complained that he was not notified of the code violations when code enforcement first observed them, pointing out that Officer Strang gave the tenants five days to abate but did not give Mr. Messick any time to correct the problems before imposing penalties.

The Board determined that administrative and abatement costs were properly incurred. It concluded, however, that the amount of administrative penalties should be reduced by one day (a reduction of $2,800, reducing the total penalties from $14,000 to $11,200). The Board ordered that administrative costs and penalties in the total amount of $15,974.51 be assessed against the property and a notice of abatement lien be recorded.

The Messicks filed a verified petition for writ of administrative mandamus pursuant to Code of Civil Procedure section 1094.5. Following a hearing, the trial court granted the petition and ordered defendants to set aside the Board's decision. The trial court ruled that the purpose of the Board hearing was to determine whether the charges should be assessed, and was not limited to whether the charges were accurate, because the Board considered the fairness of holding the Messicks accountable under the circumstances. The trial court also said the language defining the scope of the accounting hearing was broad and inclusive. The notice advised that any defense could be raised at the hearing and the ultimate question of whether such costs and penalties should be assessed would be decided. The trial court said it was obvious the Board of Supervisors evaluated the reasonableness and propriety of the charges. Although the trial court said substantial evidence supported the Board's reduction of the penalty, it ultimately

concluded that under section 7.36.220, subdivision (c), the Messicks were not responsible for any of the charges, because the tenancy created a legal impediment to abatement by the landlord.

DISCUSSION

Defendants argue the trial court lacked jurisdiction because the Messicks failed to exhaust their administrative remedies by requesting administrative review of the order to abate. Defendants claim the trial court could only consider whether the accounting for the administrative penalties and costs was reasonable and accurate.

We have reviewed the Yuba County Ordinance Code (the ordinances) in effect during the relevant time period. Articles 5, 6 and 7 of the ordinances provided for two types of hearings: abatement hearings and hearings to determine administrative penalties. (§ 7.36.510.) Those hearings made available to the Messicks certain administrative remedies. (§§ 7.36.420, 7.36.625, 7.36.628, 7.36.638, 7.36.640, 7.36.660, 7.36.665, 7.36.670, 7.36.720, 7.36.730, 7.36.760, 7.36.780, 7.40.440.) The Messicks did not seek relief under the procedure set forth in Article 6 of Chapter 7.36 of the ordinances for challenging the enforcement official's determination that a public nuisance existed on their property and should be abated. They also did not seek relief under the procedure set forth in articles 6 and 7 of chapter 7.36 of the ordinances for challenging the imposition of administrative penalties. Accordingly, the trial court lacked jurisdiction to decide the claims that the Messicks should have presented at an abatement hearing or a hearing to determine administrative penalties. (*Noonan v. Green* (1969) 276 Cal.App.2d 25, 31.) This included whether the Messicks were "accountable" for the code violations, and whether they were eligible for the exemptions set forth in section 7.36.220, subdivision (c) and section 7.36.770, subdivision (b). We also do not consider the constitutional and procedural challenges asserted by the Messicks because they were not asserted in the administrative proceeding or the trial court.

But the Messicks did participate in the accounting hearing pursuant to section 7.36.760, subdivision (b). At that hearing, the Messicks were entitled to be heard on whether the accounting and the costs included were "accurate and reasonable." (§ 7.36.665.) And the Board could consider factors "including, but not limited to, the danger to public health, safety and welfare represented by the violation, recidivism and any economic benefit associated with noncompliance." (§ 7.36.760, subd. (c).) The phrase "including, but not limited to" is a phrase of enlargement, indicating that the factors listed in the code section were illustrative and were not exhaustive. (*LT-WR, L.L.C. v. California Coastal Com*. (2007) 151 Cal.App.4th 427, 805; *In re Johnny M.* (2002) 100 Cal.App.4th 1128, 1134.) The Board was, therefore, required to consider factors relating to the violator, such as recidivism, "[i]n reaching a decision concerning any administrative penalty." (§ 7.36.760, subd. (c).) Section 7.36.760, subdivision (c) did not limit the Board's consideration to factors related to the accuracy of an accounting. The language of sections 7.36.665 and 7.36.760, subdivisions (b) and (c) does not support defendants' claim that the Board was limited to considering the accuracy of the administrative penalty at the accounting hearing.

Because the Messicks exhausted the administrative review procedure provided in articles 6 and 7 of chapter 7.36 for an accounting hearing, they may obtain judicial review of the Board's decision regarding the reasonableness of the administrative penalties and costs.

The failure of a local agency to act in accordance with an ordinance is subject to challenge in an administrative mandamus proceeding. (Code Civ. Proc., § 1094.6, subd. (a); *Civil Service Assn. v. Redevelopment Agency* (1985) 166 Cal.App.3d 1222, 1226; see also *Martin v. Riverside County Dept. of Code Enforcement* (2008) 166 Cal.App.4th 1406, 1410-1412.) Under section 1094.5, a trial court determines whether the local agency acted without or in excess of its jurisdiction, abused its discretion in a manner that was prejudicial, or denied the petitioner a fair trial. (Code

Civ. Proc., § 1094.5, subd. (b); *Clary v. City of Crescent City* (2017) 11 Cal.App.5th 274, 283.) Abuse of discretion is established if the local agency did not proceed in the manner required by law. (Code Civ. Proc., § 1094.5, subd. (b).) On appeal, we review the administrative record to determine whether the Board based its determination on an error of law. (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 144; *McGuire v. Employment Development Dept.* (2012) 208 Cal.App.4th 1035, 1041; *Auburn Woods I Homeowners Assn. v. Fair Employment & Housing Commission* (2004) 121 Cal.App.4th 1578, 1583-1584 [if the agency committed errors of law, the trial and appellate courts perform essentially the same function].)

Here, Supervisor Vasquez suggested reducing the amount of the penalties from four days to one day in light of Mr. Messick's prompt response to the order to abate. Supervisors asked Mr. Messick about what he knew regarding the activities of his tenants and what he did in response to the information provided to him, but the Board did not adopt Supervisor Vasquez's suggestion to reduce the penalties to just one day. Instead, Chairperson Griego said the issue before the Board was limited to whether the arithmetic was correct. An attorney and Officer Strang confirmed Chairperson Griego's understanding about the limited issue before the Board. The Board's decision does not discuss whether the penalties and costs sought to be assessed were reasonable, and it does not apply the factors described in section 7.36.760, subdivision (c). On this record, we see no indication that the Board evaluated the reasonableness of the charges.

It is true that the Board reduced the administrative penalty from five days to four days, but the record indicates that was based on evidence that the marijuana plants were present at the property for only four days (September 22 through 25). Because the record indicates the Board believed it could not consider the reasonableness of the costs and penalties, and because it did not consider the factors set forth in the ordinances, we will direct the trial court to remand the matter to the Board so it can exercise its discretion. (Code Civ. Proc., § 1094.5, subd. (f) [where a judgment commands that a decision be set

aside, the court may order reconsideration of the cause in light of the court's opinion, but the judgment shall not limit or control in any way the discretion legally vested in the administrative entity].)

DISPOSITION

The judgment is affirmed. The trial court is directed to remand the matter to the Yuba County Board of Supervisors so it can exercise its discretion in accordance with sections 7.36.665 and 7.36.760, subdivision (c) of the ordinances. The Messicks shall recover their costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1), (5).)

/S/
MAURO, J.

We concur:

/S/
BLEASE, Acting P. J.

/S/
RENNER, J.