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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

SCOTT KAISER,

Plaintiff and Appellant,

v.

CITY OF SAN DIEGO,

Defendant and Respondent.

D059288

(Super. Ct. No. 37-2010-00087967-
CU-WM-CTL)

APPEAL from an order of the Superior Court of San Diego County, Ronald S. Prager, Judge. Affirmed.

In this case the record shows the owner of a large vacation rental home in the Pacific Beach community in San Diego made a number of unpermitted, noncompliant and dangerous additions and alterations to the home. However, when, in following up on a complaint, city compliance officers asked the owner about the changes, he flatly denied that any unpermitted or noncompliant addition or alteration had been made and engaged in a series of dilatory actions which delayed the compliance officers' ability to identify

the noncompliant conditions. The owner's dishonest dilatory response, coupled with his previous history of building code violations, largely foreclose his contention that an administrative hearing officer was compelled to accept, as credible, photographic and other evidence he produced of remedial work he argued he performed on the home. The credibility of the evidence the owner produced was further undermined by the fact that although the city instructed him to obtain permits for the remedial work and then have the work approved by city inspectors, he failed to do so.

Given the undisputed evidence of the dangerous conditions the owner created and the unconvincing evidence of remediation, the hearing officer was fully justified in imposing \$500 a day fine on the owner from the time the city served a notice of violation, 60 percent of which was suspended on condition the owner bring the home into full compliance. Thus we affirm the trial court's order denying the owner's petition for a writ of mandate, by which he sought to set aside the fine.

FACTUAL AND PROCEDURAL BACKGROUND

1. 2003

Appellant Scott Kaiser advertises the large home he owns in Pacific Beach as a two-part vacation rental: Kaiser asks \$6,200 a week for the main five-bedroom house and \$3,500 a week for a two-bedroom basement unit. In 2003 Kaiser sought and received a building permit which allowed him to make an addition to the home. The approved addition exhausted the square footage allowed on the lot under respondent City of San Diego (City) floor area ratio (FAR) regulations.

2. 2005

In June 2005 City received a complaint from a neighbor that Kaiser had unlawfully converted a carport on the property to a garage. City issued Kaiser a request for voluntary compliance. In response to City's request, Kaiser denied he made any changes to the property. City then inspected the property and found that the carport had in fact been converted to a garage.

On August 1, 2005, City served Kaiser with a notice of a violation which he was required to correct within 30 days. Kaiser did not timely correct the violation, and on September 22, 2005, City imposed a \$100 administrative fine and directed Kaiser to either obtain a permit for the garage construction or return the area to its initial configuration.

On October 17, 2005, Kaiser advised City he was in the process of converting the garage back to a carport. City then closed its file on the violation.

3. 2007

In June 2007 City received complaints from neighbors that Kaiser had again converted the carport to a garage. City again sent Kaiser a request for voluntary compliance. In response Kaiser sent City a letter in which he stated "there is nothing on this property that violates the City of San Diego Municipal Code." Kaiser stated the complaints were originated by neighbors who objected to his use of the house as a vacation rental; Kaiser further advised City he would be out of town for the following two months.

City took no immediate further action on the complaints it had received until the following summer.

4. 2008

In August 2008 City served Kaiser with a notice of its intention to inspect the home. Between August 2008 and November 2008 Kaiser repeatedly resisted City's efforts to inspect the home. Initially, Kaiser advised City his neighbors were only complaining about a lighted shade roof he had installed on a roof deck and he had removed the shade roof because he agreed it was an eyesore. Kaiser urged City inspectors to "drive by" the house and confirm the shade roof had been removed and then close its file.

When City's inspectors insisted on inspecting the property, Kaiser demanded City inform him as to precisely what building code violations City believed existed and what evidence City had of such violations. He then attempted to administratively appeal the request for an interior inspection and again demanded proof any violation occurred.

In response a city compliance officer advised Kaiser a request for an inspection was not subject to administrative appeal and that if he did not consent to such an inspection, City would apply for a search warrant from the superior court. A city compliance officer further advised Kaiser that, although City could not provide him with the actual complaints it had received, the complaints included the following potential violations: (1) rental of the house as two units; (2) conversion of the carport to a garage;

(3) patio enclosed; (4) windows eliminated; (5) unpermitted construction, electrical and plumbing work.

Kaiser eventually consented to two separate inspections of the property in October and November 2008. During the first inspection, he would not permit the compliance officers to take photographs or go into two upstairs areas or into the basement. During the second inspection, which only occurred after City again threatened to obtain a warrant, Kaiser permitted City to inspect the areas that were not available during the first inspection.

The two inspections revealed fairly substantial municipal code violations. During the first inspection, the compliance officers discovered Kaiser: (1) once again unlawfully converted the carport into a garage; (2) unlawfully enclosed the area above the garage; (3) unlawfully enclosed the deck on the first and second floors; and (4) without obtaining any permits, converted a powder room into a full bath, added a full kitchen in an area that had been permitted as a "workshop" and added a Jacuzzi hot tub, heaters, sink and an eight-foot high wall on the roof of the home. The inspectors found the unpermitted enclosures not only violated City's FAR regulations, but, because in enclosing the first floor deck Kaiser had removed an exterior wall separating the living room from the deck, the compliance officers believed the enclosures threatened the structural integrity of the home.

During the second inspection, the compliance officers discovered Kaiser had installed an unpermitted access door to the basement, that extension cords were all over

the floor of the basement, clothes were in closets in the basement, and it appeared someone was in fact living in the basement. The inspectors confirmed the unlawful use of the basement as a separate unit in advertisements Kaiser had placed for rental of the main house. The advertisements stated that a manager was on the premises in a separate unit.

On December 11, 2008, City issued Kaiser a civil penalty notice, which cited 18 separate municipal code violations. The notice required Kaiser to submit plans to the compliance officers which would remedy the violations and, when the plans were approved by the compliance officers, obtain appropriate building permits from City's Development Services Department. Kaiser was then required to complete the permitted work and obtain final inspections from the Development Services Department.

The notice provided Kaiser with deadlines for each step in the remedial process the notice prescribed. The notice also advised Kaiser that failure to comply with the requirements of the notice subjected him to civil penalties of up to \$1,000 a day, not to exceed \$250,000.

5. 2009

The record shows that between January and May 2009 Kaiser submitted a total of four sets of plans to the compliance officers. The first three sets of plans did not meet the requirements of the civil penalty notice and were returned to Kaiser. On May 18, 2009, the compliance officers approved Kaiser's fourth set of plans.

Inexplicably, Kaiser only submitted one portion of the approved plans—the conversion of the powder room to a full bathroom—to the Department of Development Services.

Because Kaiser failed to comply with the requirements of the civil penalty notice, City set a hearing for imposition of a penalty. The hearing was conducted on October 5 and October 28, 2009. At the October 5 proceeding, Kaiser submitted 26 exhibits, was provided an opportunity to present further evidence, and was given an opportunity to cross-examine City's witnesses.

Following the October 5 hearing, Kaiser and City entered into a stipulated compliance schedule. The only issue contested at the October 28 proceeding was the amount of a civil penalty and costs.

At the October 28 hearing, city compliance officers were concerned about the seriousness of the violations, in particular the Jacuzzi which was located on the roof, a windowless bedroom, a blocked stairway, the absent load bearing wall on the second story, and extensive uninspected electrical work. For his part, Kaiser argued that by the time the hearing commenced he had brought the home into substantial compliance with City's code and that the home was not a hazard. Kaiser relied on a letter from a structural engineer he had retained, who, based on a visual inspection of the home concluded that, notwithstanding Kaiser's removal of the wall between the former second story patio and living room, the home was still structurally sound. However, according to the engineer, his observations were nonintrusive and strictly visual. The engineer's letter further stated:

"The Owner indicated to Patterson Engineering that the area of concern [the former second story patio] would be modified to satisfy the code enforcement agency. It is recommended that when these modifications take place that [the engineer] be involved in updating the affected area to current code requirements."

Kaiser also presented evidence the home is encumbered with a total of \$1.3 million in notes secured by deeds of trust. According to Kaiser, at the time of the hearing he was behind on his payments on the notes and two lenders had threatened foreclosure.

The hearing officer found the violations had been ongoing at the property for a considerable period of time, had not been remedied and put Kaiser and his tenants at risk. Thus the hearing officer rejected Kaiser's evidence and arguments and instead relied on statements from the city compliance officers. The hearing officer further found the property was quite valuable and generated significant rental income.

The hearing officer imposed a penalty of \$500 a day from February 3, 2009, the day after the first deadline set forth in the civil penalty notice and order, through October 1, 2009, for a total of \$120,500. On condition Kaiser conform with the provisions of the stipulated compliance order, the hearing officer stayed all but \$50,000 of the penalty.

Kaiser challenged the penalty by way of a writ of administrative mandate, which the trial court denied.¹

I

In reviewing the trial court's determination, this court's duty is to determine whether the hearing officer's "decision was supported by the findings and the findings by substantial evidence or whether the Board abused its discretion by failing to proceed in the manner required by law. [Citations.] In making our determination, we examine all relevant evidence in the entire administrative record. [Citation.] We view the evidence in the light most favorable to the judgment, resolving all conflicts in the evidence and drawing all inferences in support of the judgment. [Citations.] Substantial evidence is defined as evidence of ' ' ' ' 'ponderable legal significance . . . reasonable in nature, credible, and of solid value[, and]' ' ' . . . 'relevant evidence that a reasonable mind might accept as adequate to support a conclusion' ' '" [Citations.]" (*Young v. Gannon* (2002) 97 Cal.App.4th 209, 224-225.)

Moreover, it is presumed that the hearing officer regularly performed his duty and therefore the "burden is on appellant to prove an abuse of discretion by failing to proceed in the manner required by law or making a decision unsupported by substantial evidence. [Citation.]" (*Id.* at p. 225.)

¹ The hearing officer also awarded City \$6,078.48 in costs. Kaiser challenged this part of the hearing officer's order as unsubstantiated; the trial court agreed and vacated that portion of the hearing officer's order. City has not challenged this part of the trial court's order.

II

In his principal argument on appeal, Kaiser contends the record here will not support imposition of any penalty for his failure to comply with the civil notice of penalty and order. In particular, he contends that the record shows that he largely brought the home within compliance prior to the hearing, that the violations did not pose health or safety risk, and that he was in considerable financial distress. We disagree.

In imposing penalties, a hearing officer may consider the following factors:

"(1) The duration of the violation.

"(2) The frequency or recurrence of the violation.

"(3) The nature and seriousness of the violation.

"(4) The history of the violation.

"(5) Whether the offense impacted environmentally sensitive lands or historical resources.

"(6) The willfulness of Responsible Person's misconduct.

"(7) The Responsible Person's conduct after issuance of the Notice and Order.

"(8) The good faith effort by the Responsible Person to comply.

"(9) The economic impact of the penalty on the Responsible Person.

"(10) The impact of the violation upon the community.

"(11) Any other factors that justice may require." (San Diego Mun. Code (SDMC)

§ 12.0805(c).)

As the court stated in *Kizer v. County of San Mateo* (1991) 53 Cal.3d 139, 147-148, the primary purpose of civil penalties is "to secure obedience to statutes and regulations imposed to assure important public policy objectives."

Here, the hearing officer's finding with respect to Kaiser's long history of building code violations is amply supported by the record, which shows violations dating back to 2005.

Importantly, contrary to Kaiser's argument on appeal, the hearing officer's finding the violations identified in the 2008 inspection had not been remedied was also fully supported by the record. Kaiser does not dispute that when compliance officers were eventually permitted to inspect the property they found each of the 18 violations set forth in the civil notice of penalty and order. Contrary to his argument on appeal, the hearing officer was not required to accept as definitive proof that he had remedied the serious violations by either his own statements, his engineer's visual inspection, his experience as an electrician or his photographs. As the hearing officer commented after listening to Kaiser's explanation of what he had done to comply, "I mean it's not enough for you, just the homeowner to tell me, well, yeah, I have taken care of it. That's just not—it is nothing personal against you. That's, you know, it's much more persuasive when you get a city inspector to go out and tell me things have been addressed." The hearing officer's reluctance to credit the evidence offered by Kaiser was more than reasonable in light of Kaiser's long history of violations, the misrepresentations he had consistently made after receiving a notice of inspection and his resistance to the inspection. Kaiser's lack of

credibility is also supported by his failure to obtain the permits and final inspections expressly required by the civil notice of penalty and order. Thus, given undisputed evidence that the violations occurred and no credible proof they had been remedied, the hearing officer could fairly conclude they continued to exist at the time of hearing.

With respect to the seriousness of the violations, again the hearing officer was fully warranted in accepting the code compliance officer's concerns over Kaiser's self-serving appraisal.

The record also supports the hearing officer's appraisal of Kaiser's ability to pay the penalty. Although the hearing officer noted Kaiser's statement he was behind in making payments on notes secured by the home and was being threatened with foreclosure, the record also showed Kaiser had rented the home out for substantial sums. Kaiser advertised the main home for \$6,200 a week and the two-bedroom basement for \$3,500 a week. The record also showed that, notwithstanding Kaiser's difficulties, the home itself was valued in excess of \$1 million. Given all these financial circumstances, the hearing officer was warranted in imposing a substantial penalty and staying the bulk of it as an incentive to fulfill the terms of the stipulated compliance order. As the court in *City and County of San Francisco v. Sainez* (2000) 77 Cal.App.4th 1302, 1320, noted, to immunize Kaiser from penalties because he had no apparent equity in the home, but was extracting substantial income from it, would leave City with no means of enforcing its building codes and protecting the public.

In sum then the record shows a history of violations, existing serious violations, no credible attempt to remedy the violations, and the need to impose a substantial penalty as a means of encouraging compliance. Thus the record fully supports the penalty imposed by the hearing officer.

III

Kaiser also argues he was not given a fair chance to present his case to the hearing officer, who he claims was biased. There is no support in the record for this contention.

As City points out, at no time during the hearing did Kaiser object to the manner in which the hearing was conducted or make a claim the hearing officer was biased. "An issue not raised at an administrative hearing, including a claim of bias, may not be raised in later judicial proceedings. [Citations.]" (*Southern Cal. Underground Contractors, Inc. v. City of San Diego* (2003) 108 Cal.App.4th 533, 549.)

Nonetheless, our review of the record shows that although the hearing officer conducted a somewhat informal proceeding and permitted city compliance officers to interject when they thought Kaiser had made statements with which they disagreed, Kaiser was given ample opportunity to present evidence and testimony both at the October 5 and again at the October 28 penalty hearing. Neither the manner in which the hearing officer conducted the hearings or the fact he submitted his proposed decision for review as to form to the director of the Neighborhood Code Compliance Division established any undue bias. In particular, the post-hearing review as to form conducted by the division director was not an instance of the unfair combination of the prosecutorial

and adjudicative functions, rightly criticized by the court in *Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81, 93. In particular, there is nothing in the record or in the nature of such a review which would suggest any undue influence on the hearing officer's resolution of the issues presented at the hearing.

DISPOSITION

That portion of the trial court's order denying Kaiser's relief from the penalty imposed by the hearing officer is affirmed. City to recover its costs of appeal.

BENKE, Acting P. J.

WE CONCUR:

NARES, J.

McINTYRE, J.