

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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

FOURTH APPELLATE DISTRICT

DIVISION THREE

DOVE CAPISTRANO PARTNERS, LLC  
et al.,

Petitioners,

v.

THE SUPERIOR COURT OF ORANGE  
COUNTY,

Respondent;

DANIEL L. FRIESS,

Real Party in Interest.

G048275

(Super. Ct. No. 30-2011-00521556)

O P I N I O N

Original proceedings; petition for a writ of mandate to challenge an order of the Superior Court of Orange County, Nancy Wieben Stock, Judge. Petition denied.

Austin Legal Group, Gina M. Austin; Kring & Chung LLP, Laura C. Hess; Snell & Wilmer and Todd E. Lundell for Petitioners.

Allen Matkins Leck Gamble Mallory & Natsis LLP and K. Erik Friess for  
Real Party in Interest.

No appearance for Respondent.

\* \* \*

Dove Capistrano Partners, LLC (“Dove Capistrano”) and Mercado El Rey, Inc. (“Mercado”) seek a writ of mandate directing the trial court to vacate an interlocutory judgment issuing a peremptory writ of mandate. The trial court directed the City of San Juan Capistrano (the City) to vacate a building permit issued for interior tenant improvements on real property owned by Dove Capistrano and leased by Mercado. The trial court concluded the City abused its discretion by issuing the permit because the available parking on the site did not meet the minimum required by the City’s zoning ordinance and lack of adequate parking was not a legal nonconforming use. We conclude the trial court was correct and deny the writ petition.

## FACTS

### *History of the Subject Property*

Dove Capistrano is the owner of the subject property located in the City, and Mercado is its tenant. Friess is the owner of commercial property adjoining the subject property. The subject property is zoned “general commercial,” a zone in which retail uses are permitted as a matter of right pursuant to the San Juan Capistrano Municipal Code (hereafter the Municipal Code). (Mun. Code, § 9-3.303.) The City’s parking ordinance, Municipal Code section 9-3.535, prescribes the minimum required off-street parking for various uses. As relevant here, a “general retail” use must have one space for every 250 feet of “leasable floor area” and “[f]ood stores, grocery stores, [and] supermarkets” must have one space for every 200 square feet of “gross floor area.” (Mun. Code, § 9-3.535.)

The subject property was previously owned and occupied by a thrift store run by the Society of Saint Vincent De Paul (St. Vincent). The original building permits

issued in 1972 and 1973 were for construction of a 3,140 square foot building. The original building permits indicate the thrift store, classified as a retail use, was going to have 13 parking spaces although only 12 were required by the Municipal Code. However, there was area behind the building abutting the alley equal to an additional six or seven parking spaces, and St. Vincent donors dropped off their used merchandise in that area. The record is not clear as to whether the back area was originally striped off to be additional parking for the thrift store, but there are references in the record to the thrift store having at some time 18 available parking spaces even though only 12 were required. In any event, at some point St. Vincent put a chain link fence around the equivalent of six parking spaces in the back area for secure merchandise storage.

In 1982, St. Vincent applied for and received building permits and a zoning variance allowing it to build an “attached accessory structure.” The structure consisted of a six-foot high concrete wall with a roof structure three feet above the wall attached to the building’s original roof. It enclosed an approximately 60 foot by 20 foot area at the back of the building (i.e., the area equivalent to six parking spaces surrounded by the chain link fence) for a permanent storage area. The permit stated the application was for a “screen wall [and] roof.” A zoning variance was required for the roof structure because it did not comply with the Municipal Code’s rear yard setback requirements. The minutes from the public hearing before the City’s Planning Commission state the project had the benefit of alleviating problems with unsightly storage of thrift store merchandise behind the building, and Planning Commissioners discussed “access, parking, and visual impact[]” concerns before approving the roof setback variance. The Planning Commission resolution approving the variance stated a variance was appropriate because “outside storage is already a permitted use,” the variance applied only to the roof, and the roof would “mitigate the adverse impacts of the storage area by screening the merchandise from view.”

In 1991, the City issued St. Vincent another building permit allowing it to enclose an additional area behind the building. The building permit application states the project was to “enclose existing [parking] area (for truck parking).” A structural engineer’s attachment to the permit indicates the project was for “9[-foot] cant[ilever spans,] Std. 18[-foot] Bay Carport for National Carports” and “Plan Same as Std. Carport Design Except as Shown on Notes.” The building permit indicates this additional enclosed area was designated “M” for the type of occupancy, meaning it was for “storage mercantile.”

The gap between the wall and roof of the original enclosure approved in 1982 was eventually filled in, although there is nothing in the record explaining when that happened. Dove Capistrano and Mercado contend the practical effect of the 1982 variance and building permit and the 1991 building permit issued to St. Vincent was to allow the total enclosed space of the building to be increased from 3,140 to 4,641 square feet (a 47 percent increase in the building’s size), even though the on-site parking was never increased from the original 12 (or 13) spaces.

#### *The Mercado Project*

At some point, Dove Capistrano acquired the subject property. St. Vincent eventually vacated the building and it was vacant until Dove Capistrano leased the property to Mercado in April 2011. Mercado planned on operating a Hispanic-oriented convenience store/mini-market that would sell “groceries, delicatessen foods, dairy products, personal products, and beverages” (the Mercado Project). Mercado submitted a zoning compliance plan check for interior tenant improvements to the building encompassing 4,641 square feet (i.e., the original building plus the area of the two enclosures). The City’s planning department approved Mercado’s application noting there was no expansion of the building’s existing footprint and no exterior modification to the building. Additionally, although the Mercado Project did not meet code requirements for parking, it had “legal [nonconforming] parking.”

### *The Administrative Process*

On May 19, 2011, Friess filed an appeal with the Planning Commission of the “[p]lan [c]heck and pending building permit issuance” for the Mercado Project stating as his reason for appeal, “The project applicant appears to misrepresent[] the use of the building to comply with a lower parking requirement standard, while the real intended use has a higher parking standard. The City’s planning approval process was based upon misrepresented facts.” Friess’s letter that accompanied the notice of appeal claimed the Mercado Project was a “[f]ood [s]tore” and therefore required one parking space for every 200 square feet of gross leasable area (4,641 square feet)—24 parking spaces total. Moreover, Friess asserted, even as a general retail use, the project would require 19 spaces when the site had only 12, and Mercado could not qualify for legal nonconforming status as to parking because the proposed use constituted an intensification of the prior thrift store use. Friess acknowledged the building had previously been expanded by the storage structure, which removed at least six parking spaces from the property. He asserted the storage structure should be demolished and the building restored to its original footprint (3,140 square feet).

In his staff report for the Planning Commission hearing on Friess’s appeal, the City’s community services director explained why staff approved the Mercado Project with its existing parking. The parking determination was based on the approximately 4,641 square feet of enclosed space and the Mercado Project met the definition of “convenience store,” which was a use permitted by right in the general commercial zone. The Municipal Code defined a convenience store as a “retail establishment [containing] less than [5,000] square feet of gross floor area utilized in whole or in part for the retail sale of a variety of frequently needed personal convenience items such as groceries, delicatessen items, staples, dairy products, pre-packaged foods, beverages, and sundries.” (Mun. Code, tit. 9, Appendix A.) Staff interpreted “food store,

grocery store or supermarket” (terms not defined in the Municipal Code), as establishments exceeding the convenience store size (and more typically having 30-to-45,000 square feet), and thus the higher food store parking requirement did not apply. Staff concluded the Mercado Project was a retail sales general use and thus fell into the one space per 250 square feet parking requirement. By that formula, the project should have 19 parking spaces, however the 12 spaces constituted a legal nonconforming use which Dove Capistrano was entitled to maintain so long as the proposed use was not an intensification of the prior thrift store use. Staff referred to Municipal Code section 9-3.533, which allows maintenance of nonconforming uses, and particularly to subdivision (e)(2)(B), which provides, “Where parking and loading requirements are the cause for nonconformity, the use shall not be intensified, nor associated structure enlarged . . . unless additional parking and loading requirements are supplied and maintained to meet the parking requirements, subject to the provisions of Section 9-3.535 Parking.” Because the Mercado Project was not an intensification of St. Vincent’s thrift store use, the nonconforming parking was allowed.

At the Planning Commission hearing on June 28, 2011, the discussion focused on whether the project was an intensification of the property’s prior use so as to deprive it of nonconforming status with regard to parking. The Planning Commission sided with Friess finding the Mercado Project was an intensification of the prior use of the property and thus did not qualify for legal nonconforming status as to parking pursuant to section 9-3.533(e) of the Municipal Code. The Planning Commission did not resolve which parking formula applied (the 1-per-250 square feet required for general retail or the 1-per-200 square feet required for food stores) finding only that “at least 19 spaces” were required.

Dove Capistrano and Mercado appealed the Planning Commission’s decision to the City Council. Their stated reason for the appeal was that Mercado Project

“does not intensify the previous [thrift store] use of the subject property, therefore allowing the non-conformity of parking to be maintained per the [Municipal] [C]ode.”

In its report for the August 16, 2011, City Council meeting, planning staff recommended overturning the Planning Commission’s decision to deny permits for the Mercado Project, reiterating its earlier rationale for approving the project. Staff also noted someone had recently submitted a code enforcement request claiming the enclosed storage area at the rear of the facility was illegal, but staff had reviewed the building permits from 1973, 1982, and 1991 and determined the enclosures were built with proper permits, and the code enforcement case was closed.

In supplemental submittals to the City Council, Friess continued to assert the Mercado Project was an intensification of the prior thrift store use and therefore the nonconforming status of the parking could not be maintained. City staff and Mercado’s representative explained why the Mercado Project was not an intensification of the prior thrift store use. The proposed staffing for Mercado’s convenience store was three to four employees at a time, equal to or less than the thrift store. The retail sales area open to the public would be 45 percent less than the open retail area of the prior thrift store. The convenience store would stock less products and have fewer merchandise deliveries (two or three regularly scheduled truck deliveries a week instead of constant daily stream of cars and trucks dropping off thrift store items). The turnover of customers and parking would be faster—thrift store customers tended to stay for up to 30 minutes; convenience store customers spent only a few minutes, up to 15, and the average number of customers at any given time was about five. And almost half of the convenience store customers could be expected to walk to the store.<sup>1</sup>

---

<sup>1</sup> A substantial portion of Friess’s return to the writ petition is devoted to attempting to demonstrate the Mercado Project has not lived up to these representations since it opened. Friess attaches various discovery responses by Mercado—made after the trial court ruled—to support these assertions. Because none of those documents were before the City Council or the trial court, we disregard Friess’s references to them.

Friess argued to the City Council that the property was not entitled to nonconforming parking status because the history of variances and building permit approvals did not allow the full enclosure of the storage structure—it was only to be outside storage—thus the use was an intensification of use. He also asserted the parking nonconformity was “elective,” because it was brought about when the prior property owner got permits to build the two structures, and it was not the result of a zoning change. The City Council continued the matter to the next meeting on September 6, 2011.

Prior to the September 6 City Council meeting, planning staff submitted its report recommending the Planning Commission decision be overruled. Planning staff again reviewed all the building permits, which it concluded authorized the enclosure of the storage structure areas for mercantile retail occupancy. Friess’s attorney sent the City Attorney an e-mail in the late afternoon on September 6, asserting intensification of the use of the property was not the proper issue. Friess’s attorney asserted the City had been operating on the incorrect assumption the property had legal nonconforming parking, but there had been no change in the applicable parking requirements since the building was originally built. It was the 1982 variance that allowed parking spaces to be removed for the storage structure and, therefore, “the reduced parking is by variance, not by being a grandfathered, non-conforming use.” Moreover, Friess’s attorney asserted the 1982 variance was specific to the thrift store, to address the problems of merchandise being left behind the store, concerns that did not apply to a convenience store, and Mercado needed to obtain a variance from the parking requirements. Friess’s attorney reiterated his concerns to the City Council at its meeting.

The City Council voted to adopt City Council Resolution No. 11-09-06-03 “upholding [Mercado’s] appeal and approving the tenant improvement permit for the convenience store, thereby overturning the Planning Commission’s denial of the permit.” Prior to the City Council’s action, the City Attorney observed intensification of use was

the proper issue before the City Council because the structures were built with proper permits. The City Attorney opined the 1982 variance allowed St. Vincent to enclose the alley parking spaces, thus reducing the available parking on the site. “Because the [P]lanning [C]ommission granted a variance, then at that point back in [1982] they created a nonconformity as to parking only.” So, the City Attorney explained, as long as the proposed use was the same or less intensive than the thrift store use, “the [Municipal] Code . . . allow[s] the parking nonconformity to continue.” The City Attorney further opined there was no merit to the argument the 1982 variance was specific to the thrift store use, and once the thrift store was gone the storage enclosure had to be demolished or a new parking variance obtained, in view of the property owner’s investment in the improvements and reliance on the lawfully issued permits to build the structure.

After the City Council’s action, Mercado obtained permits for the tenant improvements to the building and its convenience store opened for business.

#### *The Current Litigation/Trial Court’s Ruling*

Friess filed the instant litigation, a combined petition for writ of mandate and civil complaint, against the City, Dove Capistrano, and Mercado. As to the City, the operative first amended petition for writ of mandate alleged the City failed to perform its duties under the Municipal Code regarding parking and allowable floor area ratio in approving the Mercado Project and failed to perform its duties under Government Code section 65906 regarding findings necessary to grant a variance. Friess did not allege whether mandate was sought under Code of Civil Procedure section 1085 [ordinary mandate] or 1094.5 [administrative mandate]. As to Dove Capistrano and Mercado, Friess alleged causes of action for nuisance and trespass arising out of its operation of the convenience store in violation of the City’s parking and floor area ratio requirements.

The trial court severed the mandate causes of action against the City and ordered they be tried first in a court trial. The trial court ruled in Friess’s favor and entered an interlocutory judgment granting a peremptory writ of mandate ordering the

City to vacate and set aside the permit for tenant improvements for the Mercado Project. Dove Capistrano and Mercado's motions for new trial and for reconsideration were denied.

In its statement of decision, the trial court observed Friess raised the following points: (1) the tenant improvement permit was erroneously granted because it would result in an intensified use and increased the floor area ratio, both of which increased the parking requirements under the Municipal Code; and (2) even as under the "general retail designation, the 12 parking spaces provided for at the site fall below the 18-19 sites required by the Municipal Code." The trial court rejected the first set of contentions. It found substantial evidence supported the City Council's finding the project was not a grocery store and the general retail use designation applied. It found the increased floor area ratio argument barred because it was never raised at the administrative level.

The trial court, however, found the current lack of sufficient parking on the site was not a legal nonconforming use because there had been no change in the law as to parking requirements that caused the parking deficiency. The court concluded the 1982 building permit and variance and the 1991 building permit did not allow for a reduction in the required parking spaces on the site—they had nothing to do with parking and could not be construed as "de facto variances" from the parking requirements. The court observed that no party was suggesting "that in granting the prior permits the City intended that the [t]hrift [s]tore owner build a structure that would violate City parking ordinances." Such a permit would be beyond the City's authority and would vest no rights in the property owner.

The trial court found the City proceeded on the incorrect assumption the 1982 variance and building permit and the 1991 building permit could be interpreted as having allowed the building's gross leasable area to be increased from 3,150 to 4,641 square feet. The 1982 variance allowed construction of a "screening wall" with a roof

and a gap between the wall and the roof. There were no permits in the administrative record explaining the current condition where the gap between the six-foot screening wall and the roofline were filled in. If the storage structure as approved was considered part of the gross leasable square footage of the building it resulted in the “curiosit[y]” of the City “allow[ing] a simultaneous removal of critical parking spaces, at the same time that the permits themselves resulted in *an increase* in required onsite parking. An obvious answer is that the City never anticipated that the permitted structure would result in any increased parking requirement because a screening wall could never [have] been considered *gross leasable floor area . . . .*”

*This Writ Petition and Stay*

Dove Capistrano and Mercado (hereafter referred to collectively and in the singular as “Dove Capistrano” unless the context indicates otherwise) filed a petition in this court for writ of mandate directing the trial court to vacate its peremptory writ of mandate and requested a stay of the trial court’s interlocutory judgment.<sup>2</sup> We granted the stay and issued an order to show cause why mandate or other relief should not issue.

DISCUSSION

*1. Standard of Review*

Friess brought his petition for writ of mandate pursuant to Code of Civil Procedure sections 1085 and 1094.5. Below, neither the parties nor the trial court specified which type of mandate was appropriate, largely concluding it made little difference vis à vis the standard of judicial review given to the City Council’s action. Similarly, in this appellate proceeding, the parties decline to advocate for one or the other

---

<sup>2</sup> The City appeared and defended itself in the trial court, but it is not a party to this writ proceeding. Although we invited the City to file a response to the petition, it declined to do so advising us by letter it would defer to the interested parties (Dove Capistrano and Friess) to present and litigate the issues. The City offered only that it believed its staff and the City Council had acted in good faith in granting the permit.

variety of mandate relief because, as Dove Capistrano asserts, it makes little difference to the appellate standard of review. We agree.

“Judicial review of most public agency decisions is obtained by a proceeding for a writ of ordinary [Code of Civil Procedure section 1085] or administrative [Code of Civil Procedure section 1094.5] mandate. [Citations.] The applicable type of mandate is determined by the nature of the administrative action or decision. [Citation.]” (*McGill v. Regents of the University of California* (1996) 44 Cal.App.4th 1776, 1785 (*McGill*)). Typically, quasi-legislative or ministerial acts are reviewed by ordinary mandate, and quasi-judicial acts are reviewed by administrative mandate. (*Ibid.*) Traditional “mandate is used to review adjudicatory actions or decisions when the agency was not required to hold an evidentiary hearing.” [Citation.]” (*Ibid.*) By contrast, administrative mandamus is appropriate for inquiry into the validity of final administrative orders made as the result of a proceeding “in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal. . . .” (Code Civ. Proc., § 1094.5, subd. (a); see *McGill, supra*, 44 Cal.App.4th at p. 1785.)

This matter began with the City’s planning department approving a plan check for issuance of a building permit for the interior tenant improvements to the building—a ministerial action. (See *Stockton Citizens for Sensible Planning v. City of Stockton* (2010) 48 Cal.4th 481, 498 [issuance of building permit a ministerial act].) But Friess filed an appeal challenging that ministerial act, followed by Dove Capistrano and Mercado’s appeal of the Planning Commission’s adverse determination, a process which under the Municipal Code required hearings, taking of evidence, and determination of facts. (Mun. Code, § 9-2.311.) Accordingly, we conclude administrative mandamus is the proper mechanism for judicial review.

In any event, unless a fundamental vested right is involved, the differences between the scope of judicial review for traditional and administrative mandate are

minimal.<sup>3</sup> In traditional mandate “[judicial] inquiry is limited to whether the decision was arbitrary, capricious, or entirely lacking in evidentiary support . . . .” (*McGill, supra*, 44 Cal.App.4th at p. 1786.) In administrative mandate “abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record.” (Code Civ. Proc., § 1094.5, subd. (c); *San Marcos Mobilehome Park Owners’ Assn. v. City of San Marcos* (1987) 192 Cal.App.3d 1492, 1499-1500; see *Friends of the Old Trees v. Department of Forestry & Fire Protection* (1997) 52 Cal.App.4th 1383, 1389 (*Friends of the Old Trees*) [“no practical difference between the standards of review applied under traditional or administrative mandamus”].) On appeal, we do not “undertak[e] a review of the trial court’s findings or conclusions. Instead, ‘we review the matter without reference to the trial court’s actions. In mandamus actions, the trial court and appellate court perform the same function. . . .’ [Citations.]” (*Friends of the Old Trees, supra*, 52 Cal.App.4th at p. 1393, italics omitted.)

## 2. Exhaustion of Administrative Remedies

Dove Capistrano argues judicial review of the City Council’s action is limited to issues Friess raised in the administrative proceedings. It asserts the sole issue before the City Council was whether the Mercado Project constituted an intensification of the building’s prior thrift store use thereby depriving it of legal nonconforming status as to parking. Therefore, the only issue that should have been considered by the trial court

---

<sup>3</sup> “If an administrative decision substantially affects a fundamental vested right, the trial court must exercise its independent judgment on the evidence and find an abuse of discretion if the findings are not supported by the weight of the evidence. [Citation.]” (*Goat Hill Tavern v. City of Costa Mesa* (1992) 6 Cal.App.4th 1519, 1525.) “[T]he term “vested” in the sense of “fundamental vested rights” to determine the scope of judicial review . . . [in an administrative mandamus proceeding] is not synonymous with . . . the “vested rights” doctrine relating to land use and development.’ [Citation.]” (*Id.* at p. 1526.) Dove Capistrano does not contend it has a fundamental vested right for purposes of determining the appropriate standard of judicial review.

was whether substantial evidence supported the City Council's finding the Mercado Project was not an intensification of the building's thrift store use. Dove Capistrano argues Friess should not have been permitted to argue there was no legal conforming parking in the first place and the trial court could not properly have based its ruling on the lack of nonconforming parking rights.

Dove Capistrano did not raise this specific exhaustion of administrative remedies argument in the trial court. In the trial court, Dove Capistrano's exhaustion argument was that Friess could not assert the Mercado Project violated the floor area ratio requirements of the Municipal Code because he had not raised that argument before the City Council. The trial court agreed and, correctly, declined to consider the floor area ratio argument. Although there is a split of authority as to whether an exhaustion of administrative remedies claim may be asserted for the first time on appeal (see e.g., *Cummings v. Stanley* (2009) 177 Cal.App.4th 493, 505-506 [recognizing split of authority but siding with weight of recent authority holding exhaustion of administrative remedies defense waived if not timely asserted in trial court]), we need not decide that issue because Friess adequately raised his argument before the City Council.

In general, a public agency's land use decisions may not be attacked on grounds not raised before the public agency. (Gov. Code, § 65009.) "The rationale for exhaustion is that the agency "is entitled to learn the contentions of interested parties before litigation is instituted. If [plaintiffs] have previously sought administrative relief . . . the [agency] will have had its opportunity to act and to render litigation unnecessary, if it had chosen to do so." [Citation.] The 'exact issue' must have been presented to the administrative agency to satisfy the exhaustion requirement. [Citation.] However, 'less specificity is required to preserve an issue for appeal in an administrative proceeding than in a judicial proceeding' because, although not the case here, parties in such proceedings generally are not represented by counsel. [Citation.]" (*Mani Brothers Real Estate Group v. City of Los Angeles* (2007) 153 Cal.App.4th 1385, 1394-1395.)

We conclude Friess adequately raised in the administrative proceeding his argument there were no nonconforming parking rights because there had been no change in the law. Friess appealed staff's plan check approval of the Mercado Project raising as the ground for appeal the project involved an intensified use of the building that resulted in a higher parking standard. Friess argued alternatively that either project was a grocery store, needing one parking space for every 200 square feet, or if characterized as a general retail use (with the lower parking requirement), the intensification of the use resulted in loss of nonconforming parking status.

When Dove Capistrano and Mercado appealed the Planning Commission's decision to the City Council, the issue was similarly framed. But at the first City Council hearing on the appeal, on August 16, 2011, Friess addressed the City Council and raised several reasons why he believed the property was not entitled to nonconforming parking status, including that the nonconformity was "elective," brought about when the prior property owner built the two structures and was not the result of a "zoning change." After that public hearing was closed, the matter was continued to the next City Council meeting on September 6. Well in advance of the next meeting, Friess submitted additional letters asserting among other "legal issues" that "the non-conformance is a result of the property owner intentionally requesting" the rear yard setback in 1982, "this is a voluntary condition and can be removed."

Friess's attorney sent an e-mail to the City Attorney a few hours before the City Council meeting stating the point more directly, which comments were repeated by him at the public hearing. Friess's attorney argued intensification of use should not be an issue; there was no legal nonconforming use to begin with because there had been no change in the parking requirements since the building was originally built.

Significantly, after Friess's attorney finished his comments, the City Attorney addressed the City Council implicitly recognizing the very issue Friess and his attorney had raised. The City Attorney opined intensification of the prior thrift store

use was the proper issue before the City Council. He explained all the improvements added to the property were the result of proper permits, and the 1982 variance allowed St. Vincent's to enclose the alley parking spaces, thus reducing the available parking on the site. "Because the Planning Commission granted a variance, then at that point back in [1982 it] created a nonconformity as to parking only." In other words, the City Attorney advised the City Council the nonconformity arose because of the land use approvals that had previously been granted, not because of a change in the applicable parking requirements. So long as the proposed use was the same or less intensive than the prior thrift store use, "the Code would allow the parking nonconformity to continue." Thus, the issue was not only raised, but it was addressed and rejected by the City Attorney when advising the City Council on this matter.

### *3. Nonconforming Use*

Dove Capistrano contends the trial court erred by concluding it had no legal nonconforming parking rights. We agree with the trial court the City Council abused its discretion by finding Dove Capistrano had existing legal nonconforming parking.

The trial court concluded the lack of code-compliant parking for the proposed 4,641 square foot retail project was not a legal nonconforming use and therefore the City Council abused its discretion by approving issuance of a building permit for the Mercado Project. The trial court correctly concluded the lack of the minimum required parking for the proposed 4,641 square foot convenience store did not constitute a legal nonconforming use because there has never been a change in the law concerning the minimum parking. "A nonconforming use is one which lawfully existed prior to the effective date of the zoning restriction and which continued thereafter in nonconformity with the ordinance. [Citation.]" (*County of Sonoma v. Rex* (1991) 231 Cal.App.3d 1289, 1297, citing *Hill v. City of Manhattan Beach* (1971) 6 Cal.3d 279, 285; see also 1 Longtin, Cal. Land Use (2d ed. 1987) § 3.80, p. 374 ["A legal nonconforming use is

one which was valid when brought into existence, but by subsequent regulation it becomes no longer conforming”]).)

Consistent with cases defining what constitutes a legal nonconforming use, the Municipal Code defines a legal nonconforming use as, “Any use of land or property that was lawfully established in compliance with all applicable codes and laws at the time the use commenced, but which, *due to the application of this Land Use Code* or any amendment thereto, no longer complies with all of the applicable regulations and standards of the zone in which the use is located.” (Mun. Code, tit. 9, Appendix A, italics added.) Section 9-3.533 of the Municipal Code, which concerns maintenance of legal nonconforming uses, states its purpose is to allow for regulation and continuance of certain nonconforming uses that were lawful *before* adoption of the City’s Land Use Code, “but which are [now] prohibited or restricted by” the Land Use Code. (Mun. Code, § 9-3.533 (a).)

It is undisputed that when the 3,140 square foot building was constructed in 1973 by St. Vincent, the building had the legally required minimum parking for St. Vincent’s general retail use based on the one space per 250 square feet of leasable floor area formula. The required parking formula for general retail uses has never changed. What has changed is what Dove Capistrano claims to be the size of the building. It claims St. Vincent’s 1982 storage enclosure and its 1991 carport enclosure expanded the leasable floor area of the building, with no increase in the available parking having been required by the City, throwing the use out of conformance with the Municipal Code’s parking requirements. But there is no authority for Dove Capistrano’s assertion that falling out of conformity as a result of something other than a change in applicable regulations qualifies as a legal nonconforming use.

Dove Capistrano argues that neither the relevant cases nor the Municipal Code provisions discussing or defining legal nonconforming use purport to be the last word on the subject and none claim to establish the *only* circumstances under

which a legal nonconforming use might be found to exist.<sup>4</sup> But Dove Capistrano cites no case, and we have found none, that has held a legal nonconforming use arises from anything other than a change in applicable zoning laws.

Dove Capistrano nonetheless argues the City's staff could reasonably interpret the Municipal Code as allowing maintenance of a nonconformity resulting from something other than a change in applicable zoning laws and courts must defer to that interpretation unless it is clearly erroneous. (See *Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th 1173, 1193 (*Anderson First Coalition*) [“an agency's view of the meaning and scope of its own [zoning] ordinance is entitled to great weight unless it is clearly erroneous or unauthorized”]; *Friends of Davis v. City of Davis* (2000) 83 Cal.App.4th 1004, 1015 [same]; see also *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2005) 128 Cal.App.4th 1195, 1205 [courts defer to an agency's interpretation of its own regulations].) Dove Capistrano argues the Municipal Code can be interpreted as allowing the permits and variance issued in 1982 and 1991 to be considered a legally correct basis for the City finding Dove Capistrano has legal nonconforming parking rights. Those permits, Dove Capistrano argues, allowed

---

<sup>4</sup> Dove Capistrano also refers to Municipal Code section 9-3.533 (e)(2)(B), which it suggests somehow defines legal nonconforming uses relating to parking differently (and more leniently) than other parts of the Municipal Code. But Municipal Code section 9-3.533 (e)(2)(B), has nothing to do with determining what constitutes a legal nonconforming use; rather it pertains to restricting the enlargement or expansion of an otherwise legal nonconforming use. It provides, “Enlargement. A nonconformity shall not be enlarged in volume or extended or relocated beyond the area it occupies, unless its enlargement, extension, or relocation is: [¶] (1) Made to conform to the regulations of the district in which it is located; and [¶] (2) Conforms to the following provisions: [¶] (A) Any exception permitting the enlargement, extension, or relocation shall not be construed to extend the termination date, if any, of the subject nonconformity. [¶] (B) Where parking and loading requirements are the cause for nonconformity, the use shall not be intensified, nor associated structure enlarged or altered to create additional dwelling units, guest rooms, seating capacity, or floor area, unless additional parking and loading requirements are supplied and maintained to meet the parking requirements, subject to the provisions of [s]ection 9-3.535 Parking.”

St. Vincent to expand the leasable floor area of the original building from 3,140 square feet to 4,641 square feet, without requiring it to provide any additional parking for its general retail use based on the increase square footage, and thus by right of those permits it acquired had legal nonconforming parking.

There are, indeed, two ways to interpret the permits and chain of events. The first interpretation superficially supports Dove Capistrano's position: i.e., the 1982 permit and variance and the 1992 permit allowed St. Vincent to expand its building's size (and the leasable floor area available for of its general retail use) by 47 percent without requiring St. Vincent to comply with Municipal Code parking requirements applicable to that building expansion. But the second interpretation is that the permits do not do what Dove Capistrano (and City staff) say they did—i.e., the permits did not allow the expansion of the leasable floor area of the building, rather they allowed for enclosure of outside storage areas that were accessory structures only and not meant to be additions to the original building or to its leasable floor area.

The trial court correctly followed the second path because the former interpretation would have been “clearly erroneous or unauthorized” (*Anderson First Coalition, supra*, 130 Cal.App.4th at p. 1193), as it would have required the court to conclude the City approved projects in 1982 and 1991 that were not in compliance with the applicable land use regulations (i.e., it approved a building expansion that did not comply with legal parking requirements). It is well-established that “local government entities cannot issue land-use permits that are inconsistent with controlling land-use legislation, as embodied in zoning ordinances and general plans. [Citations.]” (*Land Waste Management v. Contra Costa County Bd. of Supervisors* (1990) 222 Cal.App.3d 950, 957-958; see also *Johnston v. Board of Supervisors* (1947) 31 Cal.2d 66, 74 [county board of supervisors has no authority to grant use permit violating ordinance], disapproved on another point in *Bailey v. County of Los Angeles* (1956) 46 Cal.2d 132, 139.)

There is a presumption that official duties are properly carried out. (Evid. Code, § 664 [“It is presumed that official duty has been regularly performed”]; see *In re Hartmann* (1938) 25 Cal.App.2d 55, 60 [assume public official would act in lawful manner].) Applying the presumption the City would not have approved a project that did not conform to the Municipal Code’s parking requirements without complying with the formalities of granting a variance from the parking requirements (see *Orinda Assn v. Board of Supervisors* (1986) 182 Cal.App.3d 1145, 1162, fn. 10 [“[i]f the local agency could avoid [judicial review of a variance] simply by approving a project without any formal grant of a variance, even though the project is not in compliance with the requirements of the applicable regulations governing land use and development, those regulations could be substantially amended or voided simply by ignoring them and approving noncomplying developments”]; Gov. Code, § 65906 [variances from zoning ordinances]; see also Longtin, *supra*, 3.70[1], p. 349 [“variances sanction deviation from regulations applicable to such physical standards as . . . off-street parking requirements”]), the only reasonable interpretation of the permits is the one the trial court applied, i.e., the permits and roof setback variance were not a de facto variance from the parking requirements because the projects had nothing to do with expanding the building’s size.

A review of the permits supports the trial court’s and our conclusion. The 1982 permit and variance were not for an addition<sup>5</sup> to St. Vincent’s building intended to

---

<sup>5</sup> The Municipal Code defines an “[a]ddition” as “[a]ny construction that increases the size of a structure in terms of site coverage, height, length, width, or gross floor area, occurring after completion of the original structure.” (Mun. Code, tit. 9, Appendix A.)

expand the building's leasable floor area; they were for an accessory structure<sup>6</sup> for outside storage. The permit stated the application was for a "screen wall [and] roof." The plans were for a six-foot high concrete wall with a roof structure over it and with the wall and roof being separated by a three-foot gap. The minutes from the Planning Commission public hearing state the project alleviated problems with unsightly storage and the zoning variance was required only for the roof structure because it did not comply with rear yard setback requirements. The Planning Commission resolution approving the roof setback variance stated a variance was appropriate because "*outside storage*" (italics added) was already a permitted use, the variance applied only to the roof, and the roof would mitigate the adverse visual impacts of the storage area.

Dove Capistrano argues the variance issued as part of the 1982 approvals encompassed a variance from parking requirements because the Planning Commission minutes state commissioners discussed "access, parking, and visual impact[]" concerns before approving the roof setback variance. Thus, Dove Capistrano urges the Planning Commission understood it was approving "construction of a building that would displace parking spaces that were otherwise required by the [Municipal C]ode." Although certainly the storage enclosure removed parking area from the site, it was not parking that was required by the Municipal Code because the storage enclosure was not a building addition that would have resulted in an increased parking requirement.

---

<sup>6</sup> The Municipal Code defines an "[a]ccessory structure/building" as "[a]nything constructed or erected on the same lot or parcel as the principal use . . . that requires a building permit and has a permanent fixed location on the ground or is attached to something having a permanent fixed location on the ground which is incidental and subordinate to the main building or structure." (Mun. Code, tit. 9, Appendix A.)

Similarly, the 1991 building permit was for a carport,<sup>7</sup> not for a building addition. The permit stated it was to “enclose existing [parking] area (for truck parking)” and the plans described a standard 9-foot by 18-foot bay carport. At some point, the gap between the wall and roof of the original enclosure approved in 1982 was filled in, which makes the enclosures appear to be part of the building. At the City Council hearing, staff explained St. Vincent used the entire expanded area for its retail uses. But there is nothing in the record before the City Council explaining when that happened, i.e., whether it was before or after the 1991 carport was approved and even whether it was before or after Dove Capistrano acquired the property. And there was nothing before the City Council demonstrating the exterior storage enclosures were legally permitted to be incorporated into the interior of the building increasing its size by 47 percent.

Dove Capistrano argues the 1982 and 1991 permits necessarily increased the leasable floor area of the original St. Vincent building because the storage structures were for tenant exclusive use and occupancy. The Municipal Code does not define “leasable floor area,” which is the measurement for setting minimum parking requirements for general retail uses. Dove Capistrano refers to the definition of “gross leasable area,” which is “[t]he total floor area designed for tenant occupancy and exclusive use, including basements, mezzanines, and upper floors, if any; expressed in square feet and measured from the center line of joint partitions and from outside wall faces.” (Mun. Code, tit. 9, Appendix A.) Based on that definition, Dove Capistrano suggests any approved accessory structure that is attached to the original building increases its leasable floor area. But even assuming the “gross leasable area” definition applies, it does not suggest that exterior storage structures are part of the gross leasable area.

---

<sup>7</sup> The Municipal Code defines a “[c]arport” as “[a] permanent roofed structure not completely enclosed, used or intended to be used for vehicle parking.” (Mun. Code, tit. 9, Appendix A.)

In short, the 1982 and 1991 permits and variance cannot be interpreted as having allowing expansion of the building's leasable floor area. Therefore, there is no merit to Dove Capistrano's contention the two outside enclosures conferred legal nonconforming parking rights for a 4,641 square foot retail project.

#### 4. *Vested Rights/Estoppel*

Dove Capistrano contends if the City incorrectly concluded the lack of code compliant parking was a legal nonconforming use (because there was no change in the applicable parking standards), the City's decision should nonetheless be upheld. Dove Capistrano suggests the City was merely recognizing its vested right to use of the building as already expanded by the properly permitted two storage structures without complying with the minimum parking requirements. We disagree.

As with legal nonconforming uses, the vested rights doctrine is largely premised on acknowledging a property owner's rights vis à vis a change in regulations applicable to the property. Under the vested rights doctrine, a property owner acquires a vested right to complete a construction project in conformity with properly issued building permits once it has performed substantial work and incurred substantial liabilities in good faith reliance thereon despite changes in the governing regulations. (See e.g., *Avco Community Developers, Inc. v. South Coast Regional Com.* (1976) 17 Cal.3d 785, 791 (*Avco*); *Davidson v. County of San Diego* (1996) 49 Cal.App.4th 639, 646 (*Davidson*); *Blue Chip Properties v. Permanent Rent Control Bd.* (1985) 170 Cal.App.3d 648, 659.) “Once a landowner has secured a vested right the government may not, by virtue of a *change in the zoning laws*, prohibit construction authorized by the permit upon which he [or she] relied.’ [Citation.]” (*Davidson, supra*, 49 Cal.App.4th at p. 646 (italics added).) “The vested rights doctrine is “predicated upon estoppel of the governing body[,]” (*Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach* (2001) 86 Cal.App.4th 534, 551), and may be “invoked in the land use context in only ‘the most extraordinary case where the injustice is great and the precedent

set by the estoppel is narrow.’ [Citation.]” (*Toigo v. Town of Ross* (1998) 70 Cal.App.4th 309, 321; *Smith v. County of Santa Barbara* (1992) 7 Cal.App.4th 770, 775 (*Smith*).

But “[t]he rights which may “vest” through reliance on a government permit are no greater than those specifically granted by the permit itself. [Citation.]’ [Citation.]” (*Davidson, supra*, 49 Cal.App.4th at p. 646.) Here, as already discussed, the trial court correctly concluded there was no substantial evidence to support the City’s conclusion the 1982 and 1991 permits were issued to allow St. Vincent to expand the leasable floor area of its building by 47 percent without complying with the Municipal Code’s minimum parking requirements for that expanded building. The permits were for an outside storage enclosure and carport. Thus, the vested rights doctrine does not aid Dove Capistrano.

Moreover, if as Dove Capistrano argues the effect of the 1982 and 1991 permits was to allow St. Vincent to expand the size of its building without complying with the City’s parking ordinance, as the trial court correctly observed, it would vest no rights in the property owner. *Pettitt v. City of Fresno* (1973) 34 Cal.App.3d 813 (*Pettitt*), is instructive. In *Pettitt*, a building permit was issued to and relied upon by plaintiff to construct a beauty salon in an exclusively residential zone. When, several years later, the city revoked the permit because it violated the applicable zoning, plaintiff argued the city was estopped to deny the validity of the permit. (*Id.* at pp. 816-818.) The appellate court held the city could not be estopped to deny the validity of a building permit issued in violation of a zoning ordinance. The *Pettitt* court observed “the public and community interest in preserving the community patterns established by zoning laws outweigh[ed] the injustice that may be incurred by the individual” who relied upon “an invalid permit to build issued in violation of zoning laws.” (*Id.* at p. 820, italics omitted.)

The principle underlying the *Pettitt* court's holding was "the thesis that estoppel will not be invoked against a government agency where it would defeat the effective operation of a policy adopted to protect the public." (*Pettitt, supra*, 34 Cal.App.3d at p. 822.) The *Pettitt* court explained, "In the field of zoning laws, we are dealing with a vital public interest--not one that is strictly between the municipality and the individual litigant. All the residents of the community have a protectable property and personal interest in maintaining the character of the area as established by comprehensive and carefully considered zoning plans in order to promote the orderly physical development of the district and the city and to prevent the property of one person from being damaged by the use of neighboring property in a manner not compatible with the general location of the two parcels. [Citation.] These protectable interests further manifest themselves in the preservation of land values, in esthetic considerations and in the desire to increase safety by lowering traffic volume. To hold that the City can be estopped would not punish the City but it would assuredly injure the area residents, who in no way can be held responsible for the City's mistake. Thus, permitting the violation to continue gives no consideration to the interest of the public in the area nor to the strong public policy in favor of eliminating nonconforming uses and against expansion of such uses. [Citations.]" (*Id.* at pp. 822-823, fn. omitted.) Significantly, the *Pettitt* court distinguished the cases applying equitable estoppel based on vested rights because in those cases the permits were valid when initially issued: "It is . . . a wholly different situation when the permit is invalid from the beginning because issued in violation of the zoning law for the area." (*Id.* at p. 824, italics omitted.)

Similarly, in *Smith, supra*, 7 Cal.App.4th 770, a communications company obtained a land use permit from county planning staff to construct three communications towers each of which would support one telephone microwave dish and a subsequently issued building permit allowed installation of two telephone microwave dishes per tower. (*Id.* at p. 773.) The land use permit was based on an earlier issued conditional use permit

that allowed construction of “FM and TV Facilities” but made no reference to microwave or telephone communications. (*Id.* at p. 772.) When construction was almost complete, a neighbor complained to the county. The county board of supervisors concluded that while “the land use permit was not in substantial conformity with the conditional use permit on which it was based,” the developer had “expended substantial sums in good faith reliance on the land use permit, and thus has a vested right to maintain three antennas with one dish each.” (*Id.* at p. 774.) The trial court denied the neighbor’s petition for writ of mandate. The appellate court reversed holding the county could not be estopped to deny the validity of permits issued in violation of relevant zoning. Government estoppel applies “only in the most extraordinary case where the injustice is great and the precedent set by the estoppel is narrow” and “[t]his is not the extraordinary case.” (*Id.* at p. 775.) The court rejected the argument that the lack of identifiable health or environmental hazards from the structures indicated public policy was not “adversely affected by the application of estoppel . . . The point is that public policy may be adversely affected by the creation of precedent where estoppel can too easily replace the legally established substantive and procedural requirements for obtaining permits.” (*Id.* at p. 775.)

Dove Capistrano’s reliance on *Anderson v. City of La Mesa* (1981) 118 Cal.App.3d 657 (*Anderson*), is misplaced. In *Anderson*, the city issued a building permit to the homeowner to construct her house with a seven and one-half foot setback from the side lot line. The permit was in compliance with the city’s zoning ordinance requiring a minimum five-foot setback. (*Id.* at p. 659.) The city inspected the house several times during construction, but when the house was completed the city refused to issue a final certificate of occupancy because a specific plan ordinance required a minimum 10-foot setback. (*Ibid.*) The city denied the homeowner’s application for a variance. The appellate court affirmed a trial court order requiring the city to issue a variance and an occupancy permit, concluding the city was equitably estopped from

enforcing the 10-foot setback requirement because the house, built in accordance with the permit, did not violate the city's standard zoning ordinances and there was no evidence that granting a variance would cause any hardship on any other persons. (*Id.* at p. 661.) Unlike *Anderson*, where the building permit complied with the standard zoning, here Dove Capistrano is advocating that the permits allowed a significant expansion of the building's size without complying with the Municipal Code's parking requirements. That alone distinguishes the two cases. Moreover, *Anderson* arose in the procedural context of an application for a variance from the special zoning ordinance, a formality not observed by Dove Capistrano or the City in this case.<sup>8</sup>

Finally, we reject Dove Capistrano's suggestion the practical effect of the trial court's ruling is to require it to tear down the properly permitted structures so as to resolve the parking issues. That is not what the trial court ruled, nor it is the necessary result of the trial court's (or our) ruling. Dove Capistrano may apply for a variance from the parking requirements (Gov. Code, § 65906), a determination that rests in the sound discretion of the City. Or, it may modify the project so as to not utilize the storage

---

<sup>8</sup> In its reply to the return, Dove Capistrano for the first time suggests there is a statute of limitations issue, arguing any challenge to the validity of the permits and variance issued in 1982 and 1991 is untimely. (See Gov. Code, § 65009, subd. (c)(1)(E) [90-day statute of limitations applicable to action attacking decision granting conditional use permit under current statute]; see also former Gov. Code, § 65907 [180-day statute of limitations under former statute].) The statute of limitations argument was not raised in Dove Capistrano's opposition below, and we generally do not consider new issues raised for the first time in a reply brief. (*Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 295, fn. 11; *Save the Sunset Strip Coalition v. City of West Hollywood* (2001) 87 Cal.App.4th 1172, 1181, fn. 3.) Accordingly, we decline to consider the new argument.

In view of our conclusion the trial court correctly found Dove Capistrano did not have legal nonconforming parking rights, we need not address Friess's arguments concerning the proper parking formula to be applied (i.e., whether the Mercado Project is really a "food store" subject to the one space per 200 square feet formula) or whether even if classified as a general retail use, the use is an intensification of the prior thrift store use so as to defeat any legal nonconforming parking rights.

structures as part of the interior footprint of the building. We hold here only that it was an abuse of discretion by the City Council to approve the Mercado Project based on nonconforming parking rights that did not exist.

#### DISPOSITION

The order to show cause is discharged, and the petition for writ of mandate is denied. Real Party in Interest shall recover costs. The stay is dissolved upon the finality of the opinion as to this court.

O'LEARY, P. J.

WE CONCUR:

FYBEL, J.

THOMPSON, J.