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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

ROSS CREEK NEIGHBORS,

Plaintiff and Appellant,

v.

TOWN OF LOS GATOS et al.,

Defendants and Respondents.

H038018

(Santa Clara County

Super. Ct. No. CV208541)

Appellant Ross Creek Neighbors filed a petition for writ of administrative mandate and injunctive relief to challenge the approval of tentative and final maps by respondents Town of Los Gatos and its Town Council (Town) for a seven-lot subdivision project in a residential neighborhood.¹ The trial court found that the action was barred by collateral estoppel and laches. We affirm the judgment.

I. The Subdivision Map Act

A proposed subdivision must comply with applicable zoning ordinances and the Subdivision Map Act. (Gov. Code, § 66410 et seq.)² Under the Subdivision Map Act,

¹ Respondents also include real parties in interest Mission Way Partners, LLC, HBO LLC, Stitegarnmac LLC, Sardan LLC, Daniel Blue, and Sanford Havens.

² All further statutory references are to the Government Code unless stated otherwise.

the legislative body of each local agency must adopt ordinances to “regulate and control the initial design and improvement” of subdivisions. (§ 66411.) “A tentative and final map shall be required for all subdivisions creating five or more parcels.” (§ 66426.) A “[t]entative map” refers to a map made for the purpose of showing the design and improvement of a proposed subdivision and the existing conditions in and around it and need not be based upon an accurate or detailed final survey of the property.” (§ 66424.5, subd. (a).) In the present case, “[t]he Planning Commission is the advisory agency for the Town under the Subdivision Map Act and is authorized to approve, conditionally approve, or disapprove all maps except vesting tentative maps,” and was required to provide notice and hold a public hearing on the tentative map. (Los Gatos Town Code, §§ 24.10.020, 24.20.045 (Town Code).) The authority of the Development Review Committee (DRC) is more limited. It “[r]egularly reviews and makes recommendations to the Planning Commission concerning the determination of all subdivision matters which come before the Planning Commission,” and it “[i]s the advisory agency for the Town authorized to approve, conditionally approve or disapprove subdivision maps consisting of four lots or less.” (Town Code, § 24.10.025, subds. (3), (4).) After a tentative map has been approved, the subdivider may survey the property and prepare a final map in accordance with the approved tentative map. (§ 66456.) “A legislative body shall not deny approval of a final . . . map if it has previously approved a tentative map for the proposed subdivision and if it finds that the final or parcel map is in substantial compliance with the previously approved tentative map.” (§ 66474.1.)

II. Factual and Procedural Background

In March 2005, the developer submitted applications for the project, which involves the construction of seven single-family homes on 2.35 acres within a developed residential neighborhood in Los Gatos. Ross Creek extends along part of the northern

edge of the project site. The project also involves the removal of trees, the demolition of a single-family residence and a cottage, and the creation of a protected riparian area of approximately 0.5 acre.

In March 2007, the Town published an initial study and a mitigated negative declaration. Almost a year later, the Town held a public hearing, adopted the mitigated negative declaration, and approved the planned development (PD) ordinance and zoning changes.

On February 21, 2008, appellant³ filed its first petition for writ of mandate (CEQA case) in which it challenged the Town's actions regarding the approval of the project. Appellant argued, among other things, that the Town failed to comply with the California Environmental Quality Act (CEQA) when it issued a mitigated negative declaration and did not prepare an environmental impact report (EIR). In November 2008, the trial court granted the petition and issued a peremptory writ of mandate ordering the Town to set aside the prior approvals and to refrain from further approval of the project until it certified an adequate EIR.

On March 16, 2009, David Crites, who was one of appellant's members, wrote a letter to the Town that outlined the objections to the project, including that "the proposed site design . . . [did] not make the creek accessible to the community."

After the Town circulated a draft EIR for public review on February 9, 2010, appellant objected to the project's inconsistency with subdivision provisions of the Town Code relating to street width, removal of protected trees, lot area requirements, and public access to Ross Creek.

³ The appellants in that case also included Committee for Green Foothills and Douglas V. Ownbey.

On August 11, 2010, the planning commission held a public hearing concerning the PD ordinance and the EIR. The planning commission recommended to the Town that the EIR be certified but that the PD ordinance for the project be denied.

On September 7, 2010, the Town certified the EIR. On September 21, 2010, the Town approved the PD application and rezoning by adopting the PD ordinance.

On October 8, 2010, the DRC sent notice to the owners or the residents of property close to the project site that it was holding a public hearing to consider a request for approval of a seven-lot subdivision and that all files, plans, and reports would be available for review. The notice also stated: "If anyone wishes to challenge the action on this application in court, they may be limited to raising only those issues they or anyone else raised at the public meeting described in this notice, or in written correspondence delivered to the Town at, or prior to, the public hearing." Appellant participated in the public hearing when Crites sent a letter on behalf of appellant to the DRC and objected to the tentative map based on violations of Town Code section 29.10.020 [horizontal areas within lot lines] as well as the inadequacy of the EIR, the zoning ordinance, and the riparian enhancement plan for the project. Crites also stated that approval of the tentative map "would be counter to state and local regulations, and inconsistent with the Town's general plan. I've listed these violations in my previous correspondence about the project and incorporate them here by reference." Crites did not specify the dates of this correspondence or to whom it had been sent. There was no objection to either the DRC's authority to approve the tentative map or to the issue of public access to Ross Creek. The project's tentative map was neither appealed to nor reviewed by the Town or the planning commission. On October 19, 2010, the DRC approved the tentative map for the project.

In November 2010, the Town filed a return in the CEQA case and requested that the writ be discharged because it had completed an EIR.

On December 10, 2010, appellant filed its second petition for writ of mandamus and complaint for injunctive relief, which alleged that the PD ordinance adopted for the project was invalid (PD ordinance case). Appellant argued that the project involved “a zone change, lot line adjustment, demolition of an existing residence and removal of trees in violation of the Town’s minimum sidewalk, street width and right-of-way ordinances, minimum lot size, maximum density ordinance, and tree preservation ordinance.” Appellant did not challenge the DRC’s approval of the tentative map.

On March 8, 2011, the trial court considered the two pending actions (CEQA case and PD ordinance case) together. The trial court denied the Town’s request to discharge the writ in the CEQA case and retained jurisdiction in that case. However, the trial court denied the writ petition in the PD ordinance case and entered judgment in favor of the Town.

In May 2011, the Town filed a second supplemental return to the writ of mandate in the CEQA case. Following a hearing, the trial court issued an order discharging the writ. Appellant appealed from the order and this court affirmed the order in case No. H036927.

On June 10, 2011, appellant appealed from the judgment in the PD ordinance case. On the same day, appellant also filed an application in the CEQA case for an order from the trial court directing respondents to refrain from further activities at the project site. The trial court denied the order on June 13, 2011.

On June 20, 2011, appellant filed in this court a motion in the CEQA case for a temporary stay to enforce an automatic stay under Code of Civil Procedure section 916, subdivision (a). On the same day, the Town approved the final map for the project though appellant submitted a letter to the Town and argued that approval of the final map violated the Town Code and the Subdivision Map Act.

On June 24, 2011, appellant filed in this court a petition for writ of supersedeas and a renewed motion for a temporary stay in the CEQA case.

In July 2011, appellant abandoned its appeal in the PD ordinance case.

On September 2, 2011, appellant filed a third petition for writ of administrative mandate and complaint for declaratory relief. The first cause of action alleged that respondents violated the Subdivision Map Act because “the Project violates local subdivision ordinances as further explained below” and “[d]espite the fact that neither the Tentative Map nor the Final Map complied with California or Los Gatos law, Respondents approved both maps.” The second cause of action alleged that respondents adopted the final map in violation of Town Code sections 24.50.015, subdivision (3) [width of street and right-of-way], 24.50.065 [sidewalk width], 29.10.0990, subdivision (5) [removal of protected trees], 24.50.135 and 24.10.015 [lot area], 29.10.020 [horizontal areas within lot lines], 24.10.020 and 24.20.050 [review or approval of tentative map by planning commission or Town Council], and 24.20.080 [developer did not make dedication of land offer]. The third cause of action alleged respondents abused their discretion in approving the final map because the project fails to provide public access to Ross Creek in violation of section 66478.4, subdivision (a).

On September 9, 2011, this court denied the motion for a stay and the petition for writ of supersedeas.

Following a hearing, the trial court issued a statement of decision. The trial court found that the action was not barred by the statute of limitations, but that it was barred by collateral estoppel and laches.

III. Discussion

A. Collateral Estoppel

Appellant contends that collateral estoppel does not bar the first and second causes of action. We disagree.

“The doctrine [of res judicata] has a double aspect, a prior judgment is a bar in a new action on the same cause of action, and in a new action on a different cause of action the former judgment is a collateral estoppel, being conclusive on issues actually litigated in the former action.” (*Lewis v. Superior Court* (1978) 77 Cal.App.3d 844, 851.) This first aspect of the doctrine is often referred to as claim preclusion or res judicata while the second aspect of the doctrine is referred to as issue preclusion or collateral estoppel. (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896, fn. 7.)

“Collateral estoppel precludes relitigation of issues argued and decided in prior proceedings. [Citation.] Traditionally, we have applied the doctrine only if several threshold requirements are fulfilled. First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding. [Citations.]” (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341, fn. omitted (*Lucido*)). Once the threshold requirements are met, courts consider whether application of issue preclusion will further the public policies of “preservation of the integrity of the judicial system, promotion of judicial economy, and protection of litigants from harassment by vexatious litigation.” (*Id.* at p. 343.)

The first cause of action in the present case alleged that respondents abused their discretion and failed to proceed in the manner required by law by approving the final map

in violation of the Subdivision Map Act because the project violated local subdivision ordinances. The second cause of action alleged that respondents adopted the final map in violation of Town Code sections 24.50.015, subdivision (3) [width of street and right-of-way], 24.50.065 [sidewalk width], 29.10.0990, subdivision (5) [removal of protected trees], 24.50.135 and 24.10.015 [lot area], 29.10.020 [horizontal areas within lot lines], and 24.10.020 and 24.20.050 [review or approval of tentative map by planning commission or Town Council].

In the PD ordinance case, appellant's first cause of action alleged violations of Town Code sections 24.50.015, subdivision (3) [width of street and right-of-way], 24.50.065 [sidewalk width], 29.10.0990, subdivision (5) [removal of protected trees], 24.50.135 and 24.10.015 [lot area], and 29.10.020 [horizontal areas within lot lines].

Appellant argues that the issues in the PD ordinance case are not identical to those in the present case. They assert that the present action challenges the violations of the Town Code and the Subdivision Map Act, while the prior action challenged the PD ordinance. However, appellant's challenge to the Subdivision Map Act is based on the Town's violation of specified subdivisions in the Town Code. In challenging the PD ordinance, appellant alleged violations of the same subdivisions in the Town Code. Thus, since the issues in the present case of whether the project violated local subdivision ordinances, that is, Town Code sections 24.50.015, subdivision (3) [width of street and right-of-way], 24.50.065 [sidewalk width], 29.10.0990, subdivision (5) [removal of protected trees], 24.50.135 and 24.10.015 [lot area], and 29.10.020 [horizontal areas within lot lines], are identical to the issues in the PD ordinance case in which appellant alleged the same violations of the Town Code, the first requirement of *Lucido* has been met.

Appellant also contends that the standard of review in the present case differs from that in the PD ordinance case. In the PD ordinance case, appellant argued that the

substantial evidence standard applied under Code of Civil Procedure section 1094.5 while the Town argued that the abuse of discretion standard applied under Code of Civil Procedure section 1085. The trial court concluded that respondents prevailed under either standard. In the present case, appellant argued that the abuse of discretion standard applied while respondents argued that the substantial evidence standard applied. The trial court concluded that the case was properly reviewed under the abuse of discretion standard. Given that the trial court concluded in the PD ordinance case that respondents prevailed under either standard, there is no merit to appellant's contention that the standards of review were different.⁴

The next *Lucido* requirement involves a determination of whether the issue was actually litigated in the prior proceeding. “An issue is actually litigated “when [it] is *properly raised*, by the pleadings or otherwise, and is submitted for determination, and is *determined . . .*” [Citations.]” (*Castillo v. City of Los Angeles* (2001) 92 Cal.App.4th 477, 482 (*Castillo*)). Here, appellant filed briefing and a hearing was held on the issues of whether the Town's approval of rezoning for the project site violated Town Code sections 24.50.015, subdivision (3) [width of street and right-of-way], 24.50.065 [sidewalk width], 29.10.0990, subdivision (5) [removal of protected trees], 29.10.020 [horizontal areas within lot lines], and 24.50.135 and 24.10.015 [lot area requirements]. The trial court concluded that “[t]he record viewed as a whole contains sufficient evidence that the Town correctly applied its local codes,” denied the petition, and entered

⁴ Appellant now contends on appeal that the substantial evidence standard does not apply in this action, because the Town failed to proceed in the manner required by law and the appropriate standard was independent review. However, appellant also alleged that the Town failed to act in the manner required by law in the PD ordinance case. Assuming appellant is correct as to the standard of review, it would have also applied in the PD ordinance case. But appellant abandoned its appeal in the PD ordinance case and thus is bound by the trial court's ruling that there were no violations of the Town Code.

judgment in favor of the Town. Thus, the record establishes that the issues were previously litigated.

Lucido also requires “that the issue was ‘necessarily decided,’ [which] has been interpreted to mean that the issue was not “‘entirely unnecessary’” to the judgment in the prior proceeding. [Citation.]” (*Castillo, supra*, 92 Cal.App.4th at p. 482.) Here, the trial court rejected appellant’s contentions that the Town’s rezoning of the project site violated the Town Code, and thus the issues were necessarily decided in the prior proceeding.

The prior judgment was also final and on the merits. Appellant filed a notice of appeal from the judgment, but later filed a notice abandoning its appeal. The decision was on the merits because it followed a “‘full hearing’ in which “‘the substance of the claim [was] tried and heard.’” [Citations.]” (*Castillo, supra*, 92 Cal.App.4th at p. 483.)

As to the final *Lucido* requirement, appellant, the party against whom preclusion is sought, is a party who participated in both proceedings.

Turning to the public policy considerations, we conclude that they have been met. First, application of issue preclusion in the present case would preserve the integrity of the judicial system. If appellant was allowed to relitigate whether the Town violated the challenged provisions of the Town Code, the prior proceeding would be undermined. Second, judicial economy would also be promoted in the present case because “[a]llowing the trial court to rely on the litigated and necessary findings from the [prior judicial proceedings] would ‘minimize repetitive litigation.’ [Citation.]” (*Castillo, supra*, 92 Cal.App.4th at p. 483.) Third, the policy against vexatious litigation favors applying issue preclusion because appellant had an opportunity in the prior proceeding to show that these subdivisions of the Town Code had been violated.

In sum, we conclude that the trial court properly found that collateral estoppel barred the first cause of action and the second cause of action with the exception of the

allegation in paragraph 66 regarding approval of the tentative map by the DRC rather than the planning commission or the Town Council.

Relying on *Louis Stores, Inc. v. Department of Alcoholic Beverage Control* (1962) 57 Cal.2d 749, 757 (*Louis*), appellant contends that collateral estoppel does not apply to questions of law arising out of separate transactions if injustice would result. In *Louis*, the district liquor control administrator sought to revoke the plaintiff's wholesale beer and wine license in successive proceedings. (*Id.* at pp. 755-756.) The first proceeding was resolved in the plaintiff's favor. (*Id.* at p. 756.) In the second proceeding, which challenged the plaintiff's operations during a different period of time and under a substantially similar statute, the plaintiff argued that the administrator was collaterally estopped from relitigating the issue because its methods of operation had not changed since the first proceeding. (*Ibid.*) *Louis* stated: "The determination of a question of law by a judgment in an action is not conclusive between the parties in a subsequent action on a different cause of action, even though both causes of action arose out of the same subject matter or transaction, *if it would be unjust to one of the parties or to third persons to apply one rule of law in subsequent actions between the same parties and to apply a different rule of law between other persons.*" (Italics added.)" (*Id.* at p. 757.) The California Supreme Court then held that the second proceeding was not barred by collateral estoppel. (*Id.* at pp. 758-759.) Here, the question of law raised in the present proceeding was litigated in the PD ordinance case, that is, whether the project violated specified provisions of the Town Code.

Appellant argues, however, that it "would be unjust to bar Appellant from enforcing the law in this case, while other parties could successfully challenge Map Act violations in other cases" and "the developer in this case would be exempt from complying with the California Map Act, while other developers might be forced to comply with the Act." As previously stated, application of issue preclusion will promote

the public policies of “preservation of the integrity of the judicial system, promotion of judicial economy, and protection of litigants from harassment by vexatious litigation.” (*Lucido, supra*, 51 Cal.3d at p. 343.) Given the substantial amount of litigation that this case has generated, we conclude that there would be no injustice to appellant or to third parties to apply collateral estoppel.

B. Laches

Appellant also contends that the trial court erred in applying laches to its claims. Since we have found that collateral estoppel bars certain claims, we will only consider appellant’s claims relating to violations of Town Code sections 24.10.020 and 24.20.050 [review or approval of tentative map by planning commission or Town Council] and section 66478.4, subdivision (a) [public access to waterway].⁵

“Laches is an unreasonable delay in asserting an equitable right, causing prejudice to an adverse party such as to render the granting of relief to the other party inequitable. [Citations.]” (*Wells Fargo Bank v. Bank of America* (1995) 32 Cal.App.4th 424, 439.) “‘Generally speaking, the existence of laches is a question of fact to be determined by the trial court in light of all of the applicable circumstances, and in the absence of manifest injustice or a lack of substantial support in the evidence its determination will be sustained. [Citations.]’ [Citation.] In other words, appellate courts review such determinations for ‘manifest injustice’ or for ‘lack of substantial . . . evidence.’ [Citation.]” (*Bono v. Clark* (2002) 103 Cal.App.4th 1409, 1417.)

Here, the trial court’s determination that laches barred appellant’s claims did not result in manifest injustice and was supported by substantial evidence. As the trial court

⁵ Appellant contends that the trial court’s findings on collateral estoppel and laches are irreconcilable. Since the trial court entered judgment in favor of respondents, we interpret the trial court as having found that even if appellant’s claims were not barred by collateral estoppel, they were barred by laches.

noted, appellant was aware of the issues of public access and the DRC's approval of the tentative map for a significant period of time before it filed its writ petition. Appellant demonstrated its awareness of the issue of public access to Ross Creek in its March 16, 2009 letter to the Town. Appellant participated by letter in the public hearing before the DRC in October 2010 and never objected to its authority to approve the tentative map either prior to, during, or shortly after the hearing. Instead, appellant waited until June 2011 to raise these issues at the hearing on the approval of the final map, and did not file its writ petition until 74 days after the hearing on the final map. As a result of litigation-related delay, the developer has suffered prejudice. The period during which he could pay off loans for the project has been extended and thus he is incurring approximately \$20,000 per month in interest on these loans.

Relying on *Lerner v. Los Angeles City Board of Education* (1963) 59 Cal.2d 382, 399, appellant argues that the trial court erred as a matter of law by finding that laches barred causes of action that had not yet arisen. In *Lerner*, the state board revoked the plaintiff's teaching credential in December 1954 because he had been convicted of a sex offense. (*Id.* at pp. 386-387.) Four days later, the city board terminated plaintiff's employment. (*Id.* at p. 387.) In June 1958, the state board sent the plaintiff a letter informing him that a recent court case required an administrative hearing prior to the termination of employment for those individuals who had been convicted of a sex offense prior to July 1952. (*Id.* at pp. 387-388.) In July 1958, the state board reinstated the plaintiff's teaching credential, but the city board denied his request for reinstatement. (*Id.* at p. 388.) In December 1958, the plaintiff brought suit seeking a declaration that he had the right to be reinstated as a teacher. (*Ibid.*) The trial court found that the plaintiff's claim for reinstatement was barred by the three-year statute of limitations and laches because he had waited from December 1954 until December 1958 to initiate litigation. (*Id.* at pp. 389-390, 399.) The California Supreme Court held that laches did not bar the

plaintiff's claim, stating: "The finding of laches, however, rests upon the assumption that the cause of action arose in December 1954. Since we have held that the cause arose in July 1958, we believe that as a matter of law laches do not bar [the plaintiff's] action. [¶] The total delay, from July 1958 to the filing of suit, involved about six months; only rarely have the courts applied the doctrine of laches to so short a time." (*Id.* at p. 399.)

In our view *Lerner* is distinguishable from the present case. In *Lerner*, the plaintiff filed his action six months after the three-year statute of limitations began to run. Here, the statute of limitations for challenges involving the Subdivision Map Act is only 90 days as set forth in section 66499.37,⁶ and appellant filed its writ petition 74 days after its cause of action arose. Section 66499.37 "manifests a legislative purpose that a *decision* such as that of the City, approving a subdivision map and attaching a *condition* thereto, shall be judicially attacked within [the [90-day] limitation period of section 66499.37], or not at all." (Original italics.) [¶] The purpose of statutes and rules which require that attacks on land-use decisions be brought by petitions for administrative mandamus, and create relatively short limitation periods for those actions, and actions which challenge the validity of land use statutes, regulations, and/or decisions, is to permit and promote sound fiscal planning by state and local governmental entities." (*Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 27, quoting *Timberbridge Enterprises Inc. v. City of Santa Rosa* (1978) 86 Cal.App.3d 873, 886.) Given the extremely short

⁶ Section 66499.37 states in relevant part: "Any action or proceeding to attack, review, set aside, void, or annul the decision of an advisory agency, appeal board, or legislative body concerning a subdivision, or of any of the proceedings, acts, or determinations taken, done, or made prior to the decision, or to determine the reasonableness, legality, or validity of any condition attached thereto, including, but not limited to, the approval of a tentative map or final map, shall not be maintained by any person unless the action or proceeding is commenced and service of summons effected within 90 days after the date of the decision. Thereafter all persons are barred from any action or proceeding or any defense of invalidity or unreasonableness of the decision or of the proceedings, acts, or determinations."

statute of limitations in land use decisions and appellant's long-standing awareness of the issues involved in the present case, laches bars appellant's causes of action filed shortly before the statute of limitations had run.

Appellant next contends that "the DRC's recommendation was not ripe for judicial review" and focuses on the trial court's statement that appellant failed to explain its one-year delay in challenging the DRC's authority in court.

We first note that appellant's characterization of the DRC's action as a "recommendation" is not supported by the record. The DRC notice of the October 2010 hearing stated that it would consider the request for approval of the project. Appellant participated by letter in the public hearing and urged the DRC to deny the subdivision application. At the conclusion of the public hearing, the DRC voted to approve the subdivision application with certain conditions. The tentative map for the project was stamped "APPROVED" on the day of the hearing. Thus, the record establishes that the DRC approved the tentative map in violation of Town Code sections 24.10.020 and 24.10.025 rather than recommend to the planning commission that it be approved.

Appellant did not object at the hearing that the DRC lacked authorization to approve the tentative map. It also did not appeal the DRC's decision administratively pursuant to Town Code section 29.20.260.⁷ Instead, appellant waited until June 20, 2011, and voiced its objection at the Town meeting at which the final map was approved. Despite participating by letter in the hearing at which the DRC approved the tentative map in October 2010, appellant did not challenge the DRC's decision either administratively or judicially until September 2011.⁸ Even assuming that the issue of the

⁷ Town Code section 29.20.260 states in relevant part: "The appellant must file a written notice of appeal with the Planning Director . . . not more than ten (10) days after the decision is rendered by the Development Review Committee"

⁸ Appellant also appears to be arguing that the delay in bringing the action to court was induced by the Town's failure to have the tentative map approved by the planning

DRC's lack of authority was not ripe for judicial review until June 2011, the trial court did not err in concluding the issue was barred by laches.

Relying on *Austin v. Hallmark Oil Co.* (1943) 21 Cal.2d 718 (*Austin*), appellants contend that “the mere expenditure of money on the part of a defendant is insufficient to show prejudice, [and] the only finding that the trial court made on prejudice was that the developer has spent some money since various points in time.” There is no merit to this contention.

In *Austin, supra*, 21 Cal.2d 718, the plaintiff brought an action to recover the proceeds from the operation of oil wells. (*Id.* at p. 721.) The trial court found, among other things, that pursuant to various agreements, the plaintiff was an equitable owner in a leasehold held by defendants and entitled to future net profits from the leasehold. (*Id.* at pp. 724-725.) *Austin* held that the trial court did not abuse its discretion in finding that laches did not bar the plaintiff's case. (*Id.* at p. 735.) *Austin* found that the plaintiff “was not entitled to share in the proceeds from the leasehold until the property was fully developed, and at the date of his removal only the first well had been brought into production,” and the defendants' conduct contributed to the delay, thereby providing an adequate explanation for the plaintiff's delay in filing the action. (*Ibid.*) Regarding the issue of prejudice, *Austin* stated: “Moreover, the mere lapse of time without prejudice to defendants does not constitute laches. [Citations.] While the complaint was not filed until after [one of the defendants] had spent large sums of money to complete the enterprise, its success was assured before [the plaintiff's] ouster. The expenditures in the present case were not induced by the alleged delay in bringing this action, and the mere expenditure of money or effort on the part of a defendant is insufficient to show prejudice. [Citations.]” (*Ibid.*)

commission. Given appellant's failure to object at the hearing, this argument has no merit.

Here, the trial court found that appellant's "delay has prejudiced the Real Parties in Interest who have expended substantial sums in reliance on the Town's approvals, including almost \$1,000,000 since the tentative map was approved in October 2010, and approximately \$750,000 since the June 2, 2011 discharge of the writ in the [CEQA] case." While the expenditures that were not induced by appellant's delay could not serve as the basis for a prejudice finding, the trial court also recognized that "[t]he public policy underlying the laws on which [appellant] relies strongly favors avoiding prejudice to development projects because of litigation-related delay." The trial court further noted that "the chronology [of this case] is consistent with the Town's claim that [appellant] has parceled out its claims simply to keep litigation going." Thus, in contrast to *Austin*, here, the developer paid additional sums in the form of increased loan costs as a result of the litigation.⁹

Appellant also asserts that "without valid permits and in violation of the zoning ordinance, the developer rushed into construction in an attempt to defeat existing and anticipated lawsuits," and argues that this court should not tolerate such tactics. Relying on *People v. Department of Housing & Community Dev.* (1975) 45 Cal.App.3d 185, 197-198, appellant then faults the trial court for failing to make findings that would bar application of laches in the present case. We find no error. Appellant did not raise this issue in either its opening or reply briefs before the trial court. Thus, the issue of whether the developer performed work without permits was waived.

Noting that the developer did not attach financial documents to support his declaration and that his codevelopers filed an action against him in which they challenged

⁹ Appellant also argues that the developer could not have reasonably relied on the tentative map approval because the developer could not obtain valid permits until July 2011. However, we have rejected appellant's premise that "[t]he developer's work performed in purported reasonable reliance on the tentative map approval serves as the only basis for Respondents' claims of prejudice."

his accounting of project funds, appellant also contends that the trial court had no basis to accept his representations. “[T]he applicable standards of appellate review of a judgment based on affidavits or declarations are the same as for a judgment following oral testimony: We must accept the trial court’s resolution of disputed facts when supported by substantial evidence; we must presume the court found every fact and drew every permissible inference necessary to support its judgment, and defer to its determination of credibility of the witnesses and the weight of the evidence.” (*Betz v. Pankow* (1993) 16 Cal.App.4th 919, 923.) Here, this court defers to the trial court’s determination of credibility and the developer’s declaration constituted substantial evidence to support the trial court’s finding. Thus, there was no error.

IV. Disposition

The judgment is affirmed.

Mihara, J.

WE CONCUR:

Premo, Acting P. J.

Márquez, J.