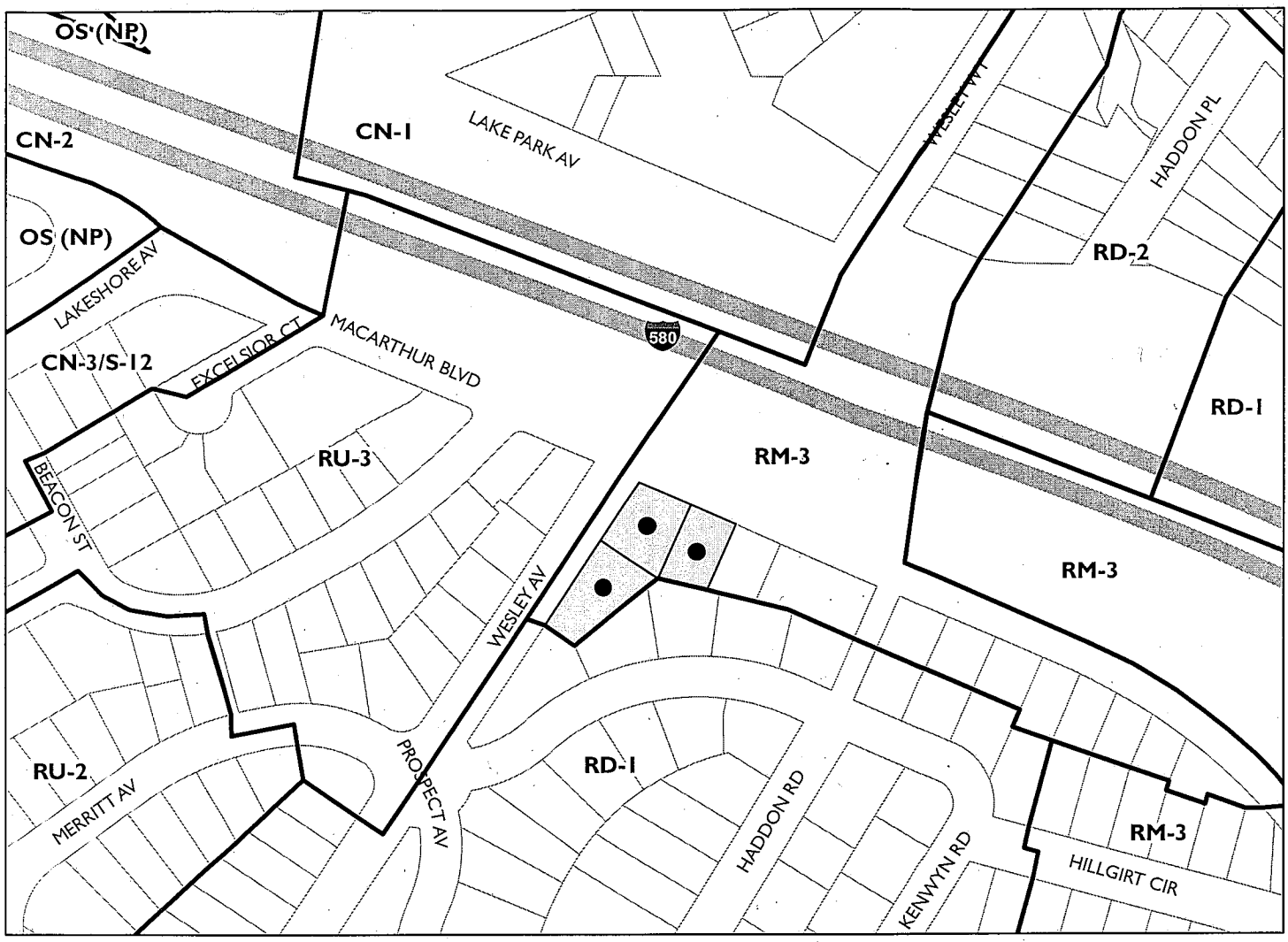
Location:	**601 MacArthur Blvd + 620 Wesley Av + 0 MacArthur Blvd (see map on reverse)**
Assessor's Parcel Numbers:	**023 -0427-001-00, 008-03, 002-00**
Proposal:	To Appeal the Zoning Manager's Determination dated November 22, 2013 indicating City Zoning entitlements for a 32-unit apartment building project are expired. (Application no. CMD00046 was approved November 6, 2002 and extension permits expired December 31, 2011)
Appellant:	Mr. Michael Gray / East Bay Builders
Phone Number:	(510) 435-1556
General Plan:	Mixed Housing Type Residential
Zoning:	RM-3 Mixed Housing Type Residential Zone (previous: R-70 High Density Residential Zone)
Environmental Determination:	Exempt, Section 15270 of the State CEQA Guidelines: Projects Which Are Disapproved; Exempt, Section 15321 of the State CEQA Guidelines: Enforcement Actions by Regulatory Agencies
Historic Status:	Non-historic properties (vacant lots; Potential Designated Historic Property single family home once existed at 601 MacArthur Blvd); 601 MacArthur Blvd and 620 Wesley Av are located in the Haddon Hill Area of Primary Importance
Service Delivery District:	3
City Council District:	2
Date Filed:	December 2, 2013
Action to be Taken:	Deny the Appeal and Uphold the Zoning Manager's Determination
Finality of Decision:	*Final (non-appealable pursuant to OMC Sec. 17.132.030)*
For Further Information:	Contact case planner **Aubrey Rose AICP, Planner II** at **(510) 238-2071** or arose@oaklandnet.com

SUMMARY

The Appellant requests that the Planning Commission overturn the Zoning Manager's administrative determination that City Zoning entitlements for a thirty-two unit residential project at a site consisting of 601 MacArthur Boulevard and two abutting properties are expired (Application no. CMD00046 was approved November 6, 2002 and extension permits expired December 31, 2011). Staff recommends that the Planning Commission deny the appeal and uphold the Zoning Manager's determination. As described in this report, staff finds there was no error or abuse of discretion by the Zoning Manager when he determined that the entitlements were expired and that the determination was supported by the evidence in the record.

CITY OF OAKLAND PLANNING COMMISSION



Case File: A13335 (DET13057)
Appellant: Mr. Michael Gray / East Bay Builders
Address: 601 MacArthur Boulevard + 620 Wesley Avenue + 0 MacArthur Boulevard
Zone: RM-3

SITE DESCRIPTION

The site consists of three vacant lots centered on MacArthur Boulevard at Wesley Avenue (601 MacArthur Blvd., 620 Wesley Avenue and 0 MacArthur Blvd.). It is L-shaped, measures 20,472 square feet in total area, and contains a steep upslope at the center of the lot (40-percent grade). Medium density residences are located on abutting properties. To the north is the 580 freeway; to the south is a mixed housing type residential neighborhood; to the east is MacArthur Boulevard; and to the west is Lakeshore Avenue.

BACKGROUND

The City Zoning entitlements ("permits") for the project expired on December 31, 2011 because no additional extension was timely requested. In September 2013, the project's applicant, who had obtained extensions on the Zoning permit in the past and was familiar with the procedure, requested a disposition on the status of the Zoning permit. The Zoning Manager made a formal determination dated November 22, 2013, which indicates that past zoning permits expired because no extension was applied for prior to the December 31, 2011 expiration date. The applicant appealed this determination on December 2, 2013 as described in this report.

Twice (first in 1991 and again in 2002), the site has been approved for a residential project, in both instances permits were extended, construction commenced, and the site was left in a hazardous condition, including improperly capped sewer lines and unstable slope, and permits were allowed to expire.

In 2005 some grading and partial foundation work was completed. In 2008 building and sanitary sewer permits were reissued. Due to substandard and dangerous conditions, and after issuing numerous notices dating back to 2006, the City pulled permits in 2010 to stabilize the hillside and cap an exposed unfinished sewer pipe during a wet weather moratorium and completed the work 2010-2011 which required removing part of the 2005 foundation wall. The City's abatement of these unsafe and unsightly conditions at the site cost over $300,000. The timeline for this Background is as follows (all items relate to Mr. Michael Gray except where otherwise indicated in 1991-1995 and 2011):

Chronology of permits

FIRST PROJECT
1991 – Zoning permit for 34-unit project approved (to another applicant)
1992–1994 – Zoning permit extended (to another applicant)
1994 – Blight citation issued on site (to another applicant)
1995 – Demolition permit issued / zoning permit extended / correction notice issued on site for litter (to another applicant)
1996 – Approval extensions requested and granted to 12/20/96 / Zoning pre-application submitted for alternate 2-unit project
1998 – Michael Gray requests determination of validity of Zoning Permit / Zoning Manager's Determination: that the Zoning Permit expired
1999 – Appeal of determination submitted / Planning Commission denies Appeal

CURRENT PROJECT
2000 – Application submitted for 32-unit project
11/6/02 – Zoning permit #CMD0046 for 32 units approved with condition: 1 year expiration
8/20/03 – Zoning permit extended
10/3/03 – Building permit issued (expired 4/21/06)
8/10/04 – Building permit reissued (expired 7/28/06)
4/8/05 – Tentative Parcel Map #TPM0836 approved for condominium ownership (2 year expiration)
2005 – Some grading and partial foundation work completed
3/29/07 – Final Map application submitted (but not approved)

2/7/08 – Zoning permit for design review extended to 2/7/09
7/15/08 – State begins subdivision extensions for all tentative maps in effect on July 15, 2008
10/16/08 – Applied for building permit reissuance
11/4/08 – Building permit reissued (expired 10/17/10)
11/5/08 – Sanitary sewer permit issued (expired 5/21/11)2009-2010 - City attempted to have owner remedy hillside stabilization and unfinished sewer pipe work (to no avail)
10/18/10 – City pulls permits to stabilize hillside and cap unfinished sewer pipe during wet weather moratorium
2010-2011 – City undertakes and completes hillside stabilization, removing part of 2005 foundation wall; restoring stable slope; property owner billed for cost; currently property lien is for $357,000 for City work and taxes. Final order issued by First District Court of Appeal on 11/1/13, affirming award of $310,315.18 damages claim to City. (**Attachment F**).
4/22/11 – Zoning permit extended to 12/31/11 pursuant to City Council Resolution (to another applicant)
1/1/12 – Zoning permit expires because the applicant never requested an extension
9/9/13-10/1/13 – Michael Gray requests determination on validity of Zoning Permit CMD0046
11/22/13 – Zoning Manager issues determination that the Zoning Permit has expired
12/2/13 – Appeal of determination submitted (containing attachment: letter by appellant's attorney dated 11/11/13)
12/3/13 – Extension request received
12/4/13 – Request for confirmation of requirements; agreement for compliance plan; agreement to comply with extension policies received
12/13/13 – Request for compliance plan; agreement to comply with extensions policies received

The Zoning Manager's Determination stated:

> On September 9, 2013 you submitted an inquiry requesting a determination on the disposition of Zoning Approval #CMD0046 (32 unit project on MacArthur Blvd at Wesley Av, approved November 6, 2002). Condition of Approval #2a stipulated that construction must commence or an extension must be granted by November 6, 2003, or the permit shall expire. Extensions were granted beginning August 20, 2003. Building permit # B0303082 was issued on October 3, 2003. You have provided an invoice from Newtown Construction for excavation dated October 27, 2003; the invoice date implies work commenced prior to the deadline. However, work was not completed or substantially completed, and hence the intent of the Condition was not met. Additional permits were pursued in 2008. It should also be noted that in 2010 the City of Oakland undertook an emergency hillside stabilization project to shore up the hillside for the protection of uphill residences and to cap unfinished sewer lines; much foundation was removed as a result. Additionally, subsequent zoning approval extensions expired on December 31, 2011. No further extensions were requested from you or current or previous property owners prior to December 31, 2011. The Planning and Zoning Division, therefore, considers the Planning entitlements issued pursuant to case CMD00046 to be expired. You are welcome to apply for required zoning approvals under the current Planning Code, and the City looks forward to future development of this site.

The City uniformly includes a condition such as Condition of Approval #2a of Appellant's original building permit in its approvals. Pursuant to this condition, the City has consistently required developers to complete or substantially complete construction in order to avoid automatic expiration of the permit.

GENERAL PLAN ANALYSIS

The site is located in the Mixed Housing Type Residential area of the General Plan's Land Use and Transportation Element. The intent of the area is: "to create, maintain, and enhance residential areas typically located near the City's major arterials and characterized by a mix of single family homes, townhouses, small multi-unit buildings, and neighborhood businesses where appropriate."

ZONING ANALYSIS

The property is located in the RM-3 Mixed Housing Type Residential Zone. The intent of the RM-3 Zone is: "to create, maintain, and enhance residential areas characterized by a mix of single family homes, duplexes, townhouses, small multi-unit buildings at somewhat higher densities than in RM-2, and neighborhood businesses where appropriate." The zoning designation at the time of the 2000 application submittal was R-70 High Density Residential Zone. Current Zoning, effective April 2011, would conditionally permit a maximum of 13 units on the property (27 units with an affordable housing Density Bonus) with approval of a Major Conditional Use Permit and Regular Design Review from the Planning Commission.

ENVIRONMENTAL DETERMINATION

The California Environmental Quality Act (CEQA) Guidelines categorically and statutorily exempts specific types of projects from environmental review. The appeal is statutorily exempt from CEQA review, without limitation, under Section 15270 (Projects Which Are Disapproved) and under Section 15321 (Enforcement Actions by Regulatory Agencies).

KEY ISSUES AND IMPACTS—ISSUES RAISED ON APPEAL

Any appeal, to be defensible, must cite error or abuse of discretion by the Zoning Manager and/or where the decision (determination) is not supported by evidence in the record (Oakland Planning Code 17.132.020). Accordingly, on an appeal, the Planning Commission decides the validity of the Zoning Manager's decision. In this case, the decision is the determination that the permit approval has indeed expired.

Following are the Appellants' bases for appealing the Zoning Manager's determination, as summarized from the appeal letter **(Attachment A)** into Issues described below and shown in **bold**. Staff's responses, which relate to the determination letter **(Attachment B)**, are shown in *italics*.

Appellants' Issue # 1
The Zoning Manager's determination letter should be "voided."

Staff's response:
*The Appellant requested, through staff, that the Zoning Manager issue a disposition of zoning permits and extensions (**Attachment C**). The information conveyed in the Zoning Manager's determination letter cannot be rescinded or "voided." Rather, the Planning Commission may overturn the decision only if it is not supported by evidence in the record, or if the Appellant can otherwise show error or abuse of discretion. For the reasons below, the Appellant fails to make such a showing.*

Appellants' Issue # 2
Zoning entitlements should be vested due to substantial construction and investment.

Staff's response:
A common law vested right lasts only as long as the underlying land use permit on which the right to develop vests, and expires if the permit expires. See, e.g., City of W. Hollywood v. 1112 Inv. Co *(2003) 105*

Cal.App.4th 1134, 1149 ("A vested right to build or develop can lapse or expire based upon failure to proceed."); Court House Plaza Co. v. City of Palo Alto *(1981) 117 Cal.App.3d 871, 887 ("The permits expired without [the developers] having built in accordance with their terms. [The developer] cannot six years later assert that it continues to have a vested right to the expired permit."). Here, the Appellant's building permit was issued on 6/23/03, reissued on 8/10/04 and again on 11/4/08, and expired on 10/18/10 after no further action was taken on the part of Appellant to have the permit reissued. Three and half years after the date of the building permit's expiration, Appellant no longer has a vested right.*

Because all permits have expired, the project has lost its vested status under the Planning Code and State law, even if substantial work was performed. The following are relevant passages from the Planning Code (emphasis added):

17.09.020 General rules for construction of language.

The following general rules of construction shall apply to the textual provisions of the zoning regulations:
C. The word "shall" is always mandatory and not discretionary. The word "may" is discretionary.

17.134.080 Adherence to approved plans.

A conditional use permit shall be subject to the plans and other conditions upon the basis of which it was granted. Unless a different termination date is prescribed, the permit shall terminate one year from the effective date of its granting unless, within such period, all necessary permits for construction or alteration have been issued, or the authorized activities have commenced in the case of a permit not involving construction or alteration. However, such period of time may be extended by the original reviewing officer or body, upon application filed at any time before said period has expired. Expiration of any necessary building permit for the project may invalidate the conditional use permit approval if such extension period has also expired.

17.136.100 Adherence to approved plans.

A design review approval shall be subject to the plans and other conditions upon the basis of which it was granted. Unless a different termination date is prescribed, the approval shall terminate two (2) years from the effective date of its granting unless all necessary permits for construction, alteration, painting, demolition, or removal, as the case may be, have been issued within such period. However, such period of time may be extended by the original reviewing officer or body, upon application filed at any time before said period has expired. Expiration of any necessary building permit for the project may invalidate the design review approval if such extension period has also expired.

Appellants' Issue # 3
Subdivision entitlements vest City zoning entitlements as underscored by State law. The Appellant cites: ***"any permit which is issued by a local agency in conjunction with a tentative subdivision map for a planned unit development shall expire no sooner than the approved tentative map, or any extension thereof, whichever occurs later."***

Staff's response:
The State Code citation does not apply to Mr. Gray's project, as the project is not a "planned unit development" under State or City law. (Chapter 17.140 of the Oakland Planning Code provides specific procedures for planned unit developments, distinct from those followed by Appellant.) Furthermore, the subdivision map was never completed. A Tentative Parcel Map was approved but the necessary complement, the Final Map, was submitted but never granted. Unlike a Tentative Parcel Map, which may be deemed approved if no action is taken within the prescribed time limit, a Final Map requires action on the part of the

agency and the subdivider. (See OMC 16.24.110.) Here, Appellant's file indicates no further action taken by either Appellant or City following submission of the Final Map, and therefore, no Final Map exists for the property at issue. Nonetheless, a valid Final Map would not preclude the expiration of other permits since the Appellant's subdivision did not involve a planned unit development and state law does not afford his development such protection.

City zoning staff correspondence dated October 16, 2008, which indicated that no extension was needed for the Tentative Parcel Map, was taken out of context by the Appellant. At the time, the Tentative Parcel Map had already expired (on 4/8/07, two years after its issuance), and there was no need for an extension given that the Final Map had been filed on 3/29/07, when the Tentative Map was still valid. Because the Tentative Parcel Map expired on 4/8/07, it was not eligible for the extensions subsequently granted by the State Legislature, which applied only to subdivision maps that were in effect as of July 15, 2008. (Gov't Code § 66452.21)

Additionally, the email exchange relied upon by the Appellant discussed only the subdivision map and in no way pertains to the expiration of his Zoning or Building permits. The Appellant is unable to cite any state or local law, nor any conversation with City staff, suggesting that the underlying Zoning or Building Permits were not *subject to expiration. Given the lack of any State or City policies vesting the Subdivision and/or Zoning Permits, both the Building permits and the Zoning permits were subject to expiration and did expire.*

*Furthermore, the Appellant essentially concedes that the project is not vested by requesting extensions after submitting the Appeal in December 2013 (**Attachment D**) where a vested project would not be subject to extensions but would be valid in perpetuity.*

CONCLUSION

In conclusion, staff does not find that the appeal has provided any evidence of error or abuse of discretion by the Zoning Manager. The City Zoning entitlements (permits) for the project expired on December 31, 2011 after no extension was timely requested and any and all building permits expired. There is no reasonable basis for overturning the decision. Staff, therefore, recommends that the Planning Commission deny the Appeal and uphold the Zoning Manager's Determination. Alternatively, should the Planning Commission grant the Appeal and overturn the Zoning Manager's Determination, the project would be extended pursuant to Resolution 84746 until December 31, 2014, pursuant to the Appellant's request of December 3, 2013 (fee due: $450.97).

RECOMMENDATIONS:

1. Affirm staff's environmental determination.
2. Uphold the Zoning Manager's determination that Zoning Permit #CMD00046 for 601 MacArthur Boulevard, 620 Wesley Avenue and 0 MacArthur Boulevard have expired.

Prepared by:

Aubrey Rose

AUBREY ROSE, AICP
Planner II

Approved by:

Scott Miller

SCOTT MILLER
Zoning Manager

Approved for forwarding to the
City Planning Commission:

RACHEL FLYNN, Director
Department of Planning and Building

ATTACHMENTS:

A. Appeal letter dated and submitted December 2, 2013
   Attachments: A1. Staff letter to appellant dated November 27, 2013
   A2. Appellant response to determination letter dated November 22, 2013
   A3. Letter to City by Appellant's attorney dated November 11, 2013
B. Zoning Manager's determination letter dated November 22, 2013
C. Correspondences from Appellant requesting entitlement status letter prior to determination
D. Additional correspondences from Appellant submitted after Appeal
E. Neighbor correspondence
F. November 1, 2013 unpublished decision by California Court of Appeal, First Appellate District

Community and Economic Development Agency

CITY OF OAKLAND
APPEAL FORM
FOR DECISION TO PLANNING COMMISSION, CITY COUNCIL OR HEARING OFFICER

PROJECT INFORMATION

Case No. of Appealed Project: DET 13057

Project Address of Appealed Project: 601 MacArthur Blvd + 620 Wesley Av + 0 Mac

Assigned Case Planner/City Staff: Aubrey Rose

APPELLANT INFORMATION:

Printed Name: Michael Gray Phone Number: 510 435-1556

Mailing Address: 9837 Shane Richmond Alternate Contact Number: 435-1556

City/Zip Code 94804 Representing:

Email: freefees98@yahoo.com

RECEIVED
DEC 2 2013
City of Oakland
Planning & Zoning Division

An appeal is hereby submitted on:

☒ **AN ADMINISTRATIVE DECISION (APPEALABLE TO THE CITY PLANNING COMMISSION OR HEARING OFFICER)**

YOU MUST INDICATE ALL THAT APPLY:

- ☐ Approving an application on an Administrative Decision
- ☐ Denying an application for an Administrative Decision
- ☒ Administrative Determination or Interpretation by the Zoning Administrator
- ☐ Other (please specify) _____

Please identify the specific Adminstrative Decision/Determination Upon Which Your Appeal is Based Pursuant to the Oakland Municipal and Planning Codes listed below:

- ☒ Administrative Determination or Interpretation (OPC Sec. 17.132.020)
- ☐ Determination of General Plan Conformity (OPC Sec. 17.01.080)
- ☐ Design Review (OPC Sec. 17.136.080)
- ☐ Small Project Design Review (OPC Sec. 17.136.130)
- ☐ Minor Conditional Use Permit (OPC Sec. 17.134.060)
- ☐ Minor Variance (OPC Sec. 17.148.060)
- ☐ Tentative Parcel Map (OMC Section 16.304.100)
- ☐ Certain Environmental Determinations (OPC Sec. 17.158.220)
- ☐ Creek Protection Permit (OMC Sec. 13.16.450)
- ☐ Creek Determination (OMC Sec. 13.16.460)
- ☐ City Planner's determination regarding a revocation hearing (OPC Sec. 17.152.080)
- ☐ Hearing Officer's revocation/impose or amend conditions (OPC Secs. 17.152.150 &/or 17.156.160)
- ☐ Other (please specify) _____

(continued on reverse)

ATTACHMENT A

(Continued)

☐ A DECISION OF THE CITY PLANNING COMMISSION (APPEALABLE TO THE CITY COUNCIL) ☐ Granting an application to: OR ☐ Denying an application to:

YOU MUST INDICATE ALL THAT APPLY:

Pursuant to the Oakland Municipal and Planning Codes listed below:

- ☐ Major Conditional Use Permit (OPC Sec. 17.134.070)
- ☐ Major Variance (OPC Sec. 17.148.070)
- ☐ Design Review (OPC Sec. 17.136.090)
- ☐ Tentative Map (OMC Sec. 16.32.090)
- ☐ Planned Unit Development (OPC Sec. 17.140.070)
- ☐ Environmental Impact Report Certification (OPC Sec. 17.158.220F)
- ☐ Rezoning, Landmark Designation, Development Control Map, Law Change (OPC Sec. 17.144.070)
- ☐ Revocation/impose or amend conditions (OPC Sec. 17.152.160)
- ☐ Revocation of Deemed Approved Status (OPC Sec. 17.156.170)
- ☐ Other (please specify) _____

FOR ANY APPEAL: An appeal in accordance with the sections of the Oakland Municipal and Planning Codes listed above shall state specifically wherein it is claimed there was an error or abuse of discretion by the Zoning Administrator, other administrative decisionmaker or Commission (Advisory Agency) or wherein their/its decision is not supported by substantial evidence in the record, or in the case of Rezoning, Landmark Designation, Development Control Map, or Law Change by the Commission, shall state specifically wherein it is claimed the Commission erred in its decision.

You must raise each and every issue you wish to appeal on this Appeal Form (or attached additional sheets). Failure to raise each and every issue you wish to challenge/appeal on this Appeal Form (or attached additional sheets), and provide supporting documentation along with this Appeal Form, may preclude you from raising such issues during your appeal and/or in court. However, the appeal will be limited to issues and/or evidence presented to the decision-maker prior to the close of the public hearing/comment period on the matter.

The appeal is based on the following: *(Attach additional sheets as needed.)*

See Attached

Supporting Evidence or Documents Attached. *(The appellant must submit all supporting evidence along with this Appeal Form;* however, the appeal will be limited evidence presented to the decision-maker prior to the close of the public hearing/comment period on the matter.

(Continued on reverse)

(Continued)

Mikuo Lee

Signature of Appellant or Representative of Appealing Organization

12/2/2013

Date

Below For Staff Use Only

Date/Time Received Stamp Below:

Cashier's Receipt Stamp Below:

RECEIVED
DEC 2 2013
City of Oakland
Planning & Zoning Division

Revised 5/31/11

December 2, 2013
Determination Appeal

Scott Miller Zoning Manager
Dear Scott Miller Zoning Manager,

This appeal is filed under protest. All of Zoning and building permits to build a 32unit project at 601 Mac Arthur have been approved by the City of Oakland and fall under the subdivision permit extensions given to builders over the past several years or more.
I again request that the determination letter dated November 22, 2013, stating the permits for 601 Mac Arthur have expired be void because I did not make a request for the letter as required by Oakland code. The determination letter is not lawful as it does not conform to California state law (subdivision act) or City of Oakland Ordinances.
Lake Merritt Village a fully entitled project with an affordable housing component; design review, building plans and tentative map. The project was 20% completed when construction completely stopped in 2008 due to the economic down turn of 2009.

- Excavation 50% to 60% completed
- Foundation 25 % completed
- Subdivision improvements 80% completed
- Tentative map approved
- To date over two million dollars have invested relying the issued permits substantial development has occurred in good faith.
- In an email dated 10/16/08 acting Zoning Manager Robert Merkemp responded to the question do the permits need an extension. In the email he responded "No extension needed"

Under State and federal case law a development project that obtained tentative map approval, obtained building permits and started construction has the vested right complete the project under the original entitlements.

Planners have explained that the history of the project filling a law suit against the City of Oakland is one of the reasons they reject the fact permits are still valid. This is wrong and is abuse of power. State of California Subdivision Act, Oakland City Ordinances and California case law clearly prove that the tentative map and all permits issued in conjunction to build a 32-unit building at 601 Mac Arthur have not expired.

I agree that tentative map is only one requirements of a project that requires multiple permits. The state law extending permits relies on Cal. Gov. Code 65863.9 says **"any permit which is issued by a local agency in conjunction with a tentative subdivision map for a planned unit development shall expire no sooner than the approved tentative map, or any extension thereof, whichever occurs later" Therefore, no additional permit or entitlement conditions can be imposed on the 601 Mac Arthur project. No additional entitlements to build can be required such as (1) conditional use permits (2) design review (3) tentative map (4) building permits, including but not limited to listed permits.**

California courts prohibit a change in law, regulation or policy from interfering with previously approved development where a valid building permit has been issued, and the developer has performed substantial work Avco Community Developers v. South Coast Regulatory Commission(1976) 17 Cal.3d 785.791. In case of 601 Mac Arthur all permits have been drawn millions of dollars has been invested surpassing the bench mark for vesting of all permits set by Federal and state courts.

The Law offices of Lobb & Cliff have over 20 years of experience in California Real Estate Law. Attorneys from the firm reviewed the history of the project. The attorneys then applied Federal and State subdivision

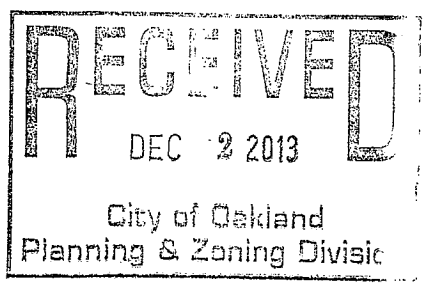
case law to state and local extension Ordinances. From the hours of research and 20 years of research they ascertained that all permits to build at 601 Mac Arthur are valid (see attached opinion letter)

The California State legislator does not write laws in a vacuum. Laws are written to work with existing laws, codes and policies. To apply Real Estate law an Individual should have full knowledge of Federal and State case law. Without knowledge of Federal and State case law an individual is reduced to "cherry picking" pieces of law. The fragmented pieces of law viewed without context will lead incorrect, unfair and determinations not in the best interest of local community's.

My understanding is that City of Oakland fee schedule requires a 150$ fee for a determination request. The planners claim I requested a determination letter. I will repeat. I did not request a determination letter and I request that determination letter dated November 22, 2013 be voided.

The determination letter dated November 22, 2013 #det13057: zoning approval #cmd00046 for 601 Ma Arthur is incorrect illegal. It does not follow state or local ordinances and should be voided. Due to the holiday schedule I have not been able to have this response reviewed by legal council. I will have my response reviewed asap by council and amended as needed

Michael Gray



CITY OF OAKLAND

DALZIEL BUILDING • 250 FRANK H. OGAWA PLAZA, SUITE 2114 • OAKLAND, CALIFORNIA 94612-2031

Community and Economic Development Agency
Planning & Zoning Services Division

(510) 238-3911
FAX (510) 238-4730
TDD (510) 238-3254

November 27, 2013

Mr. Michael Gray/East Bay Builders
2837 Shane Drive
Richmond, California 94806

SENT VIA EMAIL

Clarifications for Determination DET13057 pursuant to your recent emails dated November 25, 2013

Dear Mr. Gray:

Following are clarifications and responses to your recent emails, as referenced above. I have also attached a copy of the November 22, 2013 Determination Letter. The numbered statements below reflect your e-mail, with staff's response following in *italics*:

1. I have received and reviewed your determination letter dated 11/22/13 and it confirms the fact the permits to build a 32-unit building are still valid.

   Actually the determination letter confirms that permits are not valid.

2. In the timeline in your determination letter clearly shows the tentative map was submitted as required April 8th 2005. (See attachments #1-#2) and that the tentative map and associated permits to build where valid when the state of California legislator passed a series of laws extending tentative map and permits see attachment #3 .

   A tentative map is only one requirement of a project that requires multiple permits. These include: (1) a Conditional Use Permit (for Density Bonus, 2) Design Review Approval, (3) a Tentative Parcel Map approval (for condominium ownership), and (4) a Building Permit. State law did not extend project entitlements except for subdivision maps, and subdivision maps do not apply to your CUP, your Design Review approval, or your building permit approval.

ATTACHMENT A.1

3. On October 16, 2008 Robert Merkamp as acting Zoning Manager made a determination that no extension was required because the preliminary map was filed within two years tentative map as required by the "our condition" see attached email#4. Robert Merkamp made a determination that the map and permits where valid so no extension was requested by the current or previous property owners.

   That is correct; however, a tentative map is only one requirement of a project consisting of multiple permit requirements. These include: (1) Conditional Use Permit (for Density Bonus), (2) Design Review Approval, (3) a Tentative Parcel Map approval (for condominium ownership), and (4) a Building Permit approval.

4. The vesting of the permits build 32-unit building is a matter of law. Any attempt to force the project into further review is a continuing attempt to block affordable housing in a neighborhood (district 2) which certain City Officials feel is too good for affordable housing. The while the property was under my control I followed the City of Oakland health and safety laws. The property went into state of disrepair only when I did not have the legal standing to take action to perform repair work.

   The entitlements are expired due to inactivity on the part of the owner/applicant. The City is committed to affordable housing, worked with the applicant to approve the project originally, and will do so again should a new application conforming to current codes be submitted.

5. The project at 601 Mac Arthur spent 7 years in Design Review. As part of the design review process I had a neighborhood meeting to obtain input into the final design. The project went in front of the Planning Commission 3 separate times. The project was reviewed for compliance to City of Oakland Density Bonus Law. The project was very high profile due to fact I refused to be pushed away because "I did not look like a developer" and "Why should we give you permits" I was told by the planning department. During my 7 years of Design Review all of the City Council, Building and Planning officials where fully informed about my hardship in obtaining design Review approvals.

   Staff is not aware of this timeline because the Conditional Use Permit and Design Review application in question were submitted in 2000 and approved in 2002, a two-year process. Entitlements would be valid now had the applicant submitted timely extension requests to date or proceeded with construction activity.

6. I request that the determination letter be rescinded as it an attempt pass responsibility to act and is an unlawful attempt to ignore the state of California subdivision act.

   A tentative map is only one requirement of a project consisting of multiple permit requirements. These include: (1) Conditional Use Permit (for Density Bonus), (2) Design Review Approval, (3) a Tentative Parcel Map approval (for condominium ownership), and (4) a Building Permit approval.

7. It has been 75 five days since I first made my request for conformation of the permits to build at 601 Mac Arthur. I have explained that I have time sensitive financing in place but the planning department has shown no since urgency.

   You obtained a Conditional Use Permit and Design Review in 2002, which expired December 31, 2011 and a Building Permit which is expired on October 17, 2010. The Planning and Zoning Division provided a determination letter, at your request, to clarify the project's status.

8. Other projects in the City of Oakland where affected by the real-estate crash. The project at Clay Street got 5 million dollar bail out from the City of Oakland and another has made a 2 acre 40' foot whole in our city. All I am asking for is to confirm the validity of my permits! I again request for conformation of the permits to build at 601 Mac Arthur.

   The Planning and Zoning Division maintains that design review and CUP entitlements have expired and are no longer valid.

9. The determination letter is on clear "This decision is appeal-able to the Oakland City Planning Commission pursuant to Code Section 17.132 and such appeals must be filed by no later than ten (10) days from the date of this letter (December 2,2013)." The Letter is dated November 22, 2013 but they seem to be saying i should file an appeal on or before December 12, 2013????

   The determination letter dated November 22, 2013 correctly indicates the ten-day appeal deadline as December 2, 2013, which is ten (10) days after the letter was issued. This is pursuant to Code Section 17.132. ***Staff cannot emphasize this enough: any appeal must be filed by Monday December 2, 2013 as indicated on November 22, 2013.***

Please do not hesitate to contact me or Aubrey Rose if you have additional questions in this matter.

Sincerely,

Scott Miller
Zoning Manager

Cc: Pat Kernighan, City Council President
Fred Blackwell, Assistant City Administrator
Alexandra Orologas, Chief of Staff, Office of the City Administrator
Rachel Flynn, Planning and Building Director
Celena Chen, Deputy City Attorney
Anne Campbell-Washington, Chief of Staff to Mayor Quan
Bruce Stoffmacher, Chief of Staff to Councilmember Libby Schaaf

Att: Determination letter dated November 22, 2013

State Law and California Case Law apply to all permits to build at 601 Mac Arthur!
Scott Miller Zoning Manager
Dear Scott Miller Zoning Manager,
State of California Subdivision Act, Oakland City Ordinances and California case law clearly prove that the tentative map and all permits issued in conjunction to build a 32-unit building at 601 Mac Arthur have not expired.
I agree that tentative map is only one requirements of a project that requires multiple permits. The state law extending permits relies on Cal. Gov. Code 65863.9 says "any permit which is issued by a local agency in conjunction with a tentative subdivision map for a planned unit development shall expire no sooner than the approved tentative map, or any extension thereof, whichever occurs later" Therefore, no additional permit or entitlement conditions can be imposed on the 601 Mac Arthur project. No additional entitlements to build can be required such as (1) conditional use permits (2) design review (3) tentative map (4) building permits, including but not limited to listed permits.
California courts prohibit a change in law, regulation or policy from interfering with previously approved development where a valid building permit has been issued, and the developer has performed substantial work Avco Community Developers v. South Coast Regulatory Commission(1976) 17 Cal.3d 785.791. In case of 601 Mac Arthur all permits have been drawn millions of dollars has been invested surpassing the bench mark for vesting of all permits set by Federal and state courts.
The Law offices of Lobb & Cliff have over 20 years of experience in California Real Estate Law. Attorneys from the firm reviewed the history of the project. The attorneys then applied Federal and State subdivision case law to state and local extension Ordinances. From the hours of research and 20 years of research they ascertained that all permits to build at 601 Mac Arthur are valid (see attached opinion letter)
The California State legislator does not write laws in a vacuum. Laws are written to work with existing laws, codes and policies. To apply Real Estate law an Individual should have full knowledge of Federal and State case law. Without knowledge of Federal and State case law an individual is reduced to "cherry picking" pieces of law. The fragmented pieces of law viewed without context will lead incorrect (unlawful), unfair and determinations not in the best interest of local community's.
My understanding is that City of Oakland fee schedule requires a 150$ fee for a determination request. The planners claim I requested a determination letter. I will repeat. I did request a determination letter and I request that determination letter dated November 22, 2013 be voided.
The determination letter is appeal able to the planning commission.

The vesting of the permits build 32-unit building is a matter of law. Any attempt to force the project into further review is a continuing attempt to block affordable housing and jobs for Oakland residents.
I am asking that you request that Aubrey Rose Planner Immediately void the determination letter (#DET13057).
I request a meeting with a representative from your office and the City Administrators and the Planning Department. It would be fair and equable to resolve the issue on the administrative level.

The project has gone thru seven years of the "design review process".
I have sponsored a neighborhood meeting to obtain input into the design. The project went in front of the Planning Commission 3 separate times. The project was reviewed for compliance to City of Oakland Density Bonus Law. The City Council, Building and Planning officials where fully informed about my quest to obtain Zoning and Building approvals. I am a local builder that was hit by the recession and found it impossible to secure financing to complete my project to build affordable housing and give an economic boost to Oakland when it was most need. I plan to build and buy for my project in Oakland. I plan to have a weekend work program for local youth!

The appeal process would make a question of law and fact into a judgment call. The issue of tentative map extensions was passed by the California legislature several times since the last recession. I wish to meet with the Planning department and the City Administrator's representative to discuss a plan to restart my project that has funding in place that is time sensitive. On Monday 2,2013 I have to file a appeal of the determination letter dated November 22,2013. I know this matter should be handled on the administrative level with out further unlawful review but if the planning department does not void the determination I will be forced into apply!

ATTACHMENT A.2

LOBB CLIFF

WRITER'S E-MAIL:
pcliff@lobbcliff.com

November 11, 2013

Re: 32 Unit Condominium Project
Alameda County Tentative Parcel Map 08360
Property address: 601 MacArthur, Oakland, CA
EAST BAY WATERFRONT BUILDERS: GENERAL BUSINESS
Our File No.: 7220.000

To Whom It May Concern:

This office represents East Bay Waterfront Builders, the developer of the above referenced project, and a long standing developer of affordable housing in the East Bay. As detailed below, East Bay Waterfront Builders is entitled to proceed with its 32 unit condominium project in accord with the outstanding building permits and the conditions of approval for Tentative Parcel Map 086380.

As you are aware, Tentative Parcel Map 086380 was first approved April 8, 2005, and because the final parcel map was submitted to the City of Oakland in accord with the conditions of approval, the Tentative Parcel Map was still in force as of October 16, 2008, under the authority granted to the Development Director for the City of Oakland under the Oakland Municipal Code and the Subdivision Map Act. Section 66452.21 of the Government Code then was enacted, effective July 15, 2008, and provided that "the expiration date of any tentative . . . parcel map . . . that has not expired on the date that the act that added this section became effective . . . shall be extended by 12 months." Pursuant to Section 66452.22 of the California Government Code, the expiration date of any parcel maps that had not yet expired as of July 15, 2009, was then extended by "twenty-four (24) months." Section 66452.23 of the California Government Code extended those expiration dates by an *additional* "twenty-four (24) months." Section 66452.24 of the California Government Code *further extended* the expiration date of all unexpired parcel maps "by twenty-four (24) months." Thus, Tentative Parcel Map 08360 remains in effect. Furthermore, "any permit which is issued by a local agency in conjunction with a tentative subdivision map for a planned unit development shall expire no sooner than the approved tentative map." (Cal. Gov. Code Section 65863.9.). Therefore, no additional permit or entitlement conditions can be imposed on this project.

331013

ATTACHMENT A.3

In addition to the statutory vesting rights detailed above, the United States and California Constitutions as interpreted by California courts prohibit a change in law, regulation or policy from interfering with a previously approved development where a valid building permit has been issued, and the developer has performed substantial work and incurred substantial liability in good faith reliance on that permit. *Avco Community Developers v. South Coast Regulatory Commission* (1976) 17 Cal.3d 785, 791. The California Supreme Court more recently extended this vested rights doctrine to the specifics of a tentative map where there was no evidence in the record that the tentative map holder had actually pulled building permits for expensive substantial sums on its condominium conversion project, but had obtained the Department of Real Estate approval for the sale of individual units. *City of W. Hollywood v. Beverly Towers, Inc.* (1994) 52 Cal.3d 1184. In contrast, East Bay has incurred hundreds of thousands of dollars in construction expenses pursuant to valid building permits pursuant to a valid and in force tentative parcel map; and may therefore, not be deprived of this right to complete this project or be subject to additional requirements imposed upon it by the City of Oakland. Both the statutes and the case law are entirely clear on this issue.

East Bay Waterfront Builders is therefore entitled to proceed with construction and marketing of the 32 unit condominium project. Its financing is in place, but any delay or interference in the project could have a catastrophic effect on financing that will deprive East Bay Builders of its investment in the project.

Thank you for your attention to this matter.

Cordially,

Paul Cliff
Lobb & Cliff, LLP

PC/lmt

CITY OF OAKLAND

DALZIEL BUILDING • 250 FRANK H. OGAWA PLAZA, SUITE 2114 • OAKLAND, CALIFORNIA 94612-2031

Community and Economic Development Agency
Planning & Zoning Services Division

(510) 238-3911
FAX (510) 238-4730
TDD (510) 238-3254

November 22, 2013

Mr. Michael Gray/East Bay Builders
2837 Shane Drive
Richmond CA 94806

Determination #DET13057: Zoning Approval #CMD00046 for 601 MacArthur Blvd/0 MacArthur Blvd/620 Wesley Av

Dear Mr. Gray,

On September 9, 2013 you submitted an inquiry requesting a determination on the disposition of Zoning Approval #CMD0046 (32 unit project on MacArthur Blvd at Wesley Av, approved November 6, 2002). Condition of Approval #2a stipulated that construction must commence or an extension must be granted by November 6, 2003, or the permit shall expire. Extensions were granted beginning August 20, 2003. Building permit # B0303082 was issued on October 3, 2003. You have provided an invoice from Newtown Construction for excavation dated October 27, 2003; the invoice date implies work commenced prior to the deadline. However, work was not completed or substantially completed, and hence the intent of the Condition was not met. Additional permits were pursued in 2008. It should also be noted that in 2010 the City of Oakland undertook an emergency hillside stabilization project to shore up the hillside for the protection of uphill residences and to cap unfinished sewer lines; much foundation was removed as a result. Additionally, subsequent zoning approval extensions expired on December 31, 2011. No further extensions were requested from you or current or previous property owners. The Planning and Zoning Division, therefore, considers the Planning entitlements issued pursuant to case CMD00046 to be expired. You are welcome to apply for required zoning approvals under the current Planning Code, and the City looks forward to future development of this site.

This decision is appealable to the Oakland City Planning Commission pursuant to Code Section 17.132 and such appeals must be filed by no later than ten (10) days from the date of this letter (December 2, 2013). An appeal shall be on a form provided by the Department of Planning and Building, Planning and Zoning Division, and submitted to the same at 250 Frank H. Ogawa Plaza, Suite 2114, to the attention of **Aubrey Rose AICP, Planner II**. The appeal shall state specifically wherein it is claimed there was error or abuse of discretion by the Zoning Administrator or wherein his/her decision is not supported by substantial evidence and must include payment of **$1,352.91** in accordance with the City of Oakland Master Fee Schedule. Failure to timely appeal will preclude you, or any interested party, from challenging the City's decision in court. The appeal itself must raise each and every issue that is contested, along with all the arguments and evidence in the record which supports the basis of the appeal; failure to do so may preclude you, or any interested party, from raising such issues during the appeal and/or in court.

ATTACHMENT B

Please feel free to contact **Aubrey Rose AICP, Planner II** with any further questions at (510) 238-2071 or arose@oaklandnet.com

Sincerely,

Scott Miller

Scott Miller
Zoning Manager

CC:

Pat Kernighan, City Council President
Fred Blackwell, Assistant City Administrator
Alexandra Orologas, Chief of Staff, Office of the City Administrator
Rachel Flynn, Planning and Building Director
Celena Chen, Deputy City Attorney

Rose, Aubrey

From: freefree_98 <freefree_98@yahoo.com>
Sent: Tuesday, September 24, 2013 9:38 AM
To: Rose, Aubrey
Subject: RE: 601 Mac arthur

Any updates? Thanks!

Sent from my Samsung Galaxy Note™, an AT&T LTE smartphone

"Rose, Aubrey" <ARose@oaklandnet.com> wrote:

Thanks, Michael – I'll take this to the supervisor and see if we can get you that letter which you request

---

From: East Bay Builders [mailto:freefree_98@yahoo.com]
Sent: Wednesday, September 18, 2013 3:04 PM
To: Rose, Aubrey
Subject: 601 Mac arthur

List of attached items

The project to build 32-units at 601 Mac Arthur was approved by the City of Oakland Planning Commission November 6, 2002. The approval by Planning Commission gave one year for the project to commence work. Preceding Newtown's commencement of work. In the proceeding months demolition, excavation and site preparation was done as evidence in invoices attached("early ground break" file).

Newtown's Construction commenced work on October 27, 2003(see attached invoice "newtown" doc 10/27/2003)

An extension of the building permits was granted by the S. Lewis, City of Oakland until 10/10/04 (see attached file extensions)

August 25, 2004 Gary Patton Deputy Director of Planning & Zoning granted an extension of planning permits to November 6, 2005(see attached file "extensions") Months before that extension expired we where 25 to 35 percent finished with excavation and 10% finished with our foundation. as seen in the dated pictures attached 3/8/2005 4/12/2005 1/9/2005.

The items I have attached show that the project at 601 Mac Arthur commenced work before the original City of Oakland Planning approval expired and continued under additional planning and building granted extensions. Due to information I have put in this e-mail and other letters dated 10/12/2013 to the City of Oakland Planning department the planning approvals case file CMD00-46 - 601 Mac Arthur our still valid I would greatly appreciate a letter stating such so that I may continue construction. Thank you very! Long Live Oakland!

ATTACHMENT C

Michael Gray
East Bay Builders

510-435-1556

Rose, Aubrey

From: East Bay Builders <freefree_98@yahoo.com>
Sent: Friday, September 27, 2013 1:26 PM
To: Rose, Aubrey
Subject: Re: 601 MacArthur

May I pick up the letter that is not appeal-able on the permits for 601 Mac Arthur?

Michael Gray
East Bay Builders
510-435-1556

From: "Rose, Aubrey" <ARose@oaklandnet.com>
To: freefree_98@yahoo.com
Sent: Thursday, September 26, 2013 1:44 PM
Subject: 601 MacArthur

Michael,
I spoke with the supervisors and I think that went well, just need to run it by the manager and then get a letter signed – it just occurred to me, we didn't have your determination request set up in our database – the fee should be around $150, should I set an invoice up for you? You can charge by phone to our cashier before we release the letter if you like, please let me know
Thanks, talk to you soon
Aubrey

Aubrey B Rose, AICP
Planner II
City of Oakland / Zoning
250 Frank H Ogawa Plaza, 2nd Floor
Oakland CA 94612
(510) 238-2071 phone / 4730 fax
arose@oaklandnet.com

December 11, 2013
In regards to: 601 Mac Arthur

Scott Miller Zoning Manager
Dear Scott Miller Zoning Manager,
In the Oakland City Council meeting of 12/10/13 you stated that my project could not move forward because I do not have a compliance plan.

I once again request to enter into a compliance plan. I am willing to pay all fees and enter into a compliance plan immediately with the city of Oakland to complete the construction of 32 residential at 601 Mac Arthur (zoning approval #CMD00046). I am also ready and willing to comply with all and any terms of City of Oakland permit extension resolution.

Michael Gray

ATTACHMENT D

December 4, 2013
In regards to: 601 Mac Arthur

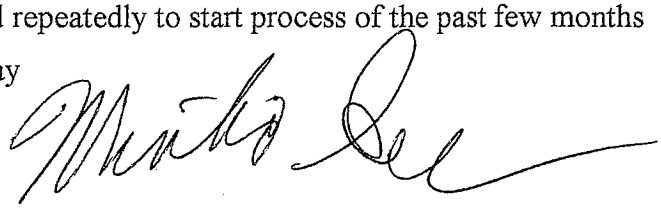
Scott Miller Zoning Manager
Dear Scott Miller Zoning Manager,

I will request again that conformation of the all the permits to build and my willingness to pay any and all fees due on the project and enter into a compliance plan if necessary immediately! I am willing to comply with any other requirements of City (resolutions) and State law required to keep or extend the entitlements to build at 601 Mac Arthur a 32-unit project.

I can be reached at 510-435-1556

I have asked repeatedly to start process of the past few months

Michael Gray



I Michael Sweeney request

An extension to the permits to build At 601 MacArthur, I wish to pay the Adinistative fee,

12-3-13

Michael Sweeney

Rose, Aubrey

From: susan coleman <susancoleman@pacbell.net>
Sent: Tuesday, January 21, 2014 8:03 PM
To: Rose, Aubrey
Cc: Mark
Subject: Case File Number A13335 (DET13057, 601 MacArthur Boulevard

Dear Ms. Rose:

We just received a copy of the Oakland City Planning Commission Agenda for the February 5th meeting.

As residents of Haddon Hill, my husband and I would like express our opposition to the request for a permit extension for a developer to build 32 units at MacArthur Boulevard and Wesley Avenue. This site is a very steep lot (it used to be a slide area before the slope was stabilized) on a very busy corner. We drive past it every day.

Since the original permit was issued, this section of MacArthur, which also serves as the entry to the Eastbound 580 On Ramp for the Lakeshore Area, has become extremely congested. The new popularity of the Lakeshore shopping district, the addition of a bike lane, the removal of one of the old traffic lanes, and the addition of " hinged" buses on this route - all of these things have created a traffic nightmare. When this permit was originally issued, the neighborhood traffic was not a problem. Now, however, traffic could not safely navigate onto Wesley or MacArthur from the proposed residential units.

Someone at the City should come over and take a look at this site. No sensible developer should consider it.

Thank you.

Susan Coleman
Resident
658 Haddon Road
Oakland, CA 94610
susancoleman@pacbell.net

ATTACHMENT E

Filed 11/1/13 GCP Management v. City of Oakland CA1/4

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

GCP MANAGEMENT, LLC et al., Plaintiff and Appellant, v. CITY OF OAKLAND et al., Defendant and Respondent.	A135871 (Alameda County Super. Ct. No. RG10538368)

GCP Management, LLC, as agent for GCP, Gibraltar Capitol Fund, VI, LLC (GCP), appeals the summary adjudication of its action for inverse condemnation as well as the subsequent grant of a nonsuit with respect to its claim of trespass. In addition, GCP contends that the trial court's ruling in favor of the City of Oakland (City) on the City's cross-complaint for damages was error. We affirm.

I. BACKGROUND

A. *The City's Abatement Proceedings*[1]

GCP is the owner of real property located at 601 MacArthur Boulevard, 620 Wesley Avenue, and 620 Hillgirt Circle in the City (collectively, the Property).

[1] Other than in connection with our consideration of the City's cross-complaint for damages, we adopt the facts set forth in this opinion from the supporting papers filed by both parties in connection with the City's motion for summary adjudication of GCP's inverse condemnation claim. Although GCP interposed numerous blanket objections with respect to the majority of the City's material facts, the trial court overruled all of these objections, and we see no abuse of discretion in that decision. (See *People ex rel. Lockyer v. Sun Pacific Farming Co.* (2000) 77 Cal.App.4th 619, 639-640.)

ATTACHMENT F

Substandard conditions on the Property have been of concern to the City for a number of years. In July 2006, pursuant to its local nuisance ordinance, the City sent a letter to a prior owner declaring the Property to be a public nuisance due to a number of deteriorating conditions, including the fact that the temporary shoring in place on a partially-excavated slope was "not designed for long-term restraint of the hillside" (2006 Declaration). Deeming the Property dangerous to workers, visitors and abutting dwellings, the City ordered the owner to fix the objectionable conditions on the Property within a specified timeframe. Failure to comply with the City's demands would result in a number of negative consequences, including the City "re-accessing your property without further notice and for additional charge" to remediate the problem.

By October 2008, the Property—which was in the process of being sold—had not been rehabilitated. At that time, both the current owner and the purchaser entered into a Compliance Plan and Rehabilitation Schedule Work Plan with the City (Compliance Plan) pursuant to which they agreed, among other things, to install "an approved shoring system for the length of the slope of the properties." The Compliance Plan expressly acknowledged that the 2006 Declaration was to remain in effect while the necessary work was being done. In addition, the Compliance Plan required the owner or new buyer to post a $250,000 performance bond to secure the "faithful completion" of its requirements. GCP—the appellant herein—supplied this $250,000 bond, which was to be returned directly to the appellant upon successful completion of the work. Repayment of the GCP loan was secured by a deed of trust recorded against the Property on October 15, 2008.

In March 2010, the City notified the then-owner of the Property that it had failed to comply with the terms of the Compliance Plan and that the Property remained "a longstanding blight and continuing hazard for the neighborhood." In February, an exposed City sewer pipe on the Property had broken during a winter storm requiring a City maintenance crew to provide a temporary repair for the "inadequately supported pipe" and to pump raw sewage off the Property. Moreover, the same winter storm caused the stability of the hillside on the Property to deteriorate. Specifically, the City noted that

"[t]he temporary shoring and winterization for the hillside has been ineffective in retaining the sloughing soil."

The City retained Ninyo & Moore, a geotechnical engineering firm, to aid in its analysis of the Property. It was Ninyo & Moore's opinion in early 2010 that "erosion and sloughing of soils from the steep, partially protected slope" on the Property would continue "if the slope [was] not protected." The firm further opined that the "erosion and sloughing" would "likely lead to larger failure of the slope." In a March 2010 letter to the owners of the Property, the City indicated that it would be contracting with third-parties to complete the sewer extension for the Property and to install a hillside stabilization system. Given the owner's default under the terms of the Compliance Plan, the City stated that it would be using the monies from the owner's forfeited performance bond to defray its costs.

An additional inspection by the City on April 27, 2010, confirmed the continuing deterioration of conditions on the Property. On April 29, 2010, the City recorded a certificate memorializing its 2006 Declaration against the Property. Then, on May 11, 2010—noting that the dangerous conditions previously identified in the 2006 Declaration were "endangering upslope properties to the extent that these conditions have become manifestly unsafe for the public and imminently hazardous for occupants and visitors"—the City notified the owner of the Property that it was declaring the Property to be an imminent hazard pursuant to the provisions of its local nuisance ordinance (Imminent Hazard). The City detailed specific abatement work required to be completed by June 1, 2010, and informed the owner that it had until May 18, 2010, to appeal the City's determination. If the owner failed to either successfully appeal or complete the required work by the stated deadline, the City indicated that it would enter the Property "without further notice to perform the mitigation work." All costs associated with this work would be charged against the Property and the owner. There is no indication in the record that an appeal was filed, or that any abatement work was done in response to this declaration of Imminent Hazard. Thereafter, on June 9, 2010, GCP became the record owner of the Property through foreclosure on its deed of trust.

Representatives of GCP met with City officials on August 25, 2010, to discuss the contemplated work on the Property. At that meeting, the City agreed to allow GCP an opportunity to assess the situation and to submit its own proposal, but indicated that work would need to begin in early September to assure its completion before winter. As of September 8, 2010, the City had not received a proposal or any permit applications from GCP. It therefore notified GCP that it intended to move forward with the planned abatement work on September 13. On September 27, 2010, GCP filed an Ex Parte Application for Temporary Restraining Order and Order to Show Cause re: Preliminary Injunction in Alameda County Superior Court (TRO), alleging that the City had entered the Property without permission and was destroying improvements on the Property. GCP sought an order stopping the City's demolition activity and requiring the City to give GCP a "meaningful opportunity to respond" to the City's concerns about the site. The TRO application was denied that same day after hearing, and the City subsequently completed the abatement work on the Property, stabilizing the hillside.

B. ***Proceedings in the Trial Court***

On the same day that it filed its TRO application, GCP also filed a complaint in Alameda County Superior Court asserting causes of action against the City for inverse condemnation and trespass based on the City's abatement activities with respect to the Property. GCP sought damages as well as injunctive and declaratory relief. A Second Amended Complaint filed in April 2011 added a cause of action for negligence. In May 2011, the City filed a cross-complaint seeking damages based on its unreimbursed abatement costs with respect to the Property.

The City filed a motion for summary adjudication of GCP's inverse condemnation claim in November 2011. On February 17, 2012, the trial court overruled all of GCP's evidentiary objections with respect to the requested summary adjudication and granted the City's motion. Subsequently, on March 8, 2012, GCP dismissed its negligence cause of action, and proceeded to trial before the court on its action for trespass. At the conclusion of GCP's opening statement and after an offer of proof, the City moved for a

judgment of nonsuit pursuant to Code of Civil Procedure section 581c, subdivision (a). The trial court granted the City's motion.

A bench trial then commenced with respect to the City's cross-complaint for damages. At the conclusion of the bench trial, the trial court awarded damages to the City in the amount of $310,315.18. Judgment against GCP on its action for trespass was entered on May 3, 2012. On that same date, the trial court issued its Statement of Decision and (Proposed) Judgment in favor of the City on its cross-complaint for damages. Final Judgment with respect to the City's cross-complaint was entered on May 18, 2012.[2] A timely notice of appeal filed July 2, 2012, brought the case before this Court.

II. SUMMARY ADJUDICATION PROCEEDINGS

We turn first to GCP's contention that the trial court erred in granting the City's motion for summary adjudication of GCP's inverse condemnation claim. The trial court granted the summary adjudication motion by order dated February 17, 2012, finding that the City's abatement activity on the Property was a valid exercise of its police power, that GCP was on notice of the need for immediate remediation of the Property, and that the City's actions did not cause GCP to suffer any damage. GCP argues that the Court's

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[2] Although the record does not reflect that judgment was ever entered with respect to appellant's inverse condemnation claim, we note that, on appeal from a superior court judgment, "the reviewing court may review the verdict or decision and *any intermediate ruling, proceeding, order or decision which involves the merits or necessarily affects the judgment or order appealed from or which substantially affects the rights of a party* . . . ." (Code of Civ. Proc., § 906 [italics added]; see also *Jennings v. Marralle* (1994) 8 Cal.4th 121, 128 ["an order . . . granting summary adjudication of certain claims . . . is generally reviewable on appeal from the final judgment in the action"].) Here, the trial court's summary adjudication of GCP's inverse condemnation claim clearly substantially affected both the court's judgment on GCP's trespass claim as well as its judgment on the City's cross-complaint for damages. We therefore review the merits of all three decisions.

summary adjudication order was improper because issues of material fact existed with respect to each of these three findings.[3]

A. *Statutory Framework and Standard of Review*

The standards for granting summary adjudication are well-settled and easily delineated. A trial court must grant a motion for summary adjudication "if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c); see also *id.*, subd. (f)(2) [motion for summary adjudication "shall proceed in all procedural respects as a motion for summary judgment"].) Summary adjudication in favor of a defendant such as the City is proper if (1) the defendant shows that one or more of the elements of a cause of action cannot be established or that there is a complete defense to it; and (2) the plaintiff fails to meet his or her burden of showing the existence of a triable issue of material fact. (*Id.*, subd. (p)(2).) A triable issue of material fact cannot be raised through speculation or conclusory assertions. (*Lyons v. Security Pacific Nat. Bank* (1995) 40 Cal.App.4th 1001, 1014 (*Lyons*).) Thus, the plaintiff cannot rely upon "the mere allegations or denials of its pleadings," but must instead set forth the "specific facts" supporting the existence of the material fact. (Code Civ. Proc., § 437c, subd. (p)(2).)

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[3] GCP also argues that the trial court's summary adjudication order runs afoul of subdivision (g) of Code of Civil Procedure section 437c, which provides in relevant part: "Upon the grant of a motion for summary judgment, on the ground that there is no triable issue of material fact, the court shall, by written or oral order, specify the reasons for its determination. The order shall specifically refer to the evidence proffered in support of, and if applicable in opposition to, the motion which indicates that no triable issue exists. The court shall also state its reasons for any other determination." Although we agree with the trial court that its ruling was "minimal," its order did specify the reasons for its determinations and reference relevant evidence. Under such circumstances, we find that it was adequate for purposes of subdivision (g). Moreover, "even assuming that, ideally, a further statement ought to have been given, there is no harm where, as here, our independent review establishes the validity of the judgment." (*Goldrich v. Natural Y Surgical Specialties, Inc.* (1994) 25 Cal.App.4th 772, 782.)

On appeal, we undertake de novo review of the trial court's decision to grant summary adjudication, "considering all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports." (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.) We are not bound by the trial court's stated reasons or rationales. (*Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 805.) Rather, we engage anew in " 'the same three-step analysis required of the trial court.' " (*Lyons, supra,* 40 Cal.App.4th at p. 1012.) First, we " ' "identify the issues framed by the pleadings since it is these allegations to which the motion must respond." ' " (*Ibid.*) Next, we " ' "determine whether the moving party's showing has established facts which negate the opponent's claim and justify a judgment in movant's favor." ' " (*Ibid.*) Finally—if the moving party has made an initial showing justifying summary adjudication—we " ' "determine whether the opposition demonstrates the existence of a triable, material factual issue." ' " (*Ibid.*)

In the present case, the City moved for and was granted summary adjudication of GCP's claim of inverse condemnation. The City argues that summary adjudication was proper because its actions with respect to the Property were a valid exercise of its police power. The City also asserts that it is entitled to summary adjudication because GCP has not shown that the Property has suffered any actual damage as a result of the City's abatement activity. Since we conclude that the City has established that its actions constituted a valid exercise of its police power—and thus the trial court's summary adjudication of the matter was appropriate—we do not reach the issue of actual damage to the Property.

B. *General Principles Governing Inverse Condemnation and the Police Power*

"Inverse condemnation, like eminent domain, 'rest[s] on the constitutional requirement that the government must provide just compensation to a property owner when it takes his or her private property for a public use.' " (*City of Los Angeles v. Superior Court* (2011) 194 Cal.App.4th 210, 220 (*Los Angeles*), quoting *Beaty v. Imperial Irrigation Dist.* (1986) 186 Cal.App.3d 897, 902 (*Beaty*); see also Cal. Const.,

art. I, § 19.) "To state a cause of action for inverse condemnation, the property owner must show there was an invasion or appropriation (a 'taking' or 'damaging') of some valuable property right which the property owner possesses by a public entity and the invasion or appropriation directly and specially affected the property owner to his injury." (*Beaty, supra*, 186 Cal.App.3d at p. 903.) Generally speaking, in inverse condemnation, "the government is obligated to pay for property taken or damaged for ' "public use" ' or damaged in the construction of 'public improvements.' " (*Los Angeles, supra*, 194 Cal.App.4th at p. 221, quoting *Customer Co. v. City of Sacramento* (1995) 10 Cal.4th 368, 379–380.) Thus, "[m]ost inverse condemnation actions arise out of unintentional or negligent damage to an owner's property or property interests arising out of the construction of public works." (*Rose v. City of Coalinga* (1987) 190 Cal.App.3d 1627, 1633-1634 (*Rose*); see, e.g., *House v. L.A. County Flood Control Dist.* (1944) 25 Cal.2d 384, 386 [flood damage to property caused by poorly constructed flood control project].)

In the present case, however, the City's abatement actions were taken pursuant to its police power rather than its power of eminent domain. While proof of compensable damages under such circumstances is possible (see *Rose, supra,* 190 Cal.App.3d at p. 1634), it is important not to confuse the two types of situations because the standards for recovery are different and—in the context of the police power—much more limited. Specifically, as a general matter, "the constitutional guaranty of just compensation attached to an exercise of the power of eminent domain does not extend to the state's exercise of its police power, and damage resulting from a proper exercise of the police power is simply *damnum absque injuria* [damage without actionable injury]." (*Lees v. Bay Area Air Pollution Control Dist.* (1965) 238 Cal.App.2d 850, 856 (*Lees*), citing *Gray v. Reclamation District No. 1500* (1917) 174 Cal. 622, 639 (*Gray*); see also *Gin S. Chow v. Santa Barbara* (1933) 217 Cal. 673, 701; *Fallen Leaf Protection Asso. v. State* (1975) 46 Cal.App.3d 816 825 (*Fallen Leaf*), citing *Gray*.) Put another way, "[w]here the police power is legitimately exercised, uncompensated submission is exacted of the property owner if his property be either damaged, taken, or destroyed." (*Gray, supra*, 174 Cal. at

p. 640.) Accordingly, if the City's actions in this case constituted a valid exercise of its police power, a complete defense exists to GCP's inverse condemnation claim and summary adjudication of that claim in favor of the City was appropriate.

In reviewing the legitimacy of the City's actions pursuant to its police power, we are mindful of the broad discretion vested in the legislative branch to adopt regulations advancing the public health and safety. Indeed, "[t]he police power is one of the most essential powers of government and one that is least limitable." (*Fallen Leaf, supra,* 46 Cal.App.3d at p. 825.) As our Supreme Court has opined in the nuisance context: " 'Where the Legislature has determined that a defined condition or activity is a nuisance, it would be a usurpation of the legislative power for a court to arbitrarily deny enforcement merely because in its independent judgment the danger caused by a violation was not significant. The function of the court in such circumstances is limited to determining whether a statutory violation in fact exists, and whether the statute is constitutionally valid.' " (*Id.* at p. 826, quoting *City of Bakersfield v. Miller* (1966) 64 Cal.2d 93, 100.) We consider each of these questions in turn.

C. *Existence of Statutory Violation*

GCP disputes the existence of a statutory violation in this case, arguing that the nuisance conditions on the Property identified by the City and its geotechnical engineers did not constitute either an emergency or an Imminent Hazard in violation of the City's abatement ordinance. The City, however, offered significant evidence that an Imminent Hazard did, in fact, exist on the Property, justifying its remediation efforts. According to the evidence presented by the City in support of its motion, the stability of the partially-excavated hillside on the Property was an issue as early as July 2006, when the Property was first declared to be a public nuisance. The then-owner of the Property, as well as a subsequent purchaser, apparently concurred with this assessment as they both executed the Compliance Plan in October 2008, agreeing to install an approved shoring system on the hillside. By March 2010, however, nothing had been done to fix the problem, the existing temporary shoring and winterization was found to be ineffective, and the stability of the hillside had deteriorated due to a recent winter storm. The City's

geotechnical engineers —who had been tracking the worsening conditions on the Property for some time—informed the City that the hillside would continue to deteriorate if not protected before the onset of winter, likely leading to a larger failure of the slope. Based on this expert opinion, the City concluded in May 2010 that conditions at the site were endangering upslope properties and therefore constituted an Imminent Hazard requiring immediate remediation.

In May 2010, the Oakland Municipal Code (OMC) defined geotechnical instability as "[s]ubsidence or lateral displacement of real property which is a hazard to buildings, structures, or portions thereof, to adjacent properties, to the public right-of-way, to a public easement, or to publicly maintained infrastructure."[4] (2008 OMC, § 15.08.340, subd. (P) [identical to current version].) An Imminent Hazard was defined to include "immediately dangerous conditions" due to geotechnical instability that constituted "a clear and certain endangerment to property, or a manifestly unhealthy or unsafe environment for the public . . . ." (*Id.*, § 15.08.380, subd. (C)(1) [identical to current version].) The existence of an Imminent Hazard authorized City officials to proceed with the "immediate abatement" of the dangerous condition. (*Ibid.*) In our view, the situation described by the City in its motion falls squarely within the definition of Imminent Hazard contained in the City's abatement ordinance.

Indeed, GCP did not dispute the existence of geotechnical instability on the Property as identified by the City. Rather, in its opposition to the City's motion it argued

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[4] During the timeframes relevant to this appeal, there have been a number of revisions to, and/or re-enactments of, the germane provisions of the OMC. We take judicial notice of all such versions. The current version of the OMC was adopted on November 9, 2010, and shall be referred to herein as the OMC. The version in effect in May 2010, when the City issued its declaration of Imminent Hazard, is contained in City of Oakland Ordinance 12842, effective January 1, 2008, and shall be referred to herein as the 2008 OMC. Finally, the version in effect in July 2006, when the City issued its 2006 Declaration, is contained in City of Oakland Ordinance 12451, adopted effective November 1, 2002, and shall be referred to herein as the 2002 OMC (Ordinance 12451 re-adopted City of Oakland Ordinance 12149). Although for purposes of this appeal all three versions are substantially similar, the different versions will be cited as appropriate, with any significant changes noted.

only that the instability had not risen to the level of an emergency for purposes of the abatement statute. The basis for GCP's assertion was a single statement by its geotechnical expert indicating that, in his opinion, "[t]here was no emergency or imminent hazard at the site any time from 2006 to the time the City of Oakland began its work at the site in September 2010." Such a conclusory assertion, however, with no specific facts to support it, is wholly inadequate to suggest the existence of a material fact for purposes of blocking an otherwise valid motion for summary adjudication. (Code Civ. Proc., § 437c, subd. (p)(2); *Lyons, supra,* 40 Cal.App.4th at p. 1014; see also *Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1117 ["when an expert's opinion is purely conclusory because unaccompanied by a reasoned explanation connecting the factual predicates to the ultimate conclusion, that opinion has no evidentiary value"].) We therefore conclude that no triable issue of material fact was raised with respect to the existence of a statutory violation on the Property. (Compare *Rose, supra,* 190 Cal.App.3d at pp. 1630-1631, 1635 [finding an issue of material fact as to the existence of an emergency justifying demolition of a building in the wake of an earthquake where plaintiff's contractor, plaintiff's architect and the state Office of Emergency Planning all concluded that the building was not a hazard; the building was fenced off; the city waited 57 days to effect the demolition; and the City appears not to have provided any evidence of hazard specific to the building in question].)

D. ***Constitutionality of the City's Abatement Process***

With respect to the constitutionality of the City's abatement ordinance, it is well established that a municipality may exercise its police power to protect the public health and safety through the abatement of nuisances. (*Fallen Leaf, supra,* 46 Cal.App.3d at p. 825; see also *Thain v. Palo Alto* (1962) 207 Cal.App.2d 173, 187 (*Thain*).) Thus, "[a] city council may, by ordinance, declare what constitutes a nuisance (*Gov. Code, § 38771*), and may provide for summary abatement of the nuisance at the expense of the person who created it. (*Gov. Code, § 38773.*)" (*Flahive v. City of Dana Point* (1999) 72 Cal.App.4th 241, 244.) Indeed, GPC does not argue here that the City's abatement ordinance is unconstitutional as drafted or that it is an improper expression of the City's

police power. Rather, it maintains that the City's abatement process as applied to GCP violated due process, a contention with which we deal at length below.

1. *Compliance with the Oakland Municipal Code (OMC)*

GCP argues strenuously that the City did not follow the terms of its own abatement ordinance and failed to notify GCP of the abatement proceedings with respect to the Property as required by the OMC. Several cases have considered the failure of a governmental entity to follow its own stated process as one factor to consider when determining whether the requirements of due process have been satisfied in the abatement context. (See *D & M Financial Corp. v. City of Long Beach* (2006) 136 Cal.App.4th 165, 180-182 (*D & M Financial*); *Friedman v. City of Los Angeles* (1975) 52 Cal.App.3d 317, 320 (*Friedman*).) Our review of the record, however, discloses that the City did substantially comply with the requirements of its abatement ordinance throughout its abatement proceedings with respect to the Property. Thus, GCP's argument is unavailing.[5]

The City first declared the property to be a public nuisance in July 2006. At that time, the OMC required that any related "Declaration of Public Nuisance—Substandard" (Declaration) issued by the City be directed to the record owner of the property and contain: (1) information sufficient to identify the property at issue; (2) a statement that the City has found the site to be substandard with a "brief and concise" explanation; (3) a statement of the action required from the property owner; (4) a statement that, if the required work is not done, the City may proceed to cause the work to be done and "charge the costs thereof against the property and the record owner"; (5) a statement advising that any person with record title in the property can request a hearing, along with

[5] For purposes of our review of the trial court's summary adjudication of GCP's inverse condemnation claim, we look only at the "papers submitted" with respect to that motion and do not consider the testimony later elicited at trial on the City's cross-complaint for damages. (See Code Civ. Proc., § 437c, subd. (c).) Any relevant evidence regarding notice and/or the City's compliance with the provisions of the OMC that was introduced at this subsequent trial is considered later in the context of our review of the City's cross-complaint. (See footnote 9, *infra*.)

the timeframes and procedures for making such a request; and (6) a statement that failure to request a hearing in a timely manner (within 14 days in this case) "will constitute a waiver of all right to an administrative hearing and determination of the matter." (2002 OMC, § 15.08.350 [substantially similar to current version].)

In the present case, the City's letter of July 13, 2006, to the then-record owner of the Property fully complied with these requirements. The OMC further required that any such Declaration be served on the property owner by personal delivery, certified mail and/or certain methods of constructive public notification. (*Id.*, §§ 15.08.110, subd. (B), 15.08.350, subd. (C) [substantially similar to current version].) Again, the City's July 13 letter fulfilled this obligation, indicating that it was mailed by certified mail. Finally, while the OMC also required that a copy of the Declaration be mailed to holders of any mortgage, deed of trust, lease, or other legal interest of record "known to the Building Official or disclosed from official public records" (*Id.*, § 15.08.350, subd. (C) [substantially similar to current version]), GCP's deed of trust was not recorded against the Property until October 2008, and thus no notice to GCP was required at the time the public nuisance was initially declared over two years earlier.

Pursuant to the City's abatement ordinance, if a property owner has not complied with the abatement requirements set forth in a Declaration and the time for appeal has expired, the Building Official must record a "certificate" with the Alameda County Clerk-Recorder. (2008 OMC, § 15.08.360 [identical to current version]; see also 2002 OMC, § 15.08.360 [substantially similar].) This certificate need not meet the requirements of a full-blown Declaration, but must instead only describe the property and indicate that a public nuisance exists and that the record owner of the property has been notified. (*Ibid.*) Here, the documents recorded by the City in April 2010 fulfill these requirements. While it is true that, by April 2010, GCP's deed of trust had been recorded against the Property, there is no requirement in section 15.08.360 that notice of the recording of such a certificate be provided to any party. (*Ibid.*) Thus, once again, the City was in compliance with its code provisions.

Finally, on May 11, 2010, the City declared the Property to be an Imminent Hazard pursuant to subdivision (C)(1) of OMC section 15.08.380. As discussed above, the existence of an immediately dangerous condition based on geotechnical instability authorized the City to declare the existence of an Imminent Hazard and proceed with the immediate abatement of the problem. (2008 OMC, § 15.08.380, subd. (C)(1) [identical to current version].) Under such circumstances, no previous declaration that the property at issue was substandard or a public nuisance is required. (*Ibid.*) Further, recognizing the time-sensitive nature of such abatement proceedings, the statute provided for a more streamlined notice and hearing process than that required for the general declaration of a public nuisance, stating: "Whenever the Building Official will cause . . . the immediate abatement by the City or its contractors of all dangerous and perilous conditions or defects or both, reasonable measures shall be taken to notify the record owner of the property of the pending abatement actions, including, but not limited to, visual communication by posting of the premises and oral communication by telephone or in person and written communication by personal delivery or telegraph or facsimile, unless circumstances and time do not otherwise warrant and permit." (2008 OMC, § 15.08.380, subd. (C)(2).)

In the present case, the City's May 11, 2010, letter to the then-owner of the Property satisfied this notice requirement. At that point, GCP was the holder of a deed of trust with respect to the Property, but was not the record owner. Thus, no notice to GCP was required. Similarly, subdivision (C)(3) of OMC section 15.08.380, which provided for an expedited hearing process with respect to the declaration of imminent hazard, was only available to the then-record owner of the Property, not to holders of deeds of trust such as GCP. Here, the City notified the record owner of the Property regarding its appeal rights in the May 2010 letter, and no appeal was filed. At that point, the City had complied with all relevant

provisions of the OMC and was authorized by statute to effect the immediate abatement of the Property.[6]

GCP's argument in this case, in effect, amounts to a claim that the City must restart the notice and hearing process under its abatement statute for every succeeding owner of a substandard property. The statute, however, contains no such obligation, and we decline to interpret it to require multiple notifications. In reaching this conclusion, we find *Hawthorne Savings & Loan Association v. City of Signal Hill* (1993) 19 Cal.App.4th 148 (*Hawthorne*) instructive. In *Hawthorne*, the city had noticed a previous owner of that owner's right to repair or demolish a substandard building as required by section 17980 of the Health and Safety Code, but had not similarly noticed Hawthorne, who had acquired the property through foreclosure during the pendency of the abatement process. (*Hawthorne, supra,* 19 Cal.App.4th at pp. 153, 161-162.) The city argued that being required to give notice to each succeeding purchaser of a right to repair or demolish would frustrate the city's code enforcement program "because it would subject enforcement to indefinite delay where . . . the property is continuously transferred from one owner to another." (*Id.* at pp. 161-162.) The appellate court agreed, stating: "We see no reason why, under the statute or the dictates of due process, a new time period has to be extended each time the property changes ownership." (*Id.* at p. 162.) Citing to related provisions requiring recorded notice of the commencement of abatement proceedings, the appellate court concluded that due process was satisfied so long as succeeding owners were put on notice that an option to repair or demolish had been offered and told the timeframe within which

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[6] Once GCP became the record owner of the Property on June 9, 2010, it arguably had the right to appeal "from orders, decisions, or determinations made relative to the applications and interpretations of Article X of [the OMC]." (2008 OMC, § 15.08.100, subd. (B).) Article X contains the definitions regarding what constitutes a public nuisance. It is not clear whether this appeal right would be available in case of an Imminent Hazard, which has its own appeal process and is located in Article XI. However, even if applicable, there was no requirement that the City notify GCP of the existence of this appeal right.

that option had to be exercised. (*Ibid.*)[7] Similarly, in the present case, the City was not required by the terms of its abatement ordinance to notify GCP of the existence of the 2006 Declaration when GCP became the holder of a deed of trust with respect to the Property in 2008. Nor was the City required by the OMC to notify GCP of its May 2010 decision to declare the Property an Imminent Hazard once GCP became record owner of the Property in June 2010.

2. *General Notions of Due Process*

Our conclusion that the City complied with the relevant provisions of its abatement ordinance throughout its proceedings with respect to the Property does not, however, end our inquiry. Rather, even though the City acted pursuant to both State law and local ordinance providing for the summary abatement of nuisances, all such enactments are subject to constitutional requirements of due process. (*People ex rel. Camil v. Buena Vista Cinema* (1976) 57 Cal.App.3d 497, 502 [discussing additional due process requirements necessary prior to the abatement of allegedly obscene films]; *Leppo v. City of Petaluma* (1971) 20 Cal.App.3d 711, 718 (*Leppo*).) As the Second District stated in *Friedman*: "Under its police power to protect public health and safety a city may destroy private property without liability to the property owner, but when it does this it must afford the owner due process of law." (*Friedman, supra,* 52 Cal.App.3d at p. 321.) Absent an emergency, due process in the abatement context generally requires notice and an opportunity to be heard. (*Ibid.*; see also *Thain, supra,* 207 Cal.App.2d at p. 189.) Moreover, where, as here, property has changed hands during abatement proceedings, due process may require some form of notice and/or opportunity to be heard for the new owner over and above that required by the express terms of the abatement

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[7] Consistent with the interpretation of section 17980 of the Health and Safety Code in *Hawthorne*, the statute was amended in 2012 to provide certain explicit rights to subsequent purchasers. Specifically, the revised statute now allows new purchasers of certain foreclosed residential properties who are "in the process of diligently abating any violation" 60 days from the date of purchase before the commencement of any abatement proceedings with respect to the substandard property. (Health & Saf. Code, § 17980, subd. (a), added by Stats. 2012, ch. 201 (A.B. 2314), § 2.)

statute. (*Friedman, supra,* 52 Cal.App.3d at p. 322 [reliance on tax rolls for notice purposes as permitted by local ordinance does not satisfy due process for subsequent owner; use of 16-month old title search also inadequate; "city cannot reasonably rely on former property owners to give notice of prospective demolition to present owners"].)

We believe, however, that the requirements of due process were satisfied under the facts of this case. First, once GCP became the record owner of the Property on June 9, 2010, it had constructive notice of the existence of the abatement activities on the Property based on the City's April 29, 2010, recordation of its abatement certificate. (Civil Code, §§ 1213 ["conveyance" of real property "acknowledged or proved and certified and recorded as prescribed by law from the time it is filed with the recorder for record is constructive notice of the contents thereof to subsequent purchasers"], 1215 [defining " 'conveyance' " to include written instruments encumbering an interest in real property or affecting title to real property]; Gov. Code, §§ 27279, subd. (a) [definition of " '[i]nstrument' "], 38773 [authorizing local ordinances for the summary abatement of nuisances], 38773.5, subd. (e) [authorizing recordation of abatement notices]; 2008 OMC, § 15.08.360 [local requirements for recordation of abatement certificate].) This certificate told GCP as new owner that—as recently as six weeks prior to its purchase—there was a "nuisance or substandard or hazardous or injurious condition" on the Property; that the owners had not corrected the problem; that the City had commenced abatement proceedings; and that the City had a "lawful claim of an accumulating dollar amount" against the Property to reimburse it for its abatement costs. Clearly, GCP was on notice that a prompt investigation of conditions on the Property was warranted. (Compare *Whiting v. Pasadena* (1967) 255 Cal.App.2d 372, 376-377 [notice of completion of demolition recorded two months prior to purchase at a trustee's sale adequate notice of special assessment for the costs of such demolition].)

Further, "[a] party to a real estate conveyance is not entitled to ignore any information pertinent to title that comes to him or her, even from outside the recorded chain of title, to the extent such information puts him or her on reasonable inquiry notice of information that may bring into question the state of title." (*In re Marriage of Cloney*

(2001) 91 Cal.App.4th 429, 441-442; see also Civil Code section 19 ["Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact"].) Here, as early as October 2008, when GCP loaned money to the then-owner of the Property and recorded its deed of trust, it had knowledge that the City had some kind of performance issue with respect to the Property. Specifically, GCP provided the money for a $250,000 performance bond and these funds were to be returned directly to GCP " 'once the terms of the Compliance Plan have been satisfied.' " Since the money was never returned to GCP and GCP subsequently received title to the Property from a trustees' deed of sale, it is reasonable to assume that GCP was aware that the prior owner had never performed as required by the City and that issues remained with respect to the Property. (Compare *Whiting v. Pasadena, supra,* 255 Cal.App.2d at pp. 376-377 [where property on which house was demolished was foreclosed on default, notice of demolition was recorded, and the city was the only potential demolisher other than the defaulting owner, prospective buyer "should have examined the city's assessment rolls" to protect his interests].)

Finally, at its meeting with City officials on August 25, 2010, GCP received actual notice of the City's pending abatement plans with respect to the Property. At that meeting, the City agreed to allow GCP an opportunity to assess the situation and submit its own proposal, but indicated that work would need to begin "in early September to assure that the excavated site would be substantially restored in advance of the winter inclement weather season." As of September 8, 2010, the City had not received a proposal or any permit applications from GCP. It therefore notified GCP that it intended to move forward with the planned abatement work on September 13. While the timeframe allowed by the City for GCP's response was short, we do not find it unreasonable under the circumstances and given the nature of the Imminent Hazard

existing on the Property.[8] Moreover, GCP never requested administrative review of the City's decision to proceed. It did, however, request judicial review when it filed its application for a temporary restraining order on September 27, 2010. The application—which alleged many of the same issues raised in this appeal—was denied on the same day after GCP received a hearing in which it was able to air its concerns with respect to the City's abatement actions. Based on all of these circumstances, we conclude that the notice and opportunity to be heard afforded GCP in this case was sufficient for purposes of due process.

GCP's reliance on *Friedman* and *D & M Financial* does not change our analysis. In *Friedman,* a subsequent purchaser had no notice of the demolition of a building on his property. (*Friedman, supra,* 52 Cal.App.3d at pp. 320-321.) Also, the court found that the provisions of the local abatement ordinance, themselves, violated due process by allowing notice to the owner listed on the tax rolls, which are "not an accurate and timely source of information." (*Id.* at p. 322.) Additionally, the city failed to follow its own customary inter-departmental procedures. (*Id.* at p. 320.) Finally, and most importantly, the court opined that recordation of a notice to demolish would have taken care of the due process issue with respect to new owners: "A new owner would then have notice of the city's projected action and could take appropriate steps to avoid loss. Had a proper notice been recorded, Friedman might never have purchased the property or might have acted promptly to repair the building and forestall the need for its demolition." (*Id.* at p. 322.) Similarly, in *D & M Financial*, the city violated its own notice statutes and policies with respect to the demolition of a substandard building such that the holder of a deed of trust

[8] Although appellant makes much of the fact that no emergency was present on the Property, we view the Imminent Hazard in this case as existing somewhere in between an emergency and a typical public nuisance for due process purposes. The City's abatement ordinance reflects this, containing streamlined notice and appeal provisions where an Imminent Hazard has been declared. (2008 OMC, § 15.08.380, subds. (C)(2) & (C)(3).) Clearly, had the situation been deemed a true emergency, the City would have had the absolute right to enter the Property and abate the nuisance without *any* prior notice or hearing. (*Leppo, supra,* 20 Cal.App.3d at p. 718; *Thain, supra,* 207 Cal.App.2d at p. 190.) Here, in contrast, we conclude that some process was due.

on the property received no notice until the day before the scheduled demolition. (*D & M Financial, supra,* 136 Cal.App.4th at pp. 172-173, 181.) In addition, the court found the recorded notice in the case to be defective because it failed to indicate that demolition was a possibility. (*Id.* at pp. 178-179.) Moreover, neither *Friedman* nor *D & M Financial* dealt with a situation involving an Imminent Hazard. Here, in contrast, the City followed the provisions of its abatement ordinance, which was not constitutionally infirm, and GCP had actual and constructive notice of the proposed abatement proceedings with respect to the Property and of the need to proceed quickly with the proposed remediation. There was no violation of due process.

III. NONSUIT ON ACTION FOR TRESPASS

GCP also appeals from the trial court's grant of a nonsuit in favor of the City with respect to GCP's cause of action for trespass. As discussed above, the trial court determined in connection with the summary adjudication of GCP's inverse condemnation claim that the City's entry onto the Property was a valid exercise of its police power. Since the City's actions were authorized by law, the trial court concluded that the City was also immune from liability for trespass. It therefore granted the City's motion for nonsuit at the conclusion of GCP's opening statement with respect to the trespass claim.

"A defendant is entitled to nonsuit after the plaintiff's opening statement only if the trial court determines that, as a matter of law, the evidence to be presented is insufficient to permit a jury to find in the plaintiff's favor." (*Ewing v. Northridge Hospital Medical Center* (2004) 120 Cal.App.4th 1289, 1296.) "We independently review the ruling on a motion for nonsuit, guided by the same rules that govern the trial court." (*Ibid.*) Thus, we will not sustain the judgment " 'unless interpreting the evidence most favorably to plaintiff's case and most strongly against the defendant and resolving all presumptions, inferences and doubts in favor of the plaintiff a judgment for the defendant is required as a matter of law.' " (*Carson v. Facilities Development Co.* (1984) 36 Cal.3d 830, 839, quoting *Mason v. Peaslee* (1959) 173 Cal.App.2d 587, 588.)

We agree with the trial court's conclusion in this case that the City was entitled to a nonsuit on GCP's claim of trespass. Trespass is the unlawful entry onto property in

another's possession without consent. (Rest.2d Torts, §§ 158, 167; see also *Martin Marietta Corp. v. Insurance Co. of North America* (1995) 40 Cal.App.4th 1113, 1132.) Since, to be actionable, any such entry must be unlawful, it stands to reason that "[a] public employee is not liable for an injury arising out of his entry upon any property where such entry is expressly or impliedly authorized by law." (Gov. Code, § 821.8.) Further, independent contractors are treated as if they are public employees for purposes of this immunity provision. (*Id.*, § 815.4.) Finally, subdivision (b) of section 815.2 of the Government Code states: "Except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability." Thus, the City is immune from liability for trespass in this case if its entrance onto the Property (through its employees and independent contractors) was "expressly or impliedly authorized by law." As the trial court concluded—and as we have previously affirmed—the City's actions in this case constituted a valid exercise of its police power and were therefore authorized by law. Consequently, we find no error in the trial court's judgment of nonsuit against GCP with respect to its trespass claim.

IV. CROSS-COMPLAINT FOR DAMAGES

As a final matter, GCP urges reversal of the trial court's allowance of damages to the City, arguing that the award of $310,315.18 was not supported by "any" evidence and was improper because the City failed to follow the procedural requirements of its nuisance abatement ordinance. We have previously concluded that the City did, in fact, follow the procedural requirements of its abatement ordinance, that its abatement of the

Property was appropriate, and that the City did not violate GCP's due process rights.[9] We therefore turn to GCP's contention that the trial court's damages ruling was not supported by the evidence.

A trial court's resolution of disputed factual questions is reviewable for substantial evidence. (*Citizens for a Better Eureka v. California Coastal Com.* (2011) 196 Cal.App.4th 1577, 1584.) When findings of fact are challenged on appeal for lack of such evidence, our power begins and ends with a determination of whether there is any substantial evidence, contradicted or uncontradicted, to support the trial court's findings. (*Thompson v. Tracor Flight Systems, Inc.* (2001) 86 Cal.App.4th 1156, 1166.) "We must therefore view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor . . . ." (*Ibid.*, quoting *Jessup Farms v. Baldwin* (1983) 33 Cal.3d 639, 660.)

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[9] The additional evidence and witness testimony presented at trial on the City's cross-complaint for damages did nothing to advance GCP's argument that the City's process was improper, and, in fact, tended to bolster the trial courts earlier findings to the contrary. Thus, for instance, the City's geotechnical expert, Ken Ferrone, testified that there was a high probability that unstable slopes on the Property could fail in the near future, impacting adjacent properties. The trial court expressly found this testimony highly credible with respect to the inadequacy of the existing shoring on the site and the likelihood of its eventual failure. In contrast, the trial court found the testimony of GCP's expert, Lawrence Karp, that the Property was stable to be less credible and ultimately unpersuasive. We defer to these credibility findings. (*Lenk v. Total-Western, Inc.* (2001) 89 Cal.App.4th 959, 968.) In addition, evidence that the unstable hillside supported two apartment buildings underscored the need for prompt action on the part of the City.

With respect to the notice issue, Shawn Hammond, a GCP principal, testified that he was aware of the City's plans with respect to the Property as early as late June or early July in 2010, substantially before the August 25 meeting with the City. In addition, Greg Stuman, another GCP representative, testified that the 2008 loan made by GCP with respect to the Property was asset-based, that is entirely dependent upon the condition and value of the Property. He testified further that he was aware in 2008 that the then-owner of the Property had no money and was not paying his contractor. Finally, Mr. Stuman testified that he never reviewed a title report in connection with GCP's foreclosure of the Property. The trial court specifically found the testimony of GCP's representatives that they had no prior knowledge of the City's concerns with respect to the Property unpersuasive. It also expressly found that no GCP representative ever requested an appeal hearing.

In the present case, the City sought damages pursuant to its local abatement ordinance, which provides in relevant part: "The fees and costs incurred and the penalties assessed and the interest accrued in . . . repairing, cleaning, remediating, removing, or demolishing a building, structure, or real property, including costs incurred . . . in ascertaining violations or affecting abatement thereof and in collecting such fees, costs, penalties, and accruing interest shall be charged against the property and owners." (2008 OMC, § 15.08.130, subd. (A) [identical to current version].) The statute goes on to state that the City's Master Fee Schedule shall be used as a basis for establishing fees, costs, penalties and interest in such cases. (*Ibid.*) Finally, these charges may be recovered by the City through "all appropriate legal means," including a civil court action brought by the City. (*Ibid.*)

To prove its damages claim for $310,315.18, the City presented evidence in the form of a summary invoice showing all funds received and charges incurred by the City with respect to its abatement activities on the Property. The summary invoice included credits for use of bond proceeds, amounts payable to contractors, costs for project-related City staff time, and applicable fees. In addition, Diana Rex—the City employee responsible for the preparation of this summary invoice—testified regarding how the invoice was compiled, how charges for City staff time were calculated, and how fees were determined in accordance with the City's Master Fee Schedule. At trial, GCP conceded that $203,492.94 claimed by the City for payments to its independent contractors was "established by competent evidence." It's quarrel was with the costs charged for City staff time and with the fees for general overhead included in the invoice pursuant to the City's Master Fee Schedule. We believe that substantial evidence substantiates the charges allowed by the trial court for City staff time. Moreover, the City's abatement statute expressly allows for the recovery of fees as set forth in the City's Master Fee Schedule. Absent specific evidence of its invalidity, we will assume that the City's Master Fee Schedule was properly adopted and adequately justifies the imposition

of the administrative fees assessed in this case. We therefore conclude that the trial court's damages award was supported by substantial evidence.[10]

V. DISPOSITION

The judgment is affirmed. Respondent is entitled to its costs on appeal.

REARDON, J.

We concur:

RUVOLO, P. J.

RIVERA, J.

[10] In reviewing the sufficiency of the evidence, we are sympathetic to the City's argument that "an appellant who contends that some particular finding is not supported is required to set forth in his brief a summary of the material evidence on that issue" or the matter is deemed waived. (*Schmidlin v. City of Palo Alto* (2007) 157 Cal.App.4th 728, 737.) This GCP did not do. However, even overlooking this deficiency, we find GCP's challenge to the sufficiency of the evidence unpersuasive for the reasons set forth herein.