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Court of Appeal, First District, Division 2, California.

Ara **TEHLIRIAN** et al, Plaintiffs and Appellants,
v.
CITY AND **COUNTY** OF **SAN FRANCISCO**, Defendant and Respondent;
Jose Morales, Real Party in Interest and Respondent.

No. A112246. | (**San Francisco City** and **County** Super. Ct. No. 505035). | March 16, 2007.

Attorneys and Law Firms

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Opinion

LAMBDEN, J.

***1** Appellants Ara **Tehlirian**, Berg **Tehlirian**, and ABT LLC (petitioners) [1] seek reversal of the superior court's denial of their petition for writ of administrative mandate, as well as an order directing issuance of a writ to the **San Francisco** Board of Appeals instructing them to reconsider petitioners' permit application and make legally relevant findings. We affirm the superior court's denial of their petition.

BACKGROUND

Petitioners own an old residential duplex located a 572-572A San Jose Avenue in **San Francisco**, purchased by Ara and Berg **Tehlirian** in 1994. The duplex consists of two units, one on the ground floor and one on the second floor, each containing two bedrooms and one bath, and measuring approximately 750 square feet. Real party in interest Jose Morales, 76 years old as of June 2005 and a self-described "low-income senior," has resided in one of the two residential units in the building since 1965; the other unit has been vacant during this dispute.

In November 2002, petitioners, through their architect, Best Design and Construction, submitted a building permit application to the Department of Building Inspection for the **City** and **County** of **San Francisco** (**City**). [2] The proposed project would remove the existing brick foundation, convert the ground floor residential unit into a two-car garage and storage facility, renovate the second floor residential unit, and add a third floor, to be used as a second residential unit. The project would add 335 square feet to the ground floor, 368 square feet to the second floor, and a 1,038 square foot third floor, extending the building in the front and back.

Morales requested the Planning Commission (Commission) conduct a discretionary review of petitioners' application. The subsequent Planning Department staff report to the Commission summarized petitioners' proposed project as follows:

"The proposed project aims to convert the first floor into a garage (currently it is used as a dwelling unit), in order to provide parking for the two dwelling units located above. The second floor the existing dwelling unit, the entryway, [*sic*] and provides a horizontal rear addition of 135 square feet. It proposes a horizontal front addition of 625 square feet and a new bay window. This second floor unit has two bedrooms and two bathrooms. The proposal also includes a vertical addition, a new third floor to house the second dwelling unit. The unit has two bedrooms and two bathrooms and is larger than the existing dwelling unit by approximately 300 square feet. The existing units measure approximately 750 square feet. The re-modeled units measure approximately 1,050."

According to the Planning Department staff summary, Morales was "concerned that his displacement will affect his health, he will incur relocation costs, and that the proposal

will result in increased rental costs. The tenant is also concerned that the project would reduce the **city's** affordable housing stock."

***2** After further analysis, the Planning Department staff reported: "There are concerns that this project is a demolition. The Department of Building Inspection has made the determination that this project is an alteration, not a demolition. Therefore, the Planning Department has received the application as an alteration." The staff recommended that the Commission not take discretionary review and approve the project as proposed. The Commission subsequently conducted a discretionary review of the project and denied the building permit application in October 2003 by a four-to-one vote, based on the following findings:

"The proposed project is not a major alteration but a de facto demolition; [¶] The project would result in the de facto loss of affordable housing by improving and expanding the existing units that are currently accessible to lower-income tenants because of their size and relative lack of amenities; [¶] The proposal might result in the displacement of an elderly man with limited income; and [¶] Any conditions of approval attached to the building permit relating to rental rates, relocation, tenant's right of return, and other arrangements made between the landlord and tenant would not be enforceable by the [Commission]."

Petitioners appealed to the Board of Appeals (Board) on the ground that the Commission erred in its determination that the alterations were a de facto demolition. In February 2004, the Board heard statements from, among others, Ara **Tehlirian**, Morales, and the public. Ara **Tehlirian** stated that he and his family wanted to move to **San Francisco** and live on the premises in order to be closer to family, and needed to make the alterations called for by the project in order to do so. The Board voted three to two to overrule the denial and grant the permit with conditions as presented by petitioners, which vote was insufficient to overturn the denial. After a rehearing in November 2004, the Board voted three to two to uphold the denial. The Board did not make specific findings regarding either ruling.

Petitioners filed a petition for a writ of administrative mandate in superior court pursuant to Code of Civil Procedure section 1094.5. The court denied the writ in September 2005, finding that the Board had substantial evidence before it that the project would impact the **City's** health, safety, and welfare by reducing its stock of affordable housing.

This timely appeal followed. We have granted each party's request for judicial notice of certain documents. These include excerpts from the Housing Element of the **City's** General Plan and documents related to petitioners' notice of withdrawal of the rental unit occupied by Morales pursuant to the Ellis Act, which we discuss further, *post.* [3]

DISCUSSION

On appeal, petitioners argue that (1) the board "failed to proceed in a manner required by law because it failed to make findings in affirming the Commission's decision to deny the permit"; and (2) "there is no substantial evidence to support the findings that the proposed remodel is either a demolition or would negatively affect the **City's** affordable rental housing stock." Neither argument has merit.

I. *The "Fi ndings" Issue*

3** Petitioners argue that the Board failed to make findings in this case, constituting an abuse of discretion under Code of Civil Procedure section 1094.5, citing *Topanga Assn. for a Scenic Community v.* ***County *of Los Angeles* (1974) 11 Cal.3d 506, 515 (*Topanga*) and *Hadley v.* ***City*** *of Ontario* (1974) 43 Cal.App.3d 121, 127-129 (*Hadley*).)

Code of Civil Procedure section 1094.5, subdivision (b) states in relevant part that "[a]buse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." This section "clearly imports a duty on the part of the administrative agency to make findings as a basis for judicial review." (*Hadley, supra,* 43 Cal.App.3d at p. 127, citing *Topanga, supra,* 11 Cal.3d at pp. 515-517.) However, this duty has not been extended to appellate bodies reviewing administrative agency decisions. (*Ross v.* ***City*** *of Rolling Hills Estates* (1987) 192 Cal.App.3d 370, 376 (*Ross*) [stating, "[b]y affirming the Commission's decision, the Council in effect adopted its findings"]; *Carmel Valley View, Ltd. v. Board of Supervisors* (1976) 58 Cal.App.3d 817, 823 (*Carmel Valley View*) [the action of the board of supervisors in effect adopted the findings of the Commission].)

Here, the Commission made specific findings, which we quote in the discussion portion above. These findings "are

sufficient to apprise the parties and the court of the basis" for the City's action here. (*Ross, supra,* 192 Cal.App.3d at p. 377.) The Board, by upholding the Commission's ruling, in effect adopted these findings. (*Id.* at pp. 376-377; *Carmel Valley View, supra,* 58 Cal.App.3d at p. 823.) Petitioners' argument is without merit.

II. *The Substantial Evidence Issue*

A. *Substantial Evidence Standard of Review*

The parties agree that because the right at stake is not a fundamental right, we apply a substantial evidence standard of review (*Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d, 28, 44-45), doing so to review the Board's decision, not the trial court's. (*Auburn Woods I Homeowners Assn. v. Fair Employment & Housing Com.* (2004) 121 Cal.App.4th 1578, 1583 (*Auburn*).) In reviewing the validity of the Board's decision, Code of Civil Procedure section 1094.5 requires we inquire into whether the Board " 'acted in excess of its jurisdiction and whether there was any prejudicial abuse of discretion.' " (*Auburn,* at p. 1583.) Abuse of discretion is established if the Board " 'failed to proceed in the manner required by law or its finding ... is not supported by substantial evidence in light of the whole record.' " (*Ibid.*)

We exercise the same function as the trial court and must decide if the Board's findings were based on substantial evidence. (*Auburn, supra,* 121 Cal.App.4th at 1583.) We do not reweigh the evidence, and must view the evidence in the light most favorable to the Board's findings and indulge in all reasonable inferences in support thereof. (*Ibid.*) " ' "We may not isolate only the evidence which supports the administrative finding and disregard other relevant evidence in the record. [Citations.] On the other hand, neither we nor the trial court may disregard or overturn the [Board's] finding ' "for the reason that it is considered that a contrary finding would have been equally or more reasonable" ' " ' " (*Ibid.*) We must uphold the Board's decision " 'unless the review of the entire record shows it is so lacking in evidentiary support as to render the decision unreasonable.' " (*Ibid.*) " 'Substantial evidence is defined as: " 'relevant evidence that a reasonable mind might accept as adequate to support a conclusion, ...' " [Citation] or evidence of " ' "ponderable legal significance ... reasonable in nature, credible, and of solid value." ' " ' " (*Auburn, supra,* 121 Cal.App.4th at 1583.)

***4** Moreover, if the Board committed errors of law, we are not bound by its legal conclusions. (*Auburn, supra,* 121 Cal.App.4th at 1583.)

B. *The Scope of A dministrative Review*

San Francisco administrative authorities exercise discretion in the review of permit applications pursuant to San Francisco Business and Tax Regulations Code, article I, section 26, subdivision (b), which provides: "[I]n the granting or denying of any permit ... the granting ... power may take into consideration the effect of the proposed business or calling upon surrounding property and upon its residents, and inhabitants thereof; and in granting or denying said permit ... may exercise its sound discretion as to whether said permit should be granted ... denied or revoked."

Article I, section 26 of the San Francisco Business and Tax Regulations is "comprehensive language affecting the issuance of *all* permits sought under the authority of the relevant San Francisco Charter and ordinance provisions [that] in plain terms vests the granting power with a 'sound discretion' generally." (*Lindell Co. v. Board of Permit Appeals* (1943) 23 Cal.2d 303, 311; see also *Guinnane v. San Francisco City Planning Com.* (1989) 209 Cal.App.3d 732, 738, fn. 4 (*Guinnane*); *Martin v. City and County of San Francisco* (2005) 135 Cal.App.4th 392, 406-407 (*Martin*).)

Furthermore, "[s]ection 26 ... vest[s] administrative authorities with very broad discretion to decide whether and on what conditions an applicant will be granted a permit. And if the application is for a building permit, the fact that the applicant's project complies with zoning ordinance and building codes does not restrict the scope of that discretion." (*Martin, supra,* 135 Cal . App.4th at p. 400; accord, *Guinnane, supra,* 209 Cal.App.3d at p. 736 ["compliance with the zoning laws and building codes did not entitle [the applicant] to a building permit as a matter of course"].) Thus, the Commission has the discretion to reject a permit simply because a proposed residential development is "unsuitable for the indicated location." (*Guinnane, supra,* 209 Cal.App.3d at p. 736.) As Division Four of this District recently stated:

"[I]t is well established that section 26 administrative discretion is not cabined by specific criteria that may be set forth in city codes or ordinances. Instead, that discretion is informed by public interest, encompassing

anything impacting the public health, safety or general welfare." (*Martin, supra,* 135 Cal.App.4th at p. 407.)

Under the **City's** Charter, the Board of Appeals has broad discretionary review powers. Section 4.106 of the Charter of the **City** and **County** of **San Francisco** (Charter section 4.106) authorizes the Board of Appeals to hear and determine appeals arising from the grant or denial of a permit, and to take the public interest into account in doing so. It states in relevant part:

"The Board shall hear and determine appeals with respect to any person who has been denied a permit ... or who believes that his or her interest or the public interest will be adversely affected by the grant [or] denial ... of a ... permit." (Charter, § 4.106, subd. (b).)

***5** Charter section 4.106, subdivision (d) states:

"After hearing and necessary investigation, the Board may concur in the action of the department involved, or by the affirmative vote of four members (or if a vacancy exists, by a vote of three members) overrule the action of the Department.

"Where the Board exercises its authority to modify or overrule the action of the department, the board shall state in summary its reasons in writing."

Thus, "both the planning commission (under § 26) and the board of permit appeals (under § 3.651 of the **city** charter) [4] are authorized to exercise independent discretionary review of a building permit application, the final authority being reposed in the board. Further ... such review is not confined to a determination whether the applicant has complied with the **city's** zoning ordinances and building codes." (*Guinnane, supra,* 209 Cal.App.3d at p. 740, fn. added.) "The board generally enjoys ' "complete power to hear and determine the entire controversy, [is] free to draw its own conclusions from the conflicting evidence before it and, in the exercise of its independent judgment in the matter, affirm or overrule...." ' [Citations.] However, that power must be exercised within the bounds of all applicable **city** charter, ordinance and code sections, and any action on its part that exceeds these bounds is void." (***City*** *and* ***County*** *of* ***San Francisco*** *v. Board of Permit Appeals* (1989) 207 Cal.App.3d 1099, 1104-1105.)

C. *The Board's Ruling*

Petitioners contend no substantial evidence supported the Board's finding that their project was a demolition or would result in the loss of "affordable" housing, either to Morales or the **City** at large. This is incorrect.

1. *"De Facto Demolition "*

The Commission's findings referred to the project as resulting in a "de facto demolition." It is not completely clear whether the Commission's use of this phrase was intended to find that the project constituted a "demolition" as that term is defined under municipal law, rather than an "alteration." [5] However, the record indicates that the Board reviewed the appeal with this in mind, as the Board's Vice President Sugaya stated at the November 2004 rehearing, "I still believe that this is an *illegal demolition* and that's what we're voting on." (Italics added.) Accordingly, we review the record to determine whether substantial evidence was presented to support the finding that the project was a "demolition" as that term is defined under municipal law. We conclude that such evidence was presented.

The **City's** Building Code defines "demolition" for the purpose of determining whether an unlawful residential demolition has occurred. It is defined as "the total tearing down or destruction of a building containing one or more residential units, or any alteration which destroys or removes ... principal portions of an existing structure containing one or more residential units." (S.F. Building Code, § 103.3.2. [6])

***6** The term "principal portion" is defined as "that construction which determines the shape and size of the building envelope (such as the exterior walls, roof and interior bearing elements), or that construction which alters two-thirds or more of the interior elements (such as walls, partitions, floors or ceilings)." (S.F. Building Code, § 103.3.2.)

Thus, under the **City** Building Code, a "demolition" includes an alteration which destroys or removes principal portions of an existing structure containing one or more residential units, which "principal portions" include "a construction which determines the shape and size of the building envelope," including, but not limited to, exterior walls, roof, and interior bearing elements. Petitioners' proposed project meets this definition of "demolition ." Petitioners' plans, rather than being "fairly modest" as petitioners claim, indicated that the project would, among other things, replace the existing brick

foundation, convert the first floor 750 square foot residential unit into an expanded two-car garage, renovate and expand the second floor rental unit occupied by Morales from 750 to 1,050 square feet, and add an entirely new third floor on top of the building, where a 1,050 square foot modern residential unit would be constructed. It can be reasonably concluded from these plans that both the shape and size of the building envelope would be significantly altered, and that "principal portions" of the building would be removed or destroyed (such as the second floor roof, a significant portion of the building "envelope" for the horizontal expansion of the first and second floors, the first floor residential unit, some portion of the first floor exterior for cars to enter the new garage, and the existing foundation).

Furthermore, there was substantial evidence that two-thirds or more of the interior gravity bearing walls would be removed by the project. A letter by Stuart Stoller, a senior associate at SGPA, an architecture and planning firm, was submitted to the Board,[7] in which Stoller disagreed with the estimate by **Tehlirian's** own architect, Charles Ng, that "less than 57% of the existing bearing walls" would be removed in the proposed construction. Stoller opined, based on his review of petitioners' "existing wall diagram," that the diagram did not take into consideration certain specified aspects of the premises or address certain "potential" requirements which, if considered, "could likely indicate that 33% or less of the existing wall structure will be retained." Stoller's letter called into question whether or not two-thirds of the interior gravity load bearing walls would be removed in the course of the project.

A letter by licensed contractor Alan Klonsky was also submitted to the Board. Klonsky reviewed Mr. Morales's rental unit and certain unspecified project plans. He stated:

"Although the project drawings are labeled as vertical and horizontal additions, in reality, the scope of work constitutes a demolition and the construction of a new building. At ground level, now occupied by the second unit, a garage is proposed along with the foundation and structural upgrades required by the construction of a 3-story building. Over the garage 2 floors of new construction will be built with an increase in the footprint of the building to current allowable lot coverage. The 2 new units will be significantly larger than the existing apartments. [¶] ... [¶] This project will require the existing building to disappear as a new building takes its place. Any remnant of the original construction will be symbolic at best. It appears to me that proposed scope of [*sic*] far exceeds the definition of a remodel."

***7** Based on this substantial evidence, the Board could reasonably conclude that the project, rather than calling for "alterations" as claimed by petitioners, was in fact ("de facto") a "demolition" as that term is defined by the **City's** Building Code. The plans called for significant changes to the shape and size of the building by the destruction or removal of significant principle portions of it. Klonsky's views, while not discussing the **City's** definition of demolition, confirmed these dramatic changes. The Board also could reasonably rely on Stoller's letter to conclude that the project more likely than not would destroy two-thirds or more of the linear feet of gravity load bearing walls, which would also constitute a "demolition" as defined in the **City's** Building Code.

Petitioners argue that we should disregard Stoller's letter as "soundly defective," amounting to "merely speculation and unsubstantiated opinion," because Stoller's qualifications are unclear, he examined only an "existing wall diagram" without showing how he could rely on it for his conclusions, and stated his conclusions in an unacceptably equivocal fashion (using such terms as "could" and "likely").

Petitioners' arguments lack merit. The Board could reasonably infer that a senior associate of an architecture and planning firm has the expertise to evaluate the materials Stoller reviewed and opine about them. Indeed, Ng's own qualifications appear to be less than what petitioners represent, i.e., a "licensed architect."[8] The evidence also strongly suggests that Stoller and Ng relied on the same or a very similar document in stating their views of the proposed project, since Stoller refers to "the 'Existing Wall Diagram' submitted by the project sponsor" and Ng refers to an "existing walls diagram." Neither explains how he could rely on such a document for his conclusions.

As for the quality of Stoller's opinion, his statements were not conclusory, and are a far cry from those discussed in the cases petitioners cite. (See *Gentry v. **City** of Murrieta* 1995) 36 Cal.App.4th 1359, 1421-1422 [expert found no effect on groundwater except for a "possible exception," and relied on unspecified information]; *Drouet v. Superior Court* (2003) 31 Cal.4th 583, 598 [referring to a "snippet" of a Senate Committee analysis in discussing a statute's interpretation, merely identified as "sufficiently tentative and equivocal to caution us against relying too heavily on [it]"]; *Citizen Action to Serve All Students v. Thornley* (1990) 222 Cal.App.3d 748,

756 [referring to a "conclusory" comment regarding what "might" occur as speculative and not substantive evidence]; *Keeton v. Workers' Comp. Appeals Bd*. (1979) 94 Cal.App.3d 307, 312, fn. 2 [merely referring to a "conclusory" doctor's report].) Stoller identified specific areas of the structure and potential requirements that factor into his views, and listed five specific items of concern. He used the phrase "could ... indicate" because he reached different conclusions depending on which of his stated items of concern are considered.[9] His use of terms such as "likely" or "potential requirements" to qualify his conclusions is hardly fatal in an expert opinion. They may go to the weight afforded to his opinion, but do not eliminate their merit altogether.

***8** Petitioners also argue that Klonsky's statement is an "unsupported conclusion, especially because it is contrary to the Planning Department's informed determination. Nothing in his conclusion attempted to apply relevant building code standards governing remodel versus demolition." Petitioners miss the relevance of Klonsky's statement, which is to support the conclusion that, practically speaking, the project "demolishes" the old building and places a new, significantly different one in its place, regardless of the Building Code definitions.

Petitioners also argue that we should rely on the Planning Department, which petitioners contend "repeatedly found ... the project *not* a demolition." The record does not support petitioners' contention. The Planning Department stated in recommending that the Commission not take discretionary review: "The Department of Building Inspection has made the determination that this project is an alteration, not a demolition. Therefore, the Planning Department has received the application as an alteration."

Regardless, we will not reweigh the evidence. The Board was entitled to rely on the substantial evidence that the **Tehlirian** project was a "de facto" demolition, even in the face of contrary evidence.

In their reply brief, petitioners also distinguish the **City's** and Morales's reference to a "de facto demolition" from a "de jure demolition," arguing that it constitutes an "admission" that there is no evidence of the latter, and that the Board acted without authority to reject a permit application for a mere "de facto demolition." To the contrary, the **City** argues that "the Project rose to the level of a demolition," and Morales, as he argued before the Board, contends that the "de facto demolition" constituted a "demolition" as the term is defined by the **City's** Building Code. As we have already stated, Board Vice President Sugaya stated that the Board was considering whether this was an "illegal demolition." In any event, there was substantial evidence that the project called for a "demolition" as that term is defined by the **City's** Building Code.

2. *Affordable Housing*

The Board did not abuse its discretion in finding that petitioners' project would eliminate affordable housing from the rental market.

Pursuant to state and municipal law, the Board may consider the need to retain affordable housing in deciding whether to grant or deny permits. "[C]reating affordable housing for low and moderate income families" is a "legitimate state interest." (*Home Builders Assn. v. **City** of Napa* (2001) 90 Cal.App.4th 188, 195.) "The assistance of moderate-income households with their housing needs is recognized in this state as a legitimate government purpose. (See, e.g., Gov.Code, § 65583, subd. (c)(2) [local communities must set forth in housing elements of their general plan a program that will 'assist in the development of adequate housing to meet the needs of low-*and moderate*-income households' (italics added)].)" (*Santa Monica Beach, Ltd. v. Superior Court* (1990) 19 Cal .4th 952, 970-971.)

***9** Municipal law requires the Board to consider the **City's** supply of affordable housing in making its decisions. The **City's** Planning Code section 101.1, subdivision (b) (3), states as a "priority policy" "[t]hat the **City's** supply of affordable housing be preserved and enhanced," and the **City's** departments must comply with the Planning Code's provisions in issuing permits. (S.F. Planning Code, § 175, subds. (a), (b).)

Furthermore, the Housing Element of the **City's** General Plan emphasizes the importance of retaining affordable housing. Objective 2 of the Housing Element states:

"The existing housing stock is the **City's** major source of relatively affordable housing. It is very difficult to replace given the cost of new construction and the size of public budgets to support housing construction. Priority should be given to the retention of existing units as a primary means to provide affordable housing." (S.F. General Plan, Housing Element (adopted May 13, 2004) p. 145.)

Consistent with this emphasis on retaining affordable housing, Policy 2.1 of the Housing Element discourages the "demolition" of sound existing housing. It states:

"Demolition of existing housing often results in the loss of lower-cost rental housing units. Even if the existing housing is replaced, the new units are generally more costly. Demolition often results in displacement of residents, causing personal hardship and relocation problems. [¶] ... The City should continue to discourage the demolition of existing housing that is sound or can be rehabilitated, particularly where those units provide an affordable housing resource." (S.F. General Plan, Housing Element (adopted May 13, 2004) pp. 145-146.)

Also consistent with this emphasis, Implementation 2.1 of the Housing Element states, among other things, "[t]he feasibility of expanding the demolition definition will continue to be evaluated in order to prevent the loss of housing classified as 'alterations.' " (S.F. General Plan, Housing Element, (adopted May 13, 2004) pp. 145-146.)

The Board's decision to uphold the denial of petitioners' permit application took into account the impact of the project on the City's stock of affordable housing. This was evidenced not only by its implicit adoption of the Commission's findings, but also by Board member Knox's statement at the November 2004 rehearing:

"I'm sensitive to the fact that Mr. Morales would be displaced and ultimately what we are looking at is the denial of the permit, not the fairness of people being able to buy property and make changes. [¶] Or frankly, I don't think we are going to be able to address the lack of affordable housing in San Francisco in this Board, with this Board in any case, including this case. [¶] As long as there is the private ownership of property in a limited geographical area, housing is going to be really expensive in this town. [¶] But I am not inclined to grant the appeal and overturn the denial of the permit."

***10** There was substantial evidence that the enlarged, renovated second floor rental unit would become unaffordable to persons in Morales's modest circumstances. Morales stated to the Board at the February 2004 hearing that he already was spending "more than 30 percent" of his income in rent, which was approximately $873 a month as of July 2005. Although petitioners eventually made certain promises to accommodate Morales's income limitations and displacement concerns as a part of their appeal to the Board, [10] Ara Tehlirian acknowledged to the Board during the February 2004 hearing that he was encouraging Morales to apply for government housing assistance and to consider taking on a roommate to pay for rent increases. Among other things, Tehlirian stated:

"[I]'d be taking a hit on the existing costs, but I'll take on that extra burden for a period of time, a reasonable period of time, until such time that the tenant can perhaps get in a roommate that can pay him several hundred dollars a month, or assistance where the government will try to assist him and by being able to get that assistance that will take some of the burden off of me."

Thus, whether or not petitioners accommodated Morales's concerns and limitations for a time, this testimony suggested that the new unit would no longer be affordable to a person in Morales's circumstances.

There was also substantial evidence that the project would remove the existing first floor, 750 square foot residential unit from the housing market as well, and that it, too, was of a more affordable nature than its "replacement." Although it was apparently vacant throughout this dispute, its conversion into a parking garage would obviously eliminate it from use. Petitioners' construction of a new third floor for the building, consisting of a modernized, 1,050 square foot residential unit, does not necessarily require its destruction. It is also reasonable to conclude that the modernized and enlarged third floor unit would be significantly more expensive if offered on the rental market.

Petitioners argue that the Board's affordable housing determination was improper for a number of reasons. First, they contend that there was no substantial evidence that affordable housing would be lost to Morales or the City at large. They point to their offer to limit capital improvement pass-throughs to Morales to $43 per month, and to the lack of evidence that the project would result in "luxury" amenities. We think these arguments avoid the obvious. The Board could reasonably conclude based on substantial evidence that the project would eliminate two residential rental units that are affordable to persons of modest circumstances, as we have discussed herein.

Petitioners also assert that Morales's unit in its present state is "perhaps dangerous," and suggest that it may violate the implied warranty of habitability, and contain "defects." Petitioners do not point to anything in the record so indicating,

and there was substantial evidence to the contrary. Klonsky, the licensed contractor, reviewed Morales's living conditions and found he lived "in a small Victorian building that appeared to suffer from deferred maintenance but was far from uninhabitable."

***11** Petitioners argue further that neither the Board nor the Commission are qualified to determine what is affordable housing, and neither body has "authority to prevent property owners from making moderate improvements to their property because doing so would affect the supply of affordable housing." They also insist that there were no standards or evidence of what constituted "affordable housing," or that the project once it completed would not be affordable. These arguments presuppose that petitioners were entitled to approval of their permit application absent some definitive proof to the contrary. As we have already discussed, the Board has broad discretion in granting or denying permits. We see no reason under the circumstances of this case to question the Board's decision that the project would eliminate affordable housing because the term was not precisely defined.

In short, given our deferential standard of review, the **City's** stated priority of retaining affordable housing and discouraging its "demolition," and the substantial evidence reviewed herein, [11] we cannot conclude that the Board abused its discretion when it denied petitioners' appeal because, as stated in the Commission's findings, the "project would result in the de facto loss of affordable housing by improving and expanding the existing units that are currently accessible to lower-income tenants because of their size and relative lack of amenities."

D. ***The Board Did Not Improperly Consider Tenancy-Related Issues***

Petitioners argue that the Board's consideration of the impact of the project on the **City's** stock of affordable housing was somehow precluded by the Board of Supervisors' creation of the Rent Stabilization and Arbitration Board (Rent Board) and enactment of related laws establishing certain rights and obligations between landlords and tenants (Rent Ordinance), and was beyond the Board's authority under **San Francisco** Business and Tax Regulations Code, article I, section 26. Petitioners contend that the Board improperly considered "tenancy-related issues," and that allowing the Board to base its decision on considerations regarding affordable housing "would undermine the creation of the Rent Ordinance and usurp the jurisdiction of the Rent Board." This argument also lacks merit.

As we have already discussed, the Board may, pursuant to Charter section 4.106, subdivision (b) of the Charter consider the "public interest" in its review of a permit. Pursuant to **San Francisco** Business and Tax Regulations Code, article I, section 26, it may review permits with regard to "public health, safety, and general welfare." (*Martin, supra,* 135 Cal.App.4th at p. 407.) Given these provisions and the **City's** stated priorities regarding affordable housing, the Board was entitled to consider the project's impact on the **City's** affordable housing stock in its deliberations.

Petitioners argue that the Board acted similarly to the Board in ***City*** *and* ***County*** *of* ***San Francisco*** *v. Board of Permit Appeals, supra,* 207 Cal.App.3d 1099, an opinion issued by this court. We disagree. In that case, the court held that the board acted in excess of its jurisdiction when it authorized a third unit for a property zoned for single family use. (*Id.* at p. 1102.) The court concluded that the board had effectively rezoned the property, a legislative act exclusively within the power of the board of supervisors. (*Id.* at p. 1110.) No such "legislating" occurred here. As we have discussed, the Board acted within its authority to review permits, and to consider such things as the public health, safety, and general welfare, and the **City's** priorities regarding its affordable housing stock, in doing so.

***12** Furthermore, the Board did not decide any issues covered by the Rent Ordinance. The Board did consider the possible impact of the project on Morales, and encouraged negotiations between petitioner and Morales to mitigate that impact. The municipal ordinances allow for the Board's consideration of the project's impact on Morales. (Charter, § 4.106, subd. (b) ["The Board shall hear and determine appeals with respect to any person who has been denied a permit ... or who believes that his or her interest ... will be adversely affected by the grant [or] denial ... of a ... permit"]; S.F. Bus. & Tax Regs.Code, art. I, § 26 ["in the granting or denying of any permit ... the granting ... power may take into consideration the effect of the proposed business or calling upon surrounding property and upon its residents, and inhabitants thereof"].) The Board inevitably considered his tenant circumstances in assessing the project's impact on him, given his status as petitioners' tenant. However, the Board did not decide any issues covered by the Rent Board or the Rent Ordinance. For example, it made no determinations related to Morales's displacement or temporary eviction, his relocation

benefits, the amount of rent to be paid should the project be completed, or the amount of capital improvement pass-through that should be allowed. [12]

E. ***Petitioners' Ellis Act Notice***

Petitioners represent that, while this appeal was pending, they invoked their Ellis Act rights pursuant to Government Code section 7060 et seq. and the **City's** Rent Ordinance, **San Francisco** Administrative Code section 37.9A, and gave notice to terminate Morales's tenancy and withdraw his unit from the rental market. They contend that, as a result, "a remand should result in a determination that the building no longer contains any rental housing, thus precluding any finding that this project will affect the **City's** affordable housing stock," and "submit that a writ of administrative mandate should issue compelling the [Board] to make legally relevant findings, which if done, will lead to permit issuance."

The courts review the Board's decision pursuant to Code of Civil Procedure, section 1094.5, based upon the record before the Board at the time it made its decision, with limited exceptions. (Code Civ. Proc., § 1094.5, subd. (e); *Eureka Teacher's Assn. v. Board of Education* (1988) 199 Cal.App.3d 353, 366-367.) We see no reason to consider petitioners' actions and contentions regarding the Ellis Act, other than to determine whether or not this appeal is moot in light of them. We conclude that it is not, as the record indicates that petitioners have extended the date of withdrawal of the unit to April 18, 2007, as indicated by petitioners' May 17, 2006 letter, of which we have taken judicial notice at Morales's request. (See *DeLaura v. Beckett* (2006) 137 Cal.App.4th 542, 547, fn. 4 [determining the merits of a dispute after Ellis Act notice had been given because the notice could still be rescinded].)

***13** The **City** also argues that we should determine that petitioners' Ellis Act notice cannot effect the Board's decision because "[i]t does not necessarily alter the property's character as 'affordable housing' or change the proposed Project from a demolition to an alteration." These issues also were not before the Board and, therefore, we do not consider them.

F. ***Other Arguments by Petitioners***

Petitioners make a number of additional arguments, none of which are persuasive. Petitioners repeatedly allege improprieties that have no support in the record, such as that Morales "called in political favors," the Commission and Board made findings that were "utterly pretextual" and "unfettered whim," and petitioners were "singled ... out solely for political reasons." We disregard these unsupported contentions.

Petitioners also argue that the Board's action effectively bans property owners from making any improvements to their buildings, stating: "If the **City's** position really is to keep housing affordable by encouraging dilapidation and preventing improvements, this court should order the **City** to cease issuing residential improvement permits of any kind to anyone. In fact, it should order that all permits already issued be rescinded and that all improvements ever made to any property be removed. That will undoubtedly not only prevent housing from becoming more expensive, it will ensure that it becomes truly affordable."

This hyperbole cannot obscure the substantial evidence of the dramatic overhaul called for in the petitioners' proposed project. Nothing in the record indicates that the Board barred petitioners from making any improvements to their property.

We also disagree with petitioners' assertions in their reply brief that the Board's action was "irrational" and "arbitrary" and against the "sound discretion" standard of **San Francisco** Business and Tax Regulations Code, article I, section 26. Petitioners' overbroad, scattershot arguments, such as their claim that the Board's action was in conflict with statutory provisions regarding the improvement and rehabilitation of property, and their contention that the **City** has "telegraphed" that it will continue to "retaliate" against them and "never approve any permit they seek," are unpersuasive. Petitioners repeatedly ignore the substantial evidence discussed herein that their project was a "demolition" and would eliminate affordable housing from the rental market, and the Board's broad discretion to act consistent with the **City's** interest in discouraging such demolitions and preserving such housing.

DISPOSITION

The superior court's denial of petitioners' petition for writ of administrative mandate is affirmed. Respondent and real party in interest are awarded costs.

We concur: KLINE, P.J., and HAERLE, J.

All Citations

Not Reported in Cal.Rptr.3d, 2007 WL 779353

Footnotes

1 The record indicates that ABT, LLC became the owner of the subject real property in 2004. To avoid unnecessary confusion, we refer to the actions of "petitioners" throughout without distinguishing between appellants.

2 All governmental entities referred to herein are part of the **City** and **County** of **San Francisco**, unless otherwise indicated.

3 We also take judicial notice of the **City's** Charter pursuant to Evidence Code section 451, subdivision (a), and of the municipal laws discussed herein pursuant to Evidence Code sections 452, subdivision (b) and 459.

4 Section 3.651 of the **City** Charter dealt with the Board's authority prior to Charter section 4.106, and language from that provision similar to that found in Charter section 4.106 was relied upon by the *Guinnane* court. (*Guinnane, supra,* 209 Cal.App.3d at p. 739.)

5 A zoning administrator summarizing the Commission's finding to the Board at its February 2004 hearing stated that "[t]he primary basis of the [Commission's] denial was that as a defacto demolition, this project resulted in the loss of affordable housing, and the destruction of sound housing." He later stated: "I did want to talk a little bit about the defacto demolition. While that's not an official term or part of the demolition policy, I believe the [Commission's] issue here was that by extending the building to the rear, removing the front façade and extending the front wall forward, totally remodeling the interior and removing most of the walls, it is not a technical demolition, but it was substantially the same effect from a design point of view of being a demolition."

6 The parties refer to the **City's** Building Code section 103.3 or 103.3.1 in their briefs for these same provisions. We refer to section 103.3.2, as the relevant provisions are presently denominated.

7 The parties do not dispute that hearsay evidence may be considered in such a municipal administrative proceeding. (See *Mohilief v. Janovici* (1996) 51 Cal.App.4th 267, 294-295 [unsworn statements and letters in the case file may be considered as evidence in municipal nuisance abatement proceedings].)

8 While Ng states in his letter that as "project engineer and architect of record, in *our* professional opinion, the subject building permit application is an alteration and not a demolition" (italics added), he merely identifies himself as a "P.E." and principal of the "BEST Design & Construction Company" (the letterhead also identifies him as a "CLC"); another individual, not a signatory to the letter, is identified as an architect on the letterhead.

9 Stoller stated, "I believe that taking into consideration items 1 through 3 above, could indicate that only 38% of the existing gravity load wall is being retained. Including items 4 & 5 into consideration, could likely indicate that 33% or less of the existing wall structure will be retained."

10 These were stated by petitioners' representative Bret Gladstone at the November 2004 rehearing.

11 We find sufficient substantial evidence without needing to determine whether or not the Board was entitled to rely on statements from the public or the Commission regarding the project's impact on affordable housing, a matter referred to by the superior court and debated between the parties in their appellate papers.

12 The Commission's findings recognized that Rent Board issues were beyond its purview, stating, "Any conditions of approval attached to the building permit relating to rental rates, relocation, tenant's right of return, and other arrangements made between the landlord and tenant would not be enforceable by the Planning Commission."

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