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Court of Appeal, First District, Division 4, California.

Eric WIDEN et al., Plaintiffs and Appellants,

v.

CITY AND COUNTY OF SAN  
FRANCISCO, Defendant and Respondent.

A155075

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A155078

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(City & County of San Francisco Super. Ct. No.  
CPF-15-514665)

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#### Opinion

[POLLAK, P.J.](#)

\*1 Eric Widen and others (Widen), owners of a three-unit condominium building on Divisadero Street in San Francisco, and Dennis Harper and Zsuzsanna Saper, as trustees of the Rita I. Harper trust (Harper trust), which owns one of four units in a building around the corner on Washington Street, appeal orders sustaining demurrers to their petitions for writs of administrative mandate. The petitions challenge abatement orders issued by the City and County of San Francisco (the city) that require appellants to repair an L-shaped retaining wall that adjoins both their properties. While the procedural history that preceded the rulings is complex, the ultimate issue requiring resolution is simple and straightforward. At bottom, appellants dispute the city's right to issue abatement orders to them without also issuing such orders to the owners of a third property, referred to as Divisadero Place, that also adjoins the retaining wall, and whose owners allegedly owe appellants a duty to maintain the wall. Because the wall is admittedly in need of repair and located at least in part on each appellant's property, the city appropriately issued abatement orders to them, whether or not it might also have issued such orders to the owners of Divisadero Place. If, as appellants contend, legal responsibility for the necessary repairs is shared, appellants' recourse, if any, lies in their pending claims for declaratory relief or indemnity against the Divisadero Place owners.<sup>1</sup>

#### Factual and Procedural History<sup>2</sup>

An aerial photograph (a copy of which is attached as appendix A) shows the L-shaped retaining wall that divides Divisadero Place (2308A–2312 Divisadero Street) from appellants' two upslope properties.<sup>3</sup> The property upslope to the north is the Widen building. Upslope to the east, on Washington Street, is the building in which the Harper trust owns a unit.

Sometime in the 1890s, the owners of Divisadero Place flattened their lot and built the retaining wall, preserving lateral support for the two upslope lots. The wall has since developed cracks.

In March 2014, the owners of Divisadero Place reported those cracks to the city's Department of Building Inspection (the department), which issued notices of violation to

the Divisadero Place owners and the upslope owners. Unbeknownst to the upslope owners, the Divisadero Place owners and their surveyor met with the inspectors and persuaded them that the wall's footing is solely on the two upslope properties. In June 2014, the department issued a second round of notices to the upslope owners alone.

\*2 When the upslope owners failed to repair the wall, the department noticed a hearing to consider imposition of penalties, including abatement orders. At the hearing, the upslope owners contended that the wall “straddle[s] the property lines,” and their structural engineer, Brett Ferrari, opined that previous owners of Divisadero Place built the wall to benefit that property.

The hearing officer indicated that he could not address whether the Divisadero Place owners, who were not before him, could also be ordered to abate the nuisance. He issued abatement orders finding the condition of the wall to be as described in the notices of violations, finding the wall to constitute a public nuisance, and requiring the upslope owners to repair or replace it.

The upslope owners appealed to the Assessment Appeals Board (the board). They asked that the orders be held in abeyance until they resolved their dispute with the owners of Divisadero Place concerning responsibility for the repairs, or that similar orders be issued to those owners. Mr. Ferrari restated his opinion, and a surveyor noted that the survey relied upon by the Divisadero Place owners shows parts of the wall crossing the property line, albeit in midair.<sup>4</sup> The department's deputy director related the prior issuance and effective withdrawal of notices of violation to the Divisadero Place owners, and brief consideration was given to the possibility of remanding the matter to the department. Ultimately, the board voted unanimously to uphold the abatement orders.

The upslope owners filed a request for rehearing. They offered new historical evidence that Divisadero Place was developed before their properties, as well as new survey evidence indicating that “the retaining wall existed on the Divisadero Place property in areas where the wall was not bowing.” The board denied the request.

Widen filed a petition for a writ of administrative mandate. The three Washington Street owners other than the Harper trust initiated a separate proceeding, combining an administrative-mandamus petition with a cause of action for

declaratory relief against the Divisadero Place owners. The pleading seeks declarations that the city did not determine the private parties' rights and duties inter se, and that the owners of Divisadero Place have a duty to maintain the wall. The Harper trust intervened in the proceeding begun by the other Washington Street owners and filed a pleading also seeking a writ of administrative mandamus against the city and declaratory relief against the Divisadero Place owners.

The city demurred to the petition of the three Washington Street owners other than the Harper trust. It argued that it had no duty “to identify each and every [party] legally responsible” for the wall, or to include the Divisadero Place owners in the proceedings, and had not been asked to make, or made, “a legal determination of ownership.” The city noted petitioners' alternative remedy in the form of their claim for declaratory relief against the Divisadero Place owners. The three Washington Street owners filed a conditional non-opposition asking the court to “find” that the city had not decided the private parties' rights or duties, to sustain the demurrer, and to let them “proceed with their complaint for declaratory relief against [the Divisadero Place owners].” Without making any “findings,” the court sustained the demurrer without leave to amend. No party sought appellate review.

\*3 The city subsequently demurred, on the same grounds, to the two remaining petitions for writs of administrative mandamus filed by Widen and the Harper trust. The court sustained the demurrers without leave to amend, and Widen and the trust each filed appeals, which this court has consolidated.<sup>5</sup>

## Discussion

In reviewing whether a demurrer was properly sustained, we treat the demurrer “‘as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law’ ”; we also consider “matters which may be judicially noticed.”<sup>6</sup> (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) If, as here, a demurrer was sustained without leave to amend, “we decide whether there is a reasonable possibility that the defect can be cured by amendment.” (*Ibid.*) “The burden of proving such reasonable possibility is squarely on the plaintiff” (*ibid.*), who “has the burden to identify specific facts showing [that] the complaint can be amended to state a viable cause of action” (*Minnick v. Automotive Creations, Inc.* (2017) 13 Cal.App.5th 1000, 1004).

A writ of administrative mandate may be sought to challenge a “final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal.” (Code Civ. Proc., § 1094.5, subd. (a).) The board's ruling undisputedly is such a decision. To obtain the writ it must be shown that the tribunal proceeded without or in excess of its jurisdiction, did not afford a fair trial, or committed a “prejudicial abuse of discretion.” (*Id.*, subd. (b).) Such abuse is shown if the tribunal has not proceeded in the manner required by law, if the findings do not support the decision or order, or if the evidence does not support the findings. (*Ibid.*)

The Harper trust contends that it alleged facts showing that the board failed to proceed in a manner required by law, and denied it a fair trial, by failing to consider “Divisadero Place's duty to maintain, repair, and/or replace” the wall, as well as Mr. Ferrari's opinion that the wall was built to benefit Divisadero Place. But the alleged responsibility of the Divisadero Place owners has no bearing on whether appellants, the owners of other properties on which the admitted nuisance sits, are properly ordered to eliminate the nuisance. Whatever the respective rights and obligations of the several property owners among themselves may be (see e.g., 6 Miller & Starr, Cal. Real Estate (4th ed. 2015) § 17:19 [discussing doctrine of lateral support] ), every property owner owes *to the public* a duty to remediate a public nuisance on their property. (See *People ex rel. Gallo v. Acuña* (1997) 14 Cal.4th 1090, 1103 [“public nuisance doctrine is aimed at the protection and redress of *community* interests”]; *Leslie Salt Co. v. San Francisco Bay etc. Com.* (1984) 153 Cal.App.3d 605, 622 (*Leslie Salt*) [“the private right to control land carries with it certain strictly enforceable public responsibilities”].) The city is authorized to enforce that obligation. (Gov. Code, § 38771 [“By ordinance the city legislative body may declare what constitutes a nuisance”]; S.F. Building Code, § 102A [declaring “buildings, structures, property, or portions thereof” that are “structurally unsafe” to be public nuisances].) All that is necessary to establish the propriety of the abatement orders, in addition to proper notice and a fair hearing, is that a portion of the wall be situated on the appellants' property and in an unsafe condition constituting a public nuisance. (*Leslie Salt, supra*, at p. 622 [“liability and the duty to take affirmative action flow not from the landowner's active responsibility for a condition of

his land ... [but] simply, from his very possession and control of the land in question”].) None of these facts is disputed.

\*4 The board did not abuse its discretion in ordering appellants to abate the nuisance even assuming the truth of appellants' allegations that previous owners of Divisadero Place built the wall to benefit their property and that part of the wall's footing is on their property. The abatement orders are authorized even assuming that the owners of Divisadero Place also are obligated to maintain the wall and may be obligated to indemnify appellants wholly or in part for the cost of doing so. In *Leslie Salt, supra*, 153 Cal.App.3d 605, Division Two of this court held that property owners are obliged to abate public nuisances on their property of which they have notice, regardless of whether another actor *created* the nuisance. The obligation exists even if the other actor created the nuisance by conduct that violated a duty owed to the landowner (in that case, by dumping bay fill on the landowner's property). (*Id. at pp. 619–620.*)

The board did not abuse its discretion by failing “to include ... Divisadero Place in the abatement proceedings.” No law compels the public agency to proceed against every responsible party in order to enforce the law of public nuisance against one such party. Over a century ago, in a case involving multiple mine operators, each of whom was discharging debris into a river, the California Supreme Court approved “the equitable principle that, in an action to abate a public or private nuisance, all persons engaged in the commission of the wrongful acts which constitute the nuisance may be enjoined, jointly or severally.” (*People v. Gold Run Ditch & Mining Co.* (1884) 66 Cal. 138, 149.) When no damages are sought, “[t]he only question was whether the nuisance ... had been committed; and it was no answer ... that other persons were committing the same sort of nuisance.” (*Id. at p. 150.*) “Each and every one [committing similar acts] is liable to a separate action, and to be restrained.” (*Ibid.*; see also, e.g., *Farmer v. Behmer* (1909) 9 Cal.App. 773; 38 Cal.Jur.3d (2014) Injunctions, § 95.)

*Vollstedt v. City of Stockton* (1990) 220 Cal.App.3d 265 (*Vollstedt*), on which the Harper trust relies, is completely inapposite. That case held that a city employee was denied a fair hearing when challenging his demotion because the city manager who approved the demotion did not attend the evidentiary hearing required by law and did not review a summary of the evidence submitted at that hearing, but instead relied on a private conversation with the city's personnel director. (*Id. at pp. 269–272.*) Nothing of the

kind happened here. The board conducted the hearing at which appellants and the city presented evidence relevant to issuance of the abatement orders. While appellants were not involved in the discussions that persuaded the inspectors not to proceed against the owners of Divisadero Place, the building inspectors were not the “decisionmaker” such as the city manager in *Vollstedt*. (*Id.* at pp. 274–275.) The inspectors were not barred from considering information received outside the noticed hearing. (Cf. *English v. City of Long Beach* (1950) 35 Cal.2d 155, 158 [barring consideration of such information by “[a]dministrative tribunals ... required to make a determination after a hearing”].) The trial court did not abuse its discretion in denying appellants leave to amend to add allegations concerning the inspectors’ meeting with the Divisadero Place representatives.

The Harper trust also contends that it can amend its petition to allege that “the findings did not support the order of abatement because both the hearing officer ... and [some] Commissioners ... expressed confusion as to why the Divisadero Place ... owners were not before [them].” But while the hearing officer said that he did not know “[w]hy the other properties aren’t before me,” he made clear that their absence was immaterial to the question that was before him. At the board hearing, the department clearly explained why the Divisadero Place owners were not before the board. While some commissioners expressed doubts about the wisdom of the department’s decision not to pursue notices of violation against the owners of that property, no commissioner expressed doubt that, given the facts found by the hearing officer, appellants have a duty to remedy the public nuisance. There was no abuse of discretion in denying leave to amend to add those allegations.

\*5 Widen contends that the city acted in excess of its jurisdiction “because ownership and responsibility for the maintenance and repair of the ... wall are matters in dispute among the [property] owners,” and they offer to amend their petition to add “facts elaborating how [the] abatement orders constituted an improper de facto determination of the rights and responsibilities of [Widen] and [the Divisadero Place owners], and [the city] thus acted in excess of its jurisdiction.” However, whatever views may have been expressed during the hearing before the board, the orders affirmed by the

board determine only that appellants are obligated to abate the nuisance. The orders make no determination of the liability of others, or of the appellants’ right, or lack of a right, to be indemnified by others. The board did not exceed its jurisdiction.

### Disposition

The orders sustaining the city’s demurrers without leave to amend are affirmed. The city shall recover its costs on appeal.

WE CONCUR:

STREETER, J.

BROWN, J.

### Appendix A

#### (Aerial Photograph of Properties)



2.JAPPX.0469

### All Citations

Not Reported in Cal.Rptr., 2020 WL 3026033

### Footnotes

1 The present appeal does not bring before us any of the disputed issues in appellants’ claims against the owners of Divisadero Place, and we express no opinion on any of those issues.

- 2 We recite the facts alleged in appellants' operative complaints, as well as certain facts based on documents that the trial court was requested to judicially notice and which the trial court implicitly did notice, though not expressly so ruling. (See fn. 6, *post*.)
- 3 As the photo shows, four buildings adjoin the wall, but the proceedings at issue involve only three of them. No one disputes the exclusion of the fourth building, located at the corner of Divisadero and Washington Streets.
- 4 The wall undisputedly bows over the property line at two feet above the ground. Whether any of its footing is on the property of Divisadero Place is disputed.
- 5 Although the trial court has not yet entered a judgment, and proceedings on the claims against the Divisadero Place owners continue, the orders at issue eliminate the only causes of action against the city. We thus have discretion to hear these appeals (*Wilson v. Sharp* (1954) 42 Cal.2d 675, 677) and do so in the interest of judicial economy.
- 6 The Divisadero Place owners contend that the court improperly relied on extrinsic evidence. However, it appears that the court implicitly took judicial notice of certain documents as it had been requested to do. The documents, all properly subject to judicial notice, include the hearing transcripts and Building Code sections submitted by the city and the notices of violation, hearing notice, and order of abatement attached to the trust's pleading.