SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Civil Division

Central District, Stanley Mosk Courthouse, Department 82

19STCP01937 October 1, 2020
LANCE JAY ROBBINS PALOMA PARTNERSHIP vs CITY OF LOS ANGELES, et al. 1:30 PM

Judge: Honorable Mary H. Strobel
Judicial Assistant: N DiGiambattista
Courtroom Assistant: R Monterroso

CSR: D Van Dyke/CSR 10795
ERM: None
Deputy Sheriff: None

APPEARANCES:

For Petitioner(s): Thomas A Nitti (Telephonic) and Andrew Kavros(x)

For Respondent(s): Amy Brothers (X) (Telephonic); Morgan Linscott Hector (X) (Telephonic)

NATURE OF PROCEEDINGS: HEARING ON PETITION FOR WRIT OF MANDATE

Matter comes on for hearing and is argued.

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Petitioner's exhibit 1 (administrative record) is admitted into evidence.

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Counsel for petitioner's oral requests to augment the record, and for a stay are made, argued and denied for the reasons set forth by the court on the record.

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The court adopts its tentative ruling as the order of the court and is set forth in this minute order.

Petitioner Lance Jay Robbins Paloma Partnership ("Petitioner") petitions for a writ of administrative mandate directing Respondent City of Los Angeles ("Respondent" or "City") to set aside a decision of the West Los Angeles Area Planning Commission ("APC") denying Petitioner's appeal of decisions of the Zoning Administrator ("ZA") and Los Angeles Department of Building the Safety ("LADBS") that LADBS did not err or abuse its discretion in issuing a Certificate of Occupancy, dated August 25, 1967, for a 58-unit Apartment House at 15 E. Paloma Ave., Los Angeles, CA 90291 ("Ellison") and by relying on the Certificate of Occupancy to prohibit the existing five-story residential building on the subject property from being used for short term rentals/transient occupancy.

Petitioner's Requests to Augment the Administrative Record

In its opening writ brief, Petitioner refers to exhibits for which no request for judicial notice has been made. (See Opening Brief (OB) 2:21-22, 3:1-4, citing OB Exh. A and B.)

"As a general rule, a hearing on a writ of administrative mandamus is conducted solely on the record of the proceeding before the administrative agency." (Richardson v. City and County of

San Francisco (2013) 214 Cal.App.4th 671, 702.) However, extra-record evidence may be admitted if, in the exercise of reasonable diligence, the relevant evidence could not have been produced or was improperly excluded at the hearing. (CCP § 1094.5(e); Pomona Valley Hosp. Med. Ctr. v. Superior Court (1997) 55 Cal.App.4th 93, 100.)

As to Exh. A, the court granted Petitioner's September 22, 2020, the application to correct page 730 of the administrative record; namely by replacing it with Exhibit A. The court continued the hearing on the writ petition so that Respondent could file a supplemental response to Petitioner's arguments concerning the document at issue. Court does not augment the record with Exh. B.

Judicial Notice

Petitioner's RJN Exhibits 1-3 – Granted.

Respondent's RJN Exhibits 1-3 – Granted.

Background

The Ellison and City's Issuance of the 1967 Certificate of Occupancy

Petitioner owns the Ellison Apartments, a 4-story, 58-unit apartment building located at 15 E. Paloma Ave., Los Angeles, CA 90291 ("Ellison"). (AR 6.) The Ellison was built between 1911 and 1913 in what was then the City of Venice. (Ibid.) In 1926, Venice was consolidated into the City Los Angeles ("City"). (Ibid.) The Certificate of Occupancy ("C of O") being challenged in this action was issued on August 25, 1967, and identifies the Ellison as a "Four-Story, Type III-A, 81' x 130', 58 Unit Apartment House." (AR 5, 13.)

Administrative Proceedings

In January 2018, Petitioner filed an appeal with the City's Department of Building & Safety ("DBS") pursuant to LAMC §12.26.K seeking issuance of a "modified" C of O. (AR 58-65.) Specifically, Petitioner requested that the 1967 C of O "be modified or interpreted to permit the Ellison's historic use as a hotel." (AR 63.)

LADBS denied the appeal, and Petitioner appealed to the City's Planning Director. (AR 5-85, 95-217.) The ZA heard the appeal on behalf of the Director on September 20, 2018, during

which multiple individuals testified, including appellant and two of its representatives, staff from LADBS and the City's Department of Housing and Community Investment ("HCID"), and residents of the Ellison. (AR 340-341 [Notice of Hearing]; AR 2215-2222 [list of witnesses and summary of their testimony].) The ZA denied the appeal on January 3, 2019. (AR 998-1034 [ZA Letter of Determination].)

Petitioner then appealed the ZA's denial to the APC. (AR 1200-1364.) The APC held a public hearing on May 15, 2019. (AR 2511-2580.) There was testimony from the ZA, Petitioner and its counsel, as well as other interested persons including residents of the Ellison. (Ibid.) The APC deliberated and ultimately voted to deny the appeal. (AR 2574-2579.) As set forth in its Letter of Determination, the APC sustained the ZA's denial and adopted the ZA's findings. (AR 2198-2236.)

Writ Proceedings

On May 16, 2019, Petitioner filed its verified petition for writ of mandate and complaint for declaratory relief. On June 17, 2019, City answered the petition.

On September 26, 2019, the court set the writ petition for hearing on September 22, 2020 and set a briefing schedule. The court previously stayed the second cause of action for declaratory relief until the writ cause of action is decided.

On February 4, 2020, the court granted in part Petitioner's motion for leave to file a first amended verified petition. The court granted Petitioner leave to amend the FAP to include allegations about ex parte communications between the ZA and a witness and other city employees. In its written minute order, the court "state[d] no opinion about whether extra-record discovery would be permitted."

On February 5, 2020, Petitioner filed the first amended verified petition ("FAP").

On March 9, 2020, Respondents filed their motion to strike. The court received Petitioner's opposition and Respondents' reply.

On June 26, 2020, Petitioner filed its motion to compel deposition and documents. The court received Respondents' opposition and Petitioner's reply.

On July 24, 2020, Petitioner filed his opening brief in support of the writ petition.

On July 28, 2020, the court denied Petitioner's motion to compel ZA Weintraub to appear for a deposition and produce documents. The court also denied Respondent's motion to strike.

On August 24, 2020, Respondent filed an opposition to the writ petition. On September 4, 2020, Petitioner filed a reply. The court has received the administrative record and joint appendix.

On September 15, 2020, the court denied Petitioner's ex parte application to conduct extra-record discovery, continue trial, or present live testimony at trial.

On September 22, 2020, the court granted Petitioner's ex parte application to correct page 730 of the administrative record. The court continued the hearing on the writ petition so that Respondent could file a supplemental response to Petitioner's arguments concerning the document at issue.

On September 28, 2020, Respondent filed its supplemental brief.

On September 29, 2020, Respondent filed an answer.

Standard of Review

Petitioner seeks a writ of mandate pursuant to CCP section 1094.5. Under CCP section 1094.5(b), the pertinent issues are whether the respondent has proceeded without jurisdiction, whether there was a fair trial, and whether there was a prejudicial abuse of discretion. An abuse of discretion is established if the agency has not proceeded in the manner required by law, the decision is not supported by the findings, or the findings are not supported by the evidence. (CCP § 1094.5(b).)

"The courts must decide on a case-by-case basis whether an administrative decision or class of decisions substantially affects fundamental vested rights and thus requires independent judgment review." (Bixby v. Pierno (1971) 4 Cal.3d 130, 144.) "Administrative decisions which result in restricting a property owner's return on his property, increasing the cost of doing business, or reducing profits are considered impacts on economic interests, rather than on fundamental vested rights." (E.W.A.P., Inc. v. City of Los Angeles (1997) 56 Cal.App.4th 310, 325.) "In contrast, the independent judgment test is applied to review administrative decisions that will drive an owner out of business or significantly injure the business's ability to function." (Benetatos v. City of Los Angeles (2015) 235 Cal.App.4th 1270, 1281; see Goat Hill Tavern v. City of Costa Mesa

(1992) 6 Cal.App.4th 1519, 1529 [independent judgment test applied because city's decision would have resulted in the loss of owner's 35-year-old tavern, a business in which the owner had recently spent $1.75 million to refurbish].)

Petitioner contends that the court should apply the independent judgment test because "the City's decision[] would be economically detrimental to Petitioner's business." (OB 4.) In reply, Petitioner asserts that the APC's decision would "completely destroy[] the short term rental business operating at the Ellison." (Reply 2.) "Courts rarely uphold the application of the independent judgment test to land use decisions." (Amerco Real Estate Co. v. City of West Sacramento (2014) 224 Cal.App.4th 778, 783; Toigo v. Town of Ross (1998) 70 Cal.App.4th 309, 317 [applying substantial evidence review to land use decisions].) Petitioner does not show, with record citation, that the APC's decision would drive Petitioner out of business or significantly injure its ability to function as a business. While the APC decision prohibits Petitioner from using the Ellison as a hotel or for short-term rentals in its current zone, Petitioner could still use the Ellison as an apartment building. Moreover, Petitioner could apply for a zone variance. Petitioner does not cite evidence of the impact of the APC's decision on its business. The court concludes the writ petition does not concern a fundamental vested right, and the substantial evidence test applies to APC's fact findings.

Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion (California Youth Authority v. State Personnel Board (2002) 104 Cal. App. 4th 575, 584-85), or evidence of ponderable legal significance which is reasonable in nature, credible and of solid value. (Mohilef v. Janovici (1996) 51 Cal. App. 4th 267, 305 n. 28.) "Courts may reverse an [administrative] decision only if, based on the evidence …, a reasonable person could not reach the conclusion reached by the agency." (Sierra Club v. California Coastal Com. (1993) 12 Cal.App.4th 602, 610.)

"'On questions of law arising in mandate proceedings, [the court] exercise[s] independent judgment.' …. Interpretation of a statute or regulation is a question of law subject to independent review." (Christensen v. Lightbourne (2017) 15 Cal.App.5th 1239, 1251.) "A challenge to the procedural fairness of the administrative hearing is reviewed de novo on appeal because the ultimate determination of procedural fairness amounts to a question of law." (Nasha L.L.C. v. City of Los Angeles (2004) 125 Cal.App.4th 470, 482.)

The petitioner seeking administrative mandamus has the burden of proof and must cite to the administrative record to support its contentions. (See Bixby v. Pierno (1971) 4 Cal. 3d 130, 143; Steele v. Los Angeles County Civil Service Commission, (1958) 166 Cal. App. 2d 129, 137.)

Analysis

In its administrative appeal, Petitioner requested that the 1967 C of O "be modified or interpreted to permit the Ellison's historic use as a hotel." (AR 63; see also AR 66 [same].) Petitioner asserted that the Ellison is a "historical hotel" dating to its construction in 1913, and that the 1967 C of O violated Petitioner's vested rights to operate as a hotel and violated the California Historical Building Code ("CHBC"). (OB 62-67.) Contrary to Petitioner's position in its reply that "this action is not about hotels versus apartment buildings," the administrative appeal expressly sought a decision from LADBS that Ellison could operate as a "hotel." (See Reply 1; see AR 63, 66.) Thus, one pertinent question for the APC was whether the 1967 C of O properly classified the Ellison as an apartment house, instead of a hotel. (See AR 2203-09 [zoning code definitions]; AR 13 [1967 C of O].) APC also affirmed decisions of the ZA and LADBS that the 1967 C of O prohibited short-term rentals ("STRs") and transient occupancy in the Ellison in its current zone. (AR 2235.)

The APC's denial of Petitioner's administrative appeal, which adopted the ZA's findings, was based upon the following findings: (1) building records show that "the only recorded use of the subject building since its construction is that of an Apartment House"; (2) the Ellison was constructed as an apartment house per every definition of the term due to the presence of kitchens; (3) there is no recorded evidence of use of the Ellison as a Hotel; (4) Petitioner does not have a vested right to operate the Ellison with short-term rentals/transient occupancy; (5) the Ellison does not have any nonconforming rights to operate with short-term rentals/transient occupancy; and (6) the Ellison is prohibited from operating as a hotel or for other short term rental (less than 30 days) occupancy in its current RD1.5 zone. (AR 2229-2235.) The APC also rejected legal arguments made by Petitioner under the Coastal Act, the California Historic Building Code, and other statutes, as analyzed below. (Ibid.)

The Recorded Use of the Ellison is that of Apartment House, not Hotel

Substantial evidence supports APC's finding that "the only recorded use of the subject building since its construction is that of an Apartment House." LADBS issued its first building permit for the Ellison to its original owners, William and Myrtle Ellison, in 1933, identifying the building as an "apartment." (AR 6, 18-19.) All building permits and C-of-Os issued by LADBS since the initial permit from 1933 consistently identified the use of the building as an "apartment house." (AR 13, 20-35.)

Although Petitioner does not dispute that the Ellison has consistently been identified as an "apartment house" in building records, Petitioner challenges APC's factual finding that there is no recorded evidence of use of the Ellison as hotel. (See OB 4; see AR 2274-75.) Petitioner contends, citing an excerpt from Venice Ordinance 983, that "[i]n 1913, the City of Venice did not distinguish between hotels and apartments" and "the City of Venice did not prohibit STRs in apartment houses." (OB 2.) Nothing on the face of the excerpt from Ordinance 983 shows either that apartments and hotels were treated the same, or that STRs in apartment houses were either permitted or prohibited. Venice Ordinance 983 is not a building record for the Ellison, does not apply specifically to the Ellison, and is not substantial evidence that the Ellison was used or permitted to be used as a hotel or for STRs.

Petitioner also cites a Ph.D. thesis about urban housing in Los Angeles from 1900-1936. The Ph.D. thesis Petitioner cites, which offers no specific information about the Ellison. Petitioner submits historical advertisements of the Ellison from 1928 advertising monthly and weekly rates. (AR 118, 353-362, 108-111.) While the historical advertisements suggest that Ellison may have offered STRs in the 1920s, the advertisements are not substantial evidence that the Ellison lawfully operated as a hotel. The APC could reasonably give more weight to the building records and other evidence, including the presence of kitchens, in determining the historic use of the Ellison.

The APC's decision cites additional evidence that the Ellison is properly classified as an apartment house. For instance, LADBS found that the Ellison is monitored by HCID, and for years has been paying the required fees to HCID's Systematic Code Enforcement Program ("SCEP") which "is directed at long-term dwelling units." (AR 9.) The ZA agreed and advised the APC that under SCEP, periodic inspections have occurred at the Ellison since 2001, and the Ellison has consistently paid the fees for the inspection. (AR 2525; SAR 22.) The ZA concluded that if the Ellison was permitted for STRs or was a hotel, those SCEP fees would not have been required. (AR 2526; SAR 22.) LADBS also explained that hotels and other STRs are subject to the "Transient Occupancy Tax" ("TOT"), which equates to 14% of the rent charged, and here there is no record of the Ellison paying this tax within the last three years. (AR 9.) Testimony and correspondence in the record also indicate that it was only very recently, within the past five years, that the Ellison began offering STRs. (See Testimony at AR 2526, 2555, 2558, 2559, 2560, 2561, 2563; SAR 22; Emails at AR 2409, AR2420, 2425, 2426, 2115.) This evidence was incorporated in the APC decision and is not challenged by Petitioner. (AR 2211-12, 2215-29.)

Substantial evidence supports APC's findings that building records show that "the only recorded use of the subject building since its construction is that of an Apartment House," and that there is

no recorded evidence of use of the Ellison as a hotel.

Construction of the Ellison with Kitchens

Substantial evidence supports APC's finding that the Ellison "was constructed as an Apartment House" under both Venice law and the LAMC, given the presence of kitchens and the definition of "Apartment" throughout the Ellison's history. (See AR 2273-74.) There is evidence that the apartment units at the Ellison were built with kitchens in each unit and that the Ellison has operated with kitchen units for many years. (AR 7, 17, 2218.)

In 1933, when the first LADBS permit was issued, "Apartment" unit was defined by the LAMC as a room or rooms "occupied by one family doing its cooking on the premises." (AR 6-7, 15-16.) An "Apartment House" was defined as a building occupied by "three or more families living independently of each other and doing their cooking in such building." (AR 2231; AR 14-16 [1933 code].) Similarly, Venice Ordinance No. 983 defined an "Apartment" as "a residence for one family doing its own cooking on the premises." (AR 2231; AR 118 [Venice Ordinance].) As staff from LADBS testified before the ZA, the presence of kitchens has historically distinguished apartments from hotels, and that kitchens are present in each of the Ellison's apartments. (AR 2218.) The cooking distinction remains in the current LAMC. (AR 2231, 2203-04.)

Petitioner contends that "City of Venice ordinance number 983, which was operable when the Property was first built, did not provide that STRs were prohibited from having kitchens." (OB 14, citing AR 118.) Petitioner also cites to "a summary of a number of hotels in Los Angeles that provide kitchen facilities (obtained from hotel booking websites)." (OB 14, citing AR 1327-38.) These contentions do not undermine the APC's finding. Venice Ordinance No. 983 defined an "Apartment" as "a residence for one family doing its own cooking on the premises." (AR 2231; AR 118 [emphasis added].) Petitioner's evidence that some modern-day hotels offer kitchen facilities is not relevant to the question of whether the Ellison was constructed as an apartment house.

In reply, Petitioner, for the first time, argues that "there was no evidence of kitchens in 1913." (Reply 5.) Although Respondent does not cite evidence of the exact year the kitchens were constructed, it is reasonable to infer from the record that the Ellison units were constructed with kitchens. (See Ibid.; see also AR 20-25 [1930s building permits].) Petitioner cites no evidence to show this inference was not supported by substantial evidence.

Substantial evidence supports APC's finding that the Ellison "was constructed as an Apartment

House."

Short-Term Rentals Are Prohibited at the Ellison under its Current Zoning

APC found that hotels and STRs are prohibited in the RD1.5 zone in which the Ellison is located. (AR 2233-34.) APC reasoned that City's Zoning Code is a "permissive" code in which any use not specifically listed as permitted for a particular zone is prohibited. (AR 2233, citing LAMC §12.21(a)(1) [no building may be used "for any use other than is permitted in the zone in which such building, structure or land is located."].) APC found that the Ellison was re-zoned to RD1.5 in 1973, and that the RD1.5 zone does not allow hotels, motels, or apartment hotels by right. All permits and certificates of occupancy issued in the 60's ad 70's (and thereafter) describe the property as apartment house or apartment building.

APC cited to a March 2014 memo of the Planning Department clarifying that STRs are prohibited in the RD residential zones. (AR 2234; 2289.) APC also incorporated LADBS's determination that "Transient Occupancy Residential Structures" are not allowed in a R-zoned lot. (AR 2296; see also AR 2522 [discussing TORS ordinance].) Thus, APC concluded that a zone variance would be required for Ellison to operate in the RD1.5 zone with STRs or transient occupancy. (AR 2233-34.)

Generally, "City's interpretation of its own City Code 'is entitled to deference' in [the court's] independent review of the meaning or application of the law." (City of Monterey v. Carrnshimba (2013) 215 Cal.App.4th 1068, 1091.) As indicated in APC's decision, the RD1.5 zone allows for use as an "apartment house," but not as a "hotel." (See AR 2204 and LAMC § 12.09.1 [defining RD zone].) APC also supported its decision that, under applicable zoning law as interpreted by City, STRs are not permitted in the RD1.5. (AR 2233-34, 2289, 2296.)

Petitioner does not directly challenge APC's determination that, pursuant to City's operative zoning laws, hotels and STRs are prohibited in the RD1.5 zone in which the Ellison is located. Rather, as analyzed below, Petitioner contends that "APC improperly relied on later-enacted laws, rather than the laws operable at the time the Ellison was originally used in 1913, in order to make a finding regarding the historical permitted use of the Ellison." (OB 10 [emphasis added].) Petitioner contends that it accrued vested rights to operate as a hotel or accommodate STRs, and that the CHBC protects the Ellison's alleged historical use. (OB 5-6.)

Petitioner cites to a trial court ruling addressing short-term rental use at an "apartment house" in the City of Los Angeles. (OB 9-10; Pet. RJN Exh. 1.) However, as Petitioner admits, the trial

court decision in the case, People of the State of California v. Venice Suites LLC, LASC Case No. BC624350, is currently on appeal in Appellate Case No. B300960, and the trial court decision is not final and provides no binding precedent. Petitioner has not requested a stay of the instant writ petition pending the appeal in Venice Suites LLC.

Nor does Petitioner provide any meaningful discussion of the legal issues and Zoning Code definitions analyzed by the trial court in Venice Suites LLC. Petitioner did not sufficiently brief this issue or even place it in issue simply by citing a trial court decision. To the extent Petitioner wished to challenge APC's interpretation of City's current zoning laws, it was incumbent on Petitioner to develop and present such arguments in its writ briefs so that City could respond. (CRC 3.1113; Quantum Cooking Concepts, Inc. v. LV Associates, Inc. (2011) 197 Cal.App.4th 927, 934; Nelson v. Avondale HOA (2009) 172 Cal.App.4th 857, 862-863 [argument waived if not supported by reasoned argument and citation to authorities].) Moreover, Petitioner's application to DBS was specifically to modify the 1967 certificate of occupancy or interpret it to permit "the Ellison's historic use as a hotel." (AR 63, emphasis added.)

Petitioner did not sufficiently raise or brief an argument about whether "apartment house," under City's current zoning laws, should be interpreted to exclude STRs. It also appears Petitioner did not argue below that "apartment house" should be interpreted to allow STRs.

Petitioner does not show an error or prejudicial abuse of discretion in APC's decision that Petitioner cannot operate the Ellison as a "hotel" or accommodate STRs or transient occupancy in the RD1.5 zone.

APC Did Not Abuse its Discretion in Rejecting Petitioner's Various Legal Arguments

Vested Right; Government Code Section 57479

Petitioner contends that upon Venice's consolidation by the City of Los Angeles in 1926, Government Code section 57479 or its "1909 predecessor statute" operated to continue the application of Venice Ordinance 983 to the Ellison indefinitely. (OB 5-6.) Petitioner contends that Venice Ordinance 983 did not prohibit STRs and "was silent as to length of stay." (OB 5.) Relatedly, Petitioner contends that "[t]he Ellison's vested right to accommodate STRs accrued in 1913 when it began business." (OB 6:26.) Petitioner contends that "the Ellison's use of renting units on short and long term basis is preserved pursuant to the Government Code and the 1909 California State predecessor statute." (OB 6.) These arguments, which were rejected by APC, are unpersuasive.

Petitioner cites only a one-page, incomplete excerpt from Venice Ordinance 983. (AR 118.) Petitioner does not develop an argument, with reasoned analysis and citation to authorities, that the ordinance conferred a vested right on property owners to operate as a hotel or to accommodate STRs.

As an evidentiary matter, Petitioner begs the question – he assumes the truth of his conclusion that, during the time of Venice Ordinance 983, Ellison was used or permitted to be used as a hotel or for STRs. As discussed above, Venice Ordinance 983 is not a building record for the Ellison, does not apply specifically to the Ellison, and is not substantial evidence that the Ellison was used or permitted to be used as a hotel or for STRs. Petitioner's other cited evidence of historic use of the Ellison – i.e. the Ph.D. thesis and historical advertisements – are not recorded evidence that Ellison has been used as a Hotel or for STRs. (AR 118, 353-362, 108-111.) In weighing the evidence, APC could reasonably give more weight to the building records than the Ph.D. thesis or historical advertisements. This is especially true where permits issued to prior owners, including the original owner, consistently referred to the property as an apartment house or building.

Government Code section 57479, cited by Petitioner, was not enacted until 1986. Petitioner does not show that this statute applied retroactively to Los Angeles's annexation of Venice 60 years prior. Petitioner acknowledges this, arguing instead that the "1909 predecessor statute" to section 57479 should apply. (OB 6.) Petitioner quotes the 1909 predecessor statute as providing that, when two municipalities were consolidated, "such repeal shall not apply to ordinances under which vested rights have accrued." 1 (OB 6.) However, as discussed, Petitioner does not show that Venice Ordinance 983 conferred vested rights on the then-owners of the Ellison to operate as a hotel or accommodate STRs. (See AR 118.)

As noted in opposition, a vested right may accrue to complete construction in accordance with a government-issued permit if the property owner "has performed substantial work and incurred substantial liabilities in good faith reliance upon [the] permit." (Avco Community Developers, Inc. v. South Coast Regional Com. (1976) 17 Cal.3d 785, 791; see Oppo. 18.) To the extent this doctrine could apply to the use of a building, Petitioner makes no argument that it accrued a vested right to operate the Ellison as a hotel or to accommodate STRs by virtue of any permit issued by City.

Petitioner claims that a City-authored letter admits that the Ellison historically was developed to accommodate STRs. (OB 3, citing Exh. B, which is found at AR 2185.) As noted earlier, this

letter was not properly made part of the record. Even if considered, the cited letter does not constitute evidence needed to establish a vested right. (AR 2185.) Nor is the letter persuasive evidence of Ellison's use or operations at any relevant time. The language of the letter, drafted in 2015 by a Deputy City Attorney in response to a letter from Petitioner's counsel regarding pending litigation, itself states that "none [of Petitioner's claimed right to use the building as a hotel] are conceded or admitted." (AR 2186.)

Goat Hill Tavern v. City of Costa Mesa (1992) 6 Cal.App.4th 1519, cited by Petitioner, is inapplicable. (OB 7.) The issue was whether the petitioner's longstanding legal nonconforming use to operate a tavern gave it a fundamental vested right solely for purposes of determining the standard of review in a writ proceeding under CCP section 1094.5. The court did not analyze whether the petitioner had a "vested right" to its nonconforming use such that it could continue that use indefinitely. (Id. at 1526 ["we note the term 'vested' in the sense of 'fundamental vested rights' to determine the scope of judicial review in an administrative mandamus proceeding is not synonymous with the 'vested rights' doctrine relating to land use and development."].)

APC's finding that Petitioner does not have a vested right to operate as a hotel or to accommodate STRs is supported by substantial evidence. Petitioner does not show a prejudicial abuse of discretion.

Non-Conforming Legal Use

In a single sentence without analysis, Petitioner contends that "[t]he Ellison's historic use is grandfathered in to the present, as an approved non-conforming use, pursuant to Cal. Health & Safety Code §§18938.5 and 19870." (OB 6.) Relatedly, Petitioner contends that LAMC sections 12.23 and 98.8103.1 "preserved" or "grandfathered" historic uses of the Ellison as a hotel or to accommodate STRs. (OB 10-11.)

As discussed in opposition, Petitioner's citation to Health & Safety Code sections 18938.5 and 19870 appears to be a mistake. (Oppo. 15.) These statutes relate to changes in building standards and appear irrelevant to a claim that Ellison has a non-conforming use as a hotel. In reply, Petitioner makes no argument to the contrary.

In its writ briefs, Petitioner does not develop an argument that it or any prior owner has obtained an "approved non-conforming use" to operate the Ellison as a hotel or to accommodate STRs. (See CRC 3.1113; Nelson v. Avondale HOA (2009) 172 Cal.App.4th 857, 862-863 [argument waived if not supported by reasoned argument and citation to authorities].)

Petitioner's reliance on LAMC sections 12.23 and 98.8103.1 is misplaced because Petitioner assumes, without proper foundation, that the Ellison was constructed or permitted to operate as a hotel or to accommodate STRs. Section 12.23 provides, in part: "A building or structure with a nonconforming use and a nonconforming building or structure may be maintained, repaired or structurally altered and a nonconforming use may be maintained provided the building or use conformed to the requirements of the zone and any other land use regulations at the time it was built or established, except as otherwise provided in this section." Section 98.8103.1 provides, in part, that "[e]very existing building or structure constructed under a valid permit and occupied in conformance with code regulations and Department approvals in effect at the time of such construction and occupancy shall be allowed to continue to exist under those regulations and approvals even though subsequently adopted regulations and approvals have changed the requirements ….." (Resp. RJN Exh. [emphasis added].) As discussed above, substantial evidence supports APC's findings that there is no indication that the Ellison was constructed or permitted to operate as a hotel. Without some prior legal use as a hotel or for STRs, LAMC sections 12.23 and 98.8103.1 do not apply.

Moreover, the APC found that in 1964 the Ellison was declared in substandard condition, which eliminated any right to operate the Ellison as a hotel with short-term rentals or transient occupancy. (AR 2232-33). Petitioner fails to discuss or challenge that finding, which is supported by substantial evidence. (See e.g. AR 2218.)

APC's finding that the Ellison does not have any nonconforming rights to operate as a hotel or with STRs and transient occupancy is supported by substantial evidence. Petitioner does not show a prejudicial abuse of discretion.

California Historical Building Code

Petitioner contends that the California Historical Building Code ("CHBC") obligates City to allow "the Ellison, being a qualified historical building, … to continue its historical use of STRs." (OB 4-5.) APC rejected this contention, finding that no C of O resulted in a vested or "grandfathered" use of the Ellison as a hotel, and the Ellison never legally operated as a hotel. (AR 2235.)

Petitioner cites to Title 24, part 8, section 8-302.1 of the California Code of Regulations, which provides:

The use or character of occupancy of a qualified historical building or property, or portion thereof, shall be permitted to continue in use regardless of any period of time in which it may have remained unoccupied or in other uses, provided such building or property otherwise conforms to all applicable requirements of the CHBC. (OB 5.)

Petitioner cites to evidence that the Ellison is listed on local, state, and national registers of historical places. (OB 4, citing AR 64, 115-116, 141.) However, none of these documents identify Ellison as a historic hotel, as opposed to a historic apartment house, for purposes of the registers of historical places. A SurveyLA report, cited by Petitioner, refers to the Ellison as "residential-multi family; apartment house." (AR 141.)

The record includes Petitioner's application to have Ellison registered as a historic property (AR 1659-69), and letters from Powers & Company and Chattel, Inc., apparently consultants, which refer to the Ellison as "hotel." (AR 1777, 1802-03.) These documents do not include any supporting evidence or analysis that the Ellison operated historically as a hotel or otherwise accommodated STRs.

In a lengthy argument, Petitioner contends that the CHBC "preempts the LAMC's [current] zoning and land use laws." (OB 11-14.) The court need not decide this issue because substantial evidence supports APC's finding that Petitioner did not establish a historic or vested use of the Ellison, as a hotel or for STRs, that is protected by the CHBC. Thus, Petitioner does not show any conflict between the CHBC and City's zoning and land use laws that could trigger a preemption issue for purposes of an administrative writ proceeding. (See generally San Diego Gas & Electric Co. v. City of Carlsbad (1998) 64 Cal.App.4th 785, 792-793.)

Substantial evidence supports APC's finding that the CHBC did not obligate City to allow the Ellison to operate as a hotel or to accommodate STRs because no C of O resulted in a vested or "grandfathered" use of the Ellison as a hotel, and the Ellison never legally operated as a hotel. 2 (AR 2235.)

Coastal Act

Petitioner contends that City violated the Coastal Act by "prohibiting" STRs at the Ellison. Specifically, Petitioner contends that "restricting" STRs in the Ellison violates the Coastal Act's goal to preserve and encourage visitor-serving uses in the coastal zone and is a "development" for which City was required to obtain a coastal development permit ("CDP"). (OB 7-9.) Although not entirely clear, it appears Petitioner contends that it was the LADBS decision at

issue in this writ petition – i.e. the determination that the 1967 C of O does not allow the Ellison to operate as a hotel or accommodate STRs in its current zone -- that violated the Coastal Act. (OB 9; see also AR 2215.)

"The Coastal Act requires that any person who seeks to undertake a 'development' in the coastal zone obtain a coastal development permit. (§ 30600, subd. (a).) 'Development' is broadly defined to include, among other things, any 'change in the density or intensity of use of land....'" (Greenfield v. Mandalay Shores Community Assn. (2018) 21 Cal.App.5th 896, 900; see Pub. Res. Code § 30106.)

APC rejected Petitioner's arguments under the Coastal Act and concluded that "[e]nforcing the permitted subject use of the structure as an Apartment House does not constitute 'development' and is not subject to a Coastal Development Permit." (AR 2234.) This conclusion was based on the findings, analyzed above, that the Ellison's permitted use has always been "apartment house" and Petitioner does not have, and never had, a vested right or nonconforming right to operate the Ellison as a hotel or to accommodate STRs. APC also found that the Ellison had historically been operated as an apartment house, not a hotel. As discussed, those findings are supported by substantial evidence.

Petitioner cites to Greenfield, supra, and other cases to argue that LADBS's decision constituted a "development" under the Coastal Act. (OB 8-9.) These cases do not support Petitioner's position because they are distinguishable. For instance, in Greenfield, supra, a homeowners' association banned STRs in a beach community without obtaining a CDP. In Surfrider Foundation v. Martins Beach 1, LLC (2017) 14 Cal.App.5th 238, 248-250, the Court held that closing public access to a beach constituted a "development."

Here, in contrast, the LADBS decision applied City's operative zoning laws to the 1967 C of O, maintained the status quo, and did not "restrict" or "prohibit" STRs at the Ellison. As noted by APC, Petitioner may apply for the necessary variance or permits should Petitioner wish to change the permitted use of the Ellison. (AR 2234.) Because the LADBS decision did not change the density or intensity of the use of the Ellison, its decision was not a "development" regarding a CDP.

Petitioner cites no authority that a city's enforcement of zoning laws, such as to an illegal hotel or illegal STRs, constitutes a "development" under the Coastal Act. To the extent the record suggests that Petitioner accommodated some STRs in recent years in violation of its RD1.5 zone (AR 2526, 2555, 2558, 2559, 2560, 2561, 2563; SAR 22), that evidence does not suggest that the

LADBS decision was a "development" under the Coastal Act.

Petitioner's writ petition does not require the court to decide whether City must comply with the Coastal Act or obtain a CDP "to ban or regulate STRs" through City ordinance, regulation, or policy. (See OB 9.) The court states no opinion on that issue.

Substantial evidence supports APC's finding that "[e]nforcing the permitted subject use of the structure as an Apartment House does not constitute 'development' and is not subject to a Coastal Development Permit." (AR 2234.) Petitioner does not show a prejudicial abuse of discretion.

Alleged Ex Parte Communications of the ZA

In the opening brief, Petitioner "reserve[d]" a section of its brief "to be supplemented in the future in the event the extra-record evidence is allowed by this Court" to support Petitioner's contention that the ZA engaged in improper ex parte communications. (OB 14-15.) On July 28, 2020, the court denied Petitioner's motion to compel discovery of extra-record evidence because Petitioner had not satisfied the requirements of CCP section 1094.5(e) and Pomona Valley Hosp. Med. Ctr. v. Superior Court (1997) 55 Cal.App.4th 93, 100.

Petitioner asserts that the ZA was biased because he "invited the Los Angeles Building Department, Housing Department, and the Office of Historical Resources to testify on behalf of the City's case" and because the ZA urged the APC to consider evidence prepared by LADBS. (OB 15, citing AR 2573-74.) "Bias and prejudice are never implied and must be established by clear averments." (Burrell v. City of Los Angeles (1989) 209 Cal.App.3d 568, 581-582; accord Petrovitch Development Co, LLC v. City of Sacramento (2020) 48 Cal.App.5th 963, 974.) Combining investigative and adjudicative functions in an administrative proceeding does not, by itself, constitute a denial of due process. (Breakzone Billiards v. City of Torrance (2000) 81 Cal.App.4th 1205, 1236.) The ZA's participation at the APC hearing does not establish bias of the ZA under the applicable standard. Nor does it suggest the APC hearing was unfair.

In reply, Petitioner makes new arguments based on evidence that was not part of the record when the reply was filed. Specifically, Petitioner contends that the ZA had an improper ex parte communication with Daniel Gomez, a witness from HCID, through ZA's secretary on or about October 9, 2018. On September 22, 2020, the court granted Petitioner's ex parte application to correct page 730 of the administrative record with Exhibit A to the reply brief. The court continued the hearing so that Respondent could address Petitioner's reply arguments based on

the document at issue in the ex parte application. The court has received and reviewed Respondent's supplemental brief.

Petitioner does not prove bias of the ZA. Exhibit A to the reply brief is a communication from Daniel Gomez from the Department of Housing and Community Investment (HCID) forwarded to the ZA by another City employee. At the hearing before the ZA, Daniel Gomez testified that per a 1964 Inspection Report, the property was declared to be substandard which destroyed any non-conforming uses. (AR 2218.) Exhibit A is to the same effect. Petitioner does not show any prejudice from the ex parte communication. Further, the argument was clearly presented at the APC hearing, and Petitioner could have addressed this argument at that time. Petitioner also does not discuss or challenge that finding in the writ petition. The finding is supported by substantial evidence. (See e.g. AR 2218.)

Declaratory Relief

The court previously stayed the second cause of action for declaratory relief until the writ cause of action is decided. (See Local Rules 2.8(d) and 2.9.) Respondent contends that the court should "adjudicate the declaratory relief cause of action, as it is improper and duplicative of Petitioner's writ claim." (Oppo. 7, fn. 1.) The issues raised in the second cause of action are entirely duplicative of Petitioner's arguments in the writ petition. (FAP ¶¶ 46-51.) Accordingly, the court lifts the stay and denies the second cause of action for the reasons stated above, and also because it is duplicative of the writ claim. (Selby Realty Co. v. City of San Buenaventura (1973) 10 Cal.3d 110, 126-27 [holding "it is settled that declaratory relief is not an appropriate method for judicial review of administrative decisions."].)

Conclusion

The petition for writ of mandate is DENIED.

The second cause of action for declaratory relief is DENIED.

FOOTNOTES:

1- Petitioner does not request judicial notice of the predecessor statute or cite to a copy in the record.
2- In light of this conclusion, the court need not decide Petitioner's contention that APC erred by also concluding that the CHBC does not allow "vested rights to an historical use." (AR 2235; see

19STCP01937 October 1, 2020
LANCE JAY ROBBINS PALOMA PARTNERSHIP vs CITY OF LOS ANGELES, et al. 1:30 PM

Judge: Honorable Mary H. Strobel
Judicial Assistant: N DiGiambattista
Courtroom Assistant: R Monterroso
CSR: D Van Dyke/CSR 10795
ERM: None
Deputy Sheriff: None

Reply 8.)

Petitioner's exhibit 1 is ordered returned forthwith to the party who lodged it, to be preserved unaltered until a final judgment is rendered in this case and is to be forwarded to the court of appeal in the event of an appeal.

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Counsel for respondent is to give notice and to prepare, serve and lodged the proposed judgment within ten days. The court will hold the proposed judgment ten days for objections.