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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

CAMINO HILLS HOMEOWNERS ASSOCIATION, a California Non-Profit Mutual Benefit Corporation, Petitioner, v. CITY OF CARLSBAD, Respondent.	CASE NO.: **37-2018-00031638-CU-WM-NC** **PETITIONER'S OPENING BRIEF TO VERIFIED PETITION FOR WRIT OF MANDATE AND APPEAL DE NOVO** **Date: March 15, 2019** **Time: 1:30 p.m.** **Dept: N-29** **Petition Filed: June 26, 2018** **Transferred to North County Div. 7/20/19**

TABLE OF AUTHORITIES

CODES

SECONDARY AUTHORITY

INTRODUCTION

This petition is necessary because the City of Carlsbad illegally demands that a senior-citizen 55+ community whose members live on fixed incomes make costly repairs to fix certain roadway and sidewalk damages on Camino Hills Drive for an alleged "public nuisance" that it cannot prove the Association caused - - which the City claims 10 years after it first observed the damage. In fact, the evidence establishes it is more likely that the City caused these damages by (1) allowing a prior developer in or around 1985 to install a buttress under Camino Hills Drive (and in the City's Right-of-Way) to address the City's actual knowledge and notice that an ancient landslide had occurred in the same location; and (2) the City's construction of a storm drain under Camino Hills Drive. Not only does the City's Notice of Violation illegally demand the Association make repairs, but also threatens civil and even criminal prosecution.

The City's illegal demand for repairs is both unconstitutional and inequitable. The City failed to provide any evidence that the Association caused the claimed damage on Camino Hills Drive or has any responsibility to make repairs, nor did the single Hearing Officer make any such findings. Rather, the City's own two witnesses confirm in their sworn testimony that the cause of the slope movement had not been determined. Moreover, the remedy demanded by the City is unconstitutional as a matter of law. The Court should grant Petitioner's writ of mandate.

BACKGROUND OF CASE

In the subject Notice of Violation dated November 1, 2017, the City of Carlsbad ("City") demands that the Association (comprised of 55+ senior citizens on fixed incomes) perform costly repairs to Camino Hills Drive to "ensure slope stabilization and correct the damage to city assets including: curb, gutter, sidewalk and asphalt pavement." (Administrative Record ["AR"] 45). The estimated costs are at least $200,000 "on the low end," which "could go even higher" and even "twice that amount." (See AR 74 at p. 92:5-16).

Prior to the November 1, 2017 Notice of Violation, the City issued two other notices that failed to include a "right-to-appeal" notice to the Association, so the City was forced to re-issue a third notice that is the subject of this action. (See AR 41, 44). The subject Notice of Violation

alleges a single violation of the Carlsbad Municipal Ordinance 6.16.010 - "Nuisance." (AR 41, 44, 45). The violation is premised on the City's incorrect claim that the Association caused the damages on Camino Hills Drive, which the City failed to prove at the administrative hearing. Nevertheless, the single Hearing Officer paid by the City upheld the Notice of Violation without any evidence to support her decision. Accordingly, the Association was required to file the instant petition to challenge the Notice of Violation and the single Administrative Hearing Officer's improper upholding of same.

On or around November 8, 2017, the Association provided formal notice of appeal of the City's Notice of Violation. (AR 46).

On March 6 and 20, 2018, an Administrative Hearing was conducted by a single Administrative Hearing Officer from the City of Carlsbad, Katherine Jane Morris. The hearing was recorded by an audio recording. (AR 74). Despite hearing the City's own two witnesses confirm in their sworn testimony that the cause of the slope movement had not been determined and without hearing any other admissible or reliable evidence to establish the Association's liability, the Hearing Officer nevertheless sided with the City and on April 1, 2018 issued an Order upholding the City's Notice of Violation dated November 1, 2017. (AR 64).

In her April 1, 2018 Order, the Hearing Officer also made a blatantly improper determination that the Association failed to comply with the November 11, 2017 compliance date listed in the November 1, 2017 Notice of Violation - - but that is impossible because the Association had already timely filed a Notice of Appeal on November 8, 2017, which the Hearing Officer acknowledges in her ruling. (AR 64). The Notice of Appeal excused the Association from complying with the November 11, 2017 compliance date at least until the matter was resolved on appeal and in any subsequent appellate procedures.

Pursuant to City of Carlsbad Municipal Code § 1.16.010, and Code Civil Procedure § 1094.5, this petition was timely filed on June 26, 2018, within 90 days of the Hearing Officer's Administrative Enforcement Order, which was sent to Petitioner on April 5, 2018 by the City of Carlsbad Office of the City Attorney. (AR 63).

STANDARD OF REVIEW

California Code of Civil Procedure § 1094.5, which is incorporated into the City of Carlsbad Municipal Code 1.16.010 govern this petition. Pursuant to CCP 1094.5 (b), this petition should be granted if petitioner establishes at least one of the following three elements:

1. The administrative hearing proceeded without, or in excess of, jurisdiction;
2. There was not a fair hearing; or
3. There was a prejudicial abuse of discretion, which itself is established by showing either:
    a. The City has not proceeded in the manner required by law;
    b. The order or decisions is not supported by the findings; or
    c. The findings are not supported by the evidence.

In determining whether the findings are supported by the evidence, because the Order does not substantially affect a vested, fundamental right, abuse of discretion will be found if a review of the administrative record shows that the Hearing Officer's findings are not supported by substantial evidence, or that the Hearing Officer committed an error of law. (See CCP 1094.5(c); see also *Bixby v. Piero*, 4 Cal. 3d 130, 144 (1971)).

The California Supreme Court has also determined that an administrative order must have a certain level of detail and analysis so that a reviewing court may properly analyze whether an agency's findings are supported by the evidence and whether the decision is supported by the findings. *Topanga Association for a Scenic Community v. County of Los Angeles*, 11 Cal. 3d 506, 515 (1974).

The Association is also entitled to a "de novo" review of the Hearing Officer's decision, pursuant to Government Code § 53069.4 and Carlsbad Municipal Code § 1.10.130. In examining the appeal de novo, the court "decides the issue anew, rather than refer to the trial court." (*Jenkings v. T&N PLC*, 45 Cal. App. 4th 1224, 1227 (1996)).

SUMMARY OF THE FACTS AND EVIDENCE

The Association is a California non-profit mutual benefit corporation located at 5950 La

Place Ct. Suite 200, Carlsbad, CA 92008. It is organized to manage the development, which is a mobile home park for residents over the age of 55. Many of the residents within Camino Hills are retired senior citizens who live on a fixed income, and many live solely on Social Security.

The Camino Hills development was built in approximately the 1985 timeframe. The original geological investigation by the developer revealed that there was an ancient landslide that would ultimately be a common area slope above what is now called Camino Hills Drive. (AR 74 at p. 38:2-21). The Camino Hills Drive is a public right-of-way, which was dedicated to the County and accepted by the City in 1984. In addition, the City has subsurface easements for water lines and a storm water drain (AR 1, 2).

As part of the site grading by the original developer, the City permitted the developer to install a stabilization buttress within Camino Hills Drive and under the City right-of-way (i.e., sidewalk and roadway areas of Camino Hills Drive) as a way to stabilize and retain the ancient landslide, rather than regrade and repair the ancient landslide. (AR 64).

The Association did not start using Camino Hills Drive until long after it was built, when the City of Carlsbad blocked ingress and egress from El Camino Real after Evans Point was developed. Thus, Camino Hills Drive was not constructed to benefit the Association.

Also, over the years, extremely heavy construction vehicles have traveled Camino Hills Drive as the area has undergone significant development. The heavy vehicles have undoubtedly contributed to the damage to the roadway. In addition, utility improvements along Camino Hills Drive, including a storm drain line, were presumably constructed after the stabilization buttress construction by the original developer. (AR 64).

In 2007, City of Carlsbad employees first observed damage to the pavement and sidewalk areas along Camino Hills Drive. The City hired the geotechnical firm Ninyo & Moore to investigate the slope movement. In January 2009, Ninyo & Moore placed inclinometers in the slope within the City's right-of-way in order to track the movement. (AR 64).

Ninyo & Moore's investigation also included digging test pits at the toe of the slope and found no ground water. However, it did not dig test pits within the buttress itself to determine

why it was failing. (AR16, AR 32). Based on the results of the City's investigation and studies, the City concluded that the roadway and sidewalk distress were a result of landslide movement. But there was no significant movement of the slope until the period of time between January and June of 2017, which also coincides with the El Niño rainstorms from 2016 and 2017. (AR 64).

Initially, the City met with the Association representatives and said the City would take responsibility for the repair. (See AR 74 at p. 177:4-17; 175:15-25). However, in or around 2010, after conducting research, the City found an indemnity agreement between the original developer and the City and later changed its position - - even though the indemnity agreement did not apply whatsoever to the Association and the Association was not a party to it, or even in existence at the time the agreement was signed. The City subsequently asserted that the Association was responsible for the repair, even though there was a ten-year limit on the indemnity agreement and the Association is not a successor-in-interest to the developer (AR 3, AR 17).

In approximately 2012, an owner within Camino Hills Association hired an engineer to investigate the condition of the storm drain underlying Camino Hills Drive, which was installed over the top of the stabilization buttress. Part of the investigation included videotaping the storm drain. That video reveals vertical gaps in the joints of the storm drain pipe, which are not consistent with breakage due to landslide movement (AR 29).

The City issued the Notice of Violation on grounds that the Association's own slope was moving and must be repaired. However, the City's investigation conducted by Ninyo & Moore was insufficient to determine the cause of the movement and the City completely ignored the fact that the Association did NOT install the stabilization buttress (it was installed by the original developer), and the fact that the City's own failing storm drain appeared to be a major cause of the slope failure.

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A. The City's Own Witnesses Testified The Cause of Slope Movement Had Not Been Determined And That The City Had Not Performed Any Investigation to Determine The Cause

Two witnesses who testified on behalf of the City of Carlsbad at the appeal hearing confirmed that the cause of the slope movement had NOT been determined. First, Mr. Hickerson, of the City of Carlsbad Code Enforcement Division, expressly testified on March 6, 2018 that the cause of the slope slippage had not been determined. (AR 64; see also AR 74 at p. 27:7). Mr. Hickerson testified as follows:

> Q: Good. Um, did you, ah, ever determine the cause of the slope movement?
>
> A: **No, ma'am.** (Id.).

Next, Johnathan Schauble, P.E. Associate Engineer, of the City of Carlsbad Public Works Department, testified on March 6, 2018, that the cause of the slope movement was not determined. (AR 64 at p. 6, see also AR 74 at p. 72:17-21). Specifically, Mr. Schauble testified no causation had been determined as follows:

> Q: Did, ah - - to your knowledge, did Ninyo & Moore determine the cause of the slope failure?
>
> A: Ah, they make some statement in their conclusions. Um, but it's **- - they did not necessarily determine a cause.**
>
> Q. Well, I think it's a yes-or-no answer. Did they determine the cause of the slope failure? Yes or no?
>
> A. I'd say no.

(See AR 74 at p. 72:17-25).

He also confirmed the City had not performed any investigation as to the cause of the slope movement:

> Q. The City hasn't done any investigation as to the cause of the slope movement, correct?
>
> A. Correct.

(See AR 77:3-5).

Mr. Schauble also testified that he does not know whether over-irrigation caused the slope movement, as follows:

> Q: Do you know whether over-irrigation is causing the slope to move?
>
> A: I don't know.
>
> Q. Did you - - did the City do any investigation to determine whether there's over irrigation of that slope?
>
> A: No.

(AR 74 at p. 76:14-20).

Mr. Schauble also testified on behalf of the City that the engineering firm retained by the City, Ninyo & Moore, did not even investigate the slope uphill in the area owned by the Association because it was "private property." (AR 74 at p. 63:2-6). He confirmed that the scope of the investigation was limited to the property within the City's right-of-way. (Id.). Mr. Schauble then "guessed" that the slope movement "probably" started at the top of hill, but reiterated again that "they [Ninyo & Moore] didn't actually investigate on private property." (Id. at p. 63:13-18).

Finally, Mr. Schauble testified that no geotechnical experts retained by the City have offered the opinion that a catastrophic slope failure is possible, nor had he discussed that possibility with the experts. (See AR 96 at p. 24-97:10).

Based on the testimony from Mr. Hickerson and Mr. Schauble alone, the City's hearing officer could not make a finding of causation against the Association because the City had not carried its burden of proof to show that the Association had caused the slope movement or was somehow responsible as the "causing party."

B. The City's Witnesses Were Not Qualified Experts In The Field Of Geotechnical Engineering

The City introduced inadmissible and unreliable hearsay evidence that lacked foundation and that cannot form the basis for the hearing officer's determination to uphold the Notice of

Violation against the Association as a matter of law. Rather than call a direct witness from Ninyo-Moore (the geotechnical engineers who performed the testing and analysis of the slope movement since 2009) or the Water Department, the City instead relied on Mr. Schauble's secondary, hearsay representations about what Ninyo-Moore "believes" and recollections of his conversations with the Water Department.

However, Mr. Schauble testified he was not a geotechnical engineer who specializes in soils and thus was not a qualified witness to provide such opinions, but felt there was no need to involve Ninyo-Moore in the appeal hearing because "he had all of their data." (AR 74 at p. 68:7-16).

Mr. Schauble confirmed his expertise does not lie in analyzing soil movement. (AR 74 at p. 68:17-20). He also confirmed he did not know what assumptions Ninyo & Moore made with respect to the strength of the buttress installed in the 1980s by the prior developer per the City's permit, and did not know whether Ninyo & Moore cored the buttress - - but after looking at the report confirmed they in fact did not. (Id. at p. 69:9-71:12).

When asked whether Mr. Schauble knew what analysis Ninyo & Moore did with respect to the slope analysis, he responded: "I don't know all the nuts and bolts that go into that. No." (AR 74 at p. 72:1-13). Accordingly, the hearing officer heard no direct testimony from anyone at Ninyo-Moore to form the basis of her decision in this matter and relied on indirect, hearsay speculation from the City's unqualified civil engineer instead.

Furthermore, Mr. Schauble testified that the extent of the City's investigation to determine whether the water line under Camino Hills Drive was leaking was a single, hearsay phone call to the Water Department's "ops guy" the same morning of the administrative appeal hearing. (AR 74 at p. 79:20-80:17). Mr. Schauble confirmed he did not ask the Water Department whether there were any water line issues in that area between January and June of 2017 and did not know why the City did not call anyone from the Water Department to present testimony at the hearing. (AR 74 at p. 80:18-24).

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C. Unlike the City's Unqualified Witnesses, the Association's Expert, Mr. Thoeny, a Qualified Geotechnical Engineer, Testified That a Failing Buttress Installed By a Prior Developer In the 1980s Under Camino Hills Drive Caused The Slope Movement

Mr. Thoeny testified he obtained a degree in geological engineering from the University of Arizona and had been a California licensed geotechnical engineer and civil engineer in the City and County of San Diego since 1991. (AR 74 at p. 135:3-23).

Unlike two of the City's witnesses, who confirmed they had not yet determined a "cause" of the slope movement, Mr. Thoeny, the Association expert witness, did establish a "cause" of the slope movement and determined it was due to the failing buttress installed by the original developer below Camino Hills Drive, which is located in the City's public right-of-way. (See AR 64 at p. 7; see also AR 74 at pp. 63:21-25; 64:12-66:24; 152:2-10; 154:16-155:12). The City's hearing officer's report specifically states: "[Mr. Thoeny] was certain that the buttress was failing and that the damage was occurring nine feet below the surface of the toe where the land is inching up." (AR 64).

Mr. Schauble unknowingly corroborated Mr. Thoeny's causation analysis when he testified that "[t]here was movement 9-10 feet below the surface and there was movement below the pavement, with rotation under the road and asphalt." (AR 64). Such testimony is consistent with a failure of the buttress installed in the City's right-of-way under the pavement on Camino Hills Drive, as testified to by the Association's Geotechnical Engineer, Scott Thoeny, P.E., G.E.

Mr. Thoeny also testified at the hearing that he felt the City's storm drain could be contributing to the problem, and that the pressurization of the lines should be evaluated. He confirmed that a "substantial portion of the slide is in the city right-of-way and is causing damage to Camino Hills Drive." (AR 64; AR 74 at p. 165:21-166:5). He estimated the cost of repair would be a minimum of around $300,000, and could be substantially more after considering engineering, permitting, and any collateral issues (AR 74 at p. 153:9-154:4).

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D. The City Has Surface and Sub-Surface Easements On Camino Hills Drive And Has Historically Taken All Responsibility For Repairs

In addition, Mr. Geldert, P.E., City Engineer testified and confirmed on behalf of the City that Camino Hills Drive is a public right-of-way and that the City has surface and subsurface easements on Camino Hills Drive and "controls surface and subsurface improvements." (AR 64 at p. 5; see also AR 74 at p. 104:22-105:25). This testimony was consistent with Mr. Schauble's testimony that the City had historically taken all responsibility for needed repairs to Camino Hills Drive. As the Administrative Enforcement Order confirms, "he testified that the city has repeatedly fixed sidewalk cracks, pavement uplift, pavement buckling along the curb and gutter, etc." (AR 64).

In fact, the City of Carlsbad's Capital Improvement Plan reserves $859,000 for the "Camino Hills and Jackspar Drive slope stabilization." (AR 74 at p. 172:15-173:1).

SUMMARY OF ADMINISTRATIVE ORDER

The April 1, 2018 Order is divided into five parts: (1) Statement of the Case; (2) Findings of Fact; (3) Position of the Parties at the Hearing; (4) Determinations; and (5) Order.

Section One titled "Statement of the Case" identifies the hearing dates and identifies the Hearing Officer, the witnesses, and the other individuals present. (AR 64). The Order misstates the actual text of Carlsbad Municipal Code 6.16.010 by completing omitting subsection "B." It also incorrectly states that the respective attorneys present provided testimony and incorrectly identified counsel for the Association as "Heather" French. It further notes that due to the large number of exhibits, many are not included in the Order itself, including "plat maps, photographs, engineering reports and drawings, grant deeds, project expenditures, etc." (AR 64).

Section Two titled "Findings of Fact" summarizes the opening statements of the respective attorneys. (AR 64). Although it is titled "Findings of Fact," it does not make any findings of fact other than stating when the Notices of Violation were issued and the contents of those notices. The remaining section merely summarizes the arguments of each attorney. (AR 64) The Findings of Fact section does not find that the allegations in the Notices of Violation are true,

nor does it find that any are false. (AR 64).

Section Three titled "Position of the Parties at the Hearing" summarizes the testimony of the various witnesses called at the hearings and provides an additional summary of the respective attorneys' arguments. (AR 64).

Section Four titled "Determinations" set forth six points. (AR 64). The first three are findings of fact that Camino Hills Homeowners Association is the owner of parcel #212-101-67-00, received the Notices of Violation via certified and regular mail, and timely challenged them on 11/8/17. (AR 64). The last three are conclusory statements that (1) "by reason of the facts presented above," without any specificity as to which facts, "the appellant violated the following Carlsbad municipal code as follows: CMC 6.16.010 – NUISANCE; (2) "by reason of the facts presented above," without any specificity as to which facts, "the appellant failed without sufficient cause to make an appointment to meet with city engineering staff member, Jonathan Schauble, to discuss correction activities and compliance project timing by the compliance date of 11/11/17 listed on the third Notice of Violation dated 11/1/17" (even though the Association had already timely appealed the violation), and that (3) "by reason of the facts presented above," without any specificity as to which facts, the "Notice of Violation dated 11/1/17 is upheld." (AR 64).

Section Five titled "Order" is a brief statement that the Notice of Violation dated 11/1/17 by the City of Carlsbad is upheld. (AR 64). The Order fails to address any of the contested facts and legal issues. For example, it does not address who or what caused the subject slope movement, who is responsible for it, or the scope of the City's surface and sub-surface easements, which was undisputed. The Order fails to make necessary determinations about whether the buttress installed by a prior developer in the 1980s failed and caused the slope movement or whether the City's storm drain contributed to the slope movement and resulting damage to Camino Hills Drive. Additionally, the Order is silent with respect to the City's demand in the subject Notice of Violation that the Association "ensure slope stabilization and correct the damage to city assets including: curb, gutter, sidewalk and asphalt pavement," which is an

unconstitutional Order as a matter of law.

ARGUMENT

It is undisputed that there is slope movement beneath Camino Hills Drive that is causing damage. Apparently, the single Hearing Officer reasoned that something is wrong and thus someone needs to fix it. But she failed to connect the necessary "causation" bridge that imputes liability to the Association. In fact, the City's own witnesses testified that the City had NOT determined the cause of the slope movement. Therefore, the City did not meet its burden of proof. The Hearing Officer also completely ignored the qualified expert testimony of the Association's geotechnical engineer - - the only witness who provided a causation analysis - - which he attributed to the failing buttress installed under Camino Hills Drive within the City's right-of-way, and possibly a failing storm drain installed by the City. Neither of those causes can be attributed to the Association to hold it responsible to make between $300,000 and $859,000 in repairs as the City demands from a 55+ senior citizen mobile home community.

The Court should issue a writ of mandate because (1) the Order does not analyze any of the arguments made at the hearing; (2) the Order is not supported by the findings and the findings are not supported by substantial evidence - - which did not establish any cause of the slope movement attributable to the Association; (3) the Hearing Officer exceeded her jurisdiction in upholding the City's unconstitutional order that the Association make repair the slope and resulting damage; and (4) the City failed to establish a proper appeal process under California law. The Court should also independently review the evidence and testimony de novo to make appropriate findings.

A. The Order Fails to Include The Findings And Analysis Required By The California Supreme Court

Under *Topanga Association For a Scenic Community v. County of Los Angeles*, 11 Cal. 3d 506 (1974), the Supreme Court determined that an administrative decision must make findings of fact and provide enough analysis so that the parties and the reviewing court may determine the Hearing Officer's thought process. Here, the Order fails to meet that standard.

As the Court explained, "[r]eference, in section 1094.5, to the reviewing court's duty to compare the evidence and ultimate decision to 'the findings' we believe leaves no room for the conclusion that the Legislature would have been content to have a reviewing court speculate as to the administrative agency's basis for decision." (Id. at 515).

The Court reasoned that a findings requirement is necessary to ensure that the administrative body draws legally relevant conclusions in support of its ultimate decision and does not "randomly leap from evidence to conclusions." (Id. at 516). Thus, detailed findings and analysis allow any subsequent reviewing court to "trace and examine" the analysis of the administrative body. (Id.). Clear findings and analysis also demonstrate to the parties that administrative decisions are "careful, reasoned, and equitable." (Id. at 517).[1]

Findings must at a minimum expose the decisions maker's analysis and evidence. *West Chandler Blvd. Neighborhood Ass'n v. City of Los Angeles*, 198 Cal. App. 4th 1506, 1522 (2011) ("On this record, however, we cannot discern the analytic route the city council traveled from evidence to action.").

Conclusory findings that merely recite statutory language without applying facts about application or subject of the hearing to the applicable law are insufficient as a matter of law. *City of Carmel-by-the-Sea v. Board of Supervisors*, 71 Cal. App. 3d 84, 92 (1977).

Here, the only findings made by the Hearing Officer are that (1) that Camino Hills Homeowners Association is the owner of parcel #212-101-67-00; (2) the Association received the Notices of Violation via certified and regular mail; and (3) timely challenged them on 11/8/17. (AR 64). Other than those three items, the Order only summarizes the competing evidence and

[1] The guidelines established in *Topanga* have been followed by multiple subsequent appellate decisions to date (See e.g., Sierra Club v. City of Hayward (1981) 28 Cal. 3D 840, 859 [in an action arising related to the California Land Conservation Act of 1965, the Supreme Court stated "The problem we faced in Topanga recurs here: we are left without a basis for determining whether the administrators strayed from the statutorily created pathway from evidence to ultimate conclusion."]; See also, McMillan v. American General Finance Corporation (1976) 60 Cal. App. 3d 175, 182 ["As the leading case on judicial review of administrative findings in California, [Topanga] is controlling. Although Topanga dealt with review of a zoning variance via mandamus, it articulates rules of general applicability to all types of review of quasi-judicial administrative actions. It is one of many recent cases in which administrative bodies have been taken to task for failing to make findings of fact which sufficiently support their actions or decisions (e.g., Burger v. County of Mendocino (1975) 42 Cal. App. 3d 322, 326; Woodland Hills Residents Assn., Inc. v. City Council (1975) 44 Cal. App. 3d 825, 833."])

testimony. The Order then concludes that (1) "by reason of the facts presented above," without any specificity as to which facts, "the appellant violated the following Carlsbad municipal code as follows: CMC 6.16.010 – NUISANCE; (2) "by reason of the facts presented above," without any specificity as to which facts, "the appellant failed without sufficient cause to make an appointment to meet with city engineering staff member, Jonathan Schauble, to discuss correction activities and compliance project timing by the compliance date of 11/11/17 listed on the third Notice of Violation dated 11/1/17" (even though the Association had already timely appealed the violation), and that (3) "by reason of the facts presented above," without any specificity as to which facts, the "Notice of Violation dated 11/1/17 is upheld." (AR 64). The Hearing Officer failed to provide any explanation or analysis linking findings of fact to the law and made absolutely no findings regarding the disputed facts and evidence.

For example, the Order makes no findings that the Association caused the slope movement by an action or inaction of the Association and ignored the City's own multiple witness testimony that the City had NOT determined the cause of the slope movement or even made an effort to investigate the cause. The Order fails to analyze or make any findings as to whether the buttress underneath Camino Hills Drive, which is in the City's right-of-way and installed by a developer in the 1980s, was failing and causing the slope movement, as Mr. Thoeny testified. It also completely fails to analyze whether the City remained responsible for the slope movement based on the failure of its own storm drain and based on the fact that it owns both surface and sub-surface easements on Camino Hills Drive, making it 100% responsible for the maintenance and repair.

The Order also fails to make any findings about the qualifications (or lack thereof) of the City's witnesses. Specifically, Mr. Schauble admitted he was not a qualified geotechnical expert, and did not know all the "nuts and bolts" that go into slope analysis. He also did not know what, if any, assumptions were made by Ninyo & Moore as part of their analysis. He further testified that he relied on a hearsay statement from the Water Department's "ops guy" who he had called the morning of the hearing. But the Order leaves everyone guessing as to whether the Hearing

Officer found that his qualifications were adequate to provide testimony about the slope movement in spite of his total lack of knowledge on the subject and mere reiteration of hearsay statements that lacked evidentiary foundation.

The Order makes no findings as to whether Mr. Thoeny's causation analysis was accepted or rejected or any explanation as to why, which is critical in light of the fact that the City's witnesses failed to carry their burden as to causation.

Finally, the Order fails to make any findings to establish the existence of real property "in a condition which is adverse or detrimental to public peace, health, safety, the environment, or general welfare," or any other requirements of CMC 6.16.010. In fact, the City's witnesses confirmed that the City did not even investigate the common area slope on the Association's property because it was "private property." Moreover, to establish a public nuisance under California statutory law, the City must prove that the Association created a nuisance by "acting" or "failing to act." (See CACI 2020). But the City presented no such evidence at the hearing, nor did the Order identify any findings to support such a conclusion.

As a result of the utter lack of findings, the parties and the court are left with the "unguided and resource-consuming exploration [of the record]" that the Supreme Court intended to prevent. (See *Topanga*, supra). The Order also lacks decision-making that is "careful, reasoned, and equitable." (Id. at 517).

B. The Order Is Not Supported By The Findings Made and The Findings Are Not Supported By Substantial Evidence

The only findings made by the Hearing Officer are that (1) that Camino Hills Homeowners Association is the owner of parcel #212-101-67-00; (2) the Association received the Notices of Violation via certified and regular mail; and (3) timely challenged them on 11/8/17. (AR 64). But these three facts do not violate any section of the CMC. To the extent the second half of her "determinations" are considered "findings" - - i.e., that the Association violated the CMC 6.16.010, failed to meet with the City to discuss appropriate repairs by 11/11/17, and the violation is upheld - - those are not supported by substantial evidence and further constitute errors

of law.

The City alleges in its Notice of Violation that the Association is liable for nuisance under CMC 6.16.010. CMC 6.16.010 defines "nuisance" as the existence of real property "in a condition which is adverse or detrimental to public peace, health, safety, the environment, or general welfare," (CMC 6.16.010(A)) or in a condition that violates the Carlsbad Municipal Code or a state code, (CMC 6.16.010 (B)) or "maintained so as to permit the same to become so defective, unsightly, dangerous, or in a condition of deterioration or disrepair so that the same will, or may cause harm to persons, or which will be materially detrimental to property or improvements located in the immediate vicinity of such real property." (CMC 6.16.010 (C)).

Here, the City failed to present any evidence that the Association caused a nuisance by acting or failing to act, and also failed to present any evidence that any such nuisance exists on the Association's property that is somehow causing harm or damage. In fact, the City's own witnesses confirmed under sworn testimony that the City made no effort to even investigate the Association's common area slope because it was "private property" and further that no effort was made to investigate the cause of the slope failure under Camino Hills Drive. It is undisputed that the scope of the City's investigation, including installation of the inclinometers, was limited to the City's right-of-way - - next to Camino Hills Drive. Thus, the evidence does not support any violation of CMC 6.16.010 by the Association.

But for no apparent reason, the City's hearing officer completely disregarded and ignored Mr. Thoeny's unrefuted evidence and testimony that the slope movement was caused by the failing buttress under Camino Hills Drive, and instead sided with the City, even though no witness from the City was able to determine the cause of the slope movement.

The City has jumped the gun and assigned responsibility to the Association without carrying its burden of proof and without any evidence that the Association caused the slope movement or is the responsible party for the slope movement. Accordingly, the City's hearing officer's Administrative Enforcement Order is not supported by any evidence and the City committed a prejudicial abuse of discretion when it upheld the Notice of Violation issued against

the Association.

C. The Hearing Officer Exceeded Her Jurisdiction By Upholding An Unconstitutional Order To Repair and Stabilize The Slope And The Association Was Denied A Fair Hearing By The Cumulative Impact In Which The Hearing Took Place

The Hearing Officer not only abused her discretion, but also acted in excess of her jurisdiction. The City also denied the Association a fair hearing.

In *Rosenblit v. Superior Court*, 231 Cal. App. 3d 1434 (1991), an endocrinologist appealed the denial of his 1094.5 petition. In that case, the petition arose from his employer (a hospital) that summarily suspended his staff privileges and subsequently upholding that decision after an administrative hearing. (Id. at 1438). The appellate court reversed the trial court's denial of the petition. (Id.).

The appellate court reasoned that "the cumulative impact of the manner in which the Hospital initiated its proceedings, responded to Rosenblit's repeated requests for specificity, and ultimately rendered judgment on his professional competency, we conclude had a notable stench of unfairness." (Id. at 1445).

Although factual differences exist between the *Rosenblit* case and the process followed by the City, there is a profound "stench of unfairness" as demonstrated by the following conduct: (1) the nature of the remedy; (2) the apparent reliance on unqualified witnesses who presented inadmissible expert opinions based on nothing more than inadmissible hearsay evidence that lacked foundation and reliability; (3) the vagueness and inadequacy of the notice provided to the Association (which had to be re-issued three times); (4) the lack of qualifications of the hearing officer; (5) the inadequacy of the findings by the hearing officer; and (6) the City's failure to appoint an appeals board as required by the Building Code and California law.

The cumulative impact of these six points demonstrates that the process followed by the City, like that followed in *Rosenblit*, was deeply flawed and the Association was not afforded a fair hearing.

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1. The Hearing Officer Acted In Excess of Her Jurisdiction By Ordering A Remedy That Is Unconstitutional As a Matter Of Law

The City has demanded the Association perform repairs to stabilize the slope and correct any damage to the roadway, sidewalk and gutters resulting from slope movement. However, it is established law that a government entity may not order the reconstruction of a structure to abate a nuisance. *People v. Greene*, 264 Cal. App. 2d 774, 821 (1968) ("A public authority cannot order reconstruction of a structure - - but it can order its demolition if demolition is necessary to insure the public safety"]. Here, Mr. Thoeny testified that the buttress underneath Camino Hills Drive is failing and causing slope movement, thus any repair to stabilize the slope would necessarily require the buttress to be repaired, as well as the roadway, gutter, and sidewalk structures, which are concrete and manmade. Accordingly, the City cannot order the Association to perform the slope stabilization and correct damage as stated in its Notice of Violation.

2. Notice of the Allegations Was Inadequate Because The City Did Not Notify The Association Which of the Three Subsections Of the CMC the Association Was Allegedly Violating Or How

The Notice of Violation references a violation of CMC 6.16.010, but that has three subsections that make further reference to additional "municipal codes" and "applicable state codes" and left the Association guessing as to whether the alleged nuisance was causing detriment to the (1) public peace, or (2) health, or (3) safety, or (4) the environment, or (5) the general welfare, as well as at least four other possible classifications under CMC 6.16.010. The City failed to specify how the Association was allegedly causing any such nuisance or detriment, or how it was legally responsible for the alleged nuisance.

As a result, as stated by the Association's attorney during the hearing, the Association felt "sandbagged" by the allegations made during the hearing for the first time and the presentation of a storm drain video that had never been mentioned. (See AR 74 at p. 107).

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3. The City Failed To Provide For the Proper Qualification and Disqualification of Hearing Officers to the Association Prior to the Hearing

The City is required to establish rules and procedures for the qualification and disqualifications of hearing officers. (CMC § 1.10.140). Decisions made by hearing officers appointed without the benefit of such rules should not be upheld.

CMC 1.10.140 requires the City to "promulgate rules and procedures as are necessary to establish a pool of qualified persons who are capable of acting on behalf of the city as administrative hearing officers." However, the City admitted in response to Public Records Act Request that it has no such standards. (See Request for Judicial Notice ["RJN"], Ex. 1).

CMC 1.10.140 (C) further provides for disqualification of any hearing officer for "bias, prejudice, interest, or for any other reason for which a judge may be disqualified" and requires the City to provide "[r]ules and procedures for the disqualification of an administrative hearing officer." However, the Association was not given the opportunity to object to the Hearing Officer at any point. (French Decl., ¶ 7). Had the Association been given an opportunity to object to the Hearing Officer, it would have done so, as the information publicly available about her does not indicate that she is qualified to act as an administrative hearing officer. (Id.).

It also appears from the City's response to a Public Records Act request in a separate matter that the Hearing Officer and the City's witnesses maintain a friendly, ongoing relationship between Mr. Hickerson (a City witness in this matter) and the Hearing Officer who decides cases. (RJN, Ex. 2). These same communications expose ongoing procedural unfairness in the City's hearing procedures, constituting unequivocal bias, prejudice and interest sufficient to disqualify the Hearing Officer. (RJN, Ex.2).

4. The Hearing Officer's Order Indicates a Bias In Favor of The City

In *Roseblit*, supra, one of the key reasons support the court's holding was its determination that no fair hearing was provided due to the absence of detailed findings. *Rosenblit v. Sup. Ct.*, supra, at p. 1434. The court noted that a conclusory verdict "offends even an elementary sense of fairness." (Id. at 1447).

The findings here, which consist solely of summaries of testimony with no indication of the evidence or testimony that the Hearing Officer relied on, are likewise inadequate and fail to satisfy the threshold standard for a fair hearing. The lack of any finding of causation against the Association and the apparent reliance of the City's unqualified witnesses who merely reiterated inadmissible hearsay evidence without any authentication or foundation, demonstrates the Hearing Officer's bias in favor of the City. It is clear on the face of the Order that the Hearing Officer merely summarizes the two sides' respective positions and concludes in the City's favor, without any true and genuine consideration of the evidence presented.

5. The City Denied the Association a Proper Appeal Process by an Appeals Board As Required Under California Law and the Building Code, And Instead Relied On a Single Hearing Officer Paid By the City

During the March 6, 2018 hearing in this matter, the City's Associate Engineer, Public Works Department, Johnathan Schauble, P.E., testified that there was a chance of a "catastrophic failure" that "could cause the homes at the top of the slope to move." (See Administrative Record, Ex. 64 [April 1, 2018 Administrative Enforcement Order, p. 6]).

Although Mr. Schauble's unsupported and unqualified testimony was later proved false, Mr. Schauble's reference to the subject slope as a foundation for the homes within the Camino Hills community necessarily invokes the application of the California Building Code and applicable provisions relating to soils and foundations for such buildings, including but not limited to Sections 1801-1810, et seq. of the 2016 California Building Code, which has been adopted by the City of Carlsbad pursuant to Municipal Code Section 18.04.010 (Adoption), which provides in relevant part as follows: "The 2016 Edition of the California Building Code, Volumes 1 and 2 hereinafter referred to as 'the code,' copyrighted by the California Buildings Standards Commission, … are hereby adopted by reference…"

In fact, although the City failed to establish the "cause" of the slope movement at the hearing and the Association's witness determined the cause was a failing buttress underneath the City's right-of-way on Camino Hills Drive, both sides agreed with underpinning as a proposed

repair, which necessarily invokes Section 1804 of the California Building Code. (See AR 64).

Based on the City's reference at the hearing to Building Code violations and issues that require application of and compliance with the California Building Code, the City should have followed the Building Code's provisions that require the appeal to be heard by a local "appeals board." But it failed to do so and instead improperly employed a single hearing officer to administer the appeal - - who was paid by the City. The City should not have employed a single hearing officer to administer the appeal because such conduct directly conflicts with applicable California law, as alleged and explained herein.

1. Specifically, Section 1.8.8.1 of the California Building Code provides as follows:

> **1.8.8.1 General**. Every city, county, or city and county shall establish a process to hear and decide appeals of orders, decisions and determinations made by the enforcing agency relative to the application and interpretation of this code and other regulations governing use, maintenance and change of occupancy. The governing body of any city, county, or city and county may establish a local appeals board and a housing appeals board to serve this purpose. Members of the appeals board(s) shall not be employees of the enforcing agency and shall be knowledgeable in the applicable building codes, regulations and ordinances as determined by the governing body of the city, county, or city and county.
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> "Where no such appeals boards or agencies have been established, the governing body of the city, county, or city and county shall serve as the local appeals board or housing appeals board as specified in California Health and Safety Code Sections 17920.5 and 17920.6."

2. In addition, Section 1.8.8.2 defines "Local Appeals Board" as follows:

> "The board or agency of a city, county or city and county which is authorized by the governing body of the city, county or city and county to hear appeals regarding the building requirements of the city, county or city and county. In any area in which there is no such board or agency, "Local appeals board" means the governing body of the city, county or city and county having jurisdiction over the area."

3. Finally, Section 1.8.8.3 on "Appeals" provides as follows:

> "Except as otherwise provided in law, any person, firm or corporation adversely affected by a decision, order or determination by a city, county or city and county relating to the application of building standards published in the California Building Standards Code, or any other applicable rule or regulation adopted by the Department of Housing and Community Development, or any lawfully enacted ordinance by a city, county or city and county, may appeal the issue for resolution to the local appeals board or housing appeals board as appropriate."

The court in *Lippman v. City of Oakland*, 19 Cal. App. 5th 750 (2017) held that "... at a minimum, there is a mandatory duty to establish a local appeals board or an agency authorized to hear appeals. And, if no such board or agency exists, the governing body shall act as the local appeals board." (Id. at 760).

The *Lippman* court also observed that the Building Code does NOT contemplate a single hearing officer for the appellate process: "Notably, however, the Building Code does not contemplate an appeal before a single hearing officer. Rather, the Building Code refers to an 'appeals board.'" (Id.).

The *Lippman* court held that an appeals process before a single hearing officer conflicted with the Building Code and directed the trial court to issue a write of mandate compelling the City to establish an appeals board or authorized agency to hear appeals or provide for an appeal to its governing body as required by section 1.8.8 of the Building Code. (Id. at 767). Specifically, it held that "[t]he City's process of authorizing an appeal to a single hearing officer appointed by the enforcement agency is contrary to the plain language of the State Housing Law and the Building Code and is inconsistent with the legislative intent. Accordingly, we conclude the municipal code conflicts with state law to the extent it provides for an appeals process inconsistent with the mechanism mandated by the Building Code and State Housing Law." (Id. at 761).

The City's use of a single hearing officer to administer the appeal, in violation of applicable California law as alleged herein, demonstrates that that City did not provide a fair trial for the Association and further establishes prejudicial abuse of discretion pursuant to Code Civil Procedure § 1094.5 (b) because the City did not proceed in the manner required by law. Based on applicable California law and the City's failure to establish a local appeals board to hear the Association's appeal, the Association requests the Court grant the requested writ of mandate.

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D. The City is Responsible For The Slope Movement And Resulting Damage Because It Owns A Surface and Sub-Surface Easement On Camino Hills Drive Where The Slope Movement Is Documented

The slope movement documented in this matter is underneath and next to Camino Hills Drive, where the City undisputedly owns easements and a public right-of-way. The City's own witnesses testified that no investigation was performed on the Association's upper common area slope because it was "private property." And the failing buttress is located below Camino Hills Drive within the City's undisputed subsurface easement.

In California, after roads and streets have been accepted for dedication and formally accepted as part of the public road system, the City or their county assumes the affirmative duty of the maintenance. *Sts. & Hy.* Code §941; see also *Herzog v. Grosso* (1953) 41 Cal. 2d 259. Once a road or street is accepted into the public street system, if the public entity fails to properly maintain the dedicated property, the City or county will be liable for any injuries incurred as a proximate result of the condition. *Gov. Code* §830, et seq.

As the City holds an easement on Camino Hills Drive for both the surface and subsurface, the general rule is that the owner of the easement has the duty of maintenance and the owner of the servient tenement does not have the duty of maintenance. (See AR 74 at p. 89:2-15 and 95:13-20; see also *Civil Code* §845).

The owner of the easement not only has the right to maintain the easement, he or she also has the duty to keep the easement in safe condition to prevent injury to third persons and to the servient tenement. This is true even if the servient tenant creates the dangerous condition. *Civil Code* §845. *Dunn v. Pacific Gas & Electric Company*, 43 Cal. 2d 265, 275 (1954). Accordingly, if the buttress installed in the 1980s underneath Camino Hills Drive is failing and causing damage, the City has the affirmative duty to make the repair - - not the Association.

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E. The Association Has No Contractual Indemnity Obligations To The City As a Matter Of Law Because It Is NOT a Successor-In-Interest To The Original Developer

The City also argued at the hearing that the Association is responsible for the repair to the slope because in or around 1985, the developer, on behalf of itself and successor-in-interest, agreed to indemnify the City for any damage resulting from a landslide. The City argues that the prior developer's contractual commitment is somehow imputed to the Association, without any legal authority for such argument. Moreover, the Hearing Officer made no finding of fact or other legal finding in her Order that the Association is somehow the "successor-in-interest" to the prior developer. (AR 64).

As a matter of law, the Association is not a successor-in-interest to the developer because it is a separate entity with entirely different obligations, duties, and goals than the developer/declarant. The City failed to make any showing at the appeal hearing or submit any evidence or legal authority that proves the Association, a separate, non-profit mutual benefit corporation, is somehow a "successor-in-interest" to the original developer. It made no showing of any assignment of rights or other interests by the developer to the Association.

As the Association is not the "successor-in-interest" to the developer, it is legally impossible for any indemnity provision between the City and the original developer from circa 1985 to apply in this matter. The City's claim that somehow that agreement makes the Association liable for the subject slope movement fails as a matter of law and could not form a basis to uphold the Notice of Violation against the Association. The purported legal analysis on this topic by Mr. Geldert (City Engineer), who is not a lawyer and has no other authority or foundational basis to render a legal opinion, should have been flatly rejected by the Hearing Officer. In fact, her Order makes no finding or determination that the Association is the successor-in-interest of the original developer.

Moreover, the evidence presented during the hearing made clear that any 1985 "indemnity" provision between the original developer and the City (at a time when the Association did not even exist) and which only applied to public/off-site improvements (not the

slope), expired 10 years after the construction of the development in 1985. (AR 3, AR 74 at p. 104:8-21, 7-24). The City's effort to rely on an inapplicable indemnity provision that expired over 24 years ago in 1995 fails as a matter of law.

F. This Court Recently Determined That The Same Hearing Officer's Order In a Similar Case Was Not Sufficient And Granted The Requested Writ

In the case *La Costa Trust Dated 8-19-2014 v. City of Carlsbad*, this Court (Department N-29, Hon. Judge Ronald F. Frazier) ruled on November 30, 2018 that the same Hearing Officer (Katherine Jane Morris), in an Administrative Enforcement Order very similar to the one at issue here (1) merely "summarizes the parties evidence and testimony without setting forth which evidence was relied upon by the hearing officer in making each finding and the finding section does not contain any actual findings but rather summarizes the arguments and some of the evidence." The Court further ruled that "[t]he Order makes no effort to provide the analytic bridge between the evidence and the City's decision and the evidence and the administrative hearing officer's decision." Finally, the Court determined that "there is evidence that the petitioner was denied a fair hearing for the following reasons: (1) City failed to provide the name of the assigned hearing officer and notice of the right to challenge the hearing officer prior to the administrative appeal hearing as allowed by CMC 1.10.104 (C); … and (3) there is evidence demonstrating ex parte communications between the hearing officer and the City."

Here, the same hearing officer's Order dated April 1, 2018, which follows the same format as the Order she made in the *La Costa Trust* case, fails for the same reasons explained by the Court in that case. Accordingly, the Court should grant the Associations' petition.

CONCLUSION

This Court should grant the Association's Petition and order a Writ of Mandate: (1) setting aside the Order and Notice of Violation with prejudice; (2) directing the City to create rules and procedures for qualification of hearing officers as required by CMC 1.10.140; (3) directing the City to provide the names of the assigned hearing officer and notice of the right to challenge the hearing officer to any part that appeals an administrative notice of violation issued by the City, as

allowed by CMC 1.10.140 (C); and (4) establish a proper appeals board when the California Building Code is invoked by the City's allegations in a notice of violation.

Dated: January 11, 2019

By:

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