1st Civil Nos. A163757 and A164933

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

THE PEOPLE OF THE STATE OF CALIFORNIA, et al.,

Plaintiffs and Respondents,

v.

DODG CORP., a corporation, et al.

Defendants and Appellants.

Appeal From the Alameda County Superior Court
Honorable Brad Seligman
Case No. RG19022353

APPELLANTS' REPLY BRIEF

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INTRODUCTION

The exhaustion rule is a non-waivable jurisdictional rule. This law has remained unchanged in California since the Supreme Court's holding 82 years ago in *Abelleira v. District Court of Appeal, Third Dist.* (1941) 17 Cal.2d 280. That means when administrative remedies are available through the City to address a City issue, a plaintiff *must* pursue—and fully exhaust—those remedies before running into court.

Here, the City of Oakland failed to exhaust the undisputedly-available administrative remedies spelled out in the Oakland Municipal Code ("OMC") before filing this lawsuit. Contrary to the City's claim in the respondents' brief, there's no modern trend overruling the jurisdictional nature of this rule. California cases still regularly hold it is jurisdictional, and thus, nonwaivable as a complete defense. As a matter of law, the exhaustion rule governs here. That rule requires reversal of the judgment because the trial court adjudicated this case notwithstanding the City's failure to comply with it.

The City posits several reasons why it thinks it should be immune from the exhaustion rule. All lack merit.

- ***First***, the City construes Oakland Municipal Code Chapter 1.08 as authorizing a court to award civil penalties, permitting it to bypass the administrative process. But the express language says no such thing. The City's strained interpretation of Chapter 1.08's clear and unambiguous language doesn't survive scrutiny.

- ***Second***, the City claims the exhaustion rule is no longer jurisdictional. But a mountain of caselaw, including recent California Supreme Court authority, establishes otherwise. Courts have continued to maintain the rule's status as a jurisdictional, nonwaivable rule since 1941.
- ***Third***, the City asserts the rule doesn't apply since it is a government entity acting in an enforcement capacity. But it cites no authority supporting such an exception, and multiple cases have required the government, including the City of Oakland, to exhaust administrative remedies before pursuing its claims in court.
- ***Fourth***, the City asserts that an exception to the exhaustion rule applies—where the applicable Code provides an alternative judicial remedy permitting the City to elect whether to pursue an administrative or judicial remedy. But binding Supreme Court authority forecloses this argument, as the Code provides no detailed procedures for pursuing the judicial remedy.
- ***Finally***, the City claims that applying the exhaustion rule wouldn't further relevant policy goals. But the policies at issue here favor obtaining the expertise of the City's Administrator/Manager—who is in charge of housing, building and community issues—over seeking redress from courts who generally lack such expertise.

The City next claims that defendants waived any argument under the primary jurisdiction rule challenging the trial court's issuance of civil penalties. But the Court has discretion to, and

should, review this issue because it is a legal question that can be decided on undisputed facts, and it involves important legal issues involving public policy.

One of the reasons the City's failure to pursue the available administrative remedies was so prejudicial to defendants is that the City's administrative process includes several requirements to ensure the City satisfies defendants' due process rights. The City claims that it could simply bypass these requirements because some of the claimed building problems were deemed nuisances by operation of law. But the court had no right to make these legal determinations without the City first pursuing its administrative remedies. The City Council's use of "shall" in the Oakland Municipal Code means the City was *required* to follow its own due-process based procedures before obtaining legal rulings from the court.

The trial court also conflated Oakland's Tenant Protection Ordinance ("TPO") with the civil penalty provisions in OMC Chapter 1.08, thereby triggering the City's duty to seek administrative remedies. The City claims that the City Council's amendment of the TPO *after* the City sued defendants proves that the TPO always independently authorized the court to award civil penalties, even though the TPO version in effect when the City sued provided *no* such authority. The City's self-serving attempt to retroactively change the law should be rejected.

The City, relying on *Frances T. v. Village Green Owners Assn.* (1986) 42 Cal.3d 490, also asks this Court to rubberstamp the trial court's decision to ignore the corporate privilege and

impose individual liability on those in charge of the defendant corporation and limited liability company that own the properties. But that case only creates an exception to the corporate privilege where the case involves tortious conduct that results in a *physical injury*. Here, the Manns' conduct resulted only in alleged pecuniary harm to DODG's tenants. The City's reliance on this inapplicable exception should be rejected.

The court also erred, as a matter of law, in imposing a 2.1 multiplier on the attorney fees awarded to the City, which was based largely on a contingency risk factor that the City now concedes was error to consider. That error, alone, was a $1.2 million error.

Nothing in the respondents' brief supports affirmance.

ARGUMENT

I. THE ENTIRE JUDGMENT MUST BE REVERSED.

A. The City's Interpretation Of OMC Chapter 1.08 Is Wrong.

1. The liberal construction rule does not authorize a court to read out clear and unambiguous language in an ordinance.

In order to engage in broad judicial construction and invite the Court to bypass the express administrative requirements included in Oakland Municipal Code ("OMC"), Chapter 1.08, the City characterizes Chapter 1.08 as a remedial statute. (See RB 21-26.)[1] The Court should decline the City's invitation to ignore the ordinance's clear and unambiguous language. The relevant question is whether, in the absence of the required administrative assessment, the city ordinance authorizes courts to award civil penalties. As a matter of law, the answer is: no.

Even with a remedial statute, "liberal construction can only go so far." (*Soria v. Soria* (2010) 185 Cal.App.4th 780, 789.) "The rule that a remedial statute is construed broadly does not permit a court to ignore the statute's plain language ...." (*Even Zohar Construction & Remodeling, Inc. v. Bellaire Townhouses, LLC* (2015) 61 Cal.4th 830, 842; see *Quarry v. Doe I* (2012) 53

[1] For the Court's convenience, the Oakland Municipal Code, Code of Ordinances, Chapter 1.08, published by the City of Oakland, can be accessed online here: https://library.municode.com/ca/oakland/codes/code_of_ordinances?nodeId=TIT1GEPR_CH1.08CIPE

Cal.4th 945, 988 [the "rule of liberal construction of remedial statutes 'does not mean that a court may read into the statute that which the Legislature has excluded, or read out that which it has included'"]; *Davis v. Harris* (1998) 61 Cal.App.4th 507, 512 [same]; *Meyer v. Sprint Spectrum L.P.* (2009) 45 Cal.4th 634, 645 ["A mandate to construe a statute liberally in light of its underlying remedial purpose does not mean that courts can impose on the statute a construction not reasonably supported by the statutory language"].) Even where the liberal construction rule applies, "the qualifying requirements of the legislation must still be enforced." (*Messenger Courier Assn. of Americas v. California Unemployment Ins. Appeals Bd.* (2009) 175 Cal.App.4th 1074, 1093.)

Courts have no authority to rewrite legislation to conform to a party's view of what the law should be. (*Soto v. Motel 6 Operating, L.P.* (2016) 4 Cal.App.5th 385, 393.) "[U]nder the guise of construction, a court should not rewrite the law, add to it what has been omitted, omit from it what has been inserted, give it an effect beyond that gathered from the plain and direct import of the terms used, or read into it an exception, qualification, or modification that will nullify a clear provision or materially affect its operation so as to make it conform to a presumed intention not expressed or otherwise apparent in the law." (*Ibid.*, internal quotation marks omitted.)

Ordinances are interpreted according to the same rules as statutes. (*Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1183.) "These rules are well established." (*Ibid.*) First, courts must look at the ordinance's express language. (*Ibid.*)

In interpreting that language, courts must "'strive to give effect and significance to every word and phrase.'" (*Id.* at pp. 1183-1184, quoting *Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1284-1285.) These words must be given their plain and commonsense meaning. (*Id.* at p. 1184, quoting *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1103.) If the language is "'clear and unambiguous,'" the court's inquiry ends. (*Id.* at p. 1185, quoting *Murphy*, at p. 1103.)

As the opening brief establishes (AOB 43-45), and as we now further confirm, OMC Chapter 1.08's language is clear and unambiguous: It requires those seeking civil penalties to have the City Manager/Administrator administratively assess its claims prior to suing in court.

2. The City's interpretation of Chapter 1.08 does not withstand scrutiny.

Relying on the "liberal construction" rule, the City claims the trial court correctly construed Chapter 1.08 as authorizing the City Attorney to file a civil action under Chapter 1.08 without first obtaining an administrative assessment. (RB 25-26.) It misreads Chapter 1.08 as granting the City Attorney *absolute discretion* to decide whether to recover civil penalties "*either* through administrative proceedings *or* through a civil action." (RB 24, original italics.) The City is wrong. "Interpreting it as respondent urges us to do would conflict with the express language of the statute." (*Davis v. Harris*, *supra*, 61 Cal.App.4th at p. 512.) Accordingly, the Court cannot bypass Chapter 1.08's express textual meaning.

a. Chapter 1.08's unambiguous, express language does not support the City's construction.

Chapter 1.08's express language is clear and unambiguous: It "authorizes the *administrative assessment of civil penalties* to effect abatement of … [a]ny violations of provisions of the following Oakland Municipal Codes …," including the "Oakland Building Maintenance Code," "the Oakland Housing Code," the "Uniform Fire Code," and the "Health and Safety Code." (OMC, § 1.08.020(A), italics added; AOB 37-43.) Nowhere does it authorize the City to bypass the administrative process.

Relying on the trial court's flawed interpretation, the City asserts that "nothing in the text says that penalties are *only* available in administrative proceedings." (RB 23, original italics, citing 1/4CT 1111.) But all of Chapter 1.08's sections and subsections must be read in their proper, administrative context:

> **1.08.010 – Purpose.**
>
> "The purpose of this Chapter is to provide for the protection, health, safety, and general public welfare of the residents of the City and to preserve the livability, appearance, property values, and social and economic stability of the City by *providing an alternative method of code enforcement to effect abatement of violations of the laws, codes, ordinances and regulations identified in this Chapter*."
>
> (OMC, § 1.08.010, italics added.)

1.08.020 – Scope.

"A. This Chapter authorizes the *administrative assessment* of civil penalties to effect abatement of:

> 1. Any violations of provisions of the following Oakland Municipal Codes … [including] … the Oakland Housing Code (O.M.C. Chapter 15.08), Uniform Fire Code (O.M.C. Chapter 15.12), … [and] Health and Safety Code (O.M.C. Title 8) … [or]
>
> 3. The occurrence of any public nuisance as known at common law or in equity jurisprudence ….

B. Civil penalties established in this Chapter are in addition to any other administrative or legal remedy which may be pursued by the City to address violations of the codes and ordinances identified in this Chapter."

(OMC, § 1.08.020(A) & (B), italics added.)

1.08.040 – Authority.

"A. Whenever conditions upon a property or structure thereon constitute a major violation as defined in this Chapter, *administrative civil penalties* may be assessed to affect abatement.

B. *The City Manager, or his or her designee, is authorized to assess civil penalties administratively* in accordance with the procedures established in this Chapter.

C. The responsible person(s) creating, committing, condoning, or maintaining a major violation of any provision of the codes and ordinances identified in this Chapter shall be subject to civil penalties as established in this Chapter.

[…]

G. Civil penalties and related *administrative* expenses, including attorneys' fees, shall accrue to the account of the responsible department and may be recovered by all appropriate legal means, including but not limited to nuisance abatement lien and special assessment/priority lien of the general tax levy, or by civil and small claims action brought by the City, or both."

(OMC, § 1.08.040(A)-(C) & (G), italics added.)

1.08.090 – Remedies not exclusive.

"Remedies under this Chapter are in addition to and do not supersede or limit any and all other remedies, civil or criminal. The remedies provided for herein shall be cumulative and not exclusive. *The enforcement official shall have the discretion to select a particular remedy* to further the purposes and intent of the chapter, depending on the particular circumstances. The enforcement official's decision to select a particular remedy is not subject to appeal."

(OMC, § 1.08.090, italics added.)

Together, these provisions authorize the City Manager to seek administrative civil penalties to abate violations of the City's municipal codes governing safety inside buildings. They do not authorize the court to assess civil penalties without a preliminary administrative assessment.

The City points to Chapter 1.08.090 (above), titled "Remedies not exclusive," as support for its interpretation that the enforcement official has absolute discretion to "decide whether to prosecute the case administratively or in court." (RB 24-25.) But that subsection refers back to the purpose of Chapter 1.08, which is to "provid[e] an *alternative* method of code enforcement to effect abatement of violations of the laws, codes, ordinances and regulations identified in this Chapter." (OMC, § 1.08.010, italics added.) It doesn't authorize the court to apply Chapter 1.08's standards and penalties without the City first pursuing and obtaining an administrative assessment.

The City disagrees. It interprets OMC section 1.08.040 as granting courts authority to assess civil penalties against DODG without the City first obtaining an administrative assessment. (RB 22-24, 51.) But section 1.08.040(B) limits the entire Chapter 1.08 "Authority" section. Subsection (B)'s language isn't ambiguous; it doesn't authorize the *court* to impose civil penalties at all. It only authorizes "[t]he City Manager, or his or her designee … to assess civil penalties administratively in accordance with the procedures established in this Chapter." Had the City Council intended to authorize *courts* to award civil penalties under Chapter 1.08, it could—and presumably would—

have simply authorized *courts* along with the City Manager to award civil penalties. But it didn't.

The City's interpretation would require the court to improperly insert words that don't exist. Courts may not broaden the meaning of Code provisions by inserting words that were intentionally omitted. (*Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 545; see *California School Employees Assn. v. Azusa Unified School Dist.* (1984) 152 Cal.App.3d 580, 594 ["where the language of the statute is clear in itself, the court should refrain from artificially adding to or altering it"]; *California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, 939, quoting Code Civ. Proc., § 1858 ["'In the construction of a statute or instrument, the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted ...'"].) Nor may a court rewrite a statute (or ordinance) to conform to an assumed intention which does not appear from its language. (*Doe*, at p. 545.) Chapter 1.08 expressly governs the *City Manager's assessment of civil penalties*; it does not authorize the court to bypass this administrative requirement.

Next, the City relies on OMC section 1.08.040(G), which provides that "[c]ivil penalties and related administrative expenses … may be recovered by all appropriate legal means, including … by civil and small claims action brought by the City, or both." According to the City, this subsection grants it "express authority" to recover penalties in a civil action, and because the language is permissive, an administrative assessment cannot be the exclusive remedy. (RB 23.) The City disagrees with DODG's

interpretation that this subsection "merely allows the City to pursue a civil action as 'an enforcement mechanism for unpaid penalties' that have already been administratively imposed." (RB 23-24, quoting AOB 46.) In the City's view, (1) OMC section 1.08.040(G) cannot be read that way since it includes no limiting language, and (2) DODG's construction requires an interpretation of the word "'recover[ed]'" that is too narrow when compared to other unrelated civil penalty statutes. (RB 24.)

Neither argument holds water. First, section 1.08.040(G) cannot be read in a vacuum. Rather, it must be read in conjunction with its other subsections—in particular, the "Authority" subsection discussed above. (See OMC, § 1.08.040(B).) Subsection (G) defines the means by which the City can *recover* the "[c]ivil penalties and related administrative expenses, including attorneys' fees." When properly read in conjunction with Subsection (B), this language simply spells out the next step for the City *after* the City Manager has "assess[ed] civil penalties administratively in accordance with the procedures established in this Chapter." In the context of the rest of section 1.08.040, referring to the administrative process, this is the interpretation that makes the most sense.

Second, the word "recovered" in subsection (G) is different than the phrasing found in Subsection (B), which authorizes the City Manager to "assess civil penalties administratively." Had the City Council intended to authorize a trial court to assess civil penalties, it would have said so. In this context, the word "recovered" simply authorizes the City to use all appropriate legal means to recover the civil penalties *already assessed* by the City

Manager if DODG (or other party assessed with civil penalties) refuses to pay the civil penalties. This meaning is most consistent with Chapter 1.08's express, unambiguous language.

Next, the City interprets OMC sections 1.08.020(B) and 1.08.090 as granting "*cumulative* remedies," and authorizing the City Attorney complete discretion to "decide whether to prosecute the case administratively or in court." (RB 24-25, original italics.) The City's broad reading of these subsections does not comport with the context of the entire provision. Section 1.08.020(B), which expressly defines Chapter 1.08's "[s]cope," and lists several subsections at issue here, refers specifically to "this Chapter." "*This Chapter*," i.e., Chapter 1.08, doesn't authorize courts to rely on it without a previous administrative assessment. Rather, it grants "[t]he enforcement official" (who assesses penalties under the City Manager's direction) "discretion to select a particular remedy to further the purposes and intent of the chapter, depending on the particular circumstances." (OMC, § 1.08.090.) Nothing in this provision authorizes a plaintiff or trial court to bypass the administrative process.

b. The statutes that the City analogizes to Chapter 1.08 are inapposite, as they expressly grant jurisdiction to the court.

The City claims that section 1.08.040(G) is just like Labor Code section 2699 and Health and Safety Code section 43154, subdivision (b), because both include the word "recover," and courts regularly award civil penalties under these statutes

without the plaintiff obtaining a prior administrative assessment. (RB 24.) Neither statute is remotely comparable.

Unlike Chapter 1.08 of the Oakland Municipal Code, Labor Code section 2699 expressly spells out a court's power to assess civil penalties that are normally assessed by an administrative agency: "Notwithstanding any other provision of law, any provision of this code that provides for a civil penalty to be assessed and collected by the Labor and Workforce Development Agency or any of its departments, divisions, commissions, boards, agencies, or employees, for a violation of this code, *may, as an alternative, be recovered through a civil action* brought by an aggrieved employee on behalf of himself or herself and other current or former employees pursuant to the procedures specified in Section 2699.3." (Lab. Code, § 2699, subd. (a), italics added.) And, "whenever the Labor and Workforce Development Agency, or any of its departments, divisions, commissions, boards, agencies, or employees, has discretion to assess a civil penalty, *a court is authorized to exercise the same discretion*, subject to the same limitations and conditions, to assess a civil penalty." (*Id.* at subd. (e)(1), italics added.) Nowhere does Chapter 1.08 say that courts have the same power to exercise the same discretion as the City Manager.

Nor is Health and Safety Code section 43154, subdivision (b) an apt comparison. It *expressly* grants jurisdiction to the superior court: "Any action to recover a penalty under this section *shall be brought in the name of the people of the State of California in the superior court* of the county where the violation occurred …." Chapter 1.08 includes no such

language. Nowhere does it even so much as suggest that an action to recover civil penalties can be brought in the superior court. The City's strained comparison to these statutes and its creative interpretation of Chapter 1.08 as permitting the City to bypass the administrative process should be rejected.

3. DODG's abatement of most of the nuisance conditions before trial relieved defendants of liability for civil penalties.

The opening brief demonstrates that DODG had already abated most of the substandard conditions and Code violations by trial time. (See AOB 47.) The City claims the evidence shows otherwise, and that, in fact, "repairs were not close to being done until *April 2021*, just before trial …." (RB 26, citing RT-121-122, 1339; 1/4CT-1104.) As we now show, the City's cited evidence does not support this claim.

The City cites the testimony of James Wimbish, the City's "specialty combination inspector," who testified that at the time of trial, violations had not been corrected and DODG still had not obtained permits. (RT 46, 121.) But Wimbish was only testifying about *one* building—i.e., 276 Hegenberger. (RT 113-122; Exh. 5 at 1-2.) There's *no* evidence that conditions at the other four buildings had not been abated at the time of trial. And, the evidence establishes that even 276 Hegenberger was "near a hundred percent completion" when trial began. (RT 1339.)

The City also claims that not all conditions at 5848 Foothill Boulevard were abated before trial. (RB 26, citing AOB 21.) The testimony it cites does not support this assertion; it relates only

to graffiti. (RT 772-773.) The City, itself, acknowledged before trial that all conditions at 5848 Foothill had been abated. (RT 772-773; see Exh. 76 at 3.) So, the City is wrong about what the evidence shows still needed to be fixed at trial time.

Contrary to the City's claim, the evidence establishes that when the City sued, DODG was near 100% completion abating the cited conditions, and it was working to correct the few remaining violations, but it was waiting for the City's final inspections. (See RT 211-212 [building permit obtained in 2019], 1317-1318 ["well ahead of schedule" on abating conditions at 1921/1931 International Blvd. prior to the deadline set by the City], 1355-1356 ["we're right there at the end of it; "there's really nothing else I can do or he can do until the City inspector they cooperate and they allow us to have – to get our final inspection"], 1354 [the City was unable to schedule the final inspection], 1363-1364 [the City had approved 5268 Foothill back in 2013 without sprinklers and then required sprinklers on the last inspection]; Exhs. 76 at 3 [3/12/20: case abated; 5848 Foothill Blvd.], 85 at 3 [7/03/2020: "Building permits in 'Final' status"; 1921 International Blvd], 261 at 1 [7/03/2020 email from the City: "the cases have been abated. Congratulations and thank you for your efforts in completing the compliance plan"; 1921/1931 International Blvd.], 353 at 2 ["This permit is placed on hold per the direction from the Code Enforcement Inspector"].) By the time trial began in 2021, DODG had spent approximately $300,000 abating the cited issues. (RT 1363.)

Even the trial court cited the applicable rule that "'[t]he assessment of civil penalties shall cease when all major violations

are wholly and permanently corrected.'" (1/4CT 1110, quoting OMC, § 1.08.060(D).)

B. The City Was Required—But Failed—To Exhaust Administrative Remedies.

1. DODG did not waive its jurisdictional exhaustion argument.

The City claims that defendants waived their administrative exhaustion argument by failing to raise it in the trial court. (See RB 29-30.) The City's waiver argument lacks merit for two distinct reasons. First, defendants *did* meaningfully raise the defense in the trial court. The opening brief cites eleven references to the exhaustion rule by defendants in the trial court. (AOB 40.) Second, because the City's failure to exhaust administrative remedies is a *jurisdictional* defect, even if DODG had failed to "meaningfully raise" (RB 29) the exhaustion of administrative remedies defense in the trial court, the Court can—and must—address the argument "at any point in the proceedings." (*Campbell v. Regents of University of California* (2005) 35 Cal.4th 311, 322, fn. 2; accord, *Los Globos Corp. v. City of Los Angeles* (2017) 17 Cal.App.5th 627, 634.) A jurisdictional argument cannot be waived. (*Ibid.*) As the opening brief establishes, the court lacked jurisdiction to adjudicate the City's claims because the City failed to first pursue and exhaust the available administrative remedies. (See AOB 37-41; *Lopez v. Civil Service Com.* (1991) 232 Cal.App.3d 307, 311 ["the exhaustion of an administrative remedy has been held *jurisdictional* in California," original italics]; *Roth v. City of Los*

Angeles (1975) 53 Cal.App.3d 679, 692 ["respondents' failure to exhaust their administrative remedy through the city council hearing is fatal to their attack on the abatement procedure in this action"]; *Hittle v. Santa Barbara County Employees Retirement Assn.* (1985) 39 Cal.3d 374, 384 [exhaustion of administrative remedies "is a condition to the court's jurisdiction"].)

The City claims that the exhaustion rule is *not* jurisdictional. (RB 28-29.) According to the City, "the 'weight of recent cases'" holds that "failure to exhaust does *not* deprive a court of subject-matter jurisdiction." (RB 28-29, italics added, citing *Cummings v. Stanley* (2009) 177 Cal.App.4th 493, 505 & *Kim v. Konad USA Distribution, Inc.* (2014) 226 Cal.App.4th 1336, 1347.) An overview of recent published caselaw proves the City is mistaken.

The California Supreme Court first held that the exhaustion rule is jurisdictional in *Abelleira v. District Court of Appeal, Third Dist.* (1941) 17 Cal.2d 280, 292-293. *Abelleira* has never been overruled or called into question. Not even close. The Court has reaffirmed the jurisdictional nature of the exhaustion rule in multiple cases including as recently as 2017. In *Williams & Fickett v. County of Fresno* (2017) 2 Cal.5th 1258, the Court confirmed that the "well settled" exhaustion rule is binding upon all courts and is not a matter of judicial discretion. (*Id.* at p. 1267.) Not long before *Williams*, another Supreme Court case reaffirmed *Abelleira*'s holding that exhaustion of administrative remedies is "'a *jurisdictional* prerequisite to resort to the courts.'" (*Coachella Valley Mosquito & Vector Control Dist. v. California*

Public Employment Relations Bd. (2005) 35 Cal.4th 1072, 1080, italics added.) Neither the respondents' brief, nor the cases cited in the respondents' brief, acknowledge this recent Supreme Court authority upholding the jurisdictional nature of the rule.

The Courts of Appeal, too, still regularly hold that compliance with the administrative exhaustion rule "is *not* a matter of judicial discretion, but a jurisdictional prerequisite to resort to the courts." (*Lion Raisins, Inc. v. Ross* (2021) 64 Cal.App.5th 718, 732, italics added, rev. denied (Sept. 1, 2021), cert. denied (2022) 142 S.Ct. 2709.)

Indeed, multiple courts, have recently (including this year) referred to and applied the exhaustion rule as a jurisdictional rule—directly refuting the City's claim that the weight of recent cases holds otherwise. (See, e.g., *FlightSafety International, Inc. v. Los Angeles County Assessment Appeals Board* (2023) 96 Cal.App.5th 712, 314 Cal.Rptr.3d 592, 595-598; *LA Live Properties, LLC v. County of Los Angeles* (2021) 61 Cal.App.5th 363, 376; *Muskan Food & Fuel, Inc. v. City of Fresno* (2021) 69 Cal.App.5th 372, 383; *Contractors' State License Bd. v. Superior Court* (2018) 28 Cal.App.5th 771, 779, 784; *Tejon Real Estate, LLC v. City of Los Angeles* (2014) 223 Cal.App.4th 149, 156; *Conservatorship of Whitley* (2007) 155 Cal.App.4th 1447, 1464 [""the exhaustion of an administrative remedy has been held *jurisdictional* in California,"" original italics].)

The latest versions of the California Judges Benchbook and the Rutter Guide also instruct trial courts and practitioners that "[t]he exhaustion requirements are jurisdictional prerequisites,

not a matter of judicial discretion." (California Judges Benchbook: Civil Proceedings–Before Trial (March 2022) § 5.6 [collecting cases]; see Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2023) ¶ 1:906.1.)

Thus, contrary to the City's claim that the exhaustion rule is somehow outdated, """the exhaustion doctrine is *still* viewed with favor 'because it facilitates the development of a complete record that draws on administrative expertise and promotes judicial efficiency.""" (*Morgan v. Ygrene Energy Fund, Inc.* (2022) 84 Cal.App.5th 1002, 1012, italics added, quoting *Sierra Club v. San Joaquin Local Agency Formation Com.* (1999) 21 Cal.4th 489, 501.)

The Court should reject the City's attempts to excuse their undisputed failure to exhaust administrative remedies by misreading current, binding law.

2. The City, as a government entity, is not immune from comporting with the jurisdictional exhaustion requirements.

The City next claims that the exhaustion rule doesn't apply to the City's Chapter 1.08 claims because this is a lawsuit by a government enforcement agency on behalf of the public. (RB 30-33.) Nonsense. Neither caselaw nor the statutory language supports an interpretation that the doctrine applies only when non-government plaintiffs file lawsuits.

In fact, the City has been down this path before and lost. In *City of Oakland, Cal. v. Hotels.com LP* (9th Cir. 2009) 572 F.3d 958, 959-960, the City sued ten Internet travel companies in

federal court under California law, claiming that they failed to calculate and remit occupancy taxes in violation of the City's own Transient Occupancy Tax Ordinance. When the district court dismissed the suit with prejudice because the City failed to comply with its own ordinance's exhaustion requirement, the City appealed. (*Id.* at p. 959.) The Ninth Circuit Court of Appeals affirmed the district court's ruling under the exhaustion rule, calling it "a classic case of jumping the gun." (*Ibid.*) It agreed that California law *required* the City to exhaust its own available administrative remedies: "We are in accord with the rationale employed in these decisions—exhaustion is required because the tax Ordinance provides for administrative remedies." (*Id.* at p. 961.)

Other California cases are to the same effect.

For example, *Tri-County Special Educ. Local Plan Area v. County of Tuolumne* (2004) 123 Cal.App.4th 563, involved questions about the exhaustion doctrine as applied to specific Government Code sections "in the context of disputes between governmental agencies." (*Id.* at p. 569.) The plaintiff was a public-entity special-education plan, organized under the Education Code. (*Ibid.*) Section 7585 permits a local agency (as well as a parent or adult pupil) to file an administrative complaint when another local agency fails to provide services required by an individualized education plan. (*Id.* at p. 574.) The Court of Appeal held that the administrative process was "fully capable of providing complete relief to appellants," and the type of relief being awarded was "specifically entrusted to the discretion of the Superintendent of Public Instruction." (*Id.* at

p. 577.) In these circumstances, the court held that the plaintiff government agency was *not* entitled to bypass the superintendent's administrative process by presenting the issues directly to a court. (*Ibid.*)

City of Cloverdale v. Department of Transportation (2008) 166 Cal.App.4th 488, likewise, directly refutes the City's claim that the exhaustion rule doesn't apply to government entities. There, landowners sued the Department of Transportation and city for flooding caused by a drainage channel, and the city cross-complained against the department for indemnity, damages, and declaratory relief. (*Id.* at p. 490.) A threshold issue was whether the Department, after completing the bypass project, effectively relinquished title to the drainage channel to the City. (*Id.* at pp. 490-491.) That issue was litigated to the court, and the court determined that title was, in fact, relinquished. (*Id.* at p. 491.) The court subsequently ruled for the Department on the City's indemnity claim, and granted, in part, the Department's motion to dismiss other causes of action alleged by the City. (*Ibid.*)

On appeal, the Department asserted that the City failed to exhaust the available administrative remedy by which the relinquishment could have been challenged under Streets and Highways Code section 73. (*Id.* at pp. 491-493, 498.) The Court of Appeal agreed. It reversed the judgment on the City's cross-complaint, holding that "the City failed to pursue that administrative remedy," which was """a jurisdictional prerequisite to resort to the courts."""" (*Id.* at pp. 498-500, quoting *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 70.)

It held that the trial court correctly applied the exhaustion rule as to those issues. (*Id.* at p. 499.)

City and County of San Francisco v. International Union of Operating Engineers, Local 39 (2007) 151 Cal.App.4th 938, further refutes the City's claim that it is immune from the exhaustion rule as a government entity in a public enforcement action. There, the City and County of San Francisco filed an enforcement lawsuit in superior court, alleging that a labor union was required by the terms of the city charter to submit all unresolved labor disputes to arbitration and seeking to compel arbitration. (*Id.* at pp. 941-942.) The union argued that the court should dismiss the City's lawsuit "because the City had failed to exhaust its administrative remedies before filing suit." (*Id.* at p. 942.) The trial court ruled it lacked jurisdiction, concluding that the Public Employment Relations Board had exclusive jurisdiction over the dispute. (*Ibid.*)

On appeal, none of the City's arguments convinced the Court of Appeal that the superior court had jurisdiction; nor did it find that the City should be excused from pursuing the available administrative remedy before it sued. (See *id.* at pp. 944-949.) The Court of Appeal thus affirmed, holding that the City was "not excused from pursuing its administrative remedies." (*Id.* at pp. 949-950.)

All four cases discussed above—*City of Oakland, Cal., Tri-County Special Educ. Local Plan Area*, *City of Cloverdale*, and *City and County of San Francisco*—compel reversing the trial court's error in this case for failing to require the City to

exhaust the available administrative remedies. The City's claim that it is immune from this jurisdictional rule simply by virtue of being a governmental body finds no support in the law.

The City also tries to avoid the exhaustion rule by citing *Jonathan Neil & Assoc., Inc. v. Jones* (2004) 33 Cal.4th 917, 930 (*Jonathan Neil*). The City claims the administrative exhaustion doctrine doesn't apply to the City's Chapter 1.08 public enforcement action because it doesn't fall within one of the doctrine's supposed three "'distinct strands'" that the court in *Jonathan Neil* discusses. (RB 30-31.)

But, *Jonathan Neil* itself says there are "*at least*" three strands. (33 Cal.4th at p. 930, italics added.) That's not a holding that the doctrine is limited to only three circumstances. And even if the doctrine were limited to three strands (it isn't), the City's case falls squarely within the third strand: one of "a variety of public contexts" where the administrator "possesses a specialized and specific body of expertise in a field that particularly equips it to handle the subject matter of the dispute"—e.g., the City's own Fire, Housing, and Building Codes. (*Id.* at p. 931; see also *Bridges v. Mt. San Jacinto Community College Dist.* (2017) 14 Cal.App.5th 104, 115 [purpose of requirement is to ensure that public agencies have opportunity to decide matters within their expertise, respond to objections, and correct any errors before a court intervenes].)

This administrative remedy, designed to assist the public, traces back to the Oakland City Charter, which was created under the California Constitution's authority. (See *Stohl v.*

Horstmann (1944) 64 Cal.App.2d 316, 319 ["The City of Oakland is governed by a freeholders' charter, which was amended in 1931 to provide for a city manager form of government"]; *State Building & Construction Trades Council of California v. City of Vista* (2012) 54 Cal.4th 547, 555 ["Charter cities are specifically authorized by our state Constitution to govern themselves, free of state legislative intrusion, as to those matters deemed municipal affairs," citing Cal. Const., art. XI, § 5, subd. (a)].)

As a charter city, the City of Oakland has exclusive power to legislate over municipal affairs, which are beyond the reach of state legislative enactment. (*Lippman v. City of Oakland* (2017) 19 Cal.App.5th 750, 756.) As a matter of Constitutional law, the City's charter "with respect to municipal affairs … supersede[s] all laws inconsistent therewith." (Cal. Const., art. XI, § 5.)[2]

"Following a revision to the charter, the position of [Oakland] city manager was renamed city administrator in 2004." (*Edgerly v. City of Oakland* (2012) 211 Cal.App.4th 1191, 1195; see OMC, § 2.29.180.) The City Charter empowers the City Administrator as "the chief administrative officer of the City." (Oakland City Charter, § 500.) His powers and duties include executing and enforcing *all City laws and ordinances*, and administering the City's affairs. (Oakland City Charter, § 504, subd. (a); *Edgerly*, at p. 1196; *Brown v. Fair Political Practices*

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[2] "A city's charter is, of course, the equivalent of a local constitution. It is the supreme organic law of the city, subject only to conflicting provisions in the federal and state constitutions and to preemptive state law." (*Creighton v. City of Santa Monica* (1984) 160 Cal.App.3d 1011, 1017.)

Com. (2000) 84 Cal.App.4th 137, 142; see also Oakland City Charter, §§ 503 ["[t]he City Administrator shall be responsible to the Council for the proper and efficient administration of all affairs of the City under the City Administrator's jurisdiction"], 504, subd. (k) ["[t]he City Administrator shall have the power and it shall be the City Administrator's duty … [t]o prescribe such general rules and regulations as the City Administrator may deem necessary or expedient to the general conduct of the administrative departments under the City Administrator's jurisdiction"].)

Both the City's Housing & Community Development Department and the City's Planning & Building Department fall directly under the supervision and administrative control of the City Administrator. (OMC, §§ 2.29.080, 2.29.100.)

The Oakland City Council enacted sections 1.08.030(C) and 1.08.040(B) of the Oakland Municipal Code to establish the remedy available to the City Administrator (previously known as the City Manager) to handle cases on behalf of the public within the City of Oakland. The City created an *internal* procedure: It made the City Administrator/Manager responsible for assessing violations and imposing civil penalties under Chapter 1.08: "The responsible department [for issuing violations] shall be the City department, its Director or Deputy Director, or other person so designated either by the City Manager or code or ordinance as responsible for enforcement of the provisions of the codes and ordinances identified in this Chapter …. The City Manager, or his or her designee, is authorized to assess civil

penalties administratively in accordance with the procedures established in this Chapter." (OMC, §§ 1.08.030(C), 1.08.040(B).)

Thus, even under the City's three "'distinct strands'" theory, the City created internal administrative remedies to assist the public in rectifying building issues, and thus, it was required, but failed, to exhaust these administrative remedies before filing a lawsuit.

3. The *Susanville* exception to the exhaustion rule does not apply.

Relying on *City of Susanville v. Lee C. Hess Co.* (1955) 45 Cal.2d 684 (*Susanville*), the City next claims that the word "remedies" in Chapter 1.08 actually means something other than its commonly known legal definition referring to forms of relief such as "damages, injunctions, penalties, etc." (RB 24-25; see also *People ex rel. Feuer v. Superior Court (Cahuenga's the Spot)* (2015) 234 Cal.App.4th 1360, 1377 [remedy: "'simply the means by which the obligation or the corresponding action is effectuated—and also from the "relief" sought'"].) The City is wrong. Its effort to change the clear and unambiguous meaning of "remedies" in Chapter 1.08 is misguided.

In *Susanville*, a city council awarded a public-improvements contract to a contractor. (45 Cal.2d at p. 688.) Within days, the city held a special meeting without giving notice to the contractor where it passed a resolution declaring the contractor to be unlicensed, and thus, unqualified to bid under the applicable section of the Streets and Highways Code. (*Ibid.*) The city then awarded the contract to the next highest bidder.

(*Ibid.*) When the city petitioned the superior court to confirm the validity of its actions, the court found in its favor. (*Ibid.*) The contractor then appealed, and eventually sought Supreme Court review. (*Id.* at p. 687.) The city argued that the contractor had failed to exhaust its administrative remedies. (*Id.* at p. 690.) *Susanville* rejected the city's exhaustion argument, finding that the former Streets and Highways Code provided an alternative judicial remedy. (*Ibid.*)

After stating what it called the "well settled" exhaustion rule, the court announced an exception: "[W]here a statute provides an administrative remedy and also provides an alternative judicial remedy the rule requiring exhaustion of the administrative remedy has no application if the person aggrieved and having both remedies afforded him by the same statute, elects to use the judicial one." (*Id.* at p. 689.)

The *Susanville* exception does not apply here. Much more recent Supreme Court authority—*Campbell, supra,* 35 Cal.4th at p. 331—explains the *Susanville* exception's narrow application based on the specific statutory language at issue. In particular:

- "Former Streets and Highways Code section 5265 provided that 'the legislative body conducting the proceedings may bring an action in the superior court ... to determine the validity of such proceedings and ... of any contract entered ... pursuant thereto.'"
- "Former section 5266 provided that the contractor might also bring such an action."

- "Former section 5267 specified that the action was in rem and specified that summons was by publication."
- "Former section 5268 provided that anyone might appear and contest or uphold the validity of the proceedings and of the contract."
- "Former section 5269 provided whom to serve if the contractor brought the action"; and
- "Former section 5270 provided that appeal might be made to the Supreme Court, and provided the time limit for actions and appeals."

(*Id.* at p. 331, fn. 6.)

Campbell held that the *Susanville* exception didn't apply because there was no comparable legislation corresponding to the detailed procedures for judicial remedy found in the former Streets and Highways Code provisions that were at issue in *Susanville*. (*Id.* at p. 332.) Further, *Campbell* held "that absent a clear indication of legislative intent, [courts] should refrain from inferring a statutory exemption from [the Supreme Court's] settled rule requiring exhaustion of administrative remedies." (*Id.* at p. 333.)

The same is true here. As in *Campbell*, "no legislation correspond[ed] to the detailed procedures" for judicial remedy found in the Oakland Municipal Code. (35 Cal.4th at p. 332.) Indeed, Chapter 1.08 includes *no* explicit lawsuit-and-appeal language whatsoever. Therefore, the City was required to first exhaust the available administrative remedies. The Court should thus refrain from inferring a statutory exemption.

4. Contrary to the City's argument, public policy favors requiring the City to first comply with the exhaustion rule.

Next, the City claims that applying the exhaustion rule here "would not further relevant policy goals." (RB 35.) In particular, it claims that the City Administrator/Manager, who would be tasked with hearing the administrative complaint, "has no more specialized expertise than courts in public nuisance law." (RB 36.) That may be so as to him personally, but he has the express power under the Oakland Municipal Code to delegate the administrative assessments to those in the City who *do* have such specialized expertise regarding housing and community development within its borders, or to obtain the wealth of information they possess.

For instance, City employee Azaria Bailey-Curry—who works in the department of housing and community development—testified that she used to work in the City's "code compliance relocation program." (RT 638.) That program "was designed to assist tenants when their unit has been deemed uninhabitable either temporarily or permanently and provides financial assistance to them to move while repairs are done on their unit to bring it up to safety standards and to be able to return." (*Ibid.*) The "overarching goal of the code compliance relocation program is to combat homelessness, … to work on anti-displacement, to keep residents in their homes as much as possible because property values and rental rates have gone up significantly and it's wrong to be displaced due to no fault of their own." (*Ibid.*) The program also strives to "educate and to inform

both parties of their rights and responsibilities," including making landlords "aware that there are certain standards that their buildings must be kept up to." (RT 639.)

As acting program manager, Bailey-Curry "coordinate[d] with the inspectors to make sure they had code compliance materials," collected applications, and assisted "potential applicants with gathering documents and completing their applications …." (RT 641.) She understood that "code compliance specifically relates to uninhabitable conditions in a home …." (RT 642.) She understood that "by the time the tenant or the landlord has come to code compliance relocation due do uninhabitable conditions that there has been ongoing tension between the landlord and the tenant," and "that landlords are usually in a position of power." (RT 647.) She also testified that in cases like this, she has access to "information from the code enforcement inspectors or the fire inspectors who have gone to the site." (*Ibid.*) And, that she would provide property owners with information regarding "their rights and responsibilities." (RT 648.) She, and those in similar positions, have extensive expertise that could have helped the City administratively adjudicate the claims it brought against DODG.

Former Assistant Fire Marshall and City employee Emmanuel Watson also has a wealth of specialized knowledge that presumably other City employees possess. (RT 234.) He was "responsible for all building construction, new construction, commercial construction, [and] residential structures." (RT 235.) He was certified as a fire inspector, hazardous material specialist, and spent seven years on the urban search and rescue

team. (RT 236.) He would personally visit properties that were placed on fire watch. (RT 238.) Mr. Watson understood fire hazards and building construction that could have helped the City administratively adjudicate the City claims.

Similarly, former Oakland City Councilmember Ignacio de la Fuente testified about his two decades of expertise serving on the Oakland City Council as chair of economic development and chair of public works. (RT 1592-1593.) The economic and community development committee that he was a member of was responsible for "overseeing of economic development and housing development, [and] commercial development in the City of Oakland." (RT 1593.) He undoubtedly had more expertise on the issues involved in this case than the superior court. The City Manager could have sought counsel from experts like these.

In any event, the City's public policy argument also ignores the doctrine's other important societal and governmental interests, including "bolstering administrative autonomy" ("courts should not interfere with an agency determination until the agency has reached a final decision"), and "promoting judicial economy" ("overworked courts should decline to intervene in an administrative dispute unless absolutely necessary"). (*Rojo v. Kliger* (1990) 52 Cal.3d 65, 86; *Jonathan Neil*, *supra*, 33 Cal.4th at p. 932.) Requiring the City to comply with the administrative exhaustion rule here furthers these interests. The courts have no need to interfere with the City's administrative process until it's complete. Cases like this can, and should, be decided through the City's administrative process

by its City Administrator/Manager or his designee without further overburdening the courts.

C. Without The Benefit Of A Prior Administrative Assessment, The Court's Civil Penalty Award Also Violated The Primary Jurisdiction Rule.

Along with violating the exhaustion rule, the City's lawsuit also violates the primary jurisdiction rule. (See AOB 52-53.) The City argues that DODG waived its primary jurisdiction doctrine argument and that DODG's reliance on the rule "is misplaced." (RB 37.) But the City cites no authority supporting its waiver argument. And even if the argument wasn't raised below, the Court still has discretion to review it. (See, e.g., *Victor Valley Union High School District v. Superior Court of San Bernardino County* (2023) 91 Cal.App.5th 1121, 1158; *Woodworth v. Loma Linda University Medical Center* (2023) 93 Cal.App.5th 1038, 1057 [finding "good reasons to exercise [its] discretion"].)

Here, the Court should exercise its discretion to review the primary jurisdiction issue for two reasons: (1) it is a "legal question determinable from facts that are uncontroverted in the record and could not have been altered by the presentation of additional evidence" (*Woodworth*, at p. 1158); and, (2) the argument concerns "legal issues where the public interest or public policy is involved" (*Meridian Financial Services, Inc. v. Phan* (2021) 67 Cal.App.5th 657, 700).

The primary jurisdiction doctrine applies here to bar the City's civil penalties even if DODG did not raise the primary jurisdiction argument at trial.

D. The City Wasn't Entitled To Civil Penalties Since Chapter 1.08's Due-Process Based Prerequisites Weren't Satisfied.

1. The City failed to issue public nuisance declarations as to three properties.

The City claims that neither the text of Chapter 1.08 nor the Building Maintenance Code required an administrative "Declaration of Public Nuisance-Substandard" to give notice to property owners, such as DODG, when the City declared its properties a public nuisance under section 1.08.030(A). (RB 40.) Instead, it claims that "each property was 'declared' a public nuisance under section 1.08.030(A)" by operation of law. (RB 39.) This is just another attempt by the City to bypass the required administrative process designed to ensure that property owners are afforded due process. The exercise of the powers granted by the nuisance statutes "is limited by the constitutional requirement of due process of law." (*People ex rel. Camil v. Buena Vista Cinema* (1976) 57 Cal.App.3d 497, 502.) Notice is the most basic due process requirement. (*Friedman v. City of Los Angeles* (1975) 52 Cal.App.3d 317, 321.)

To commence public nuisance proceedings, the applicable Code section in effect at the time—OMC section 15.08.350(A)-(B), *required* that "[w]hen the Building Official has inspected or caused to be inspected residential or non-residential buildings or structures or portions thereof and has found and determined that such buildings or structures or portions thereof are Substandard and a Public Nuisance … [t]he Building Official *shall* issue a

Declaration of Public Nuisance – Substandard directed to the record owner of the property." (1/3CT 827, italics added.)[3]

This language is not ambiguous or unclear. The word "shall" must be given effect. (See *Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 443.) It is a well-settled principle of statutory construction that the word "shall" is ordinarily construed as mandatory. (*Ibid.*) Accordingly, the City was *required* to issue such declarations.

The City—presumably hoping the Court will overlook the ordinance's mandatory nature—ignores this Code section, focusing only on Chapter 1.08. (RB 37-41.) But section 15.08.350's language cannot be so easily ignored. The City's theory is that declaration requirement in section 15.08.350 "serves a distinct administrative function, allowing the City to summarily abate a nuisance," giving "the Department immense power to directly affect an owner's property rights outside the judicial process." (RB 40.) But here, the trial court expressly relied on OMC Chapter 15.08's requirements to issue *civil penalties* under Chapter 1.08. (1/4CT 1083, 1086-1087, 1090, 1094, 1096, 1099, 1104-1105, 1112-1113, 1115, 1117.) That made Chapter 15.08's notice requirements relevant to the City's claims.

[3] The current version of the Oakland Building Maintenance Code, which is in the record, uses the word "may" instead of "shall." (1/3CT 827; 15.08.350(B).)

2. The City neglected to issue sufficient assessment notices.

In yet another attempt to bypass the City's required administrative process, the City claims that it was not required to issue an assessment notice "as a precursor to a civil action." (RB 41-42.) Again, the City had no right to jump over the administrative procedures to avoid the requirements spelled out in the Oakland Municipal Code. (OMC, § 1.08.050(A).) The City agrees that it would have been required to provide proper notice had it not avoided these administrative requirements. (RB 41.) The Court should see this gamesmanship for what it is; another attempt by the City to avoid its express duties under the Code.

3. The City violated DODG's due process rights.

According to the City, it was excused from complying with the OMC's notice procedures because the judicial system alleviated any due-process concerns. (RB 42.) This merely reinforces DODG's argument that the City caused DODG to suffer prejudice by circumventing the required administrative process before filing a civil suit.

In particular, the City claims it did not "summarily abate" the nuisance, so due-process safeguards are irrelevant and, in any event, the statute itself provides adequate notice. (RB 42, 44.) However, because the City bypassed the City's own administrative Codes and procedures, which include important notice and hearing requirements to protect property owners' due process rights, the City's successful effort to avoid these due-

process-based procedures cannot be ignored. Defendants were *not* afforded an opportunity to be heard *in front of the City tribunal that was set up to understand the internal City issues*. That was a violation of defendants' due process rights. Without the City Administrator/Manager first using his expertise to adjudicate the City's claims, the "nearly three years of civil litigation in the trial court," and "the trial court's award of civil penalties under Chapter 1.08" (RB 44), were insufficient to afford defendants the essential opportunity to be heard by the City in the venue intended by Oakland Municipal Code Chapter 1.08.

The express purpose of Chapter 1.08's civil penalty provisions is to effect abatement of conditions that still exist: It provides "an alternative method of code enforcement *to effect abatement* of violations of the laws, codes, ordinances and regulations identified in this Chapter." (OMC, § 1.08.010, italics added.) Nothing in Chapter 1.08 expresses an intent to punish landowners after landowners such as defendants have already abated a majority of the violations. Punishing a property owner for prior, already-abated violations violates due-process concerns. In that context, the defendant property owners are provided insufficient due-process notice of what will happen if they fail to abate the conditions or don't abate the conditions quickly enough. (See *Flahive v. City of Dana Point* (1999) 72 Cal.App.4th 241, 245, fn. 5 [absent an emergency, minimum administrative due process protections are required to require abatement].)

E. The Court Erred In Construing The TPO In A Manner That Directly Undermined Chapter 1.08's Administrative Scheme, Again Failing To Exhaust Administrative Remedies.

The opening brief establishes that the trial court applied Chapter 1.08's standards to its Tenant Protection Ordinance ("TPO") rulings, and conflated the two legal standards. (AOB 56-60.) Accordingly, the court's errors under Chapter 1.08 also infected its TPO analysis. Just like the court's error under Chapter 1.08 in imposing civil penalties without requiring the City to first exhaust the available administrative remedies, it also necessarily erred by imposing civil penalties under the TPO without a preliminary administrative assessment. The City concedes that DODG asserted the exhaustion rule as a defense to the City's TPO claim. (RB 30.) So, there's no question that DODG preserved, and did not waive, the issue for appeal.

The City claims that, despite the lack of any authority for a court to award penalties under the TPO, the trial court acted properly in awarding civil penalties under the TPO because when the TPO was amended in 2020, it "simply clarified that [civil] penalties had always been available." (RB 45.) To make this argument, the City turns the express language of the ordinance inside out, and invents its own interpretation. In particular, the City asserts that "'damages' can only reasonably be understood to mean penalties" in this context, despite its acknowledgment, in the same sentence, that damages and penalties "are typically distinct forms of relief." (RB 48.) The City claims these two different words—i.e., damages and penalties—have the same

meaning in the earlier applicable version of the TPO "because the City, as a government enforcement agency, does not suffer 'damages' as a result of a TPO violation." (*Ibid.*)

This type of forced strained construction is improper as a matter of law. (See *Welshans v. City of Santa Barbara* (1962) 205 Cal.App.2d 304, 308 [court "cannot read into the ordinance the strained and tenuous construction urged by [plaintiff]"]; *Richter v. Board of Sup'rs of Sacramento County* (1968) 259 Cal.App.2d 99, 107 [rejecting plaintiffs' strained construction of a zoning ordinance].) The City cannot rewrite the ordinance to find an excuse for the court's error.

The City next claims the court acted well within its discretion in consulting the factors in Chapter 1.08 to award penalties under the TPO. (RB 44-45.) It asserts that because the trial court decided to award a single daily penalty for the periods where violations overlapped, its decision to apply the Chapter 1.08 factors to the City's TPO claim was "doubly reasonable." (RB 45.) The City cites no authority for this proposition.

Instead, it reads the 2014 version of the TPO as authorizing courts to issue civil penalties, even in the absence of an administrative assessment, because it expressly provides for "'enforcement'" by the City Attorney in a civil action, and permitted the City Attorney to ask the City to issue an "'administrative citation or civil penalty.'" (RB 46-47, quoting OMC, § 8.22.670(A)(2) [2014].) This reading of the ordinance holds no water. These unambiguous phrases don't permit the City Attorney to bypass the administrative process. Rather,

they simply permit the City Attorney to file a civil action, *after an administrative assessment has been completed*, to enforce the already-assessed penalties, if and "when the party against whom enforcement is sought has a pattern and practice of violating the TPO." (OMC, § 8.22.670(A)(2) [2014].) Then, and only then, can the City Attorney seek civil penalties in court under the TPO. The City's interpretation that the 2020 TPO amendment simply clarified preexisting law mangles the unambiguous language that the Oakland City Council actually used.

II. THE COURT ERRED IN HOLDING THE MANNS PERSONALLY LIABLE.

A. Because The Manns Acted On Behalf Of Their Corporate Entities And Caused No Physical Injuries, They Cannot Be Personally Liable.

As established in the opening brief, the court wrongfully denied the individual defendants (the Manns) the benefit of the corporate privilege's legal protection, which was specifically designed to shield them from their company's liabilities. (AOB 62-63.) Relying on *Frances T. v. Village Green Owners Assn.* (1986) 42 Cal.3d 490, the City claims the individual defendants can be held *personally* liable because the trial court made numerous factual findings regarding the Manns' individual roles in committing violations. (RB 49-52.) The City's reliance on *Frances T.* is misplaced.

Frances T.'s corporate-privilege exception applies only to tortious conduct that results in a physical injury. (42 Cal.3d at pp. 503-504; see also *Self-Insurers' Security Fund v. ESIS, Inc.*

(1988) 204 Cal.App.3d 1148, 1162-1163 (*ESIS*) [no individual liability under *Frances T.* because the individual's alleged conduct resulted only in *pecuniary* harm rather than tortious conduct resulting in physical injury].) A simple failure to comply with municipal codes, such as those at issue here, does not qualify. (See, e.g., *Los Angeles Unified School Dist. v. Superior Court* (2021) 64 Cal.App.5th 549, 563 [civil penalties lie outside a tort action's perimeters].)

Francis T., itself, defined the limits of imposing personal liability on a corporate officer for his or her individual conduct: It held that the individual liability rule does *not* apply where a corporate agent is being accused of causing "*economic* losses when, in the ordinary course of his duties to his own corporation, the agent incidentally harm[ed] the *pecuniary* interests of a third party." (42 Cal.3d at p. 505, italics added; accord, *ESIS, supra,* 204 Cal.App.3d at pp. 1162-1163.) Thus, as a matter of law, the exception to the corporate privilege is generally restricted to cases involving physical injury, not pecuniary harm, to third persons. (See *United States Liab. Ins. Co. v. Haidinger-Hayes, Inc.* (1970) 1 Cal.3d 586, 595.)

This case fits squarely within this limitation, and outside of the *Francis T.* exception. Unlike this case, *Francis T.* involved tortious conduct resulting in serious physical injury to the plaintiff. In contrast, the Manns' conduct allegedly resulted only in pecuniary harm to DODG's tenants. The Manns were acting solely in the scope and course of their agency for and on behalf of DODG. It was by virtue of their status as officers of DODG, and for no other reason, that the Manns were found liable for

violating the Oakland Municipal Code. (See 1/4CT 1085-1100.) Thus, under the limitations announced in *Francis T.*, no cause of action for negligence or any other tort lies against the Manns in their individual capacities.

Even if the Court doesn't reverse the judgment against DODG, it should apply the well-settled corporate privilege to reverse as to the Manns.

B. Neither The TPO Nor Chapter 1.08 Bypass The Manns' Status As Corporate Representatives Subject To The Corporate Privilege.

The City next claims that both the TPO and Chapter 1.08 impose personal liability on *individuals* who violate these City ordinances. (RB 50-51.) In particular, it claims that the TPO extends personal liability to "any person" including the "Owner's agent." (RB 51, citing OMC, §§ 8.22.640(A), 8.22.670(C).) As established in the opening brief, these sections of the TPO do not extend personal liability for civil penalties to the agents, contractors, subcontractors, or employees of the owners of record. They simply make the owners liable for the conduct of their agents and representatives. (See AOB 67.)

The City relies on section 1.08's definition of a "Responsible Person" to mean that *anyone* who violates the law can be subject to civil penalties—even those generally protected by the corporate privilege. (RB 51.) But if the City had meant such a broad definition, it could—and presumptively would—have simply stated that a "Responsible Person" is any "natural person who is responsible for the creation, existence, commission,

and/or maintenance of a violation." Instead, it also included any "firm, partnership, or corporation"—entities that can only commit violations through the acts or omissions of a natural person. The City's interpretation makes the inclusion of "firm, partnership, or corporation" unnecessary, and courts should avoid interpretations that render language surplusage. (*Metcalf v. County of San Joaquin* (2008) 42 Cal.4th 1121, 1135.) Although the statute also refers to "the agent of any of the aforesaid," logically, that refers to a *third-party* agent—a natural person who is not affiliated with the firm, partnership, or corporation and not shielded by the corporate privilege; otherwise, the City—again—could simply have said natural person, period. To the extent either of the Manns were involved in creating conditions at the properties, their involvement only occurred while each was acting in his or her capacity as director, officer, employee, or member of the corporate defendants, DODG or SBMann2. There is *no* evidence that either individual defendant ever acted in their *individual capacities*. (See MA 40.)[4]

The City's argument that its ordinances should be interpreted to hold individual shareholders, directors, and agents accountable for the conduct and liabilities of the corporate entity defendants has it exactly backwards. California law has long followed the law stating that corporate shareholders, directors, and agents are *not* liable for the acts of corporations and limited

[4] The abbreviation "MA" refers to the concurrently filed "Appellants' Unopposed Motion To Augment The Record On Appeal."

liability companies; rather, the entities themselves are liable for the owners', directors', and agents' acts, within the scope of their agency. (See *Curci Investments, LLC v. Baldwin* (2017) 14 Cal.App.5th 214, 220; *Sandler v. Sanchez* (2012) 206 Cal.App.4th 1431, 1442-1443 [although corporate employers may be held vicariously liable for the tortious acts of their agents committed within the scope of the agency or employment, it is the corporation, not its owner or officer, that is subject to vicarious liability for torts committed by its employees or agents].) As a matter of law, cities may not, by ordinance, create liability that conflicts with, or materially expands California law. (Cal. Const., art. XI, § 7; Gov. Code, § 37100.)

Defense counsel made this argument when the Manns moved for judgment as to their individual liability, thereby preserving the argument for appeal: "It's a standard concept of agency law. It's not that the individual property manager is the one who's ultimately responsible, it's that the owner will be responsible for the actions of the agent." (RT 1654.)

The court erred in rejecting this argument and denying the Manns' motion for judgment as them individually on both of the City's claims.

C. The Court's Legal Basis For Imposing Individual Liability On The Manns Was Incorrect.

Everything the Manns did regarding the buildings at issue was within the scope of their duties as corporate (and LLC) owners. (See AOB 67.) Even the complaint alleges no direct

conduct by either individual defendant. (See, e.g., 1/1 CT 22-23 ¶¶ 14-20; MA 39.) Therefore, the court's findings regarding their individual liability (see 1/4CT 1086, 1091-1092, 1095, 1098-1099) do not justify *personal* liability.

The City asserts that substantial evidence supports the trial court's finding of individual liability. (RB 50-53.) But that doesn't answer the necessary question. The trial court concluded that the City did not have to establish alter ego liability (RB 50; see AOB 64-65, citing 1/4CT 1082-1084), but its reasoning for not applying alter ego was wrong. It erroneously interpreted the definition of "owner of record" to include individuals who are *not* owners of record. (AOB 66, citing 1/4CT 1082-1084.) Its refusal to apply the corporate privilege rested solely on this erroneous interpretation of the TPO. The City doesn't address this argument in the opening brief. Nor does it claim that it ever satisfied its burden of proof to establish alter ego liability.

In any event, no substantial evidence supports the court's findings. (See MA 40.) Everything the Manns "did" was within the scope of their duties as corporate (and LLC) owners. Under the corporate privilege, the corporate entities became subject to vicarious liability, not the owners or officers. (AOB 66-67; *Sandler, supra,* 206 Cal.App.4th at pp. 1442-1443.)

III. THE CITY'S NUISANCE CLAIM AND THE COURT'S INJUNCTION ALSO MUST BE REVERSED ALONG WITH THE JUDGMENT BASED ON THE CITY'S ERRONEOUS FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES.

The opening brief established that the *entire* judgment was infected by the City's failure to exhaust administrative remedies and its violation of due-process-based prerequisites to relief. (AOB 16.)

The City, nonetheless, emphasizes that DODG's opening brief didn't directly challenge liability under state public nuisance law or whether the court had authority to issue an injunction. (RB 54.) But that misses the point. Yes, the opening brief made no such argument, but that's because the court's error in permitting the City to seek relief *before* exhausting the administrative remedies, and awarding civil penalties in the absence of such an assessment, made the *entire* judgment erroneous. That includes all claims and awards, including the court's injunction. (See, e.g., *United Ins. Co. of Chicago, Ill. v. Maloney* (1954) 127 Cal.App.2d 155, 165 ["because of plaintiffs' failure to exercise their administrative remedy, the trial court had no discretion in the matter and should have refused to issue a preliminary injunction"]; *Board of Police Commissioners v. Superior Court* (1985) 168 Cal.App.3d 420, 435 ["the superior court is hereby prohibited from taking any further action in this matter other than to vacate the order granting the preliminary injunction until the administrative remedies have been exhausted in accordance with this opinion"].)

It is undisputed that DODG asserted the exhaustion defense at trial in opposition to the court's injunction and thereby preserved the issue for appeal. (See 1/4CT 1062-1064.) One of DODG's primary arguments in opposition to the injunction was that "the court cannot issue an injunction that bypasses the administrative process." (1/4CT 1062, first caps and boldface normalized.) The opening brief also directly raised the argument that "[t]he City's failure to exhaust administrative remedies … infects the entire judgment, *both* the civil penalties and the injunction." (AOB 16, original italics; see also AOB 42 ["The Court also erred in awarding civil penalties and an injunction under OMC Chapter 1.08," first caps and boldface normalized], 75 ["this Court should reverse the entire judgment, including the injunction"].)

IV. THE CIVIL PENALTIES AWARDED FOR 276 HEGENBERGER ROAD WERE EXCESSIVE.

The opening brief establishes that no substantial evidence supports a finding that the authorized tenancy requirement—which only allows penalties to be imposed based on authorized tenancies—is satisfied for 276 Hegenberger, pre-dating the City's violation notices. (AOB 68-69.) Accordingly, 580 days-worth of penalties awarded by the court were improper. The City claims that the absence of written leases in the record is irrelevant to whether tenancies exist, and that substantial evidence supports the amount of court's civil penalty. (RB 56.) The City's arguments do not withstand scrutiny.

First, the City relies on (a) evidence that DODG admitted to illegally converting the warehouse into residential units and, at some undefined point in time, rented these units to residential tenants, and (b) Baljit Mann's admission in his answer that he allowed tenants to live in the warehouse. (RB 55.) But a close inspection of the City's record references reveals that none of the statements include any dates or time-periods that could qualify as substantial evidence that the tenancies were authorized *during the relevant time period*. (See 1/4CT 1085; RT 962-967, 1492-1493, 1489-1490, 1500-1501.) The sole reference to a time-period in the trial record—in DODG's answer—stated that "at least one of the tenants [of 276 Hegenberger Road] lived in this storage warehouse for fifteen years." (1/1CT 24 ¶ 28; see also RT 966 [read into the record].) But nothing in this statement establishes that this particular tenancy was authorized.

Next, the City points to an unrelated unlawful detainer action brought by DODG against a tenant located at a different address—*280* Hegenberger Drive—as evidence of authorized tenancies in *276* Hegenberger Drive. (RB 55, citing Exh. 63.) Evidence about a tenancy at a different address cannot constitute substantial evidence of anything at 276 Hegenberger Drive.

Finally, the fact that City personnel "encountered at least 15 households" when they inspected 276 Hegenberger Road in 2018 (see RB 55), in no way establishes that these tenancies were authorized during the time period for which the court penalized DODG.

V. THE TRIAL COURT'S ATTORNEY FEE AND COSTS AWARDS MUST BE REVERSED.

A. The City Doesn't Contest That The Court's Reversal Of Any Portion Of The Judgment Requires A Reversal As To The Trial Court's Attorney Fee And Costs Awards.

The opening brief established that if the Court reverses any portion of the judgment, it must also reverse the attorney fee and costs awards for a redetermination on remand, as the City will no longer necessarily be the prevailing party and may not be entitled to the same amounts the trial court previously awarded. (AOB 70.) The City makes no attempt to refute this argument, thereby conceding the point.

B. Contrary To The City's Claim, The TPO Does Not Permit Courts To Bypass Other Requirements To Obtain Attorney Fees.

The City doesn't contest the argument that OMC section 1.08.040(G) doesn't support the attorney fee award since it contains no prevailing party provision. (See AOB 71-72.) It claims this doesn't matter because the TPO authorizes attorney fees, and the two municipal codes are "'inextricably intertwined.'" (RB 56.) But the case it cites for this proposition has nothing to do with OMC Chapter 1.08 or the TPO. (See *ibid.*, quoting *Harman v. City and County of San Francisco* (2007) 158 Cal.App.4th 407, 417 [attorney fees under 42 U.S.C. § 1988].)

In any event, the City's reliance on the "'inextricably intertwined'" test is misplaced. That test addresses whether

attorney fees can be apportioned between two claims, not whether a prevailing party is entitled to attorney fees based on a different statute. (*Ibid.*, citing *Harman*, at p. 417; see *California Building Industry Association v. State Water Resources Control Board* (2018) 4 Cal.5th 1032, 1043 ["It is axiomatic that cases are not authority for propositions that are not considered"].)

C. The City Is Not Entitled To A Multiplier.

The City doesn't contest the opening brief's argument that the attorney fee provision in Chapter 1.08 does not conform with Government Code section 38773.5, thereby making any award under chapter 1.08 erroneous. (See AOB 71.) Therefore, the only question is whether the court properly awarded an attorney fee multiplier under the TPO. (See AOB 72.)

Not only does the City claim that the court's 2.1 multiplier was justified under the TPO (RB 62), it claims that the multiplier was "*required*" because the base lodestar amount was "insufficient to capture the fair market value of the legal services provided" (RB 57, original italics). It asserts that this rule equally applies to both private litigants and public entities. (RB 58, original italics.) Yet it cites no authority supporting its claim that this rule applies where, as here, the multiplier simply awards more money to the City and increases the City treasury.

The opening brief amply demonstrates why the Code of Civil Procedure section 1021.5 multiplier bar against fee awards to public entities is analogous and controlling as to the City's fee provision here—that statute awards prevailing-party fees in actions resulting in the enforcement of important rights affecting

the public interest, which is basically what the City claims it did here. (See AOB 72-74.)

The City asks the Court to ignore section 1021.5's bar. (RB 59-62.) It argues that section 1021.5 doesn't prohibit fee enhancements when government-entity plaintiffs recover fees under other statutes or local laws, and that section 1021.5's framework is different from the TPO and has a different purpose. (RB 60-61.) But there's no reason not to apply the same rationale to a government plaintiff attempting to abate a nuisance: (1) The City, even under its own view of what happened here, was a "successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest"; (2) the lawsuit conferred "a significant benefit" on the general public—namely, an injunction to abate existing violations of the Building, Fire and Health & Safety Codes—and (3) the lawsuit was a financial burden for the City. (Code Civ. Proc., § 1021.5.) In such cases, attorney fees awarded to a public entity "*shall* not be increased or decreased by a multiplier." (*Ibid.*, italics added; see also *Sweetwater Union High School Dist. v. Julian Union Elementary School Dist.* (2019) 36 Cal.App.5th 970, 991-992 [court applied section 1021.5 where a public entity sued on behalf of the public in an enforcement action].) The court should apply this rationale to the trial court's 2.1 multiplier.

The City now concedes that the contingent-risk factor the trial court expressly considered doesn't apply and that the court erred by considering it as a basis for awarding a multiplier. (RB 65; see 2/2CT 486-487.) But it tries to side-step this error by

claiming other factors support the court's exercise of discretion. (RB 62-66.) The error cannot be avoided. The substantial impact of the court's error on the weighing of fee enhancement factors is irrefutable. The court found that "this was a fully contingent case" and, that the contingent risk in this case was worth "at least 1.75 if not more." (2/2CT 487.) Thus, even if this Court permits the City to claim a multiplier, the fee award must be reversed and remanded with instructions for the trial court to reconsider fees without considering contingent risk. One can only speculate what multiplier, if any, the trial court would have imposed had it not improperly considered the contingent risk factor. In any event, the attorney fee award must be reversed with the judgment to newly determine the prevailing party and fee amount, if any, to award.

CONCLUSION

The respondents' brief provides no legal basis to excuse either the City from failing to exhaust the available administrative remedies or the trial court's decision to hear this case despite the City's failure to exhaust.

The respondents' brief also fails to establish any proper legal basis for the court's decision to impose personal liability on the individual owners of the corporate defendants that own the subject properties.

And, nothing in the respondents' brief supports the court's imposing a 2.1 multiplier on the attorney fee award—especially given that fee enhancements awarded to public entities are disfavored.

For all of the above reasons as well as those asserted in the opening brief, the Court should reverse.

January 16, 2024

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CERTIFICATION

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify that this **APPELLANTS' REPLY BRIEF** contains **12,669** words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Date: January 16, 2024 */s/ Gary J. Wax*

Gary J. Wax

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 6420 Wilshire Boulevard, Suite 1100, Los Angeles, California 90048; my electronic service address is chsu@gmsr.com.

On January 16, 2024, I served the foregoing document described as: **APPELLANTS' REPLY BRIEF** on the parties in this action by serving:

SEE ATTACHED SERVICE LIST

(X) I electronically filed the document(s) with the Clerk of the Court by using the TrueFiling system. Participants in the case who are registered TrueFiling users will be served by the TrueFiling system. Participants in the case who are not registered TrueFiling users will be served by mail or by other means permitted by the court rules.

(X) By Mail: By placing a true copy thereof enclosed in sealed envelopes addressed as above and placing the envelopes for collection and mailing following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

Executed on January 16, 2024, at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Chris Hsu

Chris Hsu

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