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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

MARINA AVETISYAN,

Plaintiff and Appellant,

v.

CITY OF GLENDALE,

Defendant and Respondent.

B264411

(Los Angeles County
Super. Ct. No. BS149074)

APPEAL from a judgment of the Superior Court of Los Angeles County, Joanne O'Donnell, Judge. Affirmed.

Marina Avetisyan, in pro. per.; Law Office of Leon Laufer, Leon R. Laufer, for Plaintiff and Appellant.

Michael J. Garcia, City Attorney, Miah Yun, Assistant City Attorney, for Defendant and Respondent.

Petitioner Marina Avetisyan (petitioner) planned to build a new house on a hillside lot in the City of Glendale (City). The plans called for a house that would be roughly eight feet taller than the surrounding homes. The City’s Design Review Board refused to approve the planned development under the City’s zoning ordinance, finding the height of petitioner’s planned house was incompatible with the neighborhood. When petitioner appealed to the City Council, it reached the same conclusion. Petitioner sued, seeking a writ of mandate to overturn the City Council’s decision. The trial court denied her writ petition, and petitioner now invokes our jurisdiction, asking us to decide whether the City Council proceeded according to law and whether its decision is supported by substantial evidence.

I. BACKGROUND

A. *Legal Background: The City’s Zoning Ordinance*

The City enacted a zoning ordinance “to designate, regulate and restrict the location and use of buildings, structures and land to protect residential, commercial, and industrial . . . areas alike from harmful encroachment by incompatible uses.” (Glendale Mun. Code §§ 30.01.010, 30.01.020.) The zoning ordinance requires a conditional use permit for proposed construction on property lots that do not meet minimum size and width standards. (Glendale Mun. Code §§ 30.42.010.)

The City’s zoning ordinance also establishes a design review process for construction of new buildings and structures, unless a specified exemption applies. (Glendale Mun. Code § 30.47.020.) Among other things, the design review process is intended to “ensure single-family design which is compatible with the character inherent within the surrounding neighborhood[.]” (Glendale Mun. Code § 30.47.010, subd. (G).) The City’s design review authorities, which include the Director of Community Development, the Design Review Board, and ultimately, the City Council, are authorized to impose conditions on development plans “to ensure compatibility with surrounding development in terms of size, scale, bulk/mass, roofline orientation, setbacks, and site

layout.” (Glendale Mun. Code § 30.47.030, subd. (K).) The zoning ordinance provides standards to govern design review by the City authorities; among other things, the standards require the reviewing authority to avoid conflicting relationships between new development and adjacent buildings. (Glendale Mun. Code § 30.47.040, subd. (B).) With regard to single-family building design, the zoning ordinance directs City reviewers to ensure design that is compatible with the character of the surrounding neighborhood, specifically considering “such design elements as massing, scale, height” and other criteria. (Glendale Mun. Code § 30.47.040, subd. (D).)

The zoning ordinance authorizes City design review authorities to conduct up to three reviews of a proposed development project. During the first and second reviews, the reviewing authority may approve the project without conditions, approve the project with conditions, or return the project for redesign. (Glendale Mun. Code § 30.47.075, subd. (C).) During the third and final review, the reviewing authority may approve the project with or without conditions, or it may deny the project. An aggrieved party is entitled to appeal the reviewing authority’s determination to the City Council. (Glendale Mun. Code § 30.47.100.)

B. The Subject Property and Petitioner’s Development Plans

Petitioner owns an undeveloped lot on Deer Creek Lane in the City’s Oakmont View subdivision. Many of the surrounding lots in the subdivision are irregularly shaped, and they are primarily developed with homes built in the 1980’s and 1990’s—mostly two-story residences that are similar to each other in mass, scale, and design. Because of the hillside topography, petitioner’s lot slopes downhill at the rear of the lot.

Petitioner developed plans to construct a new, two-story, 3,522 square foot single-family residence with an attached two-car garage on her lot (the Project). Because the width of petitioner’s lot is below the minimum threshold set by the City’s zoning ordinance, petitioner was required to obtain a conditional use permit before proceeding with development and construction. (See Glendale Mun. Code § 30.42.010.) As a new

proposed building that did not qualify for an exemption, the Project was also subject to design review under the zoning ordinance. (Glendale Mun. Code, § 30.47.020.)

C. The Conditional Use Permit, and the First Design Review Board Meeting

Petitioner submitted an application to obtain a conditional use permit for the Project. City staff analyzed her application and prepared a report for the City's Planning Hearing Officer that recommended granting a conditional use permit (CUP) subject to review and approval of the Project by the City's Design Review Board. The staff report noted that petitioner had not incorporated design revisions suggested by staff, and it stated that "the project's overall mass and scale and design should be reevaluated before proceeding to the design review. If appropriate changes are not made, Planning Division staff would not be able to support the design of the project." The City's Planning Hearing Officer adopted the report's recommendation and granted petitioner a CUP with a condition requiring petitioner to obtain the Design Review Board's approval before submitting a building permit.

Petitioner submitted a design review application for the Project on August 3, 2012. After petitioner submitted her application, other residents of the Oakmont View subdivision wrote to the City to protest the proposed design of the Project, complaining that the height of the home would significantly exceed the height of the neighboring houses. Neighbors submitted photographs showing the height of the house exceeded that of its two next-door neighbors by about eight feet. The photographs showed a house that was about 24 feet high, while the neighboring houses were 16 feet.¹ The City noticed a public meeting of the Design Review Board.

City staff prepared a report in advance of the Design Review Board meeting. The report concluded site planning for the Project was appropriate given the shape of the lot and the adjoining properties. The report described the planned house as classically

¹ The photographs depict poles and string that have been installed on the empty lot to illustrate the proposed height of the house. (See Glendale Mun. Code, § 30.40.020, subd. (G.) [applicant required to construct temporary frame consisting of wood posts and taut rope illustrating the silhouette of the proposed structure].)

designed with a flat roof and a boxy appearance, and the front elevation of the house was 23 feet, 9 inches. The report indicated a flat roof contributed to the appearance of a smaller or shorter building, but it also noted that “additional opportunities exist to further reduce the overall height of the building in order to make it more similar in scale to the adjoining buildings.” The report recommended, among other things, lowering the height of the building by reducing the floor-to-ceiling height on each level, depressing the garage in a manner similar to other residences on the same street, and lowering the height of the front window.

At the Design Review Board meeting, which took place on March 7, 2013, Board members recognized the Project would be taller than the neighboring properties but concluded the staff recommendations to mitigate the height discrepancy were appropriate. The Board therefore returned the Project for redesign and specifically recommended reducing the ceiling height of the first floor from 11 feet to 10 feet and depressing the residence and garage lower than proposed to follow the topography of the lot.

D. The Second Design Review Board Meeting

Petitioner submitted a new application to the Design Review Board with revised plans for the Project. A City staff report detailed the revisions to the Project’s design and noted the new plans did not depress the building as previously recommended. The staff report again recommended approval of the revised Project but reiterated the condition that the building and garage be depressed to follow the topography of the lot “in a manner that will not create a sunken appearance, but allows the building to follow the topography of the lot in a sensitive manner.”

At the hearing before the Design Review Board on September 12, 2013, the Board found that the first floor height had been reduced only by six inches, rather than a full foot, and it noted that the garage and residence had not been depressed as previously recommended. The Board accordingly returned the Project for redesign to fully incorporate all of the initial recommended revisions to the plans.

E. *The Third Design Review Board Meeting*

After the Design Review Board rejected the Project plans at the second meeting on September 12, 2013, petitioner wanted to appeal the Board's decision to the City Council. To do so, however, petitioner needed to file a third application before the Design Review Board before proceeding with the appeal. Petitioner therefore submitted an application that was identical to the proposal the Board rejected during the second meeting. At the third meeting before the Board, petitioner's representative said he would not lower the house any further and asked the Board to deny the Project application. The Board did so.

F. *The Appeal to the City Council*

Petitioner appealed the Design Review Board's decision to deny the Project on November 20, 2013. In her appeal application to the City Council, petitioner contended that the garage driveway could not be lowered any further because it would be difficult to use; that it was impossible to design the garage so it would be depressed yet not appear sunken, which is what the Design Review Board had requested; and that the mandate to reduce the building's height was technically impossible to achieve, arbitrary, and imposed "simply to placate some of the opposing neighbors."

At a meeting held on March 4, 2014, the City Council heard testimony from a City staff member concerning the three previously-held meetings on petitioner's application, including the changes recommended by the Design Review Board to reduce the height of the Project. The City staff member conceded that the Project "meets the Zoning Code," i.e., that it was within generally applicable maximum height limits, but explained that "the Design Review Board has the authority . . . to make sure that the level of compatibility is achieved among all the homes in this neighborhood." A number of petitioner's neighbors testified in opposition to the project, arguing the proposed building was too tall and incompatible with the other houses in the neighborhood. The Project architect also testified and conceded it was technically possible to reduce the height of the Project.

Petitioner's son, speaking on her behalf, asserted that the design of the house was based on and complied with the City's zoning code. He stated petitioner would not lower the house, and he claimed that the neighbors objected to the height of the Project merely as a pretext to delay it from being built.

After hearing from witnesses, councilmembers expressed their views on the merits of the Project. One councilmember explained that he would not vote to approve the Project because the Design Review Board had been granted discretion to measure proposed projects for compatibility in the neighborhood. Another councilmember stated she had visited the Project site and explained how that visit figured into her decision to sustain the Design Review Board's decision: "[T]his is one of those projects where you really need to see the site. It's very important. I could see the story poles [see *ante*, fn. 1] from down the block. Now, granted there is a slight . . . upslope, but you generally don't see the roofs as you drive up, but these story poles really tower over the whole block. It is significantly, significantly taller than the other houses. It's even taller than the houses on the upslope side, and that's saying something . . . [¶] . . . We don't have a view ordinance but we do have a compatibility ordinance and sometimes that's hard for people to understand because they say, 'I've complied with all the Zoning rules. Why can't I have exactly what I want?' [¶] But that's not the way the City of Glendale works. The Design Review Board does have the authority primarily to ensure compatibility, and they are allowed to trump Zoning to do that." After additional comment from other members, the City Council unanimously voted to sustain the Design Review Board's denial of the Project.

G. *The Petition for Writ of Administrative Mandamus*

Petitioner filed suit seeking a writ of administrative mandamus, principally contending the Project met all the requirements of the City's zoning ordinance, yet the City failed to proceed in the manner required by law and without substantial evidence to support its decision to require her to reduce the height of the Project.

The City opposed the petition, arguing the conditions of approval the City reviewing authorities imposed were authorized by the City's zoning ordinance, which directs City personnel to ensure residential construction is compatible with neighboring properties. The City also explained that review under the ordinance was not limited to a determination of whether the project complied with general zoning rules; rather, the project also was subject to design review.

The trial court denied the petition. Petitioner filed a motion for a new trial based on newly discovered evidence, which the trial court denied as untimely and unsupported by the necessary evidence. The court entered judgment in the City's favor.

II. DISCUSSION

A. *Standard of Review*

Judicial review of administrative land use decisions is governed by Code of Civil Procedure section 1094.5. (*Saad v. City of Berkeley* (1994) 24 Cal.App.4th 1206, 1211.) That section permits a court to issue a writ of mandate if it finds an agency has abused its discretion, and an abuse of discretion is established "if the [agency] has not proceeded in the manner required by law, the [agency's] decision is not supported by the findings, or if the findings are not supported by the evidence." (Code Civ. Pro. § 1094.5, subd. (b).)

Where, as here, an administrative decision does not involve or substantially affect a fundamental vested right, a trial court deciding a section 1094.5 writ petition examines the administrative record to determine whether the agency's decision and its findings are supported by substantial evidence. (*Amerco Real Estate Company v. City of West Sacramento* (2014) 224 Cal.App.4th 778, 783-84 [discretionary land use decisions involving design-based considerations do not involve a fundamental right]; *City of Walnut Creek v. County of Contra Costa* (1980) 101 Cal.App.3d 1012, 1016.) Our function is identical to that of the trial court—we review the administrative record to determine whether petitioner has shown the agency's findings were not supported by substantial evidence. (*SP Star Enterprises, Inc. v. City of Los Angeles* (2009) 173

Cal.App.4th 459, 469 [agency’s findings presumed to be supported by substantial evidence and appellant challenging findings has the burden to show they are not].)

B. *The City Council’s Decision to Withhold Design Review Approval Was Legally Proper and Supported by Substantial Evidence*

Petitioner contends the City Council misinterpreted provisions of the City zoning ordinance and, in so doing, acted in excess of its authority. She also argues there was no substantial evidence before the council to justify its decision to deny design approval for the Project. Neither contention has merit.

Petitioner’s argument that the City did not proceed according to law is premised on a misunderstanding of the City’s zoning ordinance. She first identifies a section of the ordinance that establishes general development standards in restricted residential districts (her lot is situated in such a district), and she specifically points to a provision that states “[no] primary building . . . shall exceed two (2) stories in height or exceed a height of thirty-two (32) feet” (Glendale Mun. Code § 30.11.040, subd. (E).) This maximum allowable height provision, however, does not undercut other provisions of the zoning ordinance that require a development to be compatible with the surrounding neighborhood. (Glendale Mun. Code §§ 30.11.040, subd. (A) [“[d]evelopment shall be compatible with the surrounding neighborhood in terms of size, scale, bulk/mass, roofline orientation, setbacks, and site layout”], 30.47.040, subds. (B), (D) [review authority shall ensure design compatible with character of the surrounding neighborhood and avoid conflicting relationships to adjacent structures].) Here, the City Council determined that the Project was not compatible with the surrounding neighborhood, notwithstanding the general maximum height allowance, because the Project would be significantly taller than the adjacent homes. As we will discuss momentarily, substantial evidence supports that determination.

Petitioner also argues that the height conditions the City imposed on her project conflict with section 30.47.030, subdivision (K) of the zoning ordinance, which, according to petitioner, prohibits the City from reducing the size or scale of a project.

Petitioner misreads the provision as an unqualified limitation on the City's design review authority when it is in fact more narrow. It merely prohibits reviewing authorities from reducing the size of a project solely to accommodate concerns involving privacy, access to natural light, and placement of windows: "Notwithstanding any provision of Title 30, the review authority shall have the authority to impose conditions in order to ensure compatibility with surrounding development in terms of size, scale, bulk/mass, roofline orientation, setbacks, and site layout. *Regarding privacy, access to natural light, and placement of windows, the review authority shall consider alternative arrangement of windows or building massing or site layout to avoid conflicting relationships to adjacent buildings, structures, improvements and uses; for these reasons alone, however, the review authority shall not reduce the size or scale of a project . . .*" (Glendale Mun. Code § 30.47.030, subd. (K)(1) (emphasis added).) The City's compatibility concerns that led it to deny the Project were not based solely on privacy, natural light, or window concerns, and the limitation in subdivision (K) is therefore inapplicable.

Finally, petitioner is also wrong to suggest there was no substantial evidence supporting the City Council's determination that the height of the Project rendered it incompatible with the surrounding neighborhood. The City Council had before it photographs showing the height of the Project in relation to the adjacent homes, testimony and correspondence from neighbors about the incompatible height differential, and the observations of at least one councilmember on a site visit, which led her to conclude the Project would be "significantly, significantly taller than the other houses." This evidence amply supports the City Council's findings. (See, e.g., *Guinnane v. San Francisco City Planning Com.* (1989) 209 Cal.App.3d 732, 742-743 [upholding city's decision to refuse permit where proposed house was too massive and not in character with the neighborhood].)

C. *New Trial Motion*

Petitioner argues that the trial court erred in failing to grant her motion for reconsideration or, in the alternative, motion for new trial (the Motion) that was

predicated on what she claimed was “newly discovered evidence,” namely her allegation that self-interested members of the City Council heard her appeal of the Design Review Board’s decision to reject the Project.

The trial court denied the Motion on May 27, 2015. The court concluded it could not reconsider its ruling on the writ petition because it had already entered judgment by that date, which divested the court of authority to grant reconsideration. (*Sole Energy Co. v. Petrominerals Corp.* (2005) 128 Cal.App.4th 187, 192 [“A trial court may not rule on a motion for reconsideration after entry of judgment”].) The court also stated it would deny the Motion even if it had jurisdiction to decide it because the Motion was not accompanied by an affidavit stating what new and different facts or law justified reconsideration. (Code Civ. Pro. § 1008, subds. (a), (b); *McPherson v. City of Manhattan Beach* (2000) 78 Cal.App.4th 1252, 1265.) Similarly, as to petitioner’s request for a new trial, the trial court found it defective because petitioner had not attached an affidavit or declaration demonstrating diligent efforts to bring the claimed new evidence before the court in a timely fashion. (Code Civ. Pro. § 657, subd. 4; Code Civ. Pro. § 658 [motion “must be made upon affidavits”]; see also *Plancarte v. Guardsmark, LLC* (2004) 118 Cal.App.4th 640, 646 [party seeking new trial based on newly discovered evidence must show “he or she exercised reasonable diligence in discovering and producing it”].)

We conclude the trial court did not err in denying the Motion for the reasons expressed above.

DISPOSITION

The judgment is affirmed. Respondent is to recover its costs on appeal.

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BAKER, J.

We Concur:

TURNER, P.J.

KRIEGLER, J.