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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

NANCY ARMATO et al., Plaintiffs and Appellants, v. CITY OF MANHATTAN BEACH et al., Defendants and Respondents; JOSEPH M. PAUNOVICH, Real Party in Interest and Appellant.	B267734 (Los Angeles County Super. Ct. No. BS142266)

APPEAL from a judgment of the Superior Court of Los Angeles County. Luis A. Lavin and Joanne O'Donnell, Judges. Affirmed in part and reversed in part.

Kendall Brill & Kelly, Alan Jay Weil, Laura W. Brill, and Richard M. Simon for Plaintiffs and Appellants Nancy Armato and Rosario P. Armato.

Horvitz & Levy, David M. Axelrad and John A. Taylor, Jr.; Jeffer Mangels Butler & Mitchell, Benjamin M. Reznik and Matthew D. Hinks for Real Party in Interest and Appellant Joseph M. Paunovich.

Richards, Watson & Gershon, Quinn M. Barrow, Ginetta L. Giovinco, and Marvin E. Bonilla for Defendants and Respondents.

Jennifer B. Henning as Amicus Curiae for California State Association of Counties and League of California Cities on behalf of Defendants and Respondents, and Real Party in Interest and Appellant Joseph M. Paunovich.

This appeal involves the City of Manhattan Beach's (city's) approval of plans allowing appellant Joseph M. Paunovich (Paunovich) to build a home on property he owns in the city. Cross-appellants, Nancy and Rosario P. Armato (Armato), Paunovich's neighbors to the east, challenged the city's approval of the plans Paunovich submitted to the city.[1] Following administrative proceedings, Armato filed an administrative mandamus action in the Superior court pursuant to Code of Civil Procedure section 1094.5.

After the writ was filed, Paunovich obtained over-the-counter approval for a revision to his earlier Coastal Development Permit (CDP) permitting him to convert a portion of a previously approved crawlspace into a 200 square foot below-ground basement storage area. Armato then filed a second amended writ petition, adding a new cause of action pursuant to Code of Civil Procedure section 1085 related to the city's approval of the basement.

The Superior Court granted in part, and denied in part, Armato's writ. The court denied the writ as to the original claims challenging the city's approval of Paunovich's home construction. The court granted the writ as to the cause of action relating to

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[1] Rosario Armato died in 2014, during the pendency of this litigation. Nancy Armato is the remaining appellant.

the basement revision, on the ground that the city failed to proceed in a manner required by law when it approved the basement without providing Armato notice or an opportunity to be heard.

Paunovich appeals from the portion of the Superior Court's decision concerning the basement revision.

Armato cross-appeals from the denial of the writ challenging the initial approval of the CDP.

We find no error in the trial court's denial of the writ on the causes of action concerning the approval of the original CDP. However, we find that the trial court erred in overturning the revision. Therefore, we reverse the trial court's grant of traditional mandamus pursuant to Code of Civil Procedure section 1085.

FACTUAL AND PROCEDURAL BACKGROUND

The parties' properties

Armato and her family have resided for 45 years in their single family home on Crest Drive in the city. The home is located three blocks from the beach, on a rising sandy slope. The Armato home was originally built on a full-size lot in 1930, but the lot was split in half in the mid 1960's. The Armato home is now a legal nonconforming structure that sits on the edge of the present subdivided lot line on the east half of the split lot. At the time this dispute arose, the Armatos enjoyed an unobstructed view of the Pacific Ocean from the primary living area on the second floor of their home.

The Armato home and the surrounding area lie within the California Coastal Zone and are protected by the California Coastal Act (Coastal Act). Pursuant to the Coastal Act, local governments are required to develop local programs to set forth their policies and plans for coastal development. (Pub. Resources Code, §§ 30210-30265.5.) Coastal permits in the city are

governed by the city's Local Coastal Program (LCP), a set of development regulations. The LCP provides that, unless an exemption applies, any person undertaking development, as defined in LCP section A.96.030, must obtain a discretionary coastal development permit. (LCP § A.96.040).

Paunovich purchased the property on 25th Street in 2012. Paunovich's property sits on the western end of Armato's split lot, directly between the beach and the Armato home, on the corner of 25th Street and Highland Avenue.

The Coastal Development Permit (CDP)

On October 12, 2012, Paunovich applied for a CDP to allow the demolition of an existing duplex on his property and the construction of a new, single-family residence. Paunovich sought no variances, adjustments or any other deviation from the city's zoning and building codes.

The city's Director of Community Development granted the CDP on December 19, 2012. Written findings are required on all decisions granting CDPs, demonstrating that the project, as described in the application and accompanying material, conforms with the city's LCP. Such findings were set forth on Paunovich's CDP, including the finding that the project is "consistent with the residential development policies of the Manhattan Beach Local Coastal Program." The project was also deemed to be "consistent with the public access and recreation policies" of the California Coastal Act as well as "in compliance with the City's General Plan designation of High Density Residential."

The CDP was subject to certain standard conditions and two special conditions. Standard condition No. 3 provided that all development "must occur in strict compliance with the proposal as set forth in the application for permit . . . [a]ny deviation from the approved plans must be reviewed and

approved by the Director of Community Development." Standard condition No. 4 provided that "Any questions of intent or interpretation of any condition will be resolved by the Director of Community Development."

Special condition No. 2 provided that:

> "The project shall be constructed in substantial compliance with the submitted project description and plans as approved by the Community Development Director on December 19, 2012. Any substantial deviation from the approved plans must be reviewed by the Director to determine if any Amendment to this Coastal Permit is required."

The administrative appeals

On December 27, 2012, Armato appealed the CDP to the city's Community Development Department. Armato argued that the city's general plan and municipal code are intended to prevent situations such as this, where developers overbuild on small lots with narrow setbacks, adversely impacting surrounding properties. Armato argued that the proposed development violated the city plan and code because (1) the developers had failed to show that the lot corners were representative of the site topography; and (2) the proposed building was a four-story structure, which is specifically prohibited by the city's plan and the city's code, both of which specify that the maximum height of a home is three stories. Armato challenged the city's calculation of the lot's elevation. Armato further challenged the city's determination that the development was not a four-story building because the floors were not "stacked."

The city Planning Commission heard Armato's appeal on February 13, 2013. A staff report created for the hearing recommended denying Armato's appeal. The report noted that

the Director correctly applied the Municipal Code to determine the height of the property. During the hearing, Planning Manager Laurie Jester provided a detailed analysis of the height regulations under the code. There was also open discussion regarding how stories are defined under the municipal code. Jester noted that Paunovich's home was within the height and story limitations of the code.

Many people spoke at the hearing on both sides of the issue. It was noted that nothing in the code protects the views of adjacent property owners. After deliberations, the Planning Commission voted unanimously to deny Armato's appeal and uphold the Director's approval of the permit.

Armato then appealed the Planning Commission's decision to the city council, which is required to consider the matter at a public hearing, de novo. (Manhattan Beach Mun. Code, § 10.100.010(D) (MBMC).) Armato again argued that the project was a four-story building, in violation of the city plan and municipal code; the elevation survey was not representative of the topography of the site due to the existence of retaining walls; and the community director should have selected an elevation that minimizes the impact on adjacent properties and encourages the consistency of maximum building heights.

Armato submitted the report of Certified Engineering Geologist John Franklin, who opined:

> "[F]ill exists on both the eastern and northern property margins at 301/303 25th Street. Additionally, the geomorphic data indicates that existing grade just below the property line at 2501 Crest Drive, and to the existing building on 301/303 25th Street, has been achieved by filling in ± 2 to 4 ½ feet of soil above original natural grade in this area."

The public hearing before the city council took place on March 6, 2013. Again, a staff report recommended denial of Armato's appeal. Planning Manager Jester gave a presentation regarding the issues raised in Armato's appeal. She acknowledged the language of MBMC section 10.60.050(A) requiring selection of a reference elevation that minimized, to the extent reasonably possible, adverse impacts to neighboring property owners. Jester stated that the city's actions were in line with the language of MBMC section 10.60.050(A) because the city averaged elevations for the northwest corner through historical data. The city looked at neighbors' surveys, to see what points were used there, for consistency. Jester explained that this averaging "minimizes the adverse impacts because it's consistent with the maximum building height limits of adjacent properties." The city looked at surveys from 1966, 1988, and 1989, as well as street plans from 1913, and all were consistent with the elevations. Jester indicated that Armato's theory was not feasible, as "[t]o have a point seven feet lower right at the location where the house is built physically wouldn't be possible." Jester also indicated that there was no evidence of in-fill on the site. In response to a council member's question whether the city has a view ordinance, Jester confirmed it does not. When asked, "Do you protect anyone's views?" Jester responded, "No, we do not." Jester was also asked if the proposed home was a four-story building. She replied, "No, it is not."

The city council voted three to two to deny Armato's appeal and approve Paunovich's CDP. One of the members voting to deny the appeal was Richard Montgomery, whom Armato alleged

had private communications with Paunovich prior to the hearing and had substantially made up his mind prior to the hearing.[2]

Following the vote, the city council directed that a resolution be prepared denying Armato's appeal. On or about March 19, 2013, the city council formally adopted a resolution that set forth certain findings in support of the city council's denial of the appeal and approval of the project. The resolution included the following factual findings:

1. Paunovich's proposed residence complied with "all development standards, zoning codes, and Local Coastal Program requirements";

2. In making its final determination, "[t]he Council considered oral and written evidence, including testimony and written material submitted by [the parties] and others";

3. The Director's method of calculating the reference height of Paunovich's family home was consistent with the requirements of the Code, and "minimizes, to the extent reasonably possible, adverse impacts on adjacent properties";

4. The elevations of Paunovich's lot, as well as those of the surrounding area, "ha[d] not changed significantly in the last 100 years";

5. The City of Manhattan Beach does not have a view ordinance;

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[2] During the hearing, two city councilmembers disclosed on the record that they had previous discussions with the Armatos, Paunovich and other neighbors concerning the appeal. Those individuals were Councilmember Montgomery and Councilmember Tell. Councilmember Montgomery disclosed that he had previous conversations with Leonard Armato, whom he described as a "friend," and the Armato family, as he had known them for years. In addition, he spoke to Paunovich by phone.

6. The Director's height determination was "reasonable and supported by substantial evidence";

7. Paunovich's planned home was three stories and thus complied with the General Plan goals of "protect[ing] vistas of the ocean, and preserv[ing] the low-profile image of the community"; and

8. Paunovich's proposed residence was "consistent with the 30-foot Coastal Zone residential height limit as required by the Local Coastal Program-Implementation Plan."

Writ petition

On March 27, 2013, Armato filed a petition for writ of mandate and complaint for declaratory relief pursuant to Code of Civil Procedure section 1094.5[3] seeking to set aside the city council's decision denying Armato's appeal of the Paunovich CDP. At the same time, Armato filed an ex parte application for stay of the council action, pending judicial review. On March 29, 2013, the court denied the stay application.

On April 22, 2013, Armato filed a first amended petition for writ of mandate and complaint for declaratory relief. The amended writ contained two causes of action. The first cause of action for writ of mandate alleged that the city had failed to act in accordance with the law in (1) approving a project that is four stories, in violation of MBMC section 10.12.030(H); (2) failing to reduce the height of the project to minimize, to the extent reasonably possible, the adverse impact of the project on adjacent properties; (3) denying Armato a fair and impartial quasi-judicial hearing; and (4) depriving Armato of her due process rights during the process. The second cause of action for declaratory relief sought a declaration that "the Project is in reality four

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[3] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

stories and not in compliance with the Manhattan Beach Municipal Code and General Plan."

Revision Permit

On April 2, 2013, Paunovich submitted to the city's Planning Division a proposed modification to the approved plans. The modification included an addition of a 200 square foot, below-grade, non-habitable basement storage area. According to a declaration filed by Planning Manager Jester:

> "This minor modification did not change any of the external features of the home since it is an entirely below-grade room (*i.e.*, you cannot see it from outside his home) and uses a portion of the already existing and approved crawl space area on [Paunovich's] project. [Paunovich's] project has approximately 193 square feet beyond the walls of this below-grade basement room that is still considered non-habitable crawl space area."

The city determined that the 200 square foot below-grade, non-habitable basement room met the definition of "Basement" found in Section 10.04.030 of the city's zoning ordinance. The city's zoning ordinance distinguishes between a "basement" and a "story." Thus, the modification did not impact the number of stories in the project or the finding of the city that Paunovich's project consisted of three stories.

Based on these factors, the city's Planning Division determined that the minor modification to the approved plans was in substantial compliance with the approved CDP. Thus, the Planning Division did not require an application for an amended CDP or another public hearing. The minor modification was approved ministerially on May 7, 2013. Jester testified by declaration that it is typical that minor modifications such as the addition of a below-grade basement storage room are handled ministerially, or "at the counter."

Second amended writ petition

On September 18, 2013, Armato filed a second amended petition (SAP), adding a new cause of action for traditional writ of mandamus under section 1085 related to the city's approval of the basement.[4] In the SAP, the new second cause of action alleged that Armato was directly impacted by Paunovich's project and was denied any notice to participate in any public process or appeal of Paunovich's revised project plans. Armato further alleged that the revised project plans exceeded the square footage and was otherwise different from the plans previously approved. Armato alleged that the city approved these plans without notice to Armato and other members of the public, without authority, and in violation of Armato's due process rights.

Trial court ruling

The trial court heard the writ petition on June 25, 2015 and July 21, 2015. On July 21, 2015, the court issued a decision granting, in part, and denying, in part, the petition. The court granted the traditional writ of mandate setting aside the revision permit. However, the court denied the writ of administrative mandate challenging the original CDP.

The court first discussed the administrative mandate pursuant to section 1094.5, in which Armato argued that the original CDP should not have been issued because the project was four stories high and exceeded the maximum allowable height permitted under the MBMC.

The court disagreed with Armato's allegation that the project was four stories high, in violation of MBMC section 10.12.030(H). The court found that "[s]ubstantial evidence shows that [Paunovich's] home is only three stories under the definition

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[4] The new cause of action pursuant to section 1085 became the second cause of action, and the prior second cause of action for declaratory relief became the third cause of action.

of 'story' provided by the MBMC." The court also found that the city's calculation of the maximum height of the project was supported by substantial evidence. The court noted that:

> "[T]he Director was not required to take [Armato's] ocean view into account when determining the reference elevation for the northeast corner of the property. [The Armatos] are essentially arguing that the Director should have randomly chosen a lower elevation in order to protect their view, but do not explain why this is compelled by the code."

The court also found that Armato was not denied due process due to Montgomery's alleged bias.

However, the trial court granted Armato's traditional writ of mandate filed pursuant to section 1085. The court found that the city failed to proceed according to law when it approved the project revision without providing public notice or an opportunity to allow the public to appeal the revision. The court found that the city's approval of the revision directly contravened the applicable provisions of the LCP. Thus, the court held that "the City violated its clear, present, and ministerial duty to follow its own procedures for approving revisions to the Project without providing notice or an opportunity to appeal." The court disagreed with Paunovich's arguments that: (1) the minor deviation was not an "amendment," (2) the CDP authorized minor amendments to be made by the Director without notice, and (3) the amendment was in "substantial compliance" with the CDP. The court noted that even minor deviations must comply with procedural requirements, and the CDP could not authorize the Director to approve insubstantial modifications without triggering the notice provisions of the LCP.

Judgment

On August 7, 2015, the trial court entered a judgment consistent with its decision.

Writ return

On September 10, 2015, Paunovich submitted a "Request for Exemption Determination" seeking to have the additions in the revision permit deemed exempt from CDP requirements. The city's Planning Manager forwarded the request to the California Coastal Commission, where it was denied.

On September 8, 2015, the city filed a return on the writ, stating that "the City has set aside and rescinded the Revision to Building Permit 12-03664, which was approved after the City Council's May 9, 2014 Final Resolution, permitting the conversion of crawl space to basement."

Appeal and cross-appeal

The city served notice of entry of the trial court's judgment on August 18, 2015.

On October 13, 2015, Paunovich filed his appeal from the August 7, 2015 judgment.

On October 16, 2015, Armato filed her notice of cross-appeal from the August 7, 2015 judgment.

DISCUSSION

I. Paunovich's appeal

We first address the initial appeal from the trial court's grant of Armato's petition for traditional mandamus pursuant to section 1085. In his appeal from the judgment, Paunovich argues that the trial court erred in granting the petition reversing the city's over-the-counter approval of his crawl space-to-basement conversion.

Prior to considering the merits of the parties' arguments, we must first address a threshold question: whether the appeal is

moot given the city's actions in rescinding the revision permit and returning the writ to the superior court.

A. Mootness

Armato argues that the appeal is moot because the city has already set aside and rescinded the revision permit for the basement construction. Armato argues that because the city has rescinded the permit, it is incumbent upon Paunovich, not Armato, to show a beneficial entitlement to a mandatory duty of the city. Armato notes that Paunovich did not seek a stay of the writ, nor did he file an immediate appeal, which would have had the effect of immediately staying the writ. (Code Civ. Proc., § 916, subd. (a).) Instead, on September 8, 2015, the city filed its return, stating that it had complied with the writ and rescinded the revision permit. Armato cites *Building a Better Redondo, Inc. v. City of Redondo Beach* (2012) 203 Cal.App.4th 852, 865 (*Redondo*) for the proposition that a city's "voluntary compliance with the trial court's judgment and writ of mandate during the pendency of [an] appeal renders the appeal of the judgment moot."

1. Relevant law

"'[A]n appellate court will decide only actual controversies.'" (*Redondo, supra*, 203 Cal.App.4th at p. 866.) "'We will not render opinions on moot questions or abstract propositions, or declare principles of law which cannot affect the matter at issue on appeal.' [Citations.]" (*Ibid.*) An issue is considered moot when "'an event occurs which renders it impossible for the[e] court, if it should decide the case in favor of [appellant], to grant him any effectual relief whatever.'" (*Eye Dog Foundation v. State Board of Guide Dogs for the Blind* (1967) 67 Cal.2d 536, 541 (*Eye Dog Foundation*).) In *Redondo*, the issue was whether certain coastal land use plan amendments were subject to voter approval. (*Redondo*, at pp. 863-864.) The trial court determined that the

city was required to submit the amendment to popular vote, and issued a writ of mandate to that effect. The city appealed, but while the appeal was pending, complied with the writ. (*Id.* at pp. 862-863.) The voters passed the ballot measure. (*Id.* at p. 865.) Under these circumstances, the Court of Appeal determined that the issue was moot, because even if the court granted relief from the judgment, the results of the election were "'indisputably in effect for all purposes,'" and would remain so regardless of the outcome of the appeal. (*Id.* at p. 866.)

However, the *Redondo* court noted that a court has discretionary authority to decide moot issues under certain circumstances. (*Redondo, supra,* 203 Cal.App.4th at p. 867.) The exception applies in situations involving "a matter of continuing public interest that is likely to recur," or where "material questions remain for the court's determination." Further, courts may consider moot issues if the court can "do complete justice" by maintaining jurisdiction of the matter. (*Ibid.*)

2. Application

In the present matter, an actual controversy remains. Paunovich has built the basement in accordance with the revised permit. It is now illegal. Paunovich will seek a new permit legalizing his basement. Armato concedes that in the event we dismiss the appeal as moot, Paunovich's sole recourse will be to seek an entirely new permit. Armato is equally likely to challenge any revised permit through the administrative process, as she did before, and seek a writ if the permit is issued. Thus, the dispute will likely return to this court. In other words, the existence of Paunovich's now-built basement remains an actual controversy between the parties, which must be resolved one way or another. In the interests of conserving judicial resources, we elect to resolve this controversy now.

Further, even if the matter were moot, we may exercise our discretion to decide the issue raised in Paunovich's appeal. We have accepted an amicus brief on the matter, jointly submitted by the California State Association of Counties and League of California Cities (amici).[5] Amici argue that over-the-counter revisions are carried out all the time, as minor project modifications are commonly necessary for a variety of reasons. The trial court decision curtails local agencies' ability to carry out such minor revisions. According to amici, "[t]o prohibit staff from approving minor project modifications would create an undue burden on cities and counties and their planning commissions, may increase litigation and the number of times a single project may be reviewed by the courts." Thus, the appeal involves a matter of continuing public interest.

Finally, as demonstrated by the amicus brief, this is not a situation where this court is unable "'to grant [Paunoivch] any effectual relief whatever.'" (*Eye Dog Foundation, supra,* 67 Cal.2d at p. 541.) In the event of a reversal, Paunovich would be able to seek reissuance of the previous revised permit. This is a significantly different outcome from an affirmance, which would require him to begin the process anew.

In sum, the matter is not moot. The dispute remains a real controversy between the parties. Further, as demonstrated by the amicus brief, it is a matter of continuing public interest. Therefore, we decide the matter on the merits.

B. Standard of review

"Ordinary mandamus lies to compel the performance of a clear, present, and ministerial duty where the petitioner has a beneficial right to performance of that duty. [Citations.]"

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5 We granted the California State Association of Counties and League of California Cities' application for leave to file amicus brief on October 11, 2017.

(*California Assn. of Professional Scientists v. Department of Finance* (2011) 195 Cal.App.4th 1228, 1236.) "An appellate court reviewing a mandamus judgment must determine whether the agency had a ministerial duty capable of direct enforcement." (*Ibid.*) Our interpretation of the applicable rules, as applied to the undisputed facts on this issue, is de novo. (*Ibid.*)

C. Governing laws

Paunovich's property is governed by the Coastal Act. Pursuant to the Coastal Act, local governments are required to develop local programs to set forth their policies and plans for coastal development. (Pub. Resources Code, §§ 30210-30265.5.) The city has thus implemented its LCP, which sets forth the coastal development permit procedures.

LCP section A.96.030 defines the term "development" for the purposes of the LCP. It states:

> "I. 'Development' means, on land, in or under water, the placement or erection of any solid material or structure; discharge or disposal of any materials; grading, removing, dredging, mining, or extraction of any materials; change in the density or intensity of use of land, including, but not limited to, subdivision pursuant to the Subdivision Map Act (commencing with Section 66410 of the Government Code), and any other division of land, including lot splits, . . . ; change in the intensity of use of water, or of access thereto; construction, reconstruction, demolition, or alteration of the size of any structure, including any facility of any private, public, or municipal utility."

Section A.96.040 mandates that "any person, partnership, or corporation, or state or local government agency wishing to undertake any development, as defined in Section A.96.030, . . . shall obtain a Coastal Development Permit in accordance with the provisions of this chapter, in addition to any other permit

required by law." The section further mandates that any development undertaken pursuant to a CDP "shall conform to the plans, specifications, terms and conditions approved or imposed in granting the permit."

Section A.96.080 requires that all development requires a "valid coastal development permit issued by the California Coastal Commission or by the City pursuant to this Local Coastal Program."

Section A.96.180 permits a CDP to be amended. It provides:

> "Upon application by the permittee, a Coastal Development Permit may be amended by the approving authority. Application for and action on an amendment shall be accomplished in the same manner specified by this chapter for initial approval of Coastal Development Permit. All sections of this chapter shall apply to permit amendments."

The LCP provides that the requirement of a public hearing may be waived for "minor development." (LCP, § A.96.260.) A "minor development" is defined as a development that is consistent with the city's LCP; requires no discretionary approvals other than a CDP; and "has no adverse effect either individually or cumulatively on coastal resources or public access to the shoreline or along the coast." (LCP, § A.96.260(A).) For such minor developments, the public hearing requirement may be waived if all of the following occur:

> "1. Notice is sent to all persons consistent with the provisions of Section A.96.100 of this Title, as well as all other persons know[n] to be interested in receiving such notice.
>
> "2. The notice states that a public hearing will be held upon the request of any persons.

> "3. No request for public hearing is received by the City within 15 working days from the date of sending the notice pursuant to paragraph (1)."

(LCP, § A.96.260(B).)

Once a CDP issues pursuant to a request brought under section A.96.040, the development is subject to the plans, specifications, terms, and conditions imposed in granting the permit. (LCP, § A.96.040.)

Paunovich's permit was subject to several such specifications, including special condition No. 2, which provided that:

> "The project shall be constructed in substantial compliance with the submitted project description and plans as approved by the Community Development Director on December 19, 2012. Any substantial deviation from the approved plans must be reviewed by the Director to determine if any Amendment to this Coastal Permit is required."

This special condition granted the director discretion to determine whether a deviation from the CDP required a formal amendment.

Standard condition No. 3 also anticipated minor deviations from the initial CDP.[6] It provided that all development "must

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[6] According to amici, such deviations from initial approved plans are very common, due to various reasons such as (1) changed circumstances or increased knowledge of local zoning requirements; (2) changes necessitated by project conditions; and (3) changes arising as a result of and during the actual construction process. Thus, it is not surprising that an entity issuing a CDP would include provisions governing that project

occur in strict compliance with the proposal as set forth in the application for permit . . . [a]ny deviation from the approved plans must be reviewed and approved by the Director of Community Development."

Deviations from the original CDP were governed by these conditions within the CDP itself.

D. The agency's determination that the conversion was a deviation that did not require amendment is entitled to deference

Armato argues that the crawl space to basement conversion was an amendment that required compliance with LCP section A.96.040. Armato points to the definition of "Development" in section A.96.030, which broadly defines the term to include activities such as extracting any materials or constructing any structure. Armato states that Paunovich's modification required the excavation of additional material from below Paunovich's structure.[7] Thus, Armato concludes that the basement excavation was a "development" that required a CDP or an amendment, pursuant to the LCP regulations set forth above. Even if the basement were considered a "minor development" pursuant to LCP section A.96.260, Armato argues, notice was required to be sent to all persons within a 100-foot radius "as well as other persons know[n] to be interested in receiving such

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which allow for the possibility of such deviations from the original plans.

[7] Paunovich argues that there is no support in the record for Armato's claim that the revision permit allowed for the excavation of additional soil. In fact, Paunovich states, both the original and revised plans called for the same amount of excavation to the eastern portion of the property.

notice" (LCP, § A.96.260(B)) advising them of the right to seek a hearing.

There is no question that Paunovich's overall construction project, which included the demolition of an existing duplex on his property and the construction of a new, single-family residence, was a "development." There is also no question that Paunovich complied with the city and LCP requirements in getting his "development" approved.

The question before us, then, is whether the crawl space to basement conversion constituted a "development" requiring a coastal development permit. If the crawl space to basement conversion was a development -- either a standard development pursuant to section A.96.030, or a minor development pursuant to section A.96.260 -- the city was required to follow the procedures set forth in the LCP. Such procedures for minor developments minimally include notice to the neighbors and interested parties.

However, the LCP also contemplates that certain modifications to the original "development" do not necessarily constitute a new "development," requiring compliance with the procedures set forth in LCP sections A.96.080, A.96.180, A.96.090 or A.96.260. Instead, the LCP specifies that CDPs are issued pursuant to "terms and conditions approved or imposed in granting the permit." (LCP, § A.96.040.)

This provision allows for conditions such as the ones imposed in Paunovich's CDP, which provides for the possibility of deviations from the initial CDP. Special condition No. 2 of Paunovich's CDP granted discretion to the Director to determine if a "substantial deviation" from the approved plans required a formal "Amendment." Specifically, special condition No. 2 states:

> "Any substantial deviation from the approved plans must be reviewed by the Director to determine

if any Amendment to this Coastal Permit is required."

The CDP further provided that "questions of intent or interpretation of any condition" may be resolved by the Director.

The Director interpreted condition No. 2 in the CDP to permit minor revisions without notice. The CDP's language indicating that deviations from the plans must be presented to the Director to determine *if* an amendment is required, implies that under certain circumstances, an amendment may not be required. The Director thus reasonably determined that certain deviations do not require formal amendment.[8]

Armato does not challenge the city's delegation of authority to the Director to determine whether a deviation from the plan required a formal amendment.[9] According to amici, such

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[8] For this reason, we reject Armato's argument that the conditions in the CDP must be interpreted to incorporate the LCP's notice requirements. The agency's determination that the CDP permitted revisions without such notice is reasonable and entitled to deference.

[9] Armato admits that she is "not challenging the legality of Special Condition No. 2 on its face or as applied to the Paunovich revision permit." However, Armato argues that we should not consider Paunovich's position that the conditions in the CDP permitted the Community Development Director to approve certain minor deviations from the development without formal amendment because the argument was untimely presented in the trial court. Even if Paunovich untimely presented this argument in the trial court, we have discretion to consider it for the first time on appeal. (*Resolution Trust Corp. v. Winslow* (1992) 9 Cal.App.4th 1799, 1810.) There is no prejudice to the parties, as both have had the opportunity to address the argument on appeal. Furthermore, it involves purely legal questions involving

delegations are common and necessary so that "the community's zoning business [can] be done without paralyzing the legislative process." (*Novi v. City of Pacifica* (1985) 169 Cal.App.3d 678, 682 [affirming denial of writ seeking to compel city to issue site development permits].)[10]

City Planning Manager Jester, provided the following testimony regarding Paunovich's basement via declaration:

> "In my experience, it is typical that corrections to plans and minor modifications of this nature are handled ministerially, or "at the counter." For example, it is typical for the Planning Division to review and approve modifications at the counter for things such as the addition of a below-grade basement storage room, room layouts, structural changes, and the like that have little or no effect on the footprint of the already approved structure. This allows the planning staff to use their training and expertise to ensure compliance with the applicable development regulations, and also is efficient -- projects could be delayed for significant periods of time and City employees' time needlessly wasted if every minor modification were required to go through a public hearing process despite demonstrating

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interpretation of the LCP and CDP, as well as policy considerations affecting local agencies. Thus, we exercise our discretion to consider the issue.

[10] As Paunovich points out, the LCP grants the Community Development Director discretion to determine whether an application for development is "[c]ategorically excluded or exempt and does not require a coastal development permit." (LCP, § A.96.080(C4).) If the Director has discretion to determine that an entire project is exempt from the requirement of a coastal development permit, it follows that the Director would have similar discretion to determine if a revision to a project is insubstantial and thus does not require a permit amendment.

complete or substantial compliance with approved plans."

Jester further testified that "nearly all residential projects include some type of revisions or modifications after project approval," and "[t]he overwhelming majority of these revisions are approved at the counter."

The city's Community Development Director had the authority to approve minor project modifications in substantial conformity with the CDP without requiring amendment. Great deference should be given to an agency's interpretation where """the agency has expertise and technical knowledge""" and the decision is """[e]ntwined with issues of fact, policy, and discretion."""" (*Citizens for Beach Rights v. City of San Diego* (2017) 10 Cal.App.5th 1301, 1312 [affording deference to the city's interpretation of both its municipal code and conditions that it attached to a site development permit].) The Director's determination that the crawl space to basement conversion was a project modification that did not require an amendment to the CDP, is therefore entitled to deference.[11]

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[11] Armato sets forth numerous concerns regarding Paunovich's basement conversion that she contends she had a right to determine: whether the plans were code-compliant; what soil conditions were present; whether the depth exceeded the depth of Paunovich's foundation, and numerous other similar questions. Deference to the agency's expertise and technical knowledge is appropriate here. (*State Compensation Ins. Fund v. Brown* (1995) 32 Cal.App.4th 188, 199 ["There is good reason for deferring to an initial agency determination" where it involves "expertise in the subject matter"].) In the case of a modification that the agency has found to be a permissible deviation from previously approved development plans, we defer to the agency's implicit determination that the deviation is Code-compliant, and

E. The CDP is not void ab initio

Armato argues that if the conditions in the CDP purport to avoid the notice requirements in the LCP, the CDP is *void ab initio* with no rights vested thereunder.[12] Armato claims that a building or land use permit must be subordinate to applicable codes. Armato cites MBMC section 9.80.020, which states that: "No permit presuming to give authority to violate or cancel the provisions of this Code shall be valid, except insofar as the work or use which it authorized is lawful." Armato does not elaborate on what specific provision has purportedly been violated, where, as here, the Director has determined that no amendment to the CDP is necessary. Nor does Armato address the significance of her argument on any practical level -- particularly where the record makes clear that over-the-counter deviations, such as the one to Paunovich's CDP, are often made without notice.

Armato cites two cases in support of this argument, neither of which persuades us that the CDP is void. The first, *Neighbors in Support of Appropriate Land Use v. County of Tuolumne* (2007) 157 Cal.App.4th 997, involved landowners who wanted to open a business hosting weddings and similar events on property zoned for agricultural use. (*Id.* at p. 1001.) Commercial use for weddings and similar events was not allowed by the zoning ordinance "with or without a conditional use permit." (*Ibid.*) However, the county board of supervisors approved the

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technical issues such as soil conditions, depth, and quality of fill were appropriate.

[12] Paunovich points out that Armato did not challenge the CDP as *void ab initio* during the administrative process, thus did not exhaust her administrative remedies on this argument. We nevertheless exercise our discretion to address Armato's argument.

landowners' application to use their land for the new commercial venture, purporting to grant the landowners an exception to the zoning ordinance. (*Id.* at p. 1003.) The case does not suggest that the conditions imposed in Paunovich's CDP were improper.

Armato next cites an Arizona case that does not purport to apply California law: *City of Tucson v. Clear Channel Outdoor, Inc.* (2008) 218 Ariz. 172. The case involved billboards that were not compliant with various restrictions, including zoning and permit restrictions. No such violations are alleged in this case.

In sum, Armato has failed to convince this court that the permit was void.

F. Conclusion

The trial court read the definition of "development" in LCP section A.96.030 and concluded that the crawl space to basement conversion was a development. In doing so, the trial court failed to give deference to the agency's determination that the conversion was not a "development" that required a formal amendment to the permit but a deviation from a pre-existing approved development that did not require a formal amendment. We find that the trial court erred in failing to afford sufficient deference to the agency's own interpretation of the LCP and the CDP. The agency complied with the LCP and CDP in determining that the conversion was a minor deviation from previously-approved development plans.

The agency did not fail to comply with its own procedures. The trial court's decision is therefore reversed, and the agency's approval of the revision is reinstated.[13]

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[13] Because we have determined that the agency complied with its obligations, we decline to address the parties' competing positions regarding LCP section 96.050A, which provides that "Improvements to existing Single Family-Residences . . . such as

II. Armato's cross-appeal

Armato argues that the CDP for Paunovich's original project was issued in violation of law and must be set aside. Armato presents two arguments in support of her position: first, that the structure is four stories, in an area that is limited to three-story structures; and second, that the city calculated the maximum allowable height of the structure in a manner that failed to comply with applicable law.

Following the city's issuance of the CDP for Paunovich's home, Armato exhausted her administrative remedies through appeals to the City Planning Commission and city council. She then filed a petition for writ of administrative mandate pursuant to section 1094.5 seeking to set aside the city council's decision denying her appeal of the CDP. The trial court denied the writ, finding that the city correctly determined that the construction project was only three stories high and that the city's calculation of the maximum height of the project is supported by substantial evidence. As set forth below, we affirm the trial court's findings on these issues.

A. Standard of review

In reviewing a trial court's decision on a petition for writ of administrative mandamus, the appellate court applies a substantial evidence standard. (*JKH Enterprises, Inc. v. Department of Industrial Relations* (2006) 142 Cal.App.4th 1046, 1058.) "But depending on whether the trial court exercised independent judgment or applied the substantial evidence test, the appellate court will review the record to determine whether either the trial court's judgment or the agency's findings, respectively, are supported by substantial evidence. [Citation.]" (*Ibid.*) If a fundamental vested right was involved, the trial court

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garages, swimming pools, fences, storage sheds and landscaping are exempt" from Coastal zone permitting requirements.

exercised independent judgment and it is the trial court's judgment that is the subject of appellate review. (*Ibid.*) However, if no fundamental vested right was involved, the appellate court "reviews the administrative record to determine whether the agency's findings were supported by substantial evidence, resolving all conflicts in the evidence and drawing all inferences in support of them. [Citations.]" (*Ibid.*, fn. omitted.)

Here, the trial court determined that only economic interests are at issue, thus it reviewed the administrative record for substantial evidence. Accordingly, our review is the same: "[W]e review the administrative record to determine whether substantial evidence supports the City Council's decision, resolving all conflicts in the evidence and drawing all inferences in support of the City's findings. [Citation.]" (*Clary v. City of Crescent City* (2017) 11 Cal.App.5th 274, 284-285.)

It bears noting at this stage that a court must be deferential to an agency's findings. Regardless of competing evidence, we defer to the agency's decision, as we are required to "afford a strong presumption of correctness concerning the administrative findings." (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 817.) Thus, even where conflicting inferences can be drawn, "we accept all reasonable inferences supporting the administrative findings. [Citation.]" (*Neilson v. City of California City* (2007) 146 Cal.App.4th 633, 641.) Particularly where, as here, there is no fundamental right at issue, it is more than appropriate for us to defer to the agency's expertise on matters involving the review of architectural diagrams and grading levels. (See, e.g., *Bixby v. Pierno* (1971) 4 Cal.3d 130, 144.)[14]

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[14] We reject Armato's suggestion that we should decline to apply the deferential standard because the city made insufficient

B. Substantial evidence supports the agency's decision that the project is three stories high

Armato argues that the agency's finding that Paunovich's property is only three stories is factually incorrect. Instead, Armato argues, the Paunovich project includes four levels of vertically overlapping or "stacked" stories. Armato's argument focuses on two specific parts of the Paunovich home: the deck on top of the home, and the basement.

For the reasons set forth below, we find that the evidence supports the agency's decision that the home is only three stories high.

1. Relevant laws

MBMC section 10.12.030(H) and General Plan Land Use Policy LU-1.1 allow structures of only three stories in the parties' property zone.

MBMC section 10.12.030(H) provides, in pertinent part:

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findings. (Citing *West Chandler Boulevard Neighborhood Assn. v. City of Los Angeles* (2011) 198 Cal.App.4th 1506, 1517 (*West Chandler*) ["'[I]mplicit in section 1094.5 is a requirement that the agency which renders the challenged decision must set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order'"].) *West Chandler* is inapplicable, as it involves a situation where the city council overturned the findings of a zoning administrator but failed to "set[] forth specifically the manner in which the zoning administrator erred." (*Id*. at p. 1518.) Here, in contrast, in upholding the Planning Commission's decision, the city council made detailed findings, including finding that Paunovich's residence complied with "all development standards, zoning codes, and Local Coastal Program requirements," the residence was three stories tall, and the height determination was "reasonable and supported by substantial evidence." As set forth above, we defer to the agency's expertise in making these findings.

> "The maximum number of stories permitted shall be three (3) where the height limit is thirty feet (30') . . . . A floor level may be divided between portions qualifying as a story and portions qualifying as a basement.
>
> "A deck or balcony may be located directly above . . . [a] third story where the height limit is thirty feet (30'), if the following criteria are met. Such decks shall be located adjacent to an interior living space and shall provide additional setbacks as follows . . . ."

MBMC section 10.04.030 defines a "story" as:

> "That portion of a building included between the surface of any floor and the surface of the floor next above it. If there is no floor above it, then the space between such floor and the ceiling next above it shall be considered a story."

A deck is defined as "[a] platform, either free-standing or attached to a building, but without a roof, that is supported by pillars, posts, or walls." (MBMC, § 10.04.030.)

MBMC section 10.04.030 also contains an illustration, showing how levels can be divided where a basement and a first story are on the same level of a structure. The illustration also shows how a structure's levels sitting above a divided basement/first story may be divided. The next level may contain a first story over the basement and second story over the first story.[15]

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[15] While Armato points out that the illustration in the MBMC does not speak to the precise layout of the Paunovich home, it is a useful guide in understanding the concept of split levels.

2. The Paunovich home structure

The parties provided a diagram of the Paunovich home. The diagram showed that, because it is located on a slope towards the ocean, the home contains split levels. Further, the third story on the eastern side of the home, which is the back of the home, is higher than the third story on the western side of the home, which is the front of the home.

The bottom level is divided into a garage on the western side of the home (a first story) and a non-habitable, below-grade area (basement). The second level is split into a second story (above the garage) and a first story (directly above the basement). The third level contains a third story on the western side of the house, and the second story on the eastern side of the house. Finally, the top level contains a third story on the eastern side of the home only. On the western side of the top level, there is a roof deck.[16]

Testimony from the hearing on Armato's appeal to the city planning commission also provides evidence regarding the structure of the Paunovich home. Planning Manager Jester explained that basements do not count as stories. Because the Paunovich basement was six feet below local grade, it did not count as a story. Jester also explained why the Paunovich structure was considered three stories:

> "[Y]ou do have a garage level, you have a first level. Let's call this garage, first level, second level,

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[16] The planning manager observed that a "level" is different from a "story." She explained, "in the beach area, we have double basements. We'll have three stories above grade and two basement levels below, so we actually have five levels." Thus, the number of levels present in a home is not the relevant number -- the relevant number is the number of those levels which qualify as stories. As set forth in the MBMC, basements and decks do not count as stories.

> third level and then this, this fourth level. If this were stacked above . . . three other stories, it would be a fourth story."

However, because the fourth level is not stacked above the garage, but is "set back significantly from Highland [Avenue]," it sits over the basement, and thus constitutes the third story on the eastern side of the home. Jester further explained that the top level did not count as a story "Because it's not over the front, it's three stories in the back. . . . Never do you have four, four levels stacked up above each other."

3. Stacking

Armato takes issue with the concept of "stacking," which the planning manager discussed in concluding that the Paunovich structure is only three stories. Armato argues that there is no "exemption" from the three-story limit when floors are not vertically stacked on top of one another. None of the relevant laws includes an express exemption from the three-story limit for a building that has more than four levels but no more than three stories "stacked" vertically at any common point. Armato cites *State Water Resources Control Bd. v. Office of Admin. Law* (1993) 12 Cal.App.4th 697, 703, for the proposition that implied exemptions in the law are disfavored.

We find that the concept of stacking, referenced by the planning manager in discussing Paunovich's home, is found in the MBMC. While the MBMC does not use the word stacking, the diagram found in MBMC section 10.04.030 shows how a structure's levels can be divided where a basement and a first story are on the same level of a structure. The next level above may contain a first story over the basement and second story over the first story. The diagram represents a visual example of what the planning manager called "stacking." The diagram confirms that a structure may be more than three levels where no three

stories are vertically stacked on top of one another. Thus, we find that the MBMC permits the use of stacking when determining the number of stories in a structure.

4. The deck

The MBMC defines a "story" as "[t]hat portion of a building included between the surface of any floor and the surface of the floor next above it. If there is no floor above it, then the space between such floor and the ceiling next above it shall be considered a story." (MBMC, § 10.40.030.) Thus, a "story," by definition, must have either a floor or a ceiling above it.

A balcony or deck, such as the structure on top of the third story on the front side of the Paunovich home, is expressly permitted by MBMC section 10.12.030(H). A balcony is described in MBMC section 10.04.030 as a "cantilevered platform that projects from the wall of a building, typically above the first level, and is surrounded by a rail, balustrade or parapet not exceeding forty-two inches (42") above the platform surface." A deck is described in the MBMC as "a platform, either free standing or attached to a building, but without a roof, that is supported by pillars, posts, or walls. (See also: Balcony)." (MBMC, § 10.04.030.)

Neither party points to any express finding in the administrative record as to whether the front side of the top level of Paunovich's home was adjudicated to be a balcony or a deck. Paunovich asserts that the structure atop his home qualifies as either a balcony or a deck because it meets all criteria for both structures. Paunovich points to a diagram in the record showing that it projects from a wall, is above the first level of the home, and is surrounded by a rail not more than 42 inches above the platform's surface. Thus, he asserts, it qualifies as a balcony.

Further, Paunovich argues, the structure qualifies as a deck. It is a platform attached to a building that is supported by

the walls of the floors below it, and is not roofed.[17] MBMC section 10.12.030(H) provides that "[a] deck or balcony may be located directly above . . . the third story where the height limit is thirty feet (30')," so long as it is "located adjacent to an interior living space" and "provide[s] additional setbacks" as required by the MBMC. Paunovich asserts that his structure also meets these criteria, as the height limit is 30 feet, the structure is located directly above the third story of the home's western half, and is located adjacent to the living space of the third story of the home's eastern half. Further, it is in compliance with the setback requirements.

As the trial court noted, Armato points to no evidence in the record supporting her theory that the deck is a "story" or that the partial covering over the doorway constitutes a "roof." Armato points to a diagram of the home in which the partial covering -- which the trial court referred to as an "awning" -- is referred to as a ceiling.[18] However, the city did not find the covering to be a ceiling, and we need not overturn the city's determination based on a single word in one diagram. There is ample evidence in the record, described above, supporting the city's determination that the relevant portion of the structure qualifies as a balcony or deck.[19]

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[17] However, it includes an awning/entry cover over the doorway of the home's top story.

[18] As Paunovich points out, this precise diagram is not in the administrative record, although Armato provides a citation to a similar diagram.

[19] We decline to make our own factual findings based on diagrams in Armato's briefs that were not part of the administrative record.

The structure atop the western side of Paunovich's home is expressly permitted by the MBMC and was approved by the city's decisionmakers during the administrative process. Substantial evidence in the record supports the city's determination that the structure does not constitute a fourth story over the front side of the house.

5. The basement

The MBMC anticipates that a floor level may be divided, as Paunovich's is, between a garage, which qualifies as a story, and a basement, which does not qualify as a story. (MBMC, § 10.12.030(H).) Both the diagram and the testimony from the administrative proceeding provide substantial evidence that first level of Paunovich's home is a split level, which contains a garage (first story) in the front of the home and a basement, which is not a story, in the rear of the home. Because this substantial evidence supports the agency's determination that the home is three stories, we reject Armato's argument that the lower level renders the home a four-story structure.

6. The stairs adjacent to the garage

Armato argues that an area of the home containing stairs leading from the garage to the floor above the garage, as well as the hallway and floor area on either side of the base of the stairs, must be considered in determining the number of stories. Armato contends that the narrow area of the home directly above the stairs constitutes a four-story stacked portion of the home.

The parties cite competing laws regarding the significance of the stairs in determining the number of stories. Armato cites a portion of the MBMC relating to buildable floor area, which defines buildable floor area as "[t]he total enclosed area of all stories of a building . . . including halls and the area of the stairs," although not including the area under the stairs. (MBMC, § 10.04.030.) Paunovich claims that Armato's citation is

misleading, as it relates only to buildable floor area and does not assist in defining what constitutes a story.[20]

Paunovich points to the definition of story, emphasizing that it includes only space that is above grade. (MBMC, § 10.04.030.) Further, MBMC section 10.04.030 expressly excludes from buildable floor area "floor area under stairs and those portions of a basement that are entirely below grade." As shown in diagrams contained in the administrative record, Paunovich points out that the area that Armato complains of is both entirely below-grade and is unusable under-stair area. Thus, it is neither part of a story nor included in the home's buildable floor area.

The diagrams in the record provide substantial evidence supporting the agency's decision that the stairway adjacent to the garage need not be considered in determining the number of stories. The parties point to different diagrams, apparently depicting different grade lines. Regardless of competing evidence, we defer to the agency's decision, as we must. (*Fukuda v. City of Angels, supra,* 20 Cal.4th at p. 817.) We accept the reasonable inference provided by the diagrams supporting the administrative decision that the stairwell did not need to be counted as a story. This evidence supports the agency's decision that the garage stairwell does not render the structure four stories.[21]

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[20] Paunovich claims that Armato also misrepresents the area in question, which is only a staircase at the rear of the garage, and does not contain a hall.

[21] Armato includes in her reply brief a discussion of the difference between local grade and existing grade. She asserts that Paunovich is referring to the wrong type of grade. However, our task is to review the administrative agency's actions. Armato

C. Substantial evidence supports the agency's decision that the structure does not exceed height limitations

Armato further argues that the city applied the incorrect legal standards and failed to consider relevant evidence in approving the height of Paunovich's home.

1. The city's height determination

Height is measured "from a horizontal plane established by determining the average elevation of existing grade at all four (4) corners of the lot." (MBMC, § 10.60.050(A).) However:

> "[if] the elevation of existing grade at a lot corner is not clearly representative of a site topography (because, for example, of the existence of such structures as retaining walls, property-line walls, or planters) the Community Development Director shall select an elevation that minimizes, to the extent reasonably possible, adverse impacts on adjacent properties and encourages some degree of consistency in the maximum building height limits of adjacent properties."

(MBMC, § 1060.050(A).)

Armato argues that there existed a retaining wall along the northeastern perimeter of the Paunovich lots at the time Paunovich demolished the prior home. Thus, Armato contends, the director should have applied the requirements of MBMC section 10.60.050(A) and minimized adverse impacts on adjacent

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fails to cite to any page in the record showing that the city relied upon an incorrect grade in making its determination. Because Armato has failed to point to an erroneous finding made by the city as to which grade was used as reference, we assume the city used the correct grading measure.

properties. However, Armato argues, the CDP makes no mention of the material adverse impact on her home.

The city did not make a determination that the elevation of the property on the northeastern perimeter was "not clearly representative" of the site's topography. The administrative findings detail the process that the city undertook in determining the proper measurement of height. Specifically, the Community Development Director:

> "(1) inspected the subject property to analyze the existing conditions and surrounding properties; (2) determined the reference elevation, defined as the average of the elevation at the four corners on the lot; (3) considered a second limit to ensure that the proposed building would not exceed the maximum allowable height . . . ; and (4) because the elevation of existing grade at the northeast lot corner *may* not be clearly representative of site topography at that corner, . . . selected an elevation five feet southerly of that corner at the northwest corner of [Amato's] house." (Italics added.)

To ensure compliance with MBMC section 10.60.050, the Director further "required [Paunovich] to submit a topographic survey ('the 2012 survey') of the project site prepared by a licensed civil engineer to determine the maximum allowed height of the building." The Director used the 2012 survey to determine the property corners and to evaluate other conditions and code requirements.

The findings set forth in the administrative resolution also show that the Director considered historical evidence. The director reviewed numerous site surveys, including: (1) Paunovich's 2012 survey; (2) the Armatos' 1989 survey, created in connection with an addition to their home; (3) a 1913 street plan; (4) a 1966 topographic plan; and (5) a 1988 shoring plan from a

neighboring property to the north of the Armato and Paunovich properties. In reviewing this historical data, the Director determined that "[t]he existing grade of the lot is representative of the grade in 1913." Further, after reviewing a 1966 topographical plan, the Director determined, "The elevations for all property corners and the maximum height in 1966 compared to 2012 are virtually identical and . . . the grade has not substantially changed in over 40 years." The administrative resolution confirms that the Planning Commission came to the same conclusion:

> "Prior to affirming the decision of the Director, the Planning Commission heard public testimony and reviewed the survey information, historical data, and property corner elevations used by the Director to determine the maximum height of the proposed building. The Commission concluded that the grade of the Walkstreet (25th Street), Highland Avenue, and Crest Drive, as well as the north side of the property, has not changed historically in over 100 years."

Thus, the record shows that although the city considered the possibility that the northeast lot corner was not representative of the site topography, it ultimately concluded that was not the case. Instead, the city found that the corner elevations had not changed in the past 100 years.

The city's factual determination that the elevation was in line with the site's topography is entitled to deference. (*Fukuda v. City of Angels, supra,* 20 Cal.4th at p. 817.) Thus, even where conflicting inferences can be drawn, "we accept all reasonable inferences supporting the administrative findings. [Citation.]" (*Neilson v. City of California City, supra*, 146 Cal.App.4th at p. 641.)

The city reasonably concluded, based on the evidence before it, that the corner elevations were representative of the site's topography. Thus, MBMC section 10.60.050(A)'s contingent mandate to "minimize[] . . . adverse impacts on adjacent properties and encourage[] some degree of consistency" is inapplicable.

Despite the consistent topography, the city made an effort to minimize impacts on the Armato property. It relied upon a survey the Armatos commissioned in 1989 when adding on to their home, which showed a 2.9 foot grade difference between the north and south corners of the property line between the Armato home and the Paunovich home. To ensure consistency, the director reduced the surveyed elevation of the northeast corner of the Paunovich property to reflect the elevation change on the Armato survey. This reduced the maximum allowable height of the Paunovich property to make it consistent with the maximum allowable height for the Armato home. The city's action was reasonable and supported by the evidence.[22]

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[22] Because the qualifying language of MBMC section 10.60.050(A), triggered only where there is a finding that the existing grade of a lot corner is not clearly representative of the site's topography, is inapplicable, we decline to address Armato's arguments concerning the city's failure to comply with that language. We further reject Armato's mischaracterization of the city's brief. Armato claims that the city's position is that the Director applied the relevant language of MBMC section 10.60.050A. This is inaccurate. The city, in fact, confirmed its finding that the site topography had not changed in the past 100 years. The city noted that despite this evidence of consistency, the city caved to Armato's insistence that her prior survey showed a 2.9 foot elevation in the northeast corner of the property and reduced the surveyed elevation for that corner of the property. Thus, the city's brief makes it clear that although it did not have to, the city "selected an elevation that minimized

2. Evidence of fill on the property

Armato further argues that the city failed to consider evidence of fill at the northeast corner of the Paunovich lot. Prior to the city council hearing, Armato submitted the report of a certified geologist, John Franklin, who examined the materials behind the retaining wall and concluded that it was not simply backfill from the wall's excavation, which would have been composed of the sandy soil endemic to the area, but instead, that "the geomorphic data indicate[d] that existing grade . . . has been [filled] in ±2 to 4 ½ feet of soil above original natural grade in this area." Franklin also testified at the hearing that "two to four and a half feet of fill exists on the property . . . along the common property line."

However, contradictory evidence also existed in the record. Paunovich commissioned a soils investigation that included subsurface boring. The investigation confirmed that there was no indication of imported soils. In addition, the record contained abundant evidence that the slope of the property had remained consistent for 100 years -- suggesting no artificial fill. Finally, there was evidence that Franklin's examination of the property was not as reliable as the other evidence regarding this issue. In contrast to Paunovich's soil investigation, Franklin's examination was described as a "field review . . . performed by visual examination." Paunovich's expert explained that it would take x-ray vision to support the letter's conclusion based on such a visual examination. Paunovich's subsurface investigation concluded that Franklin's opinion had "no basis in fact."

Viewing this evidence in the light most favorable to the agency's decision, we conclude that substantial evidence

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adverse impacts, to the extent reasonably possible, and encouraged some degree of consistency in maximum building height limits."

supported the city's determination that there was no artificial fill at the northeast corner of the property.[23]

D. The city did not err in failing to protect Armato's view

Finally, Armato contends that the city was wrong in finding that it had no obligation to protect her view. While she acknowledges that the MBMC has no provision that expressly prohibits the occlusion of an ocean view, she argues that the "protection of ocean vistas is the bedrock of the city's land use laws and policies." The very first element of the City's General Plan states that its height restrictions are intended to maintain "low-profile development" and "protect vistas of the ocean." (Gen. Plan, Land Use Policy LU-1.1, p. LU-23.) Further, Armato points to the "Goals" of the General Plan, which state that "reasonable controls on development must be pursued, particularly to avoid overbuilding on small lots. . . . Excessively large structures that are tall and bulky, with tight setbacks, . . . can produce streetscapes that are aesthetically overbearing." (General Plan, Goals, p. LU- 23.) Armato contends that all these policies of the

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[23] Armato takes issue with the Planning Manager's statement: "We do not see any fill on this site. We have no evidence that there's fill on this site." Armato claims that this statement shows that the city "categorically refused" to consider her evidence that there was infill that raised the topography from its natural state. However, there was additional evidence that Armato's expert's examination was unreliable and was not grounded in the proper type of investigation. Thus, we interpret the Planning Manager's statement to mean that there was no *reliable* evidence of fill on the site. Further, because there was ample evidence in the record supporting the city's conclusion that there was no fill on the site, and Armato's arguments were considered by different bodies of city government, we decline to overturn it based on this single comment.

city are in furtherance of the Coastal Act's goal of protecting the "scenic and visual qualities" of coastal areas. (Pub. Resources Code, § 30251.)

Armato's argument appears to be that the city's action approving Paunovich's home was erroneous in that it was incompatible with the General Plan and the city's legal obligations. Armato claims that the general goals stated above are incorporated in the MBMC through section 10.60.050(A).

We have already determined that the portion of MBMC section 10.60.050(A) requiring that the city minimize adverse impacts on adjacent properties is not applicable because the site's elevation was consistent with its topography dating back 100 years. Furthermore, the General Plan implements its goals by creating a limitation on new development to three stories where the height limit is 30 feet (as it is in the area where the relevant properties are located). (Gen. Plan, Land Use Policy LU-1.1, p. LU-23.) This height limitation is imposed "to protect the privacy of adjacent properties, reduce shading, protect vistas of the ocean, and preserve the low-profile image of the community." (*Ibid.*) By enforcing the height limit, the city fulfilled its obligation to implement the goals of the General Plan.

Armato points to no specific rule or ordinance protecting landowners' views. Generally, "'[U]nder California law, a landowner has no right to an unobstructed view over adjoining property.' [Citation.]" (*Boxer v. City of Beverly Hills* (2016) 246 Cal.App.4th 1212, 1219; *Posey v. Leavitt* (1991) 229 Cal.App.3d 1236, 1250.) We therefore reject Armato's argument that the city erred in declining to protect her view.

DISPOSITION

The trial court's decision granting Armato's writ of traditional mandate under Code of Civil Procedure section 1085 is reversed. The trial court's decision denying Armato's writ of

administrative mandate under Code of Civil Procedure section 1094.5 is affirmed. Paunovich is awarded his costs of appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
HOFFSTADT