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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

ROSE CHEUNG,

Plaintiff and Appellant,

v.

CITY OF BEVERLY HILLS,

Defendant and Respondent;

1535 CARLA RIDGE OF
LOUISIANA, LLC,

Real Party in Interest.

B266262

(Los Angeles County
Super. Ct. No. BS153351)

APPEAL from a judgment of the Superior Court of Los Angeles County, James C. Chalfant, Judge. Affirmed.

Funtsen & Franzen, Don Erik Franzen; Turner Law Firm, Keith J. Turner for Plaintiff and Appellant.

Laurence S. Wiener, City Attorney (Beverly Hills); Richards, Watson & Gershon, Gregory M. Kunert and Stephen D. Lee for Defendant and Respondent.

Archer Norris, Gary A. Watt, Brian C. Merges, Tiffany F. Ng; Sheppard Mullin Richter & Hampton, Candace L. Matson for Real Party in Interest.

Real party in interest 1535 Carla Ridge of Louisiana (Carla Ridge) sought a building permit from the City of Beverly Hills (the City) in order to construct a single-family residence in the City's Trousedale Estates area, known for its panoramic views. To preserve residents' views, the Beverly Hills Municipal Code (BHMC) generally prohibits any new structure in Trousedale Estates from being taller than 14 feet above the grade upon which it stands, and also prohibits new grading that increases the elevation of an existing building pad. Rose Cheung, Carla Ridge's upslope neighbor, objected to Carla Ridge's project on the ground that it would result in a structure over 14 feet high on an elevated building pad. The City's Planning Department nevertheless approved Carla Ridge's plans, and over the next year the project was largely completed. During and after construction, Cheung requested that the City hold public hearings on the project. When the City refused to do so, she petitioned the superior court for a writ of traditional mandate pursuant to Code of Civil Procedure section 1085. The trial court denied Cheung's petition on the ground that Carla Ridge's project complied with the BHMC.

We conclude substantial evidence supports the trial court's conclusion. Accordingly, we affirm.

Background

1. Trousedale Height Restrictions

The Trousedale Estates area in the Santa Monica Mountains enjoys views overlooking neighboring cities, extending

to Catalina Island. When the City annexed the area in 1955, it agreed to maintain strong view preservation standards. In 1987, the City enacted the “Trousdale Ordinance,” which generally prohibits construction of any building more than 14 feet tall or re-grading of an existing lot so as to raise its elevation.

2. *Exception: Trousdale R-1 Permit*

A limited exception exists if an owner proposes to add to or renovate a building that lawfully exceeded 14 feet in height on October 15, 1987. In such a case, the City may issue a “Trousdale R-1” permit if it finds the addition or renovation “will not materially impair the view or line of sight” of neighboring homes. The City must hold a public hearing before issuing a Trousdale R-1 permit. (BHMC, §§ 10-3-2650 to 10-3-2655.)

3. *Carla Ridge’s Project*

On February 14, 2014, Carla Ridge applied to the City for a permit to demolish an existing residence at 1535 Carla Ridge, regrade the existing lot, and construct a new, 7,482 square foot residence. In its plans (the February Plans), Carla Ridge represented that the new building would be exactly 14 feet tall and the elevation of the new lot would, at an elevation of 1,068 feet 9 inches, be more than 2 inches lower than the existing lot, which was at 1,068 feet 11.4 inches.

During the plan check process, City staff requested that Carla Ridge revise its application in several respects, and on July 11, 2014, Carla Ridge submitted its final project plans (the July Plans). The July Plans calculated the average existing grade was 1,068 feet 11.04 inches in elevation, 0.36 inches lower than the 1,068 feet 11.4 inches as originally surveyed. But the average elevation for the new building pad would remain at 1,068 feet 9 inches, still 2.04 inches lower than the old grade.

However, page T001, the “Title Sheet” to Carla Ridge’s July Plans, contained a clerical error indicating the elevation of the high point on the roof of the proposed building—the “high roof”—would be 1,085 feet 6 inches, which is 16 feet 9 inches higher than the 1,068 feet 9 inch elevation of the proposed new building pad. But four architectural plan sheets in the July Plans reflecting the elevation of the building pad—those for “Exterior Elevations,” “Courtyard Elevations,” “Building Sections,” and “Wall Sections”—confirmed the new pad would be 1,068 feet 9 inches in elevation. And those plan sheets plus one more—for the “Roof Plan”—indicated the elevation of the high roof was 1,082 feet 9 inches, making the proposed building exactly 14 feet tall. As Randy Miller, the City’s Supervising Building Inspector explained, “The Title Sheet is like a cover page, which cites some of the specifics of the project. [Its] . . . figures are in error, and evidently weren’t cleaned up to match the architectural pages, by the author The City’s inspectors, inspect and verify compliance off of the Architectural and Structural Sheets. All of the ‘Architectural Elevations’ found on the sheets in the Architectural pages show the high roof . . . to be [14 feet].”

4. *Multiple Surveys*

During the plan check process there was some confusion as to what surveys were necessary. To determine the average grade of the existing building pad for Carla Ridge’s February Plans, M&M Co. surveyed the elevation at 18 points around the footprint of the existing home, then averaged the data points, coming up with an average elevation of 1,068 feet 11.4 inches. Point 13 in the data set was extrapolated rather than surveyed because it was impossible to access it while the existing home still stood.

In May 2014, M&M Co. again surveyed the property, and this time was able to measure Point 13, the elevation of which was determined to be six inches lower than originally extrapolated. As a result, M&M Co. calculated the true average elevation of the existing grade was 1,068 feet 11.04 inches, not 1,068 feet 11.4 inches.

Two points in the survey—Points 13 and 14, taken at the two ends of an east-west running wall at the northwest section of the existing building—were significantly higher in elevation than average: Point 13 was 1,073.7 feet, about 5.3 feet higher than the other points on average (excluding Point 14); Point 14 was 1,071.9 feet, about 3.5 feet higher than the other points on average (excluding Point 13). There is some ambiguity in the record as to why this is so, but it is undisputed that the property sloped sharply upward at the northwest corner of the lot.

In a handwritten markup during the plan check process the City mistakenly informed Carla Ridge that its Title Sheet needed to show the average existing grade at the perimeter of the *proposed* building rather than the existing building. Although the City later withdrew this requirement, before it did so M&M Co. resurveyed the elevation of the proposed building and averaged the elevation of 20 points around its footprint, obtaining an average elevation of 1,068 feet 9 inches, which accorded with the February Plans. (The elevation at several survey points had to be extrapolated because the old building was still standing.)

This 20-point survey of the proposed building pad shared data points with the 18-point survey of the existing pad wherever the perimeters of the existing and proposed buildings overlapped. As pertinent here, Point 13 on the 18-point (old pad) survey, at an elevation of 1,073.7 feet, corresponded to Point 11 on the 20-

point (new pad) survey, at an elevation of 1,074.3 feet, both representing the northwest corner of the existing and proposed buildings, respectively. Point 14 on the 18-point (old pad) survey, at an elevation of 1,071.9 feet, corresponded to Point 11 on the 20-point (new pad) survey, also at 1,071.9 feet.

These four survey points were substantially higher than the other points in the respective surveys, as reflected in the table below.¹ Point 13 was about 5.3 feet, and Point 14 about 3.5 feet, higher than the other 16 points on average. Similarly, Point 11 was about 6 feet, and Point 12 about 3.6 feet, higher than the other 18 points on average.

Old Pad	Elevation	Amt. Above Other Pts. Avg.	New Pad	Elevation	Amt. Above Other Pts. Avg.
Point 13	1,073.7'	~ 5.3'	Point 11	1,074.3'	~ 6.0'
Point 14	1,071.9'	~ 3.5'	Point 12	1,071.9'	~ 3.6'
Other Pts. Average	1,068.4'		Other Pts. Average	1,068.3'	

Page T001 of Carla Ridge's February Plans, the Title Sheet, contained a sketch of the footprint of the existing building and showed its 18 elevation points. The sketch was labeled "Existing

¹ Cheung's request for judicial notice of the averages calculated in the table is granted. (Evid. Code, § 452, subd. (h) [judicial notice may be taken of indisputable, easily determinable facts].)

Bldg. Perimeter.” Page T001 of the July Plans depicted the *proposed* building and its 20 elevation points, as the City had requested. Confusingly, this sketch was also labeled “Existing Bldg. Perimeter.”

5. *Construction*

On July 25, 2014, the City approved Carla Ridge’s plans and issued Building Permit No. BS 402234.

Carla Ridge demolished the existing structure, except for two retaining walls, and regraded the building pad. In September 2014, Cheung, who is a real estate developer and one of the founding members of the Trousdale Estates Homeowners Association, observed large amounts of dirt being trucked onto the construction site. Suspecting that Carla Ridge was elevating the old building pad, which the BHMC prohibits, she communicated this and other concerns to City staff over the next three months.

On October 13, 2014, M&G Civil Engineering and Land Surveying conducted an “As-Built Survey” of the project and determined that “per field measurement,” the “top of form elevation” was 1,068 feet 9 inches, as had been planned.

On January 29, 2015, Wayne Regester, the City’s Building & Safety inspector, inspected the height of Carla Ridge’s new building and found the “measured height of the Project from the average grade level” was approximately 13 feet 10.625 inches. On May 29, M&G Civil Engineering & Land Survey, Inc. surveyed the property and certified that the average grade elevation was 1,068.75 feet (1,068 feet 9 inches), as planned, and the high roof elevation was 1,082.51 feet (1,082 feet 6 inches), making the building 13.76 feet (13 feet 9 inches) tall. On June 9,

2015, Regester verified that the final building height complied with the BHMC.

The City ultimately informed Cheung that Carla Ridge's plans complied with the BHMC.

But the new building obstructed Cheung's view.

6. *Litigation*

On January 20, 2015, Cheung petitioned the superior court for a writ of mandate pursuant to Code of Civil Procedure section 1085. In her second amended verified petition, she alleged she observed "dozens of truckloads of dirt being brought to the site," which were used to "elevat[e] the pad height considerably above the height of the pad on which the previous structure was founded." She also observed "markings on the retaining walls indicating that the level of the pad was being raised approximately 2 1/2 feet above the prior existing level of the pad." Cheung alleged that Carla Ridge had miscalculated the average grade of the new building pad, in part by using Point 11, which appeared on no survey, and Point 12, which was "taken upslope instead of on the ground." Cheung alleged that because the July Plans failed to conform with the BHMC, Carla Ridge was required to apply for a Trousedale R-1 Permit, which would require a public hearing.

The parties agreed to a briefing schedule, with Cheung's opening brief due on June 4, 2015.

On May 7, 2015, Cheung demanded that Carla Ridge permit an independent survey to occur on June 8, 2015. Carla Ridge refused.

On June 4, 2015, Cheung filed her opening brief. In it, she argued that Carla Ridge's plans failed to comply with the BHMC in two ways, resulting in a structure that was "several feet

higher” than allowed. First, the proposed building was designed to be 16.6 feet tall. Second, some of the elevation points (which Cheung did not specify) “were taken at the top of stairs/walls instead of the natural ground level.” Therefore, the City was required to deny the permit and direct Carla Ridge to apply for a permit through the Trousdale R-1 process. Cheung further argued the City’s issuance of Permit No. BS 402234 violated the BHMC because the City was made aware during construction that Carla Ridge was importing soil to raise the building pad by approximately two and a half feet.

In support of her brief, Cheung submitted photographs of the property and copies of her communications with the City, and declared that Carla Ridge’s building plans showed the new structure would be more than 16 feet tall. She declared she personally observed that Carla Ridge was elevating the building pad, and “markings on the retaining walls indicat[ed] that the level of the pad was being raised approximately 2 1/2 feet (plus) above the prior existing level of the pad.” She also submitted a copy of surveyed elevation data she received from the City and her own reply letter indicating she thought some of the data points were taken “up from the bottom of the wall” rather than at ground level at “the bottom of the [north] retaining wall.” Finally, Cheung submitted her attorney’s declaration, wherein he introduced without comment Carla Ridge’s building plans, which he had received in discovery.

On June 23, 2015, Cheung applied ex parte for an order compelling Carla Ridge to permit her to inspect the property. The trial court denied the request, stating, “Plaintiff has waited too long to request a new survey to add to her already filed

opening brief. Granting the request would undoubtedly delay the upcoming hearing.”

In its opposition to Cheung’s opening brief, the City argued Carla Ridge’s plans complied with the BHMC. In support, it presented (1) Carla Ridge’s July Plans, which included an architectural survey and 12 architectural plan sheets, (2) the declaration of Wayne Regester, the City’s Building and Safety Inspector, (3) the declaration of Rita Naziri, a senior planner for the City, and (4) two survey reports from M&G Civil Engineering & Land Survey, Inc. (M&G Civil Engineering).

Carla Ridge also opposed the petition, contending its plans complied with the BHMC. In support, Carla Ridge presented the declarations of Austin Kelly, the project’s architect, Chris McMillan, who assisted in the design, and Greg Amoroso, a land surveyor working for M&G Civil Engineering, as well as multiple survey reports and declarations from contractors. Specifically, Drew Shryock, the contractor’s construction superintendent, declared that most markings on the project’s retaining walls had “no relationship to where the elevation of the level pad (i.e., finish grade) will be when construction is complete.”

The City’s and Carla Ridge’s evidence indicated that in both design and execution, Carla Ridge’s project involved a 14-foot tall building atop a new building pad that was two inches lower in elevation than the previous pad. For example, Naziri declared the average elevation of the old building pad was 1,068 feet 11.04 inches, as described in Carla Ridge’s July Plans, and that of the new pad was 1,068 feet 9 inches. Further, although the Title Sheet of Carla Ridge’s July Plans indicated the house would be 16.6 feet tall, this clerical error was belied by several

architectural plan sheets showing that the house would be 14 feet tall.

In her reply, Cheung argued that a permit may not be approved if it contains an error on a Title Sheet, and the City's decision to ignore the error on the Title Sheet of the July Plans—which indicated the house would be 16.6 feet tall—and credit architectural plan sheets within the plans, constituted an exercise of discretion that required a public hearing under the Trousedale R-1 permit process. Further, the City's acceptance of Carla Ridge's representations as to the elevation of the final building pad, and its resolution of admitted inconsistencies occurring over several elevation surveys, were exercises of discretion requiring a public hearing. Cheung also argued Carla Ridge's elevation calculation was wrong because some data points were taken from points on "the top of a retaining wall."

Cheung further argued for the first time that the elevation calculation for the new pad was wrong because it was measured from the "finished" grade atop stem walls and a concrete floor, instead of from the "natural" grade, i.e., the dirt beneath these improvements. She represented that this finished grade was 13 inches higher than the natural grade on the west side of the property, and from 15 inches to 3 feet higher on the east side. Therefore, Carla Ridge "gain[ed] 13 inches in height starting at the finished grade" on the west side and more than 3 feet on the east side, such that "the resulting house [was] more than 17 feet above the natural grade."

Further, Cheung argued, Carla Ridge and the City miscalculated the average grade of the new building pad by taking data points from "beyond the top of a retaining wall on" the northern boundary of the property, and "also numerous

points from the top of the stairs that enter the house or from the top of decks.” “The law of averages is simple—if you use a high number (including incorrect or artificially high numbers, as what occurred here), the resulting average is going to be a higher number. . . . By using this artificially high point, the Owner was able to skew the calculation of the average grade, claiming that an ‘average’ elevation for the Property that is several feet higher than is permissible.”

In support of her reply, Cheung presented photographs depicting the project site and new building pad, with trenches in which wooden forms are set, presumably for later concrete pours. She argued a photo of the north retaining wall showed that Point 11 was taken “at the top of an eight-foot retaining wall.”

Steven M. Murow, a construction manager, declared that pursuant to industry practice, the term “grade” means “the natural, existing dirt ground on a property.” He declared Cheung’s photographs and his personal inspection of the property in January 2015 showed that footings for the new house were constructed with stem walls and a concrete floor that were 12 to 18 inches higher than the adjacent dirt grade, which meant the final elevation of the top of the new house—assuming it was 14 feet tall—would be more than 15 inches higher than permitted by the BHMC. Murow further declared that in determining the average grade of the new building pad, Carla Ridge’s building plans inflated the elevation of one of the grade points—new-pad Point 11 in the northwest corner of the structure—upward by 12 inches.

Also in support of the reply, Jeff Voorheis, a surveyor, declared he took elevation surveys of the project in November 2014, after the foundation was laid, and February 2015, after the

building was substantially complete. He attached the surveys to his declaration but did not interpret them. The surveys showed the elevation of the slab at various places, with values ranging from 1,066 to 1,068.7 feet, and showed that the elevation of the high roof was 1,082.5 feet.

Cheung's evidence was rounded out by a request for judicial notice of several documents and by her attorney's declaration that Carla Ridge had refused his demands to have a third party surveyor take height and elevation measurements of the project.

Carla Ridge objected to Murow's declaration concerning his observations in January 2015, and to Voorheis's declaration and his November 2014 and February 2015 surveys, on the grounds that the evidence raised a new issue not raised in Cheung's earlier filings or the City's or Carla Ridge's opposition briefs—that the height of the structure was improperly determined from the “finished” grade rather than the “natural” grade—and was known to Cheung months before she filed her opening brief. The trial court sustained the objection, concluding Cheung's contentions and evidence concerning the project's natural versus finished grade impermissibly raised a new issue that the opposing parties had had no opportunity to brief. The court declined to continue the hearing to allow for further briefing because it found Cheung had not been diligent in presenting the evidence.

The trial court found that the City adequately explained the nugatory error on the Title Sheet of the July Plans, and the plans themselves showed Carla Ridge's proposed structure would be no more than 14 feet tall. The court found that Cheung's observations during construction about grading the property had nothing to do with the City's ministerial duty to issue a building

permit, but rather concerned permit revocation, which Cheung did not seek.² But assuming that noncompliance with the July Plans during construction was relevant, the court accepted Carla Ridge's explanation that the final building pad was not elevated over the old pad. The court therefore concluded Cheung failed to demonstrate either that Carla Ridge's building plans violated the BHMC or that the City breached its ministerial duty in issuing the building permit. Accordingly, the court denied Cheung's petition.

Cheung timely appealed from the resulting judgment.

DISCUSSION

Cheung contends the trial court erred in finding the height of Carla Ridge's structure did not exceed 14 feet, and in finding the discrepancy between the Title Sheet and architectural pages in the July Plans and did not require a public hearing. She also contends the trial court erred in finding Carla Ridge did not increase the elevation of the existing grade, or alternatively that it lowered the pad too much. Finally, Cheung contends the court erred in excluding Voorheis's surveys and Murow's observations.

I. Standard of Review

A writ of mandate may be issued by any court "to compel the performance of an act which the law specifically enjoins, as a duty resulting from an office, trust, or station" (Code Civ. Proc., § 1085, subd. (a).) The BHMC specifically enjoins the issuance of a building permit for building plans that comply with applicable codes. (BHMC, § 9-1-107, subd. (L)(2) ["If the building official finds that the work described in an application for a

² A building official may revoke a permit when "[a] condition to a permit has not been met or has otherwise been violated." (BHMC, § 9-1-107, subd. (O)(2)(a)(4).)

permit, and the construction documents, plans, specifications and other data filed therewith, conform to the requirements of this code, and all other pertinent laws and ordinances, and that the fees specified by resolution of the city council have been paid, the building official shall issue a permit therefor to the applicant”].)

There are two essential requirements to obtain a writ of mandate: ““(1) [a] clear, present and usually ministerial duty on the part of the respondent . . . ; and (2) a clear, present and beneficial right in the petitioner to the performance of that duty.”” (*Mission Hospital Regional Medical Center v. Shewry* (2008) 168 Cal.App.4th 460, 478-479.) Pursuant to Code of Civil Procedure section 1085, a trial court reviews an administrative action to determine “whether the agency’s action was arbitrary, capricious, or entirely lacking in evidentiary support, contrary to established public policy, unlawful, procedurally unfair, or whether the agency failed to follow the procedure and give the notices the law requires.” (*Klajic v. Castaic Lake Water Agency* (2001) 90 Cal.App.4th 987, 995.) “Although mandate will not lie to control a public agency’s discretion, that is to say, force the exercise of discretion in a particular manner, it will lie to correct abuses of discretion.” (*Helena F. v. W. Contra Costa Unified School Dist.* (1996) 49 Cal.App.4th 1793, 1799.) “In determining whether an agency has abused its discretion, the court may not substitute its judgment for that of the agency, and if reasonable minds may disagree as to the wisdom of the agency’s action, its determination must be upheld.” (*Ibid.*)

On appeal, a trial court’s factual findings are deemed conclusive if supported by substantial evidence (*Helena F. v. W. Contra Costa Unified School Dist.*, *supra*, 49 Cal.App.4th at p. 1799), but we independently review the interpretation of local

ordinances (*Farahani v. San Diego Community College Dist.* (2009) 175 Cal.App.4th 1486, 1491).

II. Building Height

Cheung contends the trial court erred as a matter of law in finding the height of Carla Ridge's proposed building did not exceed 14 feet. This is so, she argues, because the Title Sheet to Carla Ridge's July Plans showed that the building would be 16.6 feet tall. We disagree.

No building in Trousdale Estates may be more than 14 feet tall. (BHMC, § 10-3-2605 ["The maximum height of any structure in Trousdale Estates shall be fourteen feet (14')"].) The height of a building in Trousdale Estates is measured from "the highest point of grade at the perimeter of a building" to "the highest element of the building." (BHMC, § 10-3-100.) "However, if more than fifty percent (50%) of the perimeter of the building or structure at grade is below such highest grade point, then the height shall be measured from the average grade level at the perimeter of the building or structure." (*Ibid.*) The BHMC does not expressly define the term "grade." The "definitions" section of the BHMC zoning code prescribes that the height of a building is generally to be measured from "the natural ground level" at the perimeter of the building. That same section specifies that the height of a building in Trousdale Estates is to be measured from the "*grade*" at the perimeter of the building. There is no reason to differentiate between "natural ground" and "grade" for our purposes, and we can infer that "grade" means the ground where it meets the perimeter of a building.

Here, four architectural plan sheets in Carla Ridge's July Plans indicated the elevation of the new building pad would be 1,068 feet 9 inches, and those sheets plus one more indicated the

elevation of the high roof of the structure atop the pad would be 1,082 feet 9 inches, making the proposed building exactly 14 feet tall. Although the Title Sheet indicated the building would be taller, the City's Supervising Building Inspector explained that a Title Sheet does not fully describe the project but merely introduces it. To determine what is actually planned, a reviewer must consult the portions of a proposal containing the details.

When construction was substantially complete, the City measured Carla Ridge's structure to be 13 feet 10.625 inches tall, and M&G Civil Engineering certified it was 13.76 feet tall.

Thus, substantial evidence demonstrated that in both planning and execution, the height of the building did not exceed 14 feet. And Cheung adduced no evidence at trial indicating Carla Ridge's structure would be more than 14 feet tall.

III. An Error did not Cause the City's Ministerial Duty to Become Discretionary

Cheung argues the error in the Title Sheet to Carla Ridge's July Plans presented a choice to City reviewers: Either deliberately ignore the error or insist upon clarification. To do either would be to exercise discretion, she argues, which required a public hearing under the BHMC's R-1 Permit procedure. We disagree.

"When an official is required and authorized to do a prescribed act upon a prescribed contingency, his functions are ministerial only" (*Palmer v. Fox* (1953) 118 Cal.App.2d 453, 458.) "A ministerial act is one that a public functionary ""is required to perform in a prescribed manner in obedience to the mandate of legal authority,"" without regard to his or her own judgment or opinion concerning the propriety of such act. [Citation.] "Thus, "[w]here a statute or ordinance clearly defines

the specific duties or course of conduct that a governing body must take, that course of conduct becomes mandatory and eliminates any element of discretion.”” (*Ellena v. Department of Ins.* (2014) 230 Cal.App.4th 198, 205.)

Here, the BHMC prescribes conditions necessary for issuance of a building permit, and requires and authorizes issuance of the permit upon their satisfaction: “If the building official finds that the work described in an application for a permit, and the construction documents, plans, specifications and other data filed therewith, conform to the requirements of this code, and all other pertinent laws and ordinances, and that the fees specified by resolution of the city council have been paid, the building official shall issue a permit therefor to the applicant.” (BHMC, § 9-1-107, subd. (L)(2).)

The BHMC thus mandates that the City determine exactly what a builder proposes and compare the proposal to applicable codes. If the proposal violates any code, the City must reject it. Because a builder may revise a proposal (see BHMC, § 9-1-107, subd. (L)(3) [application for a building permit expires after 365 days]), the City’s rejection may be interlocutory pending further clarification or revision. Nothing about this process is discretionary—a proposed building plan either complies with the law or it does not. If the building official cannot tell whether it does, then by default it does not, and the builder must either revise the plan or abandon it. Iteration of this process after revision adds no new discretionary element.

Further, no principle or authority mandates that a building official address nugatory errors in a proposal. The BHMC prescribes only that a reviewer determine what a builder proposes, not that the determination be accomplished in any

particular manner, for example by insisting that every discrepancy be resolved.

IV. Raised Grade

Pursuant to the BHMC, a building pad may not be regraded to increase its average elevation. (BHMC, § 10-3-2604 [“no lot in Trousdale Estates shall be regraded to increase the height of a level pad above the existing elevation”].) Average grade is measured “at the perimeter” of a building or structure. (BHMC, § 10-3-100.)

Cheung contends the trial court erred in concluding Carla Ridge’s construction complied with the BHMC’s grade elevation restrictions. We disagree.

Carla Ridge’s July Plans indicated the elevation of the average grade of the new building pad would be 1,068 feet 9 inches, 2 inches lower than the old elevation of 1,068 feet 11.04 inches. The architectural plan sheets bore this out, as did survey reports and declarations from City staff and the project’s architect, designer, and contractors. The record thus amply demonstrates that Carla Ridge’s project complied with the BHMC’s grade requirements. The City was therefore obligated to issue Carla Ridge a building permit, and Cheung’s petition for a writ compelling it to withhold the permit was properly denied.

Cheung argues Points 13 and 14 in Carla Ridge’s average grade level calculation were too high because they were measured not on ground level but from atop a retaining wall. But no survey or any other evidence identified any data point as having been taken from atop a wall. Although Murow declared that page T100 of Carla Ridge’s plans indicated Point 11 represents the top of a retaining wall, our examination of that page fails to support his declaration. Cheung photographed a retaining wall and

represented that Points 13 and 14 were taken atop it, but she gave no indication how she knew where the elevation points were taken.

As discussed, Carla Ridge conducted an initial, 18-point survey in which two data points, Points 13 and 14, at respective elevations of 1,073.7 and 1,071.9 feet, were substantially higher—5.3 feet for Point 13 and 3.5 feet for Point 14—than the remaining points. Carla Ridge then conducted a second, 20-point survey representing the new building pad. In that survey, Points 11 and 12, which corresponded with Points 13 and 14 of the old-pad survey, were also substantially higher than the average—6 feet for Point 11 and 3.6 feet for Point 12.

But the surveyors and contractors all declared that elevation surveys were conducted according to standard practices in the industry. These representations constituted substantial evidence that elevation points were taken “at the perimeter” of the existing and proposed buildings, as the BHMC prescribed, which supported the trial court’s order.

Further, although significant height differences could be explained if elevation measurements are taken from atop a wall, they can also be explained by a significant slope in the land itself. Here, it was undisputed that the property at 1535 Carla Ridge sloped significantly upward from southeast to northwest, such that a retaining wall was necessary.

Even if Murow was correct that Point 11 on the new-pad survey represented the top of a retaining wall, his opinion would merely contradict the many experts who stated the surveys were completed correctly. As our review is only for substantial

evidence, the existence of this one piece of countervailing evidence would not justify reversal of the court's order.³

Even if Points 13 and 14 of the old-pad survey were measured in the wrong places, the effect would have been offset by Points 11 and 12 of the new-pad survey, which were measured in the same locations. The Trousdale Ordinance does not require that the elevation of a grade be accurately measured, only that the difference between a new and old building pad not be positive. But if the elevation of both is equally skewed, the effect on the difference between them will be zero.

And here, the net effect would be less than zero because under Cheung's theory, the new pad was skewed more than the old pad. (Point 11 was 6 feet higher than the average, while the corresponding Point 13 was only 5.3 feet higher; Point 12 was 3.6 feet higher than the average, while the corresponding Point 14 was only 3.5 feet higher.) If an elevation measurement is skewed upward, as Cheung argues, then the true elevation must be lower than represented. Thus, taken to its logical conclusion, Cheung's theory would mean that the new building pad is even lower than two inches lower than the old one.

Cheung argues that she saw markings on the retaining wall designating elevation markings for dirt fill, which means the

³ Even if Points 13 and 14 were measured from atop a retaining wall, no evidence suggests this would have been an improper practice. The grade of a building pad is the dirt "at the perimeter." If the foundation of a building rests atop a subterranean footing that serves also as a retaining wall, the grade should arguably be measured from the level of the retained dirt, i.e., from just outside the wall, even if the dirt reaches the top. View preservation standards are concerned with that part of a building that obstructs a view, not the buried part.

elevation of the new pad would be several feet higher than that of the old pad. But this had no relevance to the plans approved by the City. In any event, Drew Shryock, the contractor's construction superintendent, declared that most markings on the project's retaining walls had "no relationship to where the elevation of the level pad (i.e., finish grade) will be when construction is complete."

V. Lowered Grade

In the alternative, Cheung argues the elevation of Carla Ridge's new building pad was actually lower than represented in the July Plans. This is so because elevation Points 11 and 12 were skewed high (having been taken from atop a retaining wall), which skewed the *nominal* average elevation high, which meant the actual elevation was lower than represented. Because the height of the new building was measured by taking the difference between the elevation of the high roof and the nominal (but not actual) elevation of the building pad, she argues, the result is a building that appears on paper to be 14 feet tall but is actually sitting in a hole, which means it is more than 14 feet tall.

But as discussed, no evidence suggested any elevation point was taken from atop a retaining wall.

In any event, several surveyors and City inspectors attested that the building was of a proper height on a pad of proper elevation. This constituted substantial evidence the trial court was entitled to credit notwithstanding any countervailing evidence.

VI. Preclusion of Reply Evidence

Cheung argues the trial court erred in precluding evidence she submitted in reply to respondents' oppositions to her petition, and further erred in declining to order an inspection of the

property or to continue the hearing to afford her an opportunity to present her evidence. We disagree.

A trial court enjoys discretion to manage its proceedings and the orderly presentation of evidence. New evidence supporting a new theory raised for the first time in a reply may be disregarded. (*Regency Outdoor Advertising, Inc. v. Carolina Lanes, Inc.* (1995) 31 Cal.App.4th 1323, 1333.)

Throughout these proceedings, Cheung's theory has been something of a moving target. She first contended that Carla Ridge's building was too tall because a representation in the Title Sheet to the July Plans was inconsistent with representations elsewhere in the plans, which at least required discretionary review. She then contended it was too tall because the new-pad elevation was actually lower than Carla Ridge claimed, as two of its elevation points sat atop a retaining wall. She also contended the new building pad was actually *higher* than Carla Ridge claimed, first because too much dirt was being trucked in, and second because elevation measurements were taken in the wrong places. None of these contentions was supported by competent evidence and all were contradicted by overwhelming evidence.

From November of 2014 to February 2015, Cheung commissioned two surveys and induced Murow to examine the property. She learned from them that the new building would sit atop a foundation that was itself purportedly higher than the natural grade. She also learned that the July Plans purportedly measured the building's height from the top of the foundation, not the natural grade. Although Cheung possessed evidence supporting this new theory by February 2015, she did not state the theory or present the evidence until her reply to respondents' opposition briefs.

Cheung argues the new evidence was necessary to rebut respondents' argument, made for the first time in their oppositions to her opening brief, that the "average" grades of the old and new building pads were properly calculated. The argument is without merit. First, determination of the proper average grade of the old and new building pads has been the key issue in this litigation from the outset. Section 10-3-100 of the BHMC prescribes that on a sloping lot, the height of a building must be measured from the "average grade level" at the perimeter of the building. And the Title Sheets to Carla Ridge's February and July Plans both listed all elevation points and calculated their respective averages. Respondents' affirmation that the plans satisfied the BHMC's requirement thus presented no new issue. Second, Cheung's evidence did not rebut respondents' calculation of the average grade, it offered the new theory that respondents measured the elevation of the grade not from the dirt but from the new building's foundation. This theory was not only new, it was irrelevant, as Cheung alleged in her petition only that the City had a duty to reject Carla Ridge's permit application, not to revoke an otherwise properly issued permit due to non-conforming construction. (Cheung has not petitioned for mandate to compel the City to reject Carla Ridge's project as built.)

In any event, Cheung's photographs of the building site before construction was complete, and Voorheis's surveys and Murow's observations at that time, had no tendency in reason to show that either Carla Ridge's plans or its *completed* project violated the BHMC's height or grade restrictions.

We conclude the court was well within its discretion to preclude Cheung from belatedly offering irrelevant evidence to

support her new theory that the new building would sit atop a footing that contravened Carla Ridge's July Plans and violated the BHMC.

DISPOSITION

The judgment is affirmed. Respondents are to recover their costs on appeal.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, P. J.

JOHNSON, J.