Laidley v. City of Belvedere

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INTRODUCTION

Appellants Wendell and Claire Laidley (petitioners in the trial court) seek reversal of a judgment in favor of Respondents City of Belvedere et al. ("City"). The trial court denied appellants' petition for writ of administrative mandamus and prayer for declaratory relief challenging the constitutionality of a City ordinance, Belvedere Municipal Code ("BMC") Title 20, Architectural and Environmental Design Review, chapter 20.04 Design Review, section 20.04.035 Time Limits for Construction.[1] The City imposed a cumulative penalty of $100,000 on appellants for failure to complete a building project within the time frame specified under the conditions of the building permit. We affirm.

FACTS & PROCEDURAL BACKGROUND

A. Construction Time Limit Ordinance

In 1999, the City adopted a Construction Time Limit ordinance ("CTL ordinance") (BMC section 20.04.035) to address the "substantial and continuing adverse impacts on the City and its residents" from the "continuous stream of large numbers of construction projects on private properties within the City" in recent years. The CTL ordinance noted that among such adverse impacts are long-term noise disturbances to neighbors of the construction projects, loss of already inadequate on-street parking to the presence of large numbers of construction vehicles, and frequent closures of the City's narrow streets for construction deliveries and staging which hinder or eliminate local and emergency access for varying periods of time.

In order to address these problems, the CTL concluded: "It is in the interests of health, safety, and welfare of the citizens of Belvedere to place a reasonable time limit on the duration of each construction project, so as to balance the needs of the owner of the project with those of his neighbors and the community generally in the safe and peaceful enjoyment of their properties." It further provided that "[b]ecause of the large monetary value of many of the construction projects in the City, substantial penalties should be imposed upon persons who violate the time limits imposed

pursuant to this chapter, so as to encourage compliance with such time limits and achieve the purposes of this Section."

The CTL ordinance provides that the maximum time for completion of new construction of demonstrable value of more than $500,000 (like appellants') shall not exceed 18 months "from the commencement of work following the issuance of the building permit." It also provides that upon a failure to comply with the applicable time limits for construction, the building official shall issue an order of compliance giving the owner 30 days from the date of such order to complete the project. If the owner does not complete the project within that 30 days, then the CTL provides for a series of escalating penalties: $400 per day for the first 60 days beyond the compliance order deadline, increasing to $600 per day for days 61 through 120, and topping out at $800 per day thereafter up to "an overall maximum penalty of $100,000."[2]

A party may appeal to the City Council a penalty imposed pursuant to the CTL ordinance "for reasons beyond the control of the applicant and/or his or her representatives." In this regard, the CTL ordinance states: "For purposes of this section, reasons beyond the control of the applicant and/or his or her representatives shall include, but not be limited to, labor stoppages, acts of war or terrorism, and natural disasters. . . . [R]easons beyond the control of the applicant and/or his or her representatives shall not include: delays caused by the winter rainy season, the use of custom and/or imported materials; the use of highly specialized subcontractors, significant, numerous, and/or late design changes; access difficulties associated with the site; or by failure of materials suppliers to provide said materials in a timely manner."

B. Building Permit & CTL Violation

Appellants own real property in the City located at 12 Leeward Road. On May 16, 2002, the City issued to appellants a construction permit allowing them to demolish the existing house and construct a two-story, single-family dwelling, together with new decks, retaining wall, fences, gates, driveway and landscaping. The estimated cost of the project as stated on the construction permit application was $2.4 million. The completion date listed on the permit approval was November 15, 2003, eighteen months after the date of issuance of the permit.

On September 23, 2002, Susan Lanier and Paul Lubowicki (appellants' architects) wrote to John Anastasio at the City Building Department stating demolition of the existing residence at 12 Leeward Road had officially begun on that date. Lanier and Lubowicki referred to a pre-construction meeting with Anastasio held on May 15, 2002, where the parties agreed "the beginning date of the demolition of the building constitutes the beginning date of the time limits of construction." Lanier and Lubowicki stated they "would like to put on record this date as such by sending you this letter for your records. This meant the adjusted date for completion of the building project was March 23, 2004.

On March 24, 2004, the City Building Department sent a compliance order to appellants via certified mail stating the construction permit was supposed to be finalized by March 23, 2004. The compliance order notified appellants that "prescriptive fines will begin April 24, 2004, if the project has not been finalized by then." Apparently appellants took no action in response to this notice, because on October 13, 2004, the City Building Department wrote to appellants informing them the total amount now due in fines was $100,000. Appellants were informed they had until October 25, 2004, to file a written appeal with the City Council against imposition of the fine.

On October 25, 2004, appellants' attorney filed a written appeal with the City Council against the fine. The appeal stated appellants "were unable to comply with your timeline for construction projects for reasons beyond their control." Specifically, the appeal noted: "The most significant delay to the project was due to the roof that was put on the new residence, which ultimately must be removed and replaced. The first roof, which took a number of months to install, was not acceptable by building standards. . . . A new roof has yet to be installed due to construction constraints beyond [appellants'] control."

Correspondence attached to the appeal from Lubowicki to Asterisk, Inc., the supplier of the zinc panel roofing material, is dated June 30, 2004 and August 12, 2004. The letter of June 30 states the zinc roofing material developed white deposits identified as a corrosive substance only a few months after its installation. The letter rejected a suggestion by the German manufacturer, VM Zinc, to steam clean the roof to cure the problem, in part because steam cleaning would change the aesthetic of the material. It also reviewed the history of the problem, stating Asterisk, Inc. had noticed the deposits on April 13 and the installation contractor, SL Payton, stopped work on the project in June, 2004. Moreover, according to SL Payton, there were 2 batches of zinc used in making the roof, only one of which was defective. Lubowicki noted the difficulty of determining which panels were from the bad batch. Lubowicki also noted VM Zinc's technical marketing manager visited his office, and acknowledged "bad batches of zinc do happen from time to time." Lubowicki's letter of August 12, 2004, to Asterisk, Inc., continues to reject steam cleaning as a solution to the problem and opines "the panels were not protected properly along their edges and because of the exposed edges, the corrosion could have been already present on the panels before they were installed, occurring either during transport or in storage."

After two continuances at appellants' request, the appeal was heard by the City Council at its meeting on February 7, 2005. Vice-Mayor Morrison asked Interim Building Official Lee Braun how far the project was from completion at this time. Braun responded that the interior lacks sheetrock, siding and roofing are still underway, and the landscaping is underway. Braun's best estimate of when the project could be completed, given its complexity, was 4-5 months.

Appellant Wendell Laidley appeared at the hearing and stated in was his intention to complete the project on time, but had not done so due to unexpected delays beyond his control. Appellant's counsel asserted that the cause of delay was beyond appellant's control under the CTL ordinance

because the delay was due to a "labor stoppage," caused "when the original roofing material, which was chosen for functionality rather than aesthetics, failed and caused a Building Code violation. This necessitated finding a new roofing installer to complete the work." Also project architect Lubowicki stated that "although the roof was ordered from a manufacturer in Germany, zinc roofs have been used in Europe for hundreds of years and there are three others on the Tiburon peninsula." Lubowicki explained how the zinc began corroding as a result of poor handling and storage by the original roofing installer, and how it was later discovered that the required drainage mat had not been installed underneath the zinc." This meant the roof had to be removed, Lubowicki continued. He further added that "April to June 2004 were spent with the subcontractor and supplier promising to replace the roof. Then reports were exchanged between the parties and the contract was legally terminated."

Vice-Mayor Morrison stated that delays are never intentional and it does not signify whether the zinc was chosen for functionality or appearance. May and June are 13 and 14 months beyond deadline, she noted. She stated that the problematic roof is described in the ordinance under delays which are not grounds for appeal, i.e., "the use of custom and/or imported materials. The City is compelled to uphold the ordinance." All other councilors agreed, and the City Attorney was directed to prepare a formal resolution of denial.

The resolution of denial states: "2. Based upon all the evidence, the City Council finds that the appellants have not established that they exceeded their required construction time limit due to "reasons beyond their control" so as to justify relief from the imposition of administrative penalties under B.M.C. section 20.04.035(E)(4). "Specifically:

a. The Council finds that the circumstances listed in B.M.C. section 20.04.035(E)(4) as justifications for relief from administrative penalties are the type of events that cannot reasonably be considered to be foreseeable in the type of construction projects occurring in Belvedere, and the Council finds that defects in construction materials and the need to repair or replace those materials are reasonably foreseeable occurrences in a construction project.

b. The Council finds much of the delay associated with appellants' roof arose from the type of circumstances listed in B.M.C. section 20.04.035(E)(4) as not constituting reasons beyond the control of the applicant, so as to justify relief from administrative penalties, namely `the use of custom and/or imported materials,' `the use of highly specialized subcontractors,' the `failure of materials suppliers to provide said materials in a timely manner.' The evidence showed that the zinc material used for the roof in this project is a relatively unusual building material, which apparently has been used in only about three other projects in Belvedere; that it was fabricated in and imported from Europe; and that it required extra delivery time, special treatment in fabrication, transport, and storage, and the services of a specialized contractor." The City Council adopted the resolution denying appellants' against the imposition of administrative penalties on March 7, 2005.

C. Petition for Writ of Administrative Mandamus

On November 4, 2005, appellants filed their second amended petition for writ of administrative mandamus and complaint for declaratory relief. Appellants sought a peremptory writ directing the City to set aside the resolution of denial and a declaratory judgment that the resolution is invalid. The Administrative Record was filed on November 15, 2005. In their brief in support of the petition for mandamus, appellants raised various constitutional challenges to the CTL ordinance, contending it was unconstitutional as applied, that the City had exceeded the scope of its authority by imposing excessive fines in violation of the California and U.S. constitutions, and that the ordinance was unconstitutionally arbitrary.

The trial court adopted its tentative decision at a hearing held on March 17, 2006. The court's order denying the petition for administrative mandamus stated: "The applicable standard of review is the substantial evidence rule, inasmuch as no `fundamental vested right' is affected. (Citation.) Belvedere Municipal Code ("BMC") §20.04.035 went into effect in 1999, before any building permit was issued. Therefore, petitioners had no vested right to proceed with construction in violation of the ordinance. The City was entitled to enforce the law in effect at the time the building permit was issued. (Citations.)

"The ordinance is not unconstitutional on its face. It is a valid exercise of the City's police power. (Citation.) The City Council has the discretion to consider an appeal, and "affirm or modify" the penalty based on evidence presented at the hearing. (Citation.) The ordinance is not arbitrary or vague as to the harm meant to be avoided, the setting of timelines, or the calculations or review of penalties. (Citation.) Nor is it arbitrary or vague in defining the phrase `reasons beyond the [applicant's] control.' (Citation.) The City Council recognized the pertinent distinction by finding that circumstances included in the definition are `the type of events that cannot reasonably be considered to be foreseeable in the type of construction project occurring in Belvedere.' (Citation.) Even if the definition is ambiguous in some respects, petitioners have not shown that the ordinance is `impermissibly vague' in all of its applications. (Citation.) The definition and penalties are not arbitrary or unreasonable in light of the purposes of the ordinance. (Citation.) This is true even if these provisions affect some people more than others. (Citation.)

"The ordinance is not unconstitutional as applied to petitioners. The City Council exercised its discretion in considering the appeal, including petitioners' stated reasons for the delay, and affirmed the penalty. (Citation.) Petitioners `culpability' argument assumes that the phrase `reasons beyond [petitioners'] control' should include everything that is not their fault. This is not the definition as set forth in BMC §20.04.035(E)(4). . . . The categories set forth in the definition are not arbitrary or without rational basis. Further, even if petitioners' roof had not been made of specialty and/or imported material, delays resulting from its defective condition and installation would not have been included in `reasons beyond [petitioners'] control.' Based on the foregoing discussion, the City Council did not abuse its discretion in affirming the penalty. The decision is supported by the

findings and the findings are `supported by substantial evidence in light of the whole record. (Citations.)" Judgment denying petition for writ of administrative mandamus was filed April 13, 2006. Appellants filed a Notice of Appeal on June 7, 2006.

DISCUSSION

A.

We first address appellants' constitutional challenges to the CTL Ordinance. We conduct de novo review when asked to interpret constitutional provisions and their application to a particular ordinance. (Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles (2001) 24 Cal.4th 830, 836.)

1. Is the CTL Ordinance Unconstitutionally Vague?

In assessing appellants' facial attack on the validity of the CTL ordinance, we consider " ` "only the text of the measure itself, not its application to the particular circumstances of an individual.' [Citation.] A vagueness challenge will be rejected if the challenged ordinance `(1) gives fair notice of the practice to be avoided, and (2) provides reasonably adequate standards to guide enforcement." ' (Citation.) Moreover, `a statute or ordinance will be upheld against a vagueness challenge . . . if any reasonable and practical construction can be given its language [ ] . . . [and] [w]e are bound to give the ordinance before us "a liberal, practical common-sense construction . . . in accordance with the natural and ordinary meaning of its words." (Citation.)' " (Kumar v. Superior Court (2007) 149 Cal.App.4th 543, 548-549 (Kumar).)

Viewed against these standards, appellants' contentions are untenable. Appellants contend the CTL ordinance "fails to warn innocent individuals what conduct is proscribed before liability attaches." To the contrary, the CLT ordinance is quite clear in that regard: It states that "the maximum time [period] for completion of new construction shall not exceed . . . eighteen months from the commencement of work following the issuance of the building permit" where the value of the project exceeds $500,000. (BMC § 20.04.035(C)(4).) The CLT ordinance is similarly explicit with regard to the effect of a failure to comply with the appropriate timeline-notice of non-compliance, a 30-day period to cure, followed by a series of escalating fines up to a maximum of $100,000. (BMC § 20.04.035(E)(1-3).) It is patently clear under the plain language of the CTL ordinance that to avoid liability under its provisions appellants had to complete their construction project on time. And appellants' representatives were well aware of the time limit on construction because, as noted, they wrote to the City Building Department upon commencement of demolition in order to reset the completion date out to March 23, 2004. In sum, the CTL ordinance gives "fair notice of the practice to be avoided." (Kumar, supra, 149 Cal.App.4th at pp. 548-549.)

However, appellants also contend the CTL ordinance is void for vagueness in its definition of

"reasons beyond the control" of the applicant for purposes of appealing a fine assessed under the ordinance. We disagree. The CTL ordinance defines "reasons beyond the control of the applicant" in terms of such factors as "labor stoppages, acts of war or terrorism, and natural disasters." (BMC § 20.04.035(E)(4).) These factors are clearly beyond the control-"the function or power of directing and regulating; domination, command, sway" (Oxford English Dictionary, Second Edition 1989)-of any applicant. On the other hand, the CTL ordinance lists various factors that shall not be deemed beyond the control of the applicant; (1) delays caused by the winter rainy season; (2) the use of custom and/or imported materials; (3) the use of highly specialized subcontractors, (4) significant, numerous, and/or late design changes; (5) access difficulties associated with the site; or (6) by failure of materials suppliers to provide said materials in a timely manner."[3] The applicant has a degree of control (i.e., power to direct and regulate) over all of these factors. The use of custom or imported materials or highly specialized subcontractors is within the choice of the applicant, as is the decision to continually make design changes. Similarly, the applicant knows in advance the nature and location of the construction site and can plan access accordingly. And the applicant need not sit on his or her hands if a materials supplier fails to provide materials in a timely manner, but may find materials elsewhere. The only exception is "delays caused by the winter rainy season." This factor is beyond the control of the applicant but is not excused under the CTL ordinance. But that factor applies to every single construction project in Belvedere. The delay occasioned by the rainy winter weather affects all construction projects and is entirely foreseeable, in fact, unavoidable. In sum, the operative language, "beyond the control of the applicant," together with the factors excused and not excused as "beyond the control of the applicant," provide "reasonably adequate standards to guide enforcement." (Kumar, supra, 149 Cal.App.4th at pp. 548-549.) Although appellants attempt to "identify some instances in which the application of the statute may be uncertain or ambiguous," they have failed to "demonstrate that `the law is impermissibly vague in all of its applications.' [Citations.]" (Samples v. Brown (2007) 146 Cal.App.4th 787, 802.) Accordingly, the CTL ordinance is not unconstitutionally vague on its face.[4]

2. Was the Penalty Unconstitutionally Excessive?

Appellants assert the penalty assessed against them under the CTL ordinance is unconstitutionally excessive. "[A] civil penalty such as the one here, by virtue of its partially punitive purpose, is a fine for purposes of the constitutional protection. (Citations.) The question is whether it is excessive." (City and County of San Francisco v. Sainez (2000) 77 Cal.App.4th 1302, 1321 [italics in original] (Sainez).) A fine is excessive "if it is grossly disproportional to the gravity of a defendant's offense." (United States v. Bajakajian (1998) 524 U.S. 321, 334 (Bajakajian).) Disproportionality is assessed by examining the nature of the crime and its criminal punishment, the harm the defendant had caused, and other penalties for like offenses. (Sainez, supra, 77 Cal.App.4th at p. 1322.) Ability to pay is a also a factor to be considered under the Excessive Fines Clause. (Ibid.)

In Bajakajian, supra, the high court noted that respondent's crime-willful failure to report the removal of currency from the country-"was solely a reporting offense" because it was "permissible to

transport the currency out of the country so long as he reported it." (524 U.S. at pp. 337-338.) Moreover, the Court concluded that "[t]he harm that respondent caused was also minimal. Failure to report his currency affected only one party, the Government, and in a relatively minor way." (524 U.S. at p. 339.) Accordingly, the Court concluded that the forfeiture sought by the Government-the entire $357,144 respondent had been carrying through an airport-was grossly disproportionate. (524 U.S. at p. 340.)

Here, appellants' "crime" was continuing their construction project beyond the time permitted by the CTL ordinance, frustrating the City's attempt to curb the "adverse impact" of the large numbers of such ongoing projects. (BMC § 20.04.035(A)(1).) Nor can the harm respondents caused be said to be minimal or impacting only one party. The substantial harms the CTL ordinance sought to reduce-long-term noise disturbances, loss of already inadequate on-street parking, and frequent closures of the City's narrow streets-affect not only immediate neighbors but threaten the health and safety of the community as a whole. (BMC § 20.04.035(A)(2-4).) Also relevant to the disproportionality calculus is that the value of the project in this case was approximately $2.4 million. Thus, the penalty of $100,000 amounts to only 4 percent of the value of the project. (Cf. Sainez, supra, 77 Cal.App.4th at p. 1322 [no disproportionality where defendant's net worth of $2.3 million supports penalty of $663,000 for violations of the housing codes].)

We also recognize a party's "good or bad faith is relevant" to an evaluation of whether the fine assessed is constitutionally excessive. (People ex rel. Lockyer v. R.J. Reynolds Tobacco Co. (2005) 37 Cal.4th 707, 730 (R.J. Reynolds).) And appellants assert they acted in good faith "in proceeding with construction and in making repeated efforts to replace the defective materials in as timely a manner as possible." Doubtless appellants did not wish for the delays which beset their construction project. But "good faith" in complying with the CTL ordinance cannot turn on that intendment alone. We note that the penalty imposed here was the maximum penalty provided for under the CTL ordinance (see BMC § 20.04.035(E)(1)(c)), but that was due to the fact appellants still had not completed their project 200 days after their permit expired. Moreover, the record shows that in February 2005, almost a year after the building permit expired, the City Building Department sent a notice of non-compliance stopping any further work on the exterior of appellants' building because siding had been installed before sheer walls had been inspected. By February 24, 2005, that issue was resolved and the City allowed work to continue on the exterior of the property. Such overruns in other areas of the project, not only with respect to the roof, do not permit a finding the appellants made a good faith effort to comply with the CTL ordinance. In sum, the penalty here was not constitutionally excessive.[5]

B.

Having concluded appellants' constitutional challenges to the penalty imposed under the CTL ordinance lack merit, we now review the City's application of the ordinance to the facts of this case.

1. Standard of Review

"[A] superior court's review of an agency's adjudicatory administrative decision under Code of Civil Procedure section 1094.5 is subject to two possible standards depending on the nature of the rights involved. [Citation.] If the administrative decision involved or substantially affected a `fundamental vested right,' the superior court exercises its independent judgment upon the evidence disclosed in a limited trial de novo in which the court must examine the administrative record for errors of law and exercise its independent judgment upon the evidence. [Citations.] The theory behind this kind of review is that abrogation of a fundamental vested right `is too important to the individual to relegate it to exclusive administrative extinction.' [Citation.]" (JKH Enterprises, Inc. v. Department of Industrial Relations (2006) 142 Cal.App.4th 1046, 1056-1057 (JKH) (fns. omitted).) On the other hand, "[w]here no fundamental vested right is involved, the superior court's review is limited to examining the administrative record to determine whether the adjudicatory decision and its findings are supported by substantial evidence in light of the whole record. [Citation.] Substantial evidence, of course, must be `of ponderable legal significance,' which is reasonable in nature, credible and of solid value. [Citations.]" (Id. at p. 1057.)

"Regardless of the nature of the right involved or the standard of judicial review applied in the trial court, an appellate court reviewing the superior court's administrative mandamus decision always applies a substantial evidence standard. [Citations.] 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.] If a fundamental vested right was involved and the trial court therefore exercised independent judgment, it is the trial court's judgment that is the subject of appellate court review. [Citations.] On the other hand, if the superior court properly applied substantial evidence review because no fundamental vested right was involved, then the appellate court's function is identical to that of the trial court. It 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.]" (JKH, supra, 142 Cal.App.4th at p. 1058, fn. omitted [italics added].)

We agree with the trial court's determination that appellants had no fundamental right to proceed with their construction project unlimited by time constraints. Accordingly, we review 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.]" (JKH, supra, 142 Cal.App.4th at p. 1058.)[6]

2. Does Substantial Evidence Support the City's Imposition of the Penalty?

The City Council imposed the penalty at issue upon a finding that: "[M]uch of the delay associated with appellants' roof arose from the type of circumstances listed in B.M.C. section 20.04.035(E)(4) as

not constituting reasons beyond the control of the applicant, so as to justify relief from administrative penalties, namely `the use of custom and/or imported materials,' `the use of highly specialized subcontractors,' the `failure of materials suppliers to provide said materials in a timely manner.' " The evidence showed that the zinc material used for the roof in this project is a relatively unusual building material, which apparently has been used in only about three other projects in Belvedere; that it was fabricated in and imported from Europe; and that it required extra delivery time, special treatment in fabrication, transport, and storage, and the services of a specialized contractor."

All of the factors relied on by the City Council-the use of custom and/or imported materials, the use of highly specialized subcontractors, and the failure of materials suppliers to provide said materials in a timely manner-are listed in the CTL ordinance as causes of delay which shall not be deemed as beyond the control of the applicant. (BMC § 20.04.035(E)(4).) There is nothing ambiguous about any of those factors.

Furthermore, substantial record evidence supports the Council's finding that the delay could be attributed to such factors. The material specified for the job was "Quartz-Zinc," which is "a light grey, matt, pre-weathered zinc." "The patina of `Quartz-Zinc' is the result of a chemical process, which produces a weathered effect similar to the natural weathering effect that would occur on plain zinc only after several years' exposure to the atmosphere." This product was manufactured by VM Zinc in Germany and imported to California. After the zinc roof "developed white deposits," samples of the material had to be sent to Germany for lab testing. Based on the German lab results, VM Zinc apparently took the position it was not responsible for replacement of the zinc, so appellants' architect obtained a second opinion from an independent material testing firm. Peter Reed, VM Zinc's Technical Marketing manager stated that new material would take 4-5 weeks to arrive, and "he usually orders more than what is needed because shipments of the material happen at different times."

Steam cleaning of the roof was proposed as a solution to the problem, but that was rejected by appellants' architect because it would affect the patina of the roof and result in discoloration. It was also rejected because "the [zinc] panels are laid up in a flat seam method, meaning the zinc is folded on all four sides and interlocks with the adjacent panels [meaning] [t]here are areas of each zinc panel that cannot be washed because they are hidden under and inside the adjacent panels. Moreover, the zinc material apparently required careful handling, shipping and storage, because appellants' architect opined "[w]e do not know how the material was transported or if it was stored properly at the subcontractor's site, which if done improperly can cause white rust." Appellants' architect also stated he believed the "corrosion could have been already present on the panels before they were installed, occurring either during transport or in storage." At the Council meeting, appellants' architect stated there were three other zinc roofs on the Tiburon Peninsula. All in all, we conclude this provides substantial evidence supporting the City Council's finding that the use of a custom, imported roofing material from a foreign manufacturer, involving shipping delays and requiring

careful handling and storage, as well as specialized installation, all contributed to delays in the construction project.[7]

C.

Finally, we address the contention raised by amicus curiae Howard Jarvis Taxpayers Association ("HJTA"). HJTA contends the penalties imposed by the CTL ordinance constitute a disguised "special tax" imposed without the two-thirds voter approval required for such taxes under Article XIII A, section 4 of the California Constitution.[8] HJTA asserts the penalties collected under the CTL ordinance are "special taxes" under Government Code section 50076 because (1) they "exceed the reasonable cost of providing the service or regulatory activity for which the fee is charged and (2) they are used for "general revenue purposes" by the City. (Gov. Code § 50076 [defining "special tax"].) Specifically, HJTA asserts CTL ordinance penalties are a "special tax on property" because the penalties constitute a lien against real property.

Whether a CTL ordinance lien is a "special tax" is a question of law. (Carlsbad Mun. Water Dist. v. QLC Corp. (1992) 2 Cal.App.4th 479, 485.) "The term `special taxes' must be strictly construed and ambiguities resolved so as to limit the situations to which the two-thirds requirement applies because of the inherently undemocratic requirement that the tax must be approved by a supermajority of the electors. (Citation.)" (Carlsbad Mun. Water Dist., supra, 2 Cal.App.4th at p. 486; Alamo Rent-A-Car, Inc. v. Board of Supervisors (1990) 221 Cal.App.3d 198, 202-203.)

"The `special tax' cases have involved three general categories of fees or assessments: (1) special assessments, based on the value of benefits conferred on property; (2) development fees, exacted in return for permits or other government privileges; and (3) regulatory fees, imposed under the police power." (Sinclair Paint Co. v. State Bd. of Equalization (1997) 15 Cal.4th 866, 874 (Sinclair Paint).)

"Special assessments are made for the purpose of completing a specific public improvement in a designated district; they are compulsory charges and are placed upon specific real property. They are made under express legislative authority for the purpose of defraying the cost of the proposed local public improvement." (Isaac v. City of Los Angeles (1998) 66 Cal.App.4th 586, 595 -596 (Isaac).) Special assessments on property or similar business charges are not "special taxes" if levied "in amounts reasonably reflecting the value of the benefits conferred by improvements." (Sinclair Paint, supra, 15 Cal.4th at p. 874. However, the penalty at issue here does not meet the definition of a "special assessment" because it was not levied for the purpose of defraying the cost of a local public improvement.

Developmental fees are those fees "exacted in return for permits or other governmental privileges." (Isaac, supra, 66 Cal.App.4th at p. 596.) "[D]evelopment fees exacted in return for building permits or other governmental privileges are not special taxes if the amount of the fees bears a reasonable relation to the development's probable costs to the community and benefits to the developer."

(Sinclair Paint, supra, 15 Cal.4th at p. 875.) The penalty at issue here is not a "development fee" because it was not exacted in return for a building permit or other government privilege.

Regulatory fees are imposed under the government's police power to cover the reasonable cost "of the services necessary for the activity for which the fee is charged and for carrying out the purpose of the regulation." (Isaac, supra, 66 Cal.App.4th at p. 596.) However, a regulatory fee may be deemed a "special tax" if the fee exceeds the reasonable cost of the service provided or the fee is levied for an unrelated revenue purpose. (Ibid.; Sinclair Paint, supra, 15 Cal.4th at pp. 875-876; Carlsbad Mun. Water Dist., supra, 2 Cal.App.4th at p. 485.) The penalty at issue here does not fit into the definition of a regulatory fee either. The penalty is not a charge for a service provided by the City in regulating any identified activity. (Cf. Sinclair Paint, supra, 15 Cal.4th at p. 876 [acknowledging that "the term `special taxes' . . . does not embrace fees charged in connection with regulatory activities [such as] regulatory fees charged to alcoholic beverage sale licensees to support pilot project to address public nuisances associated with those sales; . . . landfill assessment based on land use to reduce illegal waste disposal; . . . waste disposal surcharge imposed on waste haulers; emissions-based formula for recovering direct and indirect costs of pollution emission permit programs; . . . fees for inspecting and inventorying on-premises advertising signs] [citations and punctuation omitted] [italics added].)

The CTL penalty is not a "regulatory fee" such as the examples above. It is not a fee charged for a service provided by the City in connection with the regulation of a particular activity. It is a penalty imposed for failure to complete a construction project on time. It can hardly be said the CTL ordinance penalty provisions amount to a disguised tax for general revenue purposes. The penalty provisions are designed to encourage compliance with the CTL ordinance, i.e., timely completion of construction projects, and if there was general compliance with the CTL ordinance, it would generate zero revenue.

Rather, we agree with the City that the penalties imposed under the CTL ordinance are administrative fines or penalties authorized under Government Code section 53069.4, which states: "The legislative body of a local agency . . . may by ordinance make any violation of any ordinance enacted by the local agency subject to an administrative fine or penalty." (Gov. Code § 53069.4, subd. (a)(1).) Moreover, the City is authorized, after any appeal of the penalty is final, to collect the penalty "pursuant to the procedures set forth in its ordinance." (City of Santa Paula v. Narula (2003) 114 Cal.App.4th 485, 492-493; Gov. Code 53069.4, subd. (d).) Here, the CTL provides that "[a]ny penalty finally imposed . . . shall constitute a lien on the applicant's property." (BMC § 20.04.035(E)(6).) In sum, HJTA's contention the CTL ordinance penalty constitutes an illegal "special tax" is without merit.

DISPOSITION

The judgment is affirmed.

We concur: McGuiness, P. J., Siggins, J.

1. Appellants' unopposed request for judicial notice, filed February 8, 2007, is granted. Accordingly, we take judicial notice of the current version of BMC section 20.04.035, as most recently amended by Local Ordinance 2006-10 section 1, 2006. (Request for Judicial Notice, Exhibit 1 and Exhibit 2.)

2. These were the penalties in effect at times relevant here.

3. The current version of the CTL ordinance listed one additional factor-"failure of subcontractors to complete their work according to schedule."

4. Appellants also contend the lack of a so-called "culpability requirement" renders the CLT ordinance unconstitutionally vague. However, the CTL ordinance is a regulatory requirement enacted for the benefit of the public welfare, and as such, a violator may be held strictly liable under its provisions. (City of Vacaville v. Pitamber (2004) 124 Cal.App.4th 739, 743-744 [lack of scienter requirement in city ordinance imposing duty on hotel owners to collect and remit to city a transient occupancy tax did not render ordinance unconstitutionally vague].)

5. Accordingly, without further analysis we also conclude the penalty imposed under the CTL ordinance is proportionate to its legitimate legislative goals, is "reasonable and proper [rather than] arbitrary and oppressive" (Hale v. Morgan (1978) 22 Cal.3d 388, 399), and therefore does not offend due process. (R.J. Reynolds, supra, 37 Cal.4th at p. 728 [separate analysis on questions of whether a fine was unconstitutionally excessive and whether it denied due process is only necessary if punitive damage award is at issue because "the excessive fines clause of the Eighth Amendment to the federal Constitution does not apply to punitive damages. (Citation.) But [w]here the case involves a civil penalty subject both to the state and the federal constitutional bans on excessive fines as well as state and federal provisions barring violations of due process[,] [i]t makes no difference whether we examine the issue as an excessive fine or a violation of due process."].)

6. Appellants urge us to engage in de novo statutory interpretation of the CTL ordinance on various grounds, viz., to "strictly construe" it in their favor because it entails substantial penalties, and to construe it "to require some element of culpability." However, the penalty provisions relied upon by the City (see post) were unambiguous, so no statutory interpretation is required. (Esberg v. Union Oil Co. (2002) 28 Cal.4th 262, 268 ["When statutory language is clear and unambiguous, `there is no need for construction and courts should not indulge in it' "].) Moreover, appellants' "culpability" argument, based on No Oil, Inc. v. Occidental Petroleum Corp. (1975) 50 Cal.App.3d 8 (No Oil), is inapposite: There the court of appeal concluded it would be unfair to impose penalties on Occidental for illegal drilling when it had carried out the drilling under valid City of Los Angeles drilling ordinances which were subsequently invalidated by the California Supreme Court. (No Oil, supra, 50 Cal.App.3d at p. 30-31.) Here, by contrast, appellants were fully aware of the time-limit attached to their building permit, so the same equities do not apply.

7. Accordingly we need not discuss the City's alternate finding for denying the appeal, viz., that "defects in construction materials and the need to repair or replace those materials are reasonably foreseeable occurrences in a construction project." Moreover, we reject appellants' attempt to characterize the delay as solely due to "defective materials." Our task is to review the record for substantial evidence supporting the City Council's finding the delay could be attributed to

certain factors deemed under the CLT ordinance not to be "beyond the control of the applicant,"-here the use of custom and/or imported materials, the use of highly specialized subcontractors, and the failure of materials suppliers to provide said materials in a timely manner. Appellants also argue that a subsequent amendment to the CTL ordinance-listing the "failure of subcontractors to complete their work according to schedule" as a factor not beyond the control of the applicant-is a substantive change which may not operate retroactively, citing Riley v. Hilton Hotels Corp. (2002) 100 Cal.App.4th 599. As a legal proposition, that may well be true, but it has no application here, because the City Council did not rely on that factor in its decision.

8. Article XIII A, section 4 states: Cities, counties and special districts, by a two-thirds vote of the qualified electors of such district, may impose special taxes on such district, except ad valorem taxes on real property or a transaction tax or sales tax on the sale of real property within such City, County or special district.

9. Judge of the Alameda County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.