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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

FRIENDS OF THE WEST BERKELEY PLAN,

Plaintiff and Appellant,

v.

CITY OF BERKELEY et al.,

Defendants and Respondents;

CHRISTOPHER BARLOW et al.,

Real Parties in Interest.

A140877

(Alameda County
Super. Ct. No. RG13669672)

In 2009, the Berkeley Zoning Adjustments Board (Board) granted real party in interest Wareham Development (Wareham) a height variance to develop a research and development laboratory. Following project modification proposals, the Board reaffirmed the variance in 2012. Friends of the West Berkeley Plan (Friends) appealed to the Berkeley City Council, which affirmed the Board's decision. Friends then petitioned for a writ of administrative mandate to overturn the Board's decision, but the trial court denied their petition.

Friends now appeals the denial of their petition for a writ of administrative mandate, contending that the Board's and City Council's findings were not supported by substantial evidence. We conclude that some of Friends's arguments are waived for

failure to raise them at the administrative proceedings and that the remaining arguments lack merit. Accordingly, we affirm the judgment of the trial court.

BACKGROUND[1]

The Copra Warehouse (the warehouse), at 740 Heinz Avenue (the property) in the city of Berkeley, California (city) is an unreinforced masonry (URM) structure that has been vacant and unused since the 1990's and is seismically unsafe. The warehouse, a 10,000-square-foot structure approximately 74 feet in height, was built in 1917 and exceeds the 45-foot height limit for the zoning district. The warehouse has been owned by Garr Land & Resource Management (Garr) since the mid-1980's. In 1985, the warehouse was declared a city landmark.

In 1991, following the 1989 Loma Prieta earthquake, the city adopted an ordinance requiring URMs to be seismically strengthened by certain deadlines. Garr was given a deadline of March 1, 1997, for retrofitting the building. In 2001, the retrofit had not occurred and the city informed Garr that lack of compliance was a serious violation and required immediate corrective action. In 2002, the city required that the warehouse's URM status appear on property title. Also in 2002, the city declared the warehouse a public nuisance.

In 2003, an evaluation by a structural engineer determined that the warehouse was not safe and was an "imminent hazard in an earthquake." In 2004, another structural engineer concluded that the building "is susceptible to collapse in an earthquake and represents a major risk to life safety." In 2005, a fire prevention inspector expressed his belief that "the condition of the building puts the City of Berkeley emergency vehicles, personnel, as well as civilian bystanders at risk."

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[1] We do *not* rely on the city's and Wareham's joint appendix (RJA), which they cite extensively in their reply brief. The RJA consists of materials submitted to the trial court in this case and contains evidence that is not in the administrative record. Any facts not before the administrative body in this case are irrelevant. (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 571-572.)

Wareham operates Aquatic Park Center, which owns or operates property adjacent to the warehouse on its south, east, and west sides. The north side of the warehouse faces the street. No other developers have proposed a viable development for the property.

Wareham made an initial proposal to develop the property in 2005. After several modifications, a proposal was made in 2009 (2009 proposal) to build a 92,000-square-foot research and development laboratory, with storage/warehouse uses, and a 49-stall sub-surface parking garage. Additional parking would be provided by excess parking areas already developed within Aquatic Park Center. The project required demolition of the warehouse, except for its north and south façades, which were to be retained and incorporated into the new building. The height of the building would be 74 feet.[2] Because the height would exceed the zoning limit, a variance was required. The Board made the findings required for approval of the use permit, with its included zoning variance. On July 23, 2009, the City Council passed a resolution approving the use permit and variance.

On December 20, 2011, Wareham submitted a use permit modification request to: (1) add a new lobby on the exterior of the south façade; (2) eliminate the subsurface parking lot; (3) change window design and color; and (4) increase the floor area to 100,336 feet by enlarging the first, third, and fourth floors. On May 29, 2012, Wareham requested a further revision, involving complete demolition of the warehouse without retention of the north and south façades. Wareham cited higher construction costs and lower rents (when compared to 2009) as the basis for the requested changes.

On September 27, 2012, the Board again made the findings required to approve a height variance and approved the modified project.[3] Friends appealed the Board's

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[2] The height of the building itself would be 60 feet, but a mechanical roof screen would bring the total height to 74 feet.

[3] In the Board report, the staff expressed its belief that the modifications requested did not invalidate the original variance, but stated that "in order to ensure that the Variance findings still apply, staff has repeated the 2009 analysis using 2012 financial conditions for the same scenarios, to demonstrate that standard used in 2009 is being met."

decision to the City Council, asserting that the Board's actions violated the California Environmental Quality Act (CEQA) and that the approval of the height variance was improper. The City Council affirmed the decision of the Board and dismissed the appeal on January 22, 2013.

On March 4, 2013, Friends filed a petition for writ of mandate (petition) directing the city to void the final Board approval of the project and the City Council resolution affirming it and directing Wareham to cease all project activities until the requirements of CEQA and local and state zoning laws had been satisfied. As it had in its appeal to the City Council, Friends alleged that the Board had violated CEQA and that approval of the height variance was improper. Friends filed an amended petition on April 17, 2013, making the same allegations.

Trial on the merits took place on September 19, 2013. On November 26, 2013, the court issued its final statement of decision, holding that Friends had waived some of its arguments by failing to advance them during the administrative process and that there was no merit in the remaining arguments. On January 2, 2014, the court entered judgment denying the amended petition for writ of mandate.

Friends timely filed a notice of appeal on January 27, 2014.

DISCUSSION[4]

On appeal, Friends does not contest the trial court's determination that the city met the requirements of CEQA. However, Friends contends that two of the findings required by the Berkeley Municipal Code for the grant of a zoning variance were not supported by substantial evidence.

[4] Because we affirm the judgment on other grounds, we need not address the city's contention, which the trial court rejected, that the Board's action in 2012 was only a modification of the use permit and not a modification of the 2009 variance or the grant of a new variance.

I. *Legal Standard*

"[Code of Civil Procedure] section 1094.5 makes administrative mandamus available for review of 'any final administrative order or decision made as the result of a proceeding in which *by law* a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in the inferior tribunal, corporation, board or officer.' " (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 514, fn. 12 (*Topanga*).)

"In reviewing an agency's decision under Code of Civil Procedure section 1094.5, the trial court determines whether (1) the agency proceeded without, or in excess of, jurisdiction; (2) there was a fair hearing; and (3) the agency abused its discretion." (*McAllister v. California Coastal Com.* (2008) 169 Cal.App.4th 912, 921.) "Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." (Code Civ. Proc., § 1094.5, subd. (b).) "The trial court and appellate court apply the same standard; the trial court's determination is not binding on us." (*Neighbors in Support of Appropriate Land Use v. County of Tuolumne* (2007) 157 Cal.App.4th 997, 1004 (*Tuolumne*).)

When an appellant argues that a zoning agency has abused its discretion because its findings supporting a zoning variance are not supported by the evidence, our review for substantial evidence is vigorous: "The standard of review in an administrative mandamus proceeding such as this was set forth by the unanimous Supreme Court in the leading case of [*Topanga*]. . . . In that case, the Supreme Court held that any administrative grant of a variance must be accompanied by administrative findings; and that a court reviewing such a grant must determine whether substantial evidence supports the findings and whether the findings support the conclusion that all applicable legislative requirements for a variance have been satisfied. The findings set forth by the agency which renders the challenged decision must 'bridge the analytic gap between the raw evidence and ultimate decision or order.' [Citation.] 'Among other functions, a findings requirement serves to conduce the administrative body to draw legally relevant

subconclusions supportive of its ultimate decision; the intended effect is to facilitate orderly analysis and minimize the likelihood that the agency will randomly leap from evidence to conclusions. [Citations.] In addition, findings enable the reviewing court to trace and examine the agency's mode of analysis. [Citations.]' [Citation.]" (*Orinda Assn. v. Bd. of Supervisors* (1986) 182 Cal.App.3d 1145, 1160-1161, fn. omitted (*Orinda*).)

"*Topanga* makes it clear that despite the applicability of the substantial evidence rule and the deference due to the administrative findings and decision, judicial review of zoning variances must not be perfunctory or mechanically superficial. 'Vigorous and meaningful judicial review facilitates, among other factors, the intended division of decision-making labor [in land-use control]. Whereas the adoption of zoning regulations is a legislative function [citation], the granting of variances is a quasi-judicial, administrative one. [Citations.] If the judiciary were to review grants of variances superficially, administrative boards could subvert this intended decision-making structure. [Citation.] They could "[amend] . . . the zoning code in the guise of a variance" [citation], and render meaningless, applicable state and local legislation prescribing variance requirements. [¶] Moreover, courts must meaningfully review grants of variances in order to protect the interests of those who hold rights in property nearby the parcel for which a variance is sought. A zoning scheme, after all, is similar in some respects to a contract; each party forgoes rights to use its land as it wishes in return for the assurance that the use of neighboring property will be similarly restricted, the rationale being that such mutual restriction can enhance total community welfare. [Citations.] If the interest of these parties in preventing unjustified variance awards for neighboring land is not sufficiently protected, the consequence will be subversion of the critical reciprocity upon which zoning regulation rests. [¶] Abdication by the judiciary of its responsibility to examine variance board decision-making when called upon to do so could very well lead to such subversion . . . . Vigorous judicial review . . . can serve to mitigate the effects of insufficiently independent decision-making.' [Citation.]" (*Orinda, supra,* 182 Cal.App.3d at pp. 1161-1162.)

II. *State Law Governing Variances*

Government Code section 65906 provides, in relevant part: "Variances from the terms of the zoning ordinances shall be granted only when, because of special circumstances applicable to the property, including size, shape, topography, location or surroundings, the strict application of the zoning ordinance deprives such property of privileges enjoyed by other property in the vicinity and under identical zoning classification.

"Any variance granted shall be subject to such conditions as will assure that the adjustment thereby authorized shall not constitute a grant of special privileges inconsistent with the limitations upon other properties in the vicinity and zone in which such property is situated."

III. *Required Findings for a Variance in the Berkeley Municipal Code*

Berkeley Municipal Code section 23B.44.030(A) provides: "After the Board has conducted a public hearing, it shall act on the application. The Board may approve a Variance application, either as submitted or modified, only if it makes all of the following findings: [¶] 1. There are exceptional or extraordinary circumstances or conditions applying to the land, building or use referred to in the application, which circumstances or conditions do not apply generally to land, buildings and/or uses in the same District [(finding 1)]; [¶] 2. The granting of the application is necessary for the preservation and enjoyment of substantial property rights of the subject property's owner [(finding 2)]; [¶] 3. The establishment, maintenance or operation of the use or the construction of a building . . . will not . . . materially affect adversely the health or safety of persons . . . ; [¶] 4. Any other variance findings required by the Section of the Ordinance applicable to that particular Variance." Only the first two of the required findings are at issue in this appeal.

IV. *Finding 1: Exceptional or Extraordinary Circumstances or Conditions*

Friends argues that finding 1 was not supported by substantial evidence. The trial court disagreed: "The City has identified substantial evidence in the record to support the

[Board's] and the [City] Council's finding that exceptional or extraordinary circumstances or conditions apply to the proposed building. The Warehouse 'is currently unusable, a public nuisance, seismically unsafe, and too costly to rehabilitate as the existing use (warehouse).' [Citations.] . . . The City may legitimately decide that 'the necessity of ameliorating the substantial safety hazard which would remain if the City strictly enforced the [height restriction] requirement' is an exceptional circumstance that warrants granting the height variance. [Citation.]" We agree and conclude, as did the trial court, that Friends's primary arguments are waived because it failed to raise them during the administrative process.

A. *The Board's Factors in Support of Finding 1*

In support of finding 1, the Board report stated: "Several factors, described below, when taken together create exceptional circumstances for the parcel:

"1. The Copra Warehouse is an un-reinforced masonry building, directly abuts the public right-of-way to the north (no sidewalk exists) and a parking lot serving tenants of the Aquatic Park Center to the west and south, has walls that reach 60-foot in height and could easily cause injury to passersby should an earthquake occur;

"2. No other URM in West Berkeley creates comparable risk to the public: the other URMs remaining in Berkeley are either lower in height, in better condition, are not located within a liquefaction zone, or include some retrofit. No URM in Berkeley has been vacant for as long, is as tall, or is as deteriorated. The building must be removed or restored, in order to protect the public;

"3. The relatively small (half acre) site well below the 11 acre median lot size in the MULI [multiple use/light industry] zoning district. It is surrounded on three sides by Aquatic Park Center. Unless it is integrated into the Aquatic Park Center so that it can share resources, such as parking, business support services, access, loading docks, and tenants, the barrier posed by limited land area needed to provide the parking to support reuse does not provide sufficient revenue to support renovation or replacement of the building[; and]

"4. The building is vacant, and may not be occupied as-is because it is an unsafe un-reinforced masonry building and the City prohibits re-occupancy in its present condition. Other URM buildings in Berkeley are not vacant, the existing occupancy can continue, and thus are not subject to this prohibition." (Fn. omitted)

B. *Factors 1, 2, and 4*

Friends argues that the Board's factors 1, 2, and 4, relating to the condition of the warehouse, are a "self-induced hardship" and therefore not relevant evidence in support of finding 1.

" 'The essential requirement of a variance is a showing that a strict enforcement of the zoning limitation would cause unnecessary hardship . . . .' " (*Tuolumne, supra,* 157 Cal.App.4th at p. 1007.) "Self-induced hardship is not within the purview of the [zoning] ordinance. Only that type of hardship which inheres in the particular property is recognized,—such as inability to use it for purposes of its existing zoning caused by the prevailing uses of surrounding property." (*Minney v. City of Azusa* (1958) 164 Cal.App.2d 12, 31 (*Minney*).)

In *Minney* a church had purchased property in a R-1 (residential) zone, in which churches were forbidden, and required a variance in order to build. (*Minney, supra,* 164 Cal.App.2d at pp. 31-32.) The court held that "[o]ne who purchases property in anticipation of procuring a variance to enable him to use it for a purpose forbidden at the time of sale cannot complain of hardship ensuing from a denial of the desired variance." (*Ibid.*)

Friends argues that the state of the warehouse is self-induced because "Garr did nothing to make the building safe for over twenty years." It also contends that allowing the state of the warehouse to support a finding of exceptional circumstances would contravene Civil Code section 3517, which provides: "No one can take advantage of his own wrong." The city and Wareham maintain that Friends waived its argument of self-induced hardship by failing to raise it with sufficient specificity at the administrative level.

"The requirement of exhaustion of administrative remedy is founded on the theory that the administrative tribunal is created by law to adjudicate the issue sought to be presented to the court, and the issue is within its special jurisdiction." (*California Aviation Council v. County of Amador* (1988) 200 Cal.App.3d 337, 340-341.) "The rule affords the public agency an 'opportunity to receive and respond to articulated factual issues and legal theories before its actions are subjected to judicial review.' [Citation.] Thus, by presenting the issue to the administrative body, the agency 'will have had an opportunity to act and render the litigation unnecessary.' " (*Leff v. City of Monterey Park* (1990) 218 Cal.App.3d 674, 681.)

That Friends was first required to raise all of its issues at the administrative level is mandated by law: "In an action or proceeding to attack, review, set aside, void, or annul a finding, determination, or decision of a public agency made pursuant to this title at a properly noticed public hearing, the issues raised shall be limited to those raised in the public hearing or in written correspondence delivered to the public agency prior to, or at, the public hearing, except where the court finds either of the following: [¶] (A) The issue could not have been raised at the public hearing by persons exercising reasonable diligence. [¶] (B) The body conducting the public hearing prevented the issue from being raised at the public hearing." (Gov. Code, § 65009, subd. (b)(1).) Berkeley Municipal Code section 23B.32.050, subdivision (c)(1) requires that when an appeal is taken to the City Council, "[t]he appeal shall clearly and concisely set forth the grounds upon which it is based." Thus, Friends may not argue here that Garr's hardship was self-induced unless it sufficiently raised that issue before the Board or in its appeal to the City Council. (See *Park Area Neighbors v. Town of Fairfax* (1994) 29 Cal.App.4th 1442, 1447-1448; *Evans v. City of San Jose* (2005) 128 Cal.App.4th 1123, 1136 ["A challenger who has participated in the administrative process must also show that the issues raised in the judicial proceeding were raised at the administrative level."].)

Friends relies on *East Peninsula Ed. Council, Inc. v. Palos Verdes Peninsula Unified School Dist.* (1989) 210 Cal.App.3d 155, 176-177 (*East Peninsula*): "Less specificity is required to preserve an issue for appeal in an administrative proceeding than

in a judicial proceeding because in administrative proceedings parties generally are not represented by counsel. [Citation.] To hold such parties to knowledge of the technical rules of evidence and to the penalty of waiver for failure to make a timely and specific objection would be unfair for them." Even applying a lenient standard for preservation of the issue, however, Friends must still demonstrate that it sufficiently alerted the City Council to the issue, even if the words "self-induced hardship" were not used.

In arguing that it did exhaust its administrative remedy with regard to the self-induced hardship argument, Friends cites points 3 and 4 from its January 7, 2013 letter appealing the Board decision to the City Council: "3) In 2009, [the Board] justified the variance based on ensuring a return to the property owner. This appears to be an illegal abuse of the zoning law: 'The standard of hardship with regard to applications for variances relates to the property, not to the person who owns it.' (California Governor's Office of Planning and Research); [¶] 4) The 2012 [Board] finding that the allowable size of [740] Heinz in 2009 is permitted to increase due to changing market conditions would appear to be a violation of zoning law. The City cannot use zoning variances to bail out speculators when market conditions change."

We agree with the trial court that "[t]he 'self-induced hardship' argument was not raised in the administrative process. The arguments raised were not sufficiently specific to put the City on notice of the issue." On their face, the factors cited by the Board in support of finding 1 relate to the property and not to Garr. Accordingly, we do not agree with Friends that argument 3 was sufficient to put the city on notice that, despite there being a hardship related to the property, that hardship was self-induced by Garr. We also fail to see how argument 4 relates to the argument that hardship was self-induced.

In its reply brief, Friends makes two additional citations to the administrative record. The first is a public comment by a Friends member at the January 22, 2013 City Council Hearing: "Planning staff made the dubious claims that the variance was necessary so that the owner could get some economic use out of their property. However, the developer's representative stated that the County Assessor's record showed the building to be assessed at $2,000." The second is from the January 14, 2013 letter

from Friends supplementing its letter appealing the Board's decision to the City Council: "G. Powell of the Planning Staff then mentioned but did not describe or recite language that was to be inserted into the Findings that purportedly established the unique nature of the property such as to answer the above concern [that the variance was based on economic considerations alone]. This language, he said, would be added to the Findings 'right after variance 3-B and just before the start before we start the discussion of 3-C.' [¶] The paragraph that appears to be the one he was referring to does indeed claim to discuss issues 'other than financial feasibility.' However, it only refers to one of the development alternatives without referring to the general question of what makes the property unique. Of the three reasons it cites, Reasons One and Three are financial . . . ."

We find nothing in these additional citations that would put the city on notice that Friends regarded the current state of the building to be irrelevant because that state was self-induced by Garr. Accordingly, the self-induced hardship argument is waived.

Friends also argues that because hardship caused by the current condition of the warehouse is not "inherent" in the property, evidence concerning that condition is irrelevant. Because Friends regards this argument as simply another way of stating the self-induced hardship argument, and offers no citations to the administrative record that the argument, framed in this way, was raised during the administrative proceedings, it too is waived.

Finally, Friends argues that factors 1, 2, and 4 are also irrelevant because they relate to the benefits of the project to the community. This contention was also not raised during the administrative process, in which Friends's primary contention was that the findings were improperly based on economic considerations, not that they were improperly based on consideration of public benefit. Moreover, for this argument, Friends relies on *Orinda*: "[D]ata focusing on . . . the benefits to the community . . . lack legal significance and are simply irrelevant to the controlling issue of whether strict application of zoning rules would prevent the would-be developer from utilizing his or her property to the same extent as other property owners in the same zoning district." (*Orinda, supra,* 182 Cal.App.3d at p. 1166.) However, *Orinda* was discussing public

benefit data that were unrelated to disparities between the subject property and surrounding properties. (*Ibid.*) *Orinda*'s rule of irrelevance does not apply to a public benefit that results from abatement of a hazard when that hazard is an exceptional circumstance. In this case, the hazard that the warehouse presents, requiring its demolition, is precisely the factor that "would prevent the would-be developer from utilizing his or her property to the same extent as other property owners in the same zoning district," unlike the economic benefit data in *Orinda* that were unrelated to property disparities. (*Ibid.*) Moreover, a variance that is necessary to abate a safety hazard may be warranted even where the hazard is not unique. (See *Committee to Save the Hollywoodland Specific Plan v. City of Los Angeles* (2008) 161 Cal.App.4th 1168, 1184 ["The fact that other properties in the area may have a similar below-grade configuration and do not have such fences does not detract from the necessity of ameliorating the substantial safety hazard which would remain if the City strictly enforced the setback requirement."].)

C. *Factor 3*

Friends also argues that factor 3 is irrelevant to finding 1. Factor 3 stresses the small size of the Garr property and the fact that it is surrounded on three sides by Aquatic Park Center. We agree with Friends that these facts do not, without additional evidence, establish exceptional or extraordinary circumstances. However, we agree with the trial court that "[t]he existence of the [w]arehouse in its current condition is an exceptional or extraordinary circumstance that distinguishes the property from other property in the surrounding area." Factor 3 is not necessary to establish finding 1. Instead, we read factor 3 as providing the Board's analytic pathway of connecting finding 1 and finding 2 to establish the need for a variance. Although economic considerations are irrelevant to establish finding 1, such considerations are central to finding 2. Here the small size of the lot and being surrounded by Aquatic Park Center connects the two findings because, as we discuss below, substantial evidence supports the conclusion that no developer other than Wareham is likely to propose a development on the Garr property, when limited by

its size and the costs imposed by abating the nuisance posed by the warehouse in its current condition.

V. *Finding 2: Enjoyment of Substantial Property Rights*

Friends argues that finding 2 was also not supported by relevant, substantial evidence. We disagree, concurring with the trial court that "[t]he City has identified substantial evidence in the record to support its conclusion that the granting of the application is necessary for the preservation and enjoyment of substantial property rights of the subject property's owner."

A. *The Board's Statement in Support of Finding 2*

In support of finding 2, the Board report states: "In 2009, the [Board] concluded that a height Variance was necessary for Garr . . . to preserve and enjoy substantial property rights. This conclusion was based partly on financial analysis of 7 development scenarios for redeveloping the site without a Variance for height, and one scenario that reflected the 2009 proposed project. The City engaged Economic & Planning Systems, Inc. (EPS), to verify the applicants [*sic*] cost and revenue data for these seven scenarios.

"Since then, according to the applicant and confirmed by EPS, rents for bioscience R&D space has [*sic*] gone down by 15%, construction costs have increased approximately 17%. The applicant asserts that, because of these changes, they can no longer afford to build the 2009 project and have proposed a revised project that saves nothing of the original building. As a result, [the Board] must now decide if the Variance is still needed to preserve the owner's substantial property rights.

"To this end, staff asked the applicant and EPS to update the 2009 analysis to reflect 2012 financial conditions, to add one more scenario, to evaluate the 2012 Proposed Project, and to include additional information on financing costs and restrictions."

The eight scenarios that were analyzed by EPS and considered by the Board were:

"1. Shore-in-Place. Warehouse: Seismic retrofit and reuse of the Landmark building within the existing building to restore 10,000 square feet of warehouse space with parking provided on-site;

"2. Shore-in-Place. Office: Seismic retrofit and reuse of the Landmark building to increase the square footage to 18,000 square feet within the existing building shell and to convert the building to office use (a use that provides more than twice the rent than a warehouse use, but with proportionally less improvement cost) with parking provided on-site;

"3. 2nd Preservation Alternative: Seismic retrofit and reuse of the Landmark building to restore 10,000 square feet of warehouse space within the existing building shell and to construct a stand-alone 3-story, 105,000 square foot Research and Development Laboratory building that would be integrated into the Aquatic Park Center, allowing for shared parking, additional parcel size, shared loading areas, and a 0.89 campus-wide floor area ratio (FAR) (i.e., calculated for the entire campus rather than the individual development parcel);

"4. Clear & clean the site, and build office building: Demolish the Landmark building and remove building foundations to construct a two-story, 20,000 square foot office building with parking provided on-site;"

"5. Clear & clean the site, and build research and development building: Demolish the Landmark building and remove building foundations to construct a zoning-compliant project that would involve a three-story, 75,000 square foot research and development laboratory, that would be integrated into the Aquatic Park Center, allowing for shared parking, additional parcel size, shared loading areas, and a 0.82 campus-wide floor area ratio (FAR) (i.e., calculated for the entire campus rather than the individual development parcel)[;]"

"6. Clear & clean the site: sell as a vacant site: Demolish the Landmark building entirely and remove building foundations to prepare the site for sale and reuse as vacant land[;]"

"7. 2009 Approved Project: Implement the project approved in 2009, to retrofit only the north and south facades of the Landmark building while expanding the footprint to create a 92,000 square foot research and development laboratory that would be integrated into the Aquatic Park Center, allowing for shared parking, additional parcel

size, shared loading areas, and a 0.86 campus-wide floor area ratio (FAR) (i.e., calculated for the entire campus rather than the individual development parcel); and

"8. 2012 Proposed Project: Demolish the Landmark building entirely and remove building foundations to construct a four-story, 100,336 square foot research and development laboratory that would be integrated into the Aquatic Park Center, allowing for shared parking, additional parcel size, shared loading areas, and a 0.87 campus-wide floor area ratio (FAR) (i.e., calculated for the entire campus rather than the individual development parcel)."

Of the eight scenarios, the first six would require no variance, but the last two required a height variance.

The Board report then summarized the financial performance of the eight scenarios, providing the development cost, the estimated value of the building after construction, the return on investment, the return on equity, and the simple pay-back period. These figures for the eight scenarios, using the scenario numbers above, are:

1. Development cost: $4.59 million; estimated value: $559,758; return on investment: 0.89%; return on equity: -4.3%; pay-back period: 118 years.

2. Development cost: $11.95 million; estimated value: $3.73 million; return on investment: 2.3%; return on equity: -1.5%; pay-back period: 43.5 years.

3. Development cost: $63.31 million; estimated value: $42.99 million; return on investment: 4.99%; return on equity: 3.9%; pay-back period: 20 years.

4. Development cost: $8.86 million; estimated value: $4.19 million; return on investment: 3.5%; return on equity: 0.9%; pay-back period: 28.8 years.

5. Development cost: $36.86 million; estimated value: $26.43 million; return on investment: 5.27%; return on equity: 4.5%; pay-back period: 19 years.

6. Development cost: $1.04 million; estimated value: $780,390; return on investment: N/A; return on equity: N/A; pay-back period: N/A.

7. Development cost: $51.95 million; estimated value: $34.27 million; return on investment: 4.85%; return on equity: 5%; pay-back period: 20.6 years. (In 2009, the return on investment of this scenario had been calculated at 5.53%.)

8. Development cost: $44.55 million; estimated value: $35.54 million; return on investment: 5.86%; return on equity: 5.6%; pay-back period: 17.1 years.

The Board report noted that all the scenarios had rates of return well below the industry-accepted threshold for a cost-effective project: a 7.2 percent return on investment. It concluded that "[a]ll of the scenarios are financially marginal at best . . . . Only the 2012 proposed project has a rate of return (5.6%) above the 5.53% of the previously approved project [i.e., the rate of return of the 2009 proposal as estimated in 2009]."

The Board report also stated: "The question arises why Scenario 5, with a 5.27% return, does not demonstrate that the variance is not necessary. Both options only make sense as a long term investment, as part of a larger Aquatic Park business plan; other factors, important to the applicant, would cause this applicant, but no other developer, to accept this financial risk. However, consistent with our professional experience and previous [Board] and Council decisions, staff believes that for this project the 5.53% rate of return is the minimum threshold for preserving the enjoyment of substantial property rights and that Scenario 5 is not a viable option. Scenario 5 has a similar return on investment in the short term (5.27% vs 5.53%), but has greater risk in the long run (4.5% vs 5.6%) return on equity and 2 years longer payback period. Scenario 5 lacks the benefit of the additional floor for laboratory space that will, in the long run, help increase the likelihood that the project will succeed. This evidence indicates that the 2012 proposed Project meets the financial feasibility standard used in the 2009 variance approval, and that the variance is necessary to minimize the financial risk sufficient to allow this development to succeed."

B. *Self-Induced Hardship*

Friends maintains that finding 2 also relies on evidence that is the result of self-induced hardship, and thus irrelevant. Because we have already concluded that Friends waived that argument by failing to raise it in the administrative proceedings, we do not consider it.

C. *"Rate of Return" Data*

As noted above, the Board report stated, in support of finding 2, that its staff believed that the 5.53% rate of return (as calculated for the 2009 project in 2009) was the "minimum threshold" for preserving the enjoyment of substantial property rights. Friends maintains that this is irrelevant, arguing that "[t]he 5.53% figure may be the minimum rate of return for the developer to build the project, but there is no substantial evidence to support the implicit assumption by the [Board] that this developer's minimum threshold for this particular proposed use of the building is the only measure of what is required to 'preserv[e] the enjoyment of substantial property rights.' "

Friends's argument relies on a fundamental misreading of the import of the Board's discussion of finding 2. The clear import of finding 2 is that without a financially viable development on the property, which would abate the hazard posed by the warehouse, Garr would lose all enjoyment of substantial property rights. The 5.53% rate of return enters into the picture only in a comparison between scenario 5 and scenario 8, both of which presuppose that Wareham is the developer because those scenarios assume integration of the development into Aquatic Park Center. Nothing in the Board report implies that a particular rate of return is the *only* measure of what is required to preserve the enjoyment of substantial property rights. However, the Board had to compare the financial viability of various development options and Friends proposes no way better than comparing different rates of return. Although reasonable minds might differ concerning scenario 5, the Board cited substantial evidence in support of its determination that scenario 5 was not economically viable.

Friends also contends that finding 2 "does not reference a single comparison to other properties." However, we have concluded that the condition of the warehouse was an exceptional condition of the property, as compared to other properties in the zoning district (finding 1) and the condition of the warehouse is implicitly part of the financial data presented in finding 2, because the cost of abating the hazard posed by the warehouse, either by renovation or removal, is included in the cost of development.

Finally, Friends contends that "the City's findings never identify what substantial property interest the landowner has a 'right' to. The landowner has no 'right' to maximize profits on a commercial venture, and the landowner has no 'right' to have the City rescue it from a poor investment decision or neglect of its own property." To the extent that this argument relies on self-induced hardship, we reject it as waived. Here, the grant of a variance was not to maximize profits, but to ensure that *some* economic use could be made of the land. The variance was granted only after determining that a number of zoning-compliant scenarios were not financially viable options. (See *Keystone Bituminous Coal Assn. v. DeBenedictis* (1987) 480 U.S. 470, 485 ["land use regulation can effect a taking if it . . . 'denies an owner economically viable use of his land' "].)

D. *A Zoning-Compliant Alternative with an Equal Rate of Return*

Friends maintains that "Wareham's 'rate of return' evidence is irrelevant for another reason: it does not show that achieving the Project's financial goals requires a height variance. . . . [T]he record shows no effort by the City to assess the financial viability of an alternative laboratory project that achieves the 100,336 square feet of the current Project without exceeding the zoning height limit of 45 feet." We agree with the trial court that "[t]he record contains substantial evidence that the City considered a reasonable range of alternatives for the use of the property. The evaluation was affected by the circumstance that if the property was developed by the owner then the development options were limited by the area of the specific property at issue, but that if the property were developed by Wareham then there are more options because Wareham owns the surrounding property. The City considered options that concerned the property alone, options based on the lot size in the 2009 proposals, and the option based on the lot size in [the] 2012 proposal. . . . [T]hese were sufficient [to] have an informed public discussion of the alternatives."

Friends's argument proceeds as follows: "In 2009, and again in 2012, two alternatives were explored that were within current zoning and involved laboratory construction. [Citation.] The first alternative, Scenario 3 (or '2nd Preservation Alternative'), is re-explained in the September 27, 2012, [Board] Findings and

Conditions, and includes the renovation of the 10,000 square foot Copra Warehouse and the construction of a free-standing three-story 105,000 square foot laboratory with a combined floor ratio ('FAR') of 0.89 based on aggregating with surrounding properties. [Citation.] The other alternative, Scenario 5, includes the complete demolition of the Copra Warehouse and construction of a free-standing three-story laboratory of only 75,000 square feet. [Citation.] The development cost of Scenario 3 is almost twice that of Scenario 5 due to the high costs of renovating the Warehouse. [Citation.] The applicant and the City determined that neither Scenario 3 (due to the high cost of restoring the Copra Warehouse) nor Scenario 5 (due to the reduced revenue of the smaller floor area of the laboratory) were financially viable. [Citation]

"An obvious question arises, and is nowhere addressed in the record: why did Scenario 5 propose a laboratory of only 75,000 square feet when the project as approved is 100,336 square feet? Given that the maximum allowable FAR is 2, and Scenario 3 included 115,000 square feet of buildings with a FAR of only 0.89, the applicant could have easily proposed a zoning-compliant scenario with a laboratory of 105,000 square feet (i.e., larger than the size of the laboratory as currently approved).

"This not-proposed and not-analyzed alternative would take advantage of the FAR aggregation with surrounding parcels, just as the Project as approved does [citations], would *not* require repairing the Copra Warehouse, and *would respect* the 45 foot height limit of current zoning — *all without the need for a variance.* Absent this analysis, the applicants have not proven their entitlement to a height variance and the City cannot credibly claim that the property suffers from 'extraordinary circumstances' or that a height variance is necessary to avoid the 'deprivation of substantial property rights.' "

The city and Wareham maintain here, as they maintained in the trial court, that Friends waived this argument by failing to raise it at the administrative level. The trial court agreed.

Friends maintains that it raised the issue before the Board at the September 27, 2012 hearing. At that meeting, Patrick Sheahan commented: "The lot sizes are irrelevant, the surrounding property is owned by the applicant and rightfully since it's for

all intents and purposes going to be part of a campus this property should be assimilated in order to realize the substantial property rights. . . . The developer is able to level within the context of the campus similar to two major buildings recently developed, state of the art lab buildings, built within the current development standards. And as far as I know, they're fully occupied and have provided a reasonable rate of return to an investment." The trial court found that these "comments were not sufficiently specific to put the City on notice of the issue." We disagree.

We read Sheahan's comments as amounting to the following: "If Wareham is going to integrate the Garr property into the Aquatic Park Center, then the Board should consider whether, using the Garr property along with unused property in the Aquatic Park Center, an economically viable use of the land that is also zoning compliant is possible." Even though Sheahan did not specify that the Board should have considered the zoning compliant 105,000 square foot laboratory building of scenario 3, without renovation of the warehouse, his comments are sufficient to preserve the issue of whether the Board abused its discretion by failing to analyze the zoning compliant alternative that Friends now proposes. Friends preserved the issue in its appeal to the City Council by stating in its letter appealing the Board decision: "It appears that the [Board] failed to consider alternatives that take full advantage of options that would fit within the West Berkeley Plan without requiring a variance."

The problem with Friends's argument is that it blithely assumes that the City could require Wareham to cede sufficient land to Garr so that a zoning-compliant alternative could be constructed. Scenario 3, upon which Friends bases its proposed zoning-compliant alternative, "was developed to analyze the minimum research and development laboratory floor area needed to cover the cost to restore the entire 10,000 square foot warehouse structure and to provide a return on investment that was similar to the proposed project." However, this alternative would require Wareham "to agree to transfer about 20,000 additional square feet of property to [Garr], an action that the City cannot require." In comparison, the 2009 proposal entailed an enlargement of the Garr property from 23,498 to 25,498 square feet. The project, as proposed in 2012, increased

this to 27,778 square feet.[5] However, the laboratory building in scenario 3 would have "a footprint of approximately 35,700 square feet." Thus, the scenario that Friends now proposes would require the transfer of at least 7,922 additional square feet of property from Wareham to Garr, more than double the transfer of property currently contemplated.

It appears that scenario 3 was developed and analyzed to have a data point concerning a proposal that would include renovation of the warehouse and construction of an additional zoning-compliant laboratory. However, because this scenario would require a much larger cession of land from Wareham to Garr than was contemplated by the parties and which the City could not require, we can only conclude that the scenario was developed only for the purpose of comparison with other scenarios and not as a proposal that the Board actually considered to be a feasible alternative. Thus, we do not regard a failure by the Board to consider other alternatives that are derived from it to be an abuse of discretion.

E. ***Failure to Include Evidence Relating to Wareham's Property***

Friends also argues that "the variance applies to and will run with both [Wareham's and Garr's] lands" and that the city was "required to make the variance findings required by [Berkeley Municipal Code section] 23B.44.030, including 'extraordinary circumstances' and 'deprivation of substantial property rights,' with respect to both of their lands. The City did not do so."

Friends's argument misconstrues the evidence in the administrative record. As we have already noted, the project entails a lot-line adjustment, increasing the size of the Garr lot by 4,280 square feet (from 23,498 to 27,778 square feet, an increase of about 18.2 percent). The variance will apply only to Garr's property.

At oral argument, Friends recast this argument, maintaining that the City was required to make its required findings with regard to exceptional circumstances and the enjoyment of substantial property rights in reference to the enlarged lot and not in

[5] The enlargement would be accomplished by a lot-line adjustment. Berkeley Municipal Code section 23A.12.040 prohibits building across property lines, making the lot-line adjustment necessary.

reference to the original Garr lot. Friends conceded that it had not made this argument during the administrative proceedings, but argued that this should be excused because Friends was not represented by counsel and was not aware of the planned lot-line adjustment, again relying on *East Peninsula*. While *East Peninsula* stands for the proposition that an unrepresented party may preserve an issue for appeal when it is raised in the administrative process with less specificity than we would require of a represented party, it does *not* stand for the proposition that failure to raise an issue at all may be excused. Accordingly, the issue, as recast during oral argument, is waived.

DISPOSITION

The judgment of the trial court is affirmed.

STEWART, J.

We concur.

KLINE, P.J.

RICHMAN, J.