

1 Marilynne P. Leadon
2 State Bar No. 144793
3 ADMINISTRATIVE HEARING PROGRAM
4 110 West C Street, Ste. 2002
5 San Diego, CA 92101
6 *Administrative Hearing Officer*
7
8

ADMINISTRATIVE HEARING

FOR THE CITY OF SAN DIEGO

11 In the Matter of the Civil Penalty Notice and
12 Order against SHAW ESLAMIAN

13 (Property Location: 3901 Clairemont Drive)

14 Respondent,

15 vs.

16 CITY OF SAN DIEGO, DEVELOPMENTAL
17 SERVICES DEPARTMENT, CODE
18 ENFORCEMENT DIVISION,

Complainant.

AHP Case No. 20150930.1-SD-CED-MPL

Agency Case No. 141176

**ADMINISTRATIVE ENFORCEMENT
DECISION AND ORDER**

Date: October 26, 2015

Time: 9:30 a.m.

Hearing Officer: Marilynne P. Leadon

☒ Hearing by Personal Appearance

☐ Hearing by Written Declaration

ADMINISTRATIVE ENFORCEMENT DECISION

I. STATEMENT OF THE CASE

22 Marilynne P. Leadon, was assigned as the Administrative Hearing Officer for this
23 matter, in accordance with San Diego Municipal Code (SDMC) §12.0405.

24 On October 26, 2015, evidence was received, testimony was presented, the record
25 was closed, and the matter submitted.

1 The purpose of this hearing was to determine the following issues related to the City of
2 San Diego, Development Services Department (DSD), Code Enforcement Division's (CED¹)
3 issuance of an Administrative Enforcement Decision and Order (Order) dated September 28,
4 2010, for the real property located at 3901 Clairemont Drive, San Diego, California. (hereinafter
5 property).

6
7 **A. Issues**

8 (1) Whether Respondent has failed to comply with the terms and conditions of the
9 Order issued on September 28, 2010.

10 (2) Whether the amount of additional or new civil penalties assessed by the Director
11 pursuant to the procedures and criteria outlined in Section 12.0805 were reasonable.

12 (3) Whether the amount of cost recovery sought by the City is reasonable.
13

14 **B. Parties**

15 On behalf of the City, the following appeared and testified: Duke Fernandez, Senior
16 Building Inspector; and Joyce Parani, Land Development Investigator.

17 Respondent Shaw Eslamian was not present, nor did he send a representative to the
18 hearing.

19 Stephen Skinner, an interested party who lives near the property, was present and
20 testified.

21 **C. Witnesses and Evidentiary Exhibits**

22 Individual witnesses and evidentiary exhibits are indexed and identified on the
23 Exhibit/Witness List attached to this Administrative Enforcement Order. The evidentiary
24 exhibits admitted into evidence on the record during the hearing are incorporated by reference
25 as though set forth in full here².

II. FACTUAL FINDINGS

A. Procedural Background

1. On April 9, 2010, the City issued a Civil Penalty Notice and Order (CPNO) to
Sharok Eslamian in accordance with SDMC §12.0804, for the real property located at 3901
Clairemont Drive, San Diego, California. The violations were as follows: violating the

¹ CED is a department within the City's DSD.

² Only exhibits with an "X" or other similar mark in the "EV" column of the Exhibit/Witness List were admitted
into evidence during the hearing.

1 Conditional Use Permit (CUP) that was issued on August 16, 1984; allowing trailers to sell food
2 on the premises using electrical extension cords in lieu of permanent wiring; and displaying
unpermitted signs.

3 2. A hearing on the above CPNO took place on September 21, 2010, and an Order
4 was issued on September 28, 2010 (hereinafter, "Order No. 1").

5 3. On August 31, 2015, Respondent was served with a Notice of Administrative
Hearing, setting forth a hearing date of September 30, 2015.

6 4. The Respondent contacted the City and requested a continuance, as he would be
7 out of town on September 30, 2015.

8 5. On October 13, 2015, a First Amended Notice of Administrative Hearing was
9 served upon Respondent in accordance with SDMC §11.0301 in that Respondent was served
10 with the date (October 26, 2015), time, and location of the hearing. The record contains
evidence of proof of service, and although the certified mail receipt card has not been returned,
the regular mail was not returned as undeliverable. Therefore service has occurred.

11 **B. General Factual Background**

12 6. On September 25, 1984, a Conditional Use Permit (CUP) was issued by the City
13 of San Diego to Shell Oil Company for a 24-hour convenience food store and gas station. On
14 September 8, 1998, Shell Oil Company sold the property to Sharok Eslamian, the Respondent's
brother. Sometime between the purchase date and 2010, Mr. Eslamian abandoned the CUP and
15 leased the premises to someone who began to operate a smog business. Additionally, a coffee
cart and food truck were moved to the property, and there were non-permitted signs displayed.
16 The City received a complaint in 2010, and a CPNO was issued on April 9, 2010. On May 25,
2010, Mr. Eslamian quit claim deeded the property to Respondent Shaw Eslamian.

17 7. On September 21, 2010, a hearing took place. Both brothers were present. The
18 Order stayed \$36,000 in civil penalties, and ordered that Sharok Eslamian pay \$5,000.

19 8. The Respondent was ordered to cease operation of the smog business, remove
the coffee cart, food truck, and the non-permitted signs. Respondent was also ordered to either
20 obtain a demolition permit to remove all of the structures on the property, or submit and have
deemed complete another Neighborhood Use Permit (NUP) to operate the property as a gas
21 station and convenience store, in accordance with the CUP. If the second option was chosen,
then the property must remain vacant, secure, and free of litter and graffiti. If the NUP was
22 denied, or the project abandoned or withdrawn, then Respondent was required to immediately
obtain the demolition permit per option one. Either option was to be completed by December
23 10, 2010.

24 9. Following the CPNO, Respondent complied with the first requirement. The
25 smog business ceased operating, the coffee cart, food truck and non-permitted signs were

1 removed. However, Respondent has not complied with the second requirement. Between the
2 hearing date and August 2015, Respondent has been issued numerous Administrative Citations
3 and a Notice of Abatement, because of unpermitted signs, graffiti, litter, trash and waste. The
Respondent paints over the graffiti, but it gets vandalized over again. A Neighborhood Use
Permit has not been obtained, nor has the Respondent obtained a demolition permit.

4 10. Mr. Skinner, a neighbor who walks his dog by the property daily, attended the
5 hearing and stated that the abandoned property is an eyesore. The homeowners and business
6 owners in the rest of the neighborhood have worked hard at keeping their properties well
maintained.

7 11. On October 26, 2015, after waiting 20 minutes for the Respondent to appear at
8 the hearing, the record was open and the hearing proceeded without the Respondent. The case
file did not contain a written declaration in lieu of personal appearance on behalf of Respondent.
Nor did Respondent provide any explanation for his failure to appear.

9 10 **C. Civil Penalties and Administrative Costs**

11 12. The CPNO contains a clause that explains the assessment of civil penalties,
12 which is established at \$500.00 per day, not to exceed \$250,000 per parcel. The CPNO states
13 that the civil penalty rate takes into consideration the case history, seriousness of the violation,
14 and visual impact upon the community. The City stated that Respondent has not been in
15 compliance since December 10, 2015, which is almost five years. A daily rate of \$500 per day
16 exceeds the maximum penalty of \$250,000 per parcel. The City determined that a reduced
penalty of \$75,000 would be more appropriate, and stated that they would stay \$35,000 as long
as Respondent complies with the proposed timeframe. The City requested that the stayed
penalty of \$36,000 from the September 2010 hearing be reinstated. Therefore the total civil
penalties requested by the City are \$76,000.

17 13. The City submitted a Request for Administrative Costs in connection with the
18 preparation for the administrative hearing. The costs are broken down into two categories: City
19 Personnel costs totaling \$1,939.20, and Other City Costs, such as mailing, photos, copies, and
20 mileage, totaling \$588.92. A progress chart was attached to the Request, outlining the time and
date each inspector worked on this case. The total in administrative costs sought by the City is
\$2,528.12.

21 **III. DETERMINATION OF ISSUES AND LEGAL CONCLUSIONS**

22 **A. Due Process Requirements**

23 1. "The Due Process Clause of the Fourteenth Amendment is the chief limitation on
24 the exercise of police power. If the attempted exercise of power is unreasonable or arbitrary,
25 i.e., not sufficiently justified by public necessity, or too drastic in its methods, it is a violation of
due process." 8 Witkin, *Summary of California Law* § 983 (10th Ed. Thompson-West 2012).

1 “It has been said that the police power is simply the power of sovereignty or power to govern—
2 the inherent reserved power of the state to subject individual rights to reasonable regulation for
3 the general welfare.” *Id.* § 976.

4 2. An adjudicative (quasi-judicial) proceeding before an administrative officer or
5 board is sufficient if basic due process requirements are met, including notice and an
6 opportunity for hearing. *See Anderson Nat. Bank v. Lueckett*, 321 U.S. 233 (1944); *Mohilef v.*
7 *Janovici*, 51 Cal.App.4th 267, 276 (1996). The notice and opportunity to be heard must be given
8 at a meaningful time and in a meaningful manner. *See Armstrong v. Manzo*, 380 U.S. 545, 552
(1965). This requirement has generally been interpreted to mean that the individual must at
least be given notice of the impending deprivation and the facts on which it is based and some
opportunity to present an argument against the administrative action. *See Goss v. Lopez*, 419
U.S. 565 (1975); *Skelly v. State Personnel Bd.*, 15 Cal.3d 194 (1975); *see also* Ruth S. Astle, *et*
al., *California Administrative Hearing Practice*, § 1.63 (2nd Ed. C.E.B. 2011).

9 **B. Powers of Enforcement Hearing Officer**

10 3. SDMC §12.0407(c) states, “The Enforcement Hearing Officer has continuing
11 jurisdiction over the subject matter of an administrative enforcement hearing for the purposes of
12 granting a continuance, ensuring compliance with an Administrative Enforcement Order,
13 modifying an Administrative Enforcement Order, or where extraordinary circumstances exist,
granting a new hearing. Thus, the Administrative Hearing Program retains jurisdiction under
SDMC §12.0407(c) to determine compliance with Order No. 1.

14 **C. Failure to Appear**

15 4. SDMC §12.0410 states, “Any party whose property or actions are the subject of
16 an administrative enforcement hearing and who fails to appear at the hearing is deemed to waive
17 the right to a hearing and the adjudication of the issues related to the hearing, provided that
proper notice of the hearing has been provided.”

18 5. The City Manager’s Policies and Procedures (CMPP) §3.8 states as follows:

19 Pursuant to SDMC sections 12.0410 and 12.0503, failure of the
20 appellant to appear or send a representative to the hearing shall be
21 deemed a waiver of the right to a hearing, provided that proper
22 notice of the hearing (as determined by the Hearing Officer) has
23 been given by the City. In this event, the Hearing Officer shall
24 issue an order stating that the hearing is waived and decided in the
City’s favor. Written declarations, signed under penalty of
perjury, may be accepted by the hearing Officer in lieu of
personal appearance and testimony.

25 6. SDMC §12.0403 provides the Procedures for Notification of Enforcement
Hearing. With regard to service, §12.0403(d), states that, “The notice of hearing shall be served

1 by any of the methods of service listed in Section 11.0301 of this Code.”

2 7. SDMC §11.0301, Service of Notices, states the following:

3 (a) Whenever a notice is required to be given under the
4 Municipal Code for enforcement purposes, the notice shall be
5 served by any of the following methods unless different
6 provisions are otherwise specifically stated to apply:

7 (1) Personal service; or

8 (2) Certified mail, postage prepaid, return receipt requested.
9 Simultaneously, the same notice may be sent by regular mail.
10 If a notice that is sent by certified mail is returned unsigned, then
11 service shall be deemed effective pursuant to regular mail,
12 provided the notice that was sent by regular mail is not returned.

13 (3) Posting the notice conspicuously on or in front of the property.
14 The form of the posted notice shall be approved by the City
15 Manager.

16 (b) Service by certified or regular mail in the manner
17 described above shall be effective on the date of mailing.

18 (c) The failure of any person with an interest in the
19 property to receive any notice served in accordance with this
20 section shall not affect the validity of any proceedings taken under
21 this Code.

22 **D. Evaluation of Evidence**

23 8. Respondent received proper notice of the hearing date, time and place.

24 9. Respondent's failure to attend the hearing in person, send a representative or
25 submit a declaration in lieu of personal appearance and testimony constitutes a failure to appear.

10 10. Since Respondent failed to appear at the hearing, he is deemed to waive the right
11 to a hearing and the adjudication of the issues related to the hearing, and the matter is decided in
12 the City's favor.

13 **IV. Order**

1. Civil Penalties in the amount of \$110,000 against Respondent are affirmed. However, \$35,000, are permanently stayed, pending the Respondent's compliance with the following timeline:

(a) Within 30 calendar days after service of this Decision, Respondent shall obtain all required building permits to remove all structures, buildings, signs and any remaining uses related to the service station including potentially hazardous conditions from the premises.

(b) Within 30 calendar days after obtaining the required permits, the above-referenced structures will be removed.

2. Should the Respondent fail to comply with either of the terms set forth in Order No. 1(a) or (b), he will be liable for \$35,000 of the stayed accrued civil penalties. The City shall be entitled to payment within 60 calendar days after the failure.

3. The Respondent is liable for the non-suspended civil penalty of \$76,000. He is ordered to pay the City within 90 days after service of this Decision.

4. Administrative costs in the amount of \$2,528.12 are affirmed. The Respondent is ordered to pay the administrative costs within 30 calendar days after the service of this Administrative Enforcement Decision and Order.

5. All payments should be made to the City Treasurer for the City of San Diego.

6. The Administrative Hearing Program retains jurisdiction under SDMC §12.0407(c) to determine compliance with Order No. 1.

7. The time within which judicial review must be sought is governed by Cal. Civ. Proc. Code § 1094.6.

DATED: October 29, 2015

Marilynne P. Leadon
BY: Administrative Hearing Officer
Marilynne P. Leadon
Administrative Hearing Officer