SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

THOMAS LIPPMAN, Petitioner, v. CITY OF OAKLAND, Respondent.	No. RG12–657623 ORDER DENYING PETITION FOR WRIT OF TRADITIONAL MANDAMUS AND GRANTING IN PART PETITION FOR WRIT OF ADMINISTRATIVE MANDAMUS (Code Civ. Proc., §§ 1085, 1094.5)

Thomas Lippman's joint petition for a writ of administrative mandamus (Code Civ. Proc., § 1094.5) and/or writ of traditional mandamus (*id.*, § 1085) came on regularly for hearing on December 9, 2013, and January 28, 2014, in Department 31, Judge Evelio Grillo presiding. Mr. Lippman represented himself; Respondent City of Oakland appeared by Deputy City Attorney Jamilah Jefferson.

This proceeding involves Lippman's administrative appeals from two separate decisions of the Building Division of the Department of Planning, Building and Neighborhood Preservation. Each decision upheld fees and charges arising from Lippman's alleged violations of City ordinances governing the maintenance of real property (one violation in 2009, and one in 2010). Lippman seeks a writ of traditional mandate to compel the City to have the City Council hear the appeals, on the basis that the State Building Code requires such a hearing. Alternatively, Lippman seeks a writ of administrative mandamus on two grounds: that the Hearing Officer who rejected each of the appeals, Margaret Fujioka, was biased by her former role as a Deputy City Attorney; and that, on the merits, Fujioka's decisions are unsupported by substantial evidence or constitute prejudicial abuses of discretion.

board hears such appeals (*id.*, § 17920.6); and that, if a city has not created either board, then its governing body hears such appeals.

Analysis. The above provisions, Lippman argues, require the City either to create a Housing Appeals Board to hear appeals like his or to have the City Council hear them.

The City's Municipal Code does neither. Instead, it authorizes the City Administrator to set standards and procedures for holding administrative hearings to "adjudicate the issuance of administrative citations." (O.M.C., § 1.12.080.) The City interprets this provision to include authority to prescribe what adjudicators will hear appeals. (*Id.*, § 1.12.080.) But "in all instances," the Code specifies, a "determination regarding administrative citations resulting from [an] administrative hearing shall be final and conclusive" (*id.*, § 1.12.080(C))—subject to judicial review via writ of administrative mandate. For violations of the Building Maintenance Code that result in a building being declared substandard, the Code creates a process for scheduling a hearing before a single "Hearing Examiner," whose decisions "shall be in all cases final and conclusive," subject to review by writ of administrative mandamus. (O.M.C., § 15.080.410–.460.[5])

At first blush, the Oakland Municipal Code's provisions seem to conflict with those of the relevant State Codes. As noted, the Building Code requires each city to "establish a process to hear and decide appeals of orders … by the enforcing agency," and it says, with regard to the entity that will hear such appeals, that the city's "governing body … may establish … a housing appeals board to serve this

[5] The administrative citations issued in 2009 and involved Lippman's first appeal were Notices to Abate Blight evidently issued under Oakland Municipal Code title 8 (Health & Safety), chapter 24 (Property Blight) (AR tabs 1–2), while the 2010 citation involved in the other appeal was a Notice to Abate violations of the Building Maintenance Code (O.M.C. tit. 15, ch. 8) (AR tab 22). But the parties do not dispute that each citation was subject to the same regulations allowing single Hearing Examiners to adjudicate appeals. (See O.M.C. § 8.24.080, authorizing use of abatement and fee-collection procedures of title 15, chapter 8, to address blight.)

purpose" and that "[w]here no such appeals boards or agencies have been established, the governing body of the city ... shall serve as the ... housing appeals board as specified in ... Health and Safety Code Sections 17920.5 and 17920.6." (Bldg Code, § 1.8.8.1.[6]) But Oakland's Municipal Code, as applied, neither establishes a housing appeals board nor provides for the city's governing body to serve as a housing appeals board. Instead, it provides for a "Hearing Examiner" to hear all appeals from decisions by the agency charged with enforcing the Building Maintenance Code, and it makes that Examiner's decisions final (subject only to judicial review by writ of administrative mandamus).

That potential conflict between the relevant State Codes, on one hand, and the Municipal Code, on the other, may require the court to analyze this case under the municipal affairs doctrine. Under the municipal affairs doctrine, if the court ultimately determines that state law does irreconcilably conflict with a charter city enactment on a given topic—*e.g.*, the choice of an adjudicator for appeals from decisions of a city' s Building Code enforcement agency—the court must decide whether to characterize that topic as either (1) a "municipal affair," in which case, as a matter of local concern, the charter city can override the conflicting state law, or (2) a "matter of statewide concern," in which case, State statutes on that topic

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[6] The definitions in Section 1.8.8 achieve the same result in a more circuitous way. Section 1.8.8 provides that cities can establish local appeals boards and/or housing appeals boards; and that "[t]he local appeals board shall hear appeals relating to new building construction and the housing appeals board shall hear appeals relating to existing buildings." (*Id.*, § 1.8.8.3.)

Subsection 1.8.8.2 defines "Housing Appeals Board" as the "board *or agency* ... authorized by the governing body of a city ... to hear appeals regarding the [city's building maintenance code]," and it specifies that, if "there is no such board *or agency*, 'Housing appeals board' means the local appeals board having jurisdiction over the area." (*Id.*, § 1.8.8.2, italics added.) Subsection 1.8.8.2 then defines "Local Appeals Board" in similar terms, and it specifies that if "there is no such board *or agency*, 'Local appeals board' means the governing body of the city ... having jurisdiction over the area." (*Ibid.*, italics added.)

may override conflicting charter city enactments. (See generally *Johnson v. Bradley* (1992) 4 Cal.4th 389, 394–398.)

Although the municipal affairs doctrine's application is often murky, its constitutional origins are clear:

> Charter cities are specifically authorized by our state Constitution to govern themselves, free of state legislative intrusion, as to those matters deemed municipal affairs…: "It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations *in respect to municipal affairs,* subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws. City charters adopted pursuant to this Constitution shall supersede any existing charter, and *with respect to municipal affairs* shall supersede all laws inconsistent therewith." … The provision represents an "affirmative constitutional grant to charter cities of 'all powers appropriate for a municipality to possess ...' and [includes] the important corollary that 'so far as "municipal affairs" are concerned,' charter cities are 'supreme and beyond the reach of legislative enactment.' "

(*State Bldg. & Constr. Trades Council of Cal., AFL-CIO v. City of Vista* (2012) 54 Cal.4th 547, 555–556 (*Vista*), quoting Cal. Const., art. XI, § 5, subd. (a), and *Cal. Fed. Sav. & Loan Assn. v. City of Los Angeles* (1991) 54 Cal.3d 1, 12 (*Cal. Fed.*), internal quotation omitted; italics added by *Vista.*)

In its latest decision involving the municipal affairs doctrine, our Supreme Court reiterated the requisite framework for analyzing municipal affairs disputes:

> In [*Cal. Fed.*], *supra,* 54 Cal.3d 1, we set forth an analytical framework for resolving whether or not a matter falls within the home rule authority of charter cities. First, a court must determine whether the city ordinance at issue regulates an activity that can be characterized as a "municipal affair." (*Id.* at p. 16.) Second, the court "must satisfy itself that the case presents an actual conflict between [local and state law]." (*Ibid.*) Third, the court must decide whether the state law addresses a matter of "statewide concern." (*Id.* at p. 17.) Finally, the court must determine whether the law is "reasonably related to ... resolution" of that concern (*ibid.*) and "narrowly

> tailored" to avoid unnecessary interference in local governance (*id.* at p. 24). "If ... the court is persuaded that the subject of the state statute is one of statewide concern and that the statute is reasonably related to its resolution [and not unduly broad in its sweep], then the conflicting charter city measure ceases to be a 'municipal affair' pro tanto and the Legislature is not prohibited by article XI, section 5(a), from addressing the statewide dimension by its own tailored enactments." (*Id.* at p. 17.)

(*Vista, supra*, 54 Cal.4th at p. 556)

Here, the activity at issue is establishing or selecting an officer or board to adjudicate property owners' appeals from decisions made by the agency charged with enforcing a city's building maintenance code and anti-blight ordinances. Every city or county has an enforcement agency that enforces the building-safety provisions of the Building Code and State Housing Law, along with similar local ordinances. (Health & Saf. Code, §§ 17960–17967.) In assessing the validity of Oakland's approach to the issue of who should adjudicate appeals from its enforcing agency's decisions, the court notes the general proposition that a local ordinance is presumed valid, and a party challenging it bears the burden of proving otherwise. (*Cal. Rifle & Pistol Assn. v. City of W. Hollywood* (1998) 66 Cal.App.4th 1302, 1331.)

As to the first question listed above, the court readily concludes that the activity at issue qualifies, in the first instance, as a "municipal affair": It is a matter that a city has authority to regulate.[7] As to the second question, the parties dispute whether

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[7] In the case law addressing conflicts between state law and charter city enactments, the term "municipal affair" has—confusingly—two distinct meanings. The duality stem from the fact that "municipal affair" and "matter of statewide concern" are not hermetically sealed, mutually exclusive categories. Some topics fall in only one category, and some fall only in the other category, but many topics fall in an area where the two categories overlap. (See *Cal. Fed., supra,* 54 Cal.3d at pp. 17–18 ("courts should avoid the error of 'compartmentalization,' that is, of cordoning off an entire area of governmental activity as either a 'municipal affair' or one of statewide concern").)

the City's method of adjudicating Code enforcement appeals conflicts with or satisfies the requirements of the relevant State Codes. Answering that question requires the court to decide if a conflict exists. In doing so, the court is mindful of the California Supreme Court's admonition that "[t]o the extent difficult choices between competing claims of municipal and state governments can be forestalled in this sensitive area of constitutional law, they ought to be; courts can avoid making such unnecessary choices by carefully insuring that the purported conflict is in fact a genuine one, unresolvable short of choosing between one enactment and the other." (*Cal. Fed.*, *supra*, 54 Cal.3d at pp. 16–17.)

Lippman contends that the State Codes and Municipal Code conflict for the reasons set forth above: The Building Code provides that a city must "establish a process to hear and decide appeals of orders … by the enforcing agency"; that it "may establish … a housing appeals board to serve this purpose" (and a local appeals board for related purposes); and that, "[w]here no such appeals boards or agencies have been established, the governing body of the city … shall serve as the … housing appeals board as specified in … Sections 17920.5 and 17920.6." (Bldg Code, § 1.8.8.1; accord, *id.*, § 1.8.8.2 (defining "Housing Appeals Board" and "Local Appeals Board," as discussed in note 6, *supra*)) But Oakland's Municipal Code, as applied, neither establishes a housing appeals board nor provides for

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As used in the first stage of the *Cal. Fed.* framework, "municipal affair" simply means a topic that a city may, in the first instance, properly regulate. That test is easily met (both in general and here). The second sense in which decisions use the term "municipal affair" is to signal an ultimate conclusion, at the end of the analysis, that the topic is one on which a charter city enactment prevails over conflicting state law. (The charter city enactment may prevail either because the topic is not a matter of statewide concern or because, although a statewide concern does exist, the state law is not reasonably related to that concern, or not narrowly tailored to address only that concern. (See *Cal. Fed.*, *supra*, 54 Cal.3d at p. 17 ("As applied to state and charter city enactments in actual conflict, 'municipal affair' and 'statewide concern' represent, Janus-like, ultimate legal conclusions rather than factual descriptions.").)

the city's governing body to serve as one. Instead, it provides for a lone "Hearing Examiner" to hear appeals from decisions by the enforcing agency.

The City contends that its Hearing Examiner system is nonetheless consistent with Section 1.8.8. It emphasizes three phrases in that section: that (1) "Every city ... *shall* establish a process to hear and decide appeals"; that (2) a city "*may* establish ... a housing appeals board to serve this purpose"; and that (3) "[w]here no such appeals boards *or agencies* have been established, the governing body of the city ... shall serve as the ... housing appeals board as specified in ... Health and Safety Code Sections 17920.5 and 17920.6." (§ 1.8.8.1, italics added.)[8]

The City contends that it has complied with those provisions: (1) it has established a process to hear and decide appeals (using Hearing Examiners); (2) while it has not established a housing appeals board, section 1.8.8.1 only says that it "may" establish such a board, not that it "shall"; and (3) the city's approach does not trigger the requirement that a city's governing body serve as a housing appeals board. That requirement is triggered if "no such appeals boards or agencies have been established." Here, the City insists, while it has not established an "appeals board," it has established an "agency" that hears appeals—to wit, the agency formerly known as CEDA and now known as the Department of Planning, Building and Neighborhood Preservation, Building Division.

Public entities are not *required*, as a matter of due process, to establish separate boards or agencies to enforce laws, on one hand, and to adjudicate disputes about

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[8] The City notes that its regulations are consistent with Section 1.8.8's requirement that appeals board members "shall not be employees of the enforcing agency" and shall have relevant knowledge. (See fn. 4, *supra*.) Section 15.04.025 of the City's Code, part of the "Oakland Amendments of the Current Editions of the California Building Standards Codes," specifies that a Hearing Examiner "shall not be an employee of the City of Oakland and shall be qualified by experience and training to pass on building construction and other matters pertaining to this Code." It is undisputed that Hearing Examiner Fujioka was not an employee of the City when she heard Lippman's appeals; his complaint is that she was a *former* employee.

their enforcement, on the other. (*Morongo Band of Mission Indians v. State Water Resources Ctrl. Bd.* (2009) 45 Cal.4th 731, 737 ("By itself, the combination of investigative, prosecutorial, and adjudicatory functions within a single administrative agency does not … violate the due process rights of [those] subjected to agency prosecutions.").) Thus, absent a contrary statutory command, the City may validly combine in on agency the functions of investigating, prosecuting, and adjudicating disputes over building maintenance and blight. And the State Legislature could enact a constitutionally sound statute that expressly authorized cities to combine those functions in one agency.

What the Legislature enacted here, however, is a statute expressly mandating that each city will establish a housing appeals board and that, "[w]here no such appeals boards or agencies have been established, the governing body of the city … shall serve as the … housing appeals board." (Bldg. Code, § 1.8.8.1.) Based on a naked reading of this text, it may appear that Lippman has a strong argument that state law conflicts with the Municipal Code (as applied). But things appear differently when the analysis is expanded by reading Section 1.8.8 in pari materia with the sections of the State Housing Law cited in Section 1.8.8 (as well as other, related provisions of the State Housing Law).

As noted, Section 1.8.8.1 specifies that "[w]here no such appeals boards or agencies have been established, the governing body of the city … shall serve as the … housing appeals board *as specified in ... Health and Safety Code Sections 17920.5 and 17920.6.*" (Bldg Code, § 1.8.8.1, italics added.) Those sections of the Health and Safety Code define *housing appeals board* (and *local appeals board*) for purposes of the State Housing Law (*Id.*, §§ 17920.5, 17920.6.) It is that Law, as noted above, that makes Section 1.8.8 and the rest of the Building Code applicable to all cities and counties in the state. (*Id.*, §§ 17922, 17958–17958.11.) Clearly, Section 1.8.8 of the Building Code and Sections 17920.5 and 17920.6 of the State Housing Law are in pari materia and should be construed together. (*Droeger v. Friedman, Sloan & Ross* (1991) 54 Cal.3d 26, 50 ("One 'elementary

rule' of statutory construction is that statutes in pari materia—that is, statutes relating to the same subject matter—should be construed together ....").)

As noted, Section 17920.6 defines a "Housing Appeals Board" as "the board *or agency* of a city [or other local entity] *authorized* by the governing body of the city ... to hear appeals regarding the requirements of the city ... relating to the use, maintenance, and change of occupancy of [various buildings] ... " (Health & Safety Code, § 17920.6, italics added.[9]) Its language thus differs significantly from that of Section 1.8.8.1, for it refers to a board "or agency" that is "authorized" to hear appeals, not one that is "established" to do so. This suggests that a city's housing appeals board need not be an entity that is distinct from the city's enforcement agency, and that is created specially to hear appeals; instead, Section 17920.6 suggests that a city can "authorize[]" a pre-existing "agency" to hear appeals from decisions of its enforcement agency. And nothing in Section 17920.6 indicates that the agency "authorized" to hear such appeals—or to arrange for them to be heard—cannot be the enforcement agency itself.

The fact that both Section 17920.6 and Section 1.8.8.1 refer to a "board *or agency*" when discussing the body that is to hear Code enforcement appeals further supports an inference that a city may, consistent with those statutes—and subject to due process limitations—authorize its enforcement agency to resolve such appeals (or to arrange for a hearing officer to resolve them). And interpreting Section 17920.6, as part of the State Housing Law, to afford cities such latitude is consistent with the general tenor of that Law's approach to enforcement: It broadly delegates authority to cities and counties to enforce its provisions (and those of the state and local rules and regulations adopted under it).

The arguments set forth above demonstrate that Section 1.8.8 and Section 17920.6, read in pari materia, do not clearly conflict with the approach to Code enforcement appeals taken by the City of Oakland. Given the above-noted

[9] Section 17920.5 defines a Local Appeals Board in parallel terms.

principle that courts should avoid "difficult choices between competing claims of municipal and state governments … by carefully insuring that the purported conflict is in fact a genuine one...." (*Cal. Fed.*, *supra*, 54 Cal.3d at pp. 16–17), the court concludes that the relevant provisions of the State Housing Law and State Building Code, although not free of ambiguity, do not bar a city from authorizing its enforcement agency to resolve such appeals by appointing a hearing examiner to decide them. This conclusion makes it unnecessary to decide the difficult constitutional question that would arise if state law did bar Oakland's approach to the topic—namely, whether the State has the constitutional authority to dictate how a charter city is to resolve Code enforcement appeals.

Accordingly, the petition for a writ of traditional mandamus is denied.

Petition for Writ of Administrative Mandamus

Governing Law. The court's standard of review of an administrative adjudication in an administrative mandamus proceeding depends on whether the decision affects the petitioner's fundamental vested rights. (*San Marcos Mobile-home Park Owners' Assn. v. City of San Marcos* (1987) 192 Cal.App.3d 1492, 1499–1500 (*San Marcos*).) The court exercises its independent judgment if " 'an administrative decision affects a right which has been legitimately acquired or is otherwise "vested," and when that right is of a fundamental nature from the standpoint of its economic aspect or its "effect … in human terms and the importance … to the individual in the life situation." ' " (*Id.* at p. 1499, quoting *Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28,34 (quoting, in turn, *Bixby v. Pierno* (1971) 4 Cal.3d 130, 144).) Otherwise, the court reviews the decision to determine whether the hearing was fair, whether the record as a whole includes substantial evidence to support the factual findings, and whether those findings support the legal conclusion. (*Lucas Valley Homeowners Assn. v. County of Marin* (1991) 233 Cal.App.3d 130, 141.) Courts are less likely to find a right fundamental if it involves "the preservation of purely economic