IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

No. A141865

THOMAS LIPPMAN,
Plaintiff and Appellant,

v.

CITY OF OAKLAND,
Defendant and Respondent.

On Appeal from the Superior Court of Alameda County
(Case No. RG12-657623, Honorable Evelio Grillo, Judge)

APPELLANT'S OPENING BRIEF

JOHN STUART CLAASSEN,
No. 212954
Claassen Professional Corporation
1970 Broadway, No. 525
Oakland, California 94612
Telephone: (510) 251-8010
E-mail: john@claassenlegal.com

DAMIEN M. SCHIFF, No. 235101
JONATHAN WOOD, No. 285229
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: dms@pacificlegal.org
E-mail: jw@pacificlegal.org

Attorneys for Plaintiff and Appellant Thomas Lippman

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APP-008

COURT OF APPEAL, First **APPELLATE DISTRICT, DIVISION** Four	Court of Appeal Case Number: A141865
ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):* Jonathan Wood, No. 285229 Pacific Legal Foundation 930 G Street Sacramento, CA 95814 TELEPHONE NO.: (916) 419-7111 FAX NO. *(Optional):* (916) 419-7747 E-MAIL ADDRESS *(Optional):* jw@pacificlegal.org ATTORNEY FOR *(Name):* Appellant Thomas Lippman	Superior Court Case Number: RG12-657623 ***FOR COURT USE ONLY***
APPELLANT/PETITIONER: Thomas Lippman RESPONDENT/REAL PARTY IN INTEREST: City of Oakland	
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INTRODUCTION AND SUMMARY OF ARGUMENT

The California Building Code gives every person a right to appeal a finding of a state or local building code violation to an "appeals board" or, if the local government has not established such an appeals board, to the local government's governing body. *See* Cal. Building Code § 1.8.8.3.[1] The City of Oakland's Building Service Division[2] charged Appellant Thomas Lippman more than $10,000 in fees for alleged Building Code violations. The City has not established an appeals board;[3] instead, all appeals—including Lippman's—are heard before a hearing officer appointed by Building Services. *See* Tr. 165.[4]

The City's appellate procedure is legally inadequate. The Building Code gives the City a clear choice: establish an appeals board that complies with the Building Code's requirements, or allow an appeal to its governing

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[1] All citations are to the California Building Code unless otherwise indicated. The 2010 version of the Building Code governs this case, however, the 2013 version retains the relevant sections verbatim.

[2] The fees were imposed by Oakland's Community & Economic Development Agency (CEDA), the predecessor to the Building Services Division, which is the current enforcement agency. For the sake of readability, this brief will use "Building Services" to refer to both.

[3] In its briefing below, Building Services acknowledged that Oakland has not established a compliant appeals board, but argued that it had no obligation to do so. *See* Tr. 114-17.

[4] "In April 2012, a Hearing Officer *appointed by CEDA*, Margaret Fujioka, convened a hearing at which she intended to address both the appeal from the 2009 charges and the appeal from the 2010 charges." (Emphasis added.)

body, *i.e.*, the City Council. *See id.* Because a single hearing officer appointed by the City's enforcement agency does not satisfy the Building Code's definition of an appeals board, the City was required to give Lippman an appeal to the City Council.

Contrary to Building Service's contentions below, nothing in the "home rule" doctrine requires a different result. Home rule gives charter cities like Oakland autonomy from state regulation with regard to municipal affairs, such as the *substantive* content of a local building code. *See* Cal. Const. art. XI, § 5(a). But the doctrine does not excuse charter cities from state law addressing matters of statewide concern, such as ensuring a fair building code appeals procedure for California landowners. *Cf. Cal. Fed. Sav. & Loan Ass'n v. City of Los Angeles*, 54 Cal. 3d 1, 17 (1991) (charter cities must comply with state law addressing matters of statewide concern). Because Section 1.8.8 deals explicitly with such a matter of statewide concern, Oakland is subject to its provisions and Lippman is entitled to appeal the alleged code violations to the City Council.

BUILDING CODE § 1.8.8 "APPEALS BOARD"[5]

Section 1.8.8 of the California Building Code contains the requirements for appeals from local building code enforcement decisions. It provides:

> **1.8.8.1 General.** Every city, county, or city and county shall establish a process to hear and decide appeals of orders, decisions and determinations made by the enforcing agency relative to the application and interpretation of this code and other regulations governing use, maintenance and change of occupancy. The governing body of any city, county, or city and county may establish a local appeals board and a housing appeals board to serve this purpose. Members of the appeals board(s) shall not be employees of the enforcing agency and shall be knowledgeable in the applicable building codes, regulations and ordinances as determined by the governing body of the city, county, or city and county.
>
> Where no such appeals boards or agencies have been established, the governing body of the city, county or city and county shall serve as the local appeals board or housing appeals board as specified in California Health and Safety Code Sections 17920.5 and 17920.6.
>
> **1.8.8.2 Definitions.** The following terms shall for the purposes of this section have the meaning shown.
>
> > **HOUSING APPEALS BOARD.** The board or agency of a city, county or city and county which is authorized by the governing body of the city, county or city and county to hear appeals regarding the requirements of the city, county or city and county relating to the use, maintenance and change of occupancy of buildings and structures, including requirements governing

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[5] The California Building Code is largely taken from the uniform code produced by the International Code Council. Because that code is copyrighted, it is not published in the California Code of Regulations. Consequently, for the convenience of the Court, Lippman produces the entire code provision in the text.

> alteration, additions, repair, demolition and moving. In any area in which there is no such board or agency, "Housing appeals board" means the local appeals board having jurisdiction over the area.
>
> **LOCAL APPEALS BOARD.** The board or agency of a city, county or city and county which is authorized by the governing body of the city, county or city and county to hear appeals regarding the building requirements of the city, county or city and county. In any area in which there is no such board or agency, "Local appeals board" means the governing body of the city, county or city and county having jurisdiction over the area.

> **1.8.8.3 Appeals.** Except as otherwise provided in law, any person, firm or corporation adversely affected by a decision, order or determination by a city, county or city and county relating to the application of building standards published in the California Building Standards Code, or any other applicable rule or regulation adopted by the Department of Housing and Community Development, or any lawfully enacted ordinance by a city, county or city and county, may appeal the issue for resolution to the local appeals board or housing appeals board as appropriate.
>
> The local appeals board shall hear appeals relating to new building construction and the housing appeals board shall hear appeals relating to existing buildings.

STATEMENT OF FACTS

A. 2009 Notice To Abate Blight

Thomas Lippman owns an apartment triplex at 3577-3581 Galindo Street, in Oakland, California. Tr. 2, 8. On April 16, 2009, Oakland's Building Services sent Lippman a blight notice which vaguely informed him

of the alleged presence of "trash, debris, overgrowth, recyclables, graffiti, and/or disabled vehicles or vehicle parts" or that a "structure was not property secured," and ordered him to abate the issue or face additional fees and charges. *Id*. at 8. Six days later, Building Services sent Lippman an identical notice authored by a different inspector and bearing a different complaint number. *Id*. at 10. When Lippman called the first inspector to inquire about the blight notice, the inspector informed Lippman that the problem was an overgrown weed on the property, which Lippman then promptly removed. *See id*. at 12. The first inspector thereupon told Lippman that the violation was resolved. Tr. 178. The other inspector, however, continued to process the second complaint and imposed more than $2,500 in reinspection and processing fees. Tr. 17.

At the time, the only "appeal" available to Lippman was to the inspector's supervisor within Building Services. Tr. 95. Lippman appealed to the inspector's supervisor, arguing that he should not have to pay when the first inspector told him that the issue had been resolved, especially given that Lippman had no reason to know that these notices were for different alleged violations. AR Tab 16. That "appeal" was denied. Tr. 95.

B. 2010 Notice of Violation

In April, 2010, Lippman was in the process of evicting a tenant for nonpayment of rent. AR Tab 43. Perhaps to frustrate the eviction, the tenant staged a number of code violations and filed a complaint with Building

Services. *See id*. An inspector investigated and issued a Notice to Abate that specified eight alleged violations. Tr. 26-27. Lippman contended, however, that his erstwhile tenant had caused six of those violations: an alleged leaky roof[6]; a removed smoke detector and attic access panel; damaged shower tiles, soap dish, and doors; and kicked-in foundation vents. Tr. 26-27. Lippman had abated these issues by the time the inspector reinspected the property. AR Tab 53 at 13-14.

The Notice also alleged cracked paint on the ceiling and that the water heater was installed without a permit. *Id*. Lippman denied that these two issues were violations: the ceiling had only a wrinkle in the paper over the sheet rock and was not cracked, and a prior tenant had installed the water heater without Lippman's knowledge, much less authorization. Tr. 34. The inspector disagreed and, because Lippman had not abated these issues to the inspector's satisfaction by the time of the reinspection, Building Services began imposing fees. AR Tab 53 at 28-29. As of April 18, 2012, the total fees had grown to $9,583.94. *Id*. at 28.

C. 2011 Grand Jury Report and Oakland's New Appeals Process

In June, 2011, the Alameda County Grand Jury issued a report sharply criticizing Building Services' enforcement practices and appeals process.

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[6] Unbeknownst to the tenant, Lippman had recently replaced the roof. *See* AR Tab 53 at 18.

Request for Judicial Notice (RJN) Ex. A at 63-98. The Grand Jury reported being "appalled" by the actions of Building Services. *Id*. at 78. Describing an "atmosphere of hostility and intimidation toward property owners," *id*., the Grand Jury Report detailed a lack of coherent and consistent interpretation of the code's requirements. For example, one inspector would clear a property only to have a different inspector find a violation shortly thereafter. *Id*. at 67.

Property owners feared filing appeals because of intimidation from inspectors. *Id*. at 68. "There is no clear, comprehensive appeals process, and Building Services does not always suspend its proceedings against property owners while an appeal is pending." *Id*. at 74. "Appeals" offered no relief because initial appeals were decided by the same inspector who issued the citation and any subsequent appeal was to the inspector's supervisor. *Id*. Unsurprisingly, inspectors and their supervisors routinely denied appeals. *Id*. Property owners pursuing appeals were further prejudiced by Building Services' "[i]nconsistent record keeping[,]" which prevented property owners from obtaining necessary records. *Id*. at 75. The report recommended that the City "establish a clear, simple, effective appeals process that is easily understood by property owners and provides clear instructions for use." *Id*. at 81.

In its September 26, 2011 response to the Grand Jury Report, Oakland conceded that the enforcement practices and appeals process needed to be changed. RJN Ex. B. Specifically, the City concurred with the Grand Jury's

recommendation that it establish a "clear, simple, effective appeals process," acknowledging that appeals to an inspector's supervisor were not impartial. *Id*. at 9. The City Council called for the creation of the current appeals process, providing for a hearing in front of a hearing officer. *Id.* at 5. As a result, appeals are no longer heard by an inspector's supervisor but are now directed to a single hearing officer appointed by Building Services. Tr. at 165.

D. Lippman Appeals the Fines Associated with 2009 and 2010 Notices

After Lippman heard of the Grand Jury Report and the new appellate process, he filed a new appeal challenging the fees from the 2009 and 2010 Notices. AR Tab 16; AR Tab 43.

On April 18, 2012, the hearing officer appointed by Building Services convened a hearing to resolve both appeals. Tr. 165; AR Tab 53 (transcript of April 18, 2012, hearing). The hearing officer postponed adjudication of the appeal of the 2009 Notice because Building Services was unprepared. Tr. 165; AR Tab 53 at 10-11. With respect to the 2010 Notice, Lippman testified that all the violations had been fixed by the time of the first reinspection except the water heater and the ceiling, which he contended were not violations. AR Tab 53 at 13-14. The inspector initially testified that none of the violations had been abated. *Id*. at 14-15. Then he testified that most had not. *Id*. at 16. Finally, he admitted that he could not remember because it had been two years since the inspection. *Id*. at 19, 21. The inspector did know that, as Lippman

testified, nothing had been done to the water heater or ceiling since the Notice. *Id*. at 21.

In his request for an appeal, Lippman contended that no permit was required for the water heater because he did not intend to have unpermitted work done. AR Tab 43. Rather, a tenant had done the work unbeknownst to Lippman. *See id*. Section 105.1 of the Building Code requires any property owner who "intends" to install a water hearer or "cause[s]" such installation to first obtain a permit. Section 15.08.080(E) further provides that a landlord cannot avoid any obligation under the local building code by shifting responsibility to a tenant in the lease. Lippman sought to argue that these provisions did not apply because Lippman did not know the tenant was going to replace the water heater nor did he direct him to do so, in the lease or otherwise. Yet the hearing officer never allowed Lippman to make this argument. When he tried to, the hearing officer abruptly cut him off, explaining that she would get to it later. AR Tab 53 at 21, 26, 31. But she adjourned the hearing without ever providing Lippman an opportunity to return to the issue. *See* Tr. 184; AR Tab 53.

Lippman also argued that there were no cracks in the ceiling or leaks because the roof was new. AR Tab 53 at 18. Instead, he contended that there was merely a wrinkle in the paper covering the sheet rock. *Id*. But the hearing officer sided with the inspector, who testified that no remedial work had been

done on the ceiling. AR Tab 50 (hearing officer's decision); AR Tab 53 at 25-26.

E. Lippman's Lawsuit

On November 27, 2012, Lippman filed this action, seeking writs of mandamus under sections 1085 and 1094.5 of the Code of Civil Procedure. Tr. 1.

Lippman's Section 1085 claim challenged the adequacy of Oakland's appeals process under the California Building Code. Tr. 97-98. He argued that a hearing officer is not an "appeals board" under Section 1.8.8.1. *Id*. Therefore, the City Council had a ministerial duty to provide him an appeal. *Id*. The City responded that its only obligation was to establish an appeals *process*, not necessarily any particular appeals *body*. Tr. 114. Because the Building Code provides that a local government "may" establish an appeals board, the City argued that the establishment of such a board was discretionary. Tr. 115-16. In supplemental briefing on the home rule doctrine, the City argued that its current appeals process actually *satisfies* any special requirement from Section 1.8.8.1 because Building Services is (i) authorized to hear appeals and (ii) is an *agency*. Tr. 142-43. The City also argued that the Building Code's requirements concern "municipal affairs," and therefore do not apply to charter cities such as Oakland under the home rule doctrine. Tr. 143-46.

Lippman's Section 1094.5 claim raised the same issues as his appeal to the hearing officer—namely, the alleged violations had either been abated by the time of reinspection, or they were not violations. Tr. 129-32. For its part, the City argued that Lippman's interpretation of the pertinent City ordinances was wrong and that he was responsible for any unpermitted work done by his tenant. Tr. 120-23.

F. Decision Below

Although conceding that an "arguable conflict" exists between Oakland's appeals process and the California Building Code, Tr. 167 (because Oakland's hearing officer does not qualify is not an "appeals board" under the Building Code, Tr. 169), the trial court rejected Lippman's Section 1085 claim. Tr. 172-77. The court noted that the dispute implicates Oakland's home rule powers. Tr. 170-72. Applying a presumption that local ordinances are valid, the court looked for some way to interpret the Building Code to avoid any conflict. Tr. 172-75. To that end, it interpreted the Building Code's provision, "[w]here no such appeals boards *or agencies* have been established," to include a local government's enforcement agency, such as Oakland's Building Services. Tr. 176-77 (quoting § 1.8.8.1).

The court, however, granted partial relief on Lippman's Section 1094.5 claim. Tr. 187. With respect to the 2009 fees, the court held that the writ had to be granted because the record contains no transcript from that hearing. Tr. 178-80. But the court denied the administrative writ with regard to the 2010

fees. Tr. 180-86. Acknowledging that the hearing officer never allowed Lippman an opportunity to make his case, the court presumed that she adequately considered his legal argument based on the request for an appeal. Tr. 182, 184-85. The court further held that any adjudicator must conclusively presume that a landlord is responsible for any work requiring a permit done by a tenant, even if the landlord did not know or want the tenant to do it. Tr. at 186.

On April 18, 2014, the trial court entered final judgment on all of Lippman's claims. On May 19, 2014, Lippman filed a timely notice of appeal from that judgment.

STANDARD OF REVIEW

Lippman appeals only his Section 1085 claim—whether he is entitled to an appellate hearing before Oakland's City Council because the City has not established an appeals board. This claim raises only issues of law, with no disputed facts. The trial court's denial of the petition for writ of mandate is therefore reviewed de novo. *See Prof'l Eng'rs in Cal. Gov't v. Kempton*, 40 Cal. 4th 1016, 1032 (2007). *See also Gilbert v. City of Sunnyvale*, 130 Cal. App. 4th 1264, 1275 (2005) ("In resolving questions of law on appeal from a denial of a writ of mandate, an appellate court exercises its independent judgment."). The trial court's analysis of the home rule doctrine also deserves no deference. *Gilbert*, 130 Cal. App. 4th at 1275; *see also State Bldg. & Const. Trades Council of Cal., AFL-CIO v. City of Vista*, 54 Cal. 4th 547, 557-

58 (2012) (a trial court's application of the home rule doctrine is reviewed de novo).

ARGUMENT

I

THE CALIFORNIA BUILDING CODE REQUIRES APPEALS TO BE HEARD BY AN APPEALS BOARD OR THE LOCAL GOVERNING BODY; IT DOES NOT AUTHORIZE APPEALS TO AN ENFORCEMENT AGENCY

The Building Code requires local governments to create an appeals process for individuals to challenge adverse code enforcement decisions in one of two ways: (1) create an independent appeals board consisting of members whom the local enforcement agency does not employ; or (2) allow a direct appeal to the local government's governing body. § 1.8.8.1. Any other type of appeals process, such as an appeal *within* the enforcement agency, would frustrate or nullify parts of Section 1.8.8.1. The trial court's interpretation of Section 1.8.8.1 also conflicts with the right to appeal to a "Local appeals board" guaranteed in Section 1.8.8.3. *See* § 1.8.8.2 (defining "Local appeals board"). If an enforcement agency may sit in judgment of its own actions, the property owners' express right of appeal contained in Section 1.8.8.3 is rendered a nullity.

A. The Building Code Requires Cities To Establish an Appeals Board or Allow an Appeal to the Governing Body

The Building Code mandates the establishment of an appeals process:

> **1.8.8.1 General.** Every city, county, or city and county *shall* establish a process to hear and decide appeals of orders, decisions and determinations made by the enforcing agency relative to the application and interpretation of this code and other regulations governing use, maintenance and change of occupancy. The governing body of any city, county, or city and county may establish a local appeals board and a housing appeals board to serve this purpose. Members of the appeals board(s) shall not be employees of the enforcing agency and shall be knowledgeable in the applicable building codes, regulations and ordinances as determined by the governing body of the city, county, or city and county.
>
> Where no such appeals boards or agencies have been established, the governing body of the city, county or city and county *shall serve* as the local appeals board or housing appeals board as specified in California Health and Safety Code Sections 17920.5 and 17920.6.

§ 1.8.8.1 (emphasis added).

A local government can satisfy Section 1.8.8.1's mandate by creating an appeals board. *Id*. ("The governing body of any city, county, or city and county *may* establish a local appeals board and a housing appeals board *to serve this purpose*." (emphasis added)). Otherwise, Section 1.8.8.1 requires that "the governing body . . . shall serve as the local appeals board or housing appeals board[.]" *Id*. Hence, this provision compels a local government's

governing body to hear appeals if it has not established a local appeals board or housing appeals board.

The trial court, however, interpreted this text to be permissive, concluding that the governing body need not hear the appeal if the city has established an enforcement agency. Tr. 176-77. The court construed "[w]here no such appeals boards *or agencies* have been established" to include an enforcement agency. § 1.8.8.1 (emphasis added). The more reasonable interpretation, however, is that "agencies" as used in the phrase "boards or agencies" simply refers to the appeals boards themselves. *See People v. Nguyen*, 21 Cal. 4th 197, 205 (1999) ("a word or phrase repeated in a statute should be given the same meaning throughout"). After all, the next subsection of the Building Code expressly defines such appeals boards to include a "board *or agency*." § 1.8.8.2 (emphasis added). In fact, the Code's definitions of "Local Appeals Board" and "Housing Appeals Board" repeatedly refer to these bodies as boards *or agencies*:

> **1.8.8.2 Definitions.** The following terms shall for the purposes of this section have the meaning shown.
>
> > **HOUSING APPEALS BOARD.** The *board or agency* of a city, county or city and county which is authorized by the governing body of the city, county or city and county to hear appeals regarding the requirements of the city, county or city and county relating to the use, maintenance and change of occupancy of buildings and structures, including requirements governing alteration, additions, repair, demolition and

> moving. In any area in which there is no such *board or agency*, "Housing appeals board" means the local appeals board having jurisdiction over the area.
>
> **LOCAL APPEALS BOARD.** The *board or agency* of a city, county or city and county which is authorized by the governing body of the city, county or city and county to hear appeals regarding the building requirements of the city, county or city and county. In any area in which there is no such *board or agency*, "Local appeals board" means the governing body of the city, county or city and county having jurisdiction over the area.

§ 1.8.8.2 (emphasis added).

Construing "agencies," as used in Section 1.8.8.1, to refer to an enforcement agency conflicts with other text in the Building Code; and violates the principle that" '[c]ourts should give meaning to every word of a statute if possible, and should avoid a construction making any word surplusage.' " *See Ennabe v. Manosa*, 58 Cal. 4th 697, 719 (2014) (quoting *Arnett v. Dal Cielo*, 14 Cal. 4th 4, 22 (1996)). For example, the Building Code's appeals provision presupposes the existence of an enforcement agency; otherwise, there would be no decision from which an appeal could be taken. Thus, if the phrase "boards or agencies," as used in Section 1.8.8.1, includes an enforcement agency, the provision requiring the governing body to hear appeals *in the absence* of an appeals board or agency could never be implicated. In every instance an enforcement agency would exist and that

agency, under the phrase "boards or agencies," would itself qualify as a permissible alternative to an appeal before the governing body.

Further, the lower court's construction would nullify the requirement that the members of an "appeals board" "shall not be employees of the enforcing agency." § 1.8.8.1; *see Ennabe,* 58 Cal. 4th at 719. The obvious purpose of this provision is to ensure some measure of impartiality in the appellate proceedings. *Cf. People v. Brown*, 6 Cal. 4th 322, 333 (1993) (denial of the due process right to an impartial judge is a "fatal defect in the trial mechanism"). Yet, if the lower court is correct, a city can give appellate review authority to its enforcement agency and thereby satisfy the Building Code's appeals requirements, even though the appeals may be heard by individuals employed or selected by the prosecuting agency. That conclusion follows because the enforcement agency is not, as the trial court acknowledged, an "appeals board" and therefore not bound by the Code's non-employment provision. Tr. at 114-16. It would be bizarre, to say the least, for the Code to carefully prescribe a protection for impartiality for an appeals board and yet leave to local governments an easy way to avoid that impartiality protection entirely. *See Ennabe*, 58 Cal. 4th at 719.

Accordingly, Section 1.8.8.1 requires a local government to establish an "appeals board" or to allow direct appeals to its governing body—anything else, including Oakland's hearing officer process, fails to satisfy Section 1.8.8.1.

B. The Building Code Confers a Right to an Appeal to an Appeals Board Or, If There Is No Appeals Board, to the Governing Body

The Building Code provision explicitly confers a right to an appeal:

> **1.8.8.3 Appeals.** Except as otherwise provided in law, any person, firm or corporation adversely affected by a decision, order or determination by a city, county or city and county relating to the application of building standards published in the California Building Standards Code, or any other applicable rule or regulation adopted by the Department of Housing and Community Development, or any lawfully enacted ordinance by a city, county or city and county, *may appeal the issue for resolution to the local appeals board or housing appeals board as appropriate*.
>
> The local appeals board shall hear appeals relating to new building construction and the housing appeals board shall hear appeals relating to existing buildings.

§ 1.8.8.3 (emphasis added).

Section 1.8.8.2 provides that an "appeals board" can mean only one of three things: (1) a housing appeals board , (2) a local appeals board, or, in the absence of (1) and (2), (3) the local government's governing body. Section 1.8.8.2 contains *no* reference to any other type of body, such as an enforcement agency. If, the Legislature intended to authorize an appeals procedure in addition to (1), (2), or (3) above, Section 1.8.8.2's definition of "Local appeals board" would have allowed recourse to the governing body ***or*** to any other "board or agency" authorized to hear appeals. The Legislature obviously knows how to use the phrase "board or agency," as it is repeated throughout Section 1.8.8. Therefore, its absence from the final sentence of Section

1.8.8.2's definition of "Local appeals board" strongly indicates the Legislature's intent not to authorize any other appellate process. *Cf. Dyna-Med, Inc. v. Fair Employment & Housing Comm'n*, 43 Cal. 3d 1379, 1391 n.13 (1987) ("'[T]he expression of certain things in a statute necessarily involves exclusion of other things not expressed . . . .'") (quoting *Henderson v. Mann Theatres Corp.*, 65 Cal. App. 3d 397, 403 (1976)).

The lower court wrongly concluded that Oakland's enforcement agency is an "agency" for purposes of "appeals boards or agencies," even though it acknowledged that Oakland has not established an "appeals board." Tr. 169. The City's enforcement agency cannot qualify as an "agency" within the meaning of "board or agency," as that phrase is used in Section 1.8.8.1, because then the enforcement agency must, contrary to the position of both the trial court and the City, fall within the definition of an "appeals board" to satisfy Section 1.8.8.3. Accordingly, the right to an appeal to an appeals board, contained in Section 1.8.8.3, provides further evidence that Oakland's hearing officer process fails to satisfy Section 1.8.8.1's requirements.

II

HOME RULE DOES NOT EXCUSE OAKLAND FROM COMPLYING WITH THE CALIFORNIA BUILDING CODE'S APPEALS REQUIREMENTS

A. Oakland's Appeals Process Conflicts with State Law

The California Constitution authorizes charter cities largely to govern themselves, free of state legislative intrusion into "municipal affairs." Cal. Const. art. XI, § 5(a). Nevertheless, state law controls over inconsistent charter city enactments that address matters of statewide concern. *Cal. Fed. Sav. & Loan Ass'n v. City of Los Angeles*, 54 Cal. 3d at 17. To determine whether home rule exempts a charter city from a state law requirement, a court must first ascertain that an actual conflict exists between the charter city's enactment and state law. *Id*. at 16. Where the two enactments can be reconciled, the constitutional question should be avoided. *Id*. at 17 ("[C]ourts 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."). But, where the conflict is a genuine one, the question cannot be resolved without choosing one enactment over the other. *Id*.

As explained in the preceding sections, the Building Code's guarantee of an appeal to an independent appeals board or the local government's governing body cannot be reconciled with Oakland's appeal process. The text

cannot be interpreted to avoid conflict. Therefore, this Court must decide whether Section 1.8.8 of the California Building Code addresses matters of statewide concern.

B. Providing a Fair Appeals Process for Property Owners Alleged to Have Violated Building Code Provisions Is a Matter of Statewide Concern

Courts have used a number of factors to decide whether a matter is of statewide concern, including:

- Whether the Constitution expressly deems an issue to be a municipal affair, *State Bldg. & Const. Trades Council of Cal., AFL-CIO v. City of Vista*, 54 Cal. 4th at 580 (Liu, J., concurring);
- Whether the issue is of local concern only, *Cal. Fed. Sav. & Loan Ass'n*, 54 Cal. 3d at 17;
- Whether it is more sensible and appropriate to have an issue resolved at the state or municipal level, *id.*;
- The degree to which state law intrudes on municipal issues, *Johnson v. Bradley*, 4 Cal. 4th 389, 400 (1992); and,
- Whether the state law imposes procedural, as opposed to substantive, obligations on charter cities, *City of Vista*, 54 Cal. 4th at 564.

Moreover, when determining whether an issue is of statewide concern, "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." *Cal. Fed. Sav. & Loan Ass'n*, 54 Cal. 3d at 17. This principle "has operated with particular force when the case involves asserted home rule prerogatives not explicitly protected by the text of Constitution article XI, section 5." *See City of Vista*, 54 Cal. 4th at 581 (Liu, J., concurring). Finally, if there is any " 'doubt as to whether an attempted regulation relates to a municipal or to a state matter, . . . the doubt must be resolved in favor of the legislative authority of the state.' " *See id*. at 582 (quoting *Abbott v. City of Los Angeles*, 53 Cal. 2d 674, 681 (1960)).

1. The Individual Right To Appeal Building Code Enforcement Decisions to a Neutral Body Does Not Concern a Constitutionally Recognized Core Municipal Affair

The California Constitution does not expressly deem as a municipal affair the manner by which landowners may appeal notices of violation concerning building code regulations. *Cf. City of Vista*, 54 Cal. 4th at 580 (Liu, J., concurring) ("[W]e have been most protective of home rule prerogatives explicitly recognized in the text of our Constitution."). Rather, the Constitution only identifies four areas of core municipal affairs: regulating the city police force; regulating the subgovernment of a city; regulating the

conduct of city elections; and, regulating the manner in which municipal officers are elected. *See* Cal. Const. art. XI, § 5(b). This principle has been most prominently implicated when state law interferes with local government's prerogative to set wages for its employees. *See, e.g., County of Riverside v. Superior Court*, 30 Cal. 4th 278, 286-90 (2003). None of the core municipal affairs applies here. Hence, this factor supports the application of Section 1.8.8 to Oakland.

2. The Right to an Appeal to a Neutral Body Does Not Solely Implicate Local Concerns

Issues that have external effects or concern important, universal matters do not fall within the home rule doctrine because they do not solely implicate local concerns. *See Pacific Tel. & Tel. Co. v. City & Cty. of San Francisco*, 51 Cal. 2d 766, 776 (1959) (erection of telephone lines is a matter of statewide concern because of the state's interest in a complete telephone network). The right to appeal enforcement agency decisions does not solely implicate local concerns. *Cf. Cal. Fed. Sav. & Loan Ass'n*, 54 Cal. 3d at 24-25 (local taxation of banks is a matter of statewide concern and not subject to home rule doctrine).

Protecting individual rights from government abuse concerns everyone, not just municipal interests. The California Supreme Court's analysis in *Johnson* is instructive. In that case, the Court considered whether public funding of political campaigns using local tax revenue exclusively implicates

local interests. *Johnson*, 4 Cal. 4th at 409. The Court held that the integrity of the electoral process, at both the state and local levels, is "undoubtedly a statewide concern." *Id*. Therefore, the state has a valid interest in the integrity of all elections, even the election of charter city officials. *See id.* To further this interest, the Court concluded that the state may impose disclosure requirements and contribution limits on candidates for local office. *See id*. It contrasted the statewide interest in the integrity of the electoral process with the interests in public financing of campaigns using local revenues. The latter, the Court explained, is not a matter of statewide concern because public financing does not undermine the integrity of the electoral process and effects only local funds. *See id*. at 410-11.

Similarly, the Court has repeatedly acknowledged a statewide interest in the procedure used to resolve an issue the substance of which is a municipal affair. *See Cty. of Riverside v. Superior Court*, 30 Cal. 4th at 289 (analyzing the case law demonstrating the statewide interest in the procedure used to resolve a public employee labor issue even though the state cannot regulate the substance under the home rule doctrine). In *Baggett v. Gates*, for instance, the Court held that the Public Safety Officers' Procedural Bill of Rights Act is applicable to charter cities. 32 Cal. 3d 128, 139 (1982). Acknowledging that the Act's procedural protections concern the employment of local government employees—a core municipal affair—the Court nevertheless determined that the procedural protections address a matter of statewide concern. *Id*. at 137-

39. The Court reasoned that there is a statewide interest in assuring a fair procedure for public employees and that imposing a uniform process on all cities furthers the statewide interest without unduly impinging charter cities' autonomy. *Id*. at 139-40; *see also People ex rel. Seal Beach Police Officers Ass'n v. City of Seal Beach*, 36 Cal. 3d 591, 601 (1984) (recognizing the "clear distinction between the *substance* of a public employee labor issue and the *procedure* by which it is resolved" in applying a state law meet-and-confer requirement on charter cities).

Like the right to vote in a fair political process, the state has a valid interest in protecting individual property owners from abuse by local enforcement agencies, such as that highlighted by the Alameda County Grand Jury Report. *See* RJN Ex. A at 63-98. And, like *Baggett*, it limits its intrusion into municipal affairs by regulating only the minimum appellate process, rather than the substantive local building code requirements. Hence, this factor supports the application of Section 1.8.8 to Oakland.

3. It Is Sensible for the State To Protect Citizens from Abuse by Local Government Agencies

It is sensible for a higher level of government to institute procedures to protect individuals from abuse by a lower level of government. *See Cal. Fed. Sav. & Loan Ass'n*, 54 Cal. 3d at 17. For instance, the Federal Constitution's provisions concerning separation of powers and federalism underscore that individual liberty can be protected through checks and balances, as well as

through a division of regulatory authority and enforcement. *See, e.g.*, *New York v. United States*, 505 U.S. 144, 181 (1992) ("State sovereignty is not just an end in itself: 'Rather, federalism secures to citizens the liberties that derive from diffusion of sovereign power.' " (quoting *Coleman v. Thompson*, 501 U.S. 722, 759 (1991))); *Bond v. United States*, 131 S. Ct. 2355, 2365 (2011) ("Separation-of-powers principles are intended, in part, to protect each branch of government from incursion by the others. Yet the dynamic between and among the branches is not the only object of the Constitution's concern. The structural principles secured by the separation of powers protect the individual as well."). The same is true of the Fourteenth Amendment and federal law enforcing that amendment, *see, e.g.*, 42 U.S.C. § 1983, which ensure that state and local authorities do not violate federal constitutional rights.

In *Jauregui v. City of Palmdale*, the Court of Appeal relied on state and federal constitutional protections for the right to vote in holding that there is a statewide interest in protecting the rights of voters in municipal elections. 226 Cal. App. 4th 781, 799-800 (2014). In doing so, it noted that the principles underlying those protections are universal, *i.e.* the need to protect the right to vote applies equally to all elections, regardless of whether a city is a charter city. *Id*. Similarly, the need for a fair process to appeal Building Code violations does not vary with local conditions.

These principles mean that fairness for local landowners can best be ensured by allowing the state an important role in the formulation of the local

appeals process. The local interest in the substantive requirements of the Building Code does not eclipse this statewide interest. *See Committee of Seven Thousand v. Superior Court*, 45 Cal. 3d 491, 510 (1988) (" 'If a state statute affects a municipal affair only incidentally in the accomplishment of a proper objective of state-wide concern, then the state law applies to charter cities.' " (quoting *Wilson v. Walters*, 19 Cal. 2d 111, 119 (1941))). As the Grand Jury Report sadly demonstrates, it is not sensible to rely on local government to police itself. *See* RJN Ex. A at 63-98. Hence, this factor supports the application of Section 1.8.8 to Oakland.

4. State Law Requirements for Appeals Only Minimally Intrude on Charter Cities' Powers

The Building Code's appeals provisions minimally intrude on charter cities' power to regulate building code compliance. *See Baggett*, 32 Cal. 3d at 139-40. As explained above, the Building Code requires all local governments to establish a process for individuals to appeal adverse code violation decisions. § 1.8.8.1. It gives them a choice of how to do that—they may create an independent appeals board or they may allow an appeal to the governing body. *See id*. If a local government chooses to establish an appeals board, the Building Code merely demands that: (a) the board have five members who meet certain qualifications related to the Building Code; (b) the board's members serve rotating terms; (c) the board's hearings be noticed and open to the public; and (d) the board's members not be employees of the

enforcing agency. §§ B101, 1.8.8.1. In contrast, member compensation, the rules and procedures under which the board operates, the substantive law that the board reviews, and everything and anything else pertaining to the board's work are left to the local government's discretion. *Cf.* Oakland Muni. Code § 15.08. Thus, the Building Code's appeals provisions intrude on charter city authority only to the bare extent necessary to protect individuals from abuse by local enforcement agencies. *See Johnson*, 4 Cal. 4th at 400 (state law limits on local taxation of banks are a matter of statewide concern because " 'the sweep of the state's protective measures [is] no broader than its interest' "). Accordingly, this factor supports the application of Section 1.8.8 to Oakland.

5. The State Law Appeals Requirements Are Procedural Not Substantive

That the Building Code's protections for property owners are merely procedural strengthens the conclusion that those protections should control here. *Cf. City of Vista*, 54 Cal. 4th at 564. As noted in the preceding section, the substantive requirements for new or existing buildings are left to the discretion of charter cities. *See, e.g.*, Oakland Muni. Code § 15.08. For example, the appropriate minimum standards for "light-transmitting skylight glazing" is precisely the kind of issue that will vary by local conditions and where local knowledge will be essential to determine the appropriate standard. *See Fragley v. Phelan*, 126 Cal. 383, 387 (1899) (home rule was "enacted upon the principle that the municipality itself knew better what it wanted and

needed than the state at large, and to give that municipality the exclusive privilege and right to enact direct legislation which would carry out and satisfy its wants and needs").

But the appeals provisions concern the procedures to protect individuals from the abusive application of this appropriately local substantive law. The California Supreme Court explained this distinction in *City of Vista*, a case concerning a labor union's challenge to a public contract entered into by a charter city, where the contract violated the state's prevailing wage law. *See* 54 Cal. 4th at 552. In rejecting the challenge, the Court distinguished the prevailing minimum wage law, which regulates the *substance* of a public employee labor issue, from the *procedure* for resolving public employee labor disputes. *See id*. at 564. Home rule guarantees to charter cities the power to determine the salaries that it pays (substance). *Id*. But "'the process by which salaries are fixed is obviously a matter of statewide concern[.]'" *Id*. (quoting *People ex rel. Seal Beach Police Officers Ass'n v. City of Seal Beach*, 36 Cal. 3d at 600-01 n.11).

Similarly, in *Committee of Seven Thousand v. Superior Court*, the Supreme Court of California upheld a state law that allowed only the Orange County Board of Supervisors or city councils within that county to decide whether to impose a special assessment to finance highway construction. 45 Cal. 3d at 501. Opponents of the assessment sought, by local initiative, to take this power away from the City of Irvine's—a charter city—city council. *Id*.

at 498. In analyzing the conflict between the state authorization and local prohibition, the Court recognized that the highway system is a matter of statewide concern. *Id*. at 505-07. The Court declared the initiative invalid because it interfered with the allocation of authority between local voters and their representatives established by state law on a matter of statewide concern, notwithstanding that local taxation to finance public improvements is also a municipal affair. *Id*. at 509-10.

The reasoning of *City of Chula Vista* and *Committee of Seven Thousand* apply fully here: the *substance* of building regulations is a municipal affair, but the *procedures* for enforcing those requirements are by nature procedural matters of statewide concern. Hence, this factor supports the application of Section 1.8.8 to Oakland.

C. Any Doubt as to Whether State Law Concerning the Building Code Appeals Process Must Be Resolved in Favor of the Applicability of the Building Code's Provisions

If this Court doubts whether protecting individuals from abuse by local code enforcement agencies is a matter of statewide concern exempt from conflicting local regulation, it should apply a presumption in favor of state authority. *See Baggett*, 32 Cal. 3d at 140 ("There must always be doubt whether a matter which is of concern to both municipalities and the state is of sufficient statewide concern to justify a new legislative intrusion into an area traditionally regarded as 'strictly a municipal affair.' Such doubt, however,

'must be resolved in favor of the legislative authority of the state.' "). The consequences of holding otherwise are significant. For example, if the Building Code's guarantee of a right to appeal does not apply to charter cities, then they are under no obligation to give property owners any kind of appeal. The requirement to establish an appeals process implicates the same concerns as those requiring an appeal to an appeals board or the governing body—matters plainly addressed in Section 1.8.8. Further, if a charter city not subject to the Building Code were to choose to establish an appeals process, the city could easily evade the Code's provisions designed to ensure impartiality in the proceedings. In other words, a charter city could establish the same appeals process that Oakland had before the Grand Jury condemned it—an appeal to the inspector's supervisor. *See* RJN Ex. A at 63-98. This Court can and should avoid such an outcome.

CONCLUSION

Protecting individuals' property and procedural rights from abuse by local enforcement agencies is a matter of statewide concern. California addresses that concern by requiring local governments to allow individuals to appeal adverse code enforcement decisions. Those appeals may be to an independent appeals board or to the local government's governing body. Oakland has refused to create an independent appeals board, instead merely authorizing appeals to a single hearing officer appointed by the very agency that prosecutes the violation. The Building Code, however, makes clear that

when a local government fails to establish an appeals board, an individual has a right to appeal adverse decisions to the local government's governing body.

Accordingly, the judgment of the superior court should be reversed, and that court directed to issue a writ of mandate compelling Oakland either to establish an appeals board or to provide for an appeal to its City Council.

DATED: August 18, 2014.

Respectfully submitted,

JOHN STUART CLAASSEN
DAMIEN M. SCHIFF
JONATHAN WOOD

By /s/ Jonathan Wood
JONATHAN WOOD

Attorneys for Plaintiff and Appellant
Thomas Lippman

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the foregoing Appellant's Opening Brief is proportionately spaced, has a typeface of 13 points or more, and contains 7,480 words.

DATED: August 18, 2014.

/s/ Jonathan Wood
JONATHAN WOOD

DECLARATION OF SERVICE BY MAIL

I, Tawnda Elling, declare as follows:

I am a resident of the State of California, residing or employed in Sacramento, California.

I am over the age of 18 years and am not a party to the above-entitled action.

My business address is 930 G Street, Sacramento, California 95814.

On August 18, 2014, a true copy of APPELLANT'S OPENING BRIEF was electronically filed with the Court through truefiling.com. Notice of this filing will be sent to those below who are registered with the Court's efiling system. Those who are not registered will receive a hard copy via first-class U.S. Mail, postage thereon fully prepaid, and deposited in a mailbox regularly maintained by the United States Postal Service in Sacramento, California.

John Stuart Claassen
Claassen Professional Corporation
1970 Broadway, No. 525
Oakland, CA 94612
Counsel for Plaintiff and Appellant Thomas Lippman

Thomas Lippman
263 Humboldt Road
Brisbane, CA 94005
Plaintiff and Appellant

Barbara Jean Parker
Office of the City Attorney
1 Frank Ogawa Plaza, 6th Floor
Oakland, CA 94612
Counsel for Defendant and Respondent City of Oakland

Court Clerk
Alameda County Superior Court
1225 Fallon Street
Oakland, CA 94612

Supreme Court of California
350 McAllister Street, Rm. 1295
San Francisco, CA 94102

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 18th day of August, 2014, at Sacramento, California.

/s/ Tawnda Elling
TAWNDA ELLING