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 REPLY BRIEF

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INTRODUCTION

Does the California Building Code require cities merely to have some appellate process—however perfunctory or susceptible to bias—to resolve building code violations? Or rather does the Code mandate that cities provide aggrieved property owners a right to appear before an independent appeals board or, if none has been established, the city council itself? *Cf.* Cal. Building Code § 1.8.8.[1] Respondent City of Oakland argues that its appeals process—which entails *no* appeals board and *no* city council hearing—is nevertheless consistent with the Building Code. The City reasons that the Code's Section 1.8.8, setting forth the basic structure for appeals, also authorizes an appellate system whereby the enforcing agency *itself* can conduct the appeal, so long as that process is "independent" of the agency to an unspecified and unexplained degree. *See* Respondent's Brief (Resp. Br.) at 2.

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[1] As in Appellant's Opening Brief, all citations are to the 2010 California Building Code unless otherwise indicated. Because the code is subject to copyright and is not published in the California Code of Regulations, the entire section has been reproduced in Appellant's Opening Brief, Opening Brief at 3-4, as well as in the Attachment to this Reply Brief.

Oakland asserts, without explanation, that Lippman cited the 2007 Building Code in his opening brief. *See* Respondent's Brief (Resp. Br.) at 10 n.5. Lippman is not aware of any cite to the 2007 Building Code, and did not intend to cite to any of its provisions. The text of Section 1.8.8 reproduced in Lippman's Opening Brief and this Reply are taken from the 2010 Building Code.

Neither the text nor the purpose of the Building Code supports Oakland's interpretation, which fails to give effect to much of Section 1.8.8.1, and fails to account for the provisions in Sections 1.8.8.2 and 1.8.8.3 that provide a right to appeal *only* to an appeals board or the governing body. In contrast, the interpretation advanced by Appellant Thomas Lippman avoids the shortcomings that Oakland's interpretation poses, by demonstrating that Section 1.8.8 gives cities a straightforward choice: establish an appeals board or allow an appeal to the city council. Lippman's interpretation also gives effect to the Building Code's acknowledged purpose of requiring a neutral and independent appeals process. Oakland offers no explanation as to how its interpretation would vindicate the Code's purpose. *Cf.* Resp. Br. at 16-17. Oakland's appeals process irreconcilably conflicts with the Building Code.

Accordingly, under the municipal affairs doctrine, Oakland's appeals process must cede to the Building Code's appeals process. State law that addresses a matter of statewide concern—such as protecting property owners from bureaucratic abuse—trumps charter city ordinances. Like the protections of procedural due process, the importance of the Building Code's appeals protections does not depend on local conditions. All of the factors that the California Supreme Court has used to determine that a matter is of statewide concern support that same conclusion here. *See* Opening Brief (Opening Br.) at 21-31. The fact that the Legislature and the Building Code have failed to dictate every jot and tittle of the appeals process does not overcome the

municipal affairs doctrine's presumption in favor of state authority. *See Baggett v. Gates*, 32 Cal. 3d 128, 140 (1982). Therefore, this Court should hold that Oakland's current appeals process is illegal under the Building Code.

I

THE BUILDING CODE DOES NOT PERMIT APPEALS TO BE HEARD BY THE ENFORCING AGENCY

Although the Building Code gives a city discretion whether to adopt an appeals board, *see* § 1.8.8.1, if a city fails to do so, the Code requires that a city must allow property owners to appeal enforcement decisions to the city's governing body. *See id.* Oakland's argument to the contrary is inconsistent with the Building Code's text and purpose.

A. Oakland's Argument Is Inconsistent with the Building Code's Text

Oakland argues that its obligation to establish an appeals process under the Building Code is satisfied so long as it establishes *any* process for resolving appeals, including appeals within the enforcing agency. Resp. Br. at 15-16. This argument is inconsistent with the Building Code's text, for several reasons.

First, Oakland's interpretation renders all but the first sentence of Section 1.8.8.1 surplusage. The first sentence mandates that cities establish a process to hear appeals made by enforcing agencies. § 1.8.8.1. The second sentence provides that one option for satisfying this obligation is to establish

a local appeals board or housing appeals board, the requirements for which are found in Section 1.8.8.1's third sentence, as well as in the Building Code's Section B101.[2] Oakland's argument gives this language no effect: there would be no need for the Building Code to explicitly grant the discretionary authority to establish an appeals board (which cities otherwise would have), unless some consequence were to follow from the decision not to exercise it. As Lippman has explained, the Building Code *does* provide a consequence if cities choose not to establish a compliant appeals board—appeals must then be heard by the city council. Opening Br. at 14-17.

Second, Oakland's interpretation renders the second paragraph of Section 1.8.8.1 surplusage because the requirement to allow an appeal to the city council could *never* apply. The existence of an enforcing agency is a predicate to a city's obligation to establish an appeals process. § 1.8.8.1 ("shall establish a process to hear and decide appeals of orders . . . *by the enforcing agency*"). If the enforcing agency in the first sentence of Section 1.8.8.1 satisfied a city's obligations under the second paragraph, the Building Code's requirement that the city council hear appeals could never apply, despite the second paragraph's mandatory language. *Id.* ("the governing body of the city . . . *shall* serve") (emphasis added). But these provisions need not be rendered surplusage if, as Lippman argues, "local appeals board or agency"

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[2] *See* Attachment to Appellant's Reply Brief (reproducing Sections B101 and 1.8.8 of the Building Code).

refers only to the local appeals board and housing appeals board, which are each explicitly defined as a "board or agency." § 1.8.8.2.

Third, Oakland's argument is inconsistent with the text of Section 1.8.8.3. This provision gives property owners a right to appeal adverse decisions to "the local appeals board or housing appeals board as appropriate." To Lippman's knowledge, this is the only right to appeal contained in the Building Code. According to the definition of "Local Appeals Board," if the city has not exercised its discretionary authority to establish an appeals board, the term "means the governing body of the city."[3] § 1.8.8.2. Applying this definition to Section 1.8.8.3, a property owner has a right to appeal to an appeals board (if one has been established) or to the city council. The language does not encompass a right to appeal to any other body. Opening Br. at 18-19.

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[3] Oakland implicitly acknowledges that its argument is inconsistent with Section 1.8.8's definition provisions when it asks this Court to construe those provisions as if their text were different. *See* Resp. Br. at 16-17 (asserting that the City's interpretation would be consistent with Section 1.8.8 as a whole if the latter referred to an "independent mechanism for appeals" rather than defined an appeals board as a "board or agency"). The question, however, is not whether Oakland's appeals process could be consistent with a *different* text, but whether it is consistent with the *actual* text of the Building Code. *Cf. People v. Mejia*, 211 Cal. App. 4th 586, 611 (2012) (to ascertain legislative intent, courts should look to the plain meaning of statutory language).

B. Oakland's Interpretation Is Inconsistent with the Building Code's Purpose of Requiring an Independent Appeals Process

Rather than accept the consequence of its textual argument—that any appeal within the enforcing agency would satisfy the City's obligation—Oakland simply asserts without explanation that the mandatory appeals process must be an "independent mechanism for appeals." Resp. Br. at 16-17. According to Oakland's theory, Section 1.8.8.1 only requires a city to "establish a process to hear and decide" appeals. Respondent's Br. at 11. But nothing in Section 1.8.8.1's first sentence requires that the process be "independent." Rather, the requirement that the appeals process be independent from the enforcing agency can only come from the remainder of Section 1.8.8.1, which gives a city the choice of establishing an independent appeals board or allowing an appeal to the city council.

Oakland recognizes that the clear purpose of the Building Code's appeals provisions is to require that the appeals process be independent of code enforcement. Resp. Br. at 18 ("The City agrees that the [Building Code] appears to mandate an impartial, independent, appeal process where citations are not adjudicated by enforcing agency officials."). Oakland is correct about Section 1.8.8.1's purpose but its interpretation ignores how the provision accomplishes that purpose—namely, through the requirement that a city establish an independent appeals board or allow appeals to the city council.

In contrast, Oakland's interpretation would allow it to adopt an appeals process like that criticized in the Grand Jury Report.[4] RJN Ex. A at 74-77. The City observes that its appeals process is somewhat more independent than that, but offers no explanation how, under its theory, such independence is required under the Building Code. Resp. Br. at 19-21. Because Oakland's interpretation of the Building Code would conflict with what Oakland acknowledges is Section 1.8.8's clear purpose, that interpretation should be rejected in favor of Lippman's more reasonable one, which explains how that purpose is accomplished by the text.

C. Oakland's Interpretation Would Leave Property Owners Vulnerable to Abuse by the Enforcing Agency

The correct interpretation of the Building Code's provisions is no small matter for property owners. In this case, Lippman was only allowed to appeal his case to a hearing officer appointed by the very agency that sought to punish him. Tr. 165. Pursuant to Oakland's interpretation, this right was given solely as an act of municipal grace. *See* Resp. Br. at 17-18 (noting that Oakland allows a hearing before an "independent" hearing officer, but not asserting that

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[4] Contrary to Oakland's assertion, Resp. Br. at 21-23, Lippman does not ask this Court to find that the conclusions of the Alameda County Grand Jury are true. As explained in Lippman's Motion for Judicial Notice, the Grand Jury Report is offered to show only that the Grand Jury determined that the former process of appealing adverse decisions to an inspector's supervisor was inadequate and to give examples why the right to an independent appeals process is a matter of statewide concern. RJN at 2-4.

this was required under Section 1.8.8.1). According to Oakland, the City's sole obligation was to "establish an appeal process"—*any* appeal process. Resp. Br. at 18.

This Court need not speculate to appreciate the consequences of the City's interpretation. All of the abuses described in the Grand Jury Report, regardless of whether they actually occurred, would be permitted under Oakland's theory. For example, a property owner could be allowed only a right to appeal to the inspector who issued the citation. RJN Ex. A at 74 ("The same inspector that issued the citation often conducts the initial appeal."). Because the inspector works for the enforcing agency, the Building Code's requirements would be satisfied under Oakland's theory. But an appeal to the citing inspector would provide property owners no protection from abuse or mistake by the inspector.

Alternatively, a property owner could be allowed an appeal only to an inspector's supervisor. *Id*. ("The next level of the appeal involves a Building Services supervisor, who, it is reported, routinely denies the appeal."). Again, because the supervisor works for the enforcing agency, the Building Code's requirements would be satisfied. This too would fail to assure property owners of a fair and impartial hearing.

If such "appeals processes" were consistent with the Building Code, there would be no reason for the Code to specifically require that the appeals board's members not be employees of the enforcing agency. Opening Br. at

17. Under Oakland's interpretation, those employee-members would satisfy the City's obligation under the "or agency" language. *See id*. The Grand Jury, however, was "appalled" by these possibilities, which demonstrated "an atmosphere of hostility and intimidation toward property owners within the Building Services division." RJN Ex. A at 78. At a minimum, the Building Code should be construed to prevent such abuses.

As Oakland acknowledges, the purpose behind the Building Code's appeals provisions is to accomplish many of the same goals underlying due process.[5] Resp. Br. at 18-21. "Section 1.8.8.1, for example, seeks to provide property owners with procedural due process when appealing decisions from an enforcing agency." *Id*. at 19. Therefore, it is odd that Oakland interprets Section 1.8.8.1 not to provide at least as much protection as that required by due process. If the Building Code were satisfied so long as there was *any* right to an appeal within the enforcing agency, the minimum requirements of due process would not be satisfied. *See 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"). *See also* Resp. Br. at 20 ("Due process also requires impartial adjudicators."). Oakland offers *no* explanation as to why the

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[5] Oakland is correct that Lippman has not advanced a due process claim against the City's appeals process. Resp. at 19. Due process is only relevant to Lippman's argument in that it provides some context for understanding the state's purposes in imposing the Building Code's appeals provisions and why those provisions address a matter of statewide concern. *See, e.g.*, Opening Br. at 17, 25-27.

procedures that it has adopted to satisfy due process are required by the Building Code under its interpretation of Section 1.8.8. Weighing against this serious risk of abuse to property owners is only the inconvenience to Oakland of establishing an independent appeals board or a process to appeal enforcement decisions to the city council. Hence, equity as well as Section 1.8.8.1's purpose counsel in favor of Lippman's interpretation.

II

THE PROCESS FOR RESOLVING BUILDING CODE VIOLATION APPEALS IS A MATTER OF STATEWIDE CONCERN

All of the factors relevant to determining whether a matter is of statewide concern indicate that protecting property owners from bureaucratic abuse by local enforcement agencies is such a matter. Opening Br. at 21-31. Oakland, however, argues that a matter of statewide concern must be measured solely by effects external to a local municipality. *See id*. at 26. But the City offers no meaningful distinction between this case and the public employment cases, except mere assertions that "the local impact here is far less widespread" and that the analogy "does not result in a 'sensible' or 'appropriate' allocation of power to the state." *Id*. at 28.

Although there are no cases specifically holding that the process for appealing adverse building code decisions is a matter of statewide concern, the reasoning of the public employment cases compels that conclusion. *See Cnty. of Riverside v. Superior Court*, 30 Cal. 4th 278, 289 (2003) (procedure for resolving public employee labor dispute a matter of statewide concern even though the content of the employee agreement is not); *People ex rel. Seal Beach Police Officers Ass'n v. City of Seal Beach*, 36 Cal. 3d 591, 601 (1984) (same); *Baggett*, 32 Cal. 3d at 139 (same). Even if the substance of an appeal is a municipal affair, the procedure used to resolve the issue is a statewide matter. *See Cnty. of Riverside*, 30 Cal. 4th at 289. For just as the state has an interest in assuring a fair procedure for public employees, so does it have an interest in assuring a fair procedure for property owners. *See Baggett*, 32 Cal. 3d at 139-40.

Moreover, it is reasonable to recognize the state's role in providing this protection. Like the constitutional right-to-vote issues underlying the statewide concern in *Jauregui v. City of Palmdale*, 226 Cal. App. 4th 781 (2014), the due process concerns underlying the Building Code's appeals provisions are universal, *i.e.* the importance of protecting property owners does not differ between charter and non-charter cities. *See id*. at 799-800. Contrary to Oakland's contention, Resp. Br. at 29, the presence of due process concerns supports rather than undercuts preemption. For example, although the state and federal constitutions safeguard the right to vote, *Jauregui* held that such

safeguards do not convert an otherwise statewide matter into a municipal affair. *See* 226 Cal. App. 4th at 799-800. Hence, given the universal nature of due process concerns, it is appropriate for the state to protect those concerns through the Building Code's appeals process. *See* Opening Br. at 25-27; RJN Ex. A at 63-98.

Similarly, Oakland's argument that the discretion left to cities under the Building Code weighs against a finding of statewide concern must be rejected as inconsistent with precedent. *Cf.* Resp. Br. at 29 ("If the state intended to fully preempt this area from local regulation, it follows that section 1.8.8.1 *would not* authorize *every* city and/or county to establish its *own* process to hear and decide appeals.") The Supreme Court in *Baggett* recognized that the fact that state law only minimally intrudes on a charter city's power is an argument *in favor of* finding that the law addresses a statewide concern. *See* 32 Cal. 3d at 139-40.

Finally, Oakland's position must be weighed against the presumption in favor of the state's authority. *See State Bldg. & Const. Trades Council of Cal., AFL-CIO v. City of Vista,* 54 Cal. 4th 547, 582 (2012) (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' " (quoting *Abbott v. City of Los Angeles,* 53 Cal. 2d 674, 681 (1960)). Because Oakland's appeals process conflicts with the Building Code,

the Court should resolve that conflict by applying this presumption and upholding state law over the inconsistent local process.

CONCLUSION

Protecting property owners from abuse by local enforcing agencies is a matter of statewide concern. The Building Code's appeals provisions must trump any inconsistent local appeals process, including Oakland's. Accordingly, the judgment of the superior court should be reversed, and that court directed to issue a writ of mandate to the City, requiring it either to establish an appeals board or to allow Lippman to bring his appeal before Oakland's city council.

DATED: November 5, 2014.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the foregoing Appellant's Reply Brief is proportionately spaced, has a typeface of 13 points or more, and contains 3,034 words.

DATED: November 5, 2014.

/s/ Jonathan Wood
JONATHAN WOOD

DECLARATION OF SERVICE

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 November 5, 2014, a true copy of APPELLANT'S REPLY 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.

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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 5th day of November, 2014, at Sacramento, California.

/s/ Tawnda Elling
TAWNDA ELLING