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TOWN OF FAIRFAX (erroneously sued as “City of
Fairfax”)

EXEMPT FROM FILING FEES PURSUANT
TO GOVERNMENT CODE SECTION 6103

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF MARIN

11
12 JACOB FRIEDMAN, an individual,

13 Petitioner,

14 v.

15 CITY OF FAIRFAX, a general law city, and
DOES 1 through 10,

16 Respondents.
17

Case No. CV0000737
Judge: Hon. A. Sweet

**RESPONDENT TOWN OF FAIRFAX’S
OPPOSITION TO PETITIONER’S *EX
PARTE* APPLICATION FOR
ALTERNATIVE WRIT AND STAY
AND ORDER TO SHOW CAUSE RE
PEREMPTORY WRIT**

Ex Parte Hearing

18 Date: September 5, 2023
19 Time: 9:00 a.m.
Dept.: E

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Respondent Town of Fairfax (the “Town”) requests that this Court deny the Petitioner Jacob Friedman’s (“Petitioner”) Ex Parte Application for Alternative Writ and Stay and Order to Show Cause RE Peremptory Writ (the “Application”) in its entirety.

In essence, Petitioner seeks to challenge the Town’s decisions to (1) suspend Petitioner’s building permit; (2) issue an Order to Stop Work (“OSW”) for a construction project at the real property located at 79 Wood Lane, Fairfax, California 94930; and (3) refuse to issue a “green tag” for the electrical system at the property. Petitioner’s Application confusingly conflates these decisions and attempt to paint them as three separate issues, purportedly done as part of a campaign of harassment. However, in reality, all three of the Town’s decision stem from the fact that Petitioner failed to proceed with his construction in a manner that was approved by the Town and specified in Petitioner’s permit, and repeatedly refused to obtain approval for his changes to the construction plan, despite the Town’s insistence otherwise. The Town was forced to exercise its discretionary powers to issue an OSW, and ultimately suspend Petitioner’s permit until he complied. The suspension of Petitioner’s permit prohibits any further approvals, resulting in the denial of the green tag.

Rather than availing himself of the readily available administrative remedies at his disposal, namely, to resubmit his plans or to appeal the suspension, Petitioner instead chooses to prematurely and improperly come to this Court for judicial intervention. Yet, even there, the Application fails in many regards.

First, by failing to exhaust the administrative remedy provided by the Town’s Municipal Code, the Application is procedurally premature and has failed to plead a prima facie case for issuance of a writ.

Second, notwithstanding Petitioner’s failure to exhaust his remedies, which is grounds for a denial outright, Petitioner’s claims that he was denied due process in the form of a hearing is unsupported by the plain language reading of California’s Building Code and is likewise unsupported by the law. Petitioner cannot obtain writ relief for a procedure to which he is not

1 entitled.

2 Third, because Petitioner’s permit for the entire project has been suspended, Petitioner
3 cannot show that the Town has a ministerial duty, or failed to follow this duty, to approve the
4 electrical system.

5 As a result, for the reasons below, Petitioner’s Application is meritless, procedurally
6 defective, and unsupported by the evidence contained in his Verified Petition for Alternative Writ
7 and Stay and Peremptory Writ of Mandamus (the “Verified Petition”). For these reasons, and
8 those discussed below, this Court should deny the Application in its entirety.

9 **II. STATEMENT OF FACTS**

10 **A. The Town’s Adoption of the California Building Code And Creation of an**
11 **Administrative Appeals Process**

12 As provided under Fairfax Town Code (“Town Code”) section 15.04.010, the Town has
13 adopted Division II of Chapter 1 of the 2022 edition of the California Building Code (“CBC”),
14 *except* CBC section 113.¹ Pursuant to CBC section 105, permits are required for construction
15 projects.² Pursuant to CBC section [A] 105.6, a building official has authority to suspend a
16 permit if the permit was issued on the basis of incorrect, inaccurate, or incomplete information.³

17 Likewise, as codified in Chapter 17.024, the Town requires a building permit before any
18 construction can occur. For example, Town Code section 17.024.060 prevents any construction
19 without a building permit:

20 No person, firm or corporation shall erect, construct, enlarge, alter,
21 repair, move, improve, remove, convert or demolish any building or
22 structure in the town, or cause the same to be done, without first
obtaining a separate building permit for each such building or
structure from the building official.

23 (Town Code § 17.024.060.⁴) The Town Code provides procedures for the Planning Commission
24 of the Town to review the design of a building prior to the issuance of a permit. (*See* Town Code

26 _____
27 ¹ The Town’s Request for Judicial Notice in Support of Respondent Fairfax’s Opposition to Ex
Parte Application (“RJV”), Ex. A.

28 ² RJV, Ex. B

³ RJV, Ex. C

⁴ RJV, Ex. D

1 § 17.020.020, subd. (a)⁵ [purpose of design guidelines is to review *all* developments, buildings,
2 structures, signs, and other facilities constructed in the Town]; Town Code § 17.020.040⁶ [design
3 review criteria]; Town Code § 17.020.120⁷ [requiring approval of the proposed development
4 before a building permit may be issued].) Town Code section 17.024.120 (“Section 17.024.12”)⁸
5 also provides that any decision by the Planning Commission to revoke or modify a permit may be
6 appealed under Chapter 17.036.⁹

7 Notably, by adopting only Division II of the CBC, and by excluding Section 113 of that
8 Division, the Town has expressly declined to adopt the CBC’s requirement that the Town create
9 an appeals board and the outlined “Means of Appeal” under CBC sections 1.8.8.1¹⁰ and 113¹¹.
10 Instead, appeals are done pursuant only to Town Code section 17.024.120.¹²

11 **B. Relevant Factual Background**

12 As alleged in the Verified Petition, Petitioner is the owner of the real property located at 79
13 Wood Lane, Fairfax, California 94930 (the “Worksite”). (Pet. ¶ 5.) On January 20, 2022, the
14 Town’s Planning Commission approved Petitioner’s application for construction of a house and an
15 Accessory Dwelling Unit (“ADU”) at the Worksite pursuant to a set of approved plans (the
16 “Approved Plans”. (Pet. ¶ 8; *see* RJN, Ex. F.) Resolution No. 2022-01 of the Approved Plans
17 provided the Town with discretionary authority to issue an OSW if it is determined that any
18 construction based on job plans with modifications that significantly change the project:

19 Any changes, modifications, additions, or alternations made to the
20 approved set of plans will require a modification of Application #
21 21 – 17. Modifications that do not significantly change the project,
22 the project design or the approved *discretionary* permits *may* be
23 approved by the Planning Director. Any construction based on job
24 plans that have been altered without the benefit of an approved
25 modification of Application 21-17 will result in the job being
26 immediately stopped and red tagged.

25 ⁵ RJN, Ex. E

26 ⁶ RJN, Ex. F.

27 ⁷ RJN, Ex. G

28 ⁸ RJN, Ex. H

⁹ RJN, Ex. I

¹⁰ RJN, Ex. J

¹¹ RJN, Ex. K

¹² RJN, Ex. H

1 (See RJN, Ex. M at p. A1.2A, ¶ 15.)

2 On August 4, 2022, the Town issued a building permit to Petitioner. (Pet., ¶ 9.) On
3 August 10, 2022, the Town posted an OSW on the Worksite, citing various concerns found at the
4 Worksite. (Pet., ¶ 13.) Rather than address his noncompliance with the Approved Plans in order
5 to have the OSW rescinded, on or about August 25, 2022, Petitioner filed a petition for alternative
6 writ and stay and mandamus in this Court (the “Prior Application”). (Pet., ¶ 14.) Petitioner and
7 Respondent were able to resolve their issues without requiring court intervention, and Petitioner
8 dismissed the Prior Application without prejudice. (*Ibid.*)

9 As alleged by the Verified Petition, Petitioner continued work on the Worksite throughout
10 2022. (Pet. ¶ 15-19.) On or about June 8, 2023, the Town’s Building Official, Mark Lockaby,
11 (“Mr. Lockaby”) issued another OSW on the Worksite (the “June 2023 OSW”). (*Id.*, ¶ 18.)
12 Petitioner appealed the June 2023 OSW and continued work on the Worksite pending the appeal.
13 (*Id.*, ¶ 19-21.) Notably, however, as indicated by the Town’s counsel, there is no appeal to the
14 Town’s issuance of an OSW. (Pet., Ex. 13.) On or about July 20, 2023, Mr. Lockaby completed
15 an electrical inspection of the Worksite. (*Id.*, ¶ 22.) Although Mr. Lockaby approved the
16 electrical systems at the Worksite, he informed the Petitioner that he could not issue a “green tag”
17 until and unless planning staff signs off on the entire project. (*Id.*, ¶ 22.)

18 According to the Petition, on or about August 8, 2023, the Town’s counsel sent
19 correspondence in which she indicated to Petitioner’s counsel that Petitioner would need to
20 submit an application to the Town’s Planning Commission and obtain approval for the
21 unpermitted construction at the Worksite. (Pet., at Ex. 7.) On or about August 11, 2023, Mr.
22 Lockaby sent correspondence to Petitioner in which Mr. Lockaby stated that he is suspending the
23 permit at the Worksite until Petitioner obtains the necessary approval from the Planning
24 Commission. (Pet., ¶¶28-29; Ex. 8.) The Town then enforced its suspension by posting a OSW
25 at the Worksite (the “August 2023 OSW”). (Pet., ¶ 30.)

26 On August 16, 2023, Mr. Lockaby sent another correspondence to Petitioner in which Mr.
27 Lockaby indicated that Petitioner’s building permit has been suspended pursuant to California
28 Building Code section 105.6 due to Petitioner’s submittal of incorrect, inaccurate, and incomplete

1 information. (Pet., ¶ 32, Ex. 11.)

2 On August 23, 2023, the Town’s counsel sent correspondence to counsel for Petitioner in
3 which the Town’s counsel provided procedures for Petitioner to appeal the Town’s suspension of
4 his permit. (Pet. ¶12, Ex. 12.) At this time, no appeal has been undertaken.

5 On or about August 30, 2023, Petitioner filed his Application.

6 **III. LEGAL STANDARD**

7 To obtain issuance of an alternative writ, the petitioner must state a cause of action by
8 setting forth a prima facie basis for relief. (*Turner v. Hatch* (1971) 14 Cal.App. 3d 759, 765;
9 *Ocheltree v. Gourley* (2002) 102 Cal.App.4th 1013, 1018.) A prima facie basis for relief for a
10 writ of mandate under Code of Civil Procedure section 1085 requires the showing that there is
11 “(1) [a] clear, present and usually ministerial duty upon the part of the respondent; and (2) a clear,
12 present and beneficial right in the petitioner to the performance of that duty.” (*Loder v. Mun. Ct.*
13 (1976) 17 Cal.3d 859, 863 [citations omitted].) A court’s review of a local agency or
14 municipality’s discretionary action is limited to correct abuses of discretion, and a mandate will
15 only be issued where “the public agency’s action was arbitrary, capricious, or entirely lacking in
16 evidentiary support, or whether the agency failed to follow the procedure and give the notices the
17 law require.” (*Citizens for Amending Proposition L v. City of Pomona* (“*Citizens*”) (2018) 8 Cal
18 App.5th 1159, 1186.)

19 When reviewing the exercise of discretion, [t]he scope of review is
20 limited out of deference to the agency’s authority and presumed
21 expertise: The court may not reweigh the evidence or substitute its
22 judgment for that of the agency. [Citations.] In general ... the
23 inquiry is limited to whether the decision was arbitrary, capricious,
24 or entirely lacking in evidentiary support.... [Citations.] When
25 making that inquiry, the court must ensure that an agency has
26 adequately considered all relevant factors, and has demonstrated a
27 rational connection between those factors, the choice made, and the
28 purposes of the enabling statute.

25 (*Am. Bd. of Cosm. Surgery v. Med. Bd. of California* (2008) 162 Cal.App.4th 534, 547–48
26 [internal quotations omitted].) When a local agency or municipality has the discretion to engage
27 in a course of action, and the local agency or municipality’s action is not an abuse of discretion,
28 the court cannot issue mandate to compel action. (*California High-Speed Rail Auth. v. Superior*

1 Ct. (2014) 228 Cal.App.4th 676, 699.)

2 **IV. ARGUMENT**

3 **A. Petitioner Has Failed to Exhaust His Administrative Remedies**

4 A petitioner may only seek mandamus relief after he has exhausted readily available
5 administrative remedies. (Cal. Code. Civ. Proc., § 1094.5; *California Water Impact Network v.*
6 *Newhall County Water District*. (2008) 161 Cal.App.4th 1464, 1489.) This Court has discretion
7 to deny “out of hand” a petition that has failed to plead a prima facie case for issuance of an
8 alternative writ. (*Dare v. Board of Medical Examiners* (1943) 21 Cal.2d 790, 797.)

9 Here, Petitioner is wholly incorrect in his assertion that he does not need to exhaust the
10 readily available administrative remedy under the Town Code and appeal its suspension of his
11 permit. (Petitioners’ Ex Parte Application for Alternative Writ and Stay and Order to Show
12 Cause Re Peremptory Writ (“Application”), 10:8-11:25.) For that reason, Petitioner has failed to
13 plead his prima facie case and obtain the remedy to which he seeks, and this Court should deny
14 the Application and the Verified Petition.

15 **1. The Town Has an Administrative Appeal Process**

16 As discussed above, pursuant to CBC section 105¹³ and Town Code section 17.024.060,¹⁴
17 Petitioner is required to have a permit for the Worksite. Pursuant to CBC section [A] 105.6, a
18 building official, such as Mr. Lockaby, has authority to suspend a permit if the permit was issued
19 on the basis of incorrect, inaccurate, or incomplete information.¹⁵ In turn, because issuance and
20 revocation of permits in the Town are governed by Chapter 17.024, any grievance Petitioner may
21 have had regarding this suspension should have been appealed to the Town’s Council under
22 Town Code section 17.036.010, *et seq.*¹⁶ It bears repeating that, by adopting only Division II of
23 the CBC, and by excluding Section 113 of that Division, the Town has expressly declined to
24 adopt the CBC’s requirement that the Town create an appeals board and the outlined “Means of
25

26
27 ¹³ RJN, Ex. B

¹⁴ RJN, Ex. D

¹⁵ RJN, Ex. C

¹⁶ RJN, Ex. I

1 Appeal” under CBC sections 1.8.8.1¹⁷ and 113.¹⁸ Instead, appeals are done pursuant only to
2 Town Code section 17.024.120.¹⁹

3 **2. Petitioner Failed to Exhaust Administrative Remedies by Failing to**
4 **Appeal the Permit Suspension**

5 Petitioner readily admits that he did not appeal the permit suspension prior to initiating
6 this action. (Pet., ¶ 7; Application 10:21-27.) Petitioner argues that the Town Code does not
7 provide for any such a process. As discussed above, this argument is incorrect.

8 Petitioner is proceeding on an incorrect reading of the Town Code: The Verified Petition
9 and Application purports to cite to Town Code section 15.04.100, subd. (C)(4) (“Section
10 15.04.100”) and argues that, because that section refers to a nonexistent section 15.04.028, that
11 Petitioner has no adequate administrative remedy. (Pet., ¶ 34; Application 10:23-26.) However,
12 the purpose of Section 15.04.100 is to provide enumerated “exemptions” to the requirements of
13 the Chapter, and subdivision (C)(4) explicitly provides that any aggrieved person may appeal the
14 “determination of the chief building official regarding the granting or denial of an *exemption* or
15 any other provision of [Chapter 15.04].”²⁰

16 But Petitioner’s grievance is not with the Town’s determination of a granting or denial of
17 an exemption or any provision under Chapter 15.05 of the Town Code (“Chapter 15.05”).
18 Instead, Petitioner is challenging the suspension of his building permit, which is governed by
19 Town Code section 17.024.060 of Chapter 17.024.²¹ In turn, Chapter 17.024 *does* provide for an
20 appeal process: Pursuant to section 17.024.120, Petitioner could have appealed the suspension of
21 his permit under Chapter 17.036. In fact, Petitioner admits he is aware that such an appeal
22 process exists because he previously had submitted an appeal for the June 2023 OSW. (Pet., ¶
23 19; Application 3:18-23.) Notwithstanding the fact that Petitioner’s appeal of the June 2023
24 OSW was procedurally flawed, as there is no appeal of an OSW under the Town Code, Petitioner
25 fails to show why he cannot follow the same procedure here to challenge the Town’s suspension

26 ¹⁷ RJN, Ex. J

27 ¹⁸ RJN, Ex. K

¹⁹ RJN, Ex. H

28 ²⁰ RJN, Ex. N [emphasis added].

²¹ RJN, Ex. D.

1 of his permit.

2 **3. The Available Administrative Remedies are Sufficient**

3 Petitioner claims that he does not need to exhaust administrative remedies because his
4 prior attempts to appeal the June 2023 OSW was fruitless. (Application 10:25-11:13.) He is
5 flatly wrong.

6 Petitioner claims that he “promptly filed an appeal” of the June 2023 OSW. (Application
7 11:4-5.) However, as explained by the Town’s counsel, there is no appeal process for the
8 issuance of an OSW, nor can one be found under the Town Code. (Pet., Ex. 13.) In fact, in her
9 June 14, 2023, correspondence, the Town’s counsel informed Petitioner’s counsel of this fact and
10 even indicated that Petitioner’s “misplaced appeal and check will be returned to the address on
11 the document,” thus signaling that no further action will take place on that appeal. (*Ibid.*) In that
12 case, it would obviously be the case that “the Town Counsel has neither scheduled a hearing nor
13 confirmed that the appeal will ever be heard,” because no such process exists to hear it.
14 (Application 11:7-8.)

15 What Petitioner *does not* claim is that he ever attempted to pursue an appeal on the permit
16 suspension, which is the subject matter of the instant writ and ex parte application. Petitioner
17 cannot claim that the remedy is inadequate if he never actually and correctly availed himself of it.

18 Thus, because Petition has failed to exhaust his administrative remedies in appealing the
19 Town’s suspension of his permit, this Court has no jurisdiction to entertain his writ petition.

20 **B. The Application Fails to Make a Showing of Irreparable Harm to Warrant**
21 **Ex Parte Relief**

22 Under Marin County Superior Court’s Local Rules, all ex parte applications must comply
23 with applicable rules under the California Rules of Court. (*See* Marin County Superior Court,
24 Local Rule 2.12.) Pursuant to the Rules of Court, an ex parte application must include an
25 “affirmative factual showing in a declaration containing competent testimony based on personal
26 knowledge of irreparable harm, immediate danger, or statutory basis for granting relief ex parte.”
27 (Cal. Rules of Court, rule 3.1202.) A court will not grant ex parte relief “in any but the plainest
28 and most certain of cases.” (*People ex rel. Allstate Ins. Co. v. Suh* (2019) 37 Cal.App.5th 253,

1 257.) “A trial court should deny an ex parte application absent the requisite showing.” (*Ibid.*)

2 The Application does not allege an “irreparable harm” that rises to the standard necessary
3 for the granting of an ex parte. As an initial matter, the supporting declaration by Richard Harris
4 fails to allege *any* irreparable harm. (*See generally* Declaration of Richard Harris in Support of
5 Petitioner’s Ex Parte Application for Alternative Writ and Stay and Order to Show Cause Re
6 Preemptory Writ.) This alone is grounds for denial of ex parte relief. (Cal. Rules of Court, Rule
7 3.1202.)

8 In turn, Petitioner’s claim that being forced to “wait an unknown amount of time for an
9 unknown procedure would cause him irreparable harm” likewise fails to meet the standard for ex
10 parte relief. As a factual matter, as discussed, Petitioner cannot sustain this position because he has
11 altogether failed to even attempt to avail himself of the Town’s appeal procedure. Regardless,
12 Petitioner fails to justify why he cannot proceed on a regularly noticed writ petition. He claims that
13 “stopping work for even a few months will *likely make* funding” of the Worksite impossible
14 because of additional costs. (Application 11:9.) Petitioner does not claim, for example, that the
15 project will be irreparably harmed due to this additional cost, or that this additional cost is anything
16 more than mere speculation. At best, any such additional cost would simply result in him incurring
17 additional damages, should they be available. However, this is not adequate grounds for ex parte
18 relief.

19 **C. Petitioner Is Not Entitled to Writ Relief Because the Town Acted within its**
20 **Broad Discretion and in Accordance with the Law**

21 Notwithstanding the procedural deficiencies, on its merits, the Application fails because
22 the facts show that the Town acted within its discretion at all times in the underlying case.

23 A writ of mandate will lie to “compel the performance of an act which the law specifically
24 enjoins, as a duty resulting from an office, trust, or station” (Code Civ. Proc., § 1085) “upon the
25 verified petition of the party beneficially interested,” in cases “where there is not a plain, speedy,
26 and adequate remedy, in the ordinary course of law.” (Code Civ. Proc., § 1086.)

27 Mandamus lies to compel a city or a town to perform only a mandatory duty (*Blankenship*
28 *v. Michalski* (1957) 155 Cal.App.2d 672) and courts cannot order public officials or agencies to

1 exercise their discretion in a particular way (see, e.g., Pub. Res. Code, § 21168.9, subd. (c);
2 *People ex rel. Younger v. County of El Dorado* (1971) 5 Cal.3d 480, 491). A court’s function is
3 to determine whether or not a municipal body has acted within the limits of its power and
4 discretion; its function is not to challenge the municipality’s power and wisdom. (*Riggs v. City of*
5 *Oxnard* (1984) 154 Cal.App.3d 526, 530.) Thus, a judge may not issue a writ of mandate to
6 control a city or a town’s exercise of discretion, but may only ensure that the city or town’s
7 ministerial duties have been fulfilled. (*Collins v Thurmond* (2019) 39 Cal.App.5th 323, 361.)

8 **1. Petitioner Fails to Establish His Entitlement to a Hearing, and the**
9 **Town Had Discretion to Suspend his Permit Without One**

10 Petitioner has made no showing that he is entitled to a hearing on either the Town’s
11 issuance of the June 2023 OSW or its suspension of his permit, and this Court should not compel
12 the Town to proceed in a manner it has discretion not to.

13 As discussed, pursuant to CBC section 105.6, as adopted by Town Code section
14 15.04.010, the Town has authority to “suspend or revoke a permit” that it finds was issued on the
15 basis of incorrect, inaccurate, or incomplete information.²² In his August 16, 2023, Mr. Lockaby
16 in fact cited to this authority in suspending Petitioner’s building permit. (Pet., Ex. 11.) Mr.
17 Lockaby further specifically listed the three changes to the job plan that differed to the permit, the
18 basis for his suspension. (*Ibid.*) CBC Section 105 does not require that the Town provide
19 Petitioner with an opportunity for hearing prior to this suspension, and Petitioner cites to no
20 authority in the CBC that enforces this requirement. (*See* Application 6:22-8:5.)

21 Petitioner argues that “other municipalities” may have implemented the notice and hearing
22 requirement in their municipal codes. (Application 7:24-25.) However, such an argument is
23 inapplicable here, as the Town has not implemented such a process and, instead, has afforded
24 Petitioner with the appeal process discussed above. Importantly, Petitioner’s references to CBC
25 section 1.8.8.1 misstate the Town’s legislative scheme. (Application 5:5-7.) Again, as explicitly
26 provided under Town Code section 15.04.010, the Town adopted “Division II of Chapter 1, *but*
27

28 _____
²² RJN, Ex. C.

1 not Section 113” of the CBC.²³ CBC section 1.8.8.1 is found under Division I of Chapter 1,
2 which was never adopted by the Town. The same is true for Section 113, which was also never
3 adopted. As such, Petitioner simply cannot ask this Court to mandate the Town to follow
4 procedures it never adopted.

5 Finally, the Petitioner’s argument that he has a vested interest to continue work on the
6 Worksite despite the fact that it is no longer in conformity with the issued permit likewise fails.
7 In *Weiner v. City of Los Angeles* (1968) 68 Cal.2d 697, the plaintiffs also asserted that they had a
8 vested right to proceed with a construction project on the basis that they had commenced work on
9 the project and incurred costs, all in reliance of having been issued a permit. The *Weiner* court
10 found that an individual has no vested right to proceed in accordance with a permit if the plans for
11 that permit fail to adhere to local rules, ordinances, and regulations. (*Weiner v. City of Los*
12 *Angeles, supra*, 68 Cal.2d at 705.)

13 Here, as set forth in Section II(B), *supra*, Resolution No. 2022-01 provides that *any*
14 changes to the plans that were submitted to obtain the permit would require approval by the
15 Town, which retains discretionary authority to stop any construction at the Worksite that do not
16 have this approval. (See RJN, Ex. M at p. A1.2A, ¶ 15.)

17 Petitioner admits that he made changes to the plans for the Worksite and did not obtain
18 approvals for these changes. (Application 3:3-17.) Accordingly, the plans violated Town Code
19 section 17.024.060, which requires all building permits to be approved by the Town. As a result,
20 the Town was well within its rights to suspend any further work at the Worksite that is based on
21 job plans that have been altered without the benefit of an approved modification, notwithstanding
22 any alleged incurred costs. This Court should not entertain the Petitioner’s request to challenge
23 this exercise of discretion.

24 **2. Petitioner Was Required to Obtain Approval for His Changes to the**
25 **Plans**

26 Petitioner’s argument that the “minor” changes made at the Worksite do not need approval
27 from the Town is simply flawed as a matter of law and fact.

28 ²³ RJN, Ex. A [emphasis added].

1 As an initial matter, Petitioner’s attempt to paint the changes that he made to the
2 construction at the Worksite as being “minor” is simply disingenuous. For example, at a glance,
3 these changes include the construction of *two* accessory dwelling units at the Worksite that were
4 previously not approved. (Pet., Ex. 11.) As the Town’s counsel provided, Petitioner was required
5 to obtain approval for these units under state law, which he failed to do at the time the Town
6 suspended his permit. (Pet., ¶ 13.)

7 Further, Petitioner’s so-called “correct interpretation” that “harmonizes” CBC sections
8 105.6 and 107.4 plainly ignores the plain language of these sections. (Application 8:27-9:3.)
9 CBC section 107.4 provides two clear instructions: (1) “Work shall be installed in accordance
10 with the approved construction documents,” and (2) “any changes made during construction that
11 are not in compliance with the approved construction documents shall be resubmitted for
12 approval as an amended set of construction documents.”²⁴ Initially, as he readily admits,
13 Petitioners have failed to adhere to the first instruction and did not commence work in accordance
14 with the approved construction. He has also failed to adhere to the second instruction, which is to
15 resubmit any changes to the construction for approval. Importantly, CBC section 107.4 does not
16 provide that Petitioner can follow the second instruction “at the *conclusion* of the work,” and
17 Petitioner provides no support for such a position. (Application 9:8.) Yet, he continues to
18 proceed with construction regardless, despite admitting that he is in violation, and asserts that he
19 can simply “do first, ask forgiveness later.” *That* action actually makes CBC section 107.4 a
20 nullity.

21 Regardless, in such an instance, where a builder is refusing to adhere to the first
22 instruction and has not yet done the second, what is a municipality to do? While CBC section
23 107.4 does not answer that question, CBC section 105.6 does: The municipality can suspend the
24 Petitioner’s permit for failing to meet the first instruction and thus force him to not continue work
25 until he meets the second. This interpretation requires no “harmonizing” because it requires the
26 Petitioner to simply follow the plain language of the law. Conversely, Petitioner’s interpretation
27 is nonsensical. Should the Town apply his reading, anyone can simply submit a plan for

28 _____
²⁴ RJN, Ex. L.

1 construction of a house, obtain a permit that is correct “*at the time it was submitted,*” and proceed
2 to build a sports arena using that same permit. (*See* Application 9:1.)

3 Thus, Petitioner is simply wrong that the Town could not suspend his permits, and the
4 Town acted within its authority to do so.

5 **3. Petitioner Has Failed to Overcome the High Burden of Demonstrating**
6 **the Town’s Actions Were Arbitrary or Capricious**

7 The trial court reviews administrative or governmental action pursuant to Code of Civil
8 Procedure section 1085 to determine whether the action was arbitrary, capricious, or entirely
9 lacking in evidentiary support, contrary to established public policy, unlawful, procedurally unfair,
10 or whether the agency failed to follow the procedure and give the notices required by law. (*Klajic*
11 *v. Castaic Lakes Water Agency* (2001) 90 Cal.App.4th 987, 995). Mandate does not lie to control
12 a public agency’s discretion. It cannot be used to force the exercise of discretion in a particular
13 manner, although it will lie to correct an abuse of discretion. (*Klajic, supra*, 90 Cal.App.4th at
14 995). In determining whether an agency has abused its discretion, the court may not substitute its
15 judgment for that of the agency, and if reasonable minds may disagree as to the wisdom of the
16 agency’s action, its determination must be upheld. (*Id.*; *Helena F. v. West Contra Costa Unified*
17 *School District* (1996) 49 Cal.App.4th 1793, 1799). The granting of a writ of mandate under Code
18 of Civil Procedure section 1085 can only be justified if the agency or public entity involved failed
19 to follow the correct procedure or arrived at a decision that was arbitrary, capricious, or entirely
20 lacking in evidentiary support. (*Redevelopment Agency of the City of Chula Vista v. Rados*
21 *Brothers* (2001) 95 Cal.App.4th 309, 316). The deference due to the interpretation by an agency
22 “turns on legally informed, commonsense assessment of their contextual merit.” (*Yamaha Corp.*
23 *of America v. State Bd. Of Equalization* (1998) 19 Cal.4th 1, 14.) “The weight of such a judgment
24 in a particular case will depend upon the thoroughness evident in its consideration, the validity of
25 its reasoning, its consistency with earlier and later pronouncements, and all those factors which
26 give it power to persuade, if lacking power to control.” (*Skidmore v. Swift & Co.* (1944) 323 U.S.
27 134, 140.)

28 Petitioner cannot demonstrate the Town’s decisions were arbitrary or capricious. As the

1 facts show, on numerous occasions, the Town insisted that Petitioner obtain approval for
2 construction changes at the Worksite that did not conform to the scope of work identified in his
3 permit. For months, the Town, its counsel, and its official have all indicated to Petitioner that he
4 was required to obtain approval before he would be allowed to proceed at the Worksite. In fact,
5 the Planning Commission even issued a written notice in which it outlined the three major changes
6 that need approval. The Town has discretion to interpret whether these changes are significant
7 enough changes that warrant suspension of Petitioner’s permit. The Town’s officials likewise have
8 authority to issue a OSW for the Worksite, which it found was proceeding in a manner that
9 exceeded Petitioner’s permit. These decisions should not be disturbed absent a finding that it was
10 an abuse of discretion

11 As such, there is no evidence before this Court that the Town’s actions to issue an OSW
12 and suspend Petitioner’s permit was arbitrary, capricious, or entirely lacking in evidentiary support.
13 Thus, the Town did not abuse its discretion, and Petitioner’s Application and Verified Petition
14 should be denied.

15 **D. Petitioner Cannot Establish that the Town Has a Ministerial Duty to Issue a**
16 **“Green Tag”**

17 On the same grounds, Petitioner wrongly asserts that the Town is under a ministerial duty
18 to issue him a green tag because it is an “unrelated” issue. A public agency only has a duty to
19 comply with its own rules and regulations when they are valid and unambiguous. (*Galzinski v.*
20 *Somers* (2016) 2 Cal.App.5th 1164, 1171.) A statute is found to impose a ministerial or
21 mandatory duty to a public official only if it affirmatively imposes the duty and provides
22 guidelines for implementation. (*Physicians Comm. for Responsible Med. v. Los Angeles Unified*
23 *Sch. Dist.* (2019) 43 Cal.App.5th 175, 185 [finding that mandatory duty must be phrased in
24 explicit and forceful language].)

25 Approval of the electrical system at the Worksite is subject to the same permitting
26 requirements under the Town Code and CBC. While Mr. Lockaby might have approved the
27 electrical system as being “complete and in good working order,” his subsequent suspension of
28 the permit for the entire project necessarily results in his denial of a green tag.

1 *Thompson v. City of Lake Elsinore* (1993) 18 Cal.App.4th 49, cited by Petitioner, is
2 inapplicable here. There, the municipality had already issued a building permit after a final
3 inspection. (*Id.*, at 58.) The court found that, on those facts, the municipality could not withhold
4 the certificate of occupancy. However, the court also pointed out that “the discretion to issue a
5 building permit at all is much broader than the discretion which must be exercised in determining
6 whether to issue a certificate of occupancy. Once the building permit has *been issued*, it cannot
7 be de facto revoked by the simple expedient of never issuing the certificate of occupancy.” (*Id.*,
8 57-58.) In other words, a permit was the last step, and its issuance was in effect a final approval
9 of the building.

10 Here, however, the Town has not conducted a final inspection and, in fact, has suspended
11 Petitioner’s permit. Contrary to the situation in *Thompson*, the Town has no ministerial duty to
12 approve any other construction or progress at the Worksite, and, in fact, cannot issue any
13 approvals on or under a suspended permit.

14 **V. CONCLUSION**

15 Based upon the foregoing, the Town respectfully requests that the Court deny Petitioner’s
16 *ex parte* application to stay the OSW and issue an Order to Show Cause as to why a Peremptory
17 Writ of Mandate should not issue.

18
19 Dated: August 31, 2023

BEST BEST & KRIEGER LLP

20
21 By:



JANET E. COLESON
CHRISTOPHER M. MOFFITT
Attorneys for Defendant TOWN OF FAIRFAX

Proof of Service

I, Mandy Villareal, declare:

I am a citizen of the United States and employed in Riverside County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 3390 University Avenue, 5th Floor, P.O. Box 1028, Riverside, California 92502. On August 31, 2023, I served a copy of the within document(s):

**RESPONDENT TOWN OF FAIRFAX'S OPPOSITION TO
PETITIONER'S EX PARTE APPLICATION FOR
ALTERNATIVE WRIT AND STAY AND ORDER TO SHOW
CAUSE RE PEREMPTORY WRIT**

- by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.
- by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, the United States mail at Riverside, California addressed as set forth below.
- by placing the document(s) listed above in a sealed _____ envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a _____ agent for delivery.
- by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.
- by transmitting via e-mail or electronic transmission the document(s) listed above to the person(s) at the e-mail address(es) set forth below.

Aaron P. Silberman
Richard M. Harris
ROGERS JOSEPH O'DONNELL
311 California Street
San Francisco, CA 94104
Phone: (415) 956-2828
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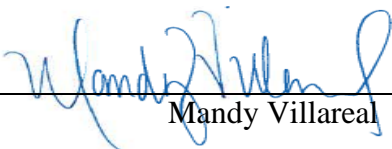
I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on

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motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on August 31, 2023, at Riverside, California.


_____ Mandy Villareal

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