

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

ROGERS JOSEPH O'DONNELL
AARON P. SILBERMAN (State Bar No. 161021)
asilberman@rjo.com
Richard M. Harris (State Bar No. 269171)
rharris@rjo.com
311 California Street
San Francisco, California 94104
Telephone: 415.956.2828
Facsimile: 415.956.6457

Attorneys for Petitioner
JACOB FRIEDMAN

FILED

AUG 30 2023

JAMES M. KIM, Court Executive Officer
MARIN COUNTY SUPERIOR COURT
By: N. Johnson, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF MARIN

JACOB FRIEDMAN, an individual

Petitioner,

vs.

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

Respondents.

Case No. ~~CV000037~~ CV0000737

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PETITIONER JACOB FRIEDMAN'S *EX
PARTE* APPLICATION FOR
ALTERNATIVE WRIT AND STAY AND
ORDER TO SHOW CAUSE RE
PREEMPTORY WRIT**

Date: August 30, 2023
Time: 9:00 A.M.
Dept.: E
Judge: Hon. Andrew E. Sweet

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Table of Contents

| | | |
|------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----|
| I. | INTRODUCTION..... | 1 |
| II. | STATEMENT OF FACTS | 2 |
| | A. Friedman obtains a building permit after a nearly two-year process, and the City stops the Project within a few days of starting work. | 2 |
| | B. The Parties dispute the timing of submitting changes to the Planning Commission, and Friedman appeals an OSW received based on the Planning Code..... | 3 |
| | C. Lockaby inspects and approves the electrical system, but refuses to issue a green tag allowing permanent power installation. | 4 |
| | D. Lockaby suspends Friedman’s building permit without a noticed hearing. | 4 |
| | E. Friedman gives Fairfax notice that he will file this action if Fairfax fails to lift the OSW and issue the green tag..... | 5 |
| III. | ARGUMENT | 5 |
| | A. The Court may exercise its independent judgment to determine if the City acted contrary to law. | 5 |
| | B. The City cannot suspend a permit without notice, a hearing, and on substantial evidence supporting its determination..... | 6 |
| | C. The City cannot suspend Friedman’s permit simply because he has made minor changes to the plans. | 8 |
| | D. The Town must perform its ministerial duty to approve the electrical system, given that it has previously determined that the system is acceptable..... | 9 |
| | E. Friedman has exhausted administrative remedies because there is no administrative remedy, and Fairfax must establish an appeals process as required by state law..... | 10 |
| IV. | CONCLUSION..... | 11 |

TABLE OF AUTHORITIES

Page(s)

Cases

American Indian Model Schools v. Oakland Unified School Dist. (2014)
 227 Cal.App.4th 25811

Avco Community Developers, Inc. v. South Coast Regional Com. (1976)
 17 Cal.3d 7856

Boydston v. Napa Sanitation District (1990)
 222 Cal.App.3d 13626

Department of Personnel Administration v. Superior Court (1992)
 5 Cal.App.4th 15510

Flippin v. Los Angeles City Bd. of Civil Service Commissioners (2007)
 148 Cal.App.4th 2726

Hill RHF Housing Partners, L.P. v. City of Los Angeles (2021)
 12 Cal.5th 45810

International Assn. of Firefighters, Local 230 v. City of San Jose (2011)
 195 Cal.App.4th 117911

Korean American Legal Advocacy Foundation v. City of Los Angeles (1994)
 23 Cal.App.4th 3767

Lippman v. City of Oakland (2017)
 19 Cal.App.5th 75011

South Lake Tahoe Property Owners Group v. City of South Lake Tahoe (2023)
 92 Cal.App.5th 7356

Thompson v. City of Lake Elsinore (1993)
 18 Cal.App.4th 499, 10

Trans-Oceanic Oil Corp. v. City of Santa Barbara (1948)
 85 Cal.App.2d 7766, 7

United Riggers & Erectors, Inc. v. Coast Iron & Steel Co. (2018)
 4 Cal.5th 10828, 9

People ex. rel. Younger v. County of El Dorado (1971)
 5 Cal.3d 480. Civil5

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Statutes

Building Code § 107.48, 9

Fairfax Town Code § 155

Fairfax Town Code § 15.04.010(A)10

Fairfax Town Code § 15.04.0285, 10

Fairfax Town Code § 17.036.0303

Fairfax Town Code § 15.04.010 (a)(1)-(12).....5

Fairfax Town Code § 15.04.100(C)(4)5, 10

Government Code § 65852, *et seq* (SB-9).2

Other Authorities

Title 24, California Code of Regulations.....5

1 **I. INTRODUCTION**

2 Jacob Friedman (“Friedman”) requires immediate court action to prevent the
3 irreparable injury he will suffer if the Town of Fairfax (“Town” or “City”) and the Building
4 Department are allowed to maintain their Order to Stop Work (“OSW”) prohibiting Friedman
5 from continuing construction of a single-family home and Accessory Dwelling Unit, and
6 issuing a “green tag” to allow PG&E to hook up the electrical system. Though Friedman has
7 obtained a valid permit to complete his construction, the City, through Building Inspector
8 Mark Lockaby, claims authority to suspend the permit without notice and hearing, and claims
9 authority to withhold the green tag until Friedman agrees to apply for minor changes with the
10 planning commission now, rather than at the end of the project. If the City had afforded
11 Friedman his hearing before it suspended his permit, Friedman would have explained that the
12 building code contemplates permitted work to be changed during construction, and all changes
13 can be submitted for approval at the end of the work.

14 The City has tried to apply all leverage possible to force Friedman to apply to
15 the planning commission to approve his minor changes during the work. The City first issued
16 an OSW under the planning code which Friedman appealed, which stays enforcement until his
17 appeal is heard (Friedman is still waiting for his appeal to be heard). The City then refused to
18 issue a “green tag” allowing PG&E to install power to the home. Lockaby explicitly stated
19 that this was to force Friedman to submit his changes to the planning commission now. When
20 Friedman still did not capitulate, Lockaby issued an alleged permit suspension and
21 accompanying OSW without notice or a hearing. If Friedman were forced to submit his
22 changes to Planning for a plenary review, it would be months before he could start the work
23 again.

24 Knowing the desperate position of Friedman in the middle of the Project, the
25 City is intent on overreaching, trying to get Friedman to submit the changes to his plans to a
26 plenary review by Planning, which would add months to the Project. Friedman comes to the
27 Court requesting that the City simply follow the law, issue the green tag, lift the suspension
28 until he has a proper hearing, and institute a proper appeal process under the Building Code.

1 **II. STATEMENT OF FACTS¹**

2 Friedman owns the real property located at 79 Wood Lane, Fairfax, CA 94930
3 (“the Worksite”). Verified Petition (VP), ¶ 4. On July 6, 2021, Friedman submitted an
4 application to the City for the construction of a house and an ADU at the Worksite (“the
5 Application”), which included plans for the proposed construction and structure. VP ¶ 5.

6 **A. Friedman obtains a building permit after a nearly two-year process, and
7 the City stops the Project within a few days of starting work.**

8 For over six months, Fairfax staff and outside administrators objected to,
9 delayed, and otherwise interfered with Friedman’s efforts to get the Application approved.
10 Specifically, the City’s Principal Planner, Linda Neal (“Neal”), threatened to recommend
11 denial of the Application unless Friedman agreed to her demands that the house be lower in
12 height and lower to the ground, even though the house was designed to be under the height
13 limit of the Fairfax Planning Code. VP ¶ 6. The planning commission ultimately approved
14 Friedman’s application, but it still took 13 months to secure a permit to begin construction, as
15 the City claimed it needed further review. VP ¶ 7-8. Construction started soon after he
16 received his permit (“Project”). VP ¶ 9.

17 Once construction began, Friedman informed Neal that he intended to submit an
18 application for changes pursuant to Government Code § 65852, *et seq.* (“SB 9”) – under SB 9,
19 the City must approve the application for change ministerially. VP ¶ 10. Friedman submitted
20 his applications for changes on August 9, 2022, just a few days after he started work. One day
21 later, the City issued and posted an OSW alleging that Friedman was excavating beyond the
22 scope of the plans. VP ¶ 12. Friedman filed a petition for alternative writ related to the OSW,
23 and the parties resolved the excavation issue without court intervention. The writ was
24 dismissed without prejudice on August 30, 2022. VP ¶ 13.

25
26
27 _____
28 ¹ The facts set forth here are supported by and explained in greater detail in Friedman’s
contemporaneously filed Verified Petition.

1 **B. The Parties dispute the timing of submitting changes to the Planning**
2 **Commission, and Friedman appeals an OSW received based on the**
3 **Planning Code.**

4 Over the next several months, work continued, and Friedman would contact
5 Mark Lockaby (“Lockaby”), a building official for the City. Lockaby would perform
6 inspections as required by the Project. As is typical for construction projects, Friedman made
7 several minor changes to the work. Lockaby requested plans showing these changes, and
8 Friedman provided plans. VP ¶ 14. There were three changes relevant to the current dispute:

- 9 1) A portion of the basement was shown to be an accessory
10 dwelling unit;
- 11 2) A portion of the top floor has been prepared to be a junior
12 accessory dwelling unit, including enclosing an upper deck,
13 and the addition of an exterior stairway; and
- 14 3) The front low roof is shown as being eliminated, and a deck
15 above a portion of the lower floor even with the top floor is
16 shown.

17 VP ¶ 14. Lockaby agreed that Friedman could continue working on other portions of the
18 property, but requested Friedman not work on these three items until he had obtained approval
19 for these three changes. VP ¶ 15. Friedman disputed this position, and rather than further
20 negotiate, Lockaby issued and posted a new OSW, forcing Friedman to stop work once again.
21 VP ¶ 17.

22 Because this OSW was issued as an alleged violation of the planning code (not
23 the building code), Friedman submitted an appeal to the planning commission, paying the
24 required fee. VP ¶ 18. Under Fairfax Town Code (“FTC”) § 17.036.030, a pending appeal of
25 a decision made under the planning code stays any enforcement of a Planning Commission
26 action. Thus, after the appeal was filed, Friedman returned to work. VP ¶ 19. To date, the
27 City has still not ruled on this appeal. *Id.*

28 In an effort to resolve the pending appeal, Friedman offered to cease work on
29 the minor changes until approvals were obtained from the planning commission and would
30 submit the plan changes within 60 days from June 24, 2023. The City never responded to this
31 offer to compromise. VP ¶ 20.

1 **C. Lockaby inspects and approves the electrical system, but refuses to issue a**
2 **green tag allowing permanent power installation.**

3 On July 20, 2023, Lockaby completed the final electrical inspection and found
4 all of the work to be in good working order, nevertheless he refused to issue the “green tag”
5 necessary for Pacific Gas and Electric (“PG&E”) to hook up the Project to permanent power.
6 Lockaby stated (and Town Counsel Coleson also stated) that the City was withholding
7 issuance of the green tag not because of any issue with the electrical system, but to induce
8 Friedman to agree to apply for changes to the Planning Commission prior to the end of the
9 Project. VP ¶ 22. On August 8, 2023, Town Counsel Coleson wrote, “I don’t believe the
10 electrical tag will be withheld for issues unrelated to the electrical.” VP ¶ 25. To date, the
11 City has not named any issue related to the electrical, and Lockaby has confirmed that the
12 green tag is being withheld until Friedman obtains approvals for changes unrelated to the
13 electrical system. VP ¶ 35. Friedman continued working, though the work was inefficient due
14 to the lack of permanent power. VP ¶ 23.

15 **D. Lockaby suspends Friedman’s building permit without a noticed hearing.**

16 From July 20 until August 10, 2023, Lockaby would no longer respond to
17 Friedman’s requests for inspection and would not further discuss why the City would not issue
18 a green tag. VP ¶ 26. On August 11, 2023, Lockaby emailed a letter to Friedman, claiming to
19 suspend his permit under Building Code section 105.6, claiming that “the work being done is
20 based on incorrect, inaccurate, and incomplete information.” VP ¶ 28. On August 17, 2023,
21 Lockaby revised his letter, claiming that Friedman’s “permit was issued on the basis of
22 [Friedman’s] submittal of incorrect, inaccurate, and incomplete information. The construction
23 documents [Friedman] submitted to obtain the permit did not reflect” the minor changes
24 discussed above. VP ¶ 31. The City continues to refuse to reinstate the building permit, using
25 the police to enforce a stoppage of work onsite. VP ¶ 36.

26 During the dispute of the OSW in June 2023, Town Counsel Coleson claimed
27 that Friedman’s pending appeal was ineffective, claiming that “there is no appeal to the
28 Planning Commission or Town Council of a Building Official’s stop work order issued under

1 the authority of the CA Bldg Code.” VP ¶ 33, Exh. 13. Fairfax does not have a provision to
2 appeal decisions under the building code, codified as section 15 of the Fairfax Town Code.
3 FTC § 15. The Building Code incorporates the 2022 edition of the California Building Code
4 (Title 24, California Code of Regulations, hereinafter “Building Code”). FTC § 15.04.010
5 (a)(1)-(12). Section 1.8.8.1 of the Building Code requires municipalities to “establish a
6 process to hear and decide appeals of orders, decisions, and determinations made by the
7 enforcing agency relative to the application and interpretation of this code....” Under the
8 Fairfax Town Code, “any aggrieved ... person may appeal the determination of the chief
9 building official regarding ... compliance with any other provision of this chapter. An appeal
10 of a determination of the chief building official shall be filed in writing and processed in
11 accordance with the provisions of § 15.04.028 of this code.” FTC § 15.04.100(C)(4). There is
12 no § 15.04.028 of the Fairfax Town Code.

13
14 **E. Friedman gives Fairfax notice that he will file this action if Fairfax fails to
lift the OSW and issue the green tag.**

15 Friedman emailed Counsel for the City stating Friedman’s intention to file this
16 action. VP ¶ 41, Exh. 12. Counsel for the Town has refused to reinstate the permit and lift the
17 OSW, refused to issue the green tag, and refused to provide the required appeals process for
18 Friedman to adjudicate his claims.

19 **III. ARGUMENT**

20 **A. The Court may exercise its independent judgment to determine if the City
acted contrary to law.**

21 This Court is responsible for determining whether the City’s conduct in
22 enforcing building code provisions was illegal, arbitrary, or a prejudicial abuse of discretion.
23 A court may issue a writ of mandate “to compel the performance of an act which the law
24 specially enjoins, as a duty resulting from an office, trust or station.” Cal. Civ. Proc. §
25 1085(a). Mandate lies where (1) the respondent has a clear, present duty to act and (2) the
26 petitioner has a beneficial right to performance of that duty. *People ex. rel. Younger v. County*
27 *of El Dorado* (1971) 5 Cal.3d 480, 491. Civil Procedure Section 1086 provides that where a
28

1 verified petition is submitted by a party “beneficially interested,” a writ “must be issued in all
2 cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law.”
3 Under a writ of mandate, the Court must “determine whether [the Town’s] actions have been
4 arbitrary or capricious, entirely lacking in evidentiary support, or whether it failed to follow
5 proper procedures.” *Boydston v. Napa Sanitation District* (1990) 222 Cal.App.3d 1362, 1369.

6 In addition, when, as here, a fundamental vested right of petitioner is involved,
7 the court must also exercise its independent judgment to determine whether the weight of the
8 evidence supports the agency’s actions. *Flippin v. Los Angeles City Bd. of Civil Service*
9 *Commissioners* (2007) 148 Cal.App.4th 272, 279. “The requisite permit on which a vested
10 right may be based is a valid building permit or its functional equivalent.” *South Lake Tahoe*
11 *Property Owners Group v. City of South Lake Tahoe* (2023) 92 Cal.App.5th 735, 747.
12 Because Friedman has begun construction and is nearly complete, he has a vested fundamental
13 right in the construction. *Avco Community Developers, Inc. v. South Coast Regional Com.*
14 (1976) 17 Cal.3d 785, 791 (“if a property owner has performed substantial work and incurred
15 substantial liabilities in good faith reliance upon a permit issued by the government, he
16 acquires a vested right to complete construction in accordance with the terms of the permit.”).

17 Thus, if the Court, in exercising its independent judgment, determines that the
18 weight of the evidence does not support Lockaby’s and the City’s actions, or that Lockaby or
19 the City failed to follow the proper procedures, the writ must issue.

20 **B. The City cannot suspend a permit without notice, a hearing, and on**
21 **substantial evidence supporting its determination.**

22 First, the Court must reinstate the permit because the Town has not followed
23 any of the procedures due process requires. “In revoking a permit lawfully granted, due
24 process requires that it act only upon notice to the permittee, upon a hearing, and upon
25 evidence substantially supporting a finding of revocation.” *Trans-Oceanic Oil Corp. v. City of*
26 *Santa Barbara* (1948) 85 Cal.App.2d 776, 795. This is because “Where a permit to [build] a
27 building has been acted upon, and where the owner has, as in this instance, proceeded to incur
28 obligations and to in good faith proceed to erect the building, such rights are then vested

1 property rights, protected by the federal and state Constitutions.” *Id.* at 796.

2 Courts continue to require that permit revocations are afforded a notice and a
3 hearing. In *City of San Marino v. Roman Catholic Archbishop of Los Angeles*, the court
4 stated, “As in the Trans-Oceanic case, it is conceded in this case that the rectory permit was
5 ‘revoked’ without prior notice and without a hearing. Therefore, since the permit was validly
6 issued, the attempted revocation was a violation of due process and ‘was inoperative and of no
7 legal force.’ Furthermore, the attempted revocation of the permit by the building inspector by
8 means of a letter to the defendants informing them that their permit would ‘stand revoked, in a
9 suspense file’ was a complete nullity.” (1960) 180 Cal.App.2d 657, 669 (internal citations
10 omitted).

11 Here, Friedman’s permit was suspended summarily and without a hearing on
12 August 11, 2023, by a posting on the Project. The permit was then re-suspended on August 17
13 when a notice was emailed to Friedman – this one not even describing what he could do to
14 resolve the permit suspension. Friedman has not had an opportunity to present his arguments
15 and evidence showing that his permit should not be revoked – without a hearing, the
16 suspension of the permit is “inoperative and of no legal force.” *Id.* at 669.

17 The Town may claim that the permit was merely suspended, and not revoked. In
18 this context, this would be a distinction without a difference. In *San Marino*, the notice and
19 hearing requirement applied whether the permit was “revoked” or “in a suspense file.” *Id.* at
20 665. The City’s actions here are similar: like in *San Marino*, Friedman’s property right to his
21 permit is effectively gone without a notice or hearing. Whether the City uses the term
22 “suspended” or “revoked,” the experience is the same for Friedman: he is not allowed to build.

23 Alternatively, the Town may claim that Friedman’s due process rights are not
24 implicated because the building code has changed. But other municipalities understand the
25 notice and hearing requirement, and implement them in their codes. *See, e.g., Korean*
26 *American Legal Advocacy Foundation v. City of Los Angeles* (1994) 23 Cal.App.4th 376, 391,
27 n.5 (Los Angeles Municipal Code “codifies these requirements of due process before revoking
28 a permit,” including written notice and a hearing prior to allowing for “the modification,

1 discontinuance, or revocation” of a duly issued permit).

2 Friedman’s permit was suspended and his constitutional rights to his property
3 have been denied. The Town’s actions are without legal force, and the law requires the Court
4 to order the reinstatement of the permit until there is proper notice and a hearing related to the
5 permit.

6 **C. The City cannot suspend Friedman’s permit simply because he has made**
7 **minor changes to the plans.**

8 Because Friedman has been denied a notice and hearing, the City is without
9 power to suspend Friedman’s permit. Should the City actually institute a hearing to suspend
10 Friedman’s permit, its decision would not be supported by the weight of the evidence
11 empowering the Court to issue a writ. The City claims the power to suspend Friedman’s
12 permit because changing the plans meant Friedman had submitted “incorrect, inaccurate, and
13 incomplete information.” VP ¶ 31. But this is a misunderstanding of the statute empowering
14 the City to suspend a permit and ignores the other provisions of the Building Code.

15 In interpreting a statute, the Court should “begin with the text, construing words
16 in their broader statutory context and, where possible, harmonizing provisions concerning the
17 same subject.” *United Riggers & Erectors, Inc. v. Coast Iron & Steel Co.* (2018) 4 Cal.5th
18 1082, 1089. Here, the meaning of “incorrect information” on which a permit may be
19 suspended must be harmonized with section 107.4 of the Building Code, which contemplates
20 construction changes during the work: “Work shall be installed in accordance with the
21 approved construction documents, and any **changes made during construction that are not**
22 **in compliance with the approved construction documents** shall be resubmitted for approval
23 as an amended set of construction documents.” (Emphasis added). Under the City’s reading,
24 section 107.4 becomes a nullity, because any changes made during construction that are not in
25 compliance with the plans subjects a builder to suspension or revocation of its permit. This
26 cannot be correct.

27 Instead, the correct interpretation harmonizes the two provisions: A building
28 official may suspend a permit, after a notice and hearing, if information submitted by

1 the builder was incorrect *at the time it was submitted*, such that the permit never should have
2 been issued. This interpretation harmonizes the sections of the Building Code together, as
3 required by *United Riggers*.

4 Under this reading, Friedman’s permit cannot be suspended because he never
5 submitted anything incorrect or inaccurate. After approval, Friedman made changes to the
6 Project, as contemplated by Building Code § 107.4. Construction commonly has changes
7 throughout the work, and the building code contemplates changes being submitted at the
8 *conclusion* of the work, not required before any minor change is made. Friedman submitted
9 correct information *at the time* of submission to the Planning Commission, and changes came
10 later. The hearing that Friedman is entitled to will show that he submitted his planned
11 construction as he knew it at the time he submitted his plans. The City cannot suspend
12 Friedman’s permit on this basis.

13 **D. The Town must perform its ministerial duty to approve the electrical**
14 **system, given that it has previously determined that the system is**
15 **acceptable.**

16 Not only must Friedman’s permit be reinstated, but also the Town must approve
17 the Project’s electrical system and issue a green tag. Once the Town has exercised its
18 discretion and determined that there is no basis to withhold the permit, approving of the work
19 is a ministerial act. *See Thompson v. City of Lake Elsinore* (1993) 18 Cal.App.4th 49, 58. In
20 *Thompson*, the building inspector completed a final inspection of a construction project, and
21 determined that the work was sufficient, writing “Final inspection Okay.” Despite this
22 finding, the municipality still refused to provide a certificate of occupancy until the owner
23 complied with unrelated demands. The Court found that “the building official had *already*
24 *exercised its discretion*” in finding that the construction was sufficient and so could no longer
25 call the approval a discretionary act. *Id.* at 58 (emphasis in original).

26 The same is true here. The Town Inspector, Mark Lockaby, inspected the
27 electrical system and determined that it was complete and in good working order. He told that
28 to Friedman, and then told Friedman that the only reason Lockaby would not issue the
building permit was because he needed final signoff on the whole project the planning

1 department. Lockaby then wrote an email to Town Counsel Coleson stating that the green tag
2 would not be issued, not because of any discretionary decision related to the quality of the
3 electrical system, but because the Town wanted to force Friedman to submit changed plans
4 *now*, and continue to submit changed plans with every change made. As in *Thompson*, the
5 approval of one item cannot be withheld to exact concession on unrelated issues. After the
6 City determined that the electrical system was in good working order, failing to issue the green
7 tag was contrary to the law.

8 **E. Friedman has exhausted administrative remedies because there is no**
9 **administrative remedy, and Fairfax must establish an appeals process as**
10 **required by state law.**

11 Friedman has exhausted his administrative remedies prior to filing this writ of
12 mandate. Citizens wishing to file a writ of mandate normally must complete whatever
13 administrative remedies are required prior to filing in court. *Hill RHF Housing Partners, L.P.*
14 *v. City of Los Angeles* (2021) 12 Cal.5th 458, 477. But when an administrative agency
15 disavows jurisdiction over the dispute, it “invi[es] judicial intervention,” waiving the need to
16 exhaust administrative remedies. *Department of Personnel Administration v. Superior Court*
17 (1992) 5 Cal.App.4th 155, 168-69. Here, the City’s legal counsel has stated that “there is no
18 appeal to the Planning Commission or Town Council of a Building Official’s stop work order
19 issued under the authority of the CA Bldg Code.” VP ¶ 36, Exh. 13. The City is thus
20 “invi[ing] judicial intervention” and is estopped from claiming that administrative remedies
21 have not been followed.

22 Further, the City counsel was correct –no administrative remedy exists to
23 exhaust. Not only does the Town suspend a permit without a notice and a hearing, but it also
24 has never created the required appeals process. The Building Code is adopted by reference in
25 Fairfax Town Code § 15.04.010(A), and appeals under that chapter “shall be filed in writing
26 and processed in accordance with the provisions of § 15.04.028” (§15.04.100(C)(4). But the
27 Town has never enacted an ordinance numbered § 15.04.028. Thus, it is impossible for an
28 appellant to meet the requirements of an appeal.

Finally, any administrative remedy that exists is too slow to be effective, and

1 therefore need not be exhausted. *International Assn. of Firefighters, Local 230 v. City of San*
2 *Jose* (2011) 195 Cal.App.4th 1179, 1213 (Exhaustion requirements do not apply if the
3 administrative procedure is “too slow to be effective.”). On the OSW issued on June 8, 2023,
4 under the planning code (which *does* have an appeal procedure), Friedman promptly filed an
5 appeal. Appealing to the Fairfax Town Council is clearly ineffective, however, as the City has
6 not acted on a previous appeal filed by Friedman under the Planning Code. The Town
7 Counsel has neither scheduled a hearing nor confirmed that the appeal will ever be heard.
8 Forcing Freidman to wait an unknown amount of time for an unknown procedure would cause
9 him irreparable harm – stopping work for even a few months will likely make funding the end
10 of the Project impossible, given the additional cost of the construction loan. *American Indian*
11 *Model Schools v. Oakland Unified School Dist.* (2014) 227 Cal.App.4th 258, 292 (irreparable
12 harm exception to exhaustion requirement found when school showed that the time required to
13 exhaust administrative remedies would mean “it would lose its faculty and student body”).

14 Not creating an administrative remedy for Friedman under the Building Code is
15 a further violation of the law by the City. Section 1.8.8.1 of the Building Code requires
16 municipalities to “establish a process to hear and decide appeals of orders, decisions, and
17 determinations made by the enforcing agency relative to the application and interpretation of
18 this code” Courts have enforced this provision, for example requiring the City of Oakland
19 to scrap its “single hearing officer” appeal procedure and instead hear appeals “(1) by creating
20 a local appeals board for new construction and a housing appeals board for existing buildings;
21 (2) by creating an agency authorized to hear such appeals; or (3) by having the governing body
22 of the city serve as the local appeals board or housing appeals board.” *Lippman v. City of*
23 *Oakland* (2017) 19 Cal.App.5th 750, 760. The City has no such process, prejudicing builders
24 like Friedman who must then file a writ of mandate in order to secure their rights. The Court
25 should order the City to implement an appeals procedure consistent with the Building Code.

26 **IV. CONCLUSION**

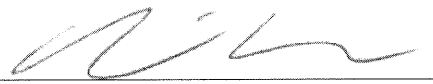
27 Since this construction began, the City has attempted to thwart Friedman’s
28 construction project. It started when he was trying to obtain his permit; it continued when he

1 wanted to add more ADUs to his property, and it has reached its end now, refusing to issue
2 Friedman a green tag and suspending his permit. Both of these decisions attacked his
3 fundamental property interest in completing the construction project shown on the permit, and
4 all of this was done without a noticed hearing, a chance to present evidence, or an opportunity
5 to appeal. All of this was contrary to law, and coming to Court is the only adequate remedy
6 for Friedman to complete his project.

7 Friedman respectfully requests that the green tag be issued, that the permit be
8 reinstated, and that the City be ordered to set up appropriate procedures of noticed hearings
9 and appeals before it tries to retaliate against Friedman for bringing these claims.

10
11 Dated: August 28, 2023

ROGERS JOSEPH O'DONNELL

12
13 By: 

AARON SILBERMAN
RICHARD M. HARRIS

Attorneys for Petitioner
JACOB FRIEDMAN

14
15
16
17
18
19
20
21
22
23
24
25
26
27
28