


Email 1 of 3: Comments for 2/29 Public Hearing 6:30 pm

Sharon C. Ingram <SIngram@rjo.com>

Thu 2/29/2024 11:16 AM

To: Fairfax Town Council <fairfaxtowncouncil@townoffairfax.org>; Christine Foster <cfoster@townoffairfax.org>

Cc: Richard M. Harris <RHarris@rjo.com>; Aaron P. Silberman <ASilberman@rjo.com>; Dawn R. Lorenzen <DLorenzen@rjo.com>

 2 attachments (447 KB)

2024-02-29; Ltr to Town of Fairfax.pdf; 2024-01-22; Dkt 1; Complaint.pdf;

Please find attached comments for this evening's public hearing at 6:30 p.m. (Email 1 of 3).

Please confirm receipt.

Thank you,
Sharon

Sharon C. Ingram

Assistant

Aaron M. Scolari | Dean D. Paik | Richard M. Harris

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February 29, 2024

VIA EMAIL

cfoster@townoffairfax.org

Town Council
142 Bolinas Road
Fairfax, CA 94930

Re: **Item No. 1; 79 Wood Lane – February 7, 2024 hearing**

To the Town Council:

We represent Mr. Friedman in connection with the 79 Wood Lane Item (Item No. 1, on schedule for a hearing tonight. Mr. Friedman objects to the timing, structure and substance of this hearing. The Town Council (Council) is without jurisdiction to hear this directed referral, just as the Planning Commission was without jurisdiction to hear the initial revocation hearing. The actions of the Council to date make a clear case for bias, such that Mr. Friedman cannot receive a fair hearing from this tribunal. The Council waived any irregularities with Mr. Friedman's construction, allowing him to continue his work even though the Council was aware of the minor variances from the original plans. Not only does the Council have discretion to allow Mr. Friedman to complete his project, and then apply for variances to his permit, it *already exercised that discretion*, causing Mr. Friedman to continue to build with the expectation that he would be able to complete his project without undue interference.

Because the Council is without jurisdiction, it should not act. If the Council chooses to act, it should reinstate Mr. Friedman's permit and allow him to finish the project, or at the very least direct the town to accept his appeal, and set a hearing for his appeal to be heard. The Planning Commission suspended Mr. Friedman's permit, constituting a taking under the California and Federal Constitutions and violating his rights under state and federal law, the California Constitution and the 1st, 5th, and 14th amendments to the Federal Constitution. If the Council does not vacate the decision of the Planning Commission, then the violation of Mr. Friedman's rights, and the taking of his right to construct his home, will have to be resolved in another venue. To that end, Mr. Friedman has filed a lawsuit in federal district court.

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I have attached Mr. Friedman's federal complaint, attached as **Exhibit A**. The complaint states additional reasons why the Town has acted unlawfully and why it should allow Mr. Friedman go back to work.

A. A Permit Revocation Hearing Is Not a Hearing Under Gov. Code § 65009

The Council's initially putting this item on its calendar notice states: "If you challenge the matter(s) described above in court, you may be limited to raising only those issues you or someone else raised at the public hearing described in this Notice, or in written correspondence delivered at, or prior to the above referenced public hearing," citing Gov. Code § 65009(b). But the cited section only applies to an "an action or proceeding to attack, review, set aside, void, or annul a finding, determination, or decision of a public agency made pursuant to this title at a properly noticed public hearing..." The purpose of this law is to "reduce delays and restraints upon expeditiously completing housing projects." Gov. Code § 65009(a)(1). The Planning Commission hearing of January 11, 2024 ("Commission Hearing") was for the Planning Commission to **stop** new construction by making a **new** decision or determination, not to attack or review a previous decision. This is not a review of an application for construction but, rather, an attempt to stop construction that is already occurring. As such, section 65009(b) does not apply.

B. This Is an Improper Directed Referral of an Improper Commission Hearing

The Council does not have jurisdiction to hear Item 1. The Council purports to bring this item under Fairfax Town Code (FTC) 17.036.090. Under that section, a councilmember or the town manager may only "assume jurisdiction on **applications** where action has been taken and is normally final at a lesser level of authority." FTC 17.036.090(a) (emphasis added). Section 17.036.130 clarifies that only "pending applications" are subject to directed referral – if there is a tie vote, it shall be "deemed a denial of the **pending application**." FTC 17.036.130(b) (emphasis added). This is in contrast to the Council's authority under an appeal by an aggrieved party. By contrast, an "aggrieved party" (someone who is negatively affected by the Planning Commission's determination) may appeal any "order, requirement, permit, decision or determination" made by the Council, if that party pays the appropriate fee. FTC 17.036.010. Item 1 is not an appeal (as the Town has refused to accept Mr. Friedman's appeal); rather, it is a directed referral. But there is no underlying "pending application" to "refer." Thus, the Council cannot hear this item under the current procedure.

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C. The Planning Commission Was Without Jurisdiction to Complete the Underlying Hearing

A hearing to revoke or modify a permit must be held pursuant to FTC 17.032.¹ Hearings pursuant to 17.032 can only be initiated by verified application and only after paying the appropriate fee. FTC 17.032.030. Here, there was no verified application before the Planning Commission. Instead, there was simply an email from the Town Attorney, Ms. Coleson, stating that “we are scheduling a hearing under Fairfax Town Code Section 17.024.080 Authority to Revoke or Modify, before the Planning Commission at 7:00 pm on January 11, 2024.” This is not a verified application, and therefore cannot initiate a hearing before the Planning Commission.

Thus, the Council has no authority to act under the Fairfax Town Code. If it did, it would have to overturn the decision of the Planning Commission and remove the item from the Council’s calendar, as the Planning Commission did not initiate its hearing according to required procedures.

D. The Planning Commission and This Hearing Fail to Provide Mr. Friedman with Due Process, and the Planning Commission Retaliated Against Him, Violating Equal Protection

Both this hearing and the Commission Hearing fail to provide Mr. Friedman with sufficient due process under the California and Federal Constitutions, and federal and state law. First, Mr. Friedman is entitled to a hearing before his right to construct is taken away, referred to as a pre-deprivation hearing. Though the Marin Superior Court ruled that the previous actions of the Council were contrary to law, neither the Council nor the Commission took any action, leaving the red tag on 79 Wood Lane as well as not rescinding the Council’s illegal findings on September 13, 2023. Until the Council rescinds its decisions and agrees Mr. Friedman is entitled to work again, it cannot hold a hearing to revoke his permit. Such a hearing, either by the Planning Commission or by the Council, is a violation of the state and federal constitutions, violates due process, and is a taking against Mr. Friedman.

Second, Mr. Friedman approaches this hearing without any knowledge of the procedure the Council will employ. When information regarding the procedure for the hearing was requested, the Town Attorney responded only that “The Mayor will conduct the hearing and I imagine she will run it the way hearings are normally conducted.”

¹ There is no provision for the Planning Commission to suspend a permit. As such, the Planning Commission has no authority to do so.

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Mr. Friedman may not have the right to confront witnesses with cross-examination, subpoena documents, or respond to various arguments leveled by the Town.

The Fairfax Town Code provides no procedures for a revocation hearing, beyond the requirement that such a hearing begin with a verified application. FTC 17.024.110; 17.032.030. Even this bare minimum requirement has not been met here, as no one has provided Mr. Friedman with a verified application to revoke or suspend his permit. Mr. Friedman has been deprived of his right to effectively respond and have a meaningful hearing in front of the Town Council.

Mr. Friedman did employ the only tool at his disposal, a public records request, to secure any evidence of why the Council and Commission acted as they did. This request was denied by the Town Council, claiming that any communications of this nature were either attorney-client communications or “relating to pending litigation.” Mr. Friedman has been unable to conduct any discovery, or look at any documents, that would uncover the true motives of the Council.

Even if given sufficient rights and procedures ad hoc at the last moment, Mr. Friedman’s counsel cannot possibly prepare without knowledge of what the procedure will be. In past hearings, the Town has proceeded with an “ad hoc” procedure, allowing objections from the Town Attorney, but not allowing Mr. Friedman to object to any statements made by the Council or its staff. Though the hearing is less than two days from now, Mr. Friedman does not know if he will be entitled to call witnesses, cross-examine evidence, compel witnesses to testify on his behalf, or subpoena documents from the Council’s records that support his position. Instead, the Council appears to be satisfied with only allowing Mr. Friedman to make a statement to the Council, even though the decision before the Council is to revoke Mr. Friedman’s rights to the construction of his property. This does not meet the due process requirements under the federal or state constitutions.

Fourth, the Council is a biased judge, violating Mr. Friedman’s due process rights. Due process requires, at a minimum, that the decisionmaker is actually unbiased and appears to be without bias. The Council has shown itself to be neither, through a variety of unfair actions taking against Mr. Friedman that other residents of the town do not face:

- Though Mr. Friedman was entitled to appeal the Planning Commission decision, his appeal was refused by the Town, purportedly because the Planning Commission’s decision was “unappealable,” as the Town’s counsel represented to the Marin County Superior Court. This was done to frustrate Mr. Friedman’s right to continue work until a hearing

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was properly noticed and heard (which he is entitled to do if an appeal is filed).

- The Town did not formally give notice to Mr. Friedman until nine days before the hearing, even though he was entitled to 10 days' notice. Rather than allow MR. Friedman to continue working during the pendency of the appeal, the Town simply continued the hearing, effectively extending the time that Mr. Friedman's permit was suspended without a proper hearing.
- Even though the electrical system in Mr. Friedman's home has been prepared to receive electricity since July 2023, the Town has withheld the "green tag" that would allow Mr. Friedman the ability to hook up his home to PG&E's power. The Town has been repeatedly informed (and the Town's attorney has agreed) that the green tag may not be withheld except for electrical related reasons. Yet the Town has withheld the green tag in an effort to force Mr. Friedman to submit his plans early. The Town is showing its bias, as it has already prejudged that Mr. Friedman is in the wrong.
- Though the Town Building Department saw and reviewed the construction of the home, it did not raise any issues with the construction until June 2023. At that time, the Building Department requested new plans, which were provided. The Town then did not move to stop the work or revoke the permit; instead, the Town allowed Mr. Friedman to continue the project for months. When the Town did suspend the permit (without due process) in August 2023, the Town only raised three issues with the plans. Now, months later, the Town raises no less than **seventeen** individual items it claims are inconsistent with the permit. Mr. Friedman has continued to work on his property in reliance on the Town's decision to allow him to submit changes after they are completed on his property; by making that decision, the Town waived and is estopped from enforcing contrary permit provisions. The Town is now ignoring this history because it is biased against Mr. Friedman.
- Between the hearing on February 7 and the one on February 29, the Town has added paragraphs of additional arguments why Mr. Friedman's permit should be revoked, including claims of drainage issues. *None* of these issues were ever brought to the attention of

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Mr. Friedman until published in this Town report. The Building Department was fully aware of the location of the home and the foundation dimensions, but did not include *any* drainage issues in his reports to Mr. Friedman regarding the Property. Even if the drainage were an actual problem, raising it well after the home is nearly complete is meant to prejudice Mr. Friedman. Additional discovery will reveal the purpose and intent of the Town's raising issues with the drainage well after Mr. Friedman would have had a simple opportunity to address any concerns.

- Mr. Friedman expects that discovery in his pending federal lawsuit will also uncover more bias by the Town.

These are only recent examples. The Town has been working against Mr. Friedman and his project since the beginning. As such, the Council cannot be an unbiased judge to determine if the permit should be revoked. Mr. Friedman has spoken up when he has seen bias from the Council, and these actions caused the Council to further curtail Mr. Friedman's rights. This violated equal protection, as he is being retaliated against for exercising his property rights and first amendment rights under the federal constitution.

E. The Decision at the Commission Hearing Is Also Contrary to Law

The Planning Commission found it had authority to suspend Mr. Friedman's permit because it believed that his construction is inconsistent with the approved permit. But the Council waived its right to prohibit the types of changes Mr. Friedman made until the conclusion of his project.

Building Code 107.4 states: "Work shall be installed in accordance with the approved construction documents, and any changes made during construction that are not in compliance with the approved construction documents shall be resubmitted for approval as an amended set of construction documents." This allows construction to deviate from the approved documents and submission of amended documents to occur at the conclusion of construction.

And this is *exactly* what was occurring on the project while Mr. Friedman was constructing it. He continued to construct his home, consistent with the Planning Code and Building Code, in reliance on the Town's decision to wait until the project was complete. In August 2023, the Town changed its position, illegally stopping his construction by putting up the red tag. Then, when the Town intended to suspend Mr. Friedman's permit, it created a list of seventeen items that are allegedly contrary to the plans, none of which had been discussed with Mr. Friedman, and all of which had been previously known to the Town.

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The Council cannot allow Mr. Friedman to nearly complete his project, seeing that the project is inconsistent with the original permit, and then suspend the permit after hundreds of thousands of dollars have been spent on the construction. The only fair, reasonable and lawful action at this point is for Mr. Friedman to be allowed to finish his construction and then submit revised plans for review and approval.

F. Conclusion

There was no verified application which started this process at the Planning Commission, so the Planning Commission had no authority to act. The Council similarly has no pending application from which to take a direct referral, depriving it of authority. The Council's actions during Mr. Friedman's construction show that this hearing is without due process and violates Mr. Friedman's first amendment right to speak and to petition for grievances. Because Mr. Friedman is being singled out for enforcement, his equal protection rights are also violated. And the Planning Commission's decision was wrong regardless, as the Council is estopped and has waived its right to strictly enforce the permit requirements proposed in this item. If the Council revokes Mr. Friedman's permit, it will be liable for a taking under the federal and state constitutions, and must provide him just compensation.

Mr. Friedman respectfully requests the Council remove this item from the calendar for lack of jurisdiction or, alternately, allow Mr. Friedman to go back to work to complete his project, and direct the issuance of the green tag.

Very truly yours,



Richard M. Harris

RMH:sci
Attachment

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7

8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA

10 JACOB FRIEDMAN, an individual,

11 Plaintiff,

12 vs.

13 CITY OF FAIRFAX, a general law city,
MARK LOCKABY; LINDA NEAL; THE
14 OFFICE OF BUILDING INSPECTOR
OF THE TOWN OF FAIRFAX, in its
15 official capacity; THE PLANNING
COMMISSION OF THE TOWN OF
16 FAIRFAX, in its official capacity,

17 Defendants.

Case No.

**COMPLAINT FOR DAMAGES AND
PETITION FOR ALTERNATIVE WRIT
AND STAY AND PEREMPTORY WRIT OF
MANDAMUS; DEMAND FOR JURY
TRIAL**

Date:
Time:
Dept.:
Judge:

Jury Demanded

18 **NATURE OF THE ACTION**
19

20 1. Plaintiff JACOB FRIEDMAN ("Friedman") brings this inverse
21 condemnation action against the Town of Fairfax ("Town" or "Fairfax") under the Fifth
22 Amendment of the United States Constitution and under California state law. As already found
23 in a state court action (Superior Court of and for the County of Marin, Case No. CV0000737),
24 the Town deprived Friedman of his vested right in constructing his home at 79 Wood Lane in
25 Fairfax, CA ("Property"). Though Friedman had a valid building permit ("the Permit"), the
26 Town illegally suspended Friedman's Permit without a hearing and then, after it was ordered by
27 the Superior Court to rescind that suspension, issued a "temporary suspension" (nowhere
28 authorized by law) and denied Friedman any right to administrative appeal. The primary

1 purpose of this action is to recover damages for the time that Friedman has been unable to use
2 the Property due to the Town's inverse condemnation.

3 2. Since the Superior Court's order, the Town has continued to deprive
4 Friedman of his fundamental right to use his property consistent with the Permit. The Property
5 still has a notice from the Town stating that Friedman is precluded from work on the Property.

6 3. On January 11, 2024, the Town's Planning Commission took an action
7 suspending Friedman's Permit. When Friedman attempted to exercise his right to appeal (and
8 thereby receive the benefits of his Permit while the appeal was pending), the Town refused to
9 allow the appeal. This is a further taking that is actionable under the Fifth Amendment of the
10 U.S. Constitution.

11 4. Plaintiff Friedman is a taxpayer and resident of Fairfax and the State of
12 California. He is seventy-two years old, in the construction business in Fairfax and elsewhere in
13 California, and is authorized, qualified and licensed to perform this business in California.

14 5. Defendant Fairfax is a general law city, subject to the Court's power to
15 compel compliance with a legal duty pursuant to sections 1085, 1086 and 1087 of the California
16 Code of Civil Procedure.

17 6. Defendant Office of the Building Inspector of the Town of Fairfax
18 ("Building Inspector") is an office within the government of the Town of Fairfax created by
19 statute, Fairfax Town Code ("FTC") § 2.20.010. Building Inspector is subject to the Court's
20 power to compel compliance with a legal duty pursuant to sections 1085, 1086 and 1087 of the
21 California Code of Civil Procedure. The current building inspector under the FTC is Mark
22 Lockaby.

23 7. Defendant Planning Commission of the Town of Fairfax ("Planning
24 Commission") is an entity within the government of the Town of Fairfax created by statute, FTC
25 § 2.28.010. The Planning Commission is subject to the Court's power to compel compliance
26 with a legal duty pursuant to sections 1085, 1086 and 1087 of the California Code of Civil
27 Procedure.

28 8. Defendant Mark Lockaby is an individual who, on information and belief,

1 resides in the Northern District.

2 9. Defendant Linda Neal is an individual who, on information and belief,
3 resides in the Northern District.

4 **JURISDICTION AND VENUE**

5 10. Friedman’s federal claims arise out of the Fifth Amendment to the U.S.
6 Constitution, 42 U.S.C. § 1983, and *Knick v. Twp. of Scott, Pennsylvania*, 139 S. Ct. 2162
7 (2019). This Court has jurisdiction under 28 U.S.C. § 1331 because Friedman’s federal claims
8 arise out of the U.S. Constitution and the laws of the United States. The Court has jurisdiction
9 over the remaining claims under 28 U.S.C § 1367(a) because all claims arise out of the same
10 case or controversy.

11 11. Venue in this District is proper under 28 U.S.C. § 1391(b) because all
12 defendants exist within the District and the Property is located in the District.

13 **STATEMENT OF FACTS**

14 12. Friedman owns the real property located at 79 Wood Lane, Fairfax, CA
15 94930 (“the Worksite”).

16 13. On July 6, 2021, Friedman submitted an application to Fairfax (“the
17 Application”) for the construction of a house and an Accessory Dwelling Unit (“ADU”) at the
18 Worksite (“the Project”). The Application included proposed plans for the proposed
19 construction and structure.

20 14. For over six months, Fairfax staff and outside administrators objected to,
21 delayed and otherwise interfered with Friedman’s efforts to get the Application approved.
22 Specifically, Defendant Linda Neal, the Fairfax Principal Planner, threatened to recommend
23 denial of the application and plans unless Friedman agreed to her demands that the house be
24 lower in height and lower to the ground, even though the house was designed to be under the
25 height limit of the Fairfax Planning Code. Friedman is informed and believes that these efforts
26 were conducted in bad faith with the intention of delaying and/or preventing Friedman from
27 proceeding with the Project.

28 15. On January 20, 2022, the Town Planning Commission unanimously

1 approved Friedman’s Application. A true and correct copy of the approved plans (“Approved
2 Plans”) is attached as **Exhibit 1**.

3 16. Despite the Planning Commission approval, the Town did not promptly
4 issue a building permit. Rather, Defendant Mark Lockaby, the Fairfax Building Official,
5 submitted Friedman’s Approved Plans to the Town Engineer (an outside contractor) for further
6 review prior to approval for the Permit, further delaying prompt construction. Finally, on
7 August 4, 2022 (over 13 months after Friedman submitted his Application), the Town issued
8 Friedman the Permit. A true and correct copy of the Permit and receipt of payment is attached
9 as **Exhibit 2**. Friedman is informed and believes that these efforts were conducted in bad faith
10 with the intention of delaying and/or preventing Friedman from proceeding with the Project.

11 17. After receipt of the Permit, Friedman hired a work crew and mobilized
12 equipment to begin work on the Project.

13 18. After the Permit was issued, Friedman informed the Town that he intended
14 to submit an application pursuant to Government Code § 65852, *et seq.* (“SB 9”), which states
15 that projects containing up to two single family homes on property meeting certain requirements
16 “shall be considered ministerially, without discretionary review or a hearing,” if certain
17 requirements are met. The Town responded by email that the Town would conduct several
18 layers of review contrary to SB 9.

19 19. On August 9, 2022, Friedman submitted his application for changes to his
20 plans that meets all of SB 9’s requirements for ministerial, non-discretionary review.

21 20. On the morning of August 10, 2022, the Town, by and through Building
22 Official Lockaby, issued and posted at the Worksite an Order to Stop Work (“OSW”)
23 prohibiting any further work on the Project. The only information the OSW states regarding the
24 “cause” of its issuance was “construction, excavation beyond scope of permit issued.” Friedman
25 is informed and believes that this action was in bad faith with the intention of delaying and/or
26 preventing Friedman from proceeding with the Project and intimidating him out of submitting
27 plan changes.

28 21. On August 25, 2022, Friedman was forced to file a petition for alternative

1 writ and stay and mandamus in the state court (Superior Court of and for the County of Marin,
2 Case No. CIV2202708). After filing the petition and serving it on the Town, the parties were
3 able to resolve the dispute short of court intervention. That petition was dismissed by Friedman
4 without prejudice.

5 22. Work continued on the Project fully in compliance with Town laws and
6 regulations, and always under safe conditions. As is typical on projects like these, Friedman
7 made various changes to the structure. Lockaby requested documentation detailing these
8 changes from Friedman, and Friedman provided these documents. The documents Friedman
9 provided to Lockaby are attached as **Exhibit 3**. Relevant to this dispute, Friedman showed three
10 changes to the plans:

- 11 a. A portion of the basement was shown to be an ADU;
- 12 b. A portion of the top floor was shown to have been prepared to be a junior
13 accessory dwelling unit (“JADU”), including enclosing an upper deck and
14 adding an exterior stairway; and
- 15 c. The front low pitched roof was shown as having been eliminated, and
16 instead a roof deck above a portion of the lower floor even with the top
17 floor was shown.

18 23. After receiving the documents, Lockaby agreed that Friedman could
19 continue with the work. Lockaby requested that Friedman obtain approval from the Fairfax
20 Planning Commission of the changes described in paragraphs 22(b) and 22(c), above, and that
21 Friedman not complete any further work on these items until the Planning Commission approved
22 the changes.

23 24. Friedman disputed Lockaby’s finding. Section 107.4 of the California
24 Building Code contemplates changes will occur during construction, stating “any changes made
25 during construction that are not in compliance with the approved construction documents shall
26 be resubmitted for approval as an amended set of construction documents.” Thus, Friedman
27 asserted his right to continue construction and submit the minor changes to the plan at the
28 conclusion of the Project.

1 25. While the requirements of plan submission were still under discussion, on
2 June 8, 2023, Lockaby issued a notice to stop work (“the Red Tag”) on the Project. The “cause”
3 described on the Red Tag was “CONSTRUCTION NOT APPROVED.” Friedman understood
4 this Red Tag to allege that Friedman was allegedly constructing the Project in violation of the
5 Fairfax Planning Code (Title 17). A true and correct photograph of the Red Tag issued on
6 June 8, 2023, is attached as **Exhibit 4**.

7 26. This Red Tag issued in June 2023 deprived Friedman in his vested
8 property right of construction on his property.

9 27. On June 9, 2023, Friedman signed and submitted to the Town an appeal of
10 the decision of Lockaby under Title 17 of the Town Code (“the Appeal”). On June 12, Friedman
11 paid the required fee for an appeal to the Town. A true and correct copy of that Appeal
12 (unsigned), and the receipt for Friedman’s payment, is attached as **Exhibit 5**.

13 28. Pursuant to the Fairfax Town Code section 17.036.030, an appeal of an
14 administrative official’s enforcement of Title 17 stays any enforcement of that action pending a
15 ruling by the Town Council on the appeal. FTC § 17.036.030. The Town claimed that the
16 Appeal was improper and returned Friedman’s check to him, uncashed in August 2023.

17 29. Because he believed Lockaby’s decision was stayed pending the appeal,
18 Friedman went back to work on the Project. For some weeks, Lockaby continued to respond to
19 requests for inspection. Work continued in a legal and safe manner. In an effort to resolve the
20 Appeal short of a ruling, Friedman’s counsel wrote to Town Counsel Janet Coleson, offering
21 that Friedman would cease work on items described in paragraphs 21(b) and 21(c) above, and
22 request a modification from the Planning Commission and submit plans within 60 days from
23 June 23, 2023. The City’s counsel never responded to this offer to resolve the dispute.

24 30. On July 20, 2023, Lockaby was called to complete, and did complete, an
25 electrical inspection of the Project. During this inspection, the electrical system appeared to
26 Lockaby to be in working order and up to code and so was approved. However, Lockaby
27 refused to issue a “green tag” signifying this approval of the electrical system for connection to
28 PG&E, notwithstanding that it met all of the requirements of the code. Lockaby told Friedman

1 that he could not release the Project’s electrical service for connection to PG&E unless and until
2 Linda Neil signed off on it.

3 31. On July 21, 2023, counsel for Friedman contacted counsel for the Town to
4 discuss why the electrical was not being approved for connection to PG&E, given that the
5 electrical system was in working order and approved. During this phone call, counsel for the
6 Town read to counsel for Friedman an email to her from Lockaby, which stated, in substance,
7 that the Town was withholding the approval of the electrical system in order to force Friedman
8 to submit new plans to the Planning Commission and secure approval. Counsel for the Town
9 then explained that the Town would often withhold a “green tag”, not because there was a
10 problem with the electrical work, but in order to extract other concessions from permit holders.

11 32. Despite the Town’s refusal to issue the green tag, Friedman continued
12 working on the Project. Over the next few weeks, he was able to complete some work on the
13 Project, although much less efficiently.

14 33. Based on this lack of efficiency, Friedman was accruing damages caused
15 by the Town’s actions. On Friday, July 28, 2023, counsel for Friedman sent an email (a true and
16 correct copy is **Exhibit 6**) to counsel for the Town, requesting that the Town issue the green tag
17 to which Friedman was entitled by law.

18 34. Counsel for the Town did not respond substantively until August 8, 2023,
19 stating in part “I don’t believe the electrical tag will be withheld for issues unrelated to the
20 electrical.” This was wholly contrary to the representations of counsel for the Town made by
21 telephone on July 21, 2023. A true and correct copy of the Town’s response is attached as
22 **Exhibit 7**.

23 35. From July 20, 2023, until Friday, August 11, 2023, Friedman’s work on
24 the Worksite was inefficient due to the lack of a green tag. During this time, Friedman would
25 call Lockaby for various inspections, but Lockaby would not respond. When Friedman called
26 from an anonymous number, Lockaby answered the phone, came to the site, and inspected
27 Friedman’s work. Friedman is informed and believes that ignoring his phone calls was in bad
28 faith with the intention of delaying and/or preventing Friedman from proceeding with the

1 Project, and/or convincing Friedman to capitulate to the Town’s demands and submit plan
2 revisions.

3 36. On August 11, 2023, Lockaby sent an email to Friedman with an attached
4 letter. In the email, Lockaby states that he observed that the rear stairs were being constructed.
5 He then falsely claims that Friedman had agreed to obtain approval from the Planning
6 Commission before continuing to construct the back staircase. Lockaby then stated: “I have no
7 choice but to suspend your permit until approvals [from the Planning Commission] are
8 obtained.” A true and correct copy of this letter is attached as **Exhibit 8**.

9 37. The letter stated that Lockaby was suspending the permit under California
10 Building Code [A] 105.6 because “the work being done is based on incorrect, inaccurate, and
11 incomplete information.” He then listed the same items contained in paragraph 21 above “have
12 not been approved by the planning commission, or building department” and that, “[i]n order to
13 commence construction, planning commission approvals must be obtained, and construction
14 drawings checked, and approved by the building department.”

15 38. On August 14, 2023, a similar letter was posted at the Worksite, together
16 with an OSW, stating that the “cause” of the OSW is “suspension of building permit.” A true
17 and correct photograph of the OSW and letter posted is attached as **Exhibit 9**.

18 39. That same day, counsel for Friedman contacted counsel for the Town,
19 explaining that this OSW was contrary to law. Counsel for the Town responded August 15,
20 2023, stating that “it’s past time for your client to stop doing whatever he wants and follow the
21 direction provided.” A true and correct copy of that email is attached as **Exhibit 10**.

22 40. Rather than discussing the matter, Lockaby sent a new letter by email to
23 Friedman on August 17, 2023. This letter stated that the permit was suspended because “your
24 permit was issued on the basis of your submittal of incorrect, inaccurate, and incomplete
25 information. The construction documents you submitted to obtain the permit did not reflect” the
26 items in paragraph 21 above. This letter does not include information about how Friedman
27 might have the permit reinstated. A true and correct copy of this letter is attached as **Exhibit 11**.

28 41. Counsel for Friedman wrote an email to Counsel for the Town, demanding

1 reinstatement of the permit because, among other reasons, Friedman had not been afforded
2 notice or a hearing prior to the suspension. Counsel for the Town responded by stating that
3 Friedman could appeal the suspension of the building permit to the Town Council (true and
4 correct copies of these emails are attached as **Exhibit 12**, p. 5-7). Counsel for Friedman emailed
5 a response, reminding counsel for the Town that she had stated “there is no appeal to the
6 Planning Commission or Town Council of a Building Official’s stop work order issued under
7 the authority of the CA Bldg. Code.” A true and correct copy of the email that included this
8 quote is **Exhibit 13**. In addition, the Fairfax Town Code does not provide for an appeal under its
9 Building Code.

10 42. The Building Code is incorporated into the Fairfax Town Code as
11 Article 15. Article 15 purports to have a provision allowing for appeals, but it does not. It
12 states: “Any aggrieved applicant or person may appeal the determination of the chief building
13 official regarding the granting or denial of an exemption or compliance with any other provision
14 of this chapter. An appeal of a determination of the chief building official shall be filed in
15 writing and processed in accordance with the provisions of § 15.04.028 of this code.” FTC
16 § 15.04.100(C)(4). But there is no section 15.04.028 of the Fairfax Town Code.

17 43. Counsel for Friedman wrote to counsel for the Town on August 22, 2023,
18 that a permit revocation done without notice or a hearing where Friedman could present
19 evidence was “inoperative and of no legal force,” citing *City of San Marino v. Roman Catholic*
20 *Archbishop of Los Angeles*, (1960) 180 Cal.App.2d 657, 669, and, on that basis, Friedman would
21 restart his construction on August 23, 2023.

22 44. Friedman also met with Lockaby at the Worksite on August 25, 2023.
23 During that conversation, Lockaby admitted that the green tag was not being withheld for any
24 reason related to the electrical system, but only because Town attorney Coleson told Lockaby
25 not to issue the green tag until Friedman obtained approval for the plan changes from the
26 Planning Commission. Lockaby also agreed that the changes under dispute were minor and
27 would likely be approved. A true and correct copy of an email sent by Friedman recounting this
28 conversion is attached as **Exhibit 14**. To date, Lockaby has not responded to this email.

1 45. That same day, Defendants caused a police officer to arrive at the Property.
2 The officer informed Friedman's employees that, if they did not stop working, they would be
3 cited and arrested.

4 46. As a result of the OSW, Friedman was forced to lay off his work crew and
5 totally stop construction. This delayed the Project completion date and increased the cost of
6 completing the Project.

7 47. Friedman is informed and believes that the purported reasons given by the
8 Town for its having issued, posting and refusing to rescind the OSW are contrary to law,
9 pretextual, factually unsupported and/or were devised after-the-fact in an effort to justify not
10 issuing the green tag. Friedman further is informed and believes that, on or before the date the
11 Town issued the OSW, its actual reasons for issuance were ill will towards Friedman as a result
12 of Friedman's asserting his property and statutory rights, including his right to a green tag, and
13 the Town's goal to convince Friedman to capitulate and agree to apply for changes in the
14 middle, as opposed to at the end, of the Project.

15 48. On August 28, 2023, Friedman filed a writ of mandamus action in Marin
16 County Superior Court (Case No. CV0000737) ("Writ"). The Writ was heard on October 4,
17 2023. In that hearing, the state Court granted Friedman's writ in part, ruling that "the Town
18 owed a mandatory duty to provide Friedman with a hearing before suspending the Permit." The
19 Court ordered that the suspension of the permit and the OSW be set aside. The Court did not
20 rule on whether the green tag must be issued, finding that issue was "premature and/or not
21 properly before the Court...." A true and correct copy of this ruling is attached as **Exhibit 15**.
22 This order was entered on October 31, 2023. To date, the red tag and OSW are still onsite, and
23 the Town has continued to refuse to issue a green tag.

24 49. After the ruling, Friedman requested that Lockaby issue the green tag
25 because there were no issues with the electrical system. Although Lockaby agreed that there
26 were no problems with the electrical system, he would not issue the green tag without agreement
27 from counsel for the Town.

28 50. Based on the Town's representation to the state Court that appeals of the

1 Building Code are properly handled under section 17, Friedman attempted to appeal Lockaby's
2 refusal to issue a green tag. However, Town officials stated that they needed guidance from
3 their attorney before an appeal could be scheduled.

4 51. Counsel for Friedman contacted counsel for the Town and requested an
5 appeals process under section 17 of the Town Code (without conceding the position that no
6 appeal is required for decisions under the Building Code). Counsel for Fairfax wrote to counsel
7 for Friedman, stating that Friedman was not entitled to an appeal because "there is no decision
8 from which to appeal."

9 52. In addition, and, on information and belief, in retaliation for Friedman's
10 rightful requests for a green tag, the Town then scheduled a special Planning Commission
11 meeting on January 11, 2024. At this meeting, the Commission held a hearing to determine
12 whether to suspend or revoke the Permit due to alleged illegal deviations from Permit
13 requirements. This was done in spite of the fact that the Town has not yet removed the previous,
14 illegal OSW requiring Friedman to stop work.

15 53. The hearing violated due process by *inter alia*, failing to give Friedman a
16 full and fair opportunity to be heard, failing to provide any right to compel the testimony of
17 witnesses or cross-examine witnesses, and failing to provide other procedural protections
18 necessary to protect Friedman's due process rights.

19 54. At the hearing, the Commission made a determination that the Permit is
20 suspended until May 5, 2024. On information and belief, the primary reason the Commission
21 made this determination was to create a pretextual reason to continue to deny Friedman his green
22 tag. The determination of the Commission was contrary to law, and the Commission was
23 without power to suspend Friedman's permit.

24 55. On January 16, 2024, Friedman attempted to appeal the decision of the
25 Planning Commission by filing an appeal with the Town clerk pursuant to section 17 of the
26 Town Code. Linda Neal, the individual in the Town office at the time, refused to allow
27 Friedman to file an appeal, and would not accept either the appeal or the fee which Friedman
28 was prepared to pay. A true and correct copy of the appeal Friedman attempted to submit is

1 attached as **Exhibit 16** (“Second Appeal”).

2 56. Filing an appeal stays the action of the Planning Commission until the
3 appeal is heard by the Town Council. As a result, had the Town not refused Friedman’s
4 tendered Second Appeal, he would have been entitled to continue work under his Permit upon
5 his filing of the Second Appeal and until the Town Council decides that appeal. By refusing to
6 accept Friedman’s appeal, the Town has deprived, and continues to deprive, Friedman of his
7 right to continue to use his Permit pending a final hearing from the Town Council.

8 57. On January 16, 2024, counsel for Friedman wrote to council for Fairfax,
9 requesting that the Second Appeal be accepted according to law. On January 17, 2024, counsel
10 for the Town appeared in a status hearing in the state court action No. CV0000737. When
11 questioned about the outstanding appeal, the Town represented to the Court that the temporary
12 suspension of Mr. Friedman’s permit was an “unappealable” decision. On January 18, 2024,
13 counsel for Friedman recounted this to counsel for the Town by email, and counsel for the Town
14 did not deny it. A true and correct copy of this email is **Exhibit 17**.

15 58. Friedman met the requirements of section 910, *et seq.*, of the California
16 Government Code by submitting a claim to the Town on or around August 22, 2023. That
17 notice described the substance of these claims as they existed on that date, as well as all other
18 requirements of the Government Code. The Town failed to respond to this notice.

19 **FIRST CAUSE OF ACTION**

20 **(Taking Due Compensation – Fifth Amendment of U.S. Constitution – Against Town,**
21 **Building Department, and Planning Commission)**

22 58. Friedman refers to and re-alleges all of the above paragraphs and by this
23 reference incorporates those paragraphs as though fully set forth herein.

24 59. Friedman possessed a vested right in his Permit. Each time Lockaby
25 and/or the Town ordered him to stop work and/or suspended the Permit, this constituted a
26 regulatory taking without just compensation.

27 60. Upon submission of the Second Appeal, Friedman was entitled to continue
28 work on his Permit until the Town Council decided the appeal. Refusing to accept the Second

1 Appeal constitutes an additional taking, because Friedman lost his right to continue working on
2 his permit.

3 61. The Town has made a final decision to not accept the Second Appeal.

4 62. No exhaustion of administrative remedies is required under the Fifth
5 Amendment Takings Clause.

6 63. Friedman therefore seeks recovery as set out below.

7 **SECOND CAUSE OF ACTION**

8 **(42 U.S.C. § 1983 – Due Process and Equal Protection – Against All Defendants)**

9 64. Friedman refers to and re-alleges all of the above paragraphs and by this
10 reference incorporates those paragraphs as though fully set forth herein.

11 65. Friedman possessed a vested right in constructing his Project. Each time
12 Lockaby ordered him to stop work, this constituted a regulatory taking without just
13 compensation. When the Planning Commission suspended the Permit, this also constituted a
14 regulatory taking without just compensation in violation of law. Finally, when Neal and the
15 Town refused to accept the Second Appeal from Friedman, this also constituted a regulatory
16 taking without just compensation in violation of law.

17 66. These regulatory takings were under color of law, as Lockaby was acting
18 under the authority of the Town and the Building Department.

19 67. Because the Permit was subject to a regulatory taking, Friedman is owed
20 just compensation from the Town for the value he lost under the Fifth Amendment to the U.S.
21 Constitution as incorporated and applied to the states by way of the Fourteenth Amendment to
22 the U.S. Constitution.

23 68. The actions of Lockaby, Neal, and the Town also deprived Friedman of his
24 property without due process of law in violation of the Fourteenth Amendment to the U.S.
25 Constitution.

26 69. The actions of Lockaby, Neal, and the Town also deprived Friedman of his
27 property without due process of law in violation of Art. 1, § 9 of the California Constitution.

28 70. The actions of Lockaby, Neal, and the Town, the suspension of the Permit,

1 and the refusal to issue the green tag are violations of Friedman's of substantive due process
2 under the Fourteenth Amendment, as these actions were arbitrary and unreasonable.

3 71. The actions of Lockaby, Neal, and the Town, the suspension of the Permit,
4 and the refusal to issue the green tag were also taken in retaliation of Friedman exercising his
5 rights under the Federal and State Constitutions and the laws of the United States, California,
6 and Fairfax. This violated Friedman's equal protection rights under the Fourteenth Amendment.

7 72. At all times relevant hereto, Lockaby acted pursuant to a policy or custom
8 of Town of depriving permit holders of their rights without a hearing.

9 73. The Town failed to adopt clear policies and failed to properly train its
10 personnel in how and when to suspend building permits, issue green tags, and/or accept appeals.

11 74. The Town's actions were a direct and proximate cause of the constitutional
12 deprivations suffered by Friedman.

13 75. Friedman therefore seeks recovery as set out below.

14 **THIRD CAUSE OF ACTION**

15 **(Inverse Condemnation –Art. 1, § 9, Cal. Const. - Against Town, Building Department, and**
16 **Planning Commission)**

17 76. Friedman refers to and re-alleges all of the above paragraphs and by this
18 reference incorporates those paragraphs as though fully set forth herein.

19 77. Friedman has a right, under the California Constitution, to just
20 compensation when a government entity takes his property. This includes when a government
21 entity acts unlawfully to deprive him of a vested right.

22 78. This claim is ripe because a court has ruled that revoking the permit and
23 issuing an OSW was contrary to law and that the Town violated its mandatory duty by depriving
24 Friedman of his vested right in his construction project without a hearing.

25 79. At all times relevant hereto, Lockaby acted pursuant to a policy or custom
26 of the Town of depriving permit holders of their rights without a hearing.

27 80. The Town failed to adopt clear policies and failed to properly train its
28 building department officials in how and when to suspend building permits.

1 were in good working order.

2 91. Fairfax also violated its legal duty when it suspended the Permit through
3 the action of the Planning Commission on January 11, 2024.

4 92. Fairfax also violated its legal duty when it refused to accept Friedman's
5 Second Appeal, further depriving him of his right to continue construction on his home.

6 93. At all times relevant to this Complaint Fairfax has been able to perform its
7 duties detailed herein, but has failed and/or refused and continues to fail and/or refuse to do so.

8 94. Friedman has exhausted his administrative remedies because there is no
9 administrative appeal procedure. Friedman requested that Fairfax issue the green tag. The green
10 tag issuance is a task under the Building Code, which has no appeal procedure. The Town has
11 ignored previous appeals filed pursuant to its Code, and the Town has stated there is no appeal
12 procedure, inviting court intervention. Friedman requested an appeal of the Town's decision to
13 refuse to issue the green tag, but to date the Town has refused to provide an administrative
14 procedure of any kind.

15 95. In the alternative, even if there were a sufficient administrative appeal
16 procedure, it would be futile for Friedman to pursue it, given that the Town ignores appeals that
17 have been filed, and has refused to accept his appeal on this issue. In addition, irreparable harm
18 will come to Friedman if he must wait an unknown time for an administrative appeal to be
19 accepted, heard and decided. Defendants' illegal actions have caused Friedman to not be able to
20 install permanent electricity on his home, even though he must continue to pay interest on his
21 construction loan and pay for temporary power. He also is unable to continue to work under his
22 Permit because the Town illegally suspended the Permit, and refused to accept the Second
23 Appeal.

24 96. Friedman does not have a plain, speedy and adequate remedy at law, other
25 than the writ sought by this Complaint.

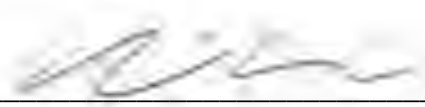
26 97. If Fairfax is allowed to not issue the green tag, suspend the Permit and
27 refuse to accept the Second Appeal, Friedman will suffer irreparable injury because (a) he will
28 suffer pecuniary loss for which money damages may not be available against Fairfax and so

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6. For such other relief as the Court considers just and proper.

Dated: January 22, 2024

ROGERS JOSEPH O'DONNELL

By: 

AARON P. SILBERMAN
RICHARD M. HARRIS

Attorneys for Plaintiff
JACOB FRIEDMAN

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VERIFICATION

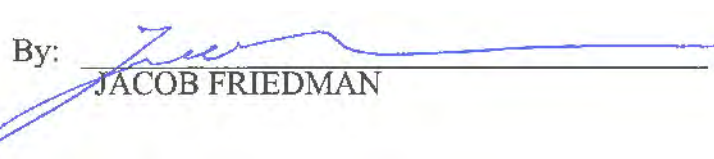
I, JACOB FRIEDMAN, declare that:

I am the petitioner in this case, and I make this verification for that reason. I have read the foregoing verified complaint for damages and petition for writ of mandate.

I have personal knowledge of all of the facts recited in the above-referenced document, and, therefore, verify them as true and correct.

I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct and that this Verification was executed at Fairfax, California.

Dated: 1/22/2024

By: 
JACOB FRIEDMAN

JACOB FRIEDMAN