

February 16, 2018

Honorable Presiding Justice Ignazio J. Ruvulo
Honorable Justice Maria P. Rivera
Honorable John W. Kennedy
California Court of Appeal
First Appellate District—Division Four
350 McAllister Street
San Francisco, CA 94102

**Re: League of California Cities' Support of Petition for Rehearing
Lippman v. City of Oakland (First Appellate District, No. A141865)**

Dear Honorable Presiding Justice and Associate Justices:

Pursuant to rule 8.200(c) of the California Rules of Court, the League of California Cities (League) respectfully requests permission to file this *amicus curiae* letter brief in support of Respondent City of Oakland (the City)'s Petition for Rehearing.

In this appeal, Plaintiff and Respondent Thomas Lippman sought review of a trial court decision upholding the City's use of a single hearing officer for building code violation appeals. The trial court determined that the City's administrative appeals process complies with the state Building Code (2010 Building Code § 1.8.8.1). This Court reversed the trial court, holding that the City's Municipal Code conflicts with the state Building Code, and that the City's home rule authority does not entitle it to establish its own administrative appeal process. This Court invalidated Oakland's building code violation appeals process, the exact same process used by numerous California cities. Although originally unpublished, on January 22, 2018, the Court certified the decision for publication.

The decision as written has a grave adverse impact on the many other California cities besides Oakland who use single hearing officers for administrative appeals. Substituting boards for single hearing officers will create an impossible administrative and financial burden for cash-strapped California cities. If not modified, the effect of the decision is to immediately throw the administrative appeals process of the cities that follow the Oakland model into confusion and uncertainty. Further, the Court's analysis of the home rule doctrine, and the finding of a conflict between Oakland's administrative appeals process and state law, has serious adverse implications for California's 121 charter cities, in which the majority of Californians live. For these reasons, the League respectfully joins in the City's arguments for rehearing.

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Under Government Code section 68081, rehearing is required if an appellate court bases a decision on "an issue which was not proposed or briefed by any party to the proceeding" and where there was no opportunity for supplemental briefing on the issue. Rehearing is also appropriate where a court of appeal opinion overlooks a relevant rule of law, or one of the party's arguments. (*See, e.g., Hager v. County of Los Angeles* (2014) 228 Cal.App.4th 1538, 1547.)

In this case, the League respectfully submits that rehearing is warranted for three reasons. First, the Opinion drastically undermines administrative appeal procedures and home rule principles for cities throughout the state. Second, the Opinion commits an error of law by unnecessarily finding a conflict, rather than harmonizing, as the trial court did, the City's Municipal Code and the State Building Code. Third, the Opinion commits another error of law by failing to construe the State Building Code and State Housing Law *in pari materia*. For these multiple independent reasons, the League requests that the Court grant Oakland's Petition for Rehearing.

Interest of the League

The League is an association of 475 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities and identifies those cases that have statewide or national significance. The Committee has identified this case as having such significance.

The Opinion Seriously Undermines Established Administrative Appeal Procedures and Home Rule Principles.

The Opinion drastically undermines established administrative appeal processes in charter and general law cities throughout the state. This particularly affects numerous small and mid-sized cities, which are more likely to use a single hearing officer model in administrative appeals. Further, the Opinion runs afoul of the principle that Oakland, as a charter city, has the exclusive power to legislate over municipal affairs. In holding that Oakland's appeal process was preempted by the state Building Code, the Court erroneously blurred the distinction between the State's interest in regulating building standards, and the City's strong interest in maintaining local control over its own internal administrative procedures.

Many cities use a single hearing officer in their appeals process. To give just a few examples, Fremont, Santa Clara, and Lathrop use single hearing officers for administrative appeals. (Oakland RJN, Ex. J at 0119 (Fremont); Ex. K at 0128 (Santa Clara); Ex. L at 0137 (Lathrop).) The effect of the decision will be to derail appeals

already in the pipeline, and cast doubt on the enforceability of prior hearing officer decisions. This will inevitably lead to a flood of litigation, which cities and the courts are ill-equipped to handle.

The Opinion Commits an Error of Law by Unnecessarily Creating Conflict between the City Municipal Code and the State Building Code.

The trial court applied a key rule of law that is not discussed in the Opinion:

To the extent difficult choices between competing claims of municipal and state governments can be forestalled in this sensitive area of constitutional law, they ought to be; courts can avoid making such unnecessary choices by carefully insuring that the purported conflict is in fact a genuine one, unresolvable short of choosing between one enactment and the other.

(Cal. Fed. Sav. & Loan Ass'n v. City of Los Angeles (1991) 54 Cal.3d 1, 16-17.)

The Opinion's analysis of the relationship between the City's Municipal Code and the State Building Code does not acknowledge this rule. The effect of that omission is that the Opinion found a conflict between state and local law, without first going through the required step of attempting to harmonize the apparent conflict, before reaching the conclusion that a conflict exists.

Instead of starting the analysis by trying to avoid the apparent conflict, the Opinion goes directly to the "plain meaning" rule, when interpreting Building Code section 1.8.8.1. (Slip Op. p. 8.) The Court concluded, based on the language of the statute, that the Building Code "does not contemplate an appeal before a single hearing officer." (Slip Op. p. 8.)

Rehearing is respectfully requested so that the Court may conduct a more searching analysis of whether the City's single hearing officer process actually conflicts with the Building Code. At the very least, attempts at harmonizing the apparent conflict would have led the Court to substantively consider the relevant state statutes—including Health & Safety Code sections 17920.5 and 17920.6—as a whole, and not in isolation.

The Court's only nod to the principle that it is required to avoid a finding of conflict if at all possible comes at the end of its Opinion, in which it concedes that it conducted its analysis without considering the rule. After noting that the City raised the issue in its briefing, the Opinion states: "[w]e have already concluded, however, that the City's procedures do conflict with the Building Code because they deprive property owners of the basic procedural protections afforded by an appeals board or governing body." (Slip Op. p. 16.) The Court's analysis, according to the California Supreme Court, should be

in the opposite order. For that reason alone, rehearing is appropriate so that the Court can attempt to harmonize state and local law, as it is required to do, before finding that a conflict exists.

The Opinion also overlooks Health & Safety Code section 17964—relied upon by the trial court—which empowers cities to implement the single hearing officer model for administrative appeals. Section 17964 is entitled "Designation of department or officer," and provides:

By charter, ordinance, or resolution, a city, county, or city and county may designate and charge a department organized to carry out the purposes of this part, **or an officer charged with the responsibility of carrying out this part**, with the enforcement of this part, the building standards published in the California Building Standards Code, or any other rules and regulations adopted pursuant to this part...

(Health & Saf. Code § 17964.)

For these additional reasons, the League respectfully requests that the Court grant rehearing.

The Opinion Commits an Error of Law by Failing to Construe the State Building Code and State Housing Law *In Pari Materia*.

The Opinion also fails to interpret cross-referencing state statutes, the State Building Code and State Housing Law, *in pari materia*.

The California Supreme Court has repeatedly observed that "[i]t is a basic canon of statutory construction that statutes *in pari materia* should be construed together so that all parts of the statutory scheme are given effect." (*Winn v. Pioneer Med. Group, Inc.* (2016) 63 Cal.4th 148, 161, quoting *Lexin v. Superior Ct.* (2010) 47 Cal.4th 1050, 1090-1091.) Put differently, statutes "relating to the same subject must be harmonized, both internally and with each other, to the extent possible." (*Winn*, 63 Cal.4th at 161.)

Courts regularly read separate statutes *in pari materia*. (See, e.g., *Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2009) 173 Cal.App.4th 13, 30 [Ellis Act and Costa-Hawkins Rental Housing Act read *in pari materia*]; *Gately v. Cloverdale Unified Sch. Dist.* (2007) 156 Cal.App.4th 487, 494 [two Education Code sections read *in pari materia*]; *Johnston v. Sonoma County Agricultural Preservation & Open Space Dist.* (2002) 100 Cal.App.4th 973, 986 [open space conveyance statutes in Public Resources Code and eminent domain statutes in Code of Civil Procedure read *in pari materia*].) Following that lead, in this case the trial court read Building Code section

1.8.8.1 and Health & Safety Code sections 17920.5 and 17920.6 *in pari materia*. This Court's Opinion does not.

The need to apply the rule is especially acute where, as here, one key statute expressly cites and incorporates another statute. Building Code Section 1.8.8.1 states:

Where no such appeals boards or agencies have been established, the governing body of the city, county, or city and county shall serve as the local appeals board or housing appeals board **as specified in Cal. Health & Safety Code §§ 17920.5, 17920.6.**

(2010 Cal. Bldg. Code § 1.8.8.1, emphasis added.)

Health & Safety Code sections 17920.5 and 17920.6 define "housing appeals board" and "local appeals board" for the purposes of the State Housing Law. And the State Housing Law makes Section 1.8.8.1 of the Building Code applicable to every city in the state. (Health & Safety Code §§ 17922, 17958-17958.11.) As such, and in light of the fact that the relevant sections reference each other, Building Code section 1.8.8.1 and Health & Safety Code sections 17920.5 and 17920.6 must be read *in pari materia*.

The Opinion mentions Sections 17920.5 and 17920.6 in a footnote, without observing that Section 17920.6's operative language significantly differs from that of Building Code section 1.8.8.1. Critically, Section 17920.6 defines a "Housing Appeals Board" as "**the board or agency of a city** [or other local entity] **authorized by** the governing body of the city...to hear appeals regarding the requirements of the city...relating to the use, maintenance, and change of occupancy of [buildings]..." (Health & Safety Code section 17920.6, emphasis added.) This language refers to a preexisting board or agency that is "authorized" to hear appeals, not one that is "established" specifically for that purpose. Nothing in Section 17920.6 indicates that the preexisting agency "authorized" to hear appeals cannot be the enforcement agency itself.

Failing to address these critical points constitutes a material omission of law. For this additional reason, the League respectfully requests that the Court grant Oakland's Petition for Rehearing so that it is able consider the full statutory scheme in light of the *in pari materia* rule.

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For the reasons stated above, the League respectfully urges the Court to grant the City's Petition for Rehearing.

Thank you.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Dolores Bastian Dalton".

DOLORES BASTIAN DALTON