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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF MONTEREY

WILLIAM HOBBS;
SUSAN HOBBS;
DONALD SHIRKEY;
And IRMA SHIRKEY,

Plaintiffs,

v.

CITY OF PACIFIC GROVE, CALIFORNIA;
BILL KAMPE, in his official capacity as the Mayor of the City of Pacific Grove;
ROBERT HUITT, in his official capacity as a Councilmember of the City of Pacific Grove;
KEN CUNEO, in his official capacity as a Councilmember of the City of Pacific Grove;
RUDY FISCHER, in his official capacity as a Councilmember of the City of Pacific Grove;
CYNTHIA GARFIELD, in her official capacity as a Councilmember of the City of Pacific Grove;
BILL PEAKE, in his official capacity as a Councilmember of the City of Pacific Grove; and
NICK SMITH, in his official capacity as a Councilmember of the City of Pacific Grove;

Defendants.

Case No. 18CV002411

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE FOR SUMMARY ADJUDICATION

Hearing Date: June 4, 2019
Dept.: 13
Judge: Hon. Vanessa W. Vallarta

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Defendants CITY OF PACIFIC GROVE, Pacific Grove Mayor BILL KAMPE, and Pacific Grove City Councilmembers ROBERT HUITT, KEN CUNEO, RUDY FISCHER, CYNTHIA GARFIELD, BILL PEAKE, and NICK SMITH (CITY) respond to Plaintiffs' WILLIAM HOBBS, SUSAN HOBBS, DONALD SHIRKEY, and IRMA SHIRKEY (collectively, Plaintiffs) motion for summary judgment, or in the alternative, for summary adjudication, pursuant to Code of Civil Procedure section 437c. Plaintiffs fail to demonstrate there are no triable issues of fact with respect to Plaintiffs' causes of actions, and therefore their motion should be denied.

In 2010, the CITY first promulgated regulations to allow short-term rentals (STRs). Residents then claimed that STRs were incompatible with residential neighborhoods, removed long-term housing from the CITY, decreased property values, and caused noise, trash and parking problems. After much public dialogue, the CITY enacted standards to cap the number of STRs and reduce their density, distributing STRs so no one neighborhood was overly burdened. The City Council adopted Ordinance 18-005 to implement the new limits by "sunsetting" select STR licenses on over-dense blocks. These properties were selected by lottery to avoid favoritism in allocating this economic opportunity. Subsequently, in November 2018, Pacific Grove voters overwhelmingly approved the citizens' Initiative to Preserve and Protect Pacific Grove's Residential Character (Measure M). Measure M banned STRs in all residential districts outside the coastal zone.

Plaintiffs now improperly seek to invalidate Ordinance 18-005 and Measure M by way of summary judgment before the CITY has prepared a record of the challenged legislative acts. First, Plaintiffs' challenge to Ordinance 18-005 under the California Coastal Act fails. Plaintiffs present no evidence Ordinance 18-005 is inconsistent with the CITY's 1989 Land Use Plan (LUP), or the 2018 Local Coastal Program (LCP). Indeed, because the LCP is currently under review by the California Coastal Commission for certification, Plaintiffs' claims are premature. The CITY was not required to submit Ordinance 18-005 to the Coastal Commission, which itself does not constitute "development." The LUP makes no reference to STRs; the LCP provides the

CITY "may continue to permit" STRs "while continuing to prevent conditions leading to increased demand for CITY services and adverse impacts in residential areas and coastal resources." Plaintiffs thus fail to demonstrate they are entitled to judgment as a matter of law.

Second, Plaintiffs cannot prevail on their vested rights claim to operate their STR businesses in perpetuity, relying as they do on inapposite authority and mischaracterizations of the law in issue. Plaintiffs ignore a fatal defect caused by their express consent to the expiration and non-renewal of their time-limited licenses. Plaintiffs present no evidence as to annual STR licenses issued in 2018 or 2019. A city may lawfully regulate land use, subject to deferential rational basis review, and may even prohibit an earlier authorized use if it allows a reasonable time to amortize that use. That is what the City Council did with Ordinance 18-005 and the voters did with Measure M. Plaintiffs' claims concerning due process are thus misplaced because they challenge legislation, not an administrative proceeding, in which the CITY balanced the interests of the community with those of individual property owners seeking to profit from their second homes. Plaintiffs therefore have not shown they are entitled either to summary judgment or adjudication and this motion should be denied.

II. STATEMENT OF FACTS

A. CITY's Local Coastal Program.

The CITY began preparing its LCP more than 35 years ago. (Declaration of Ben Harvey (Harvey Decl.), p. 1, ¶4.) On December 15, 1988, the California Coastal Commission (Coastal Commission or Commission) certified a significant part of the LCP—the CITY's LUP for its entire 458-acre coastal zone. (*Id.*, ¶5; CITY's Request for Judicial Notice (CITY RJN), Ex. 5.) The LUP does not refer to STRs, and simply provides, "visitor-serving and commercial recreational facilities are given priority on suitable private lands over private residential, general industrial, or general commercial development. . ." (CITY RJN, p. 70, § 3.3.2.) At the time the Coastal Commission certified the LUP, the CITY prohibited all STRs in residential zones. (Harvey Decl., p. 1, ¶5.) Despite the certified LUP, the Commission never certified the Implementation Plan (IP). (*Id.*, ¶6.) Thus, the CITY's LCP was incomplete. (*Id.*)

In 2014, the CITY began updating its LCP. (*Id*., ¶7.) On November 28, 2018, the City Council adopted the LUP and IP, which was submitted for certification to the Coastal Commission. (*Id.*, ¶9; CITY RJN, Ex. 6, p. 93.) The LUP provides, "Short term vacation rentals are considered a lower cost visitor accommodation and are permitted in the coastal zone so long as such rentals do not adversely impact coastal resources or unduly burden residential neighborhoods." (CITY RJN, Ex. 7, LUP, p. 212.) The IP provides, "The City may continue to permit short-term lodgings as a means of providing lower cost overnight visitor accommodations while continuing to prevent conditions leading to increased demand for City services and adverse impacts in residential areas and coastal resources." (*Id*., Ex. 8, IP, p. 249.)

B. CITY's Short-Term Rental Program

Pacific Grove is primarily a residential city. (*Id.*, Ex. 1, City Charter, Article 5.5) Indeed, its electorate adopted an initiative that restricted motel and hotel uses within the CITY in 1986, adding Chapter 23.52 to the Pacific Grove Municipal Code (PGMC). (*Id*., Exh. 2, Ordinance 1536 N.S; Harvey Decl., p. 2, ¶12.) The 1994 General Plan (GP), updated in 2015, is a comprehensive statement of CITY development policies under Government Code §65300, et seq. (CITY RJN, Ex. 3, General Plan, p. 8.) GP Policy 11 requires the CITY ensure "commercial uses are balanced, and that business and industry are compatible with the city's residential character." (*Id*., p. 15) Similarly, the Charter provides "Pacific Grove is primarily a city of homes…business and industry shall be compatible with its residential character." (*Id.*, Ex. 1, Charter Article 5.5.) GP Program 2.3(g), "Short-Term Rental of Private Homes" requires review of STR impacts. (*Id*., Ex. 4, Housing Element, p. 41.)

> The City will review [STRs] and if it is determined to have a significant effect on affordable housing cost and supply, appropriate actions will be considered to offset these effects and mitigate this impact. (*Id.*)

Prior to 2010, the CITY prohibited STRs in residential zones, like neighboring communities. (Harvey Decl., p. 2, ¶14.) The CITY amended PGMC §23.64.350 and added Chapter 7.40 in 2010 to regulate STRs. (*Id.*; CITY RJN, Ex. 9, Ord. 10-001, p. 261.) Each STR license was time-limited. (Harvey Decl., ¶16.) The CITY later adopted four separate ordinances

to regulate STRs: (1) Ord. 15-016, (2) Ord. 16-007, (3) Ord. 17-024, and (4) Ord. 18-005. (*Id*., ¶13.) An STR Task Force, the Planning Commission and the Council reviewed proposed STR limits; hours of public comment addressed the issue. (*Id*., ¶¶11, 18.) Property owners pleaded to maximize economic use of their properties. (*Id*., ¶11.) STR opponents raised concerns as to impacts on residential zoning, neighborhood character, loss of housing and housing affordability, and issues related to noise, parking and trash. (*Id*.)

CITY STR regulations evolved over time but have always been conceived as a time-limited pilot program. (*Id*., ¶16; CITY RJN, Ex. 17[1], p. 330.) STR licenses expired annually. (Harvey Decl., ¶16.) In 2017, the CITY amended the PGMC to address several objectives: (1) reduce STR concentration in select areas; (2) make STR uses compatible with residential neighborhoods; (3) reduce impacts on housing stock; (4) streamline STR License Program administration; (5) improve code enforcement; and (6) clarify definitions. (*Id*., p. 3, ¶21; CITY RJN, Ex. 14, p. 330.) The CITY modified the STR Program to set a total cap of 250 licenses, limit the number of STRs in each residential block, and limit guests each STR may accommodate. (Harvey Decl., ¶22; CITY RJN, Ex. 12, Ord. 17-024.) A "zone of exclusion" (ZOE) was created to address density; no single STR was allowed within 55 feet of a parcel on which any other STR was located. (*Id*.) STR applicants were also limited to one license per parcel. (*Id*.)

By early 2018, however, the CITY had issued 289 STR licenses, exceeding the cap. (*Id*., p. 4, ¶25.) Further, STR licenses "clustered," and existed on only 175 of the CITY's 475 defined blocks. (*Id*., ¶26.) Of those 175 blocks, 36 blocks were characterized as "overly dense," with more than 15 percent of parcels on those blocks occupied by STR-licensed residences. (*Id*.)

The CITY adopted Ordinance 18-005 to "sunset" STR licenses on overly-dense blocks. (*Id.*, ¶28; CITY RJN, Ex. 13, p. 294.) A lottery identified licenses not eligible for renewal. (*Id*.) The lottery was chosen to allocate the limited licenses in a fair and equitable manner. (Harvey

[1] Ordinance 10-001 and PGMC §7.40.070 provide "a license shall contain the following information: (c) the date of expiration of such license."; Ordinance 16-007 and PGMC §7.40.020 provide "Transient Use Licenses are issued for a term. If no expiration date is shown, each shall expire on March 31."; Ordinance 17-024 and PGMC §7.40.070 provide, "Each STR license shall be issued for a specific time-limited term" and "If no expiration date is shown, each STR license shall expire on March 31st of each year." (See CITY RJN, Ex. 9, 10, 11, and 13.)

Decl., p. 5, ¶29.) To balance interests among STR licensees, residents, businesses and property owners, the CITY allowed a sunset period for licenses designated as ineligible; upon renewal, they could be used continuously until May 1, 2019. (*Id*., ¶33.) Of the 256 STR licenses City-wide, only 22 of the 72 licenses in the coastal zone were impacted by the lottery. (*Id*., ¶32.)

The CITY provided advance notice the STR Program is time-limited. (*Id*., pp. 5-6, ¶¶33, 36-50.) Each License is limited to a term on its face, expiring March 31st every year. (*Id*.) The CITY does not guarantee renewal. (*Id*.; CITY RJN, Ex. 9-13, 17.) The "Owner Responsibility Form" signed by each STR Applicant provides, in part,

> I consent to comply with all of the terms, conditions and requirements of the STR license including, but not limited to the following: …
> 5) I understand this license expires on March 31st each year, renewal of this license is not guaranteed, and the penalty for operation without a license is 100% forfeiture of rents received. . . (Harvey Decl., pp. 2-3, ¶16.)

In 2018 and 2019, Plaintiffs each acknowledged the short-term nature of their licenses. (*Id*., p. 6, ¶36.) In March 2018, Plaintiffs William and Susan Hobbs renewed the license for 1135 Ocean View and expressly consented to expiration of that STR license after March 31, 2019. (*Id*., ¶¶38-39 and Ex. 2-3.) They later renewed their license, agreeing to its expiration April 30, 2019. (*Id.*, ¶40-41, Ex. 4-5.) In March 2018, Plaintiffs Donald and Irma Shirkey renewed the licenses for 105 5th Street, Units A and B, and consented to their expiration on March 31, 2019. (*Id*., ¶43-50 and Ex. 7-14.) In March 2019, they renewed the STR license for 105 5th Street, Unit A, and consented to its expiration on March 31, 2020. (*Id.*, ¶45-46, Ex. 9-10.) They also renewed the STR license for Unit B and consented to its expiration on April 30, 2019. (*Id.*, ¶50, Ex. 14.)

Despite repeated CITY efforts to balance interests of STR proponents and opponents, citizens voted to approve Measure M in November 2018 to amend the GP and PGMC to sunset and ban all STR licenses outside CITY commercial and coastal zones. (*Id*., p. 5, ¶34; CITY RJN, Ex. 16, p. 318.) 72 percent of the CITY STRs are located outside the coastal zone. (*Id.*, ¶35.)

III. STANDARD FOR GRANTING SUMMARY JUDGMENT

A court may not grant summary judgment when a triable issue of material fact exists. (*Oldcastle Precast, Inc. v. Lumbermens Mutual Casualty Co.* (2009) 170 Cal.App.4th 554, 562-

563.) "The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.)

A moving party must show there is "no defense to a cause of action," by proving "each element of the cause of action entitling the party to judgment on that cause of action." (Code Civ. Proc., § 437c(p)(l); *see also Aguilar, supra,* 25 Cal.4th at p. 849.) It is Plaintiffs' burden to present evidence "that would require a reasonable trier of fact to find any underlying material fact more likely than not." (*Oldcastle Precast, supra,* 170 Cal.App.4th at p. 562.) The burden then shifts to Defendants to show a triable issue of one or more material facts exists as to that cause of action or a defense thereto, setting forth specific facts. (Code Civ. Proc., § 437c(p)(l); *Aguilar, supra,* 25 Ca1.4th at p. 849.) If any single issue of triable fact exists, the Court must deny the motion. Here, Plaintiffs cannot meet their initial burden, but even if they could, there remain triable issues of material fact that prevent summary judgment or adjudication.

IV. ARGUMENT

A. CITY Has Plenary Power Over Its Municipal Affairs.

Cities hold broad authority to frame local land use regulations under the police power conferred by the California Constitution and the Planning and Zoning Law, Government Code §65000 et seq. (Cal. Const. Art XI, §7; *Schroeder v. Municipal Court* (1977) 73 Cal.App.3d 841, 848 [breadth of police power]; *Federation of Hillside & Canyon Associations v. City of Los Angeles* (2004) 126 Cal.App.4th 1180, 1195 [deferential review of land use legislation].) The constitutional powers of cities to zone land in accordance with local conditions is well-established. (Cal. Const. Art. II, §7; see, e.g., *City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc*. (2013) 56 Cal.4th 729, 737-738 [acknowledging broad police powers to establish permitted uses in zones]; *Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1151 [land use regulation function of local government under California Constitution's grant of police power].) Further, charter cities like Pacific Grove hold supreme

"home rule" authority with respect to its "municipal affairs." (Cal. Const. Art. XI § 5, *State Bldg. and Const. Trades Council of Cal. AFL-CIO v. City of Vista* (2012) 54 Cal.4th 547, 555–556.)

Courts also presume the correctness of every CITY decision to enact and implement its land use regulations. "Every intendment is in favor of the validity of the exercise of police power, and, even though a court might differ from the determination of the legislative body, if there is a reasonable basis for the belief that the establishment of a strictly residential district has substantial relation to the public health, safety, morals or general welfare, the zoning measure will be deemed to be within the purview of the police power." (*Town of Los Altos Hills v. Adobe Creek Properties., Inc.* (1973) 32 Cal.App.3d 488, 508.) Plaintiffs thus have a significant presumption to overcome to meet their burden on this motion, which they cannot and have not done.

B. Triable Fact Issues Exist as to Plaintiffs' Coastal Act Claim.

1. The Coastal Act Preserves the CITY's Constitutional Powers.

The California Coastal Act (Coastal Act or Act) preserves the constitutional power of municipalities absent a clear conflict with the Act's explicit terms. (Pub. Res. Code, §30000 et seq.) As the California Supreme Court stated, "the wording of the Coastal Act does not suggest preemption of local planning by the state; rather, under the language of section 30005, local governments have the authority to zone land to fit any of the acceptable land uses under the policies of the Act and have the discretion to be more restrictive than the Act." (*Conway v. City of Imperial Beach* (1997) 52 Cal.App.4th 78, 85, citing *Yost v. Thomas* (1984) 36 Cal.3d 561, 575-573.)

Coastal Act authority derives exclusively from the statute. The California Supreme Court stated in *Marine Forests Soc. v. California Coastal Comm'n* (2005) 36 Cal.4th 1, 25-26:

> The Coastal Act authorizes the Coastal Commission to perform a variety of governmental functions, some generally characterized as "executive," some "quasi-legislative," and some "quasi-judicial." […] The Commission performs . . . a "quasi-judicial" function when it passes upon applications for coastal development permits, when it reviews the validity of a local government's coastal program, and when it issues cease and desist orders with regard to unauthorized development. [citations omitted.]

The Supreme Court noted the Commission's quasi-judicial authority over cities is limited to two

categories: (1) certification of an LCP to implement Chapter 3 policies of the Act (Pub. Res. Code, §30512) [2]; and (2) issuance of coastal development permits (CDP) for specific development applications before an LCP is certified and to determine certain appeals. (Pub. Res. Code, §§30600(c), 30601, 30603; *Yost v. Thomas*, *supra*, 36 Cal.3d at pp. 572-573 [Commission can approve or disapprove LCP but cannot create land use rules for coastal plan.]; *City of Malibu v. California Coastal Comm'n* (2012) 206 Cal.App.4th 549, 553-554 [reaffirming local governments—not the Commission—determine precise content of local policies consistent with state policies].)

Coastal Commission review of municipal ordinances is exclusively related to LCP certification and is explicitly limited to determining whether local policies are consistent with state policies; the Commission is not authorized to abridge authority of a local government.

> [T]he commission is not authorized by any provision of this division to diminish or abridge the authority of a local government to adopt and establish, by ordinance, the precise content of its land use plan. (Pub. Res. Code, § 30512.2.)

Contrary to Plaintiffs' assertions, neither the Coastal Act nor the Commission regulates or interferes with local government's authority to determine in which zones, if any, STRs may operate in their jurisdictions.

2. Coastal Commission Does Not Review Ordinances on an Ad Hoc Basis.

The Coastal Commission lacks policymaking authority and Plaintiffs exaggerate its reach. As stated, the Commission has two limited powers related to CITY land uses—certification of LCPs and issuance of CDPs. (Pub. Res. Code, §§30513, 30512(b), (c); *Douda v. California Coastal Com'n* (2008) 159 Cal.App.4th 1181, 1192.) These two powers constitute the extent of the Commission's regulatory authority within the CITY's coastal zone. The Coastal Commission is authorized to review city legislative acts only in the context of an LCP certification or amendment process; general zoning laws not part of an LCP are outside the

[2] "'Local coastal program'" means a local government's (a) land use plans, (b) zoning ordinances, (c) zoning district maps, and (d) within sensitive coastal resources areas, other implementing actions, which, when taken together, meet the requirements of, and implement the provisions and policies of, this division at the local level." (Pub. Res. Code §30108.6.)

Commission's purview. Importantly, the CITY's regulation of STRs is part of its business license regulation found in Title 7, not the zoning code.

Plaintiffs' theory that Ordinance 18-005 must be submitted for Commission approval prior to enactment is untenable; it would require all coastal jurisdiction zoning laws either be certified as part of an LCP or be treated as "development" and issued a CDP. The legislature specifically withheld such power to regulate local jurisdictions from the Commission. Plaintiffs' contention Ordinance 18-005 effectively amends the CITY's LUP is without merit. They fail to identify a single sentence of the CITY's 1989 LUP relevant to STRs. (CITY RJN, Ex. 5.) Further, Plaintiffs ignore that at the time of certification, the CITY prohibited all STRs. The CITY has allowed STRs since 2010, passing multiple ordinances to regulate STRs throughout the CITY.

Plaintiffs' challenge is premature as the CITY is voluntarily developing an LCP and seeking Commission certification.[3] The LUP, now pending Commission certification, recognizes CITY regulation of STRs. "Short term vacation rentals . . . are permitted in the coastal zone ***so long as such rentals do not adversely impact coastal resources or unduly burden residential neighborhoods."*** (CITY RJN, Ex. 7, p. 116.) Similarly, the Council-adopted IP provides:

> The City may continue to permit short-term lodgings as a means of providing lower cost overnight visitor accommodations while continuing to prevent conditions leading to increased demand for City services and adverse impacts in residential areas and coastal resources. (*Id*., Ex. 8, p. 36.).

CITY regulation does not "amend" its LCP, it aligns with it.

Importantly, that the LCP certification process is not yet complete does not invalidate Ordinance 18-005 or prevent the CITY from exercising its constitutional land use powers. Legislative acts such as Ordinance 18-005 are enacted pursuant to the CITY's police power and are not subject to Commission review. The Ordinance exercises reasonable regulation of STR activity as expressly endorsed by the Commission and consistent with the CITY's LUP and

[3] The Coastal Act directing cities to seek certified LCPs does not impose a mandatory duty under California law. (*People v. Allen* (2007) 42 Cal.4th 91, 101; *Edwards v. Steele* (1979) 25 Cal.3d 406-409.) The Legislature provided local governments incentive to do so by transferring control over coastal development permits.

pending LCP. Plaintiffs also fail to recognize Ordinance 18-005 regulates STRs throughout the entire CITY, not just in the coastal zone. Currently, only 28 percent of CITY STRs lie within the coastal zone. (Harvey Decl., p. 6, ¶35) Striking the Ordinance based on the Coastal Act cannot and should not impede CITY regulation of the remaining 72 percent of STRs located outside the coastal zone.

Because there is no conflict between Ordinance 18-005 and the CITY's 1989 LUP and pending LCP, Plaintiffs' motion fails as a matter of law or, at least, the purported conflict raises an issue of material fact that is fatal to Plaintiffs' motion.

3. Adopting Ordinance 18-005 Is Not "Development" Under the Coastal Act.

Plaintiffs mistakenly contend changes in a coastal city's zoning laws constitute "development" and require Coastal Commission approval. Yet, neither the Coastal Act's text nor any reported case suggests a local law itself constitutes "development" under the Act. Development means a "change in the density or intensity of use of land," not a change in local law governing potential or allowable density or intensity of land uses within a zoning district. (Pub. Res. Code, §30106.) Whether Ordinance 18-005, which addresses overly dense blocks, constitutes development under the Act thus raises a material issue of triable fact.

Following the 1976 enactment of the Coastal Act, cities have adopted zoning ordinances without obtaining CDPs. The CITY is no exception. Zoning laws enable potential use or development of property; CDPs regulate actual development of property. The Commission may withhold a permit from a property owner for development incompatible with Coastal Act policies but cannot prevent the CITY from adopting zoning rules or otherwise exercising its police power.

Case law recognizes "development" does not extend to adoption of a zoning ordinance of general applicability. In *City of Dana Point v. California Coastal Comm'n* (2013) 217 Cal.App.4th 170, the Court of Appeal concluded the Commission lacked jurisdiction to review a city ordinance, but could take action against actual development (e.g., gates and time restrictions limiting beach access) authorized by the ordinance if inconsistent with the Coastal Act or the city's LUP. (*Id*.) The appellate court carefully distinguished between "development" mandated

by the ordinance and subject to Commission review, and the ordinance itself, which is not. (*Id.* at 190-192.) Even if STRs are considered "development," it is the physical act of renting the STR, rather than the Council's adoption of Ordinance 18-005, that would require a CDP.

Plaintiffs' mischaracterize *Surfrider Foundation v. Martins Beach 1, LLC* (2017) 14 Cal.App.4th 238. In that case, private property owners erected a gate closing off the only public access to the coast at that site. The court found the Coastal Act applied to the owners and they were required to apply for a CDP. The CITY agrees. Plaintiffs—not the CITY—would need to obtain CDPs together with CITY licenses to conduct STR activity in the coastal zone. Plaintiffs' reliance on *Greenfield v. Mandalay Shores Community Association* (2018) 21 Cal.App.5th 896 is similarly misplaced. That case involved a homeowner's association's (HOA) ban on STRs, impacting 1400 units. The Court stated that STR bans are a matter for the city and the Coastal Commission to address and cannot be regulated by private actors such as an HOA. The Court emphasized it is not in business of tailoring STR rules:

> That should be left for the City, which is in the process of amending its coastal zoning section to specifically deal with [STRs] and the Coastal Commission, which reviews any proposed amendment to the local coastal plan.

(*Id.* at p. 901.) The court was persuaded by the fact the HOA, and not the city, had enacted an ordinance banning STRs, which the city had allowed for decades. (*Ibid.*) Here, of course, the CITY also regulates and allows STRs in the coastal zone as it may under *Greenfield.* However, because the simple adoption of Ordinance 18-005, and not its application to particular properties, is not development, Plaintiffs' motion fails.

4. Ordinance 18-005 is Consistent with Coastal Act Policies.

The Legislature enacted broad policies in the Coastal Act, with goals of maximizing public coastal access and preserving sensitive coastal resources. Plaintiffs misconstrue policy language as specific mandates. However, the Coastal Act does not equate public access with overnight accommodations; it simply provides "use of private lands suitable for visitor-serving commercial recreational facilities designed to enhance public opportunities for coastal recreation shall have priority over private residential, general industrial, or general commercial

development." (Pub. Res. Code, §30222.) Further, the Act does not require a city to allow STR use within residential zones. Plaintiffs cannot point to any provision of law that requires STRs or a specific use in any particular zone.

The CITY agrees the Coastal Act should be liberally construed to effectuate the purpose of the statute. However, Plaintiffs ignore the Coastal Act's "purpose" and misconstrue it to fundamentally change the statute, arguing the Act supersedes the police power of a local jurisdiction. Plaintiffs err; the statute's Legislative intent explicitly preserves local governments' exercise of police powers.

> The Legislature further finds and declares that: . . . (a) To achieve maximum responsiveness to local conditions, accountability, and public accessibility, it is necessary to rely heavily on local government and local land use planning procedures and enforcement. (Pub. Res. Code §30004.)

Plaintiffs improperly assert the Commission has a greatly expanded role, which is inappropriate for an executive branch agency. Plaintiffs fail to cite any evidence the CITY does not provide sufficient public access to coastal areas or recreational opportunities.

Plaintiffs' reliance upon a 2016 policy letter from the Coastal Commission is misplaced. While the letter expresses disapproval of blanket STR ***bans*** in the coastal zone, it also provides:

> [W]here a community ***already provides an ample supply of vacation rentals*** and where further proliferation of vacation rentals would impair community character or other coastal resources, ***restrictions may be appropriate.*** (Plaintiffs Ex. 19, emphasis added.)

The Commission supports "***developing reasonable and balanced regulations*** that can be tailored to address the specific issues within your community to allow for vacation rentals, while providing appropriate regulation to ensure consistency with applicable laws." (*Id.*, emphasis added.) The Commission thus recognizes CITY regulation of STRs is appropriate. The CITY is free to impose reasonable regulations on businesses where the regulation advances CITY land use goals.

No law of general applicability such as Ordinance 18-005 has been struck down as preempted by any policy addressed by the Coastal Act. The California Supreme Court rejected an argument similar to Plaintiffs' in *Sierra Club v. California Coastal Com'n* (2005) 35 Cal.4th 839. *Sierra Club* argued the Coastal Act should be liberally construed to broaden the scope of

the Coastal Act. The Supreme Court disagreed*:*

> First, these broad statements regarding the general goals of the Coastal Act cannot overcome the express terms of section 30604(d), through which the Legislature has specifically addressed the limits of both the Coastal Act's reach and the Commission's power. Second, Sierra Club's construction would effectively transfer control over proposed development outside the coastal zone from local authorities to the Commission, simply because part of a proposed project happens to be inside the coastal zone, but the general statements Sierra Club cites reflect no legislative intent to effect such a transfer of control. (*Id.* at 856.)

The general goals of the Coastal Act do not override the limited quasi-judicial power granted the Commission in relation to local governments, and do not trump the CITY's legislative power. Plaintiffs' broad construction of the the Coastal Act attempts to limit the police power of local jurisdictions. This is clearly contrary to the intent of the Coastal Act. Ordinance 18-005 is consistent with the purposes of the Act; it presents a careful, good-faith attempt to preserve the residential character of neighborhoods, protect available and affordable housing in the CITY, and promote coastal access.

C. Triable Fact Issues Exist as to Plaintiffs' Claim of Vested Rights.

1. STR Regulations Serve Legitimate Governmental Interests.

The CITY determined to allow STR licenses by deciding the extent to which STR activity is in the public interest, limits needed to protect the public, and how best to regulate STRs. These regulations are well within the CITY's police power. (e.g., *IT Corp v. County of Imperial* (1983) 35 Cal.3d 63, 70 [affirming denial of injunction against County's enforcement of land use permit for hazardous waste disposal facility and grant of injunction to County].) Plaintiffs disagree with these regulations, but this is insufficient to invalidate them.

STR regulation is a valid exercise of CITY police power to further legitimate governmental interests. The CITY's regulations are consistent with Planning and Zoning Law, the Coastal Act, the Charter, General Plan, and Housing Element. They promote valid governmental interests – the quality of life in the CITY's residential neighborhoods and the balance of economic activity and domestic tranquility; these are not unreasonable, arbitrary or capricious. Plaintiffs fail to demonstrate CITY STR regulations do not reasonably relate to governmental interests.

Plaintiffs mischaracterize the CITY as imposing a universal ban on short-term visitors within CITY limits. (*See, e.g.,* Memorandum of Point and Authorities in Support of Plaintiffs' Motion (MPA) at p. 19 fn.7.) Neither Ordinance 18-005 nor Measure M restrict operations of hotels, motels, or other short-term lodging, but just ensure these occur in appropriate zones, with proper regulation. Visitors are not banned from enjoying Pacific Grove.

Neither Ordinance 18-005 nor Measure M effect a wholesale STR ban; rather, like other valid land-use regulations, these delineate where STRs are permitted and where they are not, using criteria that protect public health, safety, and welfare of CITY residents. Licensed STRs that conform to density and cap requirements may continue operations within coastal and commercial zones as prescribed by law. Ordinance 18-005 is no different than any other local planning or zoning law that aims to control where certain uses are permitted. (*See, e.g., Ewing v. City of Carmel-by-the-Sea* (1991) 234 Cal.App.3d 1579, 1593 ["Line drawing is the essence of zoning," upholding a similar STR ordinance].) Measure M, passed by popular vote, is similarly targeted, affecting only STRs in residential zones outside of the coastal zone. (*See* Measure M §§ 2, 3.) Measure M does not ban all STRs; it is a tailored local planning law that controls the location where select uses are allowed. (*Ewing, supra,* 234 Cal.App.3d at p. 1593.)

Plaintiffs attempt to distinguish *Ewing* on the ground the City Council made no "factual findings [showing] that such land uses were inconsistent with the traditional character of the neighborhood." Plaintiffs ignore the substantial evidence found in the extensive legislative record supporting the Council's decision. These facts evidence hours of public hearings and extended communications in support of the CITY's Findings, which are incorporated within Ordinance 18-005 and Measure M. (*See, e.g.*, Ord. 18-005 (Fact #2), Measure M § 1.C (Findings); *cf. San Mateo County Coastal Landowners' Ass'n v. County of San Mateo* (1995) 38 Cal.App.4th 523, 554-555 [initiative's findings used to determine whether initiative's policies were reasonably germane to its stated purpose].) Indeed, by adopting Measure M, the people of Pacific Grove expressly adopted facts to find STRs of residential properties fundamentally incompatible with residential land use designations such that prohibiting STRs is necessary to mitigate adverse impacts. (*Ibid.)*

Other cases relied on by Plaintiffs are distinguishable. *Younger v. County of El Dorado* involved a county ordinance essentially banning boating and "virtually all public use of [a] river." (*Younger*, (1979) 96 Cal.App.3d 403, 406.) Striking the ordinance, the court emphasized the river was uniquely suited for rafting and other activities such that a wholesale ban on public use was inappropriate without some legitimate, overriding concern. (*Id.* at 405.) The county did not articulate that concern in adopting the ordinance. Here, by contrast, the CITY held multiple public hearings and considered all affected interests. The facts demonstrate the CITY repeatedly refined the STR Program over the course of a decade to balance competing interests that included impacts on residential neighborhoods, the CITY's housing stock, affordability, and problems such as noise, parking, and lost tax revenue.

2. Plaintiffs Fail to Demonstrate Vested Rights to Renew Time-Limited STRs.

Plaintiffs claim a vested right to renew STR Licenses without any basis in fact or in law. Neither Ordinance 18-005 nor Measure M suspend or revoke STR Licenses. The STR License Program has always been time-limited; STR licenses are issued for a one-year term. Each license renewal is subject to then-current rules, and no STR license may be automatically renewed. (CITY RJN, Ex. 17, §7.40.080). Indeed, each STR License Application requires the applicant to acknowledge the license to be for a short-term. Here, each Plaintiff acknowledged that effect on their applications. Yet, Plaintiffs now ignore these provisions, and ignore their agreement to the expiration date shown on their licenses.

In the land-use context, the term "vested rights" generally implicates a right of development — not use. Plaintiffs misrepresent the Court's decision in *Avco Community Developers, Inc. v. South Coast Regional Comm'n*. (1976) 17 Cal.3d 785. There, the court states,

> It has long been the rule . . . that if a property owner has performed substantial work and incurred substantial liabilities in good faith reliance upon a permit issued by the government, he acquires a vested right *to complete construction in accordance with the terms of the permit*. (*Id.* at p. 791, emphasis added.)

Case law establishes land-use applicants are bound by terms and conditions of use, including time limitations. (*Metropolitan Outdoor Advertising Corp. v. City of Santa Ana* (1994) 23 Cal.App.4th 1401.) In *Metropolitan*, plaintiff sought a use permit to erect and maintain a

billboard. (*Ibid.*) When the permit was granted, plaintiff agreed to all provisions, including removal of the sign after the permit's expiration. Plaintiff agreed to the conditional use permit since it considered the terms and conditions advantageous even though the permit was not indefinite, and plaintiff would have to remove the billboard in the future. (*Id.* at p. 1404.)

So, too, here. STR Licenses issue for a one-year term, expiring each March 31st. Regulations limit availability of future licenses. (CITY RJN, Ex. 17, §7.40.070(b).) There is no vested right to renewal. (*Metropolitan, supra*, 23 Cal.App.4th at 1404.) Plaintiffs were informed at the time of application that all time-limited STR licenses required renewal, which was not guaranteed, and if renewed, would be subject to then-current CITY regulations.

Further, as a practical necessity, courts have long held cities can prohibit an earlier authorized use so long as they provide reasonable time to amortize that use. (See, e.g., *City of Los Angeles v. Gage* (1954) 127 Cal.App.2d 442.) Ordinance 18-005 provided license holders a 14-month sunset period, stretching beyond the length of all existing STR licenses. This amortization period exceeds the annual expiration, allowing licensees to recoup their investment, and reasonably amortizes nonconforming uses. (*City of Whittier v. Walnut Properties, Inc.* (1983) 149 Cal.App.3d 633, 644 [upholding 120-day amortization period for adult entertainment]; *Castner v. City of Oakland* (1982)129 Cal.App.3d 94, 96-97 [upholding 12-month period for same]; *People v. Gates* (1974) 41 Cal.App.3d 590, 603 [upholding 18-month amortization period for auto wrecking yard].)

Similarly, Measure M provides an even longer sunset period, setting an 18-month amortization period for existing STR licenses. Licenses in residential areas outside the coastal zone may continue using these STRs units well past their annual expiration date. Measure M's amortization period exceeds the useful life of existing licenses and allows licensees to collect revenue until the expiration date and prepare for an alternate use. This long amortization period is more than reasonable given any improvements to a property for STR use will be equally necessary for residential use, e.g., new roofs, upgraded kitchen appliances, etc.

Even if STR licenses could vest, they only vest upon the terms on which they issued, including expiration dates. Plaintiffs' STR licenses must expire by their terms; Plaintiffs have

no vested right to automatic indefinite renewal to rent their homes through Airbnb. Triable issues of fact exist as to the governing STR licenses under Ordinance 18-005 and Measure M.

3. Material Issues Exist as to Plaintiffs' Procedural Due Process Claims.

Absent a vested property right, there is no property interest to which due process might attach. Legislative action generally is not governed by "procedural due process requirements because it is not practical that everyone should have a direct voice in legislative decisions; elections provide the check there." (*Calvert v. County of Yuba* (2006) 145 Cal.App.4th 613, 622.) Oliver Wendell Holmes wrote more than a century ago:

> General statutes within the state power are passed that affect the person or property of individuals […] without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule.

(*Bi-Metallic Inv. Co. v. State Bd. of Equalization* (1915) 239 U.S. 441, 445). As the Court recognized in finding no due process right at issue: "Where a rule of conduct applies to more than a few people, it is impracticable that everyone should have a direct voice in its adoption." (*Id.* at 445.) Thus, procedural due process, as to legislation, is at the ballot box.

Plaintiffs argue the STR lottery was arbitrary and violated due process. The Supreme Court recognizes "in some circumstances, selection by lot is – in Judge Scalia's words – one of the 'realities of government.'" (*Singh v. Joshi* (E.D.N.Y. 2016) 152 F.Supp.3d 112, 126.) Governmental lottery as a means to select is evidenced, for example, by random drug testing or the courts' own jury selection process. The key is "participation on an equal footing: 'Each [voter] stands an equal opportunity of being benefitted or injured by the lottery… There can be no denial of equal protection when all share an equal opportunity to have their votes count in an election.'" (*Ibid.*, citing, *Campbell v. Board of Educ.* (E.D.N.Y. 1970) 310 F.Supp. 94, 103-04.)

> There are times when selection by lottery actually insures a fairer outcome than some arguably less arbitrary mechanism precisely because it eliminates the possibility that improper considerations will infect the decision. A fair lottery, in those situations, will insure a fair outcome.

(*Ibid*., citing *Cf. Drake v. Delta Air Lines, Inc*. (2d Cir. 1998) 147 F.3d 169, 172) "Use of a lottery, in which every owner was treated exactly like every other owner, entirely comports with

equal protection." (*Id*. at p. 127.)

Plaintiffs cite *Berlinghieri v. Dep't of Motor Vehicles* (1983) 33 Cal. 3d 392, whereby the Court provides "Business or professional licensing cases have distinguished between the denial of an application for a license (non-vested right) and the suspension or revocation of an existing license (vested right)." (*Id*. at p. 296.) This comports with the CITY's position. Neither Ordinance 18-005 nor Measure M revoke or suspend any existing STR License; they simply deny future applications for licenses. Plaintiffs also cite *Spindler Realty Corp. v. Monning* (1966) 243 Cal. App. 2d 255, which supports the CITY's position. The *Spindler* court states "a land owner has a vested right to use his property in accordance with the terms of his permit, and that a valid permit once issued cannot be arbitrarily revoked." (*Id.* at p. 267.) Here, too, Plaintiffs have a right to use property according to the terms of their STR licenses, including terms of expiration to which they consented. As stated, Plaintiffs acknowledged and agreed their STR licenses would expire annually, and that there is no guarantee of renewal.

Plaintiffs' reliance on *Doe v. Cal. Dep't of Justice* (2009) 173 Cal.App.4th 1095 is misplaced. In that case, defendant sought to apply new legislation retroactively; plaintiffs challenged it, claiming a vested right interest. Here, by contrast, neither Ordinance 18-005 nor Measure M apply retroactively; they only affect future interests.

The CITY treated all STR license holders similarly; each STR license holder had equal footing. Plaintiffs fail to produce factual evidence to support the argument that the lottery was arbitrary; in fact, Plaintiffs repeatedly admit the selection process was "random" and lacked any other consideration. (Plaintiffs MPA at pp. 7, 13.)

4. Material Factual Issues Exist as to Plaintiffs' Substantive Due Process Claims.

Due process as to economic regulation requires only minimum rationality. Courts "do not substitute their social and economic beliefs for those of the legislative body." (See e.g., *Jensen v. Franchise Tax Bd.* (2009) 178 Cal.App.4th 426 [court upheld tax on incomes over $1 million to fund mental health programs]; *Ferguson v. Skrupa* (1963) 372 U.S. 726, 730 [no searching review of statute governing debt adjusting].)

Here, the CITY used the lottery as a rational way to reduce the number of STR licenses to the approved threshold, to avoid favoritism and distribute economic privileges. Council made findings the regulation was needed to protect public health, safety, and welfare. Plaintiffs provide no factual evidence to demonstrate the regulation was not necessary.

Plaintiffs mistakenly rely on *Arnel Development Co. v. City of Costa Mesa*. The *Arnel* court held an initiative to spot-zone three contiguous parcels was a "thinly-veiled" attempt to block development on one of those parcels; this was discriminatory and lacked a rational relationship to the broader public welfare. (*Arnel Development Co. v. City of Costa Mesa* (1981) 126 Cal.App.3d 330, 337-338.) In contrast, Ordinance 18-005 applies to all properties within the CITY; Measure M applies to all residential zones outside the coastal zone. (PGMC Chapter 7.40, Measure M §§ 2, 3.) Unlike *Arnel*, CITY regulations are of general applicability and not directed at specific properties. "While arbitrary actions directed at a specific property may be invalidated [citation omitted], the actions taken here were general in nature." (*Stubblefield Construction Co. v. City of San Bernardino* (1995) 32 Cal.App.4th 687, 711 [refusing to apply *Arnel* to an ordinance that restricted all similarly situated properties throughout a city].) Additionally, the relationship between Measure M's prohibition and purpose are clear. (*Ibid.* § 1 ["Purpose, Effect, and Findings," discussing preservation of Pacific Grove's residential character].) *Arnel* is not on point. (*See Stubblefield, supra*, 32 Cal.App.4th at p. 711.)

Neither Ordinance 18-005 nor Measure M deprive any owner of meaningful alternative uses of the property. Other residential uses are allowed – the property can be rented for a long-term, used for home sharing[4], personal enjoyment, or offered for sale. The property can similarly be used for house sitting, pet sitting, work, or non-commercial arrangements. Landowners have no constitutional right to "develop property for maximum economic profit, or to receive compensation when land use regulations restrict their ability to do so." (*Terminals Equipment Co., Inc.* v. *City and County of San Francisco* (1990) 221 Cal.App.3d 234, 244.) Plaintiffs

[4] Plaintiffs confuse home-sharing with STRs. Home sharing is where "residents host guests in their homes, for compensation, for periods of 30 consecutive days or less, while at least one of the dwelling unit's residents lives in the dwelling unit." The home sharing permit is not subject to annual expiration. (PGMC §23.64.370)

benefit from their property investment, whether allowed to hold an STR license or not.

CITY's situation is akin to *Ewing v. City of Carmel-by-the-Sea.* (*Ewing*, *supra*, 234 Cal.App.3d 1579.) Following decades of Supreme Court precedent, the court reasoned the ordinance's stated purpose, "maintenance of the character of residential neighborhoods," was "a proper purpose of zoning." (*Id.* at p. 1590, citing *Village of Euclid v. Ambler Realty Co.* (1926) 272 U.S. 365; *Miller v. Board of Public Works* (1925) 195 Cal. 477.) The Court upheld the ordinance as a rational and reasonable limitation on the use of property because it restricted uses in furtherance of that purpose. (*Id.* at pp. 1592-1593.) Here, similarly, the CITY determined STR regulation necessary to protect the quality of residential neighborhoods.

O'Hagen v. Bd. of Zoning Adjustment (1917) 19 Cal. App. 3d 151 is distinguishable. In *O'Hagen*, the city brought a nuisance action against a single property owner to revoke a permit. The Court ruled, "[a] compelling public necessity warranting the revocation of a use permit for a lawful business may exist where the conduct of that business constitutes a nuisance." (*Id.* at p. 158.) The CITY's ordinance is distinguishable as it is broadly applicable to all properties within the CITY. Further, neither Ordinance 18-005 nor Measure M revoke existing STR Licenses; they simply limit future applications.

Plaintiffs fail to present uncontested facts to support their substantive due process claims. Controverted facts remain as to why regulation was needed to protect public health, safety, and welfare, and as to meaningful alternative uses of property available to Plaintiffs.

V. CONCLUSION

The CITY respectfully requests the Court deny Plaintiffs' motion for summary judgment and adjudication. Plaintiffs fail to demonstrate there are no triable issues of fact with respect to any or all of their causes of action.

Dated: 5/16/19

De LAY & LAREDO

By: _____
David C. Laredo
Attorneys for Defendants

PROOF OF SERVICE

I, Robin Rakouska, declare as follows:

I am employed in the City of Pacific Grove and County of Monterey, California. I am over the age of eighteen years, and not a party to the within cause; my business address is De LAY & LAREDO, 606 Forest Avenue, Pacific Grove, California 93950.

On May 17, 2019, I served the within:

- **DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE FOR SUMMARY ADJUDICATION**
- **DECLARATION OF BEN HARVEY, CITY MANAGER, IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE FOR SUMMARY ADJUDICATION**
- **DEFENDANTS' OPPOSITION TO PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE SUMMARY ADJUDCIATION**
- **DEFENDANTS' OBJECTIONS TO PLAINTIFFS' EVIDENCE SUBMITTED IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE FOR SUMMARY ADJUDICATION**
- **DEFENDANTS' SEPARATE STATEMENT IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE FOR SUMMARY ADJUDICATION**
- **DEFENDANTS' REQUEST FOR JUDICIAL NOTICE IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE FOR SUMMARY ADJUDICATION**

on the interested parties in this action addressed as follows:

SCHARF-NORTON CENTER FOR CONSTITUTIONAL LITIGATION AT THE GOLDWATER INSTITUTE
Timothy Sandefur
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☒ (BY MAIL) By placing such envelope, with postage thereon fully prepaid for first class mail, for collection and mailing at De Lay & Laredo, Pacific Grove, California following ordinary business practice. I am readily familiar with the practice being that in the ordinary course of business; correspondence is deposited in the United States Postal Service the same day as it is placed for collection.

☒ (BY ELECTRONIC SERVICE) By electronically mailing a true and correct copy through the electronic mail system from robin@laredolaw.net to the email addresses set forth above. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made. Executed on May 17, 2019, at Pacific Grove, California.

Robin Rakouska