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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF MONTEREY**

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

Plaintiffs,

vs.

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 Councilmember of the City of Pacific Grove,

Defendants.

No. 18CV002411

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE FOR SUMMARY ADJUDICATION

(Dept. 13 – Hon. Vanessa W. Vallarta)

INTRODUCTION

The City's opposition to Plaintiffs' motion for summary judgment/adjudication identifies no factual disputes precluding summary judgment/adjudication, and its legal

arguments are flatly incorrect. The City's short-term rental (STR) bans require approval from the California Coastal Commission (Commission). No such approval has been obtained, and the prohibition is therefore unlawful. The City's use of a random lottery to revoke Plaintiffs' right to rent their homes is, almost by definition, a violation of due process, and the lack of connection between that revocation and the City's legitimate goals is, too.

ARGUMENT

I. Plaintiffs' motion is timely.

The City's contention that this Motion is premature is incorrect for at least three reasons. First, the City's claim that Plaintiffs are seeking summary judgment "before the City has prepared a record of the challenged legislative acts" (Defendants' Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Summary Judgment (Opp'n) at 1.) makes no sense, because the City *has* produced the record, and the City does not indicate what specific additional facts it thinks it should provide. "It is not sufficient" to defeat a summary judgment motion "merely to indicate further discovery or investigation is contemplated." *Roth v. Rhodes*, 25 Cal. App. 4th 530, 548 (1994). The City must "set forth *the specific facts*" that preclude summary judgment. *Jade Fashion & Co. v. Harkham Indus., Inc*., 229 Cal. App. 4th 635, 643 (2014) (emphasis added). It has not done so.[1]

Second, the City's contention that this motion is premature because the City is awaiting approval from the Commission (Opp'n at 1) is even more unavailing. The central point of this case is that the City is enforcing a ban on STRs that has not been approved by the Commission. The fact that the Commission has not approved that ban—and may never do so—cannot be premature, because the lack of approval is the *very basis* of Plaintiffs' contentions. The fact that the City is enforcing an Ordinance that has

[1] More puzzling, it was the *City's* suggestion that an administrative record would be appropriate here, and the Parties agreed to utilize an Administrative Record in lieu of discovery because "this case is based on purely legal questions." (Parties' Joint Case Management Conference Statement (CMC), Nov. 8, 2018 at 2.)

not yet been—and may never be—approved by the Commission does not render Plaintiffs' lawsuit premature. On the contrary, it is the *City's* enforcement of Ordinance 18-005 and Measure M *before* obtaining legally required Commission approval that is premature. *See Kracke v. City of Santa Barbara,* No. 56-2016-00490376-CU-WM-VTA, Ventura Cnty. Super. Ct., Mar. 8, 2019) at 29.

Finally, the City says triable issues of fact exist regarding Plaintiffs' Coastal Act and due process claims, but it identifies none. Opp'n at 7, 13. It claims that "[w]hether Ordinance 18-005 … constitutes development … raises a material issue of triable fact," (*id.* at 10), but that is obviously a legal, not a factual, question—indeed, it is the *central* legal question in this case: it goes to whether Commission approval is required. The City's claims that "factual issues exist" as to Plaintiffs' procedural and substantive due process claims, (Opp'n at 17-18), fail for the same reason: it identifies no factual issues, and only argues legal issues.

II. Ordinance 18-005 occurred outside the City's LUP and constitutes an amendment to the LCP and/or "development" requiring Commission approval.

Ordinance 18-005 violates the Coastal Act because the City passed and enforced it outside of the context of a Commission-approved Local Coastal Plan (LCP), Cal. Pub. Res. Code § 30512(c), and it constitutes a "development." *Id.* §§ 30108.6, 30510.

First, the City's contention that it has "authority to frame local land use regulations" (Opp'n at 6) is irrelevant. Whatever deference the City is owed regarding zoning, zoning decisions in the Coastal Zone must comport with the Coastal Act. Plaintiffs do not argue (as the City claims) that the Commission must review every ordinance on an *ad hoc* basis (Opp'n at 8), or that "all coastal jurisdiction zoning laws [must] either be certified as part of an LCP or be treated as 'development.'" Opp'n at 9.) Plaintiffs instead contend that the Commission must certify changes to a coastal city's zoning laws that effectively amend a LCP if those changes affect the Act's policies, Cal. Pub. Res. Code §30512(c)—and that includes any changes that constitute "development." Because Ordinance 18-005 deviates from the City's LUP (the only part

of its LCP that the Commission has certified) *and* constitutes "development," it must be approved by the Commission—and that has not happened.

The City concedes that its LCP has not been approved by the Commission, and that the only portion of the LCP that ever was approved—its 1989 LUP—is *silent* with regard to short-term rentals (STRs). (Opp'n at 9.) Thus, the LUP did not prohibit STRs, notwithstanding the City's unsubstantiated contention otherwise. And that means Ordinance 18-005—which regulates and prohibits STRs—by definition deviates from the City's Commission-approved LUP. The Commission has never certified *any* of the City's STR regulations.[2] The fact that, as the City admits, not "a single sentence of the CITY's 1989 LUP [is] relevant to STRs" (Opp'n at 9) means that any regulation of STRs in the Coastal Zone, such as those added by Ordinance 18-005, must, by definition, "impose further conditions, restriction or limitations," 14 C.C.R. § 13554(d)(3), that differ from those contained in the LUP the Commission certified. Such amendments must be approved by the Commission, *id.* § 13551 and Cal. Pub. Res. Code § 30514(a), and it has not given the requisite approval.

The City argues that the Coastal Act does not define "development" as "a zoning ordinance of general applicability." Opp'n at 10. But the term "development" is liberally construed, *Surfrider Foundation v. Martins Beach 1, LLC,* 14 Cal. App. 5th 238, 252 (2017), and includes any "change in the intensity of [land] use," *id*. at 250—*including* prohibitions on STRs. *Greenfield v. Mandalay Shores Cmty. Ass'n*, 21 Cal. App. 5th 896, 901 (2018) (An "STR ban changes the intensity of use and access to single family residences in the [] Coastal Zone."). True, those cases involved private actors, not cities,

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[2] There is no apparent basis for the City's claim that "at the time of [the 1989 LUP] certification, the City prohibited all STRs." Opp'n at 9. First, the City identifies no ordinance or other legal authority that prohibited STRs in 1989. But even if the City did pass some such ordinance banning STRs at that time, *that* ordinance or decision was never approved by the Commission. The Commission only approved the LUP, which was silent on the subject.

but that is not the point.[3] The cases make clear that changes in land use regulations that result in changes in the intensity of land use—like banning STRs—must be approved by the Commission.

The Commission itself even says so. It has made clear that "regulation of short-term/vacation rentals … constitutes development to which the Coastal Act and LCPs must apply." (Pls' Statement of Undisputed Material Facts (PSOF) ¶ 45.) And the Ventura County Superior Court agreed just a few months ago in *Kracke, supra*, when it held that Santa Barbara was required to secure Commission approval before eliminating STRs from residential areas, including in the Coastal Zone.[4] The court held that "any 'person'—*which includes a city*—'wishing to perform or undertake any development in the coastal zone … shall obtain a coastal development permit." *Id.* at 17 (citations omitted; emphasis added). Because the city "deliberately acted to create a change" in its STR policy—a change that "was not intended to target specific [STR] owners based on a case-by-case evaluation," but "was directed against *all owners*" of STRs—its action constituted "development" under the Act. *Id.* at 22-23.

That "[t]he availability of [STRs] in coastal zones not only increases the supply of over-night short-term lodging, but … provides an opportunity for families that hotels and motels cannot provide" is "in line with common sense," and the reduction in their availability is a "change" that constitutes "development." *Id.* at 24-25. Under the Coastal Act, it is "not within the City's discretion," but rather is "a mandatory duty to obtain a CDP before undertaking a 'development.'" *Id.* at 28.

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[3] In fact, the City's brief quotes, but fails to emphasize, the significant sentence in *Greenfield:* "The decision to ban or regulate STRs must be made by the City *and Coastal Commission*." *Id*. at 901–02 (emphasis added).

[4] Like Pacific Grove, Santa Barbara's LUP was certified by the Commission in the 1980s and did (and does) not reference STRs. *Kracke, supra* at 6. And, like Pacific Grove, Santa Barbara is in the process of seeking Commission approval for its LCP. *Id.* at 14-15.

In short, Pacific Grove's new prohibition on STRs, which—as the City admits—did not exist in the LUP that the Commission approved, is *both* an "amendment" to the LCP *and* a form of "development"—both of which require Commission approval.

Finally, the City's contention that Ordinance 18-005 is consistent with Coastal Act *policies* is not only incorrect but irrelevant. Whether it comports with those *policies* is not for this Court to decide. The City was required to get Commission approval for Ordinance 18-005. It has not. Enforcement of that Ordinance is therefore unlawful.

III. Ordinance 18-005 and Measure M violate Plaintiffs' due process rights.

By arbitrarily eliminating Plaintiffs' right to rent their homes without regard to whether they have been a source of harm to the public, Ordinance 18-005 and Measure M violate Plaintiffs' due process rights. The City makes two arguments: that the lottery mechanism in Ordinance 18-005 is a legislative, not adjudicative act, so that due process was not required; and that Plaintiffs had no property right to which due process could apply. Both are wrong.

A. Ordinance 18-005 violates Plaintiffs' procedural due process rights.

The City contends that no procedural due process is required because the lottery was legislative in nature. Opp'n at 17. But the lottery was not legislative; rather it was adjudicative—or should have been. The difference between legislative and adjudicative is that a legislative process involves setting general standards, whereas an adjudicative process involves "the application of general standards to specific parcels of real property." *Horn v. Ventura,* 24 Cal. 3d 605, 614 (1979). The *adoption* of Ordinance 18-005 may have been legislative, but *applying* its provisions to Plaintiffs was "governmental conduct, affecting the relatively few, [which] is [supposed to be] 'determined by facts peculiar to the individual case,'" and therefore "'adjudicatory' in nature." *Id.* Because imposing the Ordinance on particular property owners was adjudicative, the owners were entitled to an opportunity to be heard and a determination based on facts, not a purely random lottery. The lottery deprived them of their rights without *any* sort of proceeding, administrative or otherwise. That is the opposite of due

process. *United States v. Redondo-Lemos*, 955 F.2d 1296, 1299 (9th Cir. 1992) ("[I]t would offend common notions of justice to have [certain legal decisions] made on the basis of a dart throw, a coin toss or some other arbitrary or capricious process."). In fact, under that random lottery, STR owners who caused nuisances could be allowed to keep their licenses, while responsible homeowners and renters like Plaintiffs could be stripped of theirs.

The City claims the lottery satisfied procedural due process. Opp'n at 17-18. There may be times when randomness is fair—but not when it comes to applying land use regulations to parcels of property. The City's authority to enforce zoning rules, broad as it may be, must bear a reasonable nexus to the problems the City purports to address. *O'Hagen v. Bd. of Zoning Adjustment*, 19 Cal. App. 3d 151, 165 (1971). Since applying nuisance rules to specific property owners who are licensed to operate STRs is an adjudicative act, it is by definition arbitrary to *disregard* whether or not they committed nuisances and to determine their rights in a random fashion.[5]

The cases cited by the City are inapposite. *Singh v. Joshi*, 152 F.Supp.3d 112 (E.D.N.Y. 2016), involved the application of a regulation with which all licensed taxicabs would eventually have to comply anyway. *Id.* at 126. Other cases approving random processes also deal with situations in which there are no relevant distinctions between the participants, such as the drawing of polling place boundaries, as in *Campbell v. Bd. of Educ.*, 310 F. Supp. 94, 103 (E.D.N.Y. 1970), or where no constitutionally protected interest was at stake. But there *are* relevant differences between participants here—the very differences the City claims the Ordinance addresses: the nuisances allegedly caused by STRs. Yet homeowners are deprived of

[5] "It would be preposterous to concede that … without a hearing on the merits of the application, with or without reason, or upon ex parte statements or rumors, with no opportunity of refuting them, the board could grant or deny a petition for license. This is not the purpose or spirit with which regulatory statutes are enacted." *Fascination, Inc. v. Hoover*, 39 Cal. 2d 260, 270 (1952). The City's reliance on *Ewing v. Carmel-By-The-Sea*, 234 Cal. App. 3d 1579 (1991), is therefore misplaced, since that case did not involve an "arbitrary or unreasonable" government act as this case does. *Id*. at 1593.

their rights without regard to their nuisance history or *any other relevant factor*. This violates due process.

B. Plaintiffs had rights protected by due process.

The City contends that Plaintiffs had no rights protected by due process because their licenses were valid only for limited times. Opp'n at 15-16.[6] But due process applies to *interests,* not in some formalistic manner triggered by the possession of a permit. "Interference with the right to continue an established business is far more serious than the interference a property owner experiences when denied a conditional use permit in the first instance," and thus "[d]enial of an application to renew a permit merits a heightened judicial review." *Goat Hill Tavern v. Costa Mesa*, 6 Cal. App. 4th 1519, 1529-30 (1992). *Accord, Malibu Mountains Recreation, Inc. v. Cnty. of L.A.*, 67 Cal. App. 4th 359, 368 (1998); *Bauer v. San Diego*, 75 Cal. App. 4th 1281, 1295–96 (1999); *San Benito Foods v. Veneman*, 50 Cal. App. 4th 1889, 1897 (1996); *Almaden-Santa Clara Vineyards v. Paul,* 239 Cal. App. 2d 860, 865-66 (1966).

In all these cases, business owners had operated for years under permits, had spent money in reliance on those permits, and had the opportunity to obtain renewals of those permits revoked by the government. In all these cases, courts held that refusal to renew their permits deprived the owners of vested rights. This case falls squarely in line with that precedent. Here, too, Plaintiffs spent money repairing and improving their properties to use as STRs, PSOF ¶¶ 20, 30; operated for years without complaints, PSOF ¶¶ 24, 32–33; renewed their licenses repeatedly, PSOF ¶¶ 19, 25, 29, 34, 36; and detrimentally relied on the fact that their licenses would be renewed so long as they met the requirements. PSOF ¶¶ 20, 57, 59. Thus, the circumstances "are more like the revocation of a … permit than the mere issuance of one." *Goat Hill Tavern*, 6 Cal. App. 4th at 1530.

[6] The City characterizes this as a "material factual issue" (Opp'n at 13, 18), but the existence *vel non* of a protectable property interest is a legal issue on which summary judgment/adjudication is appropriate.

The City seems to view "sunsetting" a license as definitively cutting off the Plaintiffs' constitutional protections. But the law of permits does not work that way. Rather, whenever government "deprive[s] an individual of an *important interest*, it may not do so without affording the procedural due process." *Traverso v. People ex rel. Dep't of Transp.*, 6 Cal. 4th 1152, 1162 (1993) (emphasis added). An interest may exist even where a license does not. Plaintiffs obtained STR licenses and relied upon them, and will *entirely lose* their businesses without them. They therefore have the same legally cognizable interest in seeking renewal of those permits (absent an individualized, fact-based finding of wrongdoing on their part) that was recognized in *Goat Hill, Malibu Mountains Recreation, Bauer,* and other cited cases.

These cases, which all involved the vested right to continue operating businesses even under permits that required renewals, show why the City is wrong to say "vested rights" only refer to development rights, "not [to] use" rights. Opp'n at 15. They also show why *Metro. Outdoor Adver. Corp. v. Santa Ana*, 23 Cal. App. 4th 1401 (1994), on which the City relies, is inapplicable. There, the company expressly agreed to remove its sign at a specified time, and there was "no assertion" that this would harm its business. *Id.* at 1404. But here, there was no express agreement to cease STRs and eliminating Plaintiffs' right to seek renewal of their licenses will destroy their businesses.

The City arbitrarily barred a randomly-selected group of people from seeking the renewals that other property owners in the City may seek. That violates procedural due process. The City's ban on STRs in residential areas outside the Coastal Zone also lacks a rational connection to public health, safety, or welfare. The City fails to respond to Plaintiffs' arguments that Ordinance 18-005 and Measure M lack a rational connection to a legitimate government interest. Pls.' Mem. of P. & A. in Supp. of Mot. for Summ. J. at 15–17. It reiterates that preserving "domestic tranquility" is a legitimate government interest, which Plaintiffs do not deny, but make no response to Plaintiffs' evidence that these measures lack a rational connection to that goal. Because these measures eliminate existing rights without a factual showing that this is necessary, *O'Hagen*, 19 Cal. App.

3d at 165, and do so "without consideration of the various zoning alternatives or the best utilization of the property," *Arnel Dev. Co. v. Costa Mesa*, 126 Cal. App. 3d 330, 335 (1981), these measures violate Plaintiffs' substantive due process rights.[7]

CONCLUSION

For these reasons set forth above and in their Memorandum in Support, Plaintiffs respectfully request this Court to grant their Motion for Summary Judgment.

DATED this 12th day of June, 2019.

/s/ *Christina Sandefur*
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[7] The City's argument that it has allowed the Plaintiffs an "amortization" period is simply beside the point. Amortization is a form of just compensation for a taking of private property. *Tahoe Reg'l Planning Agency v. King*, 233 Cal. App. 3d 1365, 1395–1400 (1991). But Plaintiffs have not alleged a taking. A takings argument "presupposes what the government intends to do is otherwise constitutional," *E. Enter. v. Apfel*, 524 U.S. 498, 545 (1998) (Kennedy, J., concurring), and because the City's arbitrary deprivation of the Plaintiffs' rights violates due process, they do not presuppose that. Thus the question of the reasonableness of the purported amortization period is not before the Court.

CERTIFICATE OF SERVICE

I, Kris Schlott, declare as follows:

I am employed by the Goldwater Institute, Scharf-Norton Center for Constitutional Litigation. I am over the age of eighteen years, and not a party to the within cause; my business address is Goldwater Institute, 500 East Coronado Road, Phoenix, Arizona 85004. On June 12, 2019, I served the above Plaintiffs' Reply in Support of Their Motion for Summary Judgment or in the Alternative for Summary Adjudication on the interested parties in this action addressed via the electronic filing portal and email as follows:

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Dated this: 12th day of June, 2019

/s/ *Kris Schlott*
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