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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

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

(Dept. 13 – Hon. Vanessa W. Vallarta)

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs William and Susan Hobbs and Donald and Irma Shirkey ("Plaintiffs") hereby move for summary judgment, or in the alternative, for summary adjudication, pursuant to California Code of Civil Procedure § 437(c). Plaintiffs seek a declaration that Pacific Grove Ordinance 18-005 and the Initiative to Preserve and Protect Pacific Grove's Residential Character ("Measure M") violate Plaintiffs' constitutional rights—specifically their right to choose whether to allow guests to stay in their home—and also that Ordinance 18-005 violates the California Coastal Act. Plaintiffs also request that this Court enter an order permanently enjoining Defendants City of Pacific Grove and Pacific Grove Mayor and Councilmembers, in their official capacities, ("the City") from enforcing these challenged provisions or divesting Plaintiffs of their short-term rental licenses under Ordinance 18-005 or Measure M.

By adopting and enforcing Ordinance 18-005, the City has violated and is violating the California Coastal Act, which requires coastal cities to seek approval from the California Coastal Commission before adopting changes to zoning laws if those changes effectively amend a city's Local Coastal Program (LCP) or constitute "development." Cal. Pub. Res. Code §§ 30108.6, 30514(a). Also, by enforcing Ordinance 18-005's 15% density cap on short-term rental permits, including conducting a lottery to deprive homeowners of their vested right to rent their homes; and Measure M, which prohibits and phases out existing permitted short-term rentals in residential districts outside the Coastal Zone, the City has deprived and is currently depriving Plaintiffs of their constitutional right to due process of law under the California and United States Constitutions.

STATEMENT OF LAW

Under California law, changes in a coastal city's zoning laws that effectively amend a city's LCP, and which constitute a "development," require approval from the

California Coastal Commission, which oversees land use in California's Coastal Zone. Cal. Pub. Res. Code §§ 30108.6, 30510.

The Due Process Clause of the California Constitution (Article I, § 7) provides in relevant part, "A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws." The Fourteenth Amendment to the United States Constitution provides in relevant part, "No State shall … deprive any person of life, liberty, or property, without due process of law." These provisions protect Plaintiffs' right to use their private property, subject only to regulations that are rationally related to the public's health, safety, or welfare. *See Clark v. City of Hermosa Beach*, 48 Cal. App. 4th 1152, 1184 (1996).

STATEMENT OF FACTS

I. Short-term rentals in Pacific Grove

Pacific Grove is a small beach-front town with popular tourist attractions such as an award-winning natural history museum and a nationally famous golf course. It is a popular vacation destination. SOF ¶ 1. Short-term vacationers, who stay as guests in residential homes for fewer than 30 days, have always been a part of the community's population, and informal short-term vacation rentals have always been popular in Pacific Grove, even before the city formally recognized and permitted them. The City's own website boasts of the availability of vacation rentals for tourists. SOF ¶ 2.

Online rental platforms like HomeAway and Airbnb have made it easier and cheaper for tourists to obtain short term-rental accommodations. Property owners use these platforms to advertise their willingness to share their homes, and vacationers use these platforms to reserve homes, pay for staying, and leave feedback about the quality of their stay. SOF ¶ 3. This feedback from renters is made publicly available by HomeAway, Airbnb, and similar platforms. As a result, property owners have strong incentives to keep their properties clean and in repair. SOF ¶ 4. Airbnb has an online

hotline that allows neighbors to file complaints about noisy guests, parking violations, etc. SOF ¶ 5.

Since the City began licensing short-term rentals in 2010, the number of legal, licensed short-term rentals in Pacific Grove has steadily increased. SOF ¶¶ 8, 9, 37. Yet the number of verified complaints regarding noise, parking violations, or other nuisances in short-term rentals has remained minimal. As of January 2011, there were 85 active licensed short-term rentals in Pacific Grove. The City received no complaints regarding these properties in the first year the City permitted and licensed short-term rentals. SOF ¶ 8. As of May 2017, there were 272 active licensed short-term rentals in Pacific Grove. In the previous 12 months, the City received 21 verified complaints pertaining to parking, noise, trash, etc. Most concerns were promptly resolved by the owner or property manager. SOF ¶ 9. In August 2017, and when the City passed the Ordinance at issue in this lawsuit, there were 290 active short-term rental licenses. SOF ¶ 10. Short-term rentals (both legal and illegal) make up only about four percent (4%) of the City's housing stock. SOF ¶ 6. Short-term rentals are residential uses and are not anathema to Pacific Grove being a "city of homes." SOF ¶ 7.

Short-term rentals have little or no negative impact on affordable housing in Pacific Grove. Pacific Grove has long suffered from a lack of affordable housing, and there is no evidence that short-term rentals have caused or increased this lack. On the contrary, the ability to rent properties as short-term rentals enables the owners of those homes to afford to purchase or remain in their homes when they might not otherwise have been able to do so. Short-term rentals also contribute to the community by minimizing the number of second homes that remain vacant for extended periods. SOF ¶ 11. Seventy percent of licensed short-term rentals in Pacific Grove are second homes, and 51 percent of those owners would leave those homes vacant if they could not rent them on a short term basis. SOF ¶ 12. Even if all 250 short-term rentals were returned to the long-term rental market, only a few properties would rent at the "affordable" price of

$1,718/month. For that reason, the City's Community and Economic Development staff "conclusively conclude[d]" in August 2017 "that the Short Term Rental Program has NO significant effect on the affordability of housing in Pacific Grove." *Id.* (emphasis in original).

On the contrary, short-term rentals have provided a significant and growing source of revenue for the City. In 2009, the City Council unanimously approved a budget with the expectation that revenue from short-term rentals would generate $100,000 in revenue in the first year of allowing short-term rentals. SOF ¶ 13. From January 16, 2010, through September 30, 2010, the City collected $116,839.33 in transient occupancy taxes from licensed short-term rentals. SOF ¶ 14. In 2015, short-term rentals provided between $400,000-600,000 of revenue to the City. SOF ¶ 15. In FY 2015-16, the City collected $1,136,385 from short-term rentals. It forecast the FY 2016-17 revenue would be $1,498,525. SOF ¶ 16.

A. Sea Dance

Plaintiffs William and Susan Hobbs own a home they call "Sea Dance" at 1135 Ocean View Blvd, in Pacific Grove, outside of the Coastal Zone. SOF ¶ 17. It is licensed and used for short-term rentals. *Id*. Susan's family has owned it since her parents bought it over 50 years ago. SOF ¶ 18. In 2013, Susan's mother moved into an assisted living facility, and Susan obtained a short-term rental license from the City, and offered Sea Dance for rent through a property management company. SOF ¶ 19. She used the income from the rentals to pay for her mother's care until her death in 2013. SOF ¶¶ 19, 21

Before they could rent Sea Dance, Susan and William had to conduct approximately $50,000 worth of repairs and improvements. They did this based on the reasonable expectation that they could recover the repair costs of repairs through short-term rentals. Given these costs, and because they wanted to keep the home for future use

as a primary residence, Susan and William continued to offer the home for rent on a short-term basis after Susan's mother's death. SOF ¶¶ 20–21.

Sea Dance is a popular rental home, with a 74 percent occupancy rate in 2017. It is ideal for short-term rentals, as it is located on the ocean and has ample parking. SOF ¶ 22. The average rental is for three days, although renters sometimes stay for weeks. SOF ¶ 23. In her five years of renting Sea Dance, Susan has never received a complaint about her renters from the City or anyone else. Her renters have never damaged the home or property. SOF ¶ 24. William and Susan have maintained their license in good standing. SOF ¶ 25.

B. The Shirkey Property

Plaintiffs Donald and Irma Shirkey own a home at 105 5th St. (the "Shirkey Property"), within the Coastal Zone in Pacific Grove. It is licensed and used for short-term rentals. SOF ¶ 26. They purchased it in 1999 as a second home for their children and grandchildren to use when they visit. To cover costs, they rent the home out when their family is not occupying it. SOF ¶ 27. The Shirkey Property is a two-story, single family-home with a small guest quarters over the garage. Donald and Irma often rent it as a single unit, and the City only required one short-term rental license when it was first licensed in 2010. SOF ¶ 28. To offer the Shirkey Property as a short-term rental, Donald and Irma made repairs and improvements, including installing new decks and replacing and upgrading appliances. SOF ¶ 30.

Donald and Irma obtained a license when the City first began licensing short-term rentals in April 2010. SOF ¶ 29. In 2016, the City for the first time required them to obtain two licenses: one for the main house, and one for the guest quarters over the garage. SOF ¶ 34.On average, their guests stay for three days, although renters sometimes stay for weeks. Only once since 2010 did Donald and Irma have renters stay for more than a month. SOF ¶ 31. In their eight years offering the Shirkey Property as a short-term rental, Donald and Irma have never received a complaint about renters from

the City or anyone else. The Shirkey Property has received excellent reviews from renters on online home-sharing sites. SOF ¶ 32.

Being able to offer the Shirkey Property as a short-term rental enables Donald and Irma to keep a well-maintained property for their children and grandchildren to visit, so that they do not have to spend money staying in a hotel, and, when their family is not visiting, to obtain income for purposes of maintaining the property. SOF ¶ 35. Donald and Irma Shirkey have maintained both licenses in good standing. SOF ¶ 36.

II. The challenged ordinances suddenly and arbitrarily divested homeowners of their vested right to share their homes.

Short-term rentals have been permitted and licensed in Pacific Grove since 2010, when the City enacted Ordinance 10-001. SOF ¶ 37. At that time, the City required homeowners to obtain and maintain a Transient Use License to offer their homes as short-term rentals. SOF ¶ 38. Under that Ordinance, Transient Use Licenses will not be revoked unless the license-holder committed specific, enumerated misconduct or violations. (No violations of any sort are alleged against the Plaintiffs or are involved in this case.) The Ordinance provides that even if misconduct had occurred, the licensee can still renew his or her license upon the presentation of substantial evidence that the license should not be revoked. A person whose license has been suspended or revoked is entitled to a hearing before the City Manager. SOF ¶ 39.

In 2015, the City placed a 45-day moratorium on new short-term rental license applications. In doing so, however, it specified that "[r]enewal of existing permits shall not be inhibited by this measure." SOF ¶ 41. Later that year, the City Council resolved to consider recommendations to amend the current ordinance. SOF ¶ 42.

The next year, the City enacted Ordinance 16-007, which created two short-term rental ("STR") categories, Type A (in which an entire house is non-owner occupied and is rented for 90 days or more per year) and B (for rental of an entire house for 90 days or less, and/or in which the home is owner-occupied when not rented). The Ordinance

capped Type A STR so that no more than 250 would be issued, and established density limits to restrict the number of new Type A STR licenses. It grandfathered in existing short-term rental licenses, however, regardless of whether the total number of licenses exceeded the 250 cap or density limits. SOF ¶ 43. Both Type A and Type B short-term rental licenses were "ministerial and issued over the counter." SOF ¶ 44.

In December 2016, the Coastal Commission sent a letter to all planning and community development directors in the Coastal Zone, including Pacific Grove, stating that "vacation rental regulation in the Coastal Zone must occur within the context of your [LCP] and/or be authorized pursuant to a coastal development permit (CDP)." SOF ¶ 45. Nevertheless, in 2017, the City resolved to further amend its General Plan with regard to short-term rentals in residential zones. It specified that if short-term rental licenses exceeded the 250 cap, new license applications would be placed on a waiting list. SOF ¶ 47.

In February 2018, the City adopted the ordinance that is the subject of this lawsuit. That Ordinance imposes, *inter alia*, a 15 percent density cap, Zones of Exclusion, and a procedure for determining whether properties exist in "over-dense blocks." SOF ¶ 48. The City did not submit this ordinance to the California Coastal Commission for approval. SOF ¶ 49.

The 2018 Ordinance also seeks to reduce the number of existing short-term rentals in Pacific Grove. It does this by requiring the City Manager to "conduct a lottery" to select which existing permits will be revoked.[1] SOF ¶ 50. The first such lottery occurred on May 22, 2018. The lottery consisted of a machine by which the City randomly selected 51 license-holders who will have their existing short-term rental

[1] The Community and Economic Development staff stated in August 2017 that a lottery would be "arbitrary and capricious and will possibly remove some very good [short-term rental]s." Staff instead recommended that licenses in areas that exceed the 15 percent density limit be subjected to a "scoring system" that "weeds out the marginal or troublesome licenses" based on complaints. SOF ¶ 51. The Planning Commission also recommended in August 2017 that the City "revise the STR checklist and make it a useful tool in city assessment and management, rather than a lottery system," and grandfather existing licenses that "meet the required standards." SOF ¶ 52.

permits revoked on April 30, 2019. These permit-holders will remain ineligible to apply for a new permit until such time as those permit holders whose numbers were not chosen by the lottery choose to relinquish their permits. SOF ¶¶ 54–55.

This lottery-style process for depriving existing permit-holders of their permits was not based on how long the person had been renting his or her home, or whether they or their guests had caused disturbances—or on any other factor except for the lottery. As a result, owners who had incurred numerous complaints could be allowed to keep their permits, while responsible homeowners and long-time renters, including Plaintiffs, could be stripped of theirs. SOF ¶ 51.

As a result of the City's May 2018 lottery, Plaintiffs' permits will be revoked on April 30, 2019. Donald and Irma Shirkey's two licenses were included in the lottery—meaning that their licenses were essentially competing against each other. One was selected, and one was not, meaning that they will only be allowed to keep a license to rent one portion of their property. SOF ¶ 56. As a result of the revocation of their license, they will suffer a reduction in income and will have to economize to pay their expenses, and are deprived of their right to choose whether to allow guests to stay in their home. SOF ¶ 57. Plaintiffs William and Susan Hobbs' permit to rent Sea Dance will be revoked on April 30, 2019. They will suffer the same injuries. SOF ¶¶ 58–59.

On November 6, 2018, Pacific Grove voters approved Measure M, which prohibits and phases out, over an 18-month sunset period, *all* existing permitted short-term rentals in residential districts, except in the Coastal Zone. SOF ¶ 60. As a result of Measure M, in 2020, Plaintiffs William and Susan Hobbs, whose property is not located in the Coastal Zone, will be permanently prohibited from renting Sea Dance short-term. SOF ¶ 62.

STANDARD OF REVIEW

Summary judgment is appropriate when there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. Cal. Code Civ. Proc. §

437c. "[A]ny person may bring a lawsuit to enjoin an activity that violates the Coastal Act. *Greenfield v. Mandalay Shores Cmty. Ass'n*, 21 Cal. App. 5th 896, 900 (2018).

ARGUMENT

I. Ordinance 18-005 violates the California Coastal Act.

California courts have consistently held that the California Coastal Commission "has the ultimate authority to ensure that coastal development conforms to the policies embodied in the state's Coastal Act," and that "a fundamental purpose of the Coastal Act is to ensure that state policies prevail over the concerns of local government." *Charles A. Pratt Constr. Co. v. Cal. Coastal Comm'n*, 162 Cal. App. 4th 1068, 1075 (2008). The Coastal Act is expansive in scope, such that even non-structural changes to land-use classification, such as lot-line adjustments, qualify as development under the Coastal Act and require Commission approval. *La Fe, Inc. v. Los Angeles Cnty.*, 73 Cal. App. 4th 231, 240 (1999).

Under the Coastal Act, the Coastal Commission regulates the use of land in the Coastal Zone, primarily through the approval of LCPs[2] of each city located in whole or in part in the Coastal Zone. Cal. Pub. Res. Code § 30500. Changes in a coastal city's zoning laws that effectively amend a city's LCP, or which constitute a "development," require Coastal Commission approval. Cal. Pub. Res. Code §§ 30108.6, 30510. It is undisputed that Pacific Grove did not submit Ordinance 18-005 to the Coastal Commission for approval before adopting it, or before holding the lottery at which Plaintiffs were selected to be stripped of their licenses. SOF ¶ 49. Thus, Ordinance 18-005—and the lottery held pursuant to the ordinance—are invalid.

[2] An LCP includes a city's: (a) land use plans, (b) zoning ordinances, (c) zoning district maps, and (d) within sensitive coastal resources areas, other implementing actions. Cal. Pub. Res. Code § 30108.6.

Cities like Pacific Grove[3] that operate under certified Land Use Plans (LUP) must submit any amendment to such plans to the Coastal Commission for approval. Cal. Pub. Res. Code § 30514(a); Cal. Code Regs. tit. 14, § 13551. Even if Ordinance 18-005 qualifies as a "minor amendment," because it "impose[s] further conditions, restriction or limitations on any use which might adversely affect the resources of the Coastal Zone," Cal. Code Regs. tit. 14, § 13554(d)(3),[4] the law requires that it be so designated by the executive director of the Coastal Commission before becoming effective. Cal. Pub. Res. Code § 30514(c). That did not happen.

Additionally, the City was required to obtain a Coastal Development Permit ("CDP") before enacting, implementing, or enforcing Ordinance 18-005. Any action that changes or reduces the intensity of land use or access to the coast is "development" under the Coastal Act and subject to Commission approval. *Surfrider Found. v. Martins Beach 1, LLC*, 14 Cal. App. 5th 238, 250 (2017).

Banning or regulating short-term rentals constitutes "development" under the Coastal Act, which defines development as any "change in the density or intensity of use of land" or "change in the intensity of use of water, or of access thereto," Cal. Pub. Res. Code §§ 30600(a), 30106, and requires a CDP for any development in the Coastal Zone. Indeed, this issue was recently considered in *Greenfield v. Mandalay Shores Community Association*, 21 Cal. App. 5th 896, 901–02 (2018), where the Court of Appeal upheld an injunction against a homeowner's association's short-term rental ban, noting that "[t]he decision to ban or regulate [short-term rentals] must be made by the City and Coastal Commission." The Court further held that a ban on short term rentals "changes the

[3] City of Pacific Grove Local Coastal Program Land Use Plan (1989), http://pacificgrovelibrary.org/sites/default/files/general-documents/local-coastal-program/lcp-lup-1989-reformatted.pdf.

[4] However, it is unlikely that Ordinance 18-005 could qualify to be fast-tracked as a minor amendment, since it conflicts with the Coastal Act's policies favoring "maximum access," "recreational opportunities," and "[l]ower cost visitor and recreational facilities." Cal. Pub. Res. Code §§ 30210, 30213.

intensity of use and access to single family residences in the Oxnard Coastal Zone" and therefore qualifies as development under the Coastal Act. *Id.* at 901.

The City was aware of the Coastal Commission's jurisdiction; indeed, the Commission sent a letter to the City saying so, about a year before the City adopted Ordinance 18-005. That letter reminded the City that "vacation rental regulation in the Coastal Zone must occur within the context of your [LCP] and/or be authorized pursuant to a coastal development permit (CDP)." SOF ¶ 45. The letter stated that "[t]he regulation of short-term/vacation rentals represents a change in the intensity of use and of access to the shoreline, and thus constitutes development to which the Coastal Act and LCPs must apply." *Id.*

Ordinance 18-005 limits the available visitor accommodations in Pacific Grove's Coastal Zone, thereby changing the intensity of land use and public access to water in a manner inconsistent with the overarching goals of the Coastal Act, and thus constitute a development that requires Coastal Commission approval. *Surfrider Found.*, 14 Cal. App. 5th at 246-58. Courts interpret "development" expansively in order to be "consistent with the mandate that the Coastal Act is to be liberally construed to accomplish its purposes and objectives." *Pacific Palisades Bowl Mobile Estates, LLC v. City of L.A.*, 55 Cal. 4th 783, 796 (2012) (internal quotations omitted). A primary goal of the Coastal Act is to "[m]aximize public access to and along the coast and maximize public recreational opportunities in the Coastal Zone consistent with sound resources conservation principles and constitutionally protected rights of private property owners." Cal. Pub. Res. Code § 30001.5(c). In determining whether particular land uses serve this goal, "the Coastal Act places a higher priority on the provision of visitor-serving uses, particularly overnight accommodations, over private residential uses because such visitor-service uses offer a vehicle for the general public to access and recreate within the state's Coastal Zone." SOF ¶ 46; Cal. Pub. Res. Code § 30222; Cal. Code Reg. tit. 14 § 13513(a)(6) ("uses that maximize public access to the coast" are "uses of larger-than-

local importance"). Depriving Plaintiffs of their right to offer their home to overnight guests—especially when they were lawfully permitted to do so before Ordinance 18-005 was enacted—undermines *both* the goal of maximizing access and recreational activities and the Plaintiffs' constitutionally-protected property rights. Thus, the opportunity for review of the Ordinance must be afforded to the Coastal Commission.[5]

By adopting and enforcing Ordinance 18-005 without first submitting it to the Coastal Commission for approval, the City has acted *ultra vires* in violation of Cal. Pub. Res. Code §§ 30108.6; 30514(a). Ordinance 18-005 is invalid, and this Court should enjoin the City from enforcing it to prohibit Plaintiffs from conducting short-term rentals in their previously-licensed properties.

II. Ordinance 18-005 violates Plaintiffs' due process rights.

The Due Process Clauses of the California and U.S. Constitutions protect Plaintiffs' right to use their private property. That right may be *regulated*, but such regulations must satisfy both procedural and substantive due process protections. As shown below, Ordinance 18-005 violates both the procedural and substantive due process rights of the Plaintiffs.

A. Procedural due process

Plaintiffs possess a vested right to offer their properties as short-term rentals. "[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." *Spindler Realty Corp. v. Monning*, 243 Cal. App. 2d 255, 267 (1966). The Plaintiffs obtained permits, maintained those permits in good standing, regularly rented out their homes without committing infractions or nuisances, and detrimentally relied upon the ability to rent out their homes by sacrificing thousands of dollars and numerous hours to improve

[5] Even Measure M, which completely *bans* short-term rentals in residential districts, did not attempt to regulate properties in the Coastal Zone, because "The California Coastal Commission, which implements the Coastal Act, has stated that regulation of short-term rentals in the Coastal Zone must occur within the context of the [LCP], *subject to Commission review*." SOF ¶ 61 (emphasis added).

and maintain the properties to offer as short-term rentals.[6] *See Avco Cmty. Developers, Inc. v. S. Coast Reg'l Comm'n*, 17 Cal. 3d 785, 791 (1976) ("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.); *Clerici v. Dept. of Motor Vehicles*, 224 Cal. App. 3d 1016, 1023 (1990) (vested rights are defined "in terms of a contrast between a right possessed and one that is merely sought"). *See also Berlinghieri v. Dep't of Motor Vehicles*, 33 Cal. 3d 392, 396 (1983) ("[b]usiness or professional licensing cases have distinguished between the denial of an application for a license (nonvested right) and the suspension or revocation of an existing license (vested right)."). The City itself considered short-term rental licenses to be "ministerial and issued over the counter," SOF ¶ 44, and Plaintiffs never committed misconduct or received violations that would subject them to revocation or nonrenewal under the Ordinance by which they obtained their licenses. SOF ¶¶ 24, 33. Their right to use their properties was therefore a vested right, "of which [they] may not be deprived arbitrarily without injustice." *Doe v. Cal. Dep't of Justice*, 173 Cal. App. 4th 1095, 1106 (2009) (citation omitted).

Ordinance 18-005 arbitrarily eliminates Plaintiffs' existing permits without regard to whether their properties have been the source of nuisances or other harms to the public health, safety, or welfare. Indeed, it is hard to imagine a more blatant example of an arbitrary deprivation of a vested right than a system whereby law-abiding permit-holders are randomly selected by lottery to have their permits revoked without any consideration of the merits. Since obtaining their licenses, Plaintiffs have rented their homes without complaint about their renters, and it is undisputed that their properties have never caused a nuisance or otherwise met the factors for depriving them of their

[6] The fact that Plaintiffs' licenses had to be renewed periodically does not deprive them of the protection of their vested rights, because vested rights outlive the permit upon which they are based due to their vested nature. See *Pardee Const. Co. v. Cal. Coastal Comm'n*, 95 Cal. App. 3d 471, 478 (1979) (treating permit holders and vested right holders as one and the same upon lapse of a permit).

license. As vested rights-holders, due process requires *at a minimum* that they be given notice and an opportunity to be heard before their permits are revoked. *Horn v. Cnty. of Ventura*, 24 Cal. 3d 605, 612-615 (1979). The City's decision to *randomly* select Plaintiffs to have their vested rights annulled and revoked without any consideration of fault, or opportunity to contest the revocation on the merits, violates due process. *Berlinghieri*, 33 Cal. 3d 392, 396 ("Once an agency has exercised its expertise and issued a license, the agency's subsequent revocation of that license generally calls for an independent review of the facts, because revocation or suspension affects a vested right.").

Because of this longstanding principle, "[z]oning ordinances and other land use regulations customarily exempt existing uses to avoid questions as to the constitutionality of their application to those uses." *Hansen Bros. Enters., Inc. v. Bd. of Supervisors*, 12 Cal. 4th 533, 552 (1996). The City was well aware of the option to grandfather existing license holders. After all, it did so before, SOF ¶ 43, and members of the City Council, the Director of Community and Economic Development, and city staff urged it to do so again, noting that licenses exceeding the City's preferred limit in an area could be eliminated through a scoring system that would eliminate nuisance properties, or to gradually phase-out licenses as owners sell or cease to rent their properties. SOF ¶ 52. Such a plan would have comported with due process. *See, e.g.*, *San Diego Cnty. v. McClurken*, 37 Cal. 2d 683, 686 (1951) (grandfathering preferred, especially if it provides for "the gradual elimination of the nonconforming use by obsolescence or destruction" (citations and quotations omitted)).

Instead, the City chose to cap the number of short-term rental licenses, impose density limits, and then subject those over that threshold to a random process for revocation. The City even arbitrarily chose to count the Shirkeys' single-family home as two rental properties for purposes of the lottery, even though it is usually rented as a

single unit, thus forcing them to compete against themselves in the lottery. SOF ¶¶ 28, 56.

B. Substantive due process

The Ordinance also violates substantive due process requirements. When a cognizable property interest is implicated—such as the Plaintiffs' vested rights in their permits—the Court must determine whether the city's restriction on or elimination of that right is arbitrary or irrational. *Clark*, 48 Cal. App. 4th at 1184. The Ordinance violates that rule.

Where a property owner has obtained a permit and relied upon it, and has complied with the permit conditions and not caused nuisances, the government may not deprive the owner of that vested right. *O'Hagen v. Bd. of Zoning Adjustment*, 19 Cal. App. 3d 151, 158–59 (1971). In *O'Hagen*, the property owner ran a restaurant in Santa Rosa, pursuant to a permit. Years later, complaints about the restaurant rose to the level that the city brought a public nuisance complaint, and prevailed. It then sought to revoke the permit. The Court of Appeals ruled that this was not proper. Once a property owner has a vested right, it could be eliminated only where "a compelling public necessity" required that. *Id.* at 159. While a city could abate or punish nuisances even against a vested rights holder, it had to show that "the interests of the public generally require such interference and that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals." *Id*. (citation omitted). Thus the fact that the property owner had been punished for previous nuisances and had taken steps to remedy the situation was sufficient—and showed that "a compelling necessity did not exist to totally prohibit plaintiff from operating his [restaurant]." *Id.* at 165.

Like the property owner in *O'Hagen*, the Plaintiffs have a vested right in their permits. There is no "compelling necessity" or even a rational connection between eliminating Plaintiffs' vested rights and addressing affordable housing. Since the City implemented its program nine years ago, SOF ¶ 37, short-term rentals have always made

up a small amount of the City's housing stock, SOF ¶ 6, and it has no significant effect on affordable housing, SOF ¶ 12. Even if the City's rationale for the Ordinance were that short-term rentals were causing nuisances, it is undisputed that the Plaintiffs' properties have never been the source of any nuisances or complaints of any sort. SOF ¶¶ 24, 33. Moreover, the imposition of an across-the-board ban on short-term rentals, without regard to the fact that existing city laws already prohibit nuisances and alternative means exist to remedy such concerns, would violate rational basis. *See, e.g, Edwards v. D.C.*, 755 F.3d 996, 1006 (D.C. Cir. 2014) (licensing requirement for tour guides failed rational basis because, among other things, existence of "numerous consumer review websites, like Yelp and TripAdvisor, which provide consumers a forum to rate the quality of their experiences" ensured that tour guides would provide quality services.) As deferential as rational basis may be, it does not allow the total elimination of a category of property rights throughout the city to combat nuisances that are already forbidden by existing city ordinances.

There is no foundation for the assumption that restricting Plaintiffs' right to allow guests to stay in their homes will serve the government's interest in preserving affordable housing in the City. As a matter of common sense, forbidding residential property owners from allowing guests to stay in their homes will not open those properties for occupancy by property owners seeking affordable housing. On the contrary, that prohibition will result either in the property owners not occupying their properties at all during certain times (likely resulting in deterioration) or in their being unable to afford their homes—the very opposite of the alleged government purpose. *See* SOF ¶ 12. A law that contradicts the legitimate government interest it is supposed to advance violates the rational basis test. *Merrifield v. Lockyer*, 547 F.3d 978, 991 (9th Cir. 2008) (a law that "undercuts the principle of non-contradiction, fails to meet the relatively easy standard of rational basis review."); *see also St. Joseph Abbey v. Castille*, 712 F.3d 215, 225 (5th Cir. 2013) (state law regulating the sale of caskets failed rational-

basis scrutiny because evidence did not support government's claim that unlicensed casket sellers created "widespread" problems).

Because Ordinance 18-005 violates Plaintiffs' procedural and substantive due process rights, it is invalid, and this Court should enjoin the City from enforcing it to prohibit Plaintiffs from conducting short-term rentals in their previously-licensed properties.

III. Measure M violates Plaintiffs' due process rights

By prohibiting *all* homes outside the Coastal Zone from being offered as short-term rentals, and phasing out all existing permitted short-term rentals, Measure M violates Plaintiffs William and Susan Hobbs's right to due process, depriving them of their vested rights without consideration of fault, or opportunity to be heard or to contest the revocation on the merits.

As explained above, nullifying existing permits for short-term rentals, without grandfathering existing license-holders who are in good standing, violates due process and bears no relationship to public health, safety, or welfare. But Measure M goes even further than Ordinance 18-005. It imposes a complete prohibition against *all* short-term rentals, even those that were previously permitted and have operated for years without incident. But such an outright prohibition of property and economic rights, not rationally tailored to protect the public health, safety, or welfare, is unconstitutional. *O'Hagen*, 19 Cal. App. 3d at 165.

In *People ex rel. Younger v. Cnty. of El Dorado*, 96 Cal. App. 3d 403 (1979), El Dorado County made it illegal "to float, swim or travel" in a 20-mile section of a river to address the concerns of neighboring property owners who complained that rafters caused noise, litter, pollution and unsanitary conditions. The Court of Appeals struck down the ordinance because, although it may have eliminated pollution and sanitation problems, such a total prohibition of access was excessive. Although the public "has no right to pollute the river," it did have "a right to use the river." *Id.* at 407. Likewise, here,

property owners have the right to offer their homes to overnight guests, especially when they possess a valid permit and neither they nor their guests have caused nuisances. In such cases, "[r]easonable regulation is in order; use prohibition is not." *Id.* Measure M completely prohibits short-term rentals outside the Coastal Zone, and deprives people of their existing vested rights to rent. SOF ¶ 60.

"[T]he exercise of police power may not extend to total prohibition of activity not otherwise unlawful." *Younger*, 96 Cal. App. 3d at 406; *accord*, *Frost v. City of L.A.*, 181 Cal. 22, 26–27 (1919) (prohibiting water companies from providing water unless it is "the purest and most healthful obtainable or securable under all the circumstances and conditions," even if the company's water is not harmful, is unconstitutional); *San Diego Tuberculosis Ass'n v. City of E. San Diego*, 186 Cal. 252, 253 (1921) (outlawing hospitals for the treatment of persons afflicted with contagious or infectious diseases violates property right to maintain and conduct the hospital). And while the government has broad authority to regulate land use, it may not eliminate existing rights without a factual showing that this is necessary. *O'Hagen*, 19 Cal. App. 3d at 161.

In *Arnel Development Co. v. City of Costa Mesa,* the Court of Appeal found that an ordinance that downzoned property from multifamily to single-family residential failed the rational basis test because it was done "without consideration of the various zoning alternatives or the best utilization of the property." 126 Cal. App. 3d 330, 335 (1981). To discriminate against a particular land use without any "reasonable accommodation of the competing regional interests" or any factual basis for finding that the restriction serves the public welfare is unconstitutional. *Id.* at 340. The court emphasized the fact that the ordinance "completely preclude[d] development of multiple family residences" was proof that it "[did] not effect a reasonable accommodation of the competing interests" and was "therefore not a valid exercise of the police power." *Id.*

The same analysis applies here. Rational basis is a deferential standard—but "judicial deference is not judicial abdication. The ordinance must have a *real and*

substantial relation to the public welfare. … There must be a reasonable basis in fact, not in fancy, to support the legislative determination." *Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore*, 18 Cal. 3d 582, 609 & n. 26 (1976). The City made no findings to substantiate the assertion that a total prohibition of all short-term rentals would serve any public interest in combating nuisances or threats to public health, safety, or welfare. Instead of fact, it acted on fancy. If there were reason to believe short term rentals threaten public health, safety, or welfare, "[r]easonable regulation [would be] in order; use prohibition is not." *Younger*, 96 Cal. App. 3d at 407. Reasonable regulation would address how homes and units are used or misused, so as to ensure that actions taken by guests in short-term rentals do not harm others.

The City can protect quiet, clean, and safe neighborhoods by, for example, enforcing existing rules that limit noise, parking, and other specific nuisances, or adopting new rules that specify and prohibit new types of nuisances. It could also revoke or phase out licenses for properties that caused nuisances. SOF ¶¶ 51–52. It did none of these things. Instead, as in *O'Hagen* it sought to revoke a vested right without necessity. As in *Arnel Development,* it "completely preclude[d]" short term rentals without any "reasonable accommodation of the competing … interests," 126 Cal. App. 3d at 340, and did so by eliminating the Plaintiffs' vested right to let guests stay in their homes.

Pacific Grove has always been a vacation destination since its founding in 1876 as a summer retreat community.[7] (SOF ¶ 2). The elimination of this class of uses is therefore not a regulation designed to preserve "the essential character of a neighborhood," *Ewing*, 234 Cal.App.3d at 1591, but a drastic alteration of that character by eliminating lawful existing uses that the City has permitted.

[7] These factors distinguish this case from *Ewing v. City of Carmel-By-The-Sea*, 234 Cal. App. 3d 1579, 1591 (1991), in which the City prohibited short term residences in one district of the city on the basis of factual findings that showed that such land uses were inconsistent with the traditional character of the neighborhood. Also, the *Ewing* court took pains to note that the ordinance "[did] not seek entirely to ban short-term visitors," *id.*, which the Pacific Grove ordinance does.

Because Measure M bears no reasonable relationship to how the short-term rentals are used, it bears no rational relationship to the public's health, safety, or welfare, and deprives Plaintiffs of their vested right without according them an opportunity to be heard or a procedure for considering the merits of the revocation. Thus, this Court should enjoin the City from prohibiting the Hobbses from conducting short-term rentals in their previously licensed properties.

CONCLUSION

Because the City did not submit Ordinance 18-005 to the Coastal Commission for approval prior to the Ordinance's adoption, the Ordinance and the lottery held pursuant to the ordinance are invalid. And because both Pacific Grove Ordinance 18-005 and Measure M deprive Plaintiffs of their vested rights, they are unconstitutional under Article I, § 7 of the California Constitution and the Fourteenth Amendment to the United States Constitution. For the reasons above, Plaintiffs respectfully request this Court to grant their Motion for Summary Judgment.

DATED this 15th day of March, 2019.

/s/ Christina Sandefur_____
Timothy Sandefur (224436)
* Matthew R. Miller
*Christina Sandefur
*Admitted *Pro hac vice*

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 March 15, 2019, I served the above Memorandum in Support of Plaintiffs' Motion for Summary Judgment or in the Alternative for Judicial Notice on the interested parties in this action addressed via the electronic filing portal and email as follows:

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Dated this: 15th day of March, 2019

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