No. H047705

In the Court of Appeal of the State of California
Sixth Appellate District

WILLIAM HOBBS; SUSAN HOBBS;
DONALD SHIRKEY; and IRMA SHIRKEY,
Appellants/Cross-Appellees,

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 Councilmember of the City of Pacific Grove,

Appellees/Cross-Appellants

On Appeal from the Judgment of the Superior Court
State of California, County of Monterey
Hon. Lydia M. Villarreal, Dept. 13
Case No. 18CV002411

COMBINED APPELLANTS' REPLY AND CROSS-APPELLEES' RESPONSE BRIEF

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INTRODUCTION

The City makes no serious attempt to refute Appellants' showing that they had a vested right in their continued use of their properties. The City's sole argument to the contrary is that the Appellants' permits required an annual renewal, but California law on this point is unequivocal: the mere fact that a permit must be renewed simply does not mean that the permit holder lacks a vested right. Rather, the question of whether a vested right exists depends on matters of fairness and reliance. *See, e.g.*, *Avco Cmty. Developers, Inc. v. S. Coast Reg'l Comm'n*, 17 Cal.3d 785, 791 (1976); *Goat Hill Tavern v. City of Costa Mesa*, 6 Cal.App.4th 1519, 1526–29 (1992). All such factors militate in favor of Appellants here, and because the renewal requirement is simply not dispositive, the City's argument must fail.

Appellants detrimentally relied on their permits, and the City then deprived them of their vested rights arbitrarily, in a manner that violates the most basic principles 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.") The City's

use of a random lottery to revoke their right to rent their homes is a violation of due process, and the lack of connection between that revocation (and the subsequent ban enacted via Measure M) and the City's legitimate goals is, too.

With respect to the cross-appeal, the Superior Court was correct that the City's short-term rental (STR) bans required approval from the California Coastal Commission. No such approval was obtained before the City enacted the ban and used it to deprive Appellants of their rights. Thus, assuming the City's cross-appeal was not rendered moot by the Coastal Commission's subsequent actions, the Superior Court's ruling that the City acted illegally by failing to obtain Commission approval of its STR ban should be affirmed.

APPELLANTS' REPLY BRIEF (COUNT TWO: DUE PROCESS CLAIM)

I. Count II is appealable, as this Court previously determined.

Although this Court denied the City's Motion to Dismiss this appeal nearly a year ago, *see* Order of Aug. 25, 2020, the City attempts to re-litigate that Motion here. Resp. Br. at 27-29. The City presents no new arguments to justify dismissal now, and the

arguments they repeat here must fail for the same reason as before.[1]

To briefly recap: the City is right that voluntary dismissals are not ordinarily appealable. Resp. Br. at 27. But there is an exception, as the City itself recognizes, *id.*: a voluntary dismissal with prejudice *is* an appealable order when entered as a consequence of an adverse trial court ruling that makes it impossible for the plaintiff to prevail. *See, e.g.*, *Stewart v. Colonial W. Agency, Inc.*, 87 Cal.App.4th 1006, 1012 (2001). In such a circumstance, the dismissal is "not really voluntary, but only done to expedite an appeal," because it is "tantamount to a request to enter judgment on [the defendant's] demurrer." *Ashland Chem. Co. v. Provence*, 129 Cal.App.3d 790, 793 (1982).

That is precisely what happened here. As Appellants explained in their Opposition to the Motion to Dismiss at 7–8,

[1] The City claims that Appellants have "abandon[ed] appeal of their motion *in limine*." Resp. Br. at 48-49. That statement is incomprehensible. If what the City means is that it objects to the procedure by which this case was appealed, Appellants explained in the Opposition to the Motion to Dismiss Appeal why this appeal was proper. If the City is referring to Appellants' statement that the sole *legal* issue before this Court is whether the random revocation of Appellants' licenses violated their due process rights, that is obviously not any kind of waiver. For the record: Appellants have not abandoned any part of their appeal.

the Superior Court ruled that Appellants could not, *as a matter of law*, establish a substantive or procedural due process right, because they could not have a vested right in their permits. I Rptrs. Tr. at 22:2–6, 29:28–30:3. It concluded that Appellants failed to carry their burden of proof with respect to Count Two because they could not overcome *that* threshold legal issue: that is, that they do not "have a substantive or procedural due process right to renew the time-limited short-term rental licenses." III CT 649. The Superior Court made clear that there were no relevant factual disputes. I Rptrs. Tr. at 22:2–6. Rather, its *legal* conclusion that Appellants could have no vested right due to the annual renewal requirement in the permits was itself dispositive of their due process claim. III CT 675.

That determination was tantamount to judgment for the City. It was therefore appealable in the circumstances of this case.[2] The City refused to move for entry of judgment, and the

[2] The City is incorrect that "[t]he Coastal Act claim in Count One remains pending." Resp. Br. at 29. The Superior Court granted Appellants' motion for summary adjudication on Count One, and entered judgment on Count One. *See* III CT 649. No final judgment was entered over the whole case at that time because the City refused to accept the judgment to which it was legally entitled regarding Count Two. But once Appellants entered voluntary dismissal of Count Two, the judgment previously

Superior Court believed it could not enter judgment without such a motion, *id.*, so the Appellants took the route approved of in *Stewart*, 87 Cal.App.4th at 1012; *Ashland Chem. Co.*, 129 Cal.App.3d at 792–93; *Gutkin v. Univ. of S. Cal.*, 101 Cal.App.4th 967, 974–75 (2002); *Goldbaum v. Regents of Univ. of Cal.*, 191 Cal.App.4th 703, 708 (2011), and other cases: they chose to seek dismissal rather than "'waste[] … trial court time'" by undergoing a futile "trial merely to obtain an appealable judgment." *Bldg. Indus. Ass'n v. City of Camarillo*, 41 Cal.3d 810, 817 (1986) (citation omitted). Such a dismissal is "not really voluntary" because it is "tantamount to a request to enter judgment on [the defendant's] demurrer." *Ashland Chem. Co.*, 129 Cal.App.3d at 793. The City offers no argument why this procedure should be barred here. Thus the City's arguments for dismissal should be rejected again.

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entered regarding Count One became the final judgment in the case, because at that point, there were no unresolved matters in the Superior Court. There is therefore nothing pending in the Superior Court.

II. Ordinance 18-005 and Measure M violate Appellants' due process rights.

Appellants had a vested right in the continued use of their property. The City's arbitrary means of depriving them of that right therefore violated due process. Also, Ordinance 18-005 and Measure M violated their due process rights by arbitrarily eliminating that right without regard to whether Appellants' activities bore any relationship to any public harm. The City's arguments—that (1) Appellants had no property right to which due process could apply; (2) the lottery mechanism in Ordinance 18-005 is a legislative, rather than an adjudicative act, so that due process was not required; and (3) revoking Appellants' licenses was reasonable—all fail.

A. The trial court's holding that Appellants lacked vested rights was legal error.

As a preliminary matter, the City is wrong that "[t]he Superior Court did not make a finding regarding vested rights." Resp. Br. at 14. To the contrary, the Superior Court held that as a matter of law, Appellants *could not* have either "a procedural due process or a substantive due process right to renew [a 12-month permit]. … [W]hatever rights the Plaintiffs have are dictated by the permit, and the permit only gives them 12

months." I Rptrs. Tr. at 29:17–30:3. In its ultimate order, it concluded that Appellants do not, and legally cannot, "have a substantive or procedural due process right to renew the time-limited short-term rental licenses." III CT 649. It was for this reason, not any factual matter, that the Superior Court ruled against Appellants. I Rptrs. Tr. 22:2–6. This was legal error.

The City argues that Appellants had no vested rights because their licenses were valid for "time-limited terms," and "[n]o STR license is automatically renewed." Resp. Br. at 14, 30. But as Appellants explained in their Opening Brief (AOB) at 21–25, the fact that their permits had to be renewed annually does not mean that they had no vested right to rent, because here, the vested right outlives the permit upon which it is based. *Pardee Constr. v. Cal. Coastal Comm'n*, 95 Cal.App.3d 471, 478 (1979).

This point is important because the fundamental fallacy in the City's argument lies in confusing the *permit* with the *right at issue*. Under California law, whether or not an interest constitutes a vested right is simply not determined solely by whether the permit must be renewed or not. Rather, the proper analysis weighs several factors, foremost of which is reliance. *Consaul v. City of San Diego*, 6 Cal.App.4th 1781, 1794 (1992) ("'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.'" (citation omitted)). Thus Appellants' vested right is not, as the City suggests, determined simply by the fact that a permit must be renewed. Their right is in their continued interest in renting their homes, once they obtained permits to do so and relied on those permits to invest substantially in the improvement of those homes.

As the Supreme Court explained in *Traverso v. People ex rel. Dep't of Transportation*, 6 Cal.4th 1152, 1162 (1993), "[o]nce a permit has been issued, its continued possession becomes a significant factor in the … owner's legitimate pursuit of a livelihood. The revocation of a permit thus involves state action affecting important interests of its owner, and therefore cannot be accomplished without affording the procedural due process required by the Constitution."

Case after case has made clear that the determination of whether a person has a vested right depends largely on reliance. *See Avco Cmty. Developers*, 17 Cal.3d at 791 ("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."); *Goat Hill Tavern*, 6 Cal.App.4th at 1527 (where permit holder acted "in reliance on the permit," government's "denial of … [the] renewal application" violated due process); *Spindler Realty Corp. v. Monning*, 243 Cal.App.2d 255, 267 (1966) ("a valid permit once issued cannot be arbitrarily revoked."). Here, Appellants spent considerable amounts of money repairing and improving their properties to use as STRs. III CT 606 ¶ 20, 609 ¶ 30. They renewed their licenses repeatedly over the years of continuous rental, III CT 606–611 ¶¶ 19, 25, 29, 34, 36, and it was reasonable for them to expect to continue to do so, because the City always treated license renewal as "ministerial and issued over the counter," III CT 618 ¶ 44, and Appellants had rented without any accusation of misconduct or violation that would have subjected them to revocation or nonrenewal. III CT 607 ¶ 24, 610 ¶ 33.

The City argues that this case is like *Metropolitan Outdoor Advertising Corp. v. City of Santa Ana*, 23 Cal.App.4th 1401 (1994), but it is not. In that case, the permit holders expressly agreed to remove their sign at the expiration of the permit. That is nothing like the situation here, where Appellants merely

signed a form acknowledging that their licenses would have to be renewed annually. They never expressly agreed to cease operations or alter their property at any particular date. Nor did they ever agree to the arbitrary mechanism of revocation the City used here—that is, a lottery system in which permit holders were randomly chosen to have their rights nullified without any consideration of fault or wrongdoing. Here, Appellants legitimately expected to be able to renew their licenses because they had done so for years previously, detrimentally relied upon that renewal, and never committed any violations that would have disqualified them from renewal. Moreover, in *Metro. Outdoor*, there was "no assertion" that removing the company's sign would harm its business. *Id.* at 1404. By contrast, Appellants entirely lost their right to rent due to the City's arbitrary revocation of their rights.

California courts have made clear that "[i]nterference 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 the arbitrary nullification of an existing license "merits a heightened judicial review." *Goat Hill Tavern*, 6 Cal.App.4th at 1529-30. The

City attempts to distinguish *Goat Hill Tavern* because the owners in that case invested $1.7 million, and refusal to renew the permit would destroy the business. But just because Appellants are not wealthy corporations doesn't mean they aren't entitled to due process. They spent tens of thousands of dollars repairing and improving their properties for the express purpose of renting them. III CT 606 ¶ 20, 609 ¶ 30. The City's flippant comment that their "personal enjoyment of these residential properties is … not impaired," Resp. Br. at 33–34, ignores the record evidence showing that their ability to receive STR income allows them to maintain and keep their properties at all. III CT 606–07 ¶¶ 20-21, 611 ¶ 35.

The City also argues that Appellants' detrimental reliance did not create a vested right because the City has allowed the Plaintiffs an "amortization" period. Resp. Br. at 35–36. But amortization does not negate a vested right. Rather, it is simply one factor in determining whether a property owner was afforded adequate *compensation* for a taken property right. When government terminates property uses through amortization, the reasonableness of an amortization period is one factor in determining whether the *remedy* is proper, such as whether a

property owner has received just compensation for a taking of private property. *Tahoe Reg'l Planning Agency v. King*, 233 Cal.App.3d 1365, 1395–1400 (1991). But Appellants have not alleged a taking here and do not seek compensation. Instead, they argue that the City's arbitrary deprivation of their rights is unconstitutional.

Also, the cases the City relies upon, Resp. Br. at 35–36, are not relevant because California courts have only allowed amortization in the *commercial* context. *See City of Whittier v. Walnut Props., Inc.*, 149 Cal.App.3d 633, 637 (1983) (adult businesses); *Castner v. City of Oakland*, 129 Cal.App.3d 94, 96-97 (1982) (same); *City of L.A. v. Gage*, 127 Cal.App.2d 442, 447 (1954) (plumbing business); *People v. Gates*, 41 Cal.App.3d 590, 599 (1974) (junkyard). Appellants are not aware of any case in which California courts have allowed amortization to extinguish *residential* use of *residential property*.

Finally, even in cases where amortization has been allowed, it has been a situation where the property was either already a nonconforming use under existing law, *e.g.*, *Gates*, 41 Cal.App.3d at 595–96; *Gage*, 127 Cal.App.2d at 447, or where the City made some *individualized determination* that the property

in question was specifically in violation, and then took action accordingly. *See, e.g.,* *Castner*, 129 Cal.App.3d at 97. Here, by contrast, the City engaged in no individualized determination of any sort. Property owners who committed no violations were just randomly selected by lottery to have their vested rights nullified, without any notice or right to be heard on the merits—indeed, without consideration of the merits. No amount of amortization can remedy that due process violation.

B. Ordinance 18-005 deprives Appellants of their procedural due process rights.

The City arbitrarily barred a randomly selected group of people, including Appellants, from seeking the renewals of their STR licenses that other property owners in the City may seek. That violates procedural due process.

The City argues that no procedural due process is required because Ordinance 18-005's lottery was legislative in nature. Resp. Br. at 37. But the lottery was not legislative. It was adjudicative, or should have been, since it was the process by which specific property owners were deprived of their right to rent.

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. Cnty. of Ventura*, 24 Cal.3d 605, 614 (1979). The lottery "procedure" here fell within the adjudicative category, because it was the means whereby the Ordinance was applied to specific properties, and given its randomness, plainly violated due process.

The City claims *Horn* supports its position because it involved government approval of a subdivision map, which affected the plaintiff's property. Resp. Br. at 38.[3] But those facts actually show why *Horn* supports *Appellants'* position. The *adoption* of Ordinance 18-005 may have been legislative, but

[3] The remaining cases cited by the City, Ans. Br. 37-39, 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 their rights without regard to their nuisance history or *any other relevant factor*. This violates due process.

applying its provisions to Appellants was what *Horn* called "governmental conduct, affecting the relatively few, [which] is [supposed to be] 'determined by facts peculiar to the individual case,'" and is [therefore] "'adjudicatory' in nature." 24 Cal.3d at 614. Because imposing the Ordinance on specific property owners was, or should have been, adjudicative, Appellants 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 legitimate proceeding.

The City responds that it "treated all STR license holders similarly" by subjecting them to the lottery. Resp. Br. at 39. But a due process violation is not cured by inflicting it on everyone equally. By the City's logic, it could simply seize all homeowners' property for no reason, without notice or opportunity to be heard, as long as it did so to everyone. That is plainly incorrect. Here, the City randomly selected a group of property owners to have their vested rights annulled without consideration of fault, or an opportunity to contest the revocation on the merits. Under the City's rules, STR owners who *did* cause nuisances could be allowed to keep their licenses, while responsible homeowners and renters like Appellants could be stripped of theirs. That is the

opposite of due process. *Redondo-Lemos*, 955 F.2d at 1299; *see also Am. Fed'n of Labor & Congress of Indus. Orgs. v. Nat'l Labor Relations Bd.*, 471 F.Supp.3d 228, 239 (D.D.C. 2020) ("decision 'by Ouija board or dart board, rock/paper/scissors, or even the Magic 8 Ball[,]'" would be "arbitrary-and-capricious" because such a "determination is not a reasoned one." (citation omitted)). Since applying nuisance rules to specific property owners who are licensed to operate STRs is qualitatively *adjudicative*, it was arbitrary to disregard whether or not they committed nuisances and to simply void the rights of a randomly selected, unlucky few.

C. Ordinance 18-005 and Measure M deprive Appellants of their substantive due process rights.

The City fails to respond to Appellants' arguments that Ordinance 18-005's arbitrary lottery, and Measure M's ban on STRs in residential areas outside the Coastal Zone, lack any rational connection to public health, safety, or welfare. It purports to distinguish the cases Appellants cite because they involved different facts ("a single property owner" or "demolition of [a] structure" or "a license to operate an amusement game," Resp. Br. at 45–46), but it never explains why the underlying

legal principles of due process detailed in those cases should not also protect these Appellants.

Instead, it simply makes the conclusory statement that the City's goals are "reflected in the administrative record" and that this Court should defer to its "broad authority to frame local land use regulations." *Id*. at 39. It reiterates that preserving "the quality of life" and "domestic tranquility" are legitimate government interests, but ignores Appellants' evidence that the *means the City chose* lack a rational connection to those goals. *See* AOB at 30–33, 36–37. It states that "the City held multiple public hearings and considered all affected interests," and that the City Council "made findings that the regulation was needed to protect public health, safety, and welfare." Resp. Br. at 42–43. But however much deference the City is entitled to on *policy* decisions, it cannot rely on mere *ipse dixit* to justify its blanket denial of due process.

As the Supreme Court has said, the City's regulations "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 has offered nothing to justify its arbitrary deprivation of Appellants' vested rights, or its total prohibition of all short-term rentals outside the Coastal Zone.[4]

The City notes that Sue and William Hobbs recently sold Sea Dance, one of the properties at issue here, and urges this Court to dismiss their claims against Measure M. Resp. Br. at 47–48. It is true that, deprived of their STR rental income, and due to the City's delaying tactics in this lawsuit, the Hobbses were unable to maintain that property, and were forced to sell it. But this Court should not dismiss the claim against Measure M.

"An appellate court retains discretion to decide a moot issue if the case presents an issue of 'substantial and continuing public interest' and is capable of repetition yet evades review." *Citizens Oversight, Inc. v. Vu*, 35 Cal.App.5th 612, 615 (2019) (citation omitted). The City itself acknowledges this exception. Resp. Br. at 51. The Hobbses' claims are of continuing public interest, as Measure M applies to every property owner outside

[4] The City suggests that Measure M should get some heightened deference because it "is a citizen's initiative," Resp. Br. 46-47, but cites to no authority as to why that should be so. On the contrary, initiatives "are subject to the same constitutional limitations and rules of construction as are other statutes." *Legislature v. Deukmejian*, 34 Cal.3d 658, 675 (1983).

the Coastal Zone. And, as the City admits, it frequently enacts and amends STR regulations and has done so for over a decade. *Id*. at 42. As demonstrated by this lawsuit, the effect of such regulations has been to deny homeowners the right to use their property as intended and to destroy an important source of income. AOB at 14–16, 18–19. This means other homeowners will likely be unable to maintain their properties as they await the outcome of litigation, as was the case with the Hobbses. Thus, this issue is capable of repetition yet evading review, and this Court should decide the claim against Measure M alongside the claim against Ordinance 18-005 (which involves the same legal principle).[5]

Because Ordinance 18-005 and Measure M eliminate Appellants' existing rights without any rational connection to public health and safety, *O'Hagen v. Bd. of Zoning Adjustment*, 19 Cal.App.3d 151, 165 (1971), and "without consideration of the various zoning alternatives or the best utilization of the

[5] Even if this Court finds that the Hobbses' claim against Measure M is no longer live, the Shirkeys, whose property is located *within* the Coastal Zone, and who lost their right to rent part of their home, still have a live claim against Ordinance 18-005.

property," *Arnel Dev. Co. v. City of Costa Mesa*, 126 Cal.App.3d 330, 335 (1981), these measures violate Appellants' substantive due process rights. *See* AOB at 30–38.

CROSS-APPELLEES' ANSWERING BRIEF (COUNT ONE: COASTAL ACT CLAIM)

I. Subsequent certification of the City's Local Coastal Program renders the California Coastal Act claim moot.

The Superior Court correctly held that the City violated the Coastal Act when it adopted and enforced Ordinance 18-005 without first seeking approval from the Coastal Commission. After that decision was rendered, the Commission considered and approved the City's Local Coastal Program, which includes the challenged regulations. Appellants agree with the City, Resp. Br. at 50, that this rendered the City's cross-appeal moot.

II. The trial court correctly held that Ordinance 18-005 violates the California Coastal Act.

If, however, Count One is not moot, then this Court should affirm: the Superior Court correctly held that Ordinance 18-005 violates the Coastal Act, because that Ordinance constitutes "development," Cal. Pub. Res. Code §§ 30108.6, 30510, and the

City therefore was required to get pre-approval from the Commission before adopting it, which it did not. *Id.* § 30512(c).[6]

A. Ordinance 18-005 effectively amended the City's LUP.

Although the City is correct that under the Coastal Act, "local governments have the authority to zone land to fit any of the *acceptable land uses* under the policies of the Act," Resp. Br. at 52 (emphasis added, citation omitted), zoning decisions in the Coastal Zone must nonetheless comport with the Coastal Act. California courts have consistently held that the 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 Const. 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

[6] The City says "disputed issues of fact" exist regarding Plaintiffs' Coastal Act claim, but it identifies none. Resp. Br. at 15. It also claims that "whether Ordinance 18-005 requires prior Coastal Commission approval" is a disputed fact, *id.*, but that is obviously a legal, not a factual question—indeed, it is the *central* legal question in Count One, since it goes to whether Commission approval was required.

classification, such as lot-line adjustments, qualify as "development" requiring Commission approval. *La Fe, Inc. v. L.A. 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 Local Coastal Plans (LCPs)[7] by 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 that city's LCP, or which constitute a "development," require Coastal Commission approval. *Id.* §§ 30108.6, 30510. It is undisputed that the City did not submit Ordinance 18-005 to the Commission for approval before adopting it, or before holding the lottery at which Cross-Appellees were selected to be stripped of their rights. Thus, the Superior Court was correct in ruling that Ordinance 18-005—and the lottery held pursuant to the ordinance—were invalid when enacted and applied.

In fact, when the City adopted and enforced Ordinance 18-005 (and before the Superior Court's ruling), it was not even

[7] 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.

operating under a Commission-approved LCP. Instead, it was only operating under a certified Land Use Plan (LUP),[8] and as such, it was required to submit *any* amendment to its LUP to the Commission for approval. Cal. Pub. Res. Code § 30514(a); Cal. Code Regs. tit. 14, art. 15 § 13551.

The City admits that its 1989 Land Use Plan was *silent* with regard to short-term rentals. Resp. Br. at 55. Thus, Ordinance 18-005—which regulates and prohibits STRs—deviated from the City's Commission-approved LUP. When the City adopted Ordinance 18-005, the Commission had not certified *any* of the City's STR regulations, meaning that any regulation of STRs in the Coastal Zone, such as those added by Ordinance 18-005, by definition "impose[d] further conditions, restriction or limitations," Cal. Code Regs. tit. 14, art. 15 § 13554(d)(3), that differ from those contained in the LUP the Commission certified. Such amendments must be approved by the Commission, *id.*, and at the time that the City adopted Ordinance 18-005 and used it to deprive Cross-Appellees of their STR licenses, the Commission had not given the requisite approval.

[8] City of Pacific Grove Local Coastal Program Land Use Plan (1989).

B. Ordinance 18-005 constituted "development" subject to Commission approval.

Additionally, the City was required to obtain a Coastal Development Permit ("CDP") before enacting, implementing, or enforcing Ordinance 18-005. The Coastal Act 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 banning or regulating short-term rentals satisfies this definition. Because that constitutes "development" under the Act, it required a CDP.

The City argues that "a change in the density or intensity of use of land" is not the same thing as "a change in local law governing potential or allowable density or intensity of land uses." Resp. Br. at 57. But the term "development" is liberally construed, *Surfrider Foundation v. Martins Beach 1, LLC*, 14 Cal.App.5th 238, 252 (2017), and California courts have made clear that changes in land use ordinances can fall within that definition, and trigger the requirement of Coastal Commission pre-approval. *See, e.g.*, *Kracke v. City of Santa Barbara (Kracke II)*, 63 Cal.App.5th 1089 (2021); *Greenfield v. Mandalay Shores Cmty. Ass'n*, 21 Cal.App.5th 896, 901 (2018).

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." *Pac. 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 to the coastal zone consistent with … 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. *Id.* § 30222; Cal. Code Reg., tit. 14, art. 4 § 13513(a)(6) ("uses that maximize public access to the coast" are "uses of more than local importance"). 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. It thus constituted a development that required Coastal Commission approval. *Surfrider Found.*, 14 Cal.App.5th at 246-58. And depriving Cross-Appellees 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 Cross-Appellees' constitutionally-protected property rights.[9]

The *Greenfield* court upheld an injunction against a homeowner's association's short-term rental ban, because short-term rental regulations "change[] the intensity of use and access to single family residences in the Oxnard Coastal Zone" and therefore qualify as development under the Coastal Act. 21 Cal.App.5th at 901. True, *Greenfield* involved an HOA rather than a city, but the court noted that "[t]he decision to ban or regulate [short-term rentals] must be made by the City *and*

[9] 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*." III CT 629 ¶ 61 (emphasis added).

Coastal Commission." *Id.* at 901–02 (emphasis added). And *Kracke II* made clear that the same principle applies to land use regulations. 278 Cal. Rptr. 3d at 373–76. Thus the City's argument, Resp. Br. at 58, that *Surfrider Foundation* and *Greenfield* involved private actors is irrelevant to the Superior Court's holding here that STR regulations constitute development. The cases make clear that changes in land use regulations that result in changes in the intensity of land use—like reducing STRs—must receive Commission approval.

The City's claim that Ordinance 18-005 is consistent with Coastal Act *policies*, Resp. Br. at 61–64, is both irrelevant and incorrect. The issue in this case, of course, is not whether the Ordinance comports with those *policies*—that is for the Commission to decide—but whether the City was required to get Commission approval for Ordinance 18-005. Yet the Commission has made clear 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." III CT 619 ¶ 45. The City knew this when it adopted Ordinance 18-005, because a year earlier, the Commission sent the City a letter reminding 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)." *Id.*

In *Kracke II*, the Court of Appeals agreed with that view, affirming a Ventura County Superior Court decision holding that Santa Barbara was required to secure a CDP from the Coastal Commission before virtually eliminating STRs from residential areas, including in the Coastal Zone.[10] 63 Cal.App.5th 1089 (affirming *Kracke v. City of Santa Barbara ("Kracke I")*, No. 56-2016-00490376, 2019 WL 3975530 (Cal. Super. Feb. 20, 2019)). The Superior Court in that case had 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 *9 (citations omitted; emphasis added). 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

[10] Like Pacific Grove, Santa Barbara's LUP was certified by the Commission in the 1980s and did (and does) not reference STRs. *Kracke I*, 2019 WL 3975530, at *12 n.13. And, like Pacific Grove, Santa Barbara was in the process of seeking Commission approval for its LCP when it changed its stance on STRs. *Id.* at *8.

cannot provide" is "in line with common sense," and the reduction in their availability is a "change" that constitutes "development." *Id.* at *13. The City tries to distinguish *Kracke*, arguing that Santa Barbara acted hastily due to "political pressure to ban [STRs]," while Pacific Grove supposedly "attempted to balance competing interests by enacting measured, gradual legislation." Resp. Br. at 59. But the Coastal Commission's jurisdiction—and the requirement that cities obtain Commission approval when undertaking development in the Coastal Zone—does not turn on a city's self-serving claim that it acted reasonably. Like Santa Barbara, the City in this case "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. *Kracke I*, 2019 WL 3975530 at *12. Thus, its action constituted "development" under the Coastal Act. *Kracke II*, 278 Cal. Rptr. 3d at 375. That means it was "not within the City's discretion," but rather "a mandatory duty to obtain a [Coastal Development Permit] before undertaking a 'development.'" *Kracke I*, 2019 WL 3975530 at *15.

In conclusion, Pacific Grove's prohibition on STRs pursuant to Ordinance 18-005, which—as the City admits—did not exist in

the original LUP that the Commission approved, was *both* an "amendment" to the LCP *and* a form of "development"—both of which required Commission approval. By adopting and implementing Ordinance 18-005 without first obtaining Coastal Commission approval, the City acted in violation of Cal. Pub. Res. Code §§ 30108.6; 30514(a). Thus, the Superior Court was correct to grant Cross-Appellees' Motion for Summary Judgment.

CONCLUSION

Appellants respectfully request that this Court *reverse* the Superior Court's determination with respect to Count II that Appellants have no vested right in their license, and remand for further proceedings to determine whether the City's deprivation of their vested rights deprived them of due process. Appellants further request that, if the City's appeal of Count I is not moot, this Court *affirm* the Superior Court's determination that the City violated the California Coastal Act when it adopted and applied Ordinance 18-005.

DATED: July 14, 2021.

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CERTIFICATE OF COUNSEL

Pursuant to Rule 8.204(c)(4), I hereby certify that the foregoing COMBINED APPELLANTS' REPLY AND CROSS-APPELLEES' ANSWER BRIEF, excluding the tables and certificate contains 6,149 words as stated in the word count of the computer program used to prepare the brief and is prepared in 13-point font.

DATED: July 14, 2021

/s/ *Christina Sandefur*
Christina Sandefur

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 August 2, 2018, I served the above Verified Application of Christina Sandefur for Admission *Pro Hac Vice* on the interested parties in this action addressed via the electronic filing portal and email as follows:

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