Case No. H047705

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

WILLIAM HOBBS, et al.

Plaintiffs and Appellants,

v.

CITY OF PACIFIC GROVE, et al.

Defendants and Respondents.

Appeal From a Judgment Entered in
Monterey County Superior Court Case No. 18CV002411
Honorable Lydia M. Villarreal, Judge, Dept. 13

PACIFIC GROVE NEIGHBORS UNITED'S APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND [PROPOSED] BRIEF IN SUPPORT OF RESPONDENT CITY OF PACIFIC GROVE

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*Robert "Perl" Perlmutter (SBN 183333)
Perlmutter@smwlaw.com
Andrew P. Miller (SBN 324093)
amiller@smwlaw.com
Shute, Mihaly & Weinberger LLP
396 Hayes Street
San Francisco, California 94102
Phone (415) 552-7272
Fax (415) 552-5816

Attorneys for Amicus Curiae Applicant
PACIFIC GROVE NEIGHBORS UNITED

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

There are no entities or persons that must be listed in this Certificate under Rule 8.208, California Rules of Court.

DATED: September 15, 2021 SHUTE, MIHALY & WEINBERGER LLP

By: /s/ Robert S. Perlmutter
ROBERT S. PERLMUTTER
ANDREW P. MILLER
Attorneys for Amicus Curiae Applicant
PACIFIC GROVE NEIGHBORS UNITED

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TO THE HONORABLE PRESIDING JUSTICE AND ASSOCIATE JUSTICES OF THE SIXTH DISTRICT COURT OF APPEAL:

Pursuant to Rule 8.200(c) of the California Rules of Court, Pacific Grove Neighbors United (hereinafter "PGNU") respectfully requests leave to file the attached amicus curiae brief in support of Defendant, Respondent and Cross-Appellant City of Pacific Grove.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus PGNU is an association of Pacific Grove residents formed to protect the residential character of the City of Pacific Grove and to reduce the negative impacts of short-term rentals ("STRs") on the local community. In early 2018, PGNU drafted and sponsored Pacific Grove Measure M, officially entitled "Ballot Initiative Banning and Prohibiting Short Term Rentals in All Residential Districts Outside the Coastal Zone." PGNU members served as the official proponents of Measure M, drafted the ballot arguments in support of the initiative, and led the campaign to ensure its adoption. PGNU thus has unique insight into the purpose and effect of Measure M, as well as a compelling interest in defending the initiative against Plaintiffs and Appellants William and Susan Hobbs' appeal.

HOW THIS BRIEF WILL ASSIST THE COURT

The proposed brief by amicus curiae will assist the Court by (1) providing necessary background on Measure M, its purpose, and its effects;

(2) describing fully the role of the initiative process and the tremendous deference due the will of the voters; and (3) explaining how Appellants' instant challenge misrepresents Measure M, mischaracterizes California law, and seeks to improperly constrain the constitutional right of Pacific Grove voters to determine for themselves what land uses should be allowed in residential zones. The party briefs do not fully address these issues, which are critical to understanding the legal questions before the Court. Accordingly, PGNU offers the proposed amicus brief to provide additional context that may be helpful to this Court's resolution of this appeal.

No party or counsel in the pending case authored this brief in whole or in part, or made any monetary contribution intended to fund the preparation or submission of the brief. No person other than PGNU and its members made any monetary contribution intended to fund the preparation or submission of this brief.

REQUEST FOR LEAVE TO FILE

Because the decision of this Court will directly affect PGNU and its members, and because the proposed amicus brief brings a unique perspective to bear on this matter, PGNU respectfully requests that the Court grant its application to file this amicus curiae brief.

Respectfully submitted,

DATED: September 15, 2021 SHUTE, MIHALY & WEINBERGER LLP

By: /s/ Robert S. Perlmutter
ROBERT S. PERLMUTTER
ANDREW P. MILLER
Attorneys for Amicus Curiae Applicant
PACIFIC GROVE NEIGHBORS UNITED

AMICUS CURIAE BRIEF OF PACIFIC GROVE NEIGHBORS UNITED

INTRODUCTION

When the voters of Pacific Grove enacted Measure M in 2018, they spoke with conviction: residential zones outside the Coastal Zone should be reserved for the residential uses that have come to define their City.[1] Short-term rentals—which by definition are commercial, visitor-serving uses that reduce long-term residential capacity—are incompatible with that goal. The voters thus employed their inherent legislative authority to restrict such rentals in specific residential zones within the City.

Relying on the alleged injury of William and Susan Hobbs, Appellants have gone to great lengths to paint Measure M as a rogue manifestation of predatory government overreach. But the reality is far simpler—and not at all nefarious. The power to zone property (i.e., to delineate where in a city certain uses are allowed) is one of the most basic, fundamental, and widely accepted of the municipal police powers. And zoning by initiative—harnessing those police powers for direct action by the voters—is one of the most jealously guarded rights of our democracy.

[1] Measure M is officially entitled "Ballot Initiative Banning and Prohibiting Short-Term Rentals in All Residential Districts Outside the Coastal Zone." 2 CT 275; *see* Elec. Code § 9203(a) (requiring city attorney to provide the formal title and summary). PGNU had proposed the following title: "Initiative to Preserve and Protect Pacific Grove's Residential Character." *See* 9 CT 1834. The Clerk's Transcript is cited herein as [Vol.] CT [Page].

Courts have thus repeatedly recognized that cities may prohibit land uses in the residential zone without offending constitutional safeguards on individual liberty. *E.g., Ewing v. City of Carmel-by-the-Sea* (1991) 234 Cal.App.3d 1579, 1588, 1593; *see also Associated Home Builders of the Greater East Bay v. City of Livermore* (1976) 18 Cal.3d 582, 607-11 (upholding voters' power to zone by initiative).

Throughout this litigation, Appellants have not only failed to make a case to the contrary, but they have also waived and abandoned any right do so. Specifically, after failing to carry their burden of proof on summary adjudication, Appellants ***voluntarily and unilaterally dismissed*** their due process claim ("Count II") with prejudice. Such dismissal terminates a claim for all time and forsakes any possibility of appeal.

And if that were not enough, while this appeal was pending the Hobbs sold their Pacific Grove property—the sole source of Appellants' standing to challenge Measure M. Because the Hobbs did not plead damages, there is no longer any relief that this Court could grant them. Appellants' Measure M challenge is moot.

Whether on the merits or in light of Appellants' numerous strategic blunders, this Court should dismiss this appeal and confirm that the case against Measure M has been conclusively resolved.

ARGUMENT

I. Measure M is a quintessential zoning ordinance designed to protect the longstanding character of the City's residential neighborhoods.

Pacific Grove has long been a city of homes. The City was founded in 1875 as a Methodist Seaside Retreat. Sections of the retreat lands were initially divided into small lots to be used as tent sites for seasonal visitors. City of Pacific Grove General Plan §§ 2.1, 7.1.[2] After the City incorporated in 1889, Victorian homes progressively replaced visitors' tents and became a defining feature of the City's neighborhoods. *Id.* Today, "[t]he predominant land use in Pacific Grove is residential, and most of that is single-family." *Id.* § 2.4.

The City Charter and zoning code expressly confirm the City's "residential character" and instruct the City Council to permit only that "business and industry [that is] compatible" therewith. Charter of the City of Pacific Grove, California ("City Charter"), art. 5.5; Pacific Grove Municipal Code § 23.04.010 ("Pacific Grove is primarily a city of homes, and it is, therefore, determined that business and industry ***shall be***

[2] A city's general plan is its "constitution" for all land use development, to which its zoning ordinance and all subordinate land use regulations and decisions must conform. *DeVita v. County of Napa* (1995) 9 Cal.4th 763, 772-73. Pacific Grove's General Plan is available at https://www.cityofpacificgrove.org/our_city/departments/community_development/programs___projects/general_plan.php#outer-269.

compatible with its residential character.") (emphasis added).[3] Nevertheless, in 2010 the City began to experiment with commercial uses in residential zones by permitting new short-term rentals ("STRs"). 9 CT 1835 (Initiative at C.6).

Licensing STRs in residential districts had immediate negative effects. *Id.* STRs "increased traffic, parking demand, light and glare, and noise, to the detriment of surrounding residential uses and the general welfare of Pacific Grove." *Id.* "In addition, management and enforcement needs … imposed new demands on city resources, including police, community development, and code enforcement, while burdening neighbors with unwanted monitoring and reporting responsibilities." *Id.* PGNU accordingly proposed Measure M in 2018 to put an end to these impacts and to restore the residential character of the City. 9 CT 1834-43.

Measure M works by prohibiting the issuance of ***new*** licenses for STRs in residential districts outside the Coastal Zone. 9 CT 1834 (Initiative at B). The initiative also established an 18-month sunset period for existing STR licenses, which the City had previously issued to qualifying homeowners on a time-limited basis. *Id.*; *see also* 2 CT 280 (the Hobbs' 2017 STR license, valid for 12 months and 7 days), 286 (2018 license, valid

[3] The City's Charter and its Municipal Code are available at https://www.codepublishing.com/CA/PacificGrove/.

for 12 months and 12 days), 292 (2019 license, valid for 1 month and 9 days). Notably, however, Measure M did ***not*** change existing rules for STRs within the Coastal Zone or anywhere else where STRs were an allowable use. 9 CT 1834 (Initiative at B).

Additionally, Measure M did "not change existing rules for bed and breakfast inns, motels, hotels, and other visitor lodging." 9 CT 1835 (Initiative at C.8.). Visitors in search of short-term stays still have their pick of a wide variety of traditional lodging, and residents who wish to run a short-term lodging business may do so. Residents may also "allow short-term occupancy of their homes for home sharing, house swaps, house sitting, pet sitting, work trade, and similar arrangements." *Id.* For example, under the City's home sharing ordinance, a resident can "host guests in their homes, for compensation, for periods of 30 consecutive days or less, while at least one of the dwelling unit's residents lives in the dwelling unit." Mun. Code § 23.64.370; *see also* 9 CT 1835 (Initiative at D.3) (describing same). The ***only*** thing residents cannot do as a result of Measure M is to rent an otherwise vacant residence in a residential district outside the Coastal Zone for a period of less than thirty consecutive days. 9 CT 1834-43.

Measure M is thus a quintessential zoning ordinance. It does not—as Appellants mistakenly claim (Appellants' Reply Brief ("ARB") at 24)—prohibit all STRs outside the Coastal Zone. Instead, Measure M simply

provides where in the City STRs are and are not an allowable use. 9 CT 1834-43 (prohibiting STRs only in *residential zones* outside the Coastal Zone); *see also* Mun. Code § 23.31.040 (residential uses are permitted in all but one of the City's commercial and industrial districts). This type of "[l]ine drawing is the essence of zoning" and is "presumptively constitutional." *Ewing*, 234 Cal.App.3d at 1588, 1593.

II. This Court must jealously guard the initiative power and resolve all doubts in favor of the voters' exercise of the City's police power through Measure M.

Measure M is an exercise of the initiative power—"one of the outstanding achievements" of Californian democracy. *Associated Home Builders*, 18 Cal.3d at 591. Based on "the theory that all power of government ultimately resides in the people, the [constitution] speaks of the initiative and referendum, not as a right granted the people, but as a power reserved by them." *Id.* The right of initiative is "generally co-extensive with the legislative power of the local governing body," and extends to zoning and general plan amendments. *DeVita*, 9 Cal.4th at 775, 784. However, the "[p]rocedural requirements which govern council action … generally do not apply to initiatives." *Associated Home Builders*, 18 Cal.3d at 594.

Thus, in adopting an initiative zoning ordinance like Measure M, the voters directly exercise the City's police power. *Id.* at 582 (upholding a zoning initiative as a constitutional exercise of the city's police power); *see also Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th

1139, 1151 ("[A] city's or county's power to control its own land use decisions derives from this inherent police power.") (citation omitted); *DeVita,* 9 Cal.4th at 780-82 (county initiative amending general plan is a valid exercise of the police power).[4]

Unlike where a City Council exercises that same power, however, the voters do not need to notice or hold hearings, make factual findings, or follow the other procedures typical of zoning actions. *Associated Home Builders*, 18 Cal.3d at 594. Although voter initiatives thus are not *required* to include findings, Pacific Grove's voters here made extensive findings in support of Measure M. 9CT 1834-35; *see infra* part IV.B.

The Supreme Court has repeatedly admonished that it is the courts' "duty to 'jealously guard' and liberally construe the right [of initiative] so that it 'be not improperly annulled'" *California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, 934 (citations omitted). Courts must "resolve doubts about the scope of the initiative power in its favor whenever possible, and [must] narrowly construe provisions that would burden or limit the exercise of that power." *Id.* at 936. An initiative measure "'must be upheld unless [its] unconstitutionality clearly, positively, and

[4] Respondents at one point arguably imply that initiatives are not an exercise of the police power. *See* Respondents' Brief ("RB") at 46 ("Measure M is a citizens' initiative; it [is] not an exercise of City police powers.") In fact, Measure M is both an initiative ***and***—by definition—an exercise of the City police power. *DeVita,* 9 Cal.4th at 780-82.

unmistakably appears.'" *Pala Band of Mission Indians v. Bd. of Supervisors* (1997) 54 Cal.App.4th 565, 574 (citation omitted). This Court thus has a duty to uphold Measure M if it is at least "***fairly debatable*** that the ordinance is reasonably related to the public welfare." *Associated Home Builders*, 18 Cal.3d at 606 (emphasis added).

III. Appellants have forfeited their challenge to Measure M.

As the City observed in its respondents' brief, Appellants have twice forfeited their challenge to Measure M. First, after failing to carry their burden of proof on their motion for summary judgment, Appellants voluntarily dismissed Count II with prejudice. Because the trial court never had a chance to rule on the merits of that claim, there was nothing for Appellants to appeal.

Second, while this appeal was pending, the Hobbs—who were the only plaintiffs with standing to challenge Measure M—sold their property in Pacific Grove. Respondents' and Cross-Appellants' Motion for Judicial Notice ("City RJN"), Exh. C. Even if Appellants could have made a case on the merits—and they could not—the Hobbs' voluntary sale has now precluded the courts from granting their requested relief. *See* 1 CT 40-41 (seeking "a permanent injunction against the City of Pacific Grove prohibiting the City from enforcing [Measure M] or divesting Plaintiffs of their short-term rental licenses under [Measure M]"). Thus, to the extent the

Appellants' challenge to Measure M survived dismissal, that challenge is now moot.

A. Because Appellants voluntarily dismissed Count II with prejudice, they cannot revive that claim on appeal.

Appellants acknowledge that "voluntary dismissals are not ordinarily appealable." ARB at 9. They nevertheless claim that this rule is subject to an exception where, as they claim occurred here, the dismissal was "entered as a consequence of an adverse trial court ruling that makes it ***impossible*** for the plaintiff to appeal." *Id.* (emphasis added). But this exception is plainly inapplicable here. Nothing in the trial court's ruling placed any limitations on Appellants' ability to appeal, let alone made it "impossible."

1. The trial court's order denying summary adjudication of Count II was not determinative of that claim, and thus could not support appeal from a voluntary dismissal.

It is settled that a voluntary dismissal with prejudice "'has the effect of an absolute withdrawal of [the plaintiff's] claim and leaves the defendant as though he had never been a party.'" *Stewart v. Colonial Western Agency, Inc.* (2001) 87 Cal.App.4th 1006, 1012 (quoting *Gray v. Superior Court* (1997) 52 Cal.App.4th 165, 170). Thus, a "willful dismissal terminates the action for all time and affords the appellate court no jurisdiction to review … motions made prior to the dismissal." *Gutkin v. University of Southern California* (2002) 101 Cal.App.4th 967, 975 (internal quotations and citation omitted). The lone exception to this rule occurs when dismissal is

entered after a determinative adverse ruling and the parties agree that the purpose of the dismissal is to expedite an appeal. *Stewart*, 87 Cal.App.4th at 1012. That is not what happened here.

First, and most significant, the trial court ***never issued an order on the merits of Count II***. To the contrary, in its order denying summary adjudication, the court ***explicitly rejected*** language concluding that the City was entitled to judgment on that claim. 3 CT 648-651 (finding that "Plaintiffs' motion for Summary Adjudication on Count Two (Due Process claim) is denied because Plaintiffs ***did not carry their burden of proof*** as to whether Plaintiffs have a substantive or procedural due process right to renew the time-limited short-term rental licenses," and ***striking from the proposed order*** language suggesting that "Plaintiffs [did] not have a … due process right" or a "vested right for the purposes of due process") (emphasis added); *see also* 3 CT 647 (letter from Appellants to the trial court, arguing unsuccessfully that the court should rule on the merits of Count II).

Appellants disregard entirely the trial court's actions, insisting instead that the court "ruled that Appellants could not, *as a matter of law*, establish a substantive or procedural due process right." ARB at 10 (emphasis in original). But the record directly rebuts this assertion. 3 CT 651 (order on summary judgment, ***striking out*** the following: "Plaintiffs' motion with regard to Count Two fails as a matter of law …").

The trial court did hold that Appellants failed to prove their claim in summary adjudication. But the court left open the door for Appellants to do so later with the benefit of a full evidentiary record. *See id.* The summary adjudication order is therefore not the type of dispositive ruling that can support an appeal from voluntary dismissal. *Compare* 3 CT 648-651 *with Ashland Chem. Co. v. Provence* (1982) 129 Cal.App.3d 790, 792-93 (permitting appeal from voluntary dismissal where trial court sustained demurrer without leave to amend but had not yet entered judgment).

Second, unlike the vast majority of cases where appeal was taken from a voluntary judgment***, the City here never consented to judgment*** for the purpose of expediting an appeal of Count II. *See Building Industry Assn. v. City of Camarillo* (1986) 41 Cal.3d 810, 817 ("If ***consent was merely given*** to facilitate an appeal following adverse ***determination of a critical issue***, the party will not lose his right to be heard on appeal.") (emphasis added); 9 CT 1870-71 (objecting to Appellants' "illusory" voluntary dismissal of Count II). There is accordingly no reason to deviate from established rules of civil procedure. Appellants' appeal is simply improper.

2. Appellants had multiple paths to appellate review, but chose not to pursue them.

If Appellants wanted to seek review of the order denying summary adjudication, the Code of Civil Procedure provides two paths by which they

could have proceeded. First, as with any interlocutory order that substantially affects the rights of the parties, Appellants could have sought review on appeal from a final judgment ***after trial***. *See, e.g., Lackner v. LaCroix* (1979) 25 Cal.3d 747, 753 (citing Code Civ. Proc. § 906). Alternately, if Appellants felt that more immediate review was warranted, they could have filed a petition for writ of mandate. Code Civ. Proc. § 437c(m); *Federal Deposit Ins. Corp. v. Dintino* (2008) 167 Cal.App.4th 333, 344; *see id.* at 343 (an order denying a motion for summary judgment or summary adjudication is ***not*** directly appealable).

But Appellants did not follow either of these established procedures. Instead, they attempted to make an end-run around the trial court and fabricate appellate jurisdiction. First, after failing to carry their burden of proof for summary adjudication, Appellants filed a "motion in limine" asking the court to exclude from evidence the entire administrative record and to enter judgment on Count II in favor of the City. 3 CT 662. But the City never moved for judgment on Count II, presumably because the record evidence would have allowed it to mount a more thorough defense. *See* 9 CT 1854 ("The City must not be deprived [of] an opportunity to present evidence and argue the content of the official record that supports the legislation Plaintiffs challenge."). The court thus denied Appellants' motion. 9 CT 1866.

Then, instead of allowing the City to move for judgment on the totality of evidence—which, under Appellants' theory, should have been a quick process—Appellants dismissed Count II with prejudice on their own volition. 9 CT 1867-68 (notice of dismissal); 1877-78 (order of dismissal). The law does not countenance such gamesmanship, particularly where there is a clear and established path to the relief sought. *See, e.g., McCarthy v. CB Richard Ellis, Inc.* (2009) 174 Cal.App.4th 106, 120-21 (rejecting appeal from stipulated judgment because the parties did not follow the prescribed procedures for summary judgment).

Appellants' recreant and unprecedented approach to manufacture appellate jurisdiction must be rejected. To the extent Appellants—as opposed to their attorneys—did not knowingly direct voluntary dismissal of their claims, they may have a remedy against their counsel. But that cannot create appellate jurisdiction where it is clearly lacking.

B. By selling the property that is the subject of this appeal, the Hobbs destroyed their standing and mooted their claim.

Even if Count II could rise from the ashes of Appellants' dismissal—and it cannot—the Hobbs have doomed their Measure M challenge to failure. As the only plaintiffs with property outside the Coastal Zone, the Hobbs provided Appellants' lone source of standing to challenge Measure M. *See* 1 CT 31-34, 36 (pleading that Measure M impacted only the Hobbs, not the Shirkeys); *see also* ARB at 25, fn. 5 (admitting that the

Shirkeys' "property is located *within* the Coastal Zone) (emphasis in original).

While this appeal was pending, however, the Hobbs sold their Pacific Grove property. City RJN, Exh. C. They are no longer subject to Measure M, and no remaining plaintiff has challenged the initiative. *See* 1 CT 36, 39-40. Further, even if this Court were to rule in Appellants' favor, no court could grant their requested (or any other) relief. The Hobbs did not plead damages; they simply asked the court to prohibit the City from enforcing Measure M against them and to restore their STR license. 1 CT 40-41. That request is now futile. Because there is no meaningful relief this Court could grant to the Hobbs, and because the Shirkeys did not plead standing to challenge Measure M, this Court should dismiss Count II at least to the extent that it applies to Measure M. *See, e.g., Consolidated Vultee Air Corp. v. United Automobile* (1946) 27 Cal.2d 859, 862-63.

Appellants notably do not deny that they lack standing to challenge Measure M. *See* ARB at 24-25. Instead, effectively conceding that the Hobbs' claim cannot stand on its own feet, Appellants insist this appeal should move forward because Measure M affects ***other*** homeowners who are not parties to this litigation. *Id.* Appellants theorize that because those owners "will likely be unable to maintain their properties as they await the outcome of litigation," Count II presents an issue "capable of repetition yet evading review." ARB at 25. But those dogs won't hunt.

First, in order for the mootness exception to apply, the ***conduct challenged in the litigation*** must be capable of repetition yet evading review. For example, in *Citizens Oversight, Inc. v. Vu* (2019) 35 Cal.App.5th 612, 615-16, the Fourth District applied the exception to a claim that citizens were entitled to inspect ballots after an election. The court reasoned that even though the ballots for the contested election had already been destroyed, the government's ongoing authority to destroy ballots meant the question of access was likely to recur in future elections. *Id.* In this case, by contrast, appellants have not suggested that the challenged conduct—the enactment of STR legislation—is likely to be repeated. ARB at 25. They simply hypothesize that other residents may eventually choose to sell Pacific Grove properties if that legislation remains in effect. *Id.* Regardless of whether such incidental effect is likely, it is distinct from the ***City's*** conduct and is thus irrelevant to the question of mootness.

Second, even if Appellants' argument could be construed as applying to the challenged action in this case, nothing about the City's action is capable of repetition. Measure M took effect ***one time***, two years ago. *See* 9 CT 1834-43. STR operators likewise lost the ability to renew their licenses ***one time,*** when those licenses expired approximately one year later. *See id.* The City cannot reenact Measure M a second time or ban

again an activity that is already prohibited in the residential zone outside the Coastal Zone.

Additionally, the City is not issuing any new STR licenses in the initiative area, and any licenses that were previously issued in the initiative area would have expired in or before May 2020. *See* 9 CT 1834-43. Any homeowner who could have had a claim against Measure M has thus already relinquished that claim, and their time to seek judicial relief has long since lapsed. *See* Gov. Code § 65009(c)(1)(B) (establishing a 90-day limitations period to "attack, review, set aside, void, or annul the decision of a legislative body to adopt or amend a zoning ordinance"). By definition, the issue presented in this appeal is ***incapable*** of repetition.

Because the Hobbs have denied this Court the opportunity to grant them effective relief, this Court has "the duty to avoid deciding [this] moot appeal." *Saltonstall v. City of Sacramento* (2014) 231 Cal.App.4th 837, 848 (internal quotations and citation omitted); *accord California Redevelopment Assn. v. Matosantos* (2013) 212 Cal.App.4th 1457, 1484; *MHC Operating Limited Partnership v. City of San Jose* (2003) 106 Cal.App.4th 204, 214.

IV. Measure M did not violate the Hobbs' due process rights.

Even if the Hobbs could maintain their appeal from a procedural standpoint, they have not pled a viable due process claim with respect to Measure M. First, as a matter of law, Appellants could not have a vested

right to the continuation of a license that they agreed might not be renewed in the future. To the extent any rights might have vested in the past, Appellants fully enjoyed those rights during the term of their STR licenses.

Second, Appellants have not presented any meaningful evidence or argument that Measure M is an improper exercise of the City's police power. Courts must uphold a zoning initiative against a due process challenge if it is at least "fairly debatable" that the ordinance is reasonably related to the public welfare. *Associated Home Builders*, 18 Cal.3d at 606. And courts have long recognized that protecting the character of residential zones—as Measure M does here—is a valid use of the police power. *See Ewing*, 234 Cal.App.3d at 1589-91 (upholding a zoning ordinance that prohibited STRs in the residential zone). Appellants' claims to the contrary are meritless.

A. Appellants did not have a vested right in the renewal of their time-limited STR licenses.

Appellants' primary claim on appeal is that they obtained a vested right to perpetual renewal of their STR licenses simply because they chose to repair and maintain their property. Appellants' Opening Brief ("AOB") at 8, 14, 33; ARB at 12-13. This argument fundamentally misunderstands California law and ignores entirely the terms of Appellants' licenses.

As an initial matter, Appellants confuse two distinct legal doctrines that both use the term "vested rights." In the context of land use regulation,

a developer who invests substantial resources in a project in good faith reliance on a permit can obtain a "vested right" ***to finish construction*** in accordance with the terms of that permit, even if the underlying regulations later change. *E.g., Avco Community Developers, Inc. v. South Coast Regional Com.* (1976) 17 Cal.3d 785, 793. This rule prevents shifting goalposts from hamstringing large development projects that can take many months or even years to complete.

Separately, where an agency issues a permit that is of sufficient significance to the permittee's livelihood, the permittee can obtain a "fundamental vested right" to that permit. Unlike land use vested rights, however, this "fundamental vested right" does not lock in a particular regulation or guarantee continued possession of the permit; it simply means that the permit is of such value that a court, rather than the issuing agency, must independently determine whether the permit can be extinguished. *Goat Hill Tavern v. City of Costa Mesa* (1992) 6 Cal.App.4th 1519, 1526 (noting that the "'term 'vested' in the sense of 'fundamental vested rights' to determine the scope of judicial review …***is not synonymous with*** …the 'vested rights' doctrine relating to land use and development.'") (emphasis added and citation omitted).

Appellants cherry pick cases under both of these doctrines in their attempt to build a favorable narrative. But neither doctrine helps Appellants. First, to the extent Appellants could be construed as having a

vested land use right under *Avco*, they fully enjoyed that right before their licenses expired. Where a developer obtains a vested right by virtue of a license, the scope of that right is constrained by the license's terms. *Avco*, 17 Cal.3d at 791 ("he acquires a ***vested right to complete construction in accordance with the terms of the permit***") (emphasis added); *cf. Pardee Construction Co. v. California Coastal Com.* (1979) 95 Cal.App.3d 471, 481 (holder of a vested right may continue construction after a building permit expires, provided that "no substantial change may be made in such development" relative to what was allowed under the permit) (internal quotations omitted); *O'Hagen v. Bd. of Zoning Adjustment* (1971) 19 Cal.App.3d 151, 158 (maintenance of vested right depends on compliance with the "conditions expressed in the permit granted").

Here, the Hobbs attested in their annual applications for an STR license that they understood their licenses to be time-limited and that they would need to apply for renewal if they wished to continue using their property as an STR. 2 CT 284 (signed license application, acknowledging that "renewal of this license is not guaranteed"); *see also* Mun. Code § 7.40.070. Because Measure M allowed existing licenses to sunset, the Hobbs were able to enjoy the benefits of their licenses for the full term thereof. *Compare* 2 CT 292 (the Hobbs' last-issued license expired in April 2019) *with* 9 CT 1834 (applying 18-month sunset under Measure M, all licenses would expire by May 2020). Any vested right to maintain an STR

could not survive the term of the STR license, and thus could not be impinged by Measure M. *See Avco*, 17 Cal.3d at 791.

Second, the "fundamental vested rights" doctrine discussed in *Goat Hill Tavern* does not apply to zoning ordinances like Measure M. In each "fundamental vested rights" case cited by Appellants, an administrative body acted ***in a quasi-judicial*** role to deny or revoke the plaintiff's permit. *See Berlinghieri v. Department of Motor Vehicles* (1983) 33 Cal.3d 392, 394 (DMV suspended driver's license); *Bauer v. City of San Diego* (1999) 75 Cal.App.4th 1281, 1286 (city council denied conditional use permit); *Malibu Mountains Recreation, Inc. v. County of Los Angeles* (1998) 67 Cal.App.4th 359, 362 (county planning commission revoked permit); *San Benito Foods v. Veneman* (1996) 50 Cal.App.4th 1889, 1891-92 (stayed suspension of food processing permit following hearing); *Goat Hill Tavern*, 6 Cal.App.4th at 1523 (city council denied conditional use permit); *Clerici v. Dept. of Motor Vehicles* (1990) 224 Cal.App.3d 1016, 1019 (DMV denied vehicle sales license).

By contrast, Appellants cite no case where a court has applied the fundamental vested rights doctrine to a ***legislative*** action, such as a zoning ordinance, whether enacted by initiative or otherwise. Nor could they. As the court explained in *Goat Hill Tavern*, the entire purpose of the fundamental vested rights inquiry is to determine the appropriate standard of review in an administrative mandamus proceeding—i.e., an action to

review a "quasi-judicial act." 6 Cal.App.4th at 1525-26. That inquiry is irrelevant here because the City did not adjudicate any permit.

Finally, even if legislation could theoretically abridge a "fundamental vested right," Appellants could not assert such a right here. A person can only have a vested right in the renewal of a permit if they have a reasonable expectation that the permit will be renewed as a matter of course. *Metropolitan Outdoor Advertising Corp. v. City of Santa Ana* (1994) 23 Cal.App.4th 1401, 1403-04 (finding no vested right where plaintiff agreed to remove a billboard after expiration of the billboard's permit). The Hobbs could have no such expectation here. While Appellants insist the City issued STR licenses over the counter, their sole evidence for that claim is Appellants' own disputed allegation. ARB at 15 (citing to Appellants' disputed separate statement at 3 CT 618). And, critically, Appellants repeatedly signed documents stating that their STR licenses may not be renewed. 2 CT 284 ("I understand . . . [that] renewal of this license is not guaranteed"), 290 ("I understand that this STR license sunsets and expires on April 30, 2019."). Any expectation of renewal on their part was therefore per se unreasonable.

At most, then, the Hobbs' STR is an earlier authorized use. And courts have long held that zoning ordinances can restrict an earlier authorized use where, as Measure M did here, they provide a reasonable time to amortize that use. *City of Los Angeles v. Gage* (1954) 127

Cal.App.2d 442, 460; 9 CT 1834 (Measure M at B, establishing an 18-month sunset period for existing STR licenses); *see* RB at 35-36.

B. Measure M is a valid exercise of the City's police power.

Without a vested right, Appellants have no colorable argument that Measure M violates due process. For nearly 100 years, courts have recognized that zoning regulations are a valid exercise of local police power. *Village of Euclid v. Ambler Realty Co.* (1926) 272 U.S. 365, 394-95; *Miller v. Board of Public Works* (1925) 195 Cal. 477, 486-88 ("In California it is well settled that there is no objection to zoning ordinances as such."). And while the scope of the police power "varies with circumstances and conditions" (*Euclid*, 272 U.S. at 387), local authority to create "strictly private residential districts from which are excluded and absolutely prohibited general business enterprises, apartments, tenements, and like structures" is well established (*Ewing*, 234 Cal.App.3d at 1588 (quoting *Miller*, 195 Cal. at 490)); *see also Rosenblatt v. City of Santa Monica* (9th Cir. 2019) 940 F.3d 439 (upholding an ordinance that prohibited STRs in residential zones except when the primary resident was present).

In *Ewing*, this Court recognized that STRs have unmitigable, adverse impacts because they threaten the character and stability of a residential neighborhood. 234 Cal.App.4th at 1589-91. Accordingly, this Court upheld Carmel's ordinance prohibiting STRs in the residential zone. The Court

reasoned that such zoning "does not seek entirely to ban short-term visitors," but "simply confine[s] the accommodations for those visitors" to more appropriate parts of the city. *Id.* at 1591-92. Carmel's desire "to preserve an enclave of single-family homes as the heart and soul of the city" provided a sufficient nexus to the "'public health, safety, morals or general welfare'" for this Court to conclude the zoning ordinance was constitutional. *Id.* (quoting *Euclid*, 272 U.S. at 395).

Appellants complain that Measure M cannot meet this standard because "[t]he City made no findings to substantiate the assertion that a total prohibition of all STRs would serve any public interest." AOB at 36. But this assertion is both legally irrelevant and demonstrably erroneous, on multiple grounds. As a legal matter, because Measure M is an initiative ordinance, the City was not required to make findings before adopting it. *Building Industry Assn.,* 41 Cal.3d at 824 ("To hold [that initiatives must make specific findings] would place an insurmountable obstacle in the path of the initiative process and effectively give legislative bodies the only authority to enact this sort of zoning ordinance."); *Associated Home Builders*, 18 Cal.3d at 594 ("[T]he Legislature never intended the notice and hearing requirements of the zoning law to apply to the enactment of zoning initiatives.").

Factually, Appellants simply ignore the indisputable reality that, in adopting Measure M, the voters ***did*** make specific findings in support of the

initiative. For example, the initiative expressly found that STRs interfere with the City's residential character by "increas[ing] traffic, parking demand, light and glare, and noise, to the detriment of surrounding residential uses and the general welfare of Pacific Grove." 9 CT 1835 (Initiative at C.6). The initiative also found that the City's efforts to mitigate adverse impacts of STRs had been insufficient, in substantial part because the City had grandfathered in existing STRs that could "continue operating indefinitely." *Id.* (C.7). The voters thus identified substantially the same harms and goals that the City of Carmel identified—and that this Court found constitutional—in *Ewing*.

Additionally, as demonstrated above, Measure M is emphatically ***not*** a "total prohibition of all STRs." *Supra*, Part II. Rather, like the ordinance in *Ewing*, Measure M is a zoning ordinance that protects an "enclave" of residential homes from an incompatible commercial use. 234 Cal.App.3d at 1591; 9 CT 1834-43. It does not apply in the Coastal Zone, and it does not restrict STRs in non-residential districts ***anywhere*** in the City. 9 CT 1834-43.

Appellants' cases about total use prohibition are therefore irrelevant. For example, Appellants cite *People ex rel. Younger v. County of El Dorado*, 96 Cal.App.3d 403 (1979), for the proposition that the "exercise of police power may not extend to a total prohibition of activity not otherwise unlawful." AOB at 34. But the situation before the court in *Younger* was

nothing like Measure M. In *Younger*, a county ordinance restricting boating "ban[ned] virtually all public use of [a] river." 96 Cal.App.3d at 406. Striking down the ordinance, the court emphasized that "[t]he public's right of access to navigable streams is a constitutional right." *Id.* (citing Cal. Const., art. X, § 4; *Marks v. Whitney* (1971) 6 Cal.3d 251). Further, Harbors and Navigation Code section 660 expressly limited the county's police power in that case "to enactment of measures pertaining to 'time-of-day restrictions, speed zones, special-use areas, and sanitation and pollution control." *Id.* The county's ordinance prohibiting public boating did not fall into any of these categories and was therefore unlawful. *Id.* at 406-07.[5]

Here, the City's police power is not so limited. To the contrary, this Court has long recognized that the ability to limit STRs within residential zones is squarely within the City's ambit. *Ewing*, 234 Cal.App.3d at 1591. Additionally, unlike public access to navigable streams, the ability of a

[5] Appellants' parenthetical citations to the *Lochner*-era decisions in *San Diego Tuberculosis Assn. v. City of E. San Diego* (1921) 186 Cal. 252 and *Frost v. City of Los Angeles* (1919) 181 Cal. 22, are equally inapposite. *See* AOB at 35. In *San Diego*, the Court determined that the police power did not extend to the prohibition of hospitals unless a hospital "is a menace to the public peace, morals, health, or comfort." 186 Cal. at 254. The Court found no such menace existed. *Id.* And in *Frost*, the challenged regulation had "no relation whatever to the preservation of the public health, comfort, or convenience." 181 Cal. at 29. Here, by contrast, Measure M is reasonably related to the public health, safety, and welfare because it protects the character of the residential zone. *See Ewing*, 234 Cal.App.3d at 1591.

private party to maintain an STR in a residential zone is not a constitutional right. *See generally Ewing*, 234 Cal.App.3d 1579; *cf.* Cal. Const., art. X, § 4 (expressly identifying the public's right to access navigable waters as a constitutional right). Because Measure M simply draws lines delineating where STRs are permitted within the City in order to protect the City's residential character, Measure M is a lawful exercise of the City's police power. *Ewing*, 234 Cal.App.3d 1579.

C. Appellants cannot second guess the wisdom of the voters' policy decisions.

Viewed in light of *Ewing*, Appellants' due process claim is little more than a policy disagreement. Appellants assert that because the City *could* have regulated STRs without prohibiting them in residential districts, Measure M went farther than necessary to achieve its goal. AOB at 36-37 (listing alternative approaches the City allegedly could have taken); ARB at 23 (arguing "that the *means the City chose* lack a rational connection" to its goals) (emphasis in original). But the law does not require a perfect fit between a zoning ordinance and its purpose. To the contrary, courts recognize that effective zoning requires those with knowledge of local circumstances to carefully balance competing interests. *See Associated Home Builders*, 18 Cal.3d at 605. Courts may "differ with the zoning authorities as to the necessity or propriety of an enactment, but so long as it remains a question upon which reasonable minds might differ, there will be

no judicial interference with the municipality's determination of policy." *Id.* (internal quotations and citations omitted). Courts must uphold a zoning ordinance if it is at least "***fairly debatable*** that the ordinance is reasonably related to the public welfare." *Id.* at 606 (emphasis added) (noting agreement among the California Supreme Court, the Ninth Circuit Court of Appeals, and the United States Supreme Court).

Here, Measure M draws a clear connection between its policies and the public good. *E.g.,* 9 CT 1834 (listing negative impacts of STRs in residential zones and restricting STRs to reduce those impacts). And Measure M's stated purpose—restoration and protection of the City's residential character—is a long-respected use of the police power. *Ewing*, 234 Cal.App.3d at 1589-90. On its face, the initiative passes rational basis review.

By contrast, Appellants offer no evidence that Measure M is unrelated to the public welfare. It is not enough that Appellants disagree with Measure M's policies or with the voters' characterization of their City as predominantly residential. *See* AOB at 36-37. To succeed on their due process claim, Appellants must show that it is ***indisputable*** that Measure M is an improper exercise of the police power. *See Associated Home Builders*, 18 Cal.3d at 606. They cannot meet that burden.

Finally, Appellants' claim that Measure M denied them an opportunity to be heard is simply untrue. Like all other residents of Pacific

Grove, Appellants had their opportunity to be heard at the ballot box. The Supreme Court has expressly rejected Appellants' argument that due process required anything more. *Associated Home Builders*, 18 Cal.3d at 588 (rejecting claim that rezoning by initiative violates due process clause because it does not provide an opportunity for public hearings). Appellants do not get a second bite at the apple now simply because they disagree with the majority of City voters. *Id.* at 592 ("The proponents and opponents are given all the privileges and rights to express themselves in an open election that a democracy or republican form of government can afford to its citizens … It is clear that the constitutional right reserved by the people to submit legislative questions to a direct vote cannot be abridged by any procedural requirement.") (quoting *Dwyer v. City Council* (1927) 200 Cal. 505, 516).

CONCLUSION

Appellants have twice forfeited their ability to challenge Measure M: first by voluntarily dismissing their claim with prejudice, and later by selling the Hobbs' property and rendering their request for relief moot. This Court should therefore dismiss Appellants' case for lack of jurisdiction. If,

however, this Court finds it necessary to decide the merits of Appellants' claim, amici respectfully request that this Court uphold Measure M as a valid exercise of the City's police power.

DATED: September 15, 2021 SHUTE, MIHALY & WEINBERGER LLP

By: /s/ Robert S. Perlmutter
ROBERT S. PERLMUTTER
ANDREW P. MILLER
Attorneys for Amicus Curiae Applicant
PACIFIC GROVE NEIGHBORS UNITED

CERTIFICATE OF WORD COUNT

In accordance with California Rules of Court Rule 8.204(c)(4), I certify that, exclusive of this certification and the other exclusions referenced in Rule of Court 8.204(c)(3), this **Pacific Grove Neighbors United's [Proposed] Amicus Brief in Support of Respondent City of Pacific Grove** contains **6,695** words, as determined by the word count of the computer used to prepare this brief.

DATED: September 15, 2021 SHUTE, MIHALY & WEINBERGER LLP

By: /s/ Robert S. Perlmutter
ROBERT S. PERLMUTTER
ANDREW P. MILLER
Attorneys for Amicus Curiae Applicant
PACIFIC GROVE NEIGHBORS UNITED

PROOF OF SERVICE

Hobbs, et al. v. City of Pacific Grove, et al.
Case No. H047705
California Court of Appeal, Sixth District

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of San Francisco, State of California. My business address is 396 Hayes Street, San Francisco, CA 94102.

On September 15, 2021, I served true copies of the following document(s) described as:

PACIFIC GROVE NEIGHBORS UNITED'S APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND [PROPOSED] BRIEF IN SUPPORT OF RESPONDENT CITY OF PACIFIC GROVE

on the parties in this action as follows:

Hon. Lydia M. Villarreal
Department 13
Monterey County Superior Court
1200 Aguajito Road
Monterey, California 93940

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Shute, Mihaly & Weinberger LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

On September 15, 2021, I also served true copies of the above-referenced document on the parties in this action as follows:

David C. Laredo
De Lay & Laredo
606 Forest Avenue
Pacific Grove, California 93950
Telephone: (831) 646-1502
Facsimile: (831) 646-0377
E-mail: dave@laredolaw.net

David J. Ruderman
Colantuono, Highsmith & Whatley
420 Sierra College Drive, Suite 140
Grass Valley, California 95945
Telephone: (530) 432-7357
Facsimile: (530) 432-7356
E-mail: druderman@chwlaw.us

Attorneys for Defendants,
Respondents and Cross-Appellants
CITY OF PACIFIC GROVE, et al.

Timothy Sandefur
Christina Sandefur
Scharf-Norton Center for
Constitution Litigation at the
Goldwater Institute
500 East Coronado Road
Phoenix, Arizona 85004
Telephone: (602) 462-5000
Facsimile: (602) 256-7445
E-mail:
litigation@goldwaterinstitute.org

Attorneys for Appellants
and Cross-Respondents
WILLIAM HOBBS, et al.

BY ELECTRONIC SERVICE: I electronically filed the document(s) with the Clerk of the Court by using the TrueFiling system. Participants in the case who are registered TrueFiling users will be served by the TrueFiling system. Participants in the case who are not registered TrueFiling users will be served by mail or by other means permitted by the court rules.

Executed on September 15, 2021, at Union City, California.

David Weibel

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