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

APPELLANTS'/CROSS-APPELLEES' COMBINED RESPONSE TO AMICUS BRIEFS OF PACIFIC GROVE NEIGHBORS UNITED AND LEAGUE OF CALIFORNIA CITIES

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INTRODUCTION

The amicus briefs of the League of California Cities (LCC) and Pacific Grove Neighbors United (PGNU) consist almost entirely of straw man assertions, misconstructions of Appellants' positions, and reiterations of the City's arguments. Ruling for Appellants would not, as amici claim, "cripple local governments' ability to regulate land use and zoning and to preserve the character and aesthetic of cities." LCC Br. at 3. Appellants do not challenge the City's police or zoning power, or even its authority to regulate short-term rentals (STRs). Instead, this case is about a very narrow set of circumstances: whether a city may arbitrarily deprive responsible homeowners of their vested right to offer their homes to overnight guests, in the absence of any wrongdoing by them, when they detrimentally relied upon that right—and without the requisite approval by the California Coastal Commission.

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

The City violated Appellants' due process rights because it used a random lottery (and subsequently enforced the ban in Measure M) to revoke Appellants' right to rent their homes—a

literally arbitrary process that made no connection between that revocation and the Appellants' use of their properties. Amici's repeated assertions of the obvious truisms that "cities' constitutional police power includes the regulation of land use and zoning," LCC Br. at 11, and that the zoning power is "widely accepted," PGNU Br. at 12, are not contested here and are not relevant. They are distractions[1] from the issue before the Court, which is: whether Appellants have vested rights for purposes of due process when their permits expire after twelve months and must be renewed.[2]

[1] Thus, there is no basis for LCC's concern that ruling for Appellants will render local governments powerless to address various zoning concerns. LCC Br. at 17. The City could have chosen any number of alternatives that would have comported with due process, such as revoking or phasing out licenses for properties that cause nuisances, grandfathering compliant properties, and adopting new nuisance rules. Instead, it randomly revoked permits without regard to any allegation of nuisance or reliance concerns.

[2] PGNU restates City's arguments that Hobbses' home sale moots the claim against Measure M, and the City's attempt to relitigate its MTD Count II, both of which have been stated by the City and addressed by Homeowners Appellants' Reply/Response Brief at 8–9, 24.

A. Vested right

Amici exaggerate and misstate Appellants' due process claim. Appellants do not, as Amici contend, "argue for the creation of a new vested property right," LCC Br. at 3; PGNU Br. at 27–8, or a "constitutional right to develop property for maximum economic profit," etc. LCC Br. at 21. Appellants' claim is not, as LCC calls it, a takings claim. Nor do Appellants assert a "right to renewal of a time-limited STR license." *Id.* at 12. Instead, the right in question is in Appellants' continued interest in renting their homes.

As Appellants explain in their Reply and Response Brief at 13–14, vested rights are not a simple matter of whether a permit has been issued. Instead, the question depends on several factors, particularly the person's reliance interest. *Consaul v. City of San Diego,* 6 Cal. App.4th 1781, 1794 (1992); *Avco Cmty. Dev., Inc. v. S. Coast Reg'l Comm'n*, 17 Cal.3d 785, 791 (1976). Here, Appellants detrimentally relied on their permits to make substantial investments to improve their homes for the purpose of renting them out as the permits allowed. Such reliance interests mean that vested rights can—and in this case do—outlive the permits. *Pardee Constr. v. Cal. Coastal Comm'n*, 95

Cal. App.3d 471, 478 (1979); *Traverso v. People ex rel. Dep't of Transp.*, 6 Cal.4th 1152, 1162 (1993).

Additionally, Appellants have never claimed that "their time-limited STR licenses would continue to be renewed indefinitely." LCC Br. at 15. But until the Ordinance suddenly and arbitrarily deprived them of their right to rent, renewal and revocation were based on *facts relevant to the property use*—that is, whether the license-holders had committed specific, enumerated misconduct or violations—and those people whose permits were revoked were entitled to a hearing before the City Manager. III CT 614–15 ¶ 39. Appellants maintained their licenses in good standing and never committed misconduct or received violations that would subject them to revocation or nonrenewal under the Ordinance by which they obtained their licenses. III CT 607¶ 24, 610 ¶ 33. Nevertheless, the City chose to substitute a random process that rendered Appellants ineligible to renew their licenses, regardless of how the Appellants had used their properties.

LCC's contention that "[i]f the decision maker has discretion to grant or deny the benefit, it is not a protected interest," LCC Br. at 20 (citations omitted), is both false and

irrelevant. It is false because "a valid permit once issued cannot be arbitrarily revoked," *Spindler Realty Corp. v. Monning*, 243 Cal. App.2d 255, 267 (1966), and it is irrelevant because STR licenses were "ministerial and issued over the counter," III CT 618 ¶ 44, not at the discretion of City officials. For the City to substitute a random revocation process at this point is therefore a violation of due process.

LCC's reliance on *Ewing v. City of Carmel-By-The-Sea*, 234 Cal. App.3d 1579 (1991), LCC Br. at 21, is misplaced for reasons given in Appellants' Opening Brief at 37. In *Ewing*, the City prohibited short term residences in one district of the city based on factual findings that showed that such land uses were inconsistent with the neighborhood's traditional character. Here, the City itself recognizes that visitors—and STRs—are and always have been a part of life in Pacific Grove. III CT 591–92 ¶ 2, 605 ¶¶ 14–16. Also, the *Ewing* court took pains to note that the ordinance "[did] not seek entirely to ban short-term visitors," 234 Cal. App.3d at 1591, whereas the Ordinance here, coupled with Measure M, outlaws STRs in all residential areas outside the Coastal Zone. Even if the rationale in *Ewing* justifies placing

limitations on STRs, it does not justify the elimination of existing vested rights through a random lottery.[3]

Likewise, *E&B Natural Resources Management Corp. v. County of Alameda*, No. 18-cv-05857-YGR, 2020 WL 3050736 (N.D. Cal., June 8, 2020), on which LCC relies (LCC Br. at 22–24), actually supports *Appellants'* position. There, the property owners lacked a vested right where the owners had not made substantial investments, the city did not routinely renew the permits, and the renewal process relied on "sensitive and evolving" factors. *Id.* at *4–5. Here, the opposite is true: Appellants did make expensive investments in the properties in reliance on the permits, and permit renewal was formerly ministerial, and revocation depended on specific violations. Thus, in this case, Appellants' right to use their properties became 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).

[3] LCC also attempts to resuscitate the City's argument that this case is governed by *Metro. Outdoor Advert. Corp. v. City of Santa Ana*, 23 Cal. App.4th 1401 (1994). LCC Br. at 22. Appellants have exhaustively addressed these arguments in both their Opening Brief at 25 and Response/Reply Brief at 15–16.

B. Due process

As with the threshold issue of whether Appellants have a vested right, neither amicus brief offers convincing arguments as to why the City's arbitrary deprivation of Appellants' rights did not deprive them of due process.[4]

Both LCC and PGNU argue that the Ordinance and Measure M are somehow immune from constitutional constraints or this Court's scrutiny. LCC contends that the City heard "countless hours of public comment," LCC Br. at 12, and "carefully studied this issue and determined a lottery system was the fairest way for the City to determine which STR licenses would not be renewed following expiration." *Id*. at 16. But entertaining public comments from some people about their desire to deprive otheres of their vested rights to peacefully use their property in a non-nuisance fashion does not relieve the City of its obligation to afford, at a minimum, notice and an

[4] PGNU resuscitates the City's argument that no procedural due process is required because Ordinance 18-005's lottery was legislative in nature. PGNU Br. at 31. But as Homeowners have already explained in their Reply/Response Brief at 27, the lottery was *adjudicative*, not legislative, since it was the process by which specific property owners were deprived of their right to rent.

opportunity to be heard by the Appellants on the merits before depriving them of their vested rights. *See Horn v. Cnty. of Ventura*, 24 Cal. 3d 605, 612–615 (1979).

Likewise, PGNU asserts that "Appellants cannot second guess the wisdom of the voters' policy decisions." PGNU Br. at 37. But however deferential courts may be to the legislature or electorate on *policy* matters, "the same principles that govern statutes enacted by the Legislature apply to voter initiatives," *People v. Nash*, 52 Cal. App.5th 1041, 1054 (2020), meaning that courts must determine whether a restriction on or elimination of vested rights is arbitrary or irrational, even if these are the consequence of a voter initiative. *Clark v. City of Hermosa Beach*, 48 Cal. App.4th 1152, 1184 (1996). To repeat again, this case is not about the wisdom of a policy decision—it is about the legality of randomly selecting the Appellants to have their vested rights stripped from them.

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

Changes in a coastal city's zoning laws that effectively amend a city's LCP, or constitute "development," require Coastal Commission approval. Cal. Pub. Res. Code §§ 30108.6, 30510.

Because the City did not submit Ordinance 18-005 to the Commission for approval before adopting it, or before holding the lottery, the Superior Court was correct in ruling that Ordinance 18-005—and the lottery held pursuant to that ordinance—were invalid when enacted and applied.[5] Nevertheless, amici argue that Pacific Grove should not be subject to the Coastal Commission's jurisdiction.

First, LCC says that "[a] zoning ordinance itself does not constitute development." LCC Br. at 14. But the Coastal Act defines "development" as any "change in density or intensity of use of land," or "change in the intensity of use of water, or of access to water." Cal. Pub. Res. Code §§ 30600(a), 30106. *See generally Kracke v. City of Santa Barbara*, 63 Cal. App.5th 1089, 1095–98 (2021) (holding that local STR ban was "development" under the Coastal Act). Because the Ordinance here restricts and bans STRs, thus changing the intensity of use of single-family residences and public access to the water, it constitutes "development" and is subject to Commission approval. *See also*

[5] Both Appellants and the City agree that the Coastal Commission's consideration and approval of the City's Local Coastal Program, including the challenged regulations, render the City's cross-appeal moot. City Ans. Br. at 50.

Lucy Humphreys, *Regulating Short-Term Rentals in California's Coastal Cities: Harmonizing Local Ordinances with the California Coastal Act*, 52 Loy. L.A. L. Rev. 309, 322 (2019) (discussing recent California cases holding that anti-STR ordinances constitute development under the Coastal Act).

LCC argues that *Kracke* is distinguishable because it involved a city's code enforcement *initiative* rather than an *ordinance*, but that is mere semantics. The Coastal Act is expansive in scope, such that even non-structural changes to land-use classification qualify as "development." *La Fe, Inc. v. L.A. Cnty.*, 73 Cal. App.4th 231, 240 (1999).[6] That is why the Commission itself sent the City a letter reminding it 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).*" III CT 619 ¶ 45 (italics added). *See also* Humphreys, *supra* at 327 (discussing the letter).

LCC also bizarrely claims that "[a]s the City did not have a LIP [Local Implementation Plan] in place at the time Appellants

[6] LCC also contends that the Coastal Commission "cannot require cities to allow STRs," LCC Br. at 18, but neither Appellants nor the trial court have ever suggested otherwise.

brought this action, it was not required to submit the ordinance to the Coastal Commission for review or to request an amendment to its LIP (since no LIP existed)." LCC Br. at 14; *see also id.* at 33 ("Appellant has provided no authority that shows the Coastal Commission is authorized to review the zoning ordinances of a city that does not have a LIP."). This is illogical. It cannot be that the City is exempt from the requirement for Commission approval due to its lack of an LIP, since the City was required to have an LIP in the first place. It would be absurd to suggest that a city that *abides* by the Coastal Act submitting a Land Use Plan (LUP) and LIP must seek Commission approval to change how it regulates the use of land in the coastal zone—while a city that shirks its responsibilities by failing to submit an LIP in the first place may act without consulting the Commission at all. That would allow any city to bypass the Commission entirely simply by declining to submit an LIP.

CONCLUSION

Homeowners respectfully request that this Court reverse the Superior Court's determination with respect to Count II, and, if the City's appeal of Count I is not moot, affirm the Superior Court's determination in favor of Homeowners.

Respectfully submitted this 17th day of November, 2021

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CERTIFICATE OF COUNSEL

Pursuant to Rule 8.204(c)(4), I hereby certify that the foregoing APPELLANTS'/CROSS-APPELLEES' COMBINED RESPONSE TO AMICUS BRIEFS OF PACIFIC GROVE NEIGHBORS UNITED AND LEAGUE OF CALIFORNIA CITIES, excluding the tables and certificate contains 2,225 words as stated in the word count of the computer program used to prepare the brief and is prepared in 13-point font.

DATED: November 17, 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 Appellants'/Cross-Appellees' Combined Response to Amicus Briefs of Pacific Grove Neighbors United and League of California Cities on the interested parties in this action addressed via the electronic filing portal and email as follows:

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