IN THE CALIFORNIA COURT OF APPEAL

SIXTH APPELLATE DISTRICT

WILLIAM HOBBS; SUSAN HOBBS; DONALD SHIRKEY; and IRMA SHIRKEY, Appellants/Cross-Appellees, v. CITY OF PACIFIC GROVE, CALIFORNIA, Appellee/Cross-Appellants. Real Party in Interest	Court of Appeal Case No. H047705 Trial Court Case No. 18CV002411

On Appeal From Monterey County
Superior Court

Honorable Lydia M. Villareal, Dept. 13

AMICUS BRIEF OF LEAGUE OF CALIFORNIA CITIES

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

This is the initial certificate of interested entities or persons submitted on behalf of Amicus Curiae League of California Cities in the case number listed above.

The undersigned certifies that there are no interested entities or persons that must be listed in this Certificate under California Rules of Court, rule 8.208.

Dated:September 15, 2021

By: _____

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APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF

TO THE HONORABLE PRESIDING JUSTICE:

Pursuant to California Rules of Court, Rule 8.200, subdivision (c), the League of California Cities ("Cal Cities") respectfully applies to this Court for permission to file the amicus curiae brief accompanying this application in support of Respondents/Cross-Appellants City of Pacific Grove, et al.

This brief will assist the Court by providing perspective and analysis on two important issues: the vested property rights subject to due process protections and the application of the Coastal Act to short-term vacation rental regulations.

Appellants argue for the creation of a new vested property right allowing for the continued use of their property as a short-term vacation rental. This vesting will cripple local governments' ability to regulate land use and zoning and to preserve the character and aesthetic of cities. These important and legitimate government interests are afforded to cities through the police powers granted by the California constitution.

In addition, there are far reaching implications to coastal cities if zoning ordinances are to be considered development under the Coastal Act, or if it is found that a City's zoning ordinances require Coastal Commission review outside of the narrow authority provided by the Coastal Act through the local coastal program adoption process.

For the reasons stated in this application and further

developed in the proposed amicus brief, the League of California Cities respectfully requests leave to file the amicus brief with this application.

The application and amicus curiae brief were authored by Emily S. Chaidez and Trevor L. Rusin. No person or entity made a monetary contribution to its preparation and submission.

Dated:September 15, 2021

By: 

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INTEREST OF THE AMICUS CURIAE

Cal Cities is an association of 478 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life, for all Californians. Cal Cities is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance because a finding that a time-limited, short-term vacation rental license creates a vested interest subject to due process protections would have a wide, sweeping effect on cities throughout the state. Similarly, a finding that the California Coastal Act precludes regulation of such short-term vacation rental licenses in the circumstances at issue here would create chaos in an already fragile regulatory framework properly left to local authorities.

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INTRODUCTION

This case is about the ability of municipalities to validly exercise the police power conferred on them by the California constitution to regulate short-term vacation rental (STR) properties. It is well-established that cities' constitutional police power includes the regulation of land use and zoning. In recent decades, regulation of STR properties has emerged as a contentious issue with a palpable tension between property owners' economic interests in maximizing return on costly California real estate, neighborhood concerns regarding the transient nature of STR interests and related undesirable effects, and local government interest in maintaining the character, aesthetic, and density restrictions of charming coastal cities frequented by tourists seeking accommodations.

Appellants William Hobbs, Susan Hobbs, Donald Shirkey, and Irma Shirkey (Appellants) are owners[1] of property located in the city of Pacific Grove, California (City). Pacific Grove is primarily a residential city that, prior to 2010, prohibited STRs in all residential zones. In 2010, the City established a license program to regulate STRs; from the beginning, every license was time-limited. Over the next eleven years, the City adopted various ordinances to fine-tune its regulation of STRs, created an

[1] Since the filing of this lawsuit, the Hobbs' have sold their property that is at issue in this litigation.

STR Task Force, and considered countless hours of public comment. Pacific Grove residents also enacted Measure M, a citizen's initiative regulating STRs in an effort to preserve and protect the City's residential character.

In early 2018, the City adopted Ordinance 18-005 to sunset STR licenses on overly dense blocks when the City found it had exceeded its license cap of 250 STR licenses by nearly 40 additional licenses. Ordinance 18-005 provided that certain licenses, selected by a one-time lottery, would not be eligible for renewal after their normally-scheduled expiration the following year. Significantly, the City did not revoke or rescind any existing, valid license; it only declined to renew licenses following their scheduled expiration date pursuant to the express language in those licenses that states "renewal of this license is not guaranteed."

Municipalities are given significant authority to manage local regulations, particularly as they relate to land use. Despite this fact, Appellants request a judicially-created vested property right—a right to renewal of a time-limited STR license that was limited as to its term from the moment it was granted. Appellants claim this right based on the existence of prior permits and subsequent improvements to Appellants' second homes for purposes of generating income from the short-term vacation rentals.

The trial court rejected Appellants' due process arguments, finding that Appellants failed to show they had a vested right in their STR licenses subject to due process protections in the first

instance. Appellants contend that, notwithstanding the explicit expiration dates of their licenses and Appellants' written acknowledgment that "renewal of this license is not guaranteed," the trial court's determination was error in light of Appellants' reliance on the licenses and expenditure of money to operate the property as an STR.

Not only would creation of this new property interest run afoul of longstanding precedent, it would also completely disrupt cities' ability to regulate land use in response to changing conditions and circumstances. It would also needlessly complicate an already delicately balanced regulatory framework that varies from city to city and result in a further multiplicity of lawsuits regarding STRs as courts would be required to make ad hoc determinations as to whether a particular property owner has a vested STR right or not; stripping local governments of their local authority and supplanting it with unnecessary judicial intervention.

In addition, the trial court found that Ordinance 18-005 required approval from the Coastal Commission and granted summary adjudication on this claim to Appellants. This decision is contrary to law and should be reversed.

The Coastal Act only provides authority to the Coastal Commission to review a City's zoning ordinances through the Local Coastal Program (LCP) process. This is a statutorily designed scheme that requires a city to submit both a Land Use Plan (LUP) and Local Implementation Plan (LIP) to the Coastal Commission. A LUP is made up of relevant policies in a local

government's general plan or local coastal element. A LIP is made up of a City's zoning ordinances, zoning district maps, and other implementing actions. As a result, until an LIP has been submitted, the Coastal Commission does not have authority to review a City's zoning ordinances. It is only through the LCP adoption process that these ordinances are reviewed for conformity with the Coastal Act's policies.

As the City did not have a LIP in place at the time Appellants 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).

Appellants argue alternatively that Ordinance 18-005 constituted development and a Coastal Development Permit (CDP) was thus required for the ordinance to be effective. This is also incorrect. A zoning ordinance itself does not constitute development; such ordinances merely govern the potential use of land. Neither Appellants nor the trial court provide, nor can Cal Cities locate, any authority that would support Appellants' and trial court's interpretation that the City was required to obtain a CDP to implement a zoning ordinance. Such an interpretation contradicts the process implemented by the Coastal Act for review of zoning ordinances, and would have far-ranging negative impacts for coastal cities and their residents.

For these reasons and those that follow, Cal Cities respectfully requests that the Court affirm the decision below on Count Two (due process claim), deny Appellants' appeal in its

entirety, and reverse the trial court's decision on Count One (Coastal Act claim).

SUMMARY OF ARGUMENT

The central issue on appeal is whether vested rights exist in a time-limited STR license with no guarantee of renewal. As the City has raised a protective cross-appeal on the trial court's grant of summary judgment in favor of Appellants on the Coastal Act claim, the issue of whether a zoning ordinance (Ordinance 18-005) constitutes development or is subject to Coastal Commission approval despite the City not having a Local Implementation Plan certified at the time, is also before the Court.

Both state and federal courts have consistently held that the rights associated with a time-limited license are defined by the terms of that license and, where a license creates a set expiration date, no vested right can attach. Indeed, there can be no vested right to renewal of a license that, by its terms, expires on a date certain and states "renewal of this license is not guaranteed." Nor is there a protected property right in purely economic interests.

Appellants attempt to muddle these well-established rules by citing to irrelevant cases involving vested rights in conditional use permits authorizing development and construction. They argue that their illogical assumption that their time-limited STR licenses would continue to be renewed indefinitely, combined with their investment in renting the properties, creates a vested right to continue to rent the properties as STRs.

Appellants also claim that the City's determination of which STR licenses would not be eligible for renewal following expiration was arbitrary and capricious. It was allegedly arbitrary because, in order to determine which of the licenses issued in excess of the 250 STR license cap would not be renewed (289 licenses were issued, so the licenses needed to be reduced by 39), the City utilized a lottery method.

Contrary to Appellants' claim, the City 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, as all license holders would have an equal chance to renew their license. And, notwithstanding Appellants' many characterizations to the contrary, the City did not "revoke" or "rescind" any valid, existing STR license as a result of the lottery. The City simply declined to issue a renewal of the STR license upon expiration—an express possibility Appellants were aware of and which they repeatedly consented in writing to every year when they received an annual STR license.

Appellants also concede in both their opening and responding briefs that their interests in their STR licenses are purely economic. In fact, it is not disputed that Appellants remain able to rent their properties; it just must be for a period of 31 days or longer.

Balanced against Appellants' interest receiving a larger revenue stream than could arguably be obtained from a month-to-month or longer lease of a second home is the City's public interest in regulating the land use impacts from, and density of,

STRs in a primarily residential area. In light of California's current housing crisis and the exacerbation of that crisis by the COVID-19 pandemic, cities like Pacific Grove need to be able to exercise their power to regulate zoning and land use patterns. It is through this power that cities are able to balance the many needs and issues involved including, in this context, supporting tourism and the local economy while preserving the character of residential neighborhoods and limiting the negative impacts of STRs.

Taking the unprecedented step to create a vested right in a time-limited license, such as the annual STR licenses at issue in this case, would have far reaching impacts. It would certainly lead to increased litigation as individuals, cities, and agencies seek to determine which licenses create vested rights that extend beyond an expiration date, and which ones do not. It will also lead to cities being more conservative in how many licenses and permits are issued in a city and may lead to cities choosing not to allow many activities for fear of unforeseen impacts and an inability to control or restrict use in the future.

As discussed in more detail above and below, the Coastal Act is a statutory scheme which provides the Coastal Commission two primary duties: (1) review and certify LCPs and LCP amendments to be in conformance with the Coastal Act's policies, and (2) rule on CDP applications for development on specific properties within the Coastal Zone. It does not provide the Coastal Commission with any legislative authority, nor does it grant the Coastal Commission powers beyond those specifically

enumerated in the Coastal Act. Unlike cities, the Coastal Commission does not have plenary police power.

While the Coastal Commission is generally supportive of regulations allowing STRs in cities, it cannot require cities to allow STRs. Cities themselves propose their LCPs to the Coastal Commission, and the Commission's role is solely to determine whether the proposed LCP meets the minimum requirements of the Coastal Act.

The trial court's decision to grant summary adjudication on the Coastal Act count is unsupported by law, and runs contrary to the statutory scheme created by the Act to review zoning ordinances through the LCP adoption process. Zoning ordinances are to be reviewed through this process, not through the processing of a CDP or any other way. Should the trial court's decision stand, there would be far-reaching negative consequences for all coastal cities and their residents. In such a world, almost any ordinance would require a CDP or a LCP amendment, leading to gridlock and chaos.

Zoning ordinances have never been considered development themselves, and such an interpretation is not supported by the text or spirit of the Coastal Act, which was designed to reserve to cities the ability to legislate while providing a structure to ensure protection of coastal resources.

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ARGUMENT

I. CITIES MAY DECLINE TO RENEW LICENSES UPON EXPIRATION WITHOUT VIOLATING DUE PROCESS

For due process to apply to a situation, it must involve a government deprivation of a protected property or liberty interest. (*Las Lomas Land Co., LLC v. City of Los Angeles* (2009) 177 Cal.App.4th 837, 852 (*Las Lomas*).) "The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property…the range of interests protected by procedural due process is not infinite." (*Board of Regents of State Colleges v. Roth* (1972) 408 U.S. 564, 569-70 (*Roth*).) For California procedural due process claims, the protection is narrower; "identification of a statutory benefit subject to deprivation is a prerequisite." (*Las Lomas, supra*, 177 Cal.App.4th at p. 855 [citations omitted].) In other words, not all conceivable property interests are protected by the California due process clause; only those interests or benefits conferred by statute. (*Ibid.*)

Substantive due process protects against arbitrary government action, requiring more than ordinary government error, and is subject to a heightened arbitrary and capricious standard. (*Id.* at pp. 855-56 [citations omitted].)

A. Only Limited Interests Are Subject to Due Process Protections

"A person seeking a benefit provided by the government has a property interest in the benefit for purposes of procedural

due process only if the person has 'a legitimate claim of entitlement to it.'" (*Las Lomas, supra*, 177 Cal.App.4th at p. 853, citing *Roth, supra*, 408 U.S. at p. 577.) If the decision maker has discretion to grant or deny the benefit, it is not a protected interest. (*Id*. at p. 853, citing *Castle Rock v. Gonzales* (2005) 545 U.S. 748, 756.) Whether such discretion exists is determined by state and local law. (*Id*. at p. 853 [citations omitted].)

Specific to development and land use matters, a land use application "invokes procedural due process only if the owner has a legitimate claim of entitlement to the approval" (*id.* at p. 856) and "[t]ypical land use disputes involving alleged procedural irregularities, violations of state law, and unfairness ordinarily do not implicate substantive due process." (*Id*. at p. 856, citing *Stubblefield Construction Co. v. City of San Bernardino* (1952) 32 Cal.App.4th 687, 709-10 & fn. 15 (*Stubblefield*).)

In construing the phrase 'entitlement to the approval,' the California Court of Appeal in *Las Lomas* held that a developer's reliance on city policies, practices, and representations regarding an environmental report was akin to a 'mere subjective expectancy' as described by the United States Supreme Court in *Roth* and another case decided the same day. (*Las Lomas*, *supra*, 177 Cal.App.4th at p. 853 & fn.10 ["We regard the purported reliance interest as a mere expectancy rather than a legitimate claim of entitlement"].)

Substantive due process "prevents 'governmental power from being used for purposes of oppression,' or 'abuse of governmental power that shocks the conscience,' or 'action that is

legally irrational in that it is not sufficiently keyed to any legitimate state interests.'" (*Stubblefield, supra*, 32 Cal.App.4th at pp. 709-10 [citations omitted].)

B. Time-Limited STR Licenses Do Not Create Vested Rights

Property owners have no constitutional right to develop property for maximum economic profit or to receive compensation when land use regulations restrict their ability to do so. (*Terminals Equipment Co., Inc. v. City and County of San Francisco* (1990) 221 Cal.App.3d 234, 244.) Cities, and charter cities in particular, have broad authority pursuant to the police power found in the California constitution to regulate land use, and that power "varies with circumstances and conditions." (*Ewing v. City of Carmel-By-The-Sea* (1991) 234 Cal.App.3d 1579, 1586-87 (*Ewing*) [citations omitted].)

Thus, "while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation." (*Ibid.*) Relying on United States Supreme Court precedent dating from the 1920s, the court in *Ewing* noted that "businesses of every sort, including hotels and apartment houses, are excluded" from residential districts, and "non-residential uses may have an increasingly deleterious impact on a residential district 'until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed.'" (*Id.* at p. 1587, citing *Euclid v. Ambler Co.* (1926) 272 U.S. 365, 394.)

1. There Is No Vested "Right to Renewal"

"In deciding whether a right is 'fundamental' and 'vested,' the issue in each case is whether the 'affected right is deemed to be of sufficient significance to preclude its extinction or abridgment by a body lacking judicial power.'" (*Metropolitan Outdoor Advertising Corp. v. City of Santa Ana* (1994) 23 Cal.App.4th 1401, 1404 (*Metropolitan*), citing *Goat Hill Tavern v. City of Costa Mesa* (1992) 6 Cal.App.4th 1519, 1526 (*Goat Hill*); *301 Ocean Ave. Corp. v. Santa Monica Rent Control Bd.* (1991) 228 Cal.App.3d 1548, 1556 (*301 Ocean Ave*).)

In *Metropolitan*, the court of appeal held that a company's conditional use permit to erect and maintain a billboard for a specified period of time did not create a vested right because "[t]here was no implicit understanding the permit would be renewed." (*Id.* at p. 1404.) Unlike the situation in *Goat Hill*, where the "right to continue operating an established business" was considered a vested right when a conditional use permit allowed expansion of the business in part because there was an "implicit understanding the permit would be renewable" (*ibid.*), here the STR licenses explicitly state, and the property owners expressly agree, that "renewal of this license is not guaranteed."

A recent case from the Northern District of California is instructive with regard to whether time-limited permits can create vested rights notwithstanding their expiration. (*E&B Natural Resources Management Corp. v. County of Alameda* (N.D. Cal., June 8, 2020) No. 18-cv-05857-YGR, 2020 WL 3050736 (*E&B*).)

There, plaintiff challenged the decision by the County of Alameda and Alameda County Board of Supervisors not to renew two conditional use permits required for plaintiff's continued operation of an oil extraction and production facility on two parcels of land in Livermore, California. (*Id*. at *1.) The court denied plaintiff's motion for summary judgment as to the existence of a fundamental vested right and whether the defendants were estopped to extinguish that right through the permit renewal process. (*Ibid*.) Recognizing that "courts are less sensitive to the preservation of purely economic interests" (*id*. at *3, citing *301 Ocean Ave., supra*, 228 Cal.App.3d at p. 1556), the court noted that a conditional use permit "does not bestow on the permit holder a fundamental vested right, but rather, the burden is on plaintiffs to establish such a right based on specific facts." (*Id*. at *5.) Finding there to be no vested right, the court explained, "[p]laintiffs cannot now claim to be surprised that these permits, which were, by definition, limited in term, have now expired." (*Ibid*.)

The court in *E&B* explicitly distinguished *Goat Hill*, noting it "was decided based on the unique facts it presented" (*id*. at *4 [citation omitted]), that the permit there was for expansion of a legal nonconforming use in existence for over 35 years, that the city there had a practice of doing nothing about expired permits, and that a portion of the over $1m investment made by the owner was made "at the city's behest." (*Ibid*.) The court in *E&B* also considered *Metropolitan* in its analysis, citing the reasoning that the owner of the billboard there "must have balanced the costs of

erecting, maintaining and removing the billboard against the economic benefits derived from the sign over the life of the conditional use permit." (*E&B*, *supra*, 2020 WL 3050376, at *4, citing *Metropolitan, supra*, 23 Cal.App.4th at 1404, n.1.) Finally, the court cited another recent federal case in which the Ninth Circuit found a plaintiff did not have a fundamental vested right to continued use of three cell tower facilities because the plain language of the permit explicitly required ceasing all activities ten years after the permit was issued if new applications were not timely submitted and ultimately approved. (*Id*. at *4, citing *Am. Tower Corp. v. City of San Diego* (9th Cir. 2014) 763 F.3d 1035, 1057-58.)

Similarly, past permit renewals are not equivalent to a guaranty that permits would be renewed in perpetuity. (*Id.* at *5.) Conditional use permits, like the STR licenses at issue on this appeal, are, "by definition, discretionary." (*Smith v. Cty. of Los Angeles* (1989) 211 Cal.App.3d 188, 197.) In *E&B*, the administrative process for renewing permits involved, at a minimum, analysis and review by the county planning department, environmental health department, and board of zoning authority as well as public hearings at which many opinions and recommendations were offered. (*E&B, supra*, 2020 WL 3050736 at *5.) Recognizing the permits "implicate sensitive and evolving issues related to the environment, public welfare, and public need," the court was "especially reluctant to tie the hands of the municipal government by finding that plaintiffs possess a fundamental vested right based on past acts and

conditions." (*Ibid*.)

Appellants' claims to have vested rights sound more in estoppel than procedural due process considerations. Yet even that theory is inapplicable here, as Appellants were not ignorant of the fact that there was no guaranty they could forever renew their STR licenses. In order to assert estoppel against the government Appellants must establish:

> (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury.

(*City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 489.) Additionally, Appellants needed to establish that the interests of justice in estopping the government outweighed the public interest. *(see e.g. Pettitt v. City of Fresno* (1974) 34 Cal.App.3d 813, 822.)

To the extent Appellants are arguing they have an implied STR license on the basis of past renewals, they are undermined by the fact that the municipal code expressly requires Appellants to obtain an actual STR license from the City. Appellants can only assert that the City provided them with an implied STR license if the municipal code gives City staff the power to do so. (*G.L. Mezzetta, Inc. v. City of American Canyon* (2000) 78 Cal.App.4th 1087, 1093–94 [could not enter into oral contract when neither statute nor the municipal code gave the city the power to do so]; *Merco Const. Engineers, Inc. v. Los Angeles*

Unified Sch. Dist. of Los Angeles Cty. (1969) 274 Cal.App.2d 154, 160.) Here, the code expressly requires that a property owner obtain an STR license prior to operating. Nothing in the code would allow staff to issue an "implied" STR license.

Appellants do not have a vested right either to rent their properties for short-term vacation purposes or to renewal of their existing STR licenses. The licenses explicitly state, and Appellants explicitly agreed, that "renewal of this license is not guaranteed" and that the license expires on a certain date annually. Appellants cannot claim to have detrimentally relied on the existence and renewal of those licenses when Appellants expressly agreed that there was no guarantee of renewal—such reliance is inherently unreasonable. Longstanding California authority in fact holds to the contrary, that prior renewals do not create a vested right in a time-limited license.

2. There Is No Vested Right In Purely Economic Interests

There cannot be a fundamental vested right in the use of a purely economic asset, as is the case with an STR license. For example, in *E&B,* the court concluded non-renewal of the permit at issue would result in a "purely economic loss" without any evidence it would destroy or even significantly impact overall business, and that plaintiffs "failed in their burden to show harm to their economic interests sufficient to confer a fundamental vested right." (*E&B, supra*, 2020 WL 3050736 at *5.)

Similarly, in *Hardesty v. Sacramento Metro. Air Quality Mgmt. Dist.* (2011) 202 Cal.App.4th 404, 416, the court held that requiring a permit for mining operations within a designated

area did not implicate a fundamental vested right because there was nothing to indicate that the plaintiff would be "driven out of business" by the requirement. Another similar decision to require an oil company to shut down certain refinery units did not affect a fundamental vested right because there was no contention the company would "be driven to financial ruin" or that the particular facility would "be forced to operate at a loss and close." (*Standard Oil Co. v. Feldstein* (1980) 105 Cal.App.3d 590, 604.) Finally, in *Mobil Oil Corp. v. Superior Court* (1976) 59 Cal.App.3d 293, 305, the court held that requiring two oil companies to install vapor recovery systems at gas stations did not affect a fundamental vested right where the court was not presented with "the enforcement of a rule which effectively drives the Oil Companies out of business."

Here, Appellants claim a vested right to "use their properties as STRs." (Appellants' Opening Brief (AOB), p. 21.) However nonrenewal of the STR license does not deprive Appellants of actual property interests; as the properties may still be rented out on a long-term basis, the only impact could be a difference in the economic return they can obtain. In attempting to distinguish *Metropolitan*, Appellants argue that the case is not applicable because there was "no assertion" that removing the billboard there would harm the company's business, whereas here, Appellants "entirely lost their right to rent due to the City's arbitrary revocation of their rights." (Appellants' Reply Brief ("ARB"), p. 16.) Appellants claim they "legitimately expected" their licenses to be renewed because they had been

renewed in previous years and Appellants detrimentally relied on that renewal and never committed any violations that would have disqualified them from renewal. (*Ibid.*) Appellants claim the termination of their "right to seek renewal of their licenses completely destroyed their income from their STRs," and that they "depended on the income from renting on a short-term basis." (AOB p. 25 & n.7.)

Appellants also concede that, as to the Shirkey Property, use of the property as an STR enables them to "keep a well-maintained property for their children and grandchildren to visit, so that they do not have to spend money staying in a hotel, and, when their family is not visiting, to obtain income for purposes of maintaining the property. (AOB, p. 16.) Similarly, despite originally arguing "they wanted to keep the home for future use as a primary residence" and thus offered the home for short-term rentals in the interim (AOB, p. 14), the Hobbs' residence has since been sold. (City's Opening Brief (COB), p. 25, ARB, p. 24.) Thus, the only interest claimed in the properties is the degree of financial income gained.

C. Cities Must Be Permitted to Exercise Police Power to Regulate STRs and Address Local Conditions

The constitutional power of cities to zone land in response to local conditions is fundamental. (Cal. Const., art. XI, § 7; *City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc.* (2013) 56 Cal.4th 729, 737-38 ["[t]his inherent local police power includes broad authority to determine, for purposes of the public health, safety, and welfare, the appropriate uses of

land within a local jurisdiction's borders, and preemption by state law is not lightly presumed"]; *Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1151 ["Land use regulation in California historically has been a function of local government under the grant of police power contained in article XI, section 7 of the California Constitution"]; *DeVita v. County of Napa* (1995) 9 Cal.4th 763, 782 ["We have recognized that a city's or county's power to control its own land use decisions derives from this inherent police power, not from the delegation of authority by the state" and the Legislature, when enacting said zoning laws, declared its "intention to provide only a minimum of limitation in order that counties and cities may exercise the maximum degree of control over local zoning matters"].)

In particular, charter city ordinances supersede state law with respect to municipal affairs rather than matters of statewide concern. (*State Building & Constructions Trades Council of Calif. v. City of Vista* (2012) 54 Cal.4th 547, 552, citing *California Fed. Savings & Loan Assn. v. City of Los Angeles* (1991) 54 Cal.3d 1, 17.) While cities must exercise this power judiciously, in the absence of a protected right, decisions that affect the ability of a property owner to use their land in a particular way do not run afoul of due process considerations. (*See Rosenblatt v. City of Santa Monica* (9th Cir. 2019) 940 F.3d 439, 446-47, cert. denied sub nom. *Rosenblatt v. City of Santa Monica, California* (2020) 140 S.Ct. 2762.)

Many permits and licenses are issued on a time-limited basis by cities, and it is a tool often relied upon to allow cities to

legislate and allow new uses, while monitoring the impacts of such use. Time-limited licenses provide flexibility while also informing the recipients of such licenses that their ability to operate is limited in time. It also provides cities with the ability to tailor their laws to changing conditions and circumstances. Determining that a vested right to a STR license exists in these circumstances would wreak havoc with this important tool, and run contrary to both state and federal decisional authority as described above.

Requiring renewal based on a vested right would also lead to a <u>further</u> increase in litigation throughout the state, not just related to STRs, but any time-limited license or permit. The immediate effect could be that more homes would be bought up by corporations and others to rent out, since they would be assured of their ability to continue to operate in perpetuity once they obtain a license.

For these reasons, Cal Cities urges this Court to affirm the decision of the court below finding that Appellants have no vested right in renewal of their time-limited STR licenses for purposes of due process considerations.

II. <u>THE COASTAL ACT DOES NOT REQUIRE A CITY TO OBTAIN A COASTAL DEVELOPMENT PERMIT TO ADOPT A ZONING ORDINANCE, NOR MUST IT OBTAIN A LCP AMENDMENT IF IT DOES NOT HAVE A COMPLETE LCP</u>

The Coastal Act provides for the implementation of its policies in two specific ways. (Pub. Res. C. § 30200, *Ibarra v. California Coastal Commission* (1986) 182 Cal.App.3d 687, 694 (*Ibarra*).) First, the Coastal Commission evaluates citywide

zoning ordinances during its review of a City's proposed LCP and LCP amendments for conformance with the Coastal Act's Chapter 3 policies. Second, the Coastal Commission evaluates site-specific projects through the CDP process. At the time of the events at issue in this case, the City had not adopted a Local Implementation Plan, and thus did not have a complete LCP,[2] so no LCP amendment could be required. In addition, as the City's ordinance was not a site-specific project but rather a citywide zoning ordinance, no CDP was required.

A. A LCP Amendment Was Not Required

The California Constitution provides that only a local government may legislate in the Coastal Zone. (California Const., art. XI, §7.) This stems from the City's police power, and is reiterated in the Coastal Act itself (*See* Pub. Res. C. §§ 30004(a), 30005(a), (b); *City of Chula Vista v. Superior Court* (1982) 133 Cal.App.3d 472, 488 [in approving or disapproving a LCP, the Coastal Commission "does not create or originate any land use rules and regulations"].)

The LCP provisions of the Coastal Act are the only provisions that authorize the Coastal Commission to review or reject a City's zoning ordinances. (*See* Pub. Res. C. § 30500 *et seq.*) These provisions provide for a process whereby the Commission reviews proposed LCPs or LCP amendments and

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[2] As discussed in the City's brief, the City now has a full LCP which regulates STRs, mooting Appellant's Coastal Act cause of action. (COB at pp. 49-51.) Regardless, the trial court's decision to grant summary adjudication on this issue constitutes legal error.

then decides whether to certify them as meeting the requirements of the Coastal Act's policies. (*See Conway v. City of Imperial Beach* (1997) 52 Cal.App.4th 78, 86.) Per *Ibarra*, the Coastal Commission's "primary duties under the coastal act" are to "grant or deny permits for coastal development (§30600)" and "approve or disapprove local coastal programs (§§30500-22)." (182 Cal.App.3d at p. 696.)

A LCP is made of two parts: a land use plan (LUP) and local implementation plan (LIP). A LUP is made up of "the relevant portion of a local government's general plan, or local coastal element, which are sufficiently detailed to indicate the kinds, location, and intensity of land uses, the applicable resource protection and development policies and, where necessary, a listing of implementing actions." (Pub. Res. C. § 30108.5.) The LIP is made up of a City's zoning ordinances, zoning district maps, and other implementing actions; together they implement the provisions and policies of the Coastal Act and the LUP. (Pub. Res. C. § 30108.6.)

The Commission's ability to review and reject zoning ordinances again is only provided in the LCP provisions of the Coastal Act, and it is strictly constrained:

> The commission may only reject zoning ordinances, zoning district maps, or other implementing actions on the grounds that they do not conform with, or are inadequate to carry out, the provisions of the certified land use plan.

(Pub. Res. C. § 30513.) The Coastal Commission's authority is statutory, and without specific statutory authority, the Coastal Commission lacks the power to act.

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, as none exists. The California Supreme Court has affirmed this autonomy and the limited nature of Coastal Commission administrative review of a city's legislative power over zoning ordinances:

> The wording of these and other sections do not suggest preemption of local planning by the state, rather they point to local discretion and autonomy in planning subject to review for conformity to statewide standards.

(*Yost v. Thomas* (1984) 36 Cal.3d 561, 572 (*Yost*).) *Yost* discusses at length how the Coastal Commission's authority is limited to this specific quasi-judicial role, and that it has no authority to preempt a city's police power to regulate land use. (*See, e.g., id.* at p. 574 ["The Legislature left wide discretion to local governments to formulate land use plans for the coastal zone and it also left wide discretion to local governments to determine how to implement certified LCPs"].) This is further demonstrated by a city's authority, even after adoption of a full LCP, to adopt and enforce regulations not in conflict with the Coastal Act, or to abate a nuisance, without amending its LCP. (Pub. Res. C. § 30005(a), (b).)

Once a LIP is adopted, the Coastal Act provides that a city must apply for a LCP amendment if it wants to use a zoning ordinance to change the permitted uses in the city allowed by its LCP. However, as discussed above, until a LCP is adopted, the Coastal Commission lacks statutory authority to review a city's zoning ordinances. As all cities in the coastal zone are required to

adopt a full LCP, any zoning ordinance that does not comply with the Coastal Act will necessarily be removed through the LCP certification process—but it is only through that LCP process that the state has granted the Coastal Commission the authority to administratively review a city's zoning ordinances for conformity with the Coastal Act.

Appellant also alleges that the City has amended its LUP by adopting Ordinance 18-005 relating to STRs, but this simply is not true. The STR zoning ordinance does not amend the City's general plan or LUP. In fact, under the same LUP, STRs were previously prohibited. The stronger argument would be that STRs should not be allowed at all, but in any case, Ordinance 18-005 is a zoning ordinance that marginally curtails the density of STRs that were first allowed in 2010; it does not purport to change the City's general plan or LUP.

B. A CDP Is Not Required to Adopt a Zoning Ordinance

Zoning ordinances do not require a CDP in order to become effective. They are legislative acts that authorize uses within the development zones of a city, but do not themselves constitute development. CalCities is not aware of any authority that has ever required a city to obtain a CDP for a zoning ordinance, nor has the Appellant provided such authority. To the contrary, courts have found the opposite in fact applies: no CDP is required.

A CDP is required for development of a property that is located in the Coastal Zone: "any person…wishing to perform or undertake any development in the coastal zone…shall obtain a

coastal development permit." (Pub. Res. C. § 30600(a).) When considering a CDP application, the Commission (or city if a LCP has been adopted) "is acting in an adjudicatory or quasi-adjudicatory capacity and simply applies existing rules to a specific set of facts." (*McAllister v. California Coastal Commission* (2009) 169 Cal.App.4th 912, 953.)

Again, as detailed above, the Coastal Commission has only been granted authority to review a city's zoning ordinances through the LCP process. (*See Yost, supra,* 36 Cal.3d at p. 573; *City of Dana Point v. California Coastal Commission* (2013) 217 Cal.App.4th 170, 188 (*Dana Point*) ["a municipality's legislative action in adopting an ordinance is *not* a quasi-adjudicatory administrative decision to which the Commission has appellate jurisdiction pursuant to section 30625"][original emphasis], 190 [no CDP required to enforce nuisance abatement ordinance]; *Citizens for a Better Eureka v. Cal. Coastal Com.* (2011) 196 Cal.App.4th 1577, 1585 (*Better Eureka*).)

CDPs are required for actual, site-specific development, not for zoning ordinances that govern the potential, not actual, use of land. It is the actual actions on a property that constitute development; an ordinance alone does not. This is evident from the cases cited by Appellant that all involve site-specific development. (*e.g.*, *Surfrider Foundation v. Martins Beach 1, LLC* (2017) 14 Cal.App.5th 238 [beach access]; *La Fe, Inc. v. Los Angeles Cnty.* (1999) 73 Cal.App.4th 231 [lot line adjustments]; *Pac. Palisades Bowl Mobile Estates, LLC v. City of Los Angeles* (2012) 55 Cal.4th 783 [conversion of mobile home park].)

Two cases decided by the same Division 6 panel of the Second District Court of Appeal, *Kracke v. City of Santa Barbara* (2021) 63 Cal.App.5th 1089 (*Kracke*) and *Greenfield v. Mandalay Shores Community Association* (2018) 21 Cal.App.5th 896 (*Greenfield*), are distinct from the situation of the City at the time of the events in question. Both the City of Santa Barbara (*Kracke*) and the City of Oxnard Shores (*Greenfield*) had a complete LCP (both a LUP and LIP) in place whereas the City in this case had only adopted a LUP and did not have a certified LIP.[3] This difference is critical as once a LCP is in place, a LCP amendment is required to change the uses allowed. (*See Conway, supra*, 52 Cal.App.4th at p. 89 ["only those amendments 'authoriz[ing] a use other than that designated in the LCP as a permitted use…require certification by the Commission"], citing *Yost, supra,* 36 Cal.3d at p. 573 & fn. 9.) Until a LIP is adopted and a city has a complete LCP, the LCP amendment provisions of the Coastal Act that grant review of city zoning ordinances do not apply.

In addition, even if a zoning ordinance could somehow be found to constitute development, the City's STR ordinance in this case would be exempt from the requirement to get a CDP

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[3] Appellant incorrectly states that the City of Santa Barbara did not have a LIP in place at the time of the events in the case. (ARB at p. 34, fn. 10.) In fact the reference cited by Appellant to the tentative decision affirmed in *Kracke* shows that Santa Barbara was amending its LCP, not adopting a LIP. (*See Kracke v. City of Santa Barbara* (Cal. Super., Feb. 20, 2019), No. 56-2016-00490376, 2019 WL 3975530 at *15.) The City of Santa Barbara adopted its LIP in 1986.

pursuant to Public Resources Code section 30005(b). (*See Dana Point, supra,* 217 Cal.App.4th 170; *Better Eureka, supra,* 196 Cal.App.4th 1577.) Under that section, a city may declare, prohibit, and abate nuisances without obtaining a CDP or LCP amendment. The record provides ample evidence of the damage being wrought upon the City's infrastructure, services, housing stock and neighborhood character by the overconcentration of STRs in certain areas of the City. The City's ordinance was narrowly tailored to address these nuisance issues as, instead of banning STRs, it simply limited their concentration. The Coastal Act specifically does not limit this power of the City. (Pub. Res. C. § 30005(b).

C. The Trial Court's Decision Is Contrary To Law And Would Have Grave Effects If Allowed To Stand

Holding that the City's STR zoning ordinance required a LCP amendment or CDP in a City that had a certified LUP but no LIP, would be unprecedented and have far-reaching implications on cities throughout the Coastal Zone.[4] As courts in

[4] The Division 6 panel of the Second District Court of Appeal in *Kracke* stated that "the Coastal Act required the Commission's approval of a CDP, LCP amendment or amendment waiver before the [STR] ban could be imposed." (*Kracke, supra,* 63 Cal.App.5th 1089 at 372.) *Kracke* did not involve a zoning ordinance, but rather a code enforcement initiative of the City based on a what the court found to be a new interpretation of the City's LIP that STRs actually constituted hotel use (despite the City previously permitting STRs and collecting tax). (*Id.*)

A LCP amendment would be the only remedy that could be required if that panel found the City was changing the uses allowed under the LIP. A CDP should never have been mentioned by the *Kracke* panel as being potentially required.

recent years have adopted an expansive definition of development under the Coastal Act, if zoning ordinances can constitute development requiring a CDP, there is little standing in the way of non-zoning ordinances also to be considered development that requires a CDP. Coastal cities would now need to obtain a permit in order to legislate on virtually any matter.

The effect would be paralyzing to local government, provide the Coastal Commission with sweeping powers far beyond those granted or intended, and result in myriad unforeseen consequences. If a STR ordinance limiting density is deemed development because it is considered to change the intensity of use of land, then a city's business license ordinance and home occupation ordinance would arguably also constitute development. Once a zoning ordinance is considered actual development and not just potential use of land it becomes a slippery slope that would quickly encompass a broad range of ordinances, and corresponding litigation to push the boundaries.

Similarly, finding that a zoning ordinance is subject to Coastal Commission review outside of the specific LCP adoption provisions of the Coastal Act that authorize review of zoning ordinances would be contrary to law and unprecedented. The

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As discussed above, a zoning ordinance does not constitute "development," and such interpretation directly contradicts the Coastal Act's process for bringing zoning ordinances into compliance with the Coastal Act's policies. While significantly different from a zoning ordinance, the enforcement initiative at issue in *Kracke* itself did not involve development of a specific property and does not constitute "development." To the extent the *Kracke* panel held differently, and that a CDP was required, they are simply wrong.

legislature adopted a specific procedure for bringing the zoning codes of coastal cities into conformance with the policy provisions of the Coastal Act, and that procedure is defined in the LCP adoption provisions of the Act. If the legislature chooses to change that process it may do so, but until it does, the LCP process provisions of the Coastal Act constitute the only authority that grants the Coastal Commission the ability to review a City's zoning ordinances.

III. CONCLUSION

For the reasons described above, Cal Cities respectfully requests that the Court reverse the trial court's grant of summary adjudication to Appellants on Count One, the Coastal Act claim, and affirm the trial court's ruling on summary adjudication on Count Two that Appellants' have failed to carry their burden of proof on the due process claim.

Dated:September 15, 2021

By: 

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CERTIFICATE OF WORD COUNT

The text of this brief consists of 7,384 words according to the word count feature of the computer program used to prepare this brief.

Dated:September 15, 2021

By: 

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PROOF OF SERVICE

I, Wendy Hoffman, am a citizen of the United States, employed in the City of Manhattan Beach, Los Angeles County, California. My business address is Best Best & Krieger LLP, 1230 Rosecrans Avenue, Suite 110, Manhattan Beach, California 90266. I am over the age of 18 years and not a party to the above-entitled action. On September 15, 2021, I served the following:

AMICUS BRIEF OF LEAGUE OF CALIFORNIA CITIES

☒ On the parties in this action by causing a true copy thereof to be placed in a sealed envelope with postage thereon fully prepaid in the designated area for outgoing mail addressed as listed below.

☒ I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☒ On the parties in this action by causing a true copy thereof to be electronically delivered via TrueFiling

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I declare under penalty of perjury that the foregoing is true and correct and that this Proof of Service was executed this 15th day of September, 2021, at Manhattan Beach, California.

/s/ Wendy Hoffman
Wendy Hoffman

SERVICE LIST

Via True Filing

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Via U.S. Mail

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