



May 30, 2019

Honorable Arthur Gilbert, Presiding Justice
Honorable Kenneth R. Yegan, Associate Justice
Honorable Martin J. Tangeman, Associate Justice
California Court of Appeal
Second Appellate District, Division 6
Court Place
200 East Santa Clara Street
Ventura, CA 93001

RE: Request for Publication – *Olivera St. Apartments, LLC et al. v. City of Guadalupe* (Case No. B286285)

Dear Justices Gilbert, Yeagan, and Tangeman:

Pursuant to California Rules of Court, rule 8.1120(a), the Rural County Representatives of California (RCRC)¹, the California State Association of Counties (CSAC)², the League of California Cities,³ and the City of Guadalupe hereby jointly

¹ The Rural County Representatives of California (RCRC) is a thirty-six member county service organization that champions policies on behalf of California's rural counties. Founded in 1972, RCRC works with its membership to advocate on behalf of rural issues at the state and federal levels. The core of RCRC's mission is to improve the ability of small, rural California county government to provide services by reducing the burden of state and federal mandates, and promoting a greater understanding among policy makers about the unique challenges that face California's small population counties. The RCRC Board of Directors is comprised of one member of the Board of Supervisors from each of its thirty-six member counties.

² The California State Association of Counties (CSAC) is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

³ The League of California Cities is an association of 475 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. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The

request that the Court of Appeal order its opinion in the above-captioned case be published.

The instant opinion rejected multiple challenges to certain zoning ordinances adopted by the City of Guadalupe. Most importantly, this court upheld the city's urgency ordinance adopted pursuant to Government Code Section 65858. The reasoning and result of this portion of the opinion contrast sharply with *California Charter Schools Assn. v. City of Huntington Park* (April 25, 2019, No. B284162) __ Cal.App. __ [2019 Cal. App. LEXIS 444]), recently certified for publication by Division 3 of this District (just two days after the opinion was issued in the instant case). Unlike *California Charter Schools Assn.*, the instant opinion reaffirms the deferential approach to reviewing urgency ordinances adopted by local elected bodies in general, and in particular clarifies the application of Government Code section 65858⁴ with respect to ministerial permits. As such, publication of this decision will provide clarity and stability to local governments and their constituents and preserve scarce judicial resources by avoiding unnecessary litigation challenging the adoption of interim urgency ordinances.

The court is respectfully urged to order that this opinion be published, as it meets several criteria for publication under Rule 8.1105. Counties and cities throughout the state regularly adopt interim urgency ordinances pursuant to Government Code Section 65858 to prohibit uses that may conflict with contemplated general plans, specific plans, or zoning proposals that the jurisdictions are considering, studying, or intending to study within a reasonable time. These interim measures are vital tools for local governments to prevent the vesting of rights that would undermine the underlying purposes of those proposed planning decisions. (*Miller v. Board of Public Works* (1925) 195 Cal. 477, 496.) For example, many cities and counties have adopted or are in the process of adopting interim ordinances to address a variety of issues, including establishing temporary moratoriums on the cultivation of industrial hemp,⁵ regulating excessive paving to reduce runoff,⁶ and prohibiting issuance of vacation rental and hostel rental permits in order to facilitate emergency housing for persons displaced by wildfires⁷. By

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.

⁴ All further undesignated references are to the Government Code.

⁵ See, e.g., Calaveras County Ord. No. 3113, adopted March 12, 2019 (attached hereto as Exhibit "A"); Siskiyou County Interim Zoning/Urgency Ord. No. 19-03, adopted January 8, 2019 (attached hereto as Exhibit "B").

⁶ See, e.g., Suisun City Ord. No. ____, adopted May 14, 2019 (attached hereto as Exhibit "C").

⁷ See, e.g., Sonoma County Ord. No. 6209, adopted October 24, 2017 (attached hereto as Exhibit "D").

nature, such decisions must be made quickly, and involve important matters affecting the public health, safety, and welfare. Clear articulation of the circumstances under which such ordinances may be adopted consequently “involves a legal issue of continuing public interest.” (Cal. Rules of Court, rule 8.1105(c)(6).)

The instant opinion meets several other publication criteria as well. As noted above, Division 3 recently published its decision in *California Charter Schools Assn.*, which likewise involved a challenge to a city urgency ordinance. Division 3 held that “mere inquiries, requests, and meetings about a use” do not establish the urgency required to justify an interim ordinance under Section 65858, and that an urgency ordinance may not be adopted unless and until *an actual development application is submitted* for the use in question. By contrast, the instant opinion upheld an urgency ordinance temporarily banning the establishment of boardinghouses adopted after a potential real estate buyer merely approached the city about converting an existing apartment building in an R-3 zone into a boardinghouse. This court rejected the plaintiff’s argument that “there was no urgency,” notwithstanding that no permit application of any kind had been submitted to the city.

While the facts of the instant case are not, of course, identical to *California Charter Schools Assn.*, both the similarities and the differences auger in favor of publication. An important similarity between this case and *California Charter Schools Assn.* is that both dealt with “mere inquiries,” or situations in which no actual applications had been filed before the city adopted of the interim urgency ordinance. While the *California Charter Schools Assn.* opinion made it clear that “mere inquiries, requests, and meetings do not constitute a current and immediate threat within the meaning of” Section 65858, those same types of inquiries *were* sufficient for this court to uphold the City of Guadalupe’s adoption of its interim urgency ordinance. These divergent outcomes highlight both the importance of the legal issue, and of this case in advancing the interpretation of Section 65858.⁸

On the other side of the equation, there are also differences between the instant opinion and *California Charter Schools Assn.* that satisfy the requirements of Cal. Rules of Court, rule 8.1105(c)(2) [“Applies an existing rule of law to a set of facts significantly different from those stated in published opinions”]. Perhaps the most significant difference is the fact that the instant case involved a use that required only a ministerial permit (if any), while *California Charter Schools Assn.* concerned “conditional use permits (CUP), which could be either approved or disapproved at the discretion” of the local government. While *California Charter Schools Assn.* did not expressly articulate that this discretion was dispositive, it was clearly important to that court’s conclusion

⁸ It is worth noting that prominent commentators are already interpreting the law, as articulated by *California Charter Schools Assn.*, in a manner contrary to the instant opinion. (See Wenter, *Court of Appeal Establishes Bright Line Rule That Pre-Application Inquiries and Meetings With City Staff Is Not “Current and Immediate Threat” for Valid Moratorium Ordinance* (May 20, 2019) Lexology <<https://www.lexology.com/library/detail.aspx?q=130603a6-46df-4384-83e8-712dd2a57c21>>, attached hereto as Exhibit “E”.)

Ltr to: Hon. Arthur Gilbert, Hon. Kenneth R. Yegan, Hon. Martin J. Tangeman
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that there was no urgency. (See, e.g., *id.* at p. 11 ["with CUPs, municipalities have discretion...to deny permits or to impose conditions on such permits...no right vests until a permit is granted, and the successful applicant has thereafter acted upon the grant to his or her detriment"].)

By contrast, ministerial permits, such as those at issue in this case, are typically automatically approved by local planning directors or departments if certain conditions are met. This means that there may be far less, if any, time for the city or county to adopt an interim urgency ordinance before the applicant's rights vest. Indeed, this court found the urgency requirement satisfied because "any property owner in an R-3 zone could convert his property to a boardinghouse at any time. Such conversions could result in the vesting of rights to continue the use in spite of any zoning change." (Slip Opn. at p. 11.) While this court does not expressly limit its holding to ministerial permits, and *California Charter Schools Assn.* likewise did not expressly limit *its* holding to discretionary permits, those factual differences were clearly influential to the outcome in both cases, and publication is consequently warranted to ensure that the applicable rule of law is correctly and completely set forth in the precedential caselaw.

More broadly, this court adopted a deferential approach toward judicial review of urgency ordinances, emphasizing that the "urgency ordinance is also reasonably related to the legitimate governmental purpose of briefly prohibiting boardinghouses while it considered zoning changes," and relying upon "[t]he recitals of the emergency in the ordinance..." to uphold the urgency determination. (Slip Opn. at pp. 11-12 quoting *Miller, supra*, 195 Cal. at p. 496.) *California Charter Schools Assn.* took the opposite approach, treating the determination of urgency as a question of law for the court's independent review (*id.* at p. 9), and articulating a rule of "strict[] constru[ction] so that any fair, reasonable doubt concerning the exercise of a power is resolved against" the local government. (*Id.* at p. 3, fn. 2.) These contrasts meet the criteria for publication set forth in Cal. Rules of Court, rule 8.1105(c)(4) ["Advances a new interpretation, clarification, criticism, or construction of" Section 65858] and 8.1105(c)(5) ["Addresses or creates an apparent conflict in the law"].

Accordingly, the opinion in this matter meets the criteria for publication set forth in Rule 8.1120, and we respectfully request that it be ordered published. Thank you for your consideration.

Sincerely,

ARTHUR J. WYLENE, SBN 222792
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cc: Service List