From: Brenda Wisneski
Sent: Thursday, May 5, 2022 3:13 PM
Cc: 'Farrell, Jennifer' <jfarrell@rutan.com>; Johnathan Ciampa <JCiampa@danapoint.org>; Jeff Rosaler <JRosaler@danapoint.org>; pmunoz@rutan.com
Subject: Copies of STR cases cited in Planning Commission Staff report

Good Afternoon Commissioners (bcc'd);

The STR staff report references the three court cases and includes a good discussion on their relevance on STRs. The court cases are attached in case you are interested in reading the actual cases.

Brenda

Filed 5/4/21

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THEODORE P. KRACKE, Plaintiff and Respondent, v. CITY OF SANTA BARBARA, Defendant and Appellant.	2d Civ. No. B300528 (Super. Ct. No. 56-2016-00490376-CU-WM-VTA) (Ventura County)

Prior to 2015, the City of Santa Barbara (City) encouraged the operation of short-term vacation rentals (STVRs) along its coast by treating them as permissible residential uses. In June 2015, the City began regulating STVRs as "hotels" under its municipal code, which effectively banned STVRs in the coastal zone. The City did not seek a coastal development permit (CDP) or an amendment to its certified Local Coastal Program (LCP) prior to instituting the ban.

Theodore P. Kracke, whose company manages STVRs, brought this action challenging the new enforcement policy. Following a bifurcated trial, the trial court granted Kracke's

petition for a writ of mandate enjoining the City's enforcement of the STVR ban in the coastal zone unless it obtains a CDP or LCP amendment approved by the California Coastal Commission (Commission) or a waiver of such requirement. The City appeals.

The goals of the California Coastal Act of 1976 (Pub. Resources Code, § 30000 et seq.; Coastal Act)[1] include "[m]aximiz[ing] public access" to the beach (§ 30001.5, subd. (c)) and protecting "[l]ower cost visitor and recreational facilities." (§ 30213; see § 31411, subd. (d) ["A lack of affordable accommodations remains a barrier to coastal access"]; *Greenfield v. Mandalay Shores Community Assn.* (2018) 21 Cal.App.5th 896, 899-900 (*Greenfield*).) To ensure that these and other goals are met, the Coastal Act requires a CDP for any "development" resulting in a change in the intensity of use of or access to land or water in a coastal zone. (§§ 30600, subd. (a), 30106; *Greenfield,* at p. 898.)

The City contends the trial court erred by concluding the STVR ban constituted a "development" under the Coastal Act. But, as the court explained, "[t]he loss of [STVRs] impacted the 'density or intensity of use of land' and 'the intensity of use of water, or of access thereto' because STVRs provide a resource for individuals and families, especially low-income families, to visit the Santa Barbara coast. The unavailability of low-cost housing and tourist facilities was an impediment to coastal access." Consequently, the Coastal Act required the Commission's approval of a CDP, LCP amendment or amendment waiver before the ban could be imposed. (See *Greenfield*, *supra*, 21 Cal.App.5th at pp. 900-901.) There was no such approval. We affirm.

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[1] All statutory references are to the Public Resources Code unless otherwise stated.

FACTUAL AND PROCEDURAL BACKGROUND

The City's LCP was certified in 1981 when STVRs were virtually nonexistent. The City maintains that STVRs are not legally permitted under either the LCP or its municipal code even though it allowed them to operate until 2015. The City only required the homeowner to register the STVR, to obtain a business license and to pay the 12 percent daily transient occupancy tax. The City's enforcement efforts focused on nuisance complaints about a particular STVR. In 2010 and 2014, the City identified owners who had failed to pay the 12 percent daily tax and offered them "amnesty" if they voluntarily complied. The amnesty program was not intended to curb the number of STVRs but rather to increase the City's tax revenue.

As of 2010, there were 52 registered STVRs paying daily occupancy taxes. By 2015, this number had increased to 349, including 114 STVRs in the coastal zone. In that fiscal year alone, the City collected $1.2 million in STVR occupancy taxes.

In June 2015, City staff issued a Council Agenda Report advising that "[a]ll vacation rentals or home shares that are not zoned and permitted as hotels, motels, or bed and breakfasts are in violation of the Municipal Code." The City found that the proliferation of STVRs was driving up housing costs, reducing housing stock and changing the character of residential zones.

Following a hearing, the City Council unanimously directed its staff to proactively enforce the City's zoning regulations, "which prohibits hotel uses in most residential zoning districts." This action effected an STVR ban in residential areas and strict regulation of STVRs as "hotels" in commercial and R-4 zones. By August 2018, the 114 coastal STVRs had dwindled to just 6. As

one City councilmember observed, "[T]he door is closing on vacation rentals."

Kracke filed this action on November 30, 2016. Six days later, the Commission's Chair, Steve Kinsey, sent a guidance letter to local governments, including the City, outlining "the appropriate regulatory approach to vacation rentals in your coastal zone areas moving forward." He explained: "[P]lease note that vacation rental regulation in the coastal zone must occur within the context of your local coastal program (LCP) and/or be authorized pursuant to a coastal development permit [CDP]. The regulation of short-term/vacation rentals represents a change in the intensity and use and of access to the shoreline, and thus constitutes development to which the Coastal Act and LCPs must apply. We do not believe that regulation outside of that LCP/CDP context (e.g., outright vacation rental bans through other local processes) is legally enforceable in the coastal zone, and we strongly encourage your community to pursue vacation rental regulation through your LCP."

In January 2017, Jacqueline Phelps, a Coastal Commission Program Analyst, followed up with the City Planner, Renee Brooke. Phelps explained that the Commission "disagree[s] with the City's current approach to consider residences used as STVRs as 'hotel' uses (pursuant to the City's interpretation of the definition of 'hotel' included in the [Municipal Code] for the purpose of prohibiting or limiting STVRs in residential zones." She directed Brooke to the 2016 guidance letter and again urged the City "to process an LCP amendment to establish clear provisions and coastal development permit requirements that will allow for STVRs and regulate them in a manner consistent

with the Coastal Act." The Commission's Deputy Director, Steve Hudson, sent a similar letter a few months later.

After considering the evidence, the trial court found that the City's STVR enforcement policy constituted a "development" within the meaning of section 30106 of the Coastal Act. It issued a writ requiring the City to allow STVRs "in the coastal zone on the same basis as the City had allowed them to operate prior to June 23, 2015, until such time as the City obtains a coastal development permit or otherwise complies with the provisions of the Coastal Act . . . ."[2]

DISCUSSION

Standard of Review

In reviewing a judgment granting a petition for writ of mandate under Code of Civil Procedure section 1085, we apply the substantial evidence standard to the trial court's factual findings. (*Cox v. Los Angeles Unified School Dist.* (2013) 218 Cal.App.4th 1441, 1444-1445.) On questions of law, including statutory interpretation, we apply the de novo standard. (*Hayes v. Temecula Valley Unified School Dist.* (2018) 21 Cal.App.5th 735, 746.)

The City Lacked Authority to Unilaterally Ban STVRs in the Coastal Zone

The Coastal Act is designed to "[p]rotect, maintain, and, where feasible, enhance and restore the overall quality of the coastal zone environment and its natural and artificial

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[2] Consistent with its prior correspondence with City staff, the Commission has filed an amicus curiae brief supporting Kracke's claims. The League of California Cities' amicus brief supports the City.

resources." (§ 30001.5, subd. (a); *Fudge v. City of Laguna Beach* (2019) 32 Cal.App.5th 193, 200 (*Fudge*).) It also seeks to "[m]aximize public access to and along the coast and maximize public recreational opportunities in the coastal zone consistent with sound resources conservation principles and constitutionally protected rights of private property owners." (§ 30001.5 subd. (c); *Fudge*, at p. 200.) The Commission is charged with implementing the Coastal Act's provisions and "is in many respects the heart of the Coastal Act." (*Fudge*, at pp. 200-201.)

The Coastal Act tasks local coastal governmental entities, such as the City, with developing their own LCPs to enforce the Act's objectives. (*Fudge*, *supra*, 32 Cal.App.5th at p. 201.) The LCP's content is determined by the entity but must be prepared in "'full consultation'" with the Commission. (*Ibid.*) Once completed, the LCP is submitted to the Commission for certification. (§§ 30512-30513; *Fudge*, at p. 201.)

Although the Coastal Act does not displace a local government's ability to regulate land use in the coastal zone, it does preempt conflicting local regulations. (§ 30005, subd. (a); *City of Dana Point v. California Coastal Com.* (2013) 217 Cal.App.4th 170, 200.) "'[A] fundamental purpose of the Coastal Act is to ensure that state policies prevail over the concerns of local government.' [Citation.]" (*Pacific Palisades Bowl Mobile Estates, LLC v. City of Los Angeles* (2012) 55 Cal.4th 783, 794 (*Pacific Palisades*); see *Charles A. Pratt Construction Co., Inc. v. California Coastal Com.* (2008) 162 Cal.App.4th 1068, 1075 ["The Commission has the ultimate authority to ensure that coastal development conforms to the policies embodied in the state's Coastal Act"].)

"[T]he Coastal Act [also] requires that any person who seeks to undertake a 'development' in the coastal zone obtain a [CDP]. (§ 30600, subd. (a).) 'Development' is broadly defined to include, among other things, any 'change in the density or intensity of use of land . . . .' Our courts have given the term 'development' '[a]n expansive interpretation . . . consistent with the mandate that the Coastal Act is to be "liberally construed to accomplish its purposes and objectives."'" (*Greenfield*, *supra*, 21 Cal.App.5th at p. 900, citations omitted.) Thus, "'development'" under the Coastal Act "is not restricted to activities that physically alter the land or water. [Citation.]" (*Pacific Palisades*, *supra*, 55 Cal.4th at p. 796; *Surfrider Foundation v. California Coastal Com.* (1994) 26 Cal.App.4th 151, 158 ["[T]he public access and recreational policies of the Coastal Act should be broadly construed to encompass *all* impediments to access, whether direct or indirect, physical or nonphysical"].)

Consequently, "[c]losing and locking a gate that is usually open to allow public access to a beach over private property is a 'development" under the Coastal Act. [Citation.] So is posting 'no trespassing' signs on a 23-acre parcel used to access a Malibu beach. [Citation.]" (*Greenfield*, *supra*, 21 Cal.App.5th at p. 900.) Fireworks displays also are considered developments even though not "commonly regarded" as such. (*Gualala Festivals Committee v. California Coastal Com.* (2010) 183 Cal.App.4th 60, 67.)

In *Greenfield*, a homeowners' association (HOA) adopted a resolution banning STVRs in the Oxnard Shores beach community. The resolution affected 1,400 single-family units and imposed fines for violations. (*Greenfield*, *supra*, 21 Cal.App.5th at p. 899.) The City of Oxnard's LCP, which was certified in

1982, did not mention STVRs, but Oxnard historically treated them as residential activity and collected transient occupancy taxes. (*Ibid.)*

A homeowner sought a preliminary injunction enjoining the HOA's STVR ban. In denying the request, the trial court rejected the Commission's position that the ban constituted a "development" under the Coastal Act. (*Greenfield*, *supra*, 21 Cal.App.5th at p. 899.) We reversed the court's order, noting "the [STVR] ban changes the intensity of use and access to single-family residences in the Oxnard Coastal Zone. [STVRs] were common in Oxnard Shores before the . . . ban; now they are prohibited." (*Id.* at p. 901.) As we explained, "[t]he decision to ban or regulate [STVRs] must be made by the City and Coastal Commission, not a homeowner's association. [The] ban affects 1,400 units and cuts across a wide swath of beach properties that have historically been used as short term rentals." (*Id.* at pp. 901-902.)

The same is true here. Although the City, rather than a private entity, imposed the coastal STVR ban, it also was accomplished without the Commission's input or approval. The LCPs in both cases were certified in the 1980s, decades before STVRs became popular due to the availability of Internet booking services. The City incorrectly contends that because STVRs are not expressly included in the LCP, they are therefore excluded, giving the City the right to regulate them without regard to the Coastal Act. As we clarified in *Greenfield*, regulation of STVRs in a coastal zone "must be decided by the City *and* the Coastal Commission." (*Greenfield*, *supra*, 21 Cal.App.5th at p. 901, italics added.) The City cannot act unilaterally, particularly when it not

only allowed the operation of STVRs for years but also benefitted from the payment of transient occupancy taxes.

In other words, the City did not merely "turn a blind eye" to STVRs. It established procedures whereby a residential homeowner could operate a STVR by registering it with the City, obtaining a business license and paying the 12 percent daily transient occupancy tax. When the City abruptly changed this policy, it necessarily changed the intensity of use of and access to land and water in the coastal zone. (§§ 30600, subd. (a), 30106; *Greenfield*, *supra*, 21 Cal.App.5th at p. 901.) Instead of 114 coastal STVRs to choose from, City visitors are left with only 6. This regulatory reduction is inconsistent with the Coastal Act's goal of "improv[ing] the availability of lower cost accommodations along the coast, particularly for low-income and middle-income families." (§ 31411, subd. (e).)

We agree with the trial court that "[t]he City cannot credibly contend that it did not produce a change because it deliberately acted to create a change" in coastal zone usage and access. This change constituted a "development" under the Coastal Act and, as such, required a CDP or, alternatively, an LCP amendment certified by the Commission or a waiver of such requirement.[3] (See *Greenfield*, *supra*, 21 Cal.App.5th at pp. 901-902.) Without the Commission's input and approval, the court appropriately struck down the City's STVR regulation in the coastal zone.

As for the City's argument that the Coastal Act exempts abatement of nuisances allegedly caused by STVRs, the City

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[3] The record reflects that the City submitted an LCP amendment in 2018. That amendment is pending before the Commission.

waived that issue by informing the trial court it was not "making the nuisance argument." (See *Nellie Gail Ranch Owners Assn. v. McMullin* (2016) 4 Cal.App.5th 982, 997.) Nor are we persuaded that the political question and separation of powers doctrines apply. The decision whether to ban or regulate STVRs in the coastal zone is a matter for the City and the Commission to decide. (*Greenfield*, *supra*, 21 Cal.App.5th at pp. 901-902.) The trial court appropriately expressed no opinion on the issue and none should be inferred from either its ruling or our decision.

DISPOSITION

The judgment is affirmed. Kracke shall recover his costs on appeal.

CERTIFIED FOR PUBLICATION.

PERREN, J.

We concur:

YEGAN, Acting P. J.

TANGEMAN, J.

Mark S. Borrell, Judge
Superior Court County of Ventura

Ariel Pierre Calonne, City Attorney, Robin Lewis, Assistant City Attorney; Best Best & Krieger, Christi Hogin and Amy Hoyt for Defendant and Appellant.

Rutan & Tucker and Philip D. Kohn for League of California Cities as Amicus Curiae on behalf of Defendant and Appellant.

Nossaman, Steven H. Kaufman; Crescent Cheng; Rogers, Sheffield & Campbell, Travis C. Logue and Jason W. Wansor for Plaintiff and Respondent.

Xavier Becerra, Attorney General, Daniel A. Olivas, Assistant Attorney General, Andrew M. Vogel and Norma N. Franklin, Deputy Attorneys General, for California Coastal Commission as Amicus Curiae on behalf of Plaintiff and Respondent.

Filed 4/6/22

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

DARBY T. KEEN, as Trustee, etc., Plaintiff and Respondent, v. CITY OF MANHATTAN BEACH et al., Defendants and Appellants.	B307538 Los Angeles County Super. Ct. No. 19STCP02984

APPEAL from a judgment of the Superior Court of Los Angeles County, James C. Chalfant, Judge. Affirmed.

Richards, Watson & Gershon, Quinn M. Barrow, Ginetta L. Giovinco and Marvin E. Bonilla for Defendants and Appellants.

Angel Law, Frank P. Angel and Talia E. Nimmer for Plaintiff and Respondent.

This case is about getting a room near the beach. By law, public access to the beach is a California priority. The California Coastal Commission enforces this priority by reviewing amendments beach towns make in municipal laws affecting coastal areas. Amendments require approval. The legal question here is whether there *was* an amendment.

In 1994, the City of Manhattan Beach enacted zoning ordinances, which the Coastal Commission then certified. Did these old ordinances permit rentals of a residential property for fewer than 30 days? The popularity of Airbnb and similar platforms has made the question acute.

The trial court rightly ruled the City's old ordinances *did* permit short-term rentals. This means the City's recent laws against platforms like Airbnb indeed are amendments requiring Commission approval, which the City never got. We affirm. Our statutory references are to the Public Resources Code.

I

We begin with legal, factual, and procedural background. This section recaps the California Coastal Act, describes local battles over short-term rentals, and recounts the case's posture.

A

The California Coastal Act of 1976 defined the Coastal Commission's mission to protect the coast and to maximize public access to it. (§§ 30001.5, 30330.) We liberally construe the Act to achieve these ends. (*Greenfield v. Mandalay Shores Community Assn.* (2018) 21 Cal.App.5th 896, 898 (*Greenfield*).)

The Commission works with local governments to ensure they take adequate account of state interests. (§ 30004, subds. (a) & (b); *City of Dana Point v. California Coastal Com.* (2013) 217 Cal.App.4th 170, 186.)

In this endeavor, the Act's main tool is the local coastal program. (§ 30500 et seq.; *City of Chula Vista v. Superior Court* (1982) 133 Cal.App.3d 472, 489.) Each coastal government must develop one. (§ 30500, subd. (a).) Local coastal programs have two parts: the land use plan and the local implementing program. The latter consists of zoning ordinances, zoning maps, and other possible actions. (§§ 30512, subd. (a), 30513, subd. (a).) The Commission reviews the local coastal program. (§§ 30200, 30512, 30512.2, 30513.) If it conforms to the Act's policies, the Commission certifies the program. (§§ 30512, subd. (a), 30513, subd. (b).)

In accord with these provisions, the City submitted its local coastal program to the Commission years ago. The Commission certified the City's land use plan in 1981 and its local implementing program in 1994. This local implementing program included zoning ordinances.

Once the local program is approved, it can be amended, but the local government must submit amendments to the Commission for approval. Absent approval, amendments have no force. (§ 30514, subd. (a).)

Throughout this case, the City has not disputed it would need Commission approval to enact a *new* prohibition on short-term rentals within the coastal zone. That would be an "amendment." But the City has stoutly maintained there has been no amendment, because its *old* ordinances always prohibited short-term rentals. Keen disagrees, and that frames the issue in this case: whether the City amended its program when it clamped down on short-term rentals, or whether the prohibition was not an amendment because it merely continued the legal status quo.

B

We now recount how the City banned short-term rentals.

For quite some time, people rented residential units in Manhattan Beach on both long- and short-term bases. The City knew about the practice and occasionally got complaints about a rental property, including about one "party house" in 2005.

Things changed leading up to 2015. Online platforms like Airbnb became popular, which increased short-term rentals. The City had not received a "tremendous" number of complaints, but it sought an active stance on the issue.

After hearing from the public, the Council passed two ordinances "reiterating" the City's supposedly existing ban on short-term rentals. The Council claimed its existing ordinances, including those enacted with the local coastal program, already prohibited short-term rentals implicitly.

We call these the 2015 ordinances.

When the City Council enacted the 2015 ordinances, it resolved to submit the one about the coastal zone for Commission certification.

City staff met with Commission staff. The Commission staff, however, recommended the City allow at least some short-term rentals to facilitate visitor access to the coastal zone. Then, in 2016, the Commission wrote to all coastal cities, saying municipal regulation of short-term rentals would have to be in cooperation with the Commission. The Commission emphasized that "vacation rentals provide an important source of visitor accommodations in the coastal zone" and that blanket bans would rarely be appropriate.

After the Commission made clear its support for some level of short-term renting, the City withdrew its 2015 request for

Commission approval. The City tells us its withdrawal was because the 2015 ordinance worked no change in the law and hence never required Commission certification.

The City Council continued to grapple with how to regulate short-term rentals.

In 2019, the Council adopted an ordinance creating an enforcement mechanism for its short-term rental ban. This required platforms like Airbnb to tell the City who was renting out what. The ordinance also prohibited platforms from collecting fees for booking transactions.

We call this the 2019 ordinance.

The 2019 ordinance had a pronounced effect: by June 2019, short-term rentals dropped, in round numbers, from 250 to 50. The ban was markedly, although not completely, effective.

In July 2019, the City hired Host Compliance, a company specializing in helping cities enforce short-term rental regulation.

Bewilderingly, the City tells us there is no evidence its ordinances reduced the number of short-term rentals in the City. The record contradicts this.

C

Darby Keen owns property in the City's coastal zone. He rented it on a short-term basis. The City sent Keen a Notice of Violation on July 16, 2019. Keen petitioned for a writ of mandate to enjoin the City from enforcing the 2015 and 2019 ordinances.

The trial court issued a 19-page single-spaced tentative decision: a model of careful analysis. The court noted what the City did not dispute: the City would have to obtain Commission approval if it were to enact a *new* prohibition on short-term rentals. The City's position, however, was the prohibition was not new but rather was to be found in its old zoning laws that the

Commission had approved years before. The court disagreed, ruling the City had not identified any zoning provision to support its conclusion that rentals for fewer than 30 days were barred but longer rentals were permitted. The court concluded the City was wrong to say it had always banned short-term rentals. Rather, the court ruled the ban was new, it was an amendment, and it thus required Commission approval, which it did not have. The court therefore enjoined enforcement of the ban on short-term rentals pending Commission approval.

The City appealed.

II

The City's argument boils down to this: the trial court was wrong to think the City has always allowed short-term rentals. The trial court was right, however, and the plain language of the City's ordinances proves it.

Our review is independent. (*Berkeley Hills Watershed Coalition v. City of Berkeley* (2019) 31 Cal.App.5th 880, 896.)

A

The trial court correctly interpreted the City's ordinances: they always permitted short-term, as well as long-term, residential rentals. The City's ban on short-term rentals thus amended the status quo. This amendment required Commission approval, which the City never got. So the City's ban was not valid.

The issue reduces to whether the City's old ordinances permitted short-term rentals. The following analysis demonstrates they did.

The City always has allowed people to rent apartments and homes in the City on a long-term basis. In other words, it always has been legal to live in Manhattan Beach as a renter. No one

disputes this. One would be rather surprised to discover a community anywhere that banned renting completely.

Because rentals that are *long*-term have always been permissible under the City's ordinances, however, the City has been forced to distinguish between *long*-term residential rentals the City allows and *short*-term residential rentals the platforms promote and the City dislikes. Unfortunately for the City, its old residential zoning ordinances contain no long-term/short-term distinction.

Absent some distinction in the law, then, the law must treat long-term rentals the same as short-term rentals. If long-term rentals are legal, so too are short-term rentals. The ordinances offer no textual basis for a temporal distinction about the duration of rentals. The City could have enacted a distinction like that, but it never did.

Because its ordinances say nothing about the duration of rentals, the City cannot credibly insist its ordinances permit long-term residential rentals but have always banned short-term rentals. That interpretation makes no sense.

The crucial text is ordinance A.08, which defines "Use Classifications" for the City's zoning code. One use is "Single-Family Residential," defined as "[b]uildings containing one dwelling unit located on a single lot." A second use is "Multi-family Residential," which is defined as "[t]wo or more dwelling units on a site." This ordinance contains a chart that shows the City permits both uses in residential areas.

In other words, it is legal to build a residential house or an apartment building in the City's residential zones. Once it is built, you can reside there. Anyone can. This all makes sense. It would be surprising if it were otherwise.

The reasonable interpretation of permitting a "Single-Family Residential" building in a residential area is that people are allowed to reside in that building, whether they are owners or renters.

Why, under the text of the ordinance, are renters allowed in? Because residential renters are common in cities, as everyone knows, and nothing in the ordinance takes the unusual step of banning all renting in the residential areas of the City.

Use of the word "residence" does not imply some minimum length of occupancy. (Cf. *People v. Venice Suites, LLC* (2021) 71 Cal.App.5th 715, 726 (*Venice Suites*) ["A 'residential building' is used for human habitation without regard to length of occupancy . . . ."]; *Greenfield*, *supra*, 21 Cal.App.5th at p. 899 [the city in question historically treated short term rentals as a "residential" activity].)

It is possible to reside somewhere for a night, a week, or a lifetime. The City points to no legally precedented way to draw a line between the number of days that makes some place a "residence" and the number that shows it is not. (Cf. *Venice Suites*, *supra*, 71 Cal.App.5th at p. 732 ["the dictionary definitions for apartment house do not indicate a required length of occupancy"].)

The same analysis applies to "Multi-family Residential," where the common form of a multi-family building is an apartment building. Apartment dwellers commonly rent.

The City's zoning thus permits you to rent a house or an apartment in Manhattan Beach, which accords with common experience. The City's zoning does not regulate how long your stay can be.

The City's proposed distinction between long- and short-term rentals—the former always allowed, and the latter always forbidden—has no textual or logical basis. The City thus loses this appeal as a matter of textual interpretation.

The City incorrectly argues short-term rentals are more similar to, and therefore fall under the definition of, "Hotels, Motels, and Time-Share Facilities." With our emphasis, the ordinances define these facilities as "[e]stablishments offering lodging on a weekly or less than weekly basis, and *having kitchens in no more than 60 percent of guest units*." The short-term rentals the City is trying to prohibit are of single- and multi-family residences in residential neighborhoods. Houses and apartments conventionally have kitchens. This argument is untenable.

The City asks us to take judicial notice of a 1964 ordinance that defines a hotel a particular way. The City argues we should import this definition into the ordinance in the local coastal program. This is illogical. The different definition from decades before cannot prevail over the definition enacted by the City and certified by the Commission in the ordinance at issue. The older document is not relevant. We deny this request.

The zoning ordinances certified by the Commission thus allow rentals of single- and multi-family residences in residential zones for any duration, including short-term rentals of the Airbnb variety. The City's new ban on short-term rentals was an amendment requiring Commission approval.

B

The City's other arguments are invalid.

1

The City relies heavily on the principle of permissive zoning. It argues California has adopted this doctrine: zoning ordinances prohibit any use they do not permit. But the City's ordinances *do* permit short-term rentals in residential zones. That is the only reasonable interpretation of the ordinances, as we have shown. This interpretation is not an affront to permissive zoning.

2

The City argues we should defer to its reasonable interpretation of its own ordinances because it is the local agency with responsibility for implementing them. Our analysis does not involve or require deference. We give simple words their obvious meaning. Contrary interpretations are unreasonable.

3

The City notes recent California statutes, in 2019, characterized short-term rentals as commercial uses. The City says this shows that short-term rentals are inappropriate in residential zones. These state statutes, however, deal with different issues than the municipal ordinances here. The 2019 statutes are not germane.

4

The City argues the trial court erred in interpreting the Coastal Act to require it to provide short-term rentals in residential areas. This is incorrect. The key provision is the one requiring Commission approval of amended laws. The Commission has not required the City to allow short-term rentals. The Commission has not reviewed the City's ban because the City, incorrectly, has been maintaining its ban is

nothing new. There was no erroneous interpretation of the Coastal Act.

5

The City argues Keen's reliance on *Kracke v. City of Santa Barbara* (2021) 63 Cal.App.5th 1089 is misplaced. Our analysis does not involve *Kracke*.

DISPOSITION

We affirm the judgment and award costs to Keen.

WILEY, J.

We concur:

STRATTON, Acting P. J.

HARUTUNIAN, J.*

* Judge of the San Diego Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Filed 1/7/22

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

PROTECT OUR NEIGHBORHOODS, Plaintiff and Appellant, v. CITY OF PALM SPRINGS et al., Defendants and Respondents.	E074233 (Super.Ct.No. RIC1704320)
PROTECT OUR NEIGHBORHOODS, Plaintiff and Appellant, v. CITY OF PALM SPRINGS et al., Defendants and Respondents; SCOTT GAITAN et al., Real Parties in Interest and Respondents.	(Super.Ct.No. RIC1724363) OPINION

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of part VII.

APPEAL from the Superior Court of Riverside County. Chad W. Firetag, Judge. Affirmed.

Law Offices of Babak Naficy and Babak Naficy for Plaintiff and Appellant.

Woodruff, Spradlin & Smart, James H. Eggart, Ricia R. Hager and Thomas P. Kinzinger for Defendants and Respondents.

No appearance for Real Parties in Interest and Respondents.

Because the City of Palm Springs (City) is a vacation destination, there has long been a market for short-term home rentals there. Since 2008, City ordinances have expressly allowed the short-term rental of a single-family dwelling, subject to various conditions designed to protect the interests of neighboring residents (as well as the City's own interest in collecting transient occupancy taxes, a/k/a hotel taxes).

In 2017, the City reenacted the previous ordinance, with amendments. Among other things, it made a new finding that the ordinance was consistent with the City's Zoning Code.

Meanwhile, Protect Our Neighborhoods (Protect), a membership organization opposed to short-term rentals, filed this action. Protect claimed, among other things, that the 2017 version of the short-term rental ordinance (Ordinance) violated the City's Zoning Code. The trial court disagreed and upheld the Ordinance.

Protect appeals, contending:

(1) Short-term rentals violate the Zoning Code because they are commercial, not residential.

(2) Short-term rentals violate the Zoning Code because they change the character of, and adversely affect the uses permitted in, a single-family residential zone.

(3) The Ordinance is inconsistent, contradictory, and based on erroneous findings.

(4) If the Zoning Code permits short-term rentals at all, it does so only on condition that the owner obtain a land use permit or a conditional use permit.

(5) If the Zoning Code permits short-term rentals at all, it does not allow owners to rent out properties that they do not live in.

We will hold that the trial court correctly ruled in favor of the City and against Protect. Hence, we will affirm.

I

STATEMENT OF FACTS

A. *The "Zoning Code" Chapter of the Municipal Code*.

Chapters 91 through 94 of the Municipal Code[1] are entitled "Zoning Code."

Under the Zoning Code, the uses allowed without a permit in a single-family residential (R-1) zone include (1) use as a "[p]ermanent single-family dwelling[]" and (2) "uses customarily incident to the permitted uses when located on the same lot therewith." (Mun. Code, § 92.01.01.A.)

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[1] All citations to the "Municipal Code" or "Mun. Code" are to the Palm Springs Municipal Code.

"Dwelling" is defined as "a building or portion thereof designed exclusively for residential occupancy . . . , but not including hotels, boarding or lodging houses, or mobilehomes or trailers, except when installed on a permanent foundation, or motorized homes." (Mun. Code, § 91.00.10.B.)

All uses not expressly permitted are prohibited. (Mun. Code, § 92.01.02.) In addition, in an R-1 zone, "[c]ommercial uses" "shall not be permitted . . . by commission determination . . . ." (Mun. Code, § 92.01.02.A.) "'Commission' means the planning commission of the city of Palm Springs." (Mun. Code, § 91.00.10.B.)

B. *The "Vacation Rentals" Chapter of the Municipal Code.*

1. *The 2008 ordinance.*

Title 5 of the Municipal Code is entitled "Business Regulations." Chapter 5.25 is entitled "Vacation Rentals."

This chapter was first enacted in 2008, by Ordinance No. 1748 ("Original Ordinance"). It included the following provisions, which are still in the Ordinance.

It applied to rentals for 28 days or less. (Mun. Code, former § 5.25.040; see now Mun. Code, §§ 5.25.030, 5.25.040(d), (e).)[2]

It required an owner of a vacation rental property to register the property with the City annually and to obtain a vacation rental registration certificate. (Mun. Code,

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[2] As far as we can tell, there is no difference between a "short-term rental" and a "vacation rental." For purposes of this case, they are both defined as rentals of 28 days or less. We use both terms interchangeably.

§§ 5.25.040(a), 5.25.060(a).) To do so, the owner had to have liability insurance. (Mun. Code, former § 5.25.060(c); see now Mun. Code, § 5.25.060(a)(10), 5.25.070(u).)

It limited occupancy based on the number of bedrooms. (Mun. Code, former § 5.25.070(b); see now Mun. Code, § 5.25.070(c), (d).) It required an owner to use "reasonably prudent business practices" to ensure that renters and their guests did not create unreasonable noise, disturbances, engage in disorderly conduct, or violate the law. (Mun. Code, former § 5.25.070(d); see now Mun. Code, § 5.25.070(f).) The owner, the owner's agent, or the owner's designated "local contact person" had to be available at all times to respond to complaints. (Mun. Code, §§ 5.25.060(a)(3), 5.25.070(e).)

Finally, it required the owner to pay transient occupancy taxes. (Mun. Code, § 5.25.060(a)(7), former Mun. Code, § 5.25.070(*l*); see now Mun. Code, § 5.25.070(q).)

2. *The April 2016 amendments*.

In April 2016, the City enacted Ordinance No. 1891, which amended the Original Ordinance by prohibiting short-term rentals of apartments. Short-term rentals are now allowed of single-family residences and duplexes only. (Mun. Code, §§ 5.25.030, 5.25.075(a).) Although it was a temporary urgency measure, in July 2016, Ordinance No. 1897 extended it, and in October 2016, Ordinance No. 1902 (October 2016 Ordinance) made it permanent.

3. *The December 2016 amendments*.

In December 2016, the City enacted Ordinance No. 1907 (December 2016 Ordinance), which would have amended Chapter 5.25 in respects not particularly relevant

here. The December 2016 Ordinance, by law (Elec. Code, § 9235; Mun. Code, § 803) and by its terms, did not go into effect for 30 days. During this 30-day period, a valid referendum petition was filed, which prevented the December 2016 Ordinance from going into effect at the end of the 30 days. (Elec. Code, § 9237.) In February 2017, rather than schedule a referendum election, the City rescinded the December 2016 Ordinance. Thus, the December 2016 Ordinance never took effect.[3]

4. *The current ordinance*.

In March 2017, the City adopted Ordinance No. 1918 – the Ordinance at issue – which restated and amended Chapter 5.25.

Among other changes, it barred the ownership of more than one vacation rental (Mun. Code, § 5.25.040(b)), it limited vacation rentals to 36 per year (Mun. Code, § 5.25.070(b)), it revised the enforcement provisions (Mun. Code, § 5.25.090), and it added new provisions for "Estate Homes" with five or more bedrooms (Mun. Code, §§ 5.25.030, 5.25.070(d)) and for "Homesharing" (Mun. Code, §§ 5.25.030, 5.25.078).

It also made a couple of findings that mentioned zoning.

First, it added a finding that one of the purposes of the Vacation Rentals chapter is to "ensure that vacation rentals . . . are ancillary and secondary uses of residential property consistent with the provisions of the City's Zoning Ordinance . . . ." (Mun. Code, § 5.25.020(b).)

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[3] Protect seems to think that, as a result, there was no short-term rental ordinance at all. We disagree. The October 2016 Ordinance remained in effect. Ultimately, however, this point is not material to our resolution of the issues.

Second, it added a finding that: "The primary use of single-family and multi-family dwelling units in the City of Palm Springs is the provision of permanent housing for full time and part time residents of the City who live and/or work in the City. Vacation Rentals . . . are not [a] use[] specifically recognized in the City's Zoning Ordinance, nor are these uses expressly identified as uses permitted in single-family or multi-family zones. Vacation Rentals . . . are similar in character and use as hotels and other commercial short term uses and can only be permitted in single-family or multi-family zones if such uses are ancillary and secondary to the residential use of property. This Ordinance confirms Vacation Rentals . . . as [an] ancillary and secondary use[] of residential property in the City." (Mun. Code, § 5.25.020(a).)

During a City Council meeting, the city attorney explained: "[O]ne of the important features of this revised ordinance that you have in front of you is . . . that this ordinance . . . recognizes that vacation rentals are an ancillary and secondary use of residential property within the city. This is important because this resolves any kind of ambiguity that may exist on that particular issue."

The City's director of planning has determined that, under the Zoning Code, the short-term rental of residential property is a permitted use in a residential zone.

II

STATEMENT OF THE CASE

Protect, as the trial court found, "is comprised of individual homeowners from various Palm Springs neighborhoods who find the short-term vacation rentals of single family homes to be disruptive and inconvenient."

Protect filed this action against the City in March 2017. In December 2017, it filed a second action, naming as real parties in interest a number of individual owners who had allegedly been issued vacation rental registration certificates.[4]

The two cases were consolidated. Protect's pleading in each case was styled as a complaint combined with a mandate petition. Protect asserted causes of action for violation of the City's municipal code, violation of the California Environmental Quality Act (CEQA), injunctive relief, and declaratory relief.[5]

The matter was presented to the trial court on declarations, documentary evidence, the administrative record, and matters subject to judicial notice, without any oral testimony. In August 2019, the trial court heard argument. In October 2019, it issued its final statement of decision.

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[4] These individuals are Scott and Beverly Gaitan, Jeffery Schneider, Nancy Klemperer, Michael Enenbach, Thomas Coggia, Dennis Potvin, Cheney and William Shapiro, and Joseph Ambrosavage.

[5] Protect is not raising any CEQA issue in this appeal. It also is no longer raising the argument it raised below that the Ordinance conflicts with the City's general plan.

It found in favor of the City and against Protect on all issues. As relevant here, it found that:

(1) "[T]he City's adoption of the . . . Ordinance[] reflect[s] its long-standing and consistent interpretation of its Zoning Code that [short-term rentals] are not a prohibited 'commercial' use of residential property. That interpretation is entitled to deference, and [Protect] has failed to establish that it is clearly erroneous [citation]."

(2) "[The] Ordinance . . . does not require [short-term rentals] to be 'ancillary and secondary' to the residential use of a property; the Ordinance reaffirms the City's longstanding determination that [short-term rentals] *are* ancillary and secondary uses of the properties [citation]."

It entered judgment accordingly.

III

STANDARD OF REVIEW

To the extent that this is a traditional mandate proceeding (Code Civ. Proc., § 1085), "our review is limited to a determination of whether the agency's decision was arbitrary, capricious, entirely lacking in evidentiary support, unlawful, or procedurally unfair. [Citation.] Independent review is required, however, where the issue involves statutory or regulatory construction, such as whether the agency's action was consistent with applicable law. [Citation.]" (*California School Bds. Assn. v. State Bd. of Education* (2010) 186 Cal.App.4th 1298, 1313-1314, fn. omitted.)

To the extent that this is a declaratory relief action (Code Civ. Proc., § 1060), we review the judgment as we would any judgment after a bench trial, with one exception. "In reviewing a judgment based upon a statement of decision following a bench trial, we review questions of law de novo. [Citation.] We apply a substantial evidence standard of review to the trial court's findings of fact. [Citation.]" (*Thompson v. Asimos* (2016) 6 Cal.App.5th 970, 981.) The exception is that the trial court can deny declaratory relief for discretionary reasons (Code Civ. Proc., § 1061); if it does so, we review that decision for abuse of discretion. (*D. Cummins Corp. v. United States Fidelity & Guaranty Co.* (2016) 246 Cal.App.4th 1484, 1490.) However, that is not what the trial court did here.

In this case, Protect's contentions overwhelmingly raise issues of law. Accordingly, our review is largely independent.

IV

CONFLICT WITH THE ZONING CODE

Protect contends that the Ordinance conflicts with the Zoning Code.

A. *Effect of a Conflict*.

Even assuming there is a conflict, Protect never explains why that would invalidate the Ordinance.

Throughout its brief, Protect refers to the Zoning Code as if it were some kind of higher law, akin to a state constitution or a city charter, that invalidates any ordinary law that is in conflict with it. Actually, both the Zoning Code and the Ordinance are coequal parts of the Municipal Code.

The applicable rule is that "[w]hen two or more statutes concern the same subject matter and are in irreconcilable conflict the doctrine of implied repeal provides that the most recently enacted statute expresses the will of the Legislature, and thus to the extent of the conflict impliedly repeals the earlier enactment." (*In re Thierry S.* (1977) 19 Cal.3d 727, 744.) To put it simply, a past City Council cannot tie the hands of a future City Council.

We recognize that "[r]epeals by implication are disfavored." (*Lopez v. Sony Electronics, Inc.* (2018) 5 Cal.5th 627, 637.) "'Thus, '"'"we will find an implied repeal 'only when there is no rational basis for harmonizing . . . two potentially conflicting statutes [citation], and the statutes are "irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation."'"'" [Citation.]" (*Ibid*.) Here, however, it is Protect's position that the two statutes are, in fact, irreconcilable. If they can be reconciled, then the Ordinance is valid. If, however, they cannot be reconciled, then the Ordinance is still valid.

Protect's only counter-argument[6] is that "the City Council's findings in support of the Ordinance do not evidence any intent to supersede . . . the Zoning Code. To the

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[6] Purportedly as a counter-argument, Protect argues that the Zoning Code required the City to make certain findings before it could make short-term rentals a permitted use in an R-1 zone by enacting the Ordinance. But this is not a true counter-argument at all; it is just another argument that the Ordinance violates the Zoning Code. And it fails for the same reason — if the Ordinance conflicts with the Zoning Code, the Ordinance prevails.

We will discuss whether this asserted conflict actually exists in part IV.B, *post*.

contrary, the City Council's findings show the Council intended to adopt Vacation Rental regulations in a manner that was consistent with the Zoning Code." However, if the two statutes are, in fact, irreconcilable, that would be a sufficient demonstration of the intent to repeal the inconsistent portions of the Zoning Code. It does appear that the City Council was aware of a potential conflict with the Zoning Code and tried to head it off. Assuming that attempt failed, however, surely it did not intend the Ordinance to be void. To the contrary, that very attempt shows that it intended the Ordinance to be valid, in spite of any potential conflict.

B. *Existence of a Conflict*.

Separately and alternatively, the Ordinance does not actually conflict with the Zoning Code.

To recap slightly, in an R-1 zone, the Zoning Code permits any use "customarily incident to" use as a "[p]ermanent single-family dwelling[]." (Mun. Code, § 92.01.01.A.) "Dwelling" is defined as "a building or portion thereof designed exclusively for residential occupancy . . . ." (Mun. Code, § 91.00.10.B.)

The Ordinance states: "This Ordinance confirms Vacation Rentals . . . as [an] ancillary and secondary use[] of residential property in the City." (Mun. Code, § 5.25.020(a).)[7]

[7] A use that is "ancillary and secondary" to another use, within the meaning of the Ordinance, appears to be the same thing as a use that is "customarily incident to" another use, within the meaning of the Zoning Code. We treat these terms as interchangeable.

"In interpreting municipal ordinances, we exercise our independent judgment as we would when construing a statute. [Citation.] Nonetheless, a city's interpretation of its own ordinance '"is entitled to great weight unless it is clearly erroneous or unauthorized."' [Citation.]" (*Berkeley Hills Watershed Coalition v. City of Berkeley* (2019) 31 Cal.App.5th 880, 896.)[8]

1. *Commercial use in a residential zone.*

Protect's core argument is that only residential uses are permitted in an R-1 zone, and short-term rentals are commercial. The Zoning Code, however, permits not only use as a "dwelling" (which is defined in terms of residential occupancy), but also uses "customarily incident to" use as a "dwelling." It does not prohibit any customarily incident use merely because it is "commercial." In other words, Protect is drawing a false dichotomy between "residential" and "commercial."

Protect asserts that "[c]ommercial activities are strictly prohibited in single-family (R-1) zones . . . unless they are specifically enumerated in the [Zoning] Code," citing Municipal Code section 92.01.02.A. That is incorrect. That section merely provides that, in an R-1 zone, "[c]ommercial uses" "shall not be permitted . . . *by commission*

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[8] The Zoning Code provides, "In any case where there may be conflicting or ambiguous provisions within this Zoning Code, the director of planning and building . . . shall determine the applicability of such provisions." (Mun. Code, § 91.00.08.B.) As the City notes, its director of planning has determined that the short-term rental of residential property is a permitted use in a residential zone. However, we do not believe this provision applies here, because the asserted conflict is not between two provisions "within" the Zoning Code; rather, it is between the Vacation Rentals provisions (Chapter 5.25) and the Zoning Code (Chapters 91-94).

determination . . . ." (Mun. Code, § 92.01.02.A, italics added.) In other words, while the planning commission has discretion to authorize some uses not otherwise permitted (Mun. Code, § 92.01.01.B, 92.01.01.C, 92.01.01.D), it cannot exercise that discretion to permit a commercial use. The cited section does not otherwise prohibit commercial uses.

Similarly, Protect cites our opinion in *City of Corona v. Naulls* (2008) 166 Cal.App.4th 418 for the proposition that a "commercial use not specifically enumerated in the zoning code is not allowed unless the zoning code is amended to specifically permit the use." We find no statement to this effect in *Naulls*. *Naulls* did observe that the zoning code there "contain[ed] language evidencing an intent by the City to prohibit uses not expressly identified." (*Id*. at p. 432.) The Zoning Code here similarly provides that all uses that are not permitted are prohibited. However, *Naulls* did not say anything about commercial uses in particular.

In the Ordinance itself, the City "confirm[ed]" that vacation rentals are an "ancillary and secondary use[] of residential property . . . ." (Mun. Code, § 5.25.020(a).) This interpretation was not clearly erroneous or unauthorized. In fact, even if we reviewed it independently, we would agree.

Customarily, the owner of a single-family dwelling may live there; alternatively, however, the owner may rent it out. Apparently, Protect would view this as "commercial," but the property is still being used as a single-family dwelling. The Zoning Code does not appear to prohibit the long-term rental of a house in an R-1 zone, whether annually or month-to-month. The City's director of planning testified that it has

been the City's practice to treat the occupancy of residential property by renters as a permitted use. It follows that the short-term rental of a house also is not unduly "commercial."

Admittedly, a short-term rental is not use as a "single-family dwelling"; neither the owner nor the renter is living there. (See Merriam-Webster Online Dict. <https://www.merriam-webster.com/dictionary/dwelling> ["a shelter (such as a house) in which people live"] [as of Jan 4, 2022].) Nevertheless, it is a use *customarily incident to* use as a single-family dwelling. An owner customarily can rent out a house short-term as well as long-term. Airbnb did not invent this practice; it just made it easier and more common. As early as 1991, the City was already collecting transient occupancy taxes on short-term rentals. And presumably, short-term rentals were going on even before they were taxed.

Protect argues that there is no meaningful distinction between a short-term rental and a short-term motel stay. But there is: A vacation rental, by the City's definition, is a rental of a single-family dwelling. The City could reasonably conclude that the short-term rental of a single-family dwelling (particularly when it is subject to the restrictions in the Ordinance) has different impacts than the short-term rental of 20 or 50 or 100 rooms in a motel.

Protect also cites the finding in the Ordinance itself that "Vacation Rentals . . . *are similar in character and use as hotels and other commercial short term uses* and can only be permitted in single-family or multi-family zones if such uses are ancillary and

secondary to the residential use of property." (Mun. Code, § 5.25.020(a), italics added.) It claims this is a concession that vacation rentals are commercial. As already discussed, however, the finding was perfectly accurate and consistent with the Zoning Code: Commercial uses are permitted in an R-1 zone, provided they are customarily incident to use as a single-family dwelling.

The case law and other authority that Protect cites does not call for a different conclusion.

Protect cites *Ewing v. City of Carmel by the Sea* (1991) 234 Cal.App.3d 1579. There, Carmel prohibited all short-term rentals, finding them to be a commercial use inconsistent with its R-1 zone. (*Id*. at pp. 1584, 1589.) The appellate court relied on the fact that Carmel had designated short-term rentals as "commercial" in holding that the ordinance would not apply to house-sitting or house-swapping. (*Id*. at p. 1595.) We cannot tell from *Ewing*, however, how similar Carmel's zoning laws were to the City's. Did they permit uses "customarily incident" to use as a dwelling in an R-1 zone? Did they define "commercial"?

Even more important, the rule of deference to a city's interpretation of its own ordinance means that two cities could interpret identical language in two different ways, and we would have to accept both interpretations, if they were reasonable. Apparently in Protect's view, the fact that Carmel prohibited short-term rentals in 1989 means that now all California cities must prohibit short-term rentals, as "commercial." Not so.

Protect also cites Harrington, *Vacation Rentals: Commercial Activity Butting Heads with CC&Rs* (2015) 51 Cal. Western Law Rev. 187 for the proposition that vacation rentals are a "business activity." (*Id*. at p. 201.) The thrust of that article, however, is that conditions, covenants, and restrictions (CC&Rs) that prohibit the operation of a "business" should be interpreted as prohibiting short-term rentals. It conceded that the case law on the subject was generally either undeveloped or contrary to its thesis. (*Id*. at pp. 208-215.) Moreover, it recognized that "CC&R provisions that prohibit commercial use and or business activity . . . are distinct from zoning ordinances regulating single-family use." (*Id*. at p. 216.) Finally, it acknowledged that in zoning cases, unlike CC&R cases, "results are highly localized and specific to the local and jurisdictional parameters of single-family use." (*Id*. at p. 219.) In any event, as we have already observed, the residential-commercial distinction is a false dichotomy here.

Finally, Protect cites *Biagini v. Hyde* (1970) 3 Cal.App.3d 877. *Biagini* involved a restrictive covenant that lots could be used only "for residential purposes." (*Id*. at p. 879.) It stated: "'[A]lthough no California authority is found, courts of some other jurisdictions have held 'that an incidental use of a dwelling for business or professional purposes does not necessarily constitute a violation of a covenant restricting the use of the dwelling to residential purposes, but that the question of violation in such a case depends upon the extent or manner in which the incidental use in question is conducted.' [Citation.] . . . These foreign cases have developed no precise test of incidental use, but such factors have been considered as to whether the use is casual or infrequent, results in

no appreciable damage to other owners in the area, creates no inconvenience or annoyance to neighboring residents, and is in substantial harmony with the purposes of the parties in establishing the restriction. [Citations.] A review of these cases shows, however, no high degree of predictability of result; the concept of 'incidental use' . . . has not proved to be a reliable guide to the construction of recorded restrictions." (*Id*. at pp. 879-880.)

Protect quotes only the list of "factors [that] have been considered"; it then argues that under these factors, short-term rentals are not an incidental use: They are not infrequent, they do damage other owners in the area, and they do inconvenience neighbors. Protect omits to mention the *Biagini* court's conclusion that these factors do not produce predictable results and that there is no "reliable guide." More important, however, the City is not bound by *Biagini*. It is free to use "incident" (or "incidental") in its own ordinances in a way such that the factors listed in *Biagini* are not controlling.

2. *Other asserted inconsistencies*.

Protect also argues that the Ordinance is inconsistent with the Zoning Code in two other respects.

First, it argues that, before the City could enact a new permitted use, the Zoning Code required it "to make a finding that short-term rental is 'similar to those listed above and not more obnoxious or detrimental to the public health, safety and welfare or to other uses permitted in the zone.'"

Not so. The Zoning Code provides that "[*t*]*he commission* may . . . permit any other uses which it may determine to be similar to those listed above and not more obnoxious or detrimental to other uses permitted in the zone or to the public health, safety and welfare . . . ." (Mun. Code, § 92.01.01(B), emphasis added.) Thus, this provision applies only to the planning commission. It places no similar restriction on the City Council's power to add a permitted use (and for the reasons discussed in part IV.A, *ante*, it could not).

Second, Protect argues that "[a]ccording to the City'[s] zoning code, the use of a dwelling 'may not change the character of nor adversely affect the uses permitted in that zone of which it is a part"; it cites Municipal Code section 5.22.010. It goes on to argue that short-term rentals change the character of R-1 zones and adversely affect the uses permitted in R-1 zones.

The premise of this argument, however, is simply false. Section 5.22.010 is not part of the Zoning Code. It is in the title entitled "Business Regulations," in the chapter entitled, "Home Occupations." It provides, "*This chapter* is intended to provide for those home occupation uses customarily conducted entirely within a residential dwelling and carried on by a maximum of two occupants. The use must be clearly incidental to the residential use of the dwelling and may not change the character thereof nor adversely affect the uses permitted in that zone of which it is a part." (Italics added.) Home occupation uses, and any restrictions on them, are irrelevant here. Even if short-term

rentals do adversely affect owners of nearby single-family residences and their use of their own property, allowing them was a legislative judgment that was up to the City.

V

THE FINDINGS IN THE ORDINANCE

Protect attacks two of the findings in the Ordinance, as "internally inconsistent and incoherent", and as "'arbitrary, capricious or [without] reasonable or rational basis.' [Citation.]"

The Ordinance found that:

(1) One of the purposes of the Ordinance is to "ensure that vacation rentals . . . are ancillary and secondary uses of residential property . . . ." (Mun. Code, § 5.25.020(b).)

(2) "This Ordinance confirms Vacation Rentals . . . as [an] ancillary and secondary use[] of residential property in the City." (Mun. Code, § 5.25.020(a).)

Protect claims these findings are inconsistent. In Protect's view, the first finding means that vacation rentals are not an ancillary and secondary use *only because they are regulated by the Ordinance*; however, the second finding means that vacation rentals are *always* an ancillary and secondary use.

Its interpretation of the first finding is incorrect. The Ordinance "ensure[s]" that short-term rentals are ancillary and secondary uses precisely by "confirm[ing]" that they are. In other words, it clarifies the application of the Zoning Code by declaring that short-term rentals are a customarily incidental use. It does then proceed to subject them to particularized regulations; however, these regulations do not affect the status of short-

term rentals as a customarily incidental use. What difference does it make to the use whether the owner has a registration certificate, has a local contact person, etc.?

Protect also argues that these findings are erroneous. It cites no authority for the proposition that this would invalidate a city's Ordinance (as opposed to an agency's action). "It is not the judiciary's function . . . to reweigh the 'legislative facts' underlying a legislative enactment. [Citation.]" (*American Bank & Trust Co. v. Community Hospital* (1984) 36 Cal.3d 359, 372.) "'[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.' [Citation.]" (*People v. Bloomfield* (2017) 13 Cal.App.5th 647, 658.)

First, Protect asserts that these findings have no "factual basis," because short-term rentals are not, in fact, ancillary and secondary uses of residential property. In part IV.B, *ante*, however, we held that they are — or, at a minimum, the City could reasonably find that they are.

Next, Protect asserts that the finding that the Ordinance will "ensure" that vacation rentals are ancillary and secondary uses of residential property is erroneous, because an owner can acquire a piece of property and use it exclusively as a short-term rental, without ever living there. However, a property can be residential even if it is vacant.[9] The Zoning Code defines "dwelling" in terms of whether the building is "designed exclusively for residential occupancy" (Mun. Code, § 91.00.10.B.), not whether anyone

[9] Under Protect's view, a vacant single-family residence would not be a residence at all and thus would be prohibited in an R-1 zone.

actually resides there. It then limits the *uses* of such a property to *either* (1) use as a single-family residence, *or* (2) uses customarily incident thereto. As we have held, short-term rental is such a use.

In a related argument, Protect contends that the real parties do not live in the properties that they rent out, and therefore they should not have been issued a vacation rental registration certificate. However, as just discussed, the Ordinance does not require that an owner live in a short-term rental property, and it does not have to.

VI

NEED FOR A DISCRETIONARY PERMIT

As a fallback argument, Protect contends that under the Zoning Code, a short-term rental in a single-family residential zone requires a discretionary permit.

The Zoning Code lists three uses that can be permitted in an R-1 zone if and only if the planning commission issues a land use permit. (Mun. Code, § 92.01.01.C; see also *id*., § 94.02.01.) These are a large day care, a model home, and a "[t]emporary on-site sales trailer in conjunction with the sale of subdivision lots . . . ." (Mun. Code, § 92.01.01.C.)

Similarly, the Zoning Code lists a number of uses that can be permitted in an R-1 zone if and only if the planning commission issues a conditional use permit. (Mun. Code, § 92.01.01.D; see also *id*., § 94.02.00.) These include accessory apartments, churches, schools, and golf courses. (Mun. Code, § 92.01.01.D.)

Protect argues that "vacation rentals have greater impacts" than these uses. The Zoning Code, however, does not say that other uses that are *like* the listed uses require a permit, nor that other uses that have *similar impacts* require a permit. To the contrary, it specifically says that "uses customarily incident to" use as a single-family dwelling are allowed without a permit. (Mun. Code, § 92.01.01.A.)

Protect does *not* argue that there is no rational basis for distinguishing a short-term rental from a large day care or a school. And wisely so. Under the highly deferential test that would apply to such a distinction (*Gerawan Farming, Inc. v. Agricultural Labor Relations Bd.* (2017) 3 Cal.5th 1118, 1140; *Hernandez v. City of Hanford* (2007) 41 Cal.4th 279, 299), any such argument would be frivolous.

We must decline to rewrite the Zoning Code.

VII

THE TRIAL COURT'S EVIDENTIARY RULING

In a footnote, Protect contends that the trial court erroneously sustained real parties' objection to a declaration that Protect submitted.

"Footnotes are not the appropriate vehicle for stating contentions on appeal. [Citation.] . . . The rules require points on appeal to be stated under a separate heading summarizing the point. [Citation.]" (*Sabi v. Sterling* (2010) 183 Cal.App.4th 916, 947.) We therefore deem this contention forfeited. (See *Pasternack v. McCullough* (2021) 65 Cal.App.5th 1050, 1058, fn. 6.)

If only out of an excess of caution, we also note that the asserted error was harmless. The declaration asserted that real parties had failed to respond to discovery requests that were relevant to whether they used their properties primarily for residential or investment purposes. In light of our holding that real parties were not required to live at their properties (see part V, *ante*), any such failure to respond to discovery is irrelevant.

VIII

DISPOSITION

The judgment is affirmed. The City is awarded costs on appeal against Protect.

CERTIFIED FOR PARTIAL PUBLICATION

RAMIREZ
P. J.

We concur:

MILLER
J.

SLOUGH
J.