CITY OF HERMOSA BEACH
ADMINISTVRATIVE HEARING DECISION AND ORDER

This Decision and Order is the result of an appeal of an Administrative Citation issued by the City of Hermosa Beach (City) pursuant to Hermosa Beach Municipal Code (HBMC) 1.10.090 by the Appellant identified below.

Hearing Date: June 17, 2024 at 10:30am.

Subject Matter: Administrative Hearing regarding Administrative Citation #14849114-2 regarding alleged unpermitted short term vacation rentals (STVR) and having an unpermitted use in an R-2 zone at 840 Strand, Hermosa Beach, CA 90254, APN #4187002028, (the Property).

Hearing Officer: Steve Napolitano, Esq. The Hearing Officer was present for the hearing.

Hearing Location: Hermosa Beach City Hall, 1315 Valley Drive, Hermosa Beach, CA 90254. The hearing was audio recorded and is available through the City Clerk's Office.

Appellant: Jay Mitchell for 840 The Strand LLC. Attorney Frank Angel appeared on behalf of Appellant at the hearing, along with his associate attorney, Cooper Kass, and summer legal intern Alison Vela.

City was represented at the hearing by:

- Suzanne Calderon, Code Enforcement Issuing Officer; and
- Brandon Musick, Issuing Officer; Code Enforcement Officer.

ADMINISTVRATIVE HEARING PROCEDURES

All state and local public entities are subject to due process of law. State agencies are subject to statutory requirements, including the Administrative Procedures Act. Local public agencies are, with some minor exceptions, not subject to the APA and generally subject only to the constitutional limitations of due process of law. Govt. Code §11410.30. While a local agency may elect to apply some or all of the provisions of the APA to its hearings, the City has not done so.

The process required by law are those imposed by our constitution(s) as well as any procedures adopted by the City. In Mohilef v. Janovici (1996) 51 Cal.App.4th 267 and E.W.A.P., Inc. v. City of Los Angeles (1997) 56 Cal.App.4th 310, the court explored what due process is necessary in an administrative proceeding. There is general agreement that there must be notice and an opportunity to be heard. Beyond this, "there is no precise manner of hearing which must be afforded; rather the particular interests at issue must be considered in determining what kind of hearing is appropriate. A formal hearing, with full rights of confrontation and cross-examination is not necessarily required. (Saleeby v. State Bar (1985) 39 Cal.3d 547, 565, 216 Cal.Rptr. 367, 702 P.2d 525.) 'Due process' is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts." Mohilef at 286. Our Supreme Court has stated, "[D]ue process may require only that the administrative agency comply with the statutory limitations on its authority." People v. Ramirez (1979) 25 Cal.3d 260, 269.

Beyond notice and a hearing, the procedures available in this case to the participants are those provided by Hermosa Beach Municipal Code (HBMC) 1.10.090.

(HBMC) 1.10.090(6) states, “Administrative hearings are informal, and formal rules of evidence and discovery do not apply. Each party shall have the opportunity to present evidence in support of his or her case and to cross-examine witnesses. The City bears the burden of proof at an administrative hearing to establish a violation of the Code. The administrative citation and any additional reports submitted by the enforcement official shall constitute prima facie evidence of the facts contained in those documents. The administrative hearing officer must use a preponderance of evidence as the standard of evidence in deciding the issues.”

The legal standard of review applicable to an administrative hearing is based on a preponderance of the evidence, or “evidence which is of greater weight and more convincing than the evidence which is offered in opposition to it; that is evidence which as a whole shows that the fact sought to be proved is more probable than not.” Black’s Law Dictionary, Fifth Edition.

All parties were sworn in prior to taking testimony.

EVIDENCE

All reports, documents and photos provided by the City and Appellant were accepted into evidence and incorporated here by reference.

The Issuing Officer testified to the facts contained in the timeline previously submitted by the City. In sum, Code enforcement received a complaint that the Property was being used as an unpermitted STVR hotel, with units being offered for less than 30 day stays. Code Enforcement did a search through Host Compliance, a third party STVR monitoring program, which returned multiple listings at the Property, but at the time, none of the listings had verified unit numbers or active listing.

Code Enforcement then did a Google search of the property, which led to a dedicated website for the Property from which Code Enforcement staff was able to book a one-night stay in violation of the HBMC. Code Enforcement staff was also able to reserve a one-night stay through Booking.com. While checking the Property website, as well as Booking.com, Code Enforcement staff observed that the Property was described as a hotel or apartment hotel. After some delay due to clerical issues, a first administrative citation was correctly issued and mailed to Appellant on February 8, 2024.

On April 18, 2024, Appellant called Code Enforcement, which explained that the 30 day appeal period for the first citation had lapsed, and discussed the nature of the violation with Appellant. Code Enforcement then checked that same day and confirmed that the Property was still advertising short term stays in violation of HBMC. As a result, a second administrative citation was issued on April 22, 2024. Appellant filed a timely appeal of the second citation and this hearing is the result.

Appellant stipulated at the hearing that STVRs were made available at the Property, which has 28 units. Appellant stated the Property has been an apartment hotel since it was built in 1923, providing advertisements from that time as evidence. Appellant stated that, while all units were available as STVRs, they were also available for longer stays. Appellant is the current owner who has owned the Property since 2004, using the same rental process since that time, which included STVRs. Appellant contends that, despite the City’s prohibition of STVRs, they are allowed on the Property under case law interpreting the California Coastal Act.

ANALYSIS

HBMC 17.12.010, regarding permitted uses in the R-2 two family residential zone, states: In an R-2 zone only the following uses that are hereinafter specifically provided and allowed are permitted, subject to the provisions of Chapter 17.44 governing off-street parking requirements:

A. Any use permitted in the R-1 (one-family) residential zone;
B. Attached, and/or detached multiple-family dwelling units;
C. Condominium developments consistent with the provisions of the condominium ordinance of the city;
D. Conditional uses as set forth in Chapter 17.40.

HBMC 17.12.015 prohibits short term rentals in the R-2 zone, stating: It shall be unlawful for any person to offer or make available for rent or to rent (by way of a rental agreement, lease, license or any other means, whether oral or written) for compensation or consideration a residential dwelling, a dwelling unit or a room in a dwelling for less than thirty (30) consecutive days. It shall be unlawful for any person to occupy a residential dwelling, a dwelling unit or a room in a dwelling for less than thirty (30) consecutive days pursuant to a rental agreement, lease, license or any other means, whether oral or written, for compensation or consideration. HBMC 17.12.015 was adopted on May 24, 2016.

Regarding short term rentals generally, HBMC 17.42.180 Short-Term Vacation Rentals, states: It shall be unlawful for any person to offer or make available for rent or to rent (by way of a rental agreement, lease, license or any other means, whether oral or written) for compensation or consideration a residential dwelling, a dwelling unit or a room in a dwelling for less than 30 consecutive days and for any person to occupy a residential dwelling, a dwelling unit or a room in a dwelling for less than 30 consecutive days pursuant to a rental agreement, lease, license or any other means, whether oral or written, for compensation or consideration except for short-term vacation rentals in nonconforming residential dwelling units in certain commercial zones in compliance with the following requirements. No person or entity shall maintain any advertisement of a short-term rental in violation of this section, in any zone. In the event that an advertisement has conflicting information regarding a prohibited rental, the advertisement for the shorter amount of time shall control.

HBMC 17.42.180 also sets forth the requirements to establish and operate STVRs in nonconforming residential dwelling units in certain commercial zones, but not including R-2 zones. Allowed STVRs must pay the City's transient occupancy tax, acquire a business license and pay an annual permit fee, among other requirements.

The City maintains its STVR prohibition is legal.

Appellant asserts (1) the use of all or some of the Property's rental units as STVRs is legal under the Coastal Act and recent caselaw, and (2) the Property does not meet the definition as a hotel under the HBMC and the use of any units as STVRs have been ongoing since the building was first opened more than 100 years ago and thus such use is grandfathered in despite any current prohibitions.

1. Is the City's Enforcement of Its STVR Prohibition in the R-2 Zone Illegal Under the Coastal Act and Case Law as Applied to Appellant's Property?

The California Coastal Act of 1976 (Public Resources Code, Division 20(PRC)) defines the Coastal Commission's mission to protect the coast and to maximize public access to it. (PRC 30001.5, 30330.)

The Commission works with local governments to ensure they take adequate account of state interests. (PRC 30004(a) & (b); City of Dana Point v. California Coastal Com. (2013) 217 Cal.App.4th 170, 186, 158 Cal.Rptr.3d 409.) In this endeavor, the Act's main tool is the local coastal program (LCP). (PRC 30500 et seq.; City of Chula Vista v. Superior Court (1982) 133 Cal.App.3d 472, 489, 183 Cal.Rptr. 909.)

LCPs have two parts: the land use plan and the local implementing program. The latter consists of zoning ordinances, zoning maps, and other possible actions. (PRC 30512(a), 30513(a).) The Commission reviews the local coastal program. (PRC 30200, 30512, 30512.2, 30513.) If it conforms to the Act's policies, the Commission certifies the program. (PRC 30512(a), 30513(b).)

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. (PRC 30005(a); City of Dana Point v. California Coastal Com. (2013) 217 Cal.App.4th 170, 200, 158 Cal.Rptr.3d 409.)

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. (PRC 30514(a).)

The Coastal Act also requires that any person who seeks to undertake a ‘development’ in the coastal zone obtain a Coastal Development Permit (CDP). (PRC 30600(a).) ‘Development’ is broadly defined to include, among other things, any ‘change in the density or intensity of use of land. 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, 230 Cal.Rptr.3d 827, citations omitted.) Thus, ‘development’ under the Coastal Act “is not restricted to activities that physically alter the land or water.” (Pacific Palisades, supra, 55 Cal.4th at p. 796, 149 Cal.Rptr.3d 383, 288 P.3d 717; Surfrider Foundation v. California Coastal Com. (1994) 26 Cal.App.4th 151, 158, 31 Cal.Rptr.2d 374 [“[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. So is posting ‘no trespassing’ signs on a 23-acre parcel used to access a Malibu beach.” (Greenfield, supra, 21 Cal.App.5th at p. 900, 230 Cal.Rptr.3d 827.)

Appellant’s initial brief states that, “[W]ithout Coastal Commission approval, the City’s ban on STVRs in the residential zones of the Hermosa Beach coastal zone is unenforceable. The following passages from the California Court of Appeal opinion in Kracke v. City of Santa Barbara (2021) 63 Cal.App.4th 1089 compel this conclusion:

> “The goals of the California Coastal Act of 1976 (Pub. Resources Code, § 30000 et seq.; Coastal Act) include ‘[m]aximiz[ing] public access’ to the beach ([Public Resources Code,] § 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 [coastal development permit] 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); see § 30106; Greenfield, at p. 898.)

> "[T]he 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."

Appellant further states that, "[T]he holdings of Greenfield, Kracke, and Keen are in accord with the Coastal Commission's own policy concerning STVR bans in the coastal zone. This policy states in pertinent part:"

> "The regulation of short-term vacation rentals represents a change in the intensity of 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…the Commission has not historically supported blanket vacation rental bans under the Coastal Act, and has found such programs in the past not to be consistent with the Coastal Act."

The Commission's position regarding STVRs was dated December 6, 2016 and shared with all cities and counties in the California coastal zone, including Hermosa Beach.

As the court noted in Kracke v. City of Santa Barbara (2021) 63 Cal.App.4th 1089,

> "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, 230 Cal.Rptr.3d 827.) 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.
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> 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, 230 Cal.Rptr.3d 827.) 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, 230 Cal.Rptr.3d 827.) 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, 230 Cal.Rptr.3d 827.)"

In Kracke, 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. In its holding, the Court stated,

> "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,

> 230 Cal.Rptr.3d 827, 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.
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> 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, 230 Cal.Rptr.3d 827.) 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." (PRC 31411, subd. (e))"

In Keen v. City of Manhattan Beach (2022) 77 Cal.App.5th 142, the City of Manhattan Beach claimed it didn't need to amend its LCP to prohibit STVRs because its existing ordinances and LCP implicitly prohibited them. STVRs dropped from 250 to 50. The court disagreed, saying in relevant part,

> "Absent some distinction in the law,…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…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 caselaw relied on by Appellant raises as many questions as answers, for example:

- Is any legislative act regarding STVRs in the coastal zone a change in intensity, or, if intensity can only be differentiated by measurement, what is the baseline and how is it established in that regard? In Kracke, the evidence discussed by the court found that the City's unilateral legislation reduced coastal STVRs from 114 to 6. In Keen, the court used round numbers to say STVRs were reduced from 250 to 50. In this case, no evidence or argument was offered by either side showing how many STVRs existed before the City's 2016 prohibition and how many exist today, even where they are allowed.
- Without any methodology of measurement to determine whether a change in intensity of use has actually occurred, it appears the court, starting with Greenfield, has adopted a deferential approach to the Coastal Commission's interpretation of intensity, which seems to have been stated first in the Commission's December 2016 advisory letter, which was sent after the City adopted their prohibition of STVRs. Advisory letters are not law, neither was the content of the Commission's letter self described as a 'policy'. While noting significant differences, one must ask whether this deference still justified in the wake of the Supreme Court's ruling in Lopez Bright Enterprises v. Raimondo, which overturned the "Chevron deference" previously relied on by federal administrative agencies?
- In Kracke and Greenfield, their respective cities historically and knowingly allowed STVRs for years and collected transient occupancy taxes (TOT) from them until adopting prohibitions, whereas no evidence was submitted in this case that any STVRs, including the subject

Property, has ever paid TOT, among other fees. Again, no evidence or argument was submitted in this case to show the historical context that was relied on in these other cases. According to Code Enforcement, the City's TOT is only collected from STVRs that are currently allowed in their commercial zones.

- In both Greenfield and Kracke, the court found those city's' STVR prohibitions to be "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).) And as stated in Appellant's initial brief, "The goals of the California Coastal Act of 1976 include '[m]aximiz[ing] public access' to the beach and protecting '[l]ower cost visitor and recreational facilities ['A lack of affordable accommodations remains a barrier to coastal access'] (citations omitted)." However, this appears to be an assumption at best and nothing more than a wish at worst, because neither the Coastal Act nor the Commission define what is lower cost or affordable. In this case, no evidence or argument was submitted showing how the subject Property meets the Commission's affordability goals or how allowing STVRs in general provides affordable access to the coast. Without any measurement or limits on rates that STVRs can charge, the better assumption is that all STVRs charge market rates, which would seemingly also be inconsistent with the Coastal Act's goals of lower cost accommodations for low-income and middle-income families.
- The Coastal Commission has failed to take legal action against the City for failing to have an approved and adopted LCP since 1978 or for adopting its STVR prohibition without an approved CDP since 2016. Why is that? Why is it the responsibility of cities and citizens to battle over what is supposed to be a Commission priority?
- Lastly, has the City's adoption of an ordinance allowing STVRs in its commercial areas sufficiently addressed the concerns of the Coastal Commission?

For better or worse, the above questions are beyond the scope of evidence and argument in this case. They are offered to show the difference between theory and practice, with the idea that many issues at play here remain unresolved and/or unrealized.

Nonetheless, precedent must rule for the questions that are within the scope of evidence and argument in this case. The Kracke court has held that STVR regulations constitute a "development" under the Coastal Act and as such, require a CDP or alternatively, an LCP amendment certified by the Commission or a waiver of such requirement. As stated in Kracke, "the decision whether to ban or regulate STVRs in the coastal zone is a matter for the City and the Commission to decide."

The City has not adopted a Coastal Commission approved LCP, so there is nothing to amend at this point, which would also make a waiver of such requirement moot. Thus, based on the statutes and caselaw interpreting those statutes discussed above, the City was required to submit a CDP to the Coastal Commission for approval prior to implementing the City's prohibition on STVRs in the coastal zone. Because the City failed to do so, the City's prohibition of STVRs in the coastal zone is invalid and does not apply to the Property in this case.

2. Is Appellant's Property Being Operated As An Illegal Hotel?

In its closing brief, the City states that, "The property [Property] is in the R-2 zone (Two-family Residential Zone). The zoning of the property has not changed in recent years. The R-2 zone permits residential uses, but not hotels. [The Property] is to be operated as an apartment building in accordance with the R-2 zone." It goes on to say that the prior owner verified that the Property was being operated as an apartment building as of 2002, with a business license as apartments. Further, that Appellant, who purchased the Property in 2004 signed a Residential Building Records Report

indicating the building was purchased as an apartment building and that Appellant's current business license is for an apartment building, with supporting documentation.
The City does not provide any authority supporting the assertion that the Property is being run as a hotel separate from the contention that any rental of the Property's units for less than 30 days makes its operation more like a hotel rather than an apartment building, and anything less than a 30 day stay is a violation of R-2 zoning.

HBMC section 17.12.010 states, in relevant part, "In an R-2 zone only the following uses that are hereinafter specifically provided and allowed are permitted…[including] attached, and/or detached multiple-family dwelling units." Under HBMC 17.04.040, "Dwelling unit or apartment means one (1) or more rooms in a dwelling or apartment house or apartment hotel designed for occupancy by one (1) family for living or sleeping purposes, and having only one (1) kitchen."

In Keen v. City of Manhattan Beach (2022) 77 Cal.App.5th 142 (Keen), the court of appeal rejected Manhattan Beach's argument that the zoning regulations Manhattan Beach had in place before 2015, when it first restricted STVRs, always prohibited STVRs. The Keen court observed that "it always has been legal to live in Manhattan Beach as a renter"; and that this neighboring city's "old residential zoning ordinances contain no long-term/short-term distinction." Absent that distinction, "the law must treat long-term rentals the same as short-term rentals." Because Manhattan Beach's ordinances offered "no textual basis for a temporal distinction about the duration of rentals," the Keen court, in no uncertain terms, held: "If long-term rentals are legal, so too are short-term rentals."

The City offered no evidence to show the City's code ever expressly prohibited STVRs prior to adopting its 2016 prohibition as the Keen court required. Under Keen, it is irrelevant whether the Property's units were exclusively rented for more or less than 30 days if there was no textual distinction between the two in the City's codes. As also stated in Keen, "Use of the word 'residence' does not imply some minimum length of occupancy."

Thus, it cannot be implied that Appellant is operating the Property as a hotel based on the length of a stay or residency. And, for reasons already stated above, the City's prohibition of STVRs in the coastal zone is invalid unless and until it is approved as a CDP, or as an amendment to an adopted LCP, or such requirements are waived by the Coastal Commission.

Appellant raised a grandfather defense in their closing brief, but for reasons stated above, there is no need for further discussion of it.

DECISION AND ORDER

Based on the evidence and analysis discussed above, the City's STVR prohibition in the coastal zone is invalid under the current caselaw unless and until it is approved as a CDP, or as an amendment to an adopted LCP, or such requirements are waived by the Coastal Commission. Thus, the City's prohibition is unenforceable in the coastal zone and with regard to Appellant's Property therein. This holding does not exempt the Property from the rules, regulations, licenses or taxation that the City imposes through its current STVR program or any amendments to it. Also, for reasons stated above, the City failed to meet its burden of proof with regard to Appellant operating the Property as an illegal hotel.

As a result, this Hearing Officer orders that Administrative Citation #14849114-2 be dismissed and Appellant be refunded any monetary penalties associated with the citation.

Submitted August 1, 2024 by Steve Napolitano, Esq., Administrative Hearing Officer.

Steve Napolitano, Esq.

Napolitano Law & Counsel

Right to Appeal

Within 20 days after service of this decision upon you, you may seek review of the decision by filing a notice of appeal with the Superior Court. You shall serve the City Clerk either in person or by first class mail with a copy of the notice of appeal. If you fail to timely file a notice of appeal, this decision shall be deemed final. (HBMC 1.10.100)