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February 1, 2017

## **FOR IMMEDIATE RELEASE**

### **CITY OF SANTA BARBARA ALLEGES KRACKE'S CHALLENGE TO STVR BAN CHILLS ITS FIRST AMENDMENT RIGHTS**

On January 30, 2017, the City of Santa Barbara filed an anti-SLAPP Motion against Theo Kracke, who recently sued the City over its vacation rental ban. Kracke's lawsuit argues the City should have amended its Local Coastal Program or sought a Coastal Development Permit because the vacation rental ban contravenes the policies set forth in the Coastal Act.

In its anti-SLAPP motion, the City cites to Code of Civil Procedure (CCP) § 425.16. SLAPP stands for Strategic Lawsuit Against Public Participation. Customarily, anti-SLAPP motions involve first amendment issues, like defamation. Ironically, the statute was enacted to protect the "little guy" from companies with vast resources who could file lawsuits against those who voiced opposition. Section 425.16(a) describes the Legislature's intent for the law, "The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process." While the statute's purpose was to protect the expression of first amendment rights and curb litigation that would otherwise suppress people's right to free speech, the statute is being abused by attorneys attempting to gain a tactical advantage in lawsuits. Attorneys have used anti-SLAPP motions in a variety of creative yet improper contexts, with the net result being increased attorneys' fees, delays, and more litigation.

The City's motion alleges Kracke's suit is "frankly outrageous," was "brought as a result of acts in furtherance of the City's rights of petition or free speech" and "is an attempt to stifle free speech on an issue under consideration or review by the City Council and should be summarily dismissed." If the City prevails, Kracke's lawsuit will be thrown out and he could be held liable for the City's attorneys' fees. Even if Kracke prevails at the Anti-SLAPP hearing, the City will have the right to immediately appeal the decision which will automatically delay the litigation until the appeal is resolved, possibly as late as 2018.

According to Kracke, "The City's heavy-handed tactics continue. It's outrageous the City is alleging I'm stifling its right of free speech. There is no precedent for the City to file such a motion against a suit like ours. Now we have to consider whether to file a CCP § 128.7 motion for sanctions based on the motion's frivolous nature. It's obvious the City's strategy is to delay and escalate my attorneys' fees in the hopes that I drop the lawsuit. The Coastal Commission is on record that any action banning short-term rentals amounts to 'development' under the Coastal Act and therefore requires an amendment to the City's Local Coastal Program or an application for a Coastal Development Permit. The City just refuses to acknowledge its wrongdoing and now resorts to underhanded legal tactics."

###

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**CALIFORNIA COASTAL COMMISSION**

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December 6, 2016

TO: Coastal Planning/Community Development Directors

SUBJECT: Short-Term/Vacation Rentals in the California Coastal Zone

Dear Planning/Community Development Director:

Your community and others state and nationwide are grappling with the use of private residential areas for short-term overnight accommodations. This practice, commonly referred to as vacation rentals (or short-term rentals), has recently elicited significant controversy over the proper use of private residential stock within residential areas. Although vacation rentals have historically been part of our beach communities for many decades, the more recent introduction of online booking sites has resulted in a surge of vacation rental activity, and has led to an increased focus on how best to regulate these rentals.

The Commission has heard a variety of viewpoints on this topic. Some argue that private residences should remain solely for the exclusive use of those who reside there in order to foster neighborhood stability and residential character, as well as to ensure adequate housing stock in the community. Others argue that vacation rentals should be encouraged because they often provide more affordable options for families and other coastal visitors of a wide range of economic backgrounds to enjoy the California coastline. In addition, vacation rentals allow property owners an avenue to use their residence as a source of supplemental income. There are no easy answers to the vexing issues and questions of how best to regulate short-term/vacation rentals. The purpose of this letter is to provide guidance and direction on the appropriate regulatory approach to vacation rentals in your coastal zone areas moving forward.

First, please 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 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 experience in this arena, and has helped several communities develop successful LCP vacation rental rules and programs (e.g., certified programs in San Luis Obispo and Santa Cruz Counties going back over a decade; see a summary of such LCP ordinances on our website at:

[https://documents.coastal.ca.gov/assets/la/Sample\\_of\\_Commission\\_Actions\\_on\\_Short\\_Term\\_Rentals](https://documents.coastal.ca.gov/assets/la/Sample_of_Commission_Actions_on_Short_Term_Rentals)

[.pdf](#) ). We suggest that you pay particular attention to the extent to which any such regulations are susceptible to monitoring and enforcement since these programs present some challenges in those regards. I encourage you to contact your [local district Coastal Commission office](#) for help in such efforts.

Second, 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. In such cases the Commission has found that vacation rental prohibitions unduly limit public recreational access opportunities inconsistent with the Coastal Act. However, in situations where a community already provides an ample supply of vacation rentals and where further proliferation of vacation rentals would impair community character or other coastal resources, restrictions may be appropriate. In any case, we strongly support developing reasonable and balanced regulations that can be tailored to address the specific issues within your community to allow for vacation rentals, while providing appropriate regulation to ensure consistency with applicable laws. We believe that appropriate rules and regulations can address issues and avoid potential problems, and that the end result can be an appropriate balancing of various viewpoints and interests. For example, the Commission has historically supported vacation rental regulations that provide for all of the following:

- Limits on the total number of vacation rentals allowed within certain areas (e.g., by neighborhood, by communitywide ratio, etc.).
- Limits on the types of housing that can be used as a vacation rental (e.g., disallowing vacation rentals in affordable housing contexts, etc.).
- Limits on maximum vacation rental occupancies.
- Limits on the amount of time a residential unit can be used as a vacation rental during a given time period.
- Requirements for 24-hour management and/or response, whether onsite or within a certain distance of the vacation rental.
- Requirements regarding onsite parking, garbage, and noise.
- Signage requirements, including posting 24-hour contact information, posting requirements and restrictions within units, and incorporating operational requirements and violation consequences (e.g., forfeit of deposits, etc.) in rental agreements.
- Payment of transient occupancy tax (TOT).
- Enforcement protocols, including requirements for responding to complaints and enforcing against violations of vacation rental requirements, including providing for revocation of vacation rental permits in certain circumstances.

These and/or other provisions may be applicable in your community. We believe that vacation rentals provide an important source of visitor accommodations in the coastal zone, especially for larger families and groups and for people of a wide range of economic backgrounds. At the same time we also recognize and understand legitimate community concerns associated with the potential adverse impacts associated with vacation rentals, including with respect to community character and noise

and traffic impacts. We also recognize concerns regarding the impact of vacation rentals on local housing stock and affordability. Thus, in our view it is not an ‘all or none’ proposition. Rather, the Commission’s obligation is to work with local governments to accommodate vacation rentals in a way that respects local context. Through application of reasonable enforceable LCP regulations on such rentals, Coastal Act provisions requiring that public recreational access opportunities be maximized can be achieved while also addressing potential concerns and issues.

We look forward to working with you and your community to regulate vacation rentals through your LCP in a balanced way that allows for them in a manner that is compatible with community character, including to avoid oversaturation of vacation rentals in any one neighborhood or locale, and that provides these important overnight options for visitors to our coastal areas. These types of LCP programs have proven successful in other communities, and we would suggest that their approach can serve as a model and starting place for your community moving forward. Please contact your [local district Coastal Commission office](#) for help in such efforts.

Sincerely,

A handwritten signature in black ink that reads "Steve Kinsey". The signature is written in a cursive, flowing style.

STEVE KINSEY, Chair  
California Coastal Commission

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*Exempt from fees pursuant to  
Government Code § 6103*

Attorneys for Respondent and Defendant City of Santa Barbara

SUPERIOR COURT FOR THE STATE OF CALIFORNIA  
COUNTY OF VENTURA

THEODORE P. KRACKE, an individual,

Petitioner/Plaintiff,

vs.

CITY OF SANTA BARBARA, a  
municipality,

Respondent/Defendant.

CASE NO. 56-2016-00490376-CU-WM-VTA

**CITY OF SANTA BARBARA'S  
NOTICE OF MOTION AND SPECIAL  
MOTION TO STRIKE PETITION FOR  
WRIT OF MANDATE AND  
COMPLAINT FOR CIVIL PENALTIES  
FOR VIOLATION OF THE  
CALIFORNIA COASTAL ACT,  
PURSUANT TO CODE OF CIVIL  
PROCEDURE SECTION 425.16;  
MEMORANDUM OF POINTS AND  
AUTHORITIES**

Date: February 24, 2017

Time: 8:30 a.m.

Dept.: 40

Reservation No. 2220041

Complaint Filed: 11/30/2016

Assigned to: Judge Mark S. Borrell / Dept. 40

TO PETITIONER/PLAINTIFF AND TO HIS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on February 24, 2017, at 8:30 a.m., or as soon thereafter as  
the matter may be heard in Department 40 of the Ventura County Superior Court, located at 800  
South Victoria Avenue, Ventura, California 93009, Respondent and Defendant City of Santa

Barbara (hereinafter the "City") will move to strike the Petition for Writ of Mandate and Complaint for Civil Penalties for Violation of the California Coastal Act ("Petition") pursuant to Code of Civil Procedure section 425.16.

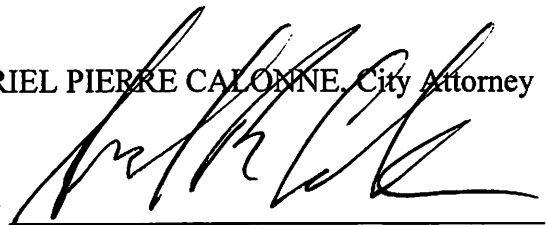
The grounds for this motion are that, in the Petition, the Petitioner/Plaintiff Theodore P. Kracke ("Kracke") challenges the written or oral statements of the City Council of the City of Santa Barbara ("City Council") made in furtherance of its right of petition or free speech under the United States Constitution or the California Constitution in connection with "an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law" and, consequently, the Petition is subject to a special motion to strike pursuant to Code of Civil Procedure section 425.16(e)(2).

The motion will be based on this notice and motion, the attached memorandum of points and authorities, the records for which the City has requested judicial notice, the declaration of City Attorney Ariel Pierre Calonne, any reply that may be filed by the City, the pleadings on file in this action, and upon such further oral and documentary evidence and argument as may be presented at the hearing.

DATED: January 30, 2017.

ARIEL PIERRE CALONNE, City Attorney

By



Ariel Pierre Calonne  
City Attorney  
Attorneys for City of Santa Barbara

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## MEMORANDUM OF POINTS AND AUTHORITIES

### I. INTRODUCTION AND SUMMARY OF ARGUMENT

This case arises from Santa Barbara's increased enforcement of long-standing ordinances that restrict illegal short term vacation rentals ("STVRs"). Petitioner/Plaintiff Theodore P. Kracke ("Kracke") runs a vacation rental business. (Petition, ¶5.) Kracke challenges certain Santa Barbara City Council statements, and the related informal actions, that occurred during a June 2015 public meeting at which the Council and community discussed options for STVR enforcement in the City zoning districts where STVRs are restricted or prohibited. (Petition, ¶25.)

Kracke's basic charge is that the City should have processed a Coastal Development Permit ("CDP") before enforcing or funding enforcement of the STVR ordinances. (Petition, ¶29.) In support, he makes the unprecedented, and frankly outrageous, claim that the City's "implementation of the STVR Ban and its broad enforcement efforts" constitute "development" within the meaning of the California Coastal Act of 1976. (Petition, ¶29; Pub. Resources Code, § 30000, et seq.) Kracke misleads by implying that the "STVR Ban" is new. He then asserts that mere enforcement of an ordinance, drafted in 1954 and last amended in 1983, amounts to a change in the "density and intensity of use of land and the intensity of the use of water, or of access." (Petition, ¶¶24 & 29.)

Kracke never questions the validity of these decades-old ordinances that pre-date the Coastal Act. Instead, he relies solely upon the City Council's constitutionally protected statements and discussion during a June 2015 City Council meeting that ended with an informal minute motion. (Petition, ¶¶25 & 26; Ex. A to Request for Judicial Notice ["RJN"], pp. 18-19 [Minutes of City Council Meeting of 6/23/15]; Declaration of Ariel Pierre Calonne, ¶4 ["Dec. of Calonne"].) Kracke's claims are thus explicitly focused upon protected speech. The challenged City speech and any related actions are protected against this "Strategic Lawsuit against Public Participation" ("SLAPP") under Code of Civil Procedure section 425.16. This action must therefore be rejected pursuant to this special motion to strike.

1 Because the Petition garbles the procedural and factual history of the City's actions, an  
2 extended statement of facts and summary of pleadings is necessary.

3  
4 **II. STATEMENT OF FACTS AND THE PETITION**

5 **A. Statement of Facts**

6 This case arose out of deliberation, discussion, and action taken by the City Council of  
7 Santa Barbara to consider whether to *fund* additional, proactive enforcement of its ordinances  
8 that prohibit STVRs, including Santa Barbara Municipal Code section 28.04.395, enacted in  
9 1954 and last amended in 1983. (Ex. C to RJN, p. 1 [8/11/15 Council Agenda Report]; Dec. of  
10 Calonne, ¶ 6.) Santa Barbara Municipal Code section 28.04.395 defines "hotel" as follows:

11 Hotel: "A building, group of buildings or a portion of a building which is  
12 designed for or occupied as the temporary abiding space of individuals for less  
13 than thirty (30) consecutive days including, but not limited to, establishments held  
14 out to the public as auto courts, bed and breakfast inns, hostels, inns, motels,  
15 motor lodges, time share projects, tourist courts, and other similar uses."

16 (Petition, ¶ 23.)

17 Kracke correctly alleges that STVRs fall within this definition of hotel, i.e., "the  
18 temporary abiding space of individuals for less than thirty (30) consecutive days." (Petition, ¶  
19 23.) By classifying STVRs as "hotels", the ordinance generally prohibits them, except in the  
20 City's Commercial and R-4 zones. (Petition, ¶ 24.)

21 On June 23, 2015, the City Council held a room-filling public meeting in order to debate  
22 and deliberate publicly on a variety of issues surrounding STVRs, including ordinance  
23 enforcement in light of the burgeoning online and local STVR marketing industry which  
24 facilitates illegal short-term rentals. (Dec. of Calonne, ¶ 5; Ex. A to RJN, pp. 16-19 [Minutes of  
25 City Council Meeting of 6/23/15]; Ex A-1 to RJN, pp. 1-9 [6/23/15 Council Agenda Report].)  
26 Up to that point, the City had enforced the STVR provisions of its zoning ordinance, including  
27 (as Kracke admits) the collection of transient occupancy (hotel) tax on this commercial use,  
28

1 albeit on a complaint-made basis. (Petition, ¶5; Dec. of Calonne, ¶7.) The Council was  
2 considering, among other topics, whether additional enforcement efforts – such as “proactive”  
3 enforcement without waiting for a neighbor complaint – should be pursued. (Ex. A-1 to RJN,  
4 pp.1-9.) At the meeting, the City Council received 47 emails and letters from the public and  
5 more than 70 people spoke, petitioned, and were indeed heard, including all 7 members of the  
6 City Council. (Ex. A to RJN, pp. 16-18.) Kracke appeared and opposed proactive enforcement  
7 of the City’s STVR ordinances. (Petition, ¶ 26.)

8 The Petition mischaracterizes the Council’s constitutionally protected discussion as a  
9 “resolution,” but no formal action was taken by the City Council, and certainly no quasi-judicial  
10 action subject to administrative mandamus. (Petition, ¶26; Code. Civ. Proc., § 1094.5.) The  
11 Council did unanimously approve a minute order, expressly described in the Council minutes as  
12 “direction to staff,” which included an order to “return to the Council with a work program  
13 which, focuses upon enforcement of existing regulations, and includes an amnesty period given  
14 to owners who have attempted to work with the City.” (Ex. A to RJN, pp. 18-19.)

15 For reasons we think are obvious, Kracke has chosen not to allege or even acknowledge  
16 what happened when staff returned to Council with its proposed work program.<sup>1</sup> Six weeks  
17 later on August 11, 2015, the City Council did take formal action when it authorized \$180,000  
18 in funding to allow proactive enforcement of the existing STVR ordinances. (Dec of Calonne,  
19 ¶6; Ex. B to RJN, p. 11 [Minutes of City Council Meeting of 8/11/15].) The City Council also  
20 issued legislative subpoenas to STVR businesses like Kracke’s. (Petition, ¶27; Ex. B to RJN,  
21 pp. 11-12.) In sum, on June 23, 2015, the City Council: 1) took public testimony, discussed,  
22 deliberated, and concluded that the City’s STVR ordinances were being violated; and, 2)  
23 directed staff to return with a responsive work program. On August 11, 2015, the Council  
24 discussed and took action to approve enhanced enforcement funding. Both the actual discussion  
25

26 <sup>1</sup> Kracke is obviously trying to assert that the Council took formal action in June 2015 to change  
27 the City’s rules on STVRs so that he can fashion an administrative mandamus claim, as he must to  
28 gain relief under the Coastal Act. (Pub. Resources Code, §30801.) He has failed to plead for  
declaratory relief under Public Resources Code section 30803. Even if he had sought declaratory  
relief, the anti-SLAPP statute would bar his action.

1 about STVRs and the subsequent formal spending discussion and action to spend constitute  
2 speech falling squarely within the protections of the First Amendment and the anti-SLAPP  
3 statute.

4 **B. The Petition**

5 As to the first cause of action for administrative mandamus under Code of Civil Procedure  
6 section 1094.5, Kracke alleges that the City failed to proceed in the manner required by law when  
7 the City Council “passed the motion to enforce the zoning ordinance and include STVR within  
8 the definition of a ‘Hotel’ ” without first obtaining a CDP. (Petition, ¶31.) Kracke is presumably  
9 referring to the Council’s minute order directing staff which occurred at the June 23, 2015  
10 meeting where Kracke opposed what he now calls a “resolution.” (Petition, ¶¶ 26 & 31.)

11 As to the second cause of action for traditional mandamus pursuant to Code of Civil  
12 Procedure section 1085, Kracke alleges that the City had a “clear legal duty to submit an  
13 application for a CDP to the Planning Commission or the Staff Hearing Officer in order to obtain  
14 approval of the STVR ban.” (Petition, ¶ 37.)

15 Finally, for the third cause of action for civil fines under California Coastal Act for  
16 Unpermitted Development, Kracke contends that the City is liable pursuant to Public Resources  
17 Code section 30820 for civil fines up to \$30,000 per violation for Coastal Act violations  
18 described in the Petition. (Petition, ¶ 45.)

19 On November 30, 2016, Kracke filed this case, founded upon the unprecedented legal  
20 claim that the City’s public enforcement discussions, decisions, and funding actions violate the  
21 California Coastal Act of 1976, Public Resources Code section 30000, et seq.

22 The crux of Kracke’s claims is alleged in Paragraph 29 of the Petition/Complaint:  
23 “The CITY’s implementation of the STVR Ban and its broad enforcement efforts  
24 change the density and intensity of use of land and the intensity of use of water, or  
25 of access. Therefore, it amounts to “development” under the Coastal Act and  
26 requires a CDP or, alternatively, an amendment to the CITY’s certified LCP  
27 approved by the Coastal Commission. The CITY’s decision to implement the  
28

STVR Ban is wholly inconsistent with the Coastal Act, does not conform to the CITY's certified LCP (including its policy requirements), and will unreasonably interfere with public access to valuable coastal resources, lower cost housing alternatives, and unique recreational opportunities."

Kracke's Petition strains hard to mischaracterize the Council's discussions, informal minute orders, and funding actions as "development" under the California Coastal Act. He alleges that mere *enforcement* of the City's *existing* ordinance changes "the density and intensity of use of land and the intensity of use of water, or of access." (Petition, ¶ 29.) As explained below, both the Council's discussions about enforcement and its related actions to fund enforcement are protected speech.

### III. ARGUMENT

#### A. THE COURT IS AUTHORIZED TO STRIKE THIS LAWSUIT BECAUSE IT WAS BROUGHT AS A RESULT OF ACTS IN FURTHERANCE OF THE CITY'S RIGHTS OF PETITION OR FREE SPEECH.

A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with "an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law" shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim. (Code Civ. Proc., § 425.16(b)(2); *Vargas v. City of Salinas* (2009) 46 Cal.4th 1, 16.) This is referred to as an anti-SLAPP motion. The California Legislature has concluded that "... there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." (Code Civ. Proc., § 425.16(a).)

Section 425.16 clearly applies to government communications and the actions in support of those communications. In *Santa Barbara County Coalition Against Auto. Subsidies v. Santa*

1 *Barbara County Ass'n of Governments* (2008) 167 Cal.App.4th 1229, the Court of Appeal held  
2 that "... government agencies and their representatives have First Amendment rights, and are  
3 "persons" entitled to protection under section 425.16, subdivision (b). It can no longer be  
4 questioned that section 425.16 extends to government entities and employees that issue reports  
5 *and take positions on issues of public interest* relating to their official duties." (*Id.* at pp. 1237-  
6 1238, emphasis added; *Vargas, supra*, 46 Cal.4th at 18.)

7 In making its determination on an anti-SLAPP motion, the trial court shall consider the  
8 pleadings, and supporting and opposing affidavits stating the facts upon which the liability or  
9 defense is based. (Code Civ. Proc., § 425.16(b)(2).) The Petition is clearly an attempt to slow  
10 or defeat STVR enforcement by thwarting the City's constitutional rights of petition and free  
11 speech in connection with its "written or oral statement[s] or writing[s] made in connection with  
12 an issue under consideration or review by a legislative, executive, or judicial body, or any other  
13 official proceeding authorized by law." The City's actions in furtherance of such speech are  
14 entitled to anti-SLAPP protection as more fully set forth below.

15 **B. THE PETITION IS AN ATTEMPT TO STIFLE FREE SPEECH ON AN**  
16 **ISSUE UNDER CONSIDERATION OR REVIEW BY THE CITY**  
17 **COUNCIL AND SHOULD BE SUMMARILY DISMISSED UNDER THE**  
18 **ANTI-SLAPP STATUTE.**

19 **1. The Court Must Take a Two-Step Approach to Ruling on an Anti-**  
20 **SLAPP Motion.**

21 The anti-SLAPP statute requires the court to take a two-step approach: First to consider  
22 "whether defendants had made a threshold showing that the challenged cause of action was one  
23 arising from 'protected activity,' and second, if so, whether plaintiffs had made a prima facie  
24 showing of facts that would support a judgment in their favor if proved at trial." (*Vargas,*  
25 *supra*, 46 Cal.4th at 14.) Here, the City will show that the challenged cause of action is one  
26 arising from "protected activity" and that the plaintiff cannot make a prima facie showing that  
27 he is likely to prevail in this action.  
28



2. The City's Challenged Actions Are Protected Communications Made in Connection with an Issue Under Consideration or Review by a Legislative, Executive, Judicial Body, or Other Official Proceeding.

A protected "act in furtherance of a person's right of petition or free speech" includes "any written or oral communication in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law." (Code Civ. Proc., § 425.16(e)(2).) Kracke essentially admits that the Petition arises out of "an issue under consideration or review" or "other official proceeding authorized by law" by the City. That is, he admits that the Petition arises out of the City's "implementation of" and "enforcement efforts" directed at STVRs, including the City Council's authorization to fund enforcement of its ordinance adopted in 1954 (and presumably the City Attorney's independent decisions whether to, or whether not to, prosecute such actions). (Petition, ¶ 29; Dec. of Calonne, ¶ 8.) In this case, STVRs were the "issue" plainly under consideration or review during "official proceedings," i.e., City Council meetings.

An issue is "'under consideration' if it 'is one kept 'before the mind,' given 'attentive thought, reflection, meditation.'" [Citation.] A matter under review is one subject to "an inspection, examination.'" [Citation.]" (*Maranatha Corrections, LLC v. Department of Corrections and Rehabilitation* (2008) 158 Cal.App.4th 1075, 1085.) The City's ultimate August 2015 decision to fund proactive enforcement of its longstanding STVR ordinances, and the discussions during the meetings conducted on June 23 and August 11, each pertain to a matter "under consideration or review" during an "official proceeding authorized by law."<sup>2</sup>

To be stricken under Code of Civil Procedure section 425.16, the defendant's act underlying the plaintiff's cause of action "must *itself* have been an act in furtherance of the right of petition or free speech.'" (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78; emphasis in

<sup>2</sup> In addition, the appellate court has implicitly recognized that "actions allegedly taken by the defendants in the investigation and prosecution of plaintiffs regarding code enforcement violations occurring at real properties owned by plaintiffs . . ." can form the basis of an anti-SLAPP motion. (*Squires v. City of Eureka* (2014) 231 Cal.App.4th 577, 589.)

1 original.) In *Cashman*, the Supreme Court distinguished between a dispute over the *validity* of an  
2 ordinance and one which concerned *protected activity* related to the ordinance, holding that the  
3 related activity met the statutory requirement under section 425.16 as an “act in furtherance of  
4 the right of petition or free speech.” (*Id.*) Here, Kracke does not challenge the validity of the  
5 City’s ordinance, which was enacted in 1954 and amended in 1983. Instead, Kracke challenges  
6 the City’s discussions and the informal minute order documenting those discussions which  
7 together led to formal action on August 11, 2015 to fund proactive enforcement of the ordinance  
8 -- an action under consideration by the City Council and an “official proceeding authorized by  
9 law.” (Code Civ. Proc., § 425.16(e) (2).)

10 It is important to note that the Petition conflates the Council’s decision to fund enforcement  
11 with the City Attorney’s independent decision to initiate (or not to initiate) enforcement. The  
12 City proceedings have been crystal clear in maintaining a bright line distinction between the  
13 Council’s budgetary authority and the City Attorney’s power and duty to exercise independent  
14 judgment in deciding which cases to prosecute or initiate. (Ex. C to RJN, p. 5 [August 11, 2015  
15 Council Agenda Report].)

16 In *Santa Barbara County Coalition*, *supra*, 167 Cal.App.4th 1229, the Santa Barbara  
17 County Association of Governments (SBCAG) proposed a ballot measure to extend a County-  
18 wide transportation sales tax. (*Id.* at p. 1234.) The plaintiff Coalition filed a lawsuit against  
19 SBCAG, alleging that SBCAG’s promotion of the ballot measure interfered with the electoral  
20 process, improperly used public funds, and obstructed the plaintiffs’ ability to marshal opposition  
21 to the measure. (*Id.* at p. 1234.) SBCAG filed a special motion to strike, arguing, *inter alia*, that  
22 the complaint sought to impose liability for conduct protected by the First Amendment rights.  
23 The trial court agreed with SBCAG and granted the special motion to strike. (*Id.* at p. 1235.)  
24 The Court of Appeal affirmed, holding that the following challenged government  
25 communications were protected under Code of Civil Procedure section 425.16: “(1) SBCAG  
26 made oral and written statements concerning the County’s transportation requirements, the cost  
27 thereof, and the need for continuation of the sales tax to provide the revenue necessary to satisfy  
28

1 those requirements, (2) the statements were made in official government proceedings and public  
2 forums, and (3) the statements otherwise concerned issues of public concern being considered by  
3 a legislative or executive body.” (*Id.* at p. 1238.)

4 Kracke’s case is no different. SBCAG’s oral and written statements “concerning the need  
5 for continuation of the sales tax to provide the revenue necessary to satisfy [transportation]  
6 requirements” and the Santa Barbara City Council’s challenged actions involving oral and written  
7 statements related to providing funding necessary to enforce existing ordinances are essentially  
8 the same protected activity – speech about governmental financial needs. In both cases, the  
9 challenged actions concerned statements pertaining to the funding of the governmental entities’  
10 authorized functions for the benefit of their constituents, they were made in official government  
11 proceedings and public forums, and “concerned issues of public concern being considered by a  
12 legislative or executive body.” (*Id.* at p. 1238.) Under *Santa Barbara County Coalition*, these  
13 types of actions are expressly protected by Code of Civil Procedure section 425.16 as “acts in  
14 furtherance of free speech rights.” (*Id.*; emphasis added.) This approach is compelled by  
15 fundamental First Amendment jurisprudence that equates expenditures with speech. (*Buckley v.*  
16 *Valeo* (1976) 424 U.S. 1, 16 [96 S.Ct. 612, 633].) The Council’s decision to spend money to  
17 enhance STVR enforcement is also protected speech.

18 Moreover, the California Supreme Court has held that City Council votes that are taken in  
19 furtherance of protected speech are likewise protected. In *City of Montebello v. Vasquez*, (2016)  
20 1 Cal.5<sup>th</sup> 409, the City of Montebello sued three of its former councilmembers and a former city  
21 administrator claiming they had violated Government Code section 1090 by voting on a waste  
22 hauling contract (“the Athens contract”) in which they held a financial interest. (*Id.* at pp. 412-  
23 413.) The plaintiff sought to invalidate the contract and the defendants filed an anti-SLAPP  
24 motion to strike the complaint. The trial court denied the motion and the Court of Appeal  
25 affirmed. The California Supreme Court reversed the Court of Appeal’s judgment, holding, in  
26 relevant part, that *the votes cast* in favor of the contract issue “were protected activity under  
27 section 425.16.” (*Id.* at p. 413.) The Court held that “councilmembers’ votes, as well as  
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statements made in the course of their deliberations at the city council meeting where the votes were taken, qualify as “any written or oral statement or writing made before a legislative ... proceeding.” (*Id.* at p. 422.) And, “Under the First Amendment, legislators are “given the widest latitude to express their views” and there are no “stricter ‘free speech’ standards on [them] than on the general public.” ’ [Citations omitted.] *The councilmember defendants’ votes were cast in furtherance of their rights of advocacy and communication with their constituents on the subject of the Athens contract.*” (*Id.* at p. 423; emphasis added.) As in *Montebello*, the Santa Barbara City Council’s votes to direct staff through an informal minute motion and ultimately to fund STVR enforcement are “any written or oral statement or writing made before a legislative . . . proceeding.” (*Id.*) Consequently, under the holdings of *City of Montebello* and *Santa Barbara County Coalition*, the City’s challenged actions are protected under Code of Civil Procedure section 425.16.

**C. THERE IS NO PROBABILITY THAT KRACKE CAN PREVAIL ON HIS CLAIMS AGAINST THE CITY.**

**1. The City’s Decision to Fund Enforcement of Its STVR Ban Does Not Constitute “Development” Under the Coastal Act.**

“The plaintiff must establish the unlawfulness of the activity as part of its burden of showing a probability of prevailing on its claim.” (*Santa Barbara County Coalition, supra*, 167 Cal.App.4<sup>th</sup> at p. 1238.) Kracke contends that the “City’s implementation of the STVR Ban and its broad enforcement efforts change the density and intensity of use of land and the intensity of use of water, or of access” and, therefore, amount to “development” under the Coastal Act and requires a coastal development permit. (Petition, ¶ 29.)

Putting aside the logical deficit in the claim that enforcing an *existing* ordinance could change the lawfully allowed land use density or intensity, there is absolutely no authority for Kracke’s position that the City Council’s minute motions or funding actions for STVR enforcement can constitute “development” under the Coastal Act. Nor is there any factual basis upon which to conclude that enforcing the City’s decades-old decision to prohibit commercial

1 hotel uses in certain residential zones changes the density and intensity of use of land, use of  
2 water or of access. "Density and intensity" describe the measurement of population density and  
3 building intensity.<sup>3</sup> Enforcement against illegal commercial hotel uses impacts who may  
4 occupy the affected properties and for how long, not how many or how densely. Simply put, the  
5 City's challenged action does not constitute "development" because it did not change the  
6 existing zoning.

7 The case law addressing the meaning of "development" under Public Resources Code  
8 section 30106 provides no support for Kracke's position. The Petition relies upon *Pacific*  
9 *Palisades Bowl Mobile Estates, LLC v. City of Los Angeles*, (2012) 55 Cal.4<sup>th</sup> 783. (Petition,  
10 ¶17.) In that case, the California Supreme Court addressed whether a city's denial of a mobile  
11 home park owner's application for a subdivision to convert the park from tenant occupancy to  
12 resident ownership constituted "development" within the meaning of the Coastal Act. Unlike  
13 the present case, the California Supreme Court simply acknowledged that the Coastal Act  
14 expressly defines "development" to include a "subdivision pursuant to the Subdivision Map  
15 Act" which, in turn, "specifically refers to the conversion of a rental mobilehome park to  
16 resident ownership as a form of 'subdivision'...." (*Id.* at p. 795; citations omitted.)

17 In this case, there is no hint in the Coastal Act that discussing a matter or taking action to  
18 fund enforcement constitutes "development." Moreover, there is no authority for the  
19 proposition that the City's funding of code enforcement falls within the definition of  
20 "subdivision," or is otherwise comparable to the list of actions in the Public Resources Code  
21 section 30106 "development" definition. *Pacific Palisades* does not support Kracke's position.

22 *Gualala Festivals Committee v. California Coastal Commission* (2010) 183 Cal.App.4<sup>th</sup>  
23 60 further explains how the courts have construed the meaning of "development" under the  
24 Coastal Act. In *Gualala Festivals*, the Coastal Commission issued an order prohibiting the  
25  
26

27 <sup>3</sup> "The land use element shall include a statement of the standards of population density and  
28 building intensity recommended for the various districts and other territory covered by the plan."  
(Gov. Code, § 65302(a); 66 Cal. Jur. 3d Zoning And Other Land Controls § 196.)

1 festival committee from discharging fireworks over the Gualala River estuary without first  
2 obtaining a CDP. (*Id.* at p. 63.) Public Resources Code section 30106 includes within its  
3 definition of development, “on land, in or under water, the placement or erection of any solid  
4 material or structure; discharge or disposal of any . . . gaseous, liquid, solid, or thermal waste . .  
5 . .” At the hearing before the Commission, evidence was introduced that the proposed fireworks  
6 display would produce solid and gaseous waste, therefore constituting “development” as  
7 described in the Coastal Act. The trial court upheld the Commission’s order and the Court of  
8 Appeal affirmed the trial court. The obvious distinction is that shooting off fireworks is a  
9 *physical* act. Enforcing Santa Barbara’s STVR laws has no physical, land changing effect.

10 Of the many cases that have construed “development,” not a single one can be relied upon  
11 by Kracke to support his position. (*See, e.g., LT-WR, L.L.C. v. California Coastal Com.* (2007)  
12 152 Cal.App.4th 770, 776, 804–805 [installation of gates with “no trespassing” signs is  
13 development]; *La Fe, Inc. v. County of Los Angeles* (1999) 73 Cal.App.4th 231, 239–240 [lot  
14 line adjustment is development]; *Stanson v. San Diego Coast Regional Com.* (1980) 101  
15 Cal.App.3d 38, 47–48 [remodel of existing structure is development]; *California Coastal Com.*  
16 *v. Quanta Investment Corp.* (1980) 113 Cal.App.3d 579, 605–609 [conversion of existing  
17 apartments into a stock cooperative is development]; *Monterey Sand Co. v. California Coastal*  
18 *Com.* (1987) 191 Cal.App.3d 169, 176 [offshore sand extraction is development].)

19 **2. Enforcement of the City’s Ordinances Does Not Constitute a Bill of**  
20 **Attainder, Ex Post Facto Law or Law Impairing the Obligation of**  
21 **Contracts.**

22 Kracke also throws in an allegation that STVR enforcement is a “bill of attainder, ex post  
23 facto law, or law impairing the obligation of contracts.” (Petition, ¶ 31(d), p. 13:4-7.) The  
24 City’s enforcement of its ordinance does not violate Article I, Section 9 of the California  
25 Constitution. “A bill of attainder has been defined as a ‘legislative act which inflicts  
26 punishment without a judicial trial’; and an ex post facto law is one which, among other things,  
27 may either aggravate a crime, make it greater than it was when committed, or which changes the  
28

1 punishment therefor and inflicts a greater punishment than was provided for when the crime was  
2 committed.” (*People v. Camperlingo* (1924) 69 Cal.App. 466, 471, quoting *Cummings v.*  
3 *Missouri* (1867) 71 U.S. 277, 323.) Kracke has failed to allege facts supporting either theory.  
4 There is no legislative act in this case. And, generally, the prohibition against ex post facto laws  
5 embraces criminal cases only. (*Carpenter v. Pennsylvania* (1855) 58 U.S. 456, 463; *Foster v.*  
6 *Board of Police Commissioners* (1894) 102 Cal. 483, 490.) To the extent it applies to a civil  
7 matter, the law must nevertheless impose a punishment to constitute an ex post facto law. (*Ellis*  
8 *v. Dept. of Motor Vehicles* (1942) 51 Cal.App.2d 753.) As indicated above, the at-issue City  
9 ordinance has been on the books essentially since 1954, as amended in 1983. Neither the June  
10 23, 2015 Council discussion nor the August 11, 2015 budgetary authorization to fund  
11 enforcement reach back before enactment of the ordinance, and neither amends the ordinance to  
12 inflict a penalty greater than when the violation of the ordinance occurred. Nor does the  
13 decision to fund enforcement of the ordinance inflict punishment or penalty without a judicial  
14 trial.

15 The contract clause of the California Constitution does not protect Kracke’s expectation in  
16 any contractual obligations regarding STVRs. A person cannot acquire a vested right in a  
17 contract which is “unsupported by the land use regulations and facts of the particular situation.”  
18 (*Consaul v. City of San Diego* (1992) 6 Cal.App.4th 1781, 1799.) “It is beyond question that a  
19 landowner has no vested right in existing or anticipated zoning.” (*Id.* at p. 1797.)

20 **3. As Shown in the City’s Demurrer Filed on January 20, 2017, the First**  
21 **and Second Causes of Action Fail to State a Cause of Action and,**  
22 **Consequently, Kracke Cannot Prevail as to Any of His Causes of**  
23 **Action.**

24 The City demurred to the first and second causes of action alleged in the Petition on the  
25 following grounds. The first cause of action for administrative mandate pursuant to Code of  
26 Civil Procedure section 1094.5 is untimely as it was not filed within 60 days of the final  
27 decision of which judicial review is herein sought. The second cause of action for traditional  
28

mandate pursuant to Code of Civil Procedure section 1085 is not a proper remedy contemplated by the Public Resources Code and the Petition does not seek to compel the performance of a ministerial duty. The third cause of action for civil penalties is, of course, necessarily dependent on a violation of the Coastal Act being established through the first two claims, and thus also fails. For these reasons, in addition to those asserted above, Kracke cannot prevail on any of his three causes of action.

**D. ATTORNEY FEES AND COSTS ARE PROPERLY AWARDED TO THE CITY UNDER THE ANTI-SLAPP STATUTE.**

The prevailing party on a special motion to strike under the anti-SLAPP statute is entitled to recover attorney fees and costs associated with making the anti-SLAPP motion and assertion of alternative defenses in response to meritless litigation. (Code Civ. Proc. § 425.16(c)(1).) This is a mandatory award of costs and fees. (*Pfeiffer Venice Properties v. Bernard* (2002) 101 Cal.App.4th 211.) Thus, the City requests an award of such fees and costs pursuant to Declarations and evidence to be submitted following the hearing on this Motion.

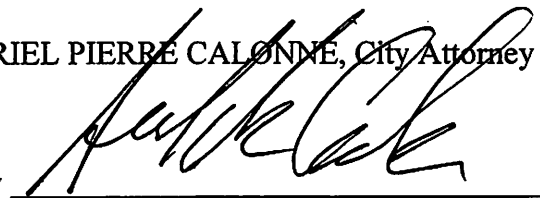
**IV. CONCLUSION**

Based upon the foregoing facts and authorities, the City respectfully requests that the court strike the Petition and Complaint against the City pursuant to Code of Civil Procedure section 425.16, and issue an award of attorney fees and costs in its favor, in an amount to be demonstrated in subsequent declarations.

DATED: January 30, 2017.

ARIEL PIERRE CALONNE, City Attorney

By



Ariel Pierre Calonne  
City Attorney  
Attorneys for City of Santa Barbara



**PROOF OF SERVICE**  
(C.C.P. §§ 1013(a), 2015.5)

**STATE OF CALIFORNIA, COUNTY OF SANTA BARBARA**

I am a citizen of the United States and a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 740 State Street, Suite 201, Santa Barbara, California; my electronic service address is [lcclendenen@santabarbaraca.gov](mailto:lcclendenen@santabarbaraca.gov).

On the date set forth below, I served a true copy of the following documents:

**CITY OF SANTA BARBARA'S NOTICE OF MOTION AND SPECIAL MOTION TO STRIKE PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR CIVIL PENALTIES FOR VIOLATION OF THE CALIFORNIA COASTAL ACT, PURSUANT TO CODE OF CIVIL PROCEDURE SECTION 425.16; MEMORANDUM OF POINTS AND AUTHORITIES**

on the party(ies) in this action or their attorney named below by:

☒ personally delivering it to the following:

Travis C. Logue, Esq.  
Jason W. Wansor, Esq.  
ROGERS, SHEFFIELD & CAMPBELL, LLP  
427 East Carrillo Street  
Santa Barbara, California 93101

☐ depositing it in the Fed Ex Overnight Mail in a sealed envelope with postage thereon fully prepaid to the following:

☐ facsimile transmission to the following facsimile numbers and depositing it in the United States Mail in a sealed envelope with postage thereon fully prepaid to the following:

☐ depositing it in the United States Mail in a sealed envelope with postage thereon fully prepaid to the following:

☐ electronic service pursuant to the parties' or their counsels' agreement to accept electronic service in this action, at the following electronic service address(es):

I declare under penalty of perjury that the above is true and correct. Executed on January 30, 2017, at Santa Barbara, California.

  
Lindsay MacDonald