SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF VENTURA

THEODORE P. KRACKE, and individual, Plaintiff/Petitioner, vs. CITY OF SANTA BARBARA, a Municipality, Defendant/ Respondent	Case No.: 56-2016-00490376-CU-WM-VTA TENTATIVE DECISION RE IMPOSITION OF CIVIL LIABILITY

Introduction

Petitioner and plaintiff, Theodore P. Kracke ("Kracke"), contends that respondent and defendant, City of Santa Barbara ("City"), has acted contrary to the mandates of the California Coastal Act of 1976 ("Coastal Act") by effectively prohibiting him and other owners of residential properties in the coastal areas of Santa Barbara from making those properties available as "short-term vacation rentals" ("STVRs").[1] The City disputed this contention.

[1] This type of an arrangement is referred to in the exhibits as a "short-term vacation rental" and sometimes as simply a "short-term rental," often abbreviated as "STVR" or "STR," respectively. The court understands these terms to be synonymous. Generally, a short-term vacation rental is a dwelling unit rented for transient use of 30 consecutive days or less.

On the stipulation of the parties, the matter proceeded to court trial on only the first and third causes of action. The court found in favor of Kracke on those claims. On the third cause of action, the court held that Kracke is entitled to a judicial declaration that the City's directive implementing a new enforcement policy concerning STVRs was a "development" within the meaning of Public Resources Code section 30106 and Title 28 of the Santa Barbara Municipal Code. On the first cause of action, the court ordered that a writ shall issue commanding 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.

On May 14, 2019, the court conducted a trial on Kracke's second cause of action, for the imposition of a civil penalty pursuant to subdivision (b) of Public Resources Code section 30820. He requests the City be ordered to pay a civil penalty in excess of $21 million to the California Coastal Conservancy's "Violation Remediation Account." The City denies that a civil penalty is warranted and contends that, even if it is, the amount of the penalty sought by Kracke is excessive.

Discussion

Under subdivision (b) of Public Resources Code section 30820, "[a]ny person who performs or undertakes development that is in violation [of the Coastal Act] when the person intentionally and knowingly performs or undertakes the development in violation of [the Act] . . . may, in addition to any other penalties, be civilly liable in accordance with this subdivision." The "civil liability" that "may be imposed" for a violation "shall not be less than one thousand dollars ($1,000), nor more than fifteen thousand dollars ($15,000), per day for each day in which the violation persists." (Pub. Resources Code, § 30820, subd, (b).)

The statute specifies certain factors to be considered in determining "the amount of civil liability" to be imposed. These are:

"(1) The nature, circumstance, extent, and gravity of the violation.

"(2) Whether the violation is susceptible to restoration or other remedial measures.

"(3) The sensitivity of the resource affected by the violation.

"(4) The cost to the state of bringing the action.

"(5) With respect to the violator, any voluntary restoration or remedial measures undertaken, any prior history of violations, the degree of culpability, economic profits, if any, resulting from, or expected to result as a consequence of, the violation, and such other matters as justice may require." (Pub. Resources Code, § 30820, subd, (c).)

A reasonably held good faith belief that one is acting in conformance with the provisions of the Coastal Act is a defense to a claim for a civil penalty under Public Resources Code section 30820. (See *No Oil, Inc. v. Occidental Petroleum Corp.* (1975) 50 Cal.App.3d 8, 30 [interpreting former Pub. Resources Code, §§ 27500 and 27501].)

It is Kracke's burden to establish that the City's failure to comply with the Coastal Act was both intentional and knowing. To put this inquiry into the appropriate context, it is important to understand what the City knew and when it knew it.

The enhanced enforcement policy that the court found to be a "development" originated from the City's decision to construe the established definition of what was a "hotel" under the City's zoning ordinance to include STVRs. (See SOD, 3/8/19, p. 6.) That decision was made sometime after 1983, when the definition of "hotel" was adopted, but before 2015, when the enhanced enforcement was authorized; the record is not clear as to exactly when. Nor is the record clear as to how or by whom the decision to include STVRs in that definition was made or the reason for it. However, it appears that this interpretation of the "hotel" definition was well

recognized long before June 23, 2015 – the date the City Council directed staff to move forward with the enforcement policy.

The City reasonably, albeit erroneously, viewed its decision in June 2015 as maintaining the status quo. At that time, the City was entrenched in two conflicting, yet co-existing, policies: one that tolerated SVTRs and the other that largely did not. (See SOD, 3/8/19, pp. 6-9.) The City's motivation at that time was to establish a single, consistent zoning policy for STVRs. It did so by aggressively pursuing one of the existing policies and phasing out the other. However, the City failed to recognize that its decision to reduce the number of STVRs in the city, including the coastal zone, was more than merely the enforcement of an existing regulation but represented a change in policy that affected the intensity of use of the coastal area and, therefore, was a "development" under the Coastal Act.

Kracke points to a number of events and communications that he contends put the City on notice that it was not complying with the Coastal Act.[2] A series of three correspondence from persons associated with the Coastal Commission is particularly telling. In December 2016, the Chair of the Coastal Commission provided guidance to local governments which cautioned that regulation of STVRs "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)." (SOD, 3/8/19, p. 12, emphasis in original.) It "strongly encourage[d]" local governments "to pursue vacation rental regulation through your LCP." (*Ibid.*) In conclusion, the chair's letter observed that the commission "strongly support[ed] developing reasonable and balanced regulations that can be tailored to address the specific issues within your community to allow for vacation

[2] Many of these events are summarized in the court's prior Statement of Decision. (See SOD, 3/8/19, pp. 12-15.)

rentals, while providing appropriate regulation to ensure consistency with applicable laws." (*Ibid*, emphasis in original.)

Within the months that followed, representatives of the Coastal Commission wrote the City two more letters, the last in July 2017. These correspondence, to the Santa Barbara City Planner and the Santa Barbara City Administrator, respectively, echoed the statements expressed in the chair's prior letter. In addition, both correspondence expressed the commission's disagreement with the City's inclusion of STVRs in the definition of "hotel."

Furthermore, by the time of the last of these three letters, this court had overruled the City's demurrer to Kracke's first amended petition and complaint. The court held that Kracke had alleged facts that pleaded a "development" within the meaning of the Coastal Act.

None of this evidence, however, is relevant to show what the City knew and what its motivations were in mid-2015 when it adopted its heighted enforcement directive. The court finds that the evidence before it fails to establish that the City intentionally and knowingly violated the Act *at that time*.[3]

Kracke suggests that even if the City initially failed to recognize its violation, by July 2017 it was no longer reasonable for the City to believe that its enhanced enforcement program, as it related to properties in the coastal zone, comported with the Coastal Act. In response to this argument, the City contends that the statements contained in these three letters from persons associated with the commission were not "binding" on the City, and, therefore, the City was free to disregard those comments. Although technically correct, the City's contention misses the point. The relevance of these communications is not that the City was being required to do

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[3] This conclusion is not undermined by the fact that one of the public comments asserted the possibility that the contemplated action might constitute a "development." The City received input from a number of sources, representing numerous points of view. A former employee of the commission cannot express the views of the commission.

something by the commission. Rather, the significance of these correspondence is that persons within the commission (i.e., the chair, the deputy director of the regional office, and a coastal program analyst) who were knowledgeable with the City's LCP and the Coastal Act were emphatically expressing disagreement with the City's use of its zoning ordinance to exclude STVRs from the coastal zone. These communications would give a reasonable person cause for reflection.

That the City chose not to be persuaded by this guidance does not, in itself, establish that the City's violation of the Coastal Act was intentional and knowing. The ultimate determination as to whether something is a "development" is for the judicial branch. And this court has acknowledged that in its research it has not identified a case finding a "development" on facts like those present here. (See SOD, 3/8/19, p. 21.) And the case most like this one -- *Greenfield v. Mandalay Shores Community Assn.* (2018) 21 Cal.App.5th 896 – was not published until March 27, 2018. Thus, although the court has rejected the City's contention that it did not violate the Coastal Act, the court does not find that the City's opposition to the petition has been advanced without a good faith belief in the merits of that opposition.

Even assuming that an intentional and knowing violation of the Act was found to exist at some point along the timeline of events, a persistent issue has been what the City could do, as an appropriate exercise of its police powers, and what it could not do without violating the Coastal Act. This issue was not resolved until the court issued its first statement of decision. (See SOD, 3/8/19, pp. 30-32.)

The court has considered, among other things, the "nature, circumstance, extent, and gravity of the violation" in determining whether to impose a civil penalty here. (See Pub. Resources Code, § 30820, subd, (c).) Kracke has not established that these factors weigh in favor of imposing a civil penalty against the City.

Conclusion

Kracke's claim for the imposition of a civil penalty under subdivision (b) of Public Resources Code section 30820 is denied, and the second cause of action is dismissed with prejudice.

This tentative decision is the proposed statement of decision and shall become the court's final statement of decision unless, within 10 days after announcement or service of the tentative decision (plus five days for service by mail), a party specifies those principal controverted issues as to which the party is requesting a statement of decision or makes proposals not included in the tentative decision. (See Code Civ. Proc. § 632; Cal. Rules of Court, Rule 3.1590, subd. (c).) If no such request/proposal is made within the specified time (see Cal. Rules of Court, Rule 3.1590, subd. (d)), counsel for Kracke is to prepare, serve and submit a proposed judgment and writ within 20 days of the service of this tentative decision.

The clerk is directed to mail to the parties copies of this tentative decision.

Date: May 15, 2019

Mark S. Borrell
Judge of the Superior Court

PROOF OF SERVICE
CCP § 1012, 1013a (1), (3) & (4)

STATE OF CALIFORNIA)
) ss.
COUNTY OF VENTURA)

Case Number: 56-2016-00490376-CU-WM-VTA **Case Title: Theodore P. Kracke v. City of Santa Barbara**

I am ~~employed in the County~~ of Ventura, State of California. I am over the age of 18 years and not a party to the above-entitled action. My business address is 800 S. Victoria Avenue, Ventura, CA 93009. On the **May 16, 2019**, I served the within:

TENTATIVE DECISION RE IMPOSITION OF CIVIL LIABILITY

on the following named party(ies)

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☐ **BY PERSONAL SERVICE**: I caused a copy of said document(s) to be hand delivered to the interested party at the address set forth above on _____at _____ a.m./p.m.

☒ **BY MAIL**: I caused such envelope to be deposited in the mail at Ventura, California. I am readily familiar with the court's practice for collection and processing of mail. It is deposited with the U.S. Postal Service on the dated listed below.

☐ **BY FACSIMILE**: I caused said documents to be sent via facsimile to the interested party at the facsimile number set forth above at _____ a.m,/p.m. from telephone number **(805) 477-5893**

I declare under penalty of perjury that the foregoing is true and correct and that this document is executed on **May 16, 2019,** at Ventura, California.

MICHAEL D. PLANET, Superior Court,
Executive Officer and Clerk

By: _____
Denise Arreola, Judicial Secretary