As to application only

IN THE CALIFORNIA COURT OF APPEAL

THIRD APPELLATE DISTRICT

SOUTH LAKE TAHOE PROPERTY OWNERS GROUP, Appellant, v. THE CITY OF SOUTH LAKE TAHOE, Respondent.	Court of Appeal Case No. C093603 Trial Court Case No. SC20180243

On Appeal From El Dorado County
Superior Court – Cameron Park Division

Honorable Dylan Sullivan, Dept. 9

AMICUS BRIEF OF LEAGUE OF CALIFORNIA CITIES

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

This is the initial certificate of interested entities or persons submitted on behalf of Amicus Curiae League of California Cities in the case number listed above.

The undersigned certifies that there are no interested entities or persons that must be listed in this Certificate under California Rules of Court, rule 8.208.

Dated: March 10, 2022

By: _____

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APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF

TO THE HONORABLE PRESIDING JUSTICE:

Pursuant to California Rules of Court, Rule 8.200, subdivision (c), the League of California Cities ("Cal Cities") respectfully applies to this Court for permission to file the amicus curiae brief accompanying this application in support of Respondent City of South Lake Tahoe.

This brief will assist the Court by providing perspective and analysis on two important issues: the nature of vested property rights subject to due process protections and the independent ability of cities within the jurisdiction of the Tahoe Regional Planning Agency ("TRPA") to make adjustments to local zoning regulations without prior approval by TRPA.

Appellant argues for the creation of a new vested property right allowing for the continued use of their properties for short-term vacation home rental ("VHR") purposes. Creating such a right would cripple local governments' ability to regulate land use and zoning and preserve the character and aesthetic of cities—fundamental interests that are governed by local governments through the police powers granted to them by the California constitution. It would also undermine the voters' ability to exercise initiative rights that are enshrined in the California Constitution.

For the reasons stated in this application and further developed in the proposed amicus brief, the Cal Cities

respectfully requests leave to file the amicus brief with this application.

The application and amicus curiae brief were authored by Emily S. Chaidez and Trevor L. Rusin. No person or entity made a monetary contribution to its preparation and submission.

Dated:March 10, 2022

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INTEREST OF THE AMICUS CURIAE

Cal Cities is an association of 479 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life, for all Californians. Cal Cities is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance because a finding that a time-limited, short-term vacation rental permit creates a vested interest subject to due process protections would have a wide, sweeping effect on cities throughout the state. Similarly, a finding that the Tahoe Regional Planning Agency's regulations bar the voters from enacting initiative measures in their own city such as the initiative at issue would fundamentally misconstrue their purpose and effect and disrupt the democratic initiative process.

Dated: March 10, 2022

By: _____

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BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENT

INTRODUCTION AND SUMMARY OF ARGUMENT

As short-term vacation home rentals (VHRs) have exploded in number over the past decade (due in part to the popularity of platforms such as Airbnb that simplify the process and connect travelers to hosts), cities have wrestled with the best way to regulate them and minimize the negative and nuisance impacts often associated with such use in residential zones.

Similar to other cities, this led the City of South Lake Tahoe to repeatedly amend its VHR ordinance, adopted in 2003, in 2008, 2011, 2014, 2015, 2016, 2017 and 2018 to increasingly address the negative impacts it was seeing from the growth of VHRs. These amendments culminated in Measure T, an initiative measure passed by the voters in 2018 that allowed VHRs to continue in the tourist core of the City but phased out VHRs in residentially zoned areas over a three year period that was to terminate at the end of 2021. It also included an exception that allowed owners to rent out their primary residence for up to 30 days, even if it is located in a residentially zoned area.

Prior to Measure T, the City required owners to obtain a VHR permit to rent a property out for period of less than 30 days, and limited these permits to a one year duration. These permits could be renewed annually, but such renewal was not automatic and it was never granted for a period over one year. More specifically, the ordinance provided the VHR permits "shall not be construed as providing property rights or vested interests and

entitlements in continued operation of a [VHR]. [VHR] permits are revocable permits which expire annually…[and] shall not run with the land." (South Lake Tahoe City Code, § 3.50.460.)

Despite the explicit one-year limitation, Appellant claims that holders of VHR permits acquired a vested right to continue operating as a VHR. (OB at 22.) The claim is based on the cost of the permit and improvements alleged to have been made by VHR permit holders. (OB at 31-33.)

What Appellant ignores is that any investment that was based on an assumption of a VHR permit lasting more than one year was unreasonable given the explicit language of the City's ordinance, and the increased regulation of VHRs imposed by repeated amendments to the ordinance. Cases such as *E&B Natural Resources Management Corp. v. County of Alameda* (N.D. Cal., June 8, 2020) No. 18-cv-05857-YGR, 2020 WL 3050736, *5 bear out the unreasonableness of such action and the fact that a right of endless renewals of a permit cannot be assumed.

Unlike the situation in most of the cases cited by Appellant, which involve conditional use or building permits related to physical construction, Appellant's members only received temporary one-year licenses that did not include site-specific conditions commonly seen on conditional use permits to ensure compatibility with surrounding uses and limit site-specific negative impacts of a use. The VHR permits also did not authorize construction, only the allowance of an additional use (VHR use) for a period of one year.

In addition, Appellant concedes in both its opening and reply briefs that any harm to owners who held VHRs in 2018 is purely economic. Such pure economic harm cannot support a vested rights claim. (*SP Star Enterprises, Inc. v. City of Los Angeles* (2009) 173 Cal.App.4th 459, 470.) A property owner is not entitled to the highest and most profitable use of a property; just because renting a property on a short-term basis can be more profitable does not mean one is entitled to do so.

In further contrast to the cases cited by Appellant, property owners may still (1) rent their property out on a long-term basis, (2) rent their property out on a short term basis for up to 30 days[1] if the property is the primary residence of the owner, or (3) sell the property—all without requiring any changes to the property itself. This is not a case where a permit to drill oil has been revoked and the infrastructure on the site is now worthless.

Given the stay on the implementation of Measure T, and the three-year amortization period called for by the measure, owners have also had up to three years to continue renting their properties as VHRs and amortize any improvements made primarily for VHR purposes.

Municipalities are given significant authority to manage local regulations, particularly as they relate to land use. This is particularly true when the regulation is the result of an initiative measure. Despite this fact, Appellant requests a judicially-created vested property right—a right to renewal of a time-

[1] As the days do not have to be consecutive, this could cover up to 15 weekends).

limited VHR permit that was limited as to its term the moment it was granted.

Not only would creation of this new property interest run afoul of longstanding precedent, it would also completely disrupt cities' ability to regulate land use in response to changing conditions and circumstances. It would also needlessly complicate an already delicately balanced regulatory framework that varies from city to city and result in a *further* multiplicity of lawsuits regarding VHRs as courts would be required to make ad hoc determinations as to which permits create vested rights that extend beyond an expiration date and which ones do not; stripping local governments of their local authority and supplanting it with unnecessary judicial intervention.

Cities must be able to exercise the police power granted to them under the California Constitution to regulate how property is used, in particular to mitigate negative impacts caused by such use. VHRs can negatively impact cities through noise, trash, crime, traffic, carbon footprint, loss of parking, loss of neighborhood character, loss of permanent residents (and resulting negative impacts on school enrollment/funding and employee base), and increase in the cost of housing.

Allowing time-limited uses in a city, such as the VHR permits in this case, is a valuable tool cities use to efficiently allow a use, but still guard against unforeseen consequences or negative impacts. It also allows regulations to evolve to meet the times. As a use such as VHRs grows exponentially, the impacts of such a use also grow exponentially.

Taking the unprecedented step to create a vested right in a time-limited permit, such as the annual VHR permits at issue in this case, would have far reaching impacts. It will also lead to cities being more conservative in how many permits are issued and may lead to cities choosing not to allow many activities for fear of unforeseen impacts and an inability to control or restrict use in the future.

Appellant also argues, without authority, that the ordinance is invalid because it required prior approval by the Tahoe Regional Planning Agency ("TRPA"), a bi-state agency created by federal legislative act. Created in 1969 by interstate compact with Nevada, its purpose is to set minimum standards to govern the environment of the Lake Tahoe Region. It specifically preserves a city's ability to regulate zoning and allows cities to implement zoning regulations that impose an "equal or higher" standard than what is required by TRPA. TRPA does not replace a City's power to enact zoning regulations.

Confusingly, Appellant cites *Kracke v. City of Santa Barbara* (2021) 63 Cal.App.5th 1089, for the proposition that TRPA approval was required, but *Kracke* addressed the application of the California Coastal Act, not TRPA. The Coastal Act is primarily a permitting scheme which requires a coastal development permit to be obtained before development can occur in the Coastal Zone. There is no overlap between the provisions of TRPA and the Coastal Act, nor are they similar schemes as the Coastal Act is created by California State law while TRPA was created by federal action to coordinate interstate issues between

California and Nevada.

In light of the above, as further described below, Cal Cities respectfully requests the Court affirm the trial court's decision, uphold judgment in favor of the City, and deny Appellant's appeal in its entirety.

ARGUMENT

I. CITIES MAY DECLINE TO RENEW TIME-LIMITED PERMITS WITHOUT VIOLATING DUE PROCESS

To implicate due process, there must be a government deprivation of a protected property or liberty interest. (*Las Lomas Land Co., LLC v. City of Los Angeles* (2009) 177 Cal.App.4th 837, 852 (*Las Lomas*).) "The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property…the range of interests protected by procedural due process is not infinite." (*Board of Regents of State Colleges v. Roth* (1972) 408 U.S. 564, 569-70 (*Roth*).) For California procedural due process claims, the protection is narrower; "identification of a statutory benefit subject to deprivation is a prerequisite." (*Las Lomas, supra*, 177 Cal.App.4th at p. 855 [citations omitted].) In other words, not all conceivable property interests are protected by the California due process clause; only those interests or benefits conferred by statute. (*Ibid*.)

Substantive due process protects against arbitrary government action, requiring more than ordinary government error, and is subject to a heightened arbitrary and capricious

standard. (*Id*. at pp. 855-56 [citations omitted].

For time-limited VHR permits, particularly ones with an explicit one-year expiration, no protected property or liberty interest is at issue, and no vested right can exist in such a permit past its expiration date.

A. Only Certain Interests Are Subject to Due Process Protections

"A person seeking a benefit provided by the government has a property interest in the benefit for purposes of procedural due process only if the person has 'a legitimate claim of entitlement to it.'" (*Las Lomas, supra*, 177 Cal.App.4th at p. 853, citing *Roth, supra*, 408 U.S. at p. 577.) If the decision maker has discretion to grant or deny the benefit, it is not a protected interest. (*Id*. at p. 853, citing *Castle Rock v. Gonzales* (2005) 545 U.S. 748, 756.) Whether such discretion exists is determined by state and local law. (*Id*. at p. 853 [citations omitted].)

Specific to development and land use matters, a land use application "invokes procedural due process only if the owner has a legitimate claim of entitlement to the approval" (*id.* at p. 856) and "[t]ypical land use disputes involving alleged procedural irregularities, violations of state law, and unfairness ordinarily do not implicate substantive due process." (*Id*. at p. 856, citing *Stubblefield Construction Co. v. City of San Bernardino* (1952) 32 Cal.App.4th 687, 709-10 & fn. 15 (*Stubblefield*).)

In construing the phrase 'entitlement to the approval,' the California Court of Appeal in *Las Lomas* held that a developer's reliance on city policies, practices, and representations regarding an environmental report was akin to a 'mere subjective

expectancy' as described by the United States Supreme Court in *Roth* and another case decided the same day. (*Las Lomas*, *supra*, 177 Cal.App.4th at p. 853 & fn.10 ["We regard the purported reliance interest as a mere expectancy rather than a legitimate claim of entitlement"].)

Substantive due process "prevents 'governmental power from being used for purposes of oppression,' or 'abuse of governmental power that shocks the conscience,' or 'action that is legally irrational in that it is not sufficiently keyed to any legitimate state interests.'" (*Stubblefield*, *supra*, 32 Cal.App.4th at pp. 709-10 [citations omitted].)

Moreover, a zoning ordinance is considered unconstitutional only where its provisions are "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." (*Village of Euclid v. Ambler Realty Co.* (1926) 272 U.S. 365, 395.) Similarly, a citizens' initiative "must be upheld unless its unconstitutionality clearly, positively, and unmistakably appears." (*Citizens for Planning Responsibly v. County of San Luis Obispo* (2009) 176 Cal.App.4th 357, 366.) The state constitutional right of initiative is "one of the most precious rights of our democratic process. These powers are reserved to the people, not granted to them," and it is the courts' "duty to jealously guard these powers and construe the relevant constitutional provisions liberally in favor of the people's right to exercise the powers of initiative and referendum." (*Citizens for Planning Responsibly v. County of San Luis Obispo* (2009) 126 Cal.App.4th 357, 366.)

Appellant argues the vested rights doctrine prohibits the City from declining to renew its members VHR permits 3 years after Measure T passed, but misconstrues the California authority it cites and, inexplicably, relies on case law from Texas and New York that is inapplicable in California.

To wit, the court in *Avco Community Developers, Inc. v. South Coast Regional Commission* (1976) 17 Cal.3d 785 ("*Avco*") stated that "[i]t has long been the rule" in California and elsewhere "that if a property owner has performed substantial work and incurred substantial liabilities in good faith reliance upon a permit issued by the government, he acquires a vested right to complete construction in accordance with the terms of the permit." (*Id*. at p. 791, citing *Dobbins v. City of Los Angeles* (1904) 195 U.S. 223; *Trans-Oceanic Oil Corp. v. City of Santa Barbara* (1948) 85 Cal.App.2d 776, 784 [emphasis added].) However, the court proceeded to hold that the plaintiff in *Avco* had neither a common law vested right nor a vested right under the Coastal Zone Conservation Act of 1972 to construct its buildings notwithstanding the rule and other construction cases cited. No construction is at issue in this case.

Moreover, in the other cases relied on by Appellant, the challenged ordinances immediately prohibited a previously allowed use of the property rendering the projects at issue essentially worthless, and did not include an amortization period such as Measure T's three-year amortization period. (*See*, e.g., *Stewart Enterprises, Inc. v. City of Oakland* (2016) 248 Cal.App.4th 410, 419-20 [holding urgency ordinance requiring

conditional use permit for crematorium could not be applied to an applicant who already had a vested right to build a crematorium]; *Igna v. City of Baldwin Park* (1970) 9 Cal.App.3d 909, 913-14 [recognizing an ordinance "may operate retroactively to require a denial of the application, or the nullification of a permit already issued, provided that the applicant has not already engaged in substantial building or incurred expenses in connection therewith" [emphasis added]]; *Jones v. City of Los Angeles* (1930) 211 Cal. 304, 306, 321 [holding ordinance prohibiting asylums made applicable to existing asylums immediately upon effective date of ordinance was unjustifiable retroactive ordinance]; *Anderson v. City Council of the City of Pleasant Hill* (1964) 229 Cal.App.2d 79, 88-89 ["it is the rule that '[t]he activity of the owner in the use of his property at the time it becomes subject to a zoning ordinance and not his plans regarding the future use of that property determines the scope of the nonconforming use excepted from the restrictions imposed by the ordinance'…[t]he property owner acquires a vested right to continue a use 'actually instituted,' not to capitalize upon anticipated profit" [emphasis added]]; *Malibu Mountains Recreation, Inc. v. County of Los Angeles* (1998) 67 Cal.App.4th 359, 372 [holding it was not error for the trial court to conclude that revocation of a conditional use permit for a tennis ranch was not a violation of due process despite finding vested rights in operation of tennis ranch by previous owner]; *County of San Diego v. McClurken* (1951) 37 Cal.2d 683, 686-87 [recognizing "a growing tendency to guard against the indefinite continuance of nonconforming uses by

providing for their liquidation within a prescribed period…[g]iven the objective of zoning to eliminate nonconforming uses, courts throughout the country generally follow a strict policy against their extension or enlargement" [citations omitted]].)

Appellant has not demonstrated that its members possess a protected property interest they are entitled to keep years after the passage of Measure T and the expiration of their VHR permits. Moreover, unlike the owners in the cases cited by Appellant, owners of VHR properties have had over three years to amortize any VHR-specific investment in a property and can continue to rent their property on a month-to-month or longer basis, rent the property short-term up to 30 days (if they declare the property their primary residence), or sell to another who can immediately rent or live at the property.

B. Time-Limited VHR Permits Do Not Create Vested Rights

1. There Is No Vested "Right to Renewal" of a Time-Limited Permit

"In deciding whether a right is 'fundamental' and 'vested,' the issue in each case is whether the 'affected right is deemed to be of sufficient significance to preclude its extinction or abridgment by a body lacking judicial power.'" (*Metropolitan Outdoor Advertising Corp. v. City of Santa Ana* (1994) 23 Cal.App.4th 1401, 1404 (*Metropolitan*), citing *Goat Hill Tavern v. City of Costa Mesa* (1992) 6 Cal.App.4th 1519, 1526 (*Goat Hill*); *301 Ocean Ave. Corp. v. Santa Monica Rent Control Bd.* (1991) 228 Cal.App.3d 1548, 1556 (*301 Ocean Ave*).) In *Metropolitan*, the court of appeal held that a company's conditional use permit

to erect and maintain a billboard for a specified period of time did not create a vested right because "[t]here was no implicit understanding the permit would be renewed." (*Id*. at p. 1404.)

Unlike the situation in *Goat Hill*, where the "right to continue operating an established business" was considered a vested right when a conditional use permit allowed expansion of the business in part because there was an "implicit understanding the permit would be renewable" (*ibid*.), here the City Code states that the VHR permits "shall not be construed as providing property rights or vested interests and entitlements in continued operations of a vacation home rental….are revocable permits which expire annually…[and] shall not run with the land." (City's RJN Ex. 1 at 13 [South Lake Tahoe City Code, § 3.50.460].) Appellant's claim that the City's regulations are "akin to Goat Hill" (*see* Reply at 11) thus mischaracterizes the case and the unique situation it represents.

Moreover, as found by the trial court, when a VHR permit was granted by the City, each permit holder agreed to be bound by the permit's provisions—including the one-year expiration date. There was never a guarantee a VHR permit would be renewed.

Further, as VHR regulations had been repeatedly debated and changed, as reflected in the City's 2003 VHR ordinance being amended in 2008, 2011, 2014, 2015, 2016, 2017 and 2018, to add more restrictions and increase penalties to address nuisance issues, assuming a VHR permit that explicitly says it expires in one year will be renewed indefinitely into the future is

unreasonable. (2 AA 450-51 ¶¶ 21-22; 3 AA 631-41, 663-703; 4 AA 706-882.)

A recent case from the Northern District of California is instructive as to whether time-limited permits can create vested rights notwithstanding their expiration. (*E&B*, *supra*, 2020 WL 3050736.) There, plaintiff challenged the decision by the County of Alameda and Alameda County Board of Supervisors not to renew two conditional use permits required for plaintiff's continued operation of an oil extraction and production facility on two parcels of land in Livermore, California. (*Id*. at *1.) Recognizing that "courts are less sensitive to the preservation of purely economic interests" (*id*. at *3, citing *301 Ocean Ave., supra*, 228 Cal.App.3d at p. 1556), the court noted that a conditional use permit "does not bestow on the permit holder a fundamental vested right, but rather, the burden is on plaintiffs to establish such a right based on specific facts." (*Id*. at *5.) Finding there to be no vested right, the court explained, "[p]laintiffs cannot now claim to be surprised that these permits, which were, by definition, limited in term, have now expired." (*Ibid*.)

The court in *E&B* explicitly distinguished *Goat Hill*, noting *Goat Hill* "was decided based on the unique facts it presented" (*id*. at *4 [citation omitted]), that the permit there was for expansion of a legal nonconforming use in existence for over 35 years, that the city there had a practice of doing nothing about expired permits, and that a portion of the over $1m investment made by the owner was made "at the city's behest." (*Ibid*.) The

court in *E&B* also considered *Metropolitan* in its analysis, citing the reasoning that the owner of the billboard there "must have balanced the costs of erecting, maintaining and removing the billboard against the economic benefits derived from the sign over the life of the conditional use permit." (*E&B*, *supra*, 2020 WL 3050376, at *4, citing *Metropolitan, supra*, 23 Cal.App.4th at 1404, n.1.; *see also Am. Tower Corp. v. City of San Diego* (9th Cir. 2014) 763 F.3d 1035, 1057-58 [plaintiff did not have a fundamental vested right to continued use of three cell tower facilities where permit required all activities to cease ten years after the permit was issued if new applications were not timely submitted and ultimately approved.].)

Appellant cites *Anza Parking Corp. v. City of Burlingame* (1987) 195 Cal.App.3d 855, stating the case holds a city may not simply declare that use permits do not run with the land. The principal issue on appeal in *Anza* was whether a municipal zoning authority had the power to condition a conditional use permit upon its non-transferability, and stated that "it is widely held that a conditional use permit creates a right which runs with the land; it does not attach to the permittee." (*Id.* at p. 858.) However, the one-year VHR permit at issue here is not a conditional use permit, and Appellant has challenged the expiration of the permit—not whether the permit can be transferred. Appellant simply overstates the ruling in *Anza* in both its opening and reply briefs.

Similarly, Appellant's reliance on *Davidson v. County of San Diego* (1996) 49 Cal.App.4th 639, 648 to argue Measure T

cannot declare VHR permits do not confer vested rights is also misplaced—the court there explicitly stated they "are not concerned with whether Davidson had a vested right under the judicial doctrine, which he did not, but with whether section 1019(a) conferred a vesting earlier than available under the *Avco* doctrine."

Appellant's argument that VHR permits are "automatically renewable" and may not be denied is not supported factually or legally. Past permit renewals are not equivalent to a guaranty that permits would be renewed in perpetuity. (*E&B*, *supra*, 2020 WL 3050376, at *5.) Conditional use permits, like the VHR permits at issue on this appeal, are, "by definition, discretionary." (*Smith v. Cty. of Los Angeles* (1989) 211 Cal.App.3d 188, 197.) Recognizing the permits "implicate sensitive and evolving issues related to the environment, public welfare, and public need," the court was "especially reluctant to tie the hands of the municipal government by finding that plaintiffs possess a fundamental vested right based on past acts and conditions." (*Ibid.*)

To the extent Appellant is arguing its members have an implied VHR permit on the basis of past renewals, it is undermined by the fact that the City Code expressly required members to obtain an annual VHR permit from the City. (City's RJN Exh. 1 at 9 [South Lake Tahoe City Code §3.50.400(A)]; 2 AA 447 ¶6, 469-472; 4 AA 863.) Appellant can only assert the City provided its members with an implied VHR permit if the code gives City staff the power to do so. (*G.L. Mezzetta, Inc. v. City of American Canyon* (2000) 78 Cal.App.4th 1087, 1093–94

[could not enter into oral contract when neither statute nor the municipal code gave the city the power to do so]; *Merco Const. Engineers, Inc. v. Los Angeles Unified Sch. Dist. of Los Angeles Cty.* (1969) 274 Cal.App.2d 154, 160.) Here, the code expressly required that a property owner obtain a VHR permit prior to operating, and renew the permit annually. Nothing in the code would allow staff to issue an "implied" VHR permit that would last longer than one year.

The trial court found that the VHR permits are revocable permits rather than conditional use permits, and given Appellant's members' conduct in accepting the benefits of the VHR permits by operating them as short-term rentals they must also accept the limitations of that permit—which state the permits expire annually, and shall not be construed as providing property rights or vested interests and entitlements in continued operation of a short-term rental. The trial court also noted that even where members expended funds to meet the requirements of obtaining a one-year VHR permit, such expenditures could not form the basis to claim a vested interest to indefinite continuation of the short-term rental operation on the property, particularly in light of the one-year duration of the permit and three-year amortization period.

In sum, and as described above, VHR permit holders do not have a vested right either to rent their properties for short-term vacation purposes or to renewal of their prior VHR permits in light of the fact that the City's municipal code explicitly states that VHR permits are "revocable permits which expire annually."

(City's RJN at 13 [South Lake Tahoe City Code § 3.50.460].) They also cannot claim to have detrimentally relied on the continued renewal of those permits when they were expressly told that there was no guarantee of renewal—such reliance is inherently unreasonable, particularly in consideration of the growing concern in the community with regard to VHR permits and the deleterious effect of short-term vacation rental operations on the neighborhood. As described above, longstanding California authority holds that prior renewals do not create a vested right in a time-limited permit, and VHR permit holders should never have expected such renewal to occur as a matter of right.

2. There Is No Vested Right In Purely Economic Interests

Property owners have no constitutional right to develop property for maximum economic profit or to receive compensation when land use regulations restrict their ability to do so. (*Terminals Equipment Co., Inc. v. City and County of San Francisco* (1990) 221 Cal.App.3d 234, 244.)

Here, the trial court properly held that the economic interest in continuing to operate a VHR business is not a fundamental right requiring the application of strict scrutiny, citing *SP Star Enterprises, Inc. v. City of Los Angeles* (2009) 173 Cal.App.4th 459, 470:

> "[A]s a general rule, when a case involves or affects purely economic interests, courts are far less likely to find a right to be of the fundamental vested character. [Citations.]" (*JKH Enterprises, Inc. v. Department of Industrial Relations, supra*, 142 Cal.App.4th at p. 1060, 48 Cal.Rptr.3d 563.) Thus, " '[a]dministrative decisions which result in restricting

> a property owner's return on his property, increasing the cost of doing business, or reducing profits are considered impacts on economic interests, rather than on fundamental vested rights.' (*E.W.A.P., Inc. v. City of Los Angeles* (1997) 56 Cal.App.4th 310, 325, 326–327, 65 Cal.Rptr.2d 325....)." [Citation].

There cannot be a fundamental vested right in the use of a purely economic asset, as is the case with a VHR permit. For example, in a recent federal case from the Northern District of California, the court concluded non-renewal of the permit at issue would result in a "purely economic loss" without any evidence it would destroy or even significantly impact overall business, and that plaintiffs "failed in their burden to show harm to their economic interests sufficient to confer a fundamental vested right." (*E&B Natural Resources Management Corp. v. County of Alameda* (N.D. Cal., June 8, 2020) No. 18-cv-05857-YGR, 2020 WL 3050736, *5 (*E&B*); see also *Hardesty v. Sacramento Metro. Air Quality Mgmt. Dist.* (2011) 202 Cal.App.4th 404, 416 [requiring a permit for mining operations within a designated area did not implicate a fundamental vested right because there was nothing to indicate the plaintiff would be "driven out of business" by the requirement]; *Standard Oil Co. v. Feldstein* (1980) 105 Cal.App.3d 590, 604 [requiring an oil company to shut down certain refinery units did not affect a fundamental vested right because there was no contention the company would "be driven to financial ruin" or that the particular facility would "be forced to operate at a loss and close"]; *Mobil Oil Corp. v. Superior Court* (1976) 59 Cal.App.3d 293, 305 [requiring two oil companies to install vapor recovery systems at gas stations did not affect a

fundamental vested right where the court was not presented with "the enforcement of a rule which effectively drives the Oil Companies out of business"].)

Determining whether a right is fundamental is made on a case-by-case basis, and thus is not a proper basis for a facial challenge to a zoning ordinance. (*Bixby v. Pierno* (1951) 4 Cal.3d 130, 144.) The authority cited in Appellant's briefs does not support its position that the investments made by Appellant's members in complying with the VHR permit process and preparing and optimizing the properties for short-term rentals established a vested property right.

In *Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Cal.4th 310, the Supreme Court found that ConocoPhillip's vested rights to continue to operate boilers and pollute at their current level did not excuse it from CEQA analysis. (*Id.* at 325.) The holding has no applicability to this case. The case also generally described the "doctrine of vested rights as developed in land use law" and explained it "states that a property owner who, in good faith reliance on a government permit, has performed substantial work and incurred substantial liabilities has a vested right to complete construction under the permit and to use the premises as the permit allows." (*Id.* at p. 323 [citation omitted].) As described above, there has been no showing of good faith reliance by VHR permit holders in this case that their permits would continue indefinitely, let alone substantial work or liabilities incurred.

In *Kissinger v. City of Los Angeles* (1958) 161 Cal.App.2d

454, the court found, based on the evidence before it, that a spot zoning ordinance was invalid as arbitrary, discriminatory, denying due process, and a taking of the property without just compensation. In dicta, the court noted that the investment of $2,300 (over 60 years ago) on some of the lots in reliance on permits issued for construction established a vested right also giving rise to grounds for invalidity of the ordinance. (*Id*. at p. 463.) In *Highland Development Co. v. City of Los Angeles* (1985) 170 Cal.App.3d 169, overruled on other grounds by *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, the court held that a city council lacked jurisdiction to overrule the board of public works' driveway permit decision and could not therefore revoke the permit. Again in dicta, the court noted that $1,000 spent on construction, a small percentage of the total expenditures claimed, was "extremely substantial in relation to the scope of construction contemplated and authorized by the permit in question" and thus could constitute substantial reliance sufficient to create a vested right in the driveway permit. (*Id*. at p. 187.) However, the VHR permits at issue did not authorize any construction—and any construction undertaken by VHR permit holders constituted either required health and safety work or work that would improve the value of the property whether rented for short or long-term rental or used as a residence.

Finally, *Hock Investment Co. v. City & County of San Francisco* (1989) 215 Cal.App.3d 438 is an estoppel case, and no estoppel claims have been brought here.

Any harm to VHR permit holders is thus solely economic in

nature, and does not constitute a fundamental right or liberty interest. Such individuals are not entitled to generate the greatest profit possible from their property, particularly in light of the negative impacts of VHRs. These property owners still have comparable options to use or generate income from their property, and any investment that assumed they would hold their VHR permit for 3 years beyond the expiration date of the permit is unreasonable and cannot create a vested right.

C. Cities Must Be Allowed To Exercise Their Police Power To Regulate VHRs To Address Local Impacts; And Even Greater Deference To This Power Is Due When Exercised Through An Initiative Of The People

The constitutional power of cities to zone land in response to local conditions is fundamental. (Cal. Const., art. XI, § 7; *City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc.* (2013) 56 Cal.4th 729, 737-38 ["[t]his inherent local police power includes broad authority to determine, for purposes of the public health, safety, and welfare, the appropriate uses of land within a local jurisdiction's borders, and preemption by state law is not lightly presumed"]; *Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1151 ["Land use regulation in California historically has been a function of local government under the grant of police power contained in article XI, section 7 of the California Constitution"]; *DeVita v. County of Napa* (1995) 9 Cal.4th 763, 782 ["We have recognized that a city's or county's power to control its own land use decisions derives from this inherent police power, not from the delegation of authority by the state" and the Legislature, when enacting said zoning laws,

declared its "intention to provide only a minimum of limitation in order that counties and cities may exercise the maximum degree of control over local zoning matters"].)

While cities must exercise this power judiciously, in the absence of a protected right, decisions that affect the ability of a property owner to use their land in a particular way do not run afoul of due process considerations. (*See Rosenblatt v. City of Santa Monica* (9th Cir. 2019) 940 F.3d 439, 446-47 (*Rosenblatt*), cert. denied sub nom. *Rosenblatt v. City of Santa Monica, California* (2020) 140 S.Ct. 2762.) Cities have broad authority pursuant to the police power found in the California constitution to regulate land use, and that power "varies with circumstances and conditions." (*Ewing v. City of Carmel-By-The-Sea* (1991) 234 Cal.App.3d 1579, 1586-87 (*Ewing*) [citations omitted]; see also *Rosenblatt, supra* 940 F.3d 439 [upholding an ordinance prohibiting short-term rentals of residences].)

Thus, "while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation." (*Ibid.*) Relying on United States Supreme Court precedent dating from the 1920s, the court in *Ewing* noted that "businesses of every sort, including hotels and apartment houses, are excluded" from residential districts, and "non-residential uses may have an increasingly deleterious impact on a residential district 'until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly

destroyed.'" (*Id*. at p. 1587, citing *Euclid v. Ambler Co.* (1926) 272 U.S. 365, 394.)

Appellant is incorrect in arguing that the court in *Ewing* "did not address vested rights in any manner." (Reply, p. 20.) To the contrary, though the phrase "vested rights" is not used in the opinion, the court in *Ewing* held that a zoning ordinance that restricted the operation of short-term vacation rentals "does not constitute a taking simply because it narrows a property owner's options" with regard to the rights in that property. (*Ewing*, *supra*, 234 Cal.App.3d at p. 1592.)

> In fact, "[m]any zoning ordinances place limits on the property owner's right to make profitable use of some segments of his property." (*Keystone Bituminous Coal Assn. v. DeBenedictis* (1987) 480 U.S. 470, 498 [94 L. Ed. 2d 472, 496, 107 S. Ct. 1232]; see, e.g., *Griffin Development Co. v. City of Oxnard* (1985) 39 Cal. 3d 256 [217 Cal. Rptr. 1, 703 P.2d 339] [condominium conversion ordinance]; *Birkenfeld v. City of Berkeley* (1976) 17 Cal. 3d 129 [130 Cal. Rptr. 465, 550 P.2d 1001] [rent control law].) Justice Holmes stated the test in *Penna. Coal Co. v. Mahon* (1922) 260 U.S. 393, 413 [67 L. Ed. 322, 43 S. Ct. 158, 28 A.L.R. 1321]…
>
> [The ordinance at issue] leaves plaintiffs with several economically viable uses of their property. Plaintiffs may live in their homes permanently or occasionally. They may rent their homes for remuneration for at least 30 days. They may allow others to use their homes, without remuneration, for any length of time. They may sell their homes or otherwise encumber them. The only thing they may not do. . .is operate their homes as "bed and breakfast, hostel, hotel, inn, lodging, motel, resort or other transient lodging ...." The intrusion into plaintiffs' bundle of ownership rights-"the extent of

> the diminution," in Justice Holmes's words-is minimal and far outweighed by the public interest in enhancing and maintaining permanent residential areas.

(*Ewing*, *supra*, 234 Cal.App.3d at p. 1592.)

Many permits and licenses are issued on a time-limited basis by cities, and it is a tool often relied upon to allow cities to legislate and allow new uses, while monitoring the impacts of such use. Time-limited permits provide flexibility while also informing the recipients of such permits that their ability to operate is limited in time. It also provides cities with the ability to tailor their laws to changing conditions and circumstances. Determining that a judicially-created vested right to a VHR permit exists in these circumstances would wreak havoc with this important tool, and run contrary to both state and federal decisional authority as described above.

Finding that VHR permit holders have a vested right to have their VHR permits renewed, despite the one-year duration, would also lead to a further increase in litigation throughout the state, not just related to VHRs, but any time-limited license or permit. The immediate effect could be that more homes would be bought up by corporations and others to rent out, since they would be assured of their ability to continue to operate in perpetuity once they obtain a permit.

For these reasons, Cal Cities urges this Court to affirm the decision of the court below finding that no vested right to renewal of time-limited VHR permits exists for purposes of due process considerations.

II. TRPA DOES NOT PREEMPT THE ABILITY OF CITIES TO REGULATE VHRS, BUT RATHER IMPOSES MINIMUM REGULATIONS TO PROTECT THE ENVIRONMENT IN THE LAKE TAHOE AREA

TRPA is a quasi-federal, bi-state agency created by federal compact ratified by the United States Congress pursuant to the United States Constitution. (*City of South Lake Tahoe v. Tahoe Regional Planning Agency* (E.D. Cal. 1987) 664 F. Supp. 1375, 1377.) The TRPA Compact "is a congressional exercise of power under the commerce clause and amounts to federal legislation." (*Ibid*.) Thus, generally, questions concerning the interpretation and application of TRPA regulations present federal questions and are heard in federal court to avoid different interpretations between state courts in California and Nevada. (*California Tahoe Regional Planning Agency v. Jennings* (9th Cir. 1979) 594 F.2d 181, 187.)

The TRPA Compact reserves zoning powers to local jurisdictions such as the City by providing that any political subdivision or public agency "may adopt and enforce an equal or higher requirement applicable to the same subject of regulation in its territory." (7 AA 1515 at Art VI(a).) Thus, just because TRPA *allows* cities to authorize short-term vacation rentals does not mean that it *requires* cities to authorize such rentals. TRPA does not prohibit cities from implementing stricter requirements, or even complete bans, on such rentals, and Appellant has provided no authority to the contrary.

As a result, a zoning ordinance, such as the City's, that in fact allows short term rentals, but requires that they be located

in the tourist core of the City or conducted for no more than 30 days (by a resident), does not run afoul of TRPA. Nothing in TRPA requires a City to allow unlimited rentals in all zones of the City.

Kracke v. City of Santa Barbara (2021) 63 Cal.App.5th 1089, cited by Appellant, is completely inapplicable and provides no authority or interpretation of TRPA. *Kracke* involved interpretation of the applicability of the Coastal Act, a California statute with its own specific provisions—it did not involve a quasi-federal bi-state agency, and did not involve TRPA.

The Coastal Act is essentially a state-created permitting scheme under which development in the coastal zone must be authorized by a coastal development permit unless an exemption applies. (*Burke v. California Coastal Comm'n* (2008) 168 Cal.App.4th 1098, 1107–1108 ["the only authority the Coastal Commission has is over development in the coastal zone. The Coastal Act's 'cardinal requirement' [citation omitted] and its central enforcement mechanism, is the requirement that anyone seeking to undertake a development within the coastal zone must first obtain a coastal development permit."].) TRPA is completely different, and *Kracke's* interpretation of the Coastal Act has no applicability here, or anywhere outside the Coastal Zone.

At no point has TRPA taken the position that the City was obligated to involve TRPA or its Governing Board in the adoption of Measure T. This is consistent with TRPA's role of establishing minimum standards to protect the environment in the region, not controlling all aspects of land use regulation. (*League to Save*

Lake Tahoe v. City of South Lake Tahoe (E.D. Cal., Jan. 19, 2012, No. 2:11-CV-01648-GEB) 2012 WL 170170 at 2* ["Pursuant to the TRP Compact, the TRPA maintains and enforces a regional plan, which plans for land-use, transportation, conservation, recreation, and public services and facilities. TRP Compact Art. V(c), (d). TRPA's regional plan "establish[es] minimum [environmental] standard[s] applicable throughout the region," but "leav[es] to the jurisdiction of the respective States, counties and cities the enactment of specific and local ordinances, and rules, regulations and policies which conform to the regional plan." TRP Compact Art. VI(a).].)

This reflects the importance of local control of zoning ordinances and properly gives deference to the body that is most familiar with local conditions, impacts and development. As described in I(c) above, the constitutional power of cities to zone land in response to local conditions is fundamental, is to be given deference, and should not be constrained outside of specific acts of the State or Federal government. (*See* Cal. Const., art. XI, § 7; *City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc.* (2013) 56 Cal.4th 729, 737-38.) Appellant has made no such showing, as such a showing is not possible and no provision of TRPA's regulations cited by Appellant holds differently.

III. CONCLUSION

For the reasons described above, Cal Cities respectfully requests that the Court affirm the decision of the trial court.

Dated:March 10, 2022

By: 

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CERTIFICATE OF WORD COUNT

The text of this brief consists of 7,068 words according to the word count feature of the computer program used to prepare this brief.

Dated:March 10, 2022

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PROOF OF SERVICE

I, Wendy Hoffman, am a citizen of the United States, employed in the City of Manhattan Beach, Los Angeles County, California. My business address is Best Best & Krieger LLP, 300 S. Grand Avenue, 25th Floor, Los Angeles, California 90071. I am over the age of 18 years and not a party to the above-entitled action. On March 10, 2022, I served the following:

AMICUS BRIEF OF LEAGUE OF CALIFORNIA CITIES

☒ On the parties in this action by causing a true copy thereof to be placed in a sealed envelope with postage thereon fully prepaid in the designated area for outgoing mail addressed as listed below.

☒ I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☒ On the parties in this action by causing a true copy thereof to be electronically delivered via TrueFiling

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I declare under penalty of perjury that the foregoing is true and correct and that this Proof of Service was executed this 10th day of March, 2022, at Los Angeles, California.

/s/ Wendy Hoffman
Wendy Hoffman

SERVICE LIST

Via True Filing

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