

July 2, 2021

The Honorable Tani Cantil-Sakauye
Chief Justice & Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

Re: Kracke v. City of Santa Barbara
Supreme Court Case No. S269277
Second Appellate District, Division Six, Case No. B300528
Letter in Support of Petition for Review by City of Santa Barbara

To the Chief Justice and Associate Justices of the Supreme Court of California:

Pursuant to California Rules of Court, Rule 8.500(g), the League of California Cities (Cal Cities) respectfully submits this letter as amicus curiae in support of the Petition for Review filed by the City of Santa Barbara in this action.

Cal Cities urges this Court to grant the Petition in order to resolve any doubt that except in truly extraordinary circumstances threatening to result in a great injustice, which do not exist here, cities may not be estopped from enforcing their zoning laws. Cal Cities further urges this Court to grant review in order to validate the applicability of the permissive zoning doctrine for all California cities, whether coastal or inland. These are important questions of law with serious practical implications for local governments, who must allocate finite resources to discharge their constitutional power and obligation to promote and protect the public health, safety and general welfare, specifically with regard to the enactment and enforcement of land use regulations.

The League of California Cities' Interest in this Case

The League of California Cities is an association of 476 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 California. 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.

Cal Cities has a substantial interest in the outcome of this case because it raises important questions regarding the ability of all cities to enforce their duly adopted laws. The impediments

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placed by the published opinion of the Court of Appeal, if allowed to stand, will impose broad and far-reaching consequences on all local government entities authorized and committed to enforce their valid laws.

The Court of Appeal's Opinion Improvidently Expands the Application of Estoppel to the Enforcement of Land Use Regulations

It is well settled in California that absent extraordinary circumstances where a manifest and grave injustice will result, a local government cannot be estopped from the enforcement of its land use regulations by reason of the actions, inactions or representations of its officials and employees inconsistent with or contrary to those laws. (E.g., *Schafer v. City of Los Angeles* (2015) 237 Cal.App.4th 1250, 1259; *Golden Gate Water Ski Club v. County of Contra Costa* (2008) 165 Cal.App.4th 249, 262; *Smith v. County of Santa Barbara* (1992) 7 Cal.App.4th 770, 774; *West Washington Properties, LLC v. Dept. of Transportation* (2012) 210 Cal.App.4th 1136, 1145-1149; *Pettit v. City of Fresno* (1973) 34 Cal.App.3d 813, 819-821.) To be sure, this Court has held that a local government “lacks the power to waive or consent to violation of the zoning law.” (*Hansen Brothers Enterprises, Inc. v. Board of Supervisors* (1996) 12 Cal.4th 533, 564.) The public and community interest in the adherence to and enforcement of land use regulations is great and not outweighed by alleged harms to private persons acting contrary to those regulations. (*Toigo v. Town of Ross* (1998) 70 Cal.App.4th 309, 321; *Burchett v. City of Newport Beach* (1995) 33 Cal.App.4th 1472, 1479-1480.)

The end-result of the Court of Appeal's opinion seems to have been swayed by the undisputed fact that at various times, and in furtherance of the prudent allocation of scarce municipal resources, the City declined to undertake enforcement proceedings against unauthorized short-term vacation rentals in the absence of neighborhood complaints. Additionally, in some instances, City personnel issued business licenses to and collected transient occupancy taxes from operators of unlawful short-term lodging units.

In the absence of intentional or purposeful discrimination, which admittedly would implicate equal protection considerations, selective enforcement of local regulations or laxity of enforcement does not rise to the level of an estoppel against the exercise of police powers. (*City of Banning v. Desert Outdoor Advertising* (1962) 209 Cal.App.2d 152, 156-157; see *Murgia v. Municipal Court* (1975) 15 Cal.3d 286, 297.) Here, there was no allegation, much less evidence, that the City had taken into account any invidious criteria in determining whether and how to exercise its code enforcement authority on a case-by-case basis.

Further, the occasional issuance of business licenses and collection of transient occupancy taxes in regard to otherwise unpermitted short-term vacation rentals has no bearing on the validity and enforceability of regulatory matters. Business licenses and tax collection pertain to revenue-raising activities of local governments and do not represent zoning or land use entitlements. (E.g., *Arnke v. City of Berkeley* (1960) 185 Cal.App.2d 842, 846 (revenue-raising and regulation are

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distinct activities); see Santa Barbara Municipal Code, § 5.04.040 [“The ordinance codified in this chapter is enacted solely to raise revenue for municipal purposes, and is not intended for regulation”].) As a matter of public policy, the issuance of a business license for a business that is not permitted under the applicable zoning and/or the collection of fees and taxes for such a business do not support or justify the continuation of a prohibited use simply because the forced cessation of the use would be a hardship to the operator.

Estoppel against a public entity is an extreme remedy. If left undisturbed, the Court of Appeal’s opinion will create unnecessary and unwarranted uncertainty concerning the ability of local governments to enforce valid land use regulations for the protection and benefit of their community as a whole and those residents and owners of property directly impacted by proscribed uses. This outcome is especially unacceptable when the operators of such uses have already reaped the economic reward of their endeavors and thus have not been injured in any real sense.

The Court of Appeal’s Opinion Improperly Eliminates the Permissive Zoning Doctrine

Comprehensive zoning regulations are firmly embedded in the authorized police powers exercised by local governments. (*Village of Euclid v. Ambler Realty Co.* (1926) 272 U.S. 365, 388.) Appropriate local zoning ordinances, like the one established by the City of Santa Barbara, separate the city into districts or zones within which buildings, structures and uses are regulated. (See *O’Loane v. O’Rourke* (1965) 231 Cal.App.2d 774, 780.) When these zoning ordinances list permitted or conditionally permitted uses, and when a particular use is not expressly allowed, these non-listed uses are effectively prohibited by default, which is the concept known and referred to as the permissive zoning doctrine. (*City of Corona v. Naulls* (2008) 166 Cal.App.4th 418, 425, 433; see *Urgent Care Medical Services v. City of Pasadena* (2018) 21 Cal.App.5th 1086, 1095; *The Kind and Compassionate v. City of Long Beach* (2016) 2 Cal.App.5th 116, 128.)

The Santa Barbara zoning ordinance does not enumerate short-term vacation rentals as an expressly permitted use. Nor does the City’s local coastal program, which was certified by the California Coastal Commission. There is no conflict between the two regulatory documents. However, the opinion of the Court of Appeal turns the permissive zoning doctrine on its head by essentially holding that because short-term vacation rentals are not expressly prohibited, such uses somehow must be permitted. In doing so, the Court of Appeal dismissively sweeps away the permissive zoning doctrine with a broad conclusory hand and without any analytical support. (Slip Op. at p. 8.)

With regard to coastal cities and counties, the Court of Appeal’s opinion apparently rests on a notion that the permissive zoning doctrine is not applicable to coastal jurisdictions because local land use regulations are necessarily preempted by the Coastal Act. But such a proposition would be incorrect. As pointed out in the Petition for Review, the Coastal Act does not trump or divest the discretionary power and ability of local governments to promulgate zoning regulations. Although the Coastal Act sets forth a process for the California Coastal Commission’s certification

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of local coastal programs, the Act does not authorize the Coastal Commission to unilaterally establish permitted land uses for a local government. Thus, while the Coastal Commission arguably might consider short-term vacation rentals to be a desirable use within the coastal zone, such a viewpoint does not translate into the ability of the Coastal Commission to compel the City of Santa Barbara or any other coastal city or county to allow the use when the applicable zoning ordinances do not otherwise expressly do so.

And with regard to cities and counties generally – not just coastal jurisdictions – the Court of Appeal’s opinion calls into doubt the validity and enforceability of zoning ordinances that are premised on the permissive zoning doctrine as historically recognized by the courts. Taken to its logical end, the Court of Appeal’s opinion would require every local agency to revisit its land use regulations and in addition to identifying permitted and conditionally permitted uses within its zoning districts, to explicitly and comprehensively specify an exclusive list of uses that are prohibited within those districts. There simply is no legal authority for such a mandate. Nor as a practical or public policy matter would such a requirement be realistic or desirable.

Conclusion

While the specific facts and issues in this case are presented in the context of the Coastal Act, the ramifications of the Court of Appeal’s disposition of the questions raised extend beyond coastal cities and counties. The ability of all California cities and counties to efficiently and effectively enforce their laws and regulations – and not just in the field of land use regulation – is placed into jeopardy by the Court of Appeal’s application of estoppel to less-than-extraordinary circumstances. Similar peril is threatened by the Court of Appeal’s rejection of the permissive zoning doctrine, with the result that local governments would be compelled to allow any land use that is not expressly prohibited by their zoning laws.

For the foregoing reasons as well as those demonstrated in the Petition for Review filed by the City of Santa Barbara, the League of California Cities urges this Honorable Court to grant review in this case.

Respectfully submitted,



Philip D. Kohn
for Amicus Curiae
League of California Cities

Attachment: Proof of Service

| | |
|---|---|
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| SUPREME COURT OF CALIFORNIA 350 McAllister Street San Francisco, CA 94102-4797 | Supreme Court Case No. S269277 |
| PLAINTIFF/PETITIONER: Theodore P. Kracke DEFENDANT/RESPONDENT: City of Santa Barbara | Second Appellate District, Division Six Case No. B300528 |
| PROOF OF SERVICE | |

1. I am at least 18 years old.

a. My residence or business address is (specify):

Mia R. Slobodien
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b. My electronic service address is (specify):

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2. I served the following documents (exact titles):

Letter dated 07/02/2021 in Support of Petition for Review by City of Santa Barbara

The documents served are listed in an attachment. (Form POS-050(D)/EFS-050(D) may be used for this purpose.)

3. I electronically served via **TrueFiling** and by **U.S. First Class Mail** the documents listed in 2 as follows:

a. Name of person served: **See Service List**

On behalf of (name or names of parties represented, if person served is an attorney):

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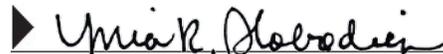
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Date: **July 2, 2021**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Mia R. Slobodien

(TYPE OR PRINT NAME OF DECLARANT)



(SIGNATURE OF DECLARANT)

SERVICE LIST

KRACKE v. CITY OF SANTA BARBARA

CA Supreme Court Case No. S269277

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| Office of the City Attorney | | d1d940ce-2bde-41ed-b011-0518b212a805 | |
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The contents of this proof of service are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury that the foregoing is true and correct.

07-02-2021

Date

/s/Mia Slobodien

Signature

Kohn, Philip (90158)

Last Name, First Name (Attorney Number)

Rutan & Tucker, LLP

Firm Name