Filed 1/17/18 Johnston v. City of Hermosa Beach CA2/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

JANINE JOHNSTON et al., Plaintiffs and Appellants, v. CITY OF HERMOSA BEACH, Defendant and Respondent.	B278424 (Los Angeles County Super. Ct. No. BS163448)

APPEAL from an order of the Superior Court of Los Angeles County, Amy D. Hogue, Judge. Affirmed.

Freilich & Popowitz, Robert H. Freilich and Neil M. Popowitz for Plaintiffs and Appellants.

Jenkins & Hogin, Michael Jenkins, Christi Hogin, and Patrick Donegan for Defendant and Respondent.

The City of Hermosa Beach (the City) enacted an ordinance expressly prohibiting short term vacation rentals (STVR's) in areas zoned for residential housing. Because some residential areas are located in the "coastal zone," plaintiffs contend the California Coastal Act of 1976[1] (Coastal Act) preempts the ordinance. Plaintiffs challenge the trial court's denial of the request for a preliminary injunction. They also argue the trial court's application of the "balance of harm test" failed to recognize plaintiffs' status as private attorneys general representing the state's interest in effectuating the mandates of the Coastal Act. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Internet booking resources have contributed to a proliferation of STVR's in recent years, particularly in areas that traditionally draw vacationers and tourists. In response to this growing trend—as well as an increase in complaints from neighbors—the City enacted Ordinance No. 16-1635 (the Ordinance) on May 24, 2016. The Ordinance provides:

> **Short term rentals prohibited.**
> It shall be unlawful for any person to offer or make available for rent or to rent (by way of a rental agreement, lease, license or any other means, whether oral or written) for compensation or consideration a residential dwelling, a dwelling unit or a room in a dwelling for less than thirty

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[1] Public Resources Code section 30000 et seq. All statutory references are to the Coastal Act contained in the Public Resources Code unless otherwise noted.

> [30] consecutive days. It shall be unlawful for any person to occupy a residential dwelling, a dwelling unit or a room in a dwelling for less than thirty [30] consecutive days pursuant to a rental agreement, lease, license or any other means, whether oral or written, for compensation or consideration."

The Ordinance adds seven different sections to the Hermosa Beach Municipal Code (HBMC), each using the language reproduced above. The STVR prohibition accordingly applies in all residential zones, which include single family, two-family, multiple family, mobilehome and residential/professional dwellings. Additionally, the Ordinance added HBMC section 17.42.180, prohibiting advertising of STVR's.

HBMC section 17.040 provides an alphabetical list of definitions for words and phrases used in the City's ordinances. For context in this appeal, the following definitions are helpful:

1. "'Advertisement' means any printed or lettered announcement, whether in a magazine, newspaper, handbill, notice, display, billboard, poster, email, internet website o application, or any other form."[2]

2. "Dwelling" is defined as "a building or portion of a building designed for residential purposes, including one-family, two-family and multiple dwellings, but shall not include hotels, boarding and lodging houses."

3. "Family" means "two or more persons living together in a dwelling unit, sharing common cooking facilities, and

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[2] This definition was enacted as part of the challenged Ordinance.

possessing the character of a relatively permanent single bona fide housekeeping unit in a domestic bond of social, economic and psychological commitment to each other, as distinguished from a group occupying a boarding house, club, dormitory, fraternity, hotel, lodging house, motel, rehabilitation center, rest home or sorority."

4. "Transient" is defined as the rental of living space "by reason of concession, permit, right of access, license or other agreement, for a period of thirty (30) consecutive calendar days or less."

The pros and cons of permitting STVR's in residential zones were debated in the City government for a number of years before passage of the Ordinance. Before enactment of the Ordinance, STVR's were not expressly permitted in areas zoned as residential. Residential zoning is the most restrictive, and uses not expressly permitted are prohibited.

Plaintiffs petitioned the superior court to enjoin enforcement of the Ordinance. Plaintiffs' ex parte application for a temporary restraining order was denied. The trial court proceeded with a hearing on plaintiffs' request for a preliminary injunction.

Plaintiffs argued the ordinance was unconstitutional because it (1) violated the Coastal Act; (2) banned commercial speech (i.e., advertising residences for STVR use); and (3) deprived them of a vested right to use their properties for nonconforming commercial purposes in a residential zone and generate income.

The trial court engaged in a two-part analysis and denied the request for a preliminary injunction. It issued an amended written order on October 17, 2016. The trial court first

determined plaintiffs did not establish a probability of prevailing on the merits of any of their theories, specifically finding:

1. The Ordinance does not violate the Coastal Act and does not constitute a "development" as that word is used in the Coastal Act, which would require a coastal development permit (CDP).

2. Plaintiffs' constitutional right to free speech was not implicated because "the First Amendment does not protect commercial speech advertising illegal activity," citing *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York* (1980) 447 U.S. 557, 562-564.)

3. Plaintiffs had no constitutionally protected vested rights because the pre-Ordinance use of their properties as STVR's was not legal or permitted.

The trial court recognized plaintiffs' failure to establish the first prong of the analysis—the likelihood of success on the merits—meant it was not necessary to balance the respective harm to the parties should the preliminary injunction be denied. Nevertheless, the court engaged in that weighing process and determined "the City's interest in regulating STVR's and mitigating these impacts outweighs [plaintiffs'] interest in receiving rental income during the pendency of this lawsuit."

Plaintiffs timely appealed and sought a writ of supersedeas to stay enforcement of the Ordinance pending resolution of this appeal. We denied the request for an immediate stay. Plaintiffs renewed the request, and we again denied it.

REQUESTS FOR JUDICIAL NOTICE

Plaintiffs submitted requests for judicial notice on May 22, 2017, and September 7, 2017. The city opposed both requests,

asserting the documents were not records of official acts and/or not relevant. The requests for judicial notice are denied.

Not one of the documents in these requests was presented to the trial court. Several documents predated the hearing on plaintiffs' request for a preliminary injunction; others came into existence after the trial court denied the request for a preliminary injunction. (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3 ["[r]eviewing courts generally do not take judicial notice of evidence not presented to the trial court"].)

The requests do not include any documents we are statutorily required to judicially notice. (Evid. Code, § 451.) To the extent the requests concern documents that may be judicially noticed, this court declines to exercise its discretion to do so as plaintiffs have not provided the court with sufficient information to determine their relevance. (Evid. Code, §§ 452, 453; *C.R. v. Tenet Healthcare Corp.* (2009) 169 Cal.App.4th 1094, 1103 ["the truth of statements may be accepted when made by a party but not those of third parties or an opponent"]; *Love v. Wolf* (1964) 226 Cal.App.2d 378, 403 ["While courts take judicial notice of public records, we do not take judicial notice of the truth of all matters stated therein. [Citation.] And the official character of a document will not make otherwise inadmissible material therein admissible"].)

DISCUSSION

A. Standard of Review

"[A]s a general matter, the question whether a preliminary injunction should be granted involves two interrelated factors: (1) the likelihood that the plaintiff will prevail on the merits, and

(2) the relative balance of harms that is likely to result from the granting or denial of interim injunctive relief." (*White v. Davis* (2003) 30 Cal.4th 528, 554.) In this case, the first prong—the likelihood plaintiffs will prevail on the merits—depends on legal issues—the interpretation of a municipal ordinance and state statute. Accordingly, our review of that question is de novo. (*People ex rel. Feuer v. Nestdrop, LLC* (2016) 245 Cal.App.4th 664, 672.)

Once the de novo review of the first prong is accomplished, this court turns to the second prong to determine whether the trial court abused its discretion in balancing the harm caused by the denial of interim injunctive relief. (*Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277, 286.)

B. The Coastal Act

As the trial court noted in its ruling, "the Coastal Act . . . is the legislative continuation of the coastal protection efforts commenced when the People passed Proposition 20, the 1972 initiative that created the Coastal Commission. (See *Ibarra v. California Coastal Comm.* (1986) 182 Cal.App.3d 687, 693.) . . . The Supreme Court described the [Coastal] Act as a comprehensive scheme to govern land use planning for the entire coastal zone of California. (*Yost v. Thomas* (1984) 36 Cal.3d 561, 565.) The [Coastal] Act must be liberally construed to accomplish its purposes and objectives. [§ 30009.] [¶] . . . The supremacy of these statewide policies over local, parochial concerns is a primary purpose of the [Costal] Act, and the Coastal Commission is therefore given the ultimate authority under the [Coastal] Act and its interpretation. [Citation]."

Cities along California's coastline are required to prepare an LCP in order to implement our state's coastal policies, as reflected in the Coastal Act.[3] (§ 30500.) Section 30108.6 defines an LCP as "a local government's (a) land use plans, (b) zoning ordinances, (c) zoning district maps, and (d) within sensitive coastal resources areas, other implementing actions, which, when taken together, meet the requirements of, and implement the provisions and policies of, this division at the local level." The phrase "implementing actions" is defined in section 30108.4 as "the ordinances, regulations, or programs which implement either the provisions of the certified [LCP] or the policies of this division and which are submitted pursuant to Section 30502." Section 30502 concerns "designate[d] sensitive coastal resource areas within the coastal zone." The LCP is effective once the Coastal Commission certifies it. (§ 30500 et seq.)

All "development" in the "coastal zone" of a city requires a "coastal development permit." (§ 30600.) Once the Coastal Commission has certified a city's LCP, the city approves CDP applications. (§ 30519, subd. (a).) Until certification of the LCP, a city may adopt procedures and approve CDP applications or the applicant may seek approval from the Coastal Commission. (§ 30600.)

Chapter 3 of the Coastal Act provides, "the policies of this chapter shall constitute the standards by which the adequacy of [LCP's], as provided in Chapter 6 (commencing with Section 30500), and the permissibility of proposed developments subject to the provisions of this division are determined." (§ 30200, subd.

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[3] For reasons not explained in the record, the City did not have a certified LCP at the time of the preliminary injunction hearing.

(a).) Chapter 3 includes section 30213, which provides in part, "Lower cost visitor and recreational facilities shall be protected, encouraged, and, where feasible, provided. Developments providing public recreational opportunities are preferred."[4] It also includes section 30222: "The use of private lands suitable for visitor-serving commercial recreational facilities designed to enhance public opportunities for coastal recreation shall have priority over private residential, general industrial, or general commercial development, but not over agriculture or coastal-dependent industry."

C. Issues on Appeal

In this court, plaintiffs have not pursued the free speech or vested rights claims. (*Ewing v. City of Carmel-By-The-Sea* (1991) 234 Cal.App.3d 1579.) Rather than reprise their trial court argument that the Ordinance violates the Coastal Act, they recast it and assert the Coastal Act preempts the Ordinance. We disagree.

1. The Coastal Act Does Not Preempt the Ordinance

We review the preemption issue de novo. Plaintiffs have the burden to establish the Ordinance is preempted. (*Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1149.) But they have not demonstrated it is likely they will succeed on the merits of the preemption claim.

A city "may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in

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[4] There is no evidence in the record that any of the Hermosa Beach short-term residential accommodations are "lower cost."

conflict with general laws." (Cal. Const., art. XI, § 7.) A city's power to enact zoning ordinances "in accordance with local conditions is well entrenched." (*IT Corp. v. Solano County Bd. of Supervisors* (1991) 1 Cal.4th 81, 89.)

The Coastal Commission's "primary duties under the [C]oastal [A]ct are to grant or deny permits for coastal development . . . and approve or disapprove [LCP's]." (*Ibarra v. California Coastal Comm.* (1986) 182 Cal.App.3d 687, 696.) The Ordinance at issue here was not passed in conjunction with an LCP. In any event, there is no suggestion that Hermosa Beach's coastal zone has been designated as a sensitive coastal resource area. (§ 30502.)

Plaintiffs conceded in the trial court—and make no contrary argument here—that the Ordinance does not constitute a CDP. The Ordinance was enacted pursuant to the City's police power and did not fall under the auspices of the Coastal Commission. The absence of a certified LCP did not eliminate the City's ability to enact and amend zoning ordinances.

Plaintiffs' reliance on sections 30213 ("lower cost visitor and recreational facilities") and 30222 ("use of private lands suitable for visitor-serving commercial recreational facilities designed to enhance public opportunities for coastal recreation") is unavailing. Those provisions set forth standards by which the adequacy of an LCP is determined. As noted, by the time of the hearing on the request for a preliminary injunction, the City had not prepared a proposed LCP. There is no authority applying these provisions to zoning ordinances enacted pursuant to a city's police powers.

As discussed earlier in this opinion, plaintiffs also argue various "actions of the Coastal Commission make clear that the

ban on STVR's within the Coastal Zone is an unconstitutional violation of the Coastal Act." They rely primarily on documents—a number of which were Coastal Commission staff reports—this court has declined to judicially notice. Moreover, the Coastal Commission did not seek leave to intervene in the trial court, nor did it seek to submit an amicus brief in this court.

2. Balancing of Harm

Plaintiffs also fault the trial court for failing "to address the true balance of harm—between the City and the State of California—with regard to the protection of coastal zone resources." Plaintiffs raise this issue for the first time on appeal and thus failed to preserve it in the trial court for our review.

In the trial court, plaintiffs conceded their short-term rental businesses were nonconforming uses in a residential zone, and they sought to balance the harm between their economic interests and the City's exercise of its police power. We apply the abuse of discretion standard to this aspect of the trial court's ruling.

Before the Ordinance was passed, two individuals (Johnston and Malone) rented their homes as STVR's and earned more than $70,000 each year since 2012. Income to plaintiff Rhodes, who only rented a room in her home, ranged from $31,000 to $45,000 per year since 2012. Their declarations asserted "irreparable harm, financial and non-financial, from the loss of short term rental income," which deprived them of vested rights. Besides focusing on loss of income, the plaintiffs' declarations also noted their short term tenants had not engaged in conduct that generated complaints to the City. The declarations did not address whether their short term rentals

provided low or lower cost lodging alternatives, and on the record presented at this stage of the proceedings, the balance of harm tips decidedly in the City's favor.

DISPOSITION

The judgment is affirmed. Defendant is awarded its costs on appeal.

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DUNNING, J.*

We concur:

KRIEGLER, Acting P. J.

BAKER, J.

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* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.