

**SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF SAN DIEGO  
CENTRAL**

**MINUTE ORDER**

DATE: 12/24/2019

TIME: 01:49:00 PM

DEPT: C-69

JUDICIAL OFFICER PRESIDING: Katherine Bacal

CLERK: Calvin Beutler

REPORTER/ERM:

BAILIFF/COURT ATTENDANT:

CASE NO: **37-2017-00019864-CU-TT-CTL** CASE INIT.DATE: 06/01/2017

CASE TITLE: **Del Mar Alliance for the Preservation of Beach Access and Village vs City of Del Mar**  
**[E-FILE]**

CASE CATEGORY: Civil - Unlimited CASE TYPE: Toxic Tort/Environmental

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**APPEARANCES**

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The Court, having taken the above-entitled matter under submission on 12/20/19 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

The petition for writ of mandate, filed by Del Mar Alliance for the Preservation of Beach Access and Village ("Alliance"), is granted.

*Preliminary Matters*

During the originally scheduled hearing, the Court asked the City for authority supporting its position regarding whether non-action could constitute a project under CEQA. As the City asked to brief this question, the Court continued the hearing and allowed the parties to file additional case citations. ROA # 112. The Court has reviewed the citations provided by the Alliance and the City. None of the cases stand for the proposition that adopting a resolution constitutes inaction.

The City's unopposed request for judicial notice is granted.

**Background**

The Del Mar Municipal Code ("Muni. Code") provides a process for the City of Del Mar ("City") to render an administrative interpretation of the Zoning Code, including whether a particular use is permitted. Muni. Code, § 30.01.020 *et seq.* In February 2017, the City's Planning Commission held a public hearing to determine whether short-term rentals ("STRs") are an allowed use under the Zoning Code. AR 1137-1139. The Planning Commission concluded it could not make an interpretation because nothing in the Muni. Code specifically references or defines STRs. AR 3081-3082. The Alliance appealed that determination to the City Council. AR 1479-1482. After a public hearing, on May 1, 2017 the City adopted Resolution 2017-29 which determined that STRs are an allowed use in the Residential

Commercial (RC) zone but not the residential zones. AR 1-7.

Alliance filed this lawsuit to challenge the Resolution, which it calls an "STR ban." The sole cause of action for "Illegal Approval and Adoption of STR Ban" alleges the Resolution violates the California Environmental Quality Act ("CEQA") and Coastal Act, and deprives property owners of due process.

## Discussion

The City argues that its adoption of the Resolution is not subject to environmental review under CEQA because it merely restates existing law. An activity that is not a "project" as defined in CEQA and the Guidelines (Cal. Code of Regulations, title 14, section 15000 *et seq.*) is not subject to CEQA. *Union of Medical Marijuana Patients, Inc. v. City of Upland* (2016) 245 Cal.App.4th 1265, 1271 ("UMMP"). Under CEQA, a project is an activity undertaken by a public agency that "may cause a direct physical change in the environment or a reasonably foreseeable indirect change in the environment...." Pub. Res. Code, § 21065. "A direct physical change in the environment is a physical change in the environment which is caused by and immediately related to the project. Examples of direct physical changes in the environment are the dust, noise, and traffic of heavy equipment that would result from construction of a sewage treatment plant and possible odors from operation of the plant." Guidelines, § 15064, subd. (d)(1). "An indirect physical change in the environment is a physical change in the environment which is not immediately related to the project, but which is caused indirectly by the project.... For example, the construction of a new sewage treatment plant may facilitate population growth in the service area due to the increase in sewage treatment capacity and may lead to an increase in air pollution." Guidelines, § 15064, subd. (d)(2).

Enactments and amendments to zoning plans are potential projects. Guidelines, § 15378, subd. (a)(1). However, a "municipal ordinance that merely restates or ratifies existing law does not constitute a project and is therefore not subject to environmental review under CEQA." *UMMP, supra*, at 1273; see also, *San Jose Country Club Apartments v. County of Santa Clara* (1982) 137 Cal.App.3d 948, 953 (ordinance that prohibited discrimination already prohibited by the Unruh Civil Rights Act and not subject to CEQA review); *Black Property Owners Assn. v. City of Berkeley* (1994) 22 Cal.App.4th 974, 985 (adoption of updated housing element as part of general plan not subject to CEQA review to the extent it readopts existing policies without change).

Whether a particular activity constitutes a project in the first instance is a question of law. *UMMP, supra*, at 1273. The City argues that the Resolution is a mere restatement of the law because STRs were already prohibited under the Zoning Code. The City argues it has a permissive zoning code which does not expressly allow STRs. A permissive zoning code is one in which a particular use of land is not allowed unless it is expressly designated in the zoning code as a permissible use. *City of Corona v. Naulls* (2008) 166 Cal.App.4th 418, 433. STRs are neither listed nor expressly prohibited in the Zoning Code. AR 2891, 2989; 3076-3082.

If, as the City contends, STRs were already prohibited under the Zoning Code, then the Resolution is not a restatement of the law as the Resolution *allows* STRs in the RC zone. The City acknowledges that CEQA review is required if the City is considering whether to allow and regulate STRs. *Oppo*, at p. 10. Indeed, the City undertook a CEQA review when it previously considered whether to adopt an ordinance allowing STRs. AR 196-197; see also, AR 200 (STRs place demands on the City's infrastructure and municipal services such as beach and park maintenance, fire safety, and law/code enforcement).

There is also substantial evidence that notwithstanding the Zoning Code, the City has long allowed STRs to operate. AR 199, 258 (STRs "predates the City's incorporation), 1541-1542, and 1544-1545. When the Community Plan was being created, the Land Use Subcommittee did not adopt a proposal to "discourage transient occupancy" in residential areas. AR 6719, 6726. In June 2010, a measure to tax STRs (Proposition J) was placed on the ballot. AR 5948. The argument against Proposition J was that STRs were "part of the fabric of Del Mar and have never needed to be regulated." AR 5945. Proposition J did not pass. OB, p. 3. In 2018, the City considered adopting Ordinance 934 to regulate STRs. City's RJN, Ex. 3. At that time, the City noted there were likely around 300 to 400 STRs. *Id.* at p. 3; see also AR 258, 4494, 8705.

The Resolution effectively bans STRs from all non-residential areas. Alliance argues - and the City does not dispute - that such a ban could result in the construction of additional hotels and motels to serve visitors, exacerbate traffic and parking issues, and reduce access to coastal resources. It is also undisputed that concentrating STRs in the RC zone could result in environmental impacts related to traffic, overuse and beach erosion. Under these circumstances, the Resolution constitutes a project under CEQA and should have been reviewed accordingly. Thus, the petition for writ of mandate is granted.

In light of this conclusion, it is unnecessary to consider whether the City also violated the Coastal Act or due process rights.

This is the order of the Court. Petitioner is directed to submit a proposed judgment.



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Judge Katherine Bacal