

Summer 8-31-2020

## The California Coastal Commission's Efforts to Provide Affordable Overnight Accommodations by Preempting Cities' Constitutional Police Power

Taylor Smith

Follow this and additional works at: <https://digitalcommons.law.byu.edu/lawreview>



Part of the [Law Commons](#)

---

### Recommended Citation

Taylor Smith, *The California Coastal Commission's Efforts to Provide Affordable Overnight Accommodations by Preempting Cities' Constitutional Police Power*, 2019 BYU L. Rev. 1369 (2020).  
Available at: <https://digitalcommons.law.byu.edu/lawreview/vol2019/iss5/9>

This Comment is brought to you for free and open access by the Brigham Young University Law Review at BYU Law Digital Commons. It has been accepted for inclusion in BYU Law Review by an authorized editor of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

# The California Coastal Commission’s Efforts to Provide Affordable Overnight Accommodations by Preempting Cities’ Constitutional Police Power

## CONTENTS

I. INTRODUCTION.....	1370
II. BACKGROUND .....	1371
A. Rise in STLU Popularity .....	1371
B. Cities.....	1373
C. California Coastal Commission and the Coastal Act .....	1375
D. Status Quo.....	1378
III. HISTORY OF THE COMMISSION’S EFFORTS TO PROVIDE OVERNIGHT ACCOMMODATIONS.....	1378
A. ZIP Code Rates.....	1378
B. San Diego Unified Port District.....	1379
C. City Enactments as “Development” in Context .....	1380
IV. “DEVELOPMENT” .....	1381
A. “Development” Under the Coastal Act.....	1382
B. Judicial Review of and Deference for Commission Interpretations .	1382
C. Judicial Acceptance of a Broad Interpretation of “Development” ...	1383
D. The Difference Between Potential and Actual Changes .....	1385
E. Absurd Outgrowth.....	1387
V. CHALLENGES TO THE STATUS QUO .....	1388
A. Hermosa Beach .....	1388
B. Mandalay Shores .....	1390
C. Homeaway and Santa Monica .....	1391
D. San Clemente.....	1392
E. Case Consolidation .....	1393
VI. STLU EXTERNALITIES .....	1394
A. STLUs Threaten Public Welfare .....	1394
B. Threat Abatement.....	1396
VII. CONCLUSION.....	1398

## I. INTRODUCTION

California's coastal cities have contemplated regulating short-term lodging units (STLU), like those offered on Airbnb. Many cities do so to appease residents complaining of STLUs disrupting their neighborhoods. Grievances include noise, insufficient local parking, and disruption of community character. However, the California Coastal Commission (the Commission) has asserted its authority under the California Coastal Act of 1976 (the Coastal Act) in an effort to prevent cities from regulating STLUs without first obtaining Commission approval. The Coastal Act empowers the Commission to protect public access to the coast, and the Commission has designated STLUs as a vital source of that access.<sup>1</sup> Although zoning and nuisance regulation traditionally fit within cities' police power, the Commission has final authority over all "development" in the coastal zone, as delineated in the Coastal Act.<sup>2</sup> The Commission interprets "development" to include STLU regulation and uses that broad definition to effectively require cities to get approval before passing any new restrictions, thereby giving the Commission unprecedented authority over cities' zoning power.

The purpose of this Note is to analyze the Commission's history of providing public access to low-cost overnight accommodations in the coastal zone as it relates to its current efforts to limit municipal STLU regulations. The Commission's broad historic view of its authority under the Coastal Act is reflected in its approach to limiting local regulation of STLUs. Currently, the Commission asserts its authority over municipal STLU regulation in two ways: (1) its review and issuance of coastal development permits in coastal areas where the Commission has direct permitting authority; and (2) its review and approval of Local Coastal Programs before delegating permitting authority to cities and counties. In both areas, the Commission must walk a line between its legitimate review of land use decisions for their impacts on coastal access and its impairment of local government's common law authority to do the same in pursuit of its own legitimate objectives. In areas where the Commission has direct permitting

---

1. CAL. PUB. RES. CODE ANN. §§ 30000–30900 (West 2018).

2. *Id.*; *see id.* § 30200.

authority, it asserts a broad interpretation of “development” that includes local land use and nuisance regulations, especially limitations on STLUs that only pose a potential—as opposed to actual—change in land use.

Several cities have challenged the Commission’s practice at the trial court level. State courts have historically upheld the Commission’s broad interpretation of what constitutes “development.” Federal courts, in contrast, seem less willing to uphold the Commission’s broad definition of “development.” Neither has struck a clear balance between the Commission’s preemptive authority to intervene when coastal land use decisions limit public access and cities’ traditional police power to protect single-family residential neighborhoods. The Commission’s current interpretation of “development” encroaches on coastal cities’ police power and poses significant risks to public welfare.

## II. BACKGROUND

Coastal Act disputes in California are usually between the regulated (property owners) and the regulator (the Commission). In the case of STLUs, however, the Commission and property owners are more likely to be aligned in their support of short-term rental of residential homes against cities and neighbors concerned about their nuisance effects.<sup>3</sup> Many property owners favor STLUs because owners can convert their unused property into income with higher rents charged for short-term use, especially during peak seasons. The Commission asserts authority over STLUs in the interest of providing low-cost accommodations on the coast. Cities choose to regulate STLUs because the properties threaten neighborhood stability, affordable housing stock, and public welfare.

### *A. Rise in STLU Popularity*

STLUs have risen in popularity with the advent of home sharing websites like Airbnb. Airbnb is an online platform that connects hosts with travelers looking for overnight accommodation around the world and offers unique advantages for both hosts

---

3. See *Homeaway.com, Inc. v. City of Santa Monica*, No. 2:16-cv-06641-ODW, 2018 WL 1281772, at \*1 (C.D. Cal. Mar. 9, 2018).

and guests.<sup>4</sup> These competitive advantages have contributed to Airbnb's popularity and have drawn the regulatory attention of coastal cities. Since its launch and subsequent success, Airbnb has generated substantial controversy.<sup>5</sup> However, this Note will only address the controversies necessary to provide context for the Commission's resistance to STLU regulation.

Property owners or leaseholders may become hosts by listing their spaces on Airbnb's website with custom prices, schedules, and guest requirements.<sup>6</sup> Hosts can rent entire properties or individual rooms.<sup>7</sup> This flexibility allows hosts to generate income from properties they already own, including those in single-family residential neighborhoods.

Travelers connect with potential hosts by creating an Airbnb profile and browsing available accommodations.<sup>8</sup> Travelers can often find cheaper and more interesting accommodations than hotels, such as coastal beach houses.<sup>9</sup> Across the world, options range from cheap, single rooms in an apartment to igloos to extravagant castles.<sup>10</sup> Because Airbnb allows hosts to list properties in primarily residential areas, travelers can also find more local accommodation experiences than they find at hotels.<sup>11</sup>

Airbnb's flexibility for hosts and attractiveness to travelers draws investors as well. Through Airbnb's platform, savvy investors convert residential properties into units that "operate year-round essentially as independent, unlicensed hotel rooms."<sup>12</sup> In fact, "64% of Airbnb listings in Los Angeles . . . are never

---

4. Alexander W. Cloonan, *The New American Home: Look at the Legal Issues Surrounding Airbnb and Short-Term Rentals*, 42 U. DAYTON L. REV. 27, 31 (2017).

5. *Id.* at 32.

6. *Hosting in 3 Steps*, AIRBNB (Dec. 31, 2018), <https://www.airbnb.com/host/homes>.

7. Dayne Lee, *How Airbnb Short-Term Rentals Exacerbate Los Angeles's Affordable Housing Crisis: Analysis and Policy Recommendations*, 10 HARV. L. & POL'Y REV. 229, 232 (2016).

8. *How Do I Search for a Place to Stay?*, AIRBNB (Dec. 31, 2018), <https://www.airbnb.com/help/article/252/how-do-i-search-for-a-place-to-stay>.

9. This fact is hotly contested between cities and STLU hosts. Hosts claim that extended families can rent an entire house for less than multiple hotel rooms. Cities argue that STLUs are not inherently cheaper options and that affordability depends on the actual price. See *Anthem Sales & Mgmt., LLC v. City of San Clemente*, No. SACV 18-01359-CJC(JDEx), at \*1 (C.D. Cal. Aug. 24, 2018) (STLU in question rented for \$1000 per night).

10. Cloonan, *supra* note 4, at 28.

11. Lee, *supra* note 7, at 232.

12. *Id.* at 234.

occupied by their owners or leaseholders.”<sup>13</sup> But unlike hotels, hosts and guests often do not pay hotel occupancy taxes, potentially making them cheaper for travelers.<sup>14</sup>

### *B. Cities*

California cities regulate neighborhoods in the interest of protecting public welfare by exercising its police power.<sup>15</sup> The concept of public welfare is broad and includes concerns of “[p]ublic safety, public health, morality, peace and quiet, [and] law and order,” or even things that “suffocate the spirit” of city residents or neighborhoods.<sup>16</sup> Cities do this by regulating behavior, for example, by passing laws that require licenses for property management or other businesses, or adopting limitations on noise and on-street parking. Cities can also do this through zoning ordinances that designate certain areas of town for certain uses. STLU regulations can fall within both categories of regulations. The line between passing behavior laws and passing zoning ordinances is somewhat blurry, and STLU regulations can fall within both of these categories. It is difficult to determine what portion of this continuum of municipal police power is preempted by the Commission’s authority to protect coastal access.

California cities regulate general land use through a general plan and a zoning code. A city’s general plan must include a land use element that designates the distribution, location, and extent of different land uses.<sup>17</sup> Generally, a city’s more specific zoning ordinances must be consistent with its general plan.<sup>18</sup> A city’s zoning ordinances are considered quasi-legislative acts and therefore are only rejected by reviewing courts if they are “arbitrary, capricious, or totally lacking in evidentiary support.”<sup>19</sup>

---

13. *Id.*

14. Cloonan, *supra* note 4, at 32.

15. CECILY TALBERT BARCLAY & MATTHEW S. GRAY, CALIFORNIA LAND USE & PLANNING LAW 1 (2016). While traditionally associated with states, California cities enjoy a broad police power over municipal affairs under the California Constitution. *DeVita v. Cty. of Napa*, 889 P.2d 1019, 1030 (Cal. 1995).

16. *Berman v. Parker*, 348 U.S. 26, 32–33 (1954).

17. CITY ATT’YS’ DEP’T & LEAGUE OF CAL. CITIES, THE CALIFORNIA MUNICIPAL LAW HANDBOOK § 10.18 (2018).

18. *Id.* §§ 10.89–90.

19. *Id.* § 10.92.

Under their police power, cities also have the authority to regulate nuisance in order to protect public welfare.<sup>20</sup> This includes the power to prohibit anything that obstructs the free use of property or comfortable enjoyment of property.<sup>21</sup> Cities seeking to regulate STLUs may do so under this power if STLUs pose a threat to neighbors' comfortable enjoyment of their property. Examples of potential STLU nuisance regulation include limiting the impacts STLUs have on street parking, trash pickup, and community comfort.<sup>22</sup> Conducting business without a license also constitutes nuisance per se and may be enjoined.<sup>23</sup>

Cities also have the authority to regulate STLUs as businesses.<sup>24</sup> While long-term rentals (greater than thirty days) are a constitutionally protected property right, short-term rentals (less than thirty days) are a commercial activity.<sup>25</sup> Commercial regulations on STLUs range from registration requirements to outright bans.<sup>26</sup> As with traditional visitor-oriented uses like hotels and bed and breakfasts, cities commonly regulate STLUs by imposing time limits, maximum guest limits, inspections, and limits on the total rental days per year.<sup>27</sup>

A city's police power encompasses regulating STLUs as land uses, nuisances, and business activities. These types of STLU restriction seem to fit together on an overlapping continuum. A land use ordinance may restrict specific commercial uses, like hosting an STLU, in residential areas. A nuisance ordinance may protect community character by prohibiting activities incidental to the presence of STLUs, effectively prohibiting them. A business activity regulation may restrict STLU permits to specific locations where the community is well-suited to accommodate transient visitors. All three categories of police power exercise allow for a de facto prohibition on STLUs. Although different by name, each of these categories fits into a city's ability to regulate neighborhoods within its boundaries.

---

20. *Id.* § 9.121.

21. *Id.* § 9.122; *see also* CAL. CIV. CODE § 3479 (West 2018).

22. CITY ATT'YS' DEP'T & LEAGUE OF CAL. CITIES, *supra* note 17, §§ 9.122-.123.

23. *City of Claremont v. Kruse*, 100 Cal. Rptr. 3d 1 (Ct. App. 2009).

24. CITY ATT'YS' DEP'T & LEAGUE OF CAL. CITIES, *supra* note 17, § 9.52B.

25. *Id.* § 9.52A.

26. *Id.* § 9.52B.

27. *Id.* § 9.52D.

Most California cities can regulate STLUs as they see fit. Coastal cities, however, are subject to the Commission's preemptive authority to protect STLUs. The Commission has chosen to do this by expanding its traditional role of reviewing physical development in coastal areas to reviewing cities' nuisance and business regulations under a broad interpretation of "development" in the Coastal Act.

### *C. California Coastal Commission and the Coastal Act*

In 1976, the California legislature adopted the Coastal Act, declaring California's coastal zone "a distinct and valuable natural resource of vital and enduring interest."<sup>28</sup> It further declared that "existing developed uses[] and future developments . . . are essential to the economic and social well-being of the people of this state."<sup>29</sup> The Commission administers the Coastal Act by "plan[ning] and regulat[ing] the use of land and water in the coastal zone" in coordination with coastal cities.<sup>30</sup>

The coastal zone was mapped by California's legislature and includes a three-mile-wide band of ocean and a variable width of land along the entire coastline, minus San Francisco Bay and a few other exceptions.<sup>31</sup> The coastal zone overlaps with fifteen counties and sixty-one cities.<sup>32</sup> The Commission and these cities and counties implement the Coastal Act by preparing Local Coastal Programs (LCP) that include a land use plan, which is similar to a city's general plan, and an implementation plan, which is similar to a city's zoning code.<sup>33</sup> A city may submit its land use plan and implementation plan or get its land use plan approved first and submit an implementation plan later.

Any "development" in the coastal zone cannot begin without a coastal development permit from the Commission or from a local government in areas where the Commission has delegated

---

28. CAL. PUB. RES. CODE ANN. § 30001(a) (West 2018).

29. *Id.* § 30001(d).

30. *Our Mission*, CAL. COASTAL COMM'N (Dec. 31, 2018), <https://www.coastal.ca.gov/whoweare.html>.

31. *Id.* These exceptions are often governed by other authorities in addition to counties and cities.

32. *Id.*

33. *Id.*



permitting authority through an approved LCP.<sup>34</sup> In areas without LCPs, applicants must seek local land use and building permit approvals from the city and separate coastal development permits from the Commission. In areas with approved LCPs, cities have the ability to issue all permits as long as their issuance of coastal development permits is consistent with the requirements of an LCP.<sup>35</sup> The Commission must approve any amendments to an LCP.<sup>36</sup> Any city development also requires a coastal development permit from the Commission.<sup>37</sup>

According to the Commission, “[t]he Coastal Act defines development broadly . . . to include not only typical land development activities such as construction of buildings, but also changes in the intensity of use of land or water, even where no construction is involved.”<sup>38</sup> Under this definition, examples of “development” include discharging a fireworks display over a river estuary and a property owner limiting historical public access to the coast over her private property.<sup>39</sup>

The Commission evaluates LCPs for conformance with Coastal Act policies upon submission and every five years after that.<sup>40</sup> One such policy is to “[m]aximize public access to and along the coast and maximize public recreational opportunities in the coastal zone consistent with sound resources conservation principles and constitutionally protected rights of private property owners.”<sup>41</sup>

The Commission’s primary interaction with cities occurs upon LCP submission and approval. During this interaction, the Commission’s power is limited to approving or denying the LCP.<sup>42</sup> However, the Commission has effectively expanded its power to

---

34. *Id.*

35. *Local Coastal Programs*, CAL. COASTAL COMM’N (Dec. 31, 2018), <https://www.coastal.ca.gov/lcps.html>.

36. *Local Coastal Programs: Resources for Local Governments*, CAL. COASTAL COMM’N (Dec. 31, 2018), <https://www.coastal.ca.gov/rflg/>.

37. CAL. PUB. RES. CODE ANN. § 30600(a) (West 2018); *id.* § 21066 (“person” includes a city).

38. *Coastal Development: Permit Applications and Appeal Forms*, CAL. COASTAL COMM’N, [coastal.ca.gov/cdp/cdp-forms.html](https://www.coastal.ca.gov/cdp/cdp-forms.html) (last visited Sept. 24, 2019).

39. *Gualala Festivals Comm. v. Cal. Coastal Comm’n*, 106 Cal. Rptr. 3d 908, 909 (Ct. App. 2010); *Surfrider Found. v. Martins Beach 1, LLC*, 221 Cal. Rptr. 3d 382, 389 (Ct. App. 2017), *cert. denied*, 139 S. Ct. 54 (2018).

40. *Our Mission*, *supra* note 30.

41. PUB. RES. § 30001.5(c).

42. *See San Diego Unified Port Dist. v. Cal. Coastal Comm’n*, 238 Cal. Rptr. 3d 671 (Ct. App. 2018).

review city ordinances outside of the LCP process, especially STLU regulations, by considering them development under the Coastal Act, inasmuch as the ordinance decreases the supply of affordable overnight accommodation in the coastal zone. The Commission argues that STLU restrictions constitute “development” because they change the intensity of use and access to the shoreline.<sup>43</sup> Thus, the Commission argues that STLU restrictions must be authorized by a coastal development permit, issued by the Commission, and conformed to the Coastal Act’s policy to provide affordable overnight accommodations.<sup>44</sup>

The Commission acknowledges that STLUs pose a threat to public welfare but “has not historically supported blanket [STLU] bans” because such restrictions are not consistent with the Coastal Act’s affordable accommodation policies.<sup>45</sup> The Commission has only approved partial STLU bans, including regulations that limit the total number of rental units in certain areas, the types of housing that can be converted to STLUs, the maximum STLU occupancy, and the amount of time a given unit may be rented during a given time period.<sup>46</sup> The Commission has also approved requirements for 24-hour management or emergency response, for parking, for noise limits, for transient occupancy taxes, and for specific signage posting important information.<sup>47</sup>

Although the Commission paints itself as willing to cooperate with cities to impose reasonable regulations on STLUs, it is peculiar that the Commission is involved at all. Outside of approving an LCP, the Commission is not involved in cities’ day-to-day general plan resolutions or zoning ordinances, let alone nuisance and business activity regulation. However, under the guise of overseeing “development” in the coastal zone, the Commission now supervises traditional applications of cities’ police power.

---

43. Opinion Letter from Cal. Coastal Comm’n to Coastal Planning/Cmty. Dev. Dirs. (Dec. 6, 2016) (discussing short-term and vacation rentals in the California coastal zone).

44. *Id.* at 1.

45. *Id.* at 2.

46. *Id.*

47. *Id.*

*D. Status Quo*

Under the Commission's current view of the regulatory scheme, a city must either amend its LCP to contemplate STLU regulations or, since STLU regulations constitute "development," obtain a coastal development permit to authorize any STLU restriction. Either way, a city must receive approval from the Commission to regulate STLUs, and the Commission has stated that it will only approve certain limitations to public overnight accommodations.<sup>48</sup> Some cities have successfully challenged the Commission's status quo while others have struggled to loosen the grip on STLU regulations.<sup>49</sup>

### III. HISTORY OF THE COMMISSION'S EFFORTS TO PROVIDE OVERNIGHT ACCOMMODATIONS

Section 30213 of the Coastal Act requires that the Commission protect, encourage, and provide "[l]ower cost visitor and recreational facilities."<sup>50</sup> The Commission has tried to do this in several ways. Categorizing city STLU restrictions as "development" is the newest iteration in a pattern of less-than-straightforward assertions of Coastal Act authority by the Commission to provide low-cost overnight accommodations.

*A. ZIP Code Rates*

In 1981, California legislators amended § 30213 of the Coastal Act in response to concerns that the Commission overreached its authority in the regulation of hotel development.<sup>51</sup>

In order to increase public access to overnight accommodation, the Commission essentially required hotels to rent some of their units at a reduced rate to moderate income guests, all under the auspices of reviewing "development" to ensure coastal access.<sup>52</sup>

---

48. *Id.*

49. *See infra* Part V.

50. CAL. PUB. RES. CODE ANN. § 30213 (West 2018).

51. David Francis Pierucci, *The California Coastal Commission's Approach to Lower Coast Overnight Visitor-Serving Accommodations Mitigation: A Policy and Legal Analysis* 11 (2015) (unpublished thesis, California Polytechnic State University, San Luis Obispo) (available at <https://digitalcommons.calpoly.edu/theses/1417>).

52. Paul A. Sabatier & Daniel A. Mazmanian, *CAN REGULATION WORK?: THE IMPLEMENTATION OF THE 1972 CALIFORNIA COASTAL INITIATIVE 333* (1983).

In one case, the Commission accepted a hotel owner's offer to reserve forty-five rooms during weekends at 50% of the normal rate for guests from certain zip codes.<sup>53</sup> In 1981, likely in response to what they saw as an overreach by the Commission, state legislators added a provision to § 30213 forbidding the Commission from fixing room rates or "establish[ing] or approv[ing] any method for the identification of low or moderate income persons for the purpose of determining eligibility for overnight room rentals in any such facilities."<sup>54</sup>

### *B. San Diego Unified Port District*

In 2015, the San Diego Unified Port District, which interacts with the Commission on essentially the same basis as a city, submitted a port master plan<sup>55</sup> amendment for Commission approval.<sup>56</sup> The original plan contemplated a single 500-room hotel, while the amendment allowed for three hotels to provide a combined total of 500 rooms.<sup>57</sup> The Commission denied the amendment on the grounds that it did not provide lower-cost overnight accommodations with sufficient specificity, even though the plan generally acknowledged that developers provide their fair share of low-cost accommodations or pay an in-lieu fee.<sup>58</sup>

Normally, under § 30714, the Commission simply approves or denies a plan according to whether it is consistent with the policies in the Coastal Act, and it may not make a modification as a condition for certification, such as requiring a precise, explicit change to the plan.<sup>59</sup> San Diego Unified Port District took issue with the Commission's denial, claiming the Commission had exceeded its jurisdiction under the Coastal Act by infringing on the port district's discretion to determine the specifics of the port master plan.<sup>60</sup> The trial court agreed, ruling in the Port's favor.<sup>61</sup>

---

53. *Id.*

54. PUB. RES. § 30213; Pierucci, *supra* note 51, at 10.

55. The functional equivalent of an LCP.

56. *San Diego Unified Port Dist. v. Cal. Coastal Comm'n*, 238 Cal. Rptr. 3d 671, 676 (Ct. App. 2018).

57. *Id.*

58. *Id.* at 677.

59. PUB. RES. § 30714.

60. *San Diego Unified Port Dist.*, 238 Cal. Rptr. 3d at 675.

61. *Id.*

On appeal, however, the reviewing court held that the Coastal Act only forbids “conditionally approving” a plan and requires that the Commission provide specific reasons for denial, such as public access deficiencies.<sup>62</sup> Essential to this ruling, the court rejected the trial court’s reasoning that port districts and cities possess analogous authority. Rather, the court explained, port districts do not enjoy the same broad discretion to determine the precise contents of land use and implementation plans as other local authorities, like cities.<sup>63</sup>

Although this case diminishes a port district’s authority over plan development, it strongly affirms a city’s authority over the specifics of LCP policy development, and its implementation of approved LCPs through land use and zoning.

### C. City Enactments as “Development” in Context

The Commission primarily interacts with cities regarding the availability of visitor accommodations when the Commission reviews an LCP for conformity with the Coastal Act’s policy to provide low-cost overnight accommodations.<sup>64</sup> The 1981 amendment to the Coastal Act marks an attempt by legislators to narrowly limit the specificity to which the Commission may dictate local policies. In San Diego Unified Port District’s case, the reviewing court sanctioned the Commission’s ability to identify deficiencies in a development proposal and to make specific recommendations. However, this ruling turned on the fact that the port district was not a city.<sup>65</sup> Thus, while courts approve of the Commission’s authority to point out deficiencies in a plan submitted for approval, courts also recognize that cities deserve substantial discretion in dictating specific local policy.<sup>66</sup> In other words, the Coastal Act grants cities “broad land-use implementation and policy-making jurisdiction,” while the Commission is prohibited from determining the precise content of an LCP.<sup>67</sup>

---

62. *Id.* at 693.

63. *Id.* at 687.

64. *See supra* Section II.C.

65. *See supra* Section III.B.

66. *Id.*

67. *San Diego Unified Port Dist.*, 238 Cal. Rptr. 3d at 689.

Courts' reluctance to allow the Commission to impair traditional, municipal land use, business, and nuisance abatement jurisdiction in the LCP process should apply even more to the Commission's interpretation of "development." The Commission's requirement that cities obtain a coastal development permit for STLU regulation jettisons the normal LCP approval and amendment processes and allows the Commission to directly review a city's application of traditional police power to regulate nuisance and business, so long as there is a potential decrease in public access. The Commission's permitting authority is meant to ensure that actual coastal "development" conforms with Coastal Act policies when there is no LCP, not to allow the Commission to dictate how cities regulate potential uses in the coastal zone in their own general plan and zoning code as the Commission does now.

#### IV. "DEVELOPMENT"

Because any development in the coastal zone requires a coastal development permit, the definition of "development" under the Coastal Act is essential to determining the limit of the Commission's regulatory power. California courts tend to agree with the Commission's position that "development" includes a broad range of activities. However, courts have not yet provided specific direction about the Commission's inclusion of city enactments as "development" subject to Commission review under the Coastal Act.<sup>68</sup> Courts should not endorse the Commission's broad inclusion of all city ordinances in "development" because ordinances only represent a potential change in public access, not actual change. STLU ordinances regulating licensing, consumer protection, noise, parking, trash, and other nuisance prohibition arguably have nothing to do with coastal access. Leaving unfettered discretion to the Commission to dictate which homes in the coastal zone should be STLUs deprives municipalities of their traditional ability to decide which uses are compatible and to preserve single-family, owner-occupied housing stock.

---

68. *But see* *Greenfield v. Mandalay Shores Cmty. Ass'n*, 230 Cal. Rptr. 3d 827, 828 (Ct. App. 2018). While the appellate court held that a homeowners' association's STLU ban constituted "development" under the Coastal Act, courts have yet to rule on whether general-application city ordinances constitute "development."

*A. "Development" Under the Coastal Act*

The Coastal Act requires that the Coastal Act itself be "liberally construed to accomplish its purposes and objectives."<sup>69</sup> Subject to courts' "independent judgment on pure questions of law,"<sup>70</sup> "[t]he Commission has the ultimate authority to ensure that coastal development conforms to the policies embodied in the state's Coastal Act."<sup>71</sup> Unlike most California administrative agencies, the Commission's acts are even exempt from review by California's Office of Administrative Law.<sup>72</sup>

The Coastal Act specifically defines "development" somewhat broadly. "Development" includes erecting any solid or material structure, discharging or disposing dredged materials or waste, physically grading or disrupting any material, changing the intensity of use of land or water, construction or alteration of a structure, or removing major vegetation other than for agricultural purposes.<sup>73</sup> Thus, the Commission enjoys some statutory leeway in interpreting "development."

*B. Judicial Review of and Deference for Commission Interpretations*

When interpreting statutes, California courts "ascertain the aim and goal of the lawmakers so as to effectuate the purpose of the statute."<sup>74</sup> They presume the plain language of the statute governs unless the language is unclear or allows for more than one reasonable interpretation.<sup>75</sup> If the statute is unclear or allows for multiple reasonable interpretations, courts look to legislative history, public policy, and the evils to be remedied to better ascertain the lawmakers' intent.<sup>76</sup> "In such circumstances, [courts] must select the construction that comports most closely with the aim and goal of the Legislature to promote rather than defeat the statute's general purpose and avoid an interpretation that would

---

69. CAL. PUB. RES. CODE ANN. § 30009 (West 2018).

70. *McAllister v. Cal. Coastal Comm'n*, 87 Cal. Rptr. 3d 365, 372 (Ct. App. 2008).

71. *City of Dana Point v. Cal. Coastal Comm'n*, 158 Cal. Rptr. 3d 409, 421 (Ct. App. 2013).

72. *Cal. Coastal Comm'n v. Office of Admin. Law*, 258 Cal. Rptr. 560 (Ct. App. 1989).

73. CITY ATT'YS' DEPT & LEAGUE OF CAL. CITIES, *supra* note 17, § 10.329; PUB. RES. § 30106.

74. *Gualala Festivals Comm. v. Cal. Coastal Comm'n*, 106 Cal. Rptr. 3d 908, 912 (Ct. App. 2010).

75. *Id.*

76. *Id.*

lead to absurd and unintended consequences.”<sup>77</sup> With respect to interpretations of the Coastal Act, courts give the “highest priority to environmental considerations.”<sup>78</sup>

Reviewing courts in California afford an agency’s interpretation of its governing statute “great weight,” but reserve final interpretive authority for the courts.<sup>79</sup> However, “courts do not defer to an agency’s determination when deciding whether the agency’s action lies within the scope of authority delegated to it by the Legislature.”<sup>80</sup> “[T]he issue of whether an agency acted in excess of its jurisdiction is a question of law reviewed de novo on appeal.”<sup>81</sup> Thus, the question of whether the Commission’s inclusion of city enactments in “development” is proper will ultimately be decided de novo by courts, not the Commission, because it is a question of jurisdiction.<sup>82</sup>

### *C. Judicial Acceptance of a Broad Interpretation of “Development”*

Although the Commission’s statutory interpretations do not receive deference, courts have upheld the Commission’s broad interpretation of “development” under the Coastal Act on numerous occasions. Examples of accepted interpretations of “development” outside those specifically listed in the Coastal Act include lot line adjustments, conversion of a storage area into a restaurant, conversion of a mobile home park to resident ownership, city development of public land, and projects on federal land within the coastal zone.<sup>83</sup> This Part will focus on two examples, namely the inclusion of setting off fireworks and restricting historical public access as “development.”

The word “development” is defined by the list of examples in the Coastal Act and not by common usage. For example, California courts upheld the Commission’s determination that a fireworks display constitutes “development” under the Coastal Act. Gualala Festivals Committee, an association of businesses and property

---

77. *Id.* (brackets and citation omitted).

78. *Id.*

79. *Id.* at 911–12 (citation omitted).

80. *Id.* at 911 (citation omitted).

81. *Id.*

82. *See id.*

83. CITY ATT’YS’ DEP’T & LEAGUE OF CAL. CITIES, *supra* note 17, § 10.330.



owners in Gualala, sought to challenge the Commission's requirement that the committee obtain a coastal development permit before discharging a fifteen-minute fireworks display over the Gualala River Estuary.<sup>84</sup> The court conceded that "a fireworks display is not what is commonly regarded as a development of real property."<sup>85</sup> But the court ultimately sided with the Commission, stating that the legislature did not leave "development" to be defined by its common usage.<sup>86</sup> Rather, the court pointed to an expansive list, provided by the legislature, of activities that constitute "development" under the Coastal Act, including the discharge of any amount of gaseous or solid waste.<sup>87</sup> The court reasoned that the Gualala Festivals Committee's fireworks display would likely result in the discharge of solid and chemical waste in the Gualala River Estuary and therefore constituted "development" under the Coastal Act.<sup>88</sup>

"Development" also includes changing the use of private property in the coastal zone if the change decreases public access to the coast. Martins Beach 1 and Martins Beach 2, two LLCs, purchased property over which the public historically enjoyed access to the coast for a fee during the daytime.<sup>89</sup> The new owners initially continued to charge beachgoers for access but eventually closed off access completely and painted over the previous owner's beach access sign.<sup>90</sup> The Surfrider Foundation, a non-profit organization dedicated to preserving the recreational use of California's coast, filed a complaint alleging that the new owners engaged in "development" without obtaining a coastal development permit as required by the Coastal Act.<sup>91</sup> The new owners asserted that the property was private and that closing a gate and painting over a sign was not "development."<sup>92</sup> But the court held that "development" ought to be liberally construed and that a significant decrease in public access to beach fits within the

---

84. *Gualala Festivals*, 106 Cal. Rptr. 3d at 909.

85. *Id.* at 912.

86. *Id.*

87. *Id.*

88. *Id.* at 913.

89. *Surfrider Found. v. Martins Beach 1, LLC*, 221 Cal. Rptr. 3d 382, 388 (Ct. App. 2017), *cert. denied*, 139 S. Ct. 54 (2018).

90. *Id.* at 389.

91. *Id.* at 390.

92. *Id.* at 394.

scope of the permitting requirement.<sup>93</sup> The gate and the sign impaired this access. Thus, the court held the Commission could require a coastal development permit even for a change in private use if that use decreases public access.

*D. The Difference Between Potential and Actual Changes*

Although courts and the Commission interpret “development” broadly, they should not interpret it so broadly as to include changes to the potential use of land by city ordinance regardless of the physical impacts of that ordinance, especially when the focus of that ordinance is in areas traditionally regulated under the city’s police power. The Commission currently asserts its authority to require cities to obtain a coastal development permit to regulate STLUs in areas without LCPs or in areas with LCPs that do not contemplate such regulation. The Commission’s position in this regard is that STLU regulation “represents a change in the intensity of use and of access to the shoreline, and thus constitutes development.”<sup>94</sup> However, this approach represents a broader interpretation of the Commission’s authority, even under the cases summarized above. Both a fireworks display and the restriction of public travel over private property represent actual changes, while a city ordinance represents only a theoretical change. This distinction between actual and theoretical changes is critical because the primary purpose of the Commission’s permitting authority is to prohibit activities that cities otherwise allow (such as a fireworks display), not to dictate what activities cities should or should not allow.<sup>95</sup>

The fireworks display risked almost certain discharge of solid waste into the Gualala River Estuary. The Coastal Act specifically classifies the discharge of waste, no matter how minimal, as “development.”<sup>96</sup> Although this seems to stretch the ordinary meaning of “development,” as the reviewing court held, it is not a surprising interpretation under the Coastal Act’s somewhat broad definition. However, if the issue in the Gualala case had been a city

---

93. *Id.*

94. Opinion Letter from Cal. Coastal Comm’n to Coastal Planning/Cmty. Dev. Dirs. (Dec. 6, 2016).

95. *See supra* Section III.C.

96. CAL. PUB. RES. CODE ANN. § 30106 (West 2018).

ordinance generally allowing fireworks displays over the estuary, the Commission may not have succeeded in exercising exclusive jurisdiction over that activity. In this hypothetical, a party wishing to shoot fireworks under the city fireworks ordinance would still need to obtain a coastal development permit from the Commission. The court upheld only the Commission's traditional authority to withhold a permit for an activity that would cause actual discharge of waste in the estuary, not a broader authority to prevent the creation of a city ordinance that risks theoretical future discharge of waste. This difference is key. In other words, the Commission has the authority to review and issue permits for actual development activities but not for city regulations regulating or allowing those activities.

Similarly, the Martins Beach property owners actually limited public access to the coast by closing the entry gate and restricting entry. This caused an actual change in the public's access to water as specifically contemplated in the Coastal Act's definition of "development."<sup>97</sup> This case more closely resembles the topic of this Note. However, STLU restriction through land use, nuisance, and business activity regulation does not actually change the intensity of use or access as required by the Coastal Act.<sup>98</sup> Rather, STLU regulation represents only a potential change to access or use. The actual change in access occurs when the property owner changes the property's actual use to conform to any new STLU regulation. While it is true that a change in a city's approach to STLU regulation will likely herald in a future reduction in the availability of STLUs, this application of Coastal Act authority differs significantly from regulating actual public access to the beach in the Martins Beach case. The court upheld the Commission's authority to withhold a permit from a private property owner changing public access to the beach, not a broader authority to prevent a city ordinance that poses a theoretical future decrease in public access to the shore regardless of whether it relates to actual access to the coast or simply nuisance prevention.

The Commission's current practice of requiring cities to obtain coastal development permits to regulate STLUs under an expansive

---

97. *Id.*

98. *Id.*

interpretation of “development” exceeds the limited authority granted by the Coastal Act. Under the Coastal Act, the Commission’s interaction with cities is primarily limited to quasi-judicial review of proposed LCPs.<sup>99</sup> Cities enjoy substantial discretion when determining the contents of their LCPs, while the Commission is intended to take a backseat role.<sup>100</sup> Outside of the LCP approval process, the Commission is meant to act as a stopgap to prohibit actual “development” activities that are otherwise allowed by cities’ zoning codes, over which the Commission has no jurisdiction. However, the Commission’s broad interpretation of “development” to include potential changes in use, such as those posed by zoning ordinances, allows the Commission to directly oversee city zoning ordinances in a way not contemplated in the Coastal Act. With respect to city zoning ordinances, courts should preserve cities’ independent authority to regulate city affairs in the absence of an approved LCP and should limit the Commission’s authority to that which is outlined in the Coastal Act—namely to fill gaps in lax local zoning codes—by interpreting “development” to include only actual changes in use.

#### *E. Absurd Outgrowth*

California courts have stated that they will not construe the Coastal Act so liberally as to allow for absurd applications.<sup>101</sup> The Commission’s broad interpretation of “development” to include STLU restrictions leads to absurd consequences when put in the context of *Martins Beach*.

The Commission stretches the definition of “development” when it includes STLU regulations because such regulations potentially restrict access to overnight accommodations. If any change in the availability of residential homes as overnight accommodations constitutes “development,” the Commission could require private property owners, like Martins Beach’s owners, to obtain coastal development permits to stop renting their

---

99. *Anthem Sales & Mgmt., LLC v. City of San Clemente*, No. SACV 18-01359-CJC(JDEx), at \*1 (C.D. Cal. Aug. 24, 2018).

100. *San Diego Unified Port Dist. v. Cal. Coastal Comm’n*, 238 Cal. Rptr. 3d 671, 688 (Ct. App. 2018).

101. *Gualala Festivals Comm. v. Cal. Coastal Comm’n*, 106 Cal. Rptr. 3d 908, 912 (Ct. App. 2010).

property as an STLU. This assertion of authority is not unthinkable in light of *Martins Beach*. There, the court upheld the Commission's authority to curb traditional private property rights in order to maintain public access to the coast. However, it seems absurd to require a property owner to obtain a permit to live in her own home instead of renting it as an STLU.

Although it is uncertain whether the Commission would ever require a property owner to obtain a permit to occupy her own home, the Commission does prevent cities from requiring owners to occupy their homes—even though this would be an exercise of the city's traditional police power. Cities' police power allows them to protect neighborhood character and health by requiring owner occupancy or restricting commercial uses, such as STLU rental. The Commission, however, asserts that it has the authority to negate city ordinances that restrict STLUs as "development" and to allow unfettered commercial STLU lodging throughout the coastal zone. Taking this assertion a step further, the Commission could neutralize cities' ability to prevent the complete commercialization and ultimate deterioration of coastal neighborhood communities through conversion of single-family homes to STLUs because the Commission has no obligation under the Coastal Act to protect community character or welfare. Allowing the Commission to trigger its coastal development permitting authority to negate city ordinances as "development" would be an immense grant of power and would put coastal neighborhoods at risk.

## V. CHALLENGES TO THE STATUS QUO

Several cities have challenged the Commission's current practice of overseeing STLU regulations as "development" in the coastal zone. However, no case squarely addresses the proper balance between city authority and Commission oversight and the proper definition of "development."

### A. *Hermosa Beach*

In a recent unpublished opinion, California's Second District Court of Appeals ruled in favor of the City of Hermosa Beach, whose ordinance banned STLUs in residential areas altogether but allowed them in commercial areas. The plaintiffs, who sought to continue renting out their properties as STLUs, argued that the

city's ban violated the policies of the Coastal Act to provide low-cost overnight accommodations.<sup>102</sup> The court held that the policy sections of the Coastal Act only set standards under which an LCP is reviewed for adequacy and that there is "no authority applying these provisions to zoning ordinances enacted pursuant to a city's police powers."<sup>103</sup> In other words, the City reserves its traditional regulatory powers in areas of coastal jurisdiction. The court also held that the absence of an approved LCP did not eliminate the City's "ability to enact and amend zoning ordinances."<sup>104</sup> However, in this case, plaintiffs had conceded at trial that zoning ordinances did not constitute "development" under the Coastal Act.<sup>105</sup> The court was unpersuaded by plaintiffs' submission of Commission opinion documents declaring STLU bans a violation of the Coastal Act.<sup>106</sup>

This case stands for a city's ability to regulate STLUs in areas lacking an approved LCP. The Commission's preemptive authority extends only to LCP approval and development activity permitting. The coastal zone does not revert to anarchy in the absence of an approved LCP; cities retain jurisdiction over local affairs. It also stands for the fact that cities without an LCP need only get coastal development permits for "development" in the coastal zone, not underlying traditional zoning regulations.

However, this case is peculiar for several reasons. First, the opinion is unpublished and therefore will not have any precedential control over the issue of future city STLU regulation. That being said, the opinion still signals a potential willingness from the court to affirm cities' authority to enact zoning ordinances, like STLU bans, without an approved LCP or LCP amendment. Second, the court's ruling did not touch on the issue of city ordinances, like STLU regulations, constituting "development" because plaintiffs conceded that they were not. Thus, the opinion does not give much guidance on the merits of this broad interpretation of "development." The fact that plaintiffs conceded the issue may indicate that city ordinances are at least not

---

102. *Johnston v. City of Hermosa Beach*, B278424, 2018 WL 458920, at \*4 (Cal. Ct. App. 2018).

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at \*5.

clear-cut “development.” Lastly, the court noted that the Commission had not sought to intervene in the case at the trial or appellate levels.<sup>107</sup> This fact may signal that the Commission knows that the position described in its opinion documents is untenable, and the Commission did not want to see this case establish precedential value as a reported appellate decision. Alternatively, this may indicate that the real battle between cities and the Commission over the interpretation of “development” is still yet to come.

### *B. Mandalay Shores*

*Greenfield v. Mandalay Shores Community Ass’n* reached a contrary result. In this case, homeowners who wanted to lease out their homes as vacation rentals sued their homeowners’ association over the association’s resolution banning STLUs in the community.<sup>108</sup> The homeowners argued that the association’s STLU ban constituted “development” because it changed the intensity of access to single-family residential homes in the coastal zone.<sup>109</sup> Therefore, the association needed to obtain a coastal development permit before limiting STLUs.<sup>110</sup> The appellate court held that the use of homes as STLUs is a matter for cities and the Commission to regulate, not for private actors like the association.<sup>111</sup> The court also upheld the trial court’s finding that “arguably the public will be restricted in its access to the coast” and held that the STLU ban constituted “development.”<sup>112</sup>

While the court’s interpretation of “development” does not bode well for city ordinances that outright ban STLUs, the holding could be narrowly construed to restrict a homeowners’ association’s ability to ban STLUs. This ruling does not touch on cities imposing reasonable restrictions on STLUs short of an outright ban. In fact, the court explicitly stated that cities, in concert with the Commission, are better-suited to enact STLU regulations

---

107. *Id.*

108. *Greenfield v. Mandalay Shores Cmty. Ass’n*, 230 Cal. Rptr. 3d 827 (Ct. App. 2018), *rev. denied* (June 13, 2018).

109. *Id.* at 828.

110. *Id.*

111. *Id.* at 828–29.

112. *Id.* at 831 (citing *Greenfield v. Mandalay Shores Cmty. Ass’n*, No. 56-2016-00485246-CU-MC-VTA (Aug. 12, 2016)).

or bans.<sup>113</sup> However, the court did not specifically discuss the proper interplay between the Commission and cities in regulating STLUs or whether municipal police powers allow locational limits on STLUs.

*C. Homeaway and Santa Monica*

In *Homeaway.com, Inc. v. City of Santa Monica*, Homeaway, a service similar to Airbnb, challenged a Santa Monica city ordinance requiring that hosts be present for the duration of their guests' stay, and that Homeaway not book a rental unit that is not on Santa Monica's STLU registry.<sup>114</sup> Homeaway procedurally and substantively challenged the ordinance on the grounds that it "restrains coastal access" without the authority of a coastal development permit.<sup>115</sup> Santa Monica defended its ordinance, citing STLUs' threat to the supply of affordable housing and the character of its neighborhoods.<sup>116</sup> Homeaway argued that Santa Monica's land use plan, as approved by the Commission under the Coastal Act, did not contemplate limits on STLUs. Therefore, enacting an ordinance that limits STLUs requires either a land use plan amendment that has been reviewed by the Commission, or a coastal development permit for "development," also reviewed by the Commission.<sup>117</sup>

While not ruling on the land use plan amendment issue, the U.S. District Court held that Homeaway had not sufficiently convinced the court that "development" includes "every possible change in the law that might result in a change to land use" to justify an injunction.<sup>118</sup> The Ninth Circuit Court of Appeals recently affirmed the decision without reaching the merits of Homeaway's claims. Because Homeaway was filing for an injunction against Santa Monica and primarily relied on opinion documents from the Commission, the briefing and ruling are not specific enough to definitively put the issue of STLU regulation to rest.

---

113. *Id.*

114. *Homeaway.com, Inc. v. City of Santa Monica*, No. 2:16-cv-06641-ODW, 2018 WL 1281772, at \*1-2 (C.D. Cal. Mar. 9, 2018).

115. *Id.* at \*4.

116. *Id.* at \*2.

117. *Id.* at \*4.

118. *Id.*



This case indicates that federal district courts may be skeptical of the Commission's position that all STLU regulations constitute "development" under the Coastal Act. This case also directly conflicts with the *Mandalay Shores* court's position on the correct interpretation of "development." One way to reconcile the rulings is that the regulation at issue in *Mandalay Shores* was an outright ban posing actual changes in use, whereas Santa Monica only imposed restrictions posing a theoretical change in access, depending on whether long- or short-term occupancy affected access.

#### *D. San Clemente*

In July 2018, a property owner challenged San Clemente's STLU regulations, arguing that the regulations violated the Coastal Act.<sup>119</sup> The ordinances limited STLUs to certain zones within the city that are proximate to commercial facilities and public transportation.<sup>120</sup> The Commission had not approved the specific regulations. Plaintiffs argued that the ordinances constituted "development" without a coastal development permit and sought an injunction to block their enforcement.<sup>121</sup> Dismissing the application for relief, the court held that the Commission's function with respect to cities is limited by the Coastal Act to quasi-judicial review of LCPs and issuing coastal development permits until an LCP is approved.<sup>122</sup> However, the Coastal Act does not preempt cities' constitutional police power absent a clear conflict.<sup>123</sup> The court held that a change in local regulations governing the potential use of land does not constitute "development" under the Coastal Act.<sup>124</sup>

This case is a district court ruling and a review of likelihood of outcomes in a pre-trial motion for an injunction and is therefore not precedentially binding. However, it provides another example of courts' unwillingness to consider any and all local regulations as "development" under the Coastal Act and thus preempted by

---

119. *Anthem Sales & Mgmt., LLC v. City of San Clemente*, No. SACV 18-01359-CJC(JDEx), at \*1 (C.D. Cal. Aug. 24, 2018).

120. *Id.* at \*3.

121. *Id.* at \*6.

122. *Id.*

123. *Id.*

124. *Id.*

Commission authority. This case also directly conflicts with the interpretation of “development” in *Mandalay Shores*. However, again, San Clemente’s ordinances did not outright ban STLUs, and the authority issuing the restriction was a city, not a private entity. The source of authority is especially important in light of the court’s statement that the Coastal Act does not preempt cities’ police power absent clear conflict, whereas homeowners’ associations do not enjoy such restricted oversight from the Commission.

#### E. Case Consolidation

Although controlling precedent, *Mandalay Shores* seems to be an easily distinguishable outlier from the Santa Monica and San Clemente cases. First, the court in *Mandalay Shores* dealt with an STLU ban under authority derived from private ownership. This more closely resembles *Martins Beach* in which a private owner restricted access through their own private property. In contrast, Santa Monica and San Clemente’s STLU restrictions were enacted under traditional city police power. Second, neither Santa Monica nor San Clemente’s restrictions constituted outright STLU bans. In contrast, the *Mandalay Shores* homeowners’ association outright banned STLUs in their community. Third, while the court in *Mandalay Shores* readily accepted the inclusion of homeowners’ association STLU bans in their interpretation of “development” under the Coastal Act, courts reviewing city STLU restrictions refused to do so. This could indicate a willingness on the courts’ part to balance the Commission’s authority to preserve coastal access against cities’ traditional authority to regulate land use, land use adjacencies, and the general public welfare through business regulations and use regulations.

The court in *Mandalay Shores* took an aggressive stance on the interpretation of development under the Coastal Act. Not only does this lead to absurd consequences as described above, but it reduces cities’ traditional police authority to combat threats to public welfare.

*Mandalay Shores*, *Martins Beach*, and the Commission’s inclusion of city ordinances in “development” represent a troubling trend. All three exemplify the Commission’s assumed authority to prevent people from doing nothing with their land, or in other words, its assumed authority to require that people allow public

access to their land. Although the statutory definition of “development” is broad, it should not be so broad as to give the Commission near general police power over the coastal zone, either by directly prohibiting property owners’ actions or tailoring city ordinances through the coastal development permitting process. This is a stark departure from the backseat role envisioned in *Hermosa Beach*, in which the Commission’s preemptive authority over city affairs is limited to LCP approval and development permitting, not full police power.

## VI. STLU EXTERNALITIES

Courts have yet to rule definitively on whether local STLU regulations constitute “development” under the Coastal Act. However, courts should eliminate this legal ambiguity in favor of acknowledging some use of city police power to allow cities to address significant threats to public welfare posed by STLUs. STLUs pose a threat to the supply of affordable housing, disrupt community character, and generate nuisance complaints.

### A. STLUs Threaten Public Welfare

STLUs pose a variety of threats to public welfare. STLUs threaten the supply of affordable housing, threaten community character, and lead to neighbor nuisance complaints. These threats to public welfare must be stopped by STLU regulation.

STLUs threaten cities’ ability to provide affordable housing. Each home converted to an STLU is essentially removed from the market and added to cities’ hotel supply.<sup>125</sup> This not only decreases the housing supply in coastal communities but can also lead to rent increases and pressure on owners occupying their own homes to convert them to STLU uses.<sup>126</sup> In San Francisco, one quarter of vacant homes in 2015 were filled by short-term renters, rather than left available as affordable housing to potential buyers or long-term renters.<sup>127</sup>

The housing market and development constraints in already crowded areas of the coastal zone provide no ready safety valves

---

125. Lee, *supra* note 7, at 230.

126. *Id.*

127. Cloonan, *supra* note 4, at 46.

to adequately offset these quick market changes eliminating long-term housing availability.<sup>128</sup>

So long as a property owner or leaseholder can rent out a room on Airbnb for cheaper than the price of a hotel room, while earning a substantial premium over the residential market . . . there is an overpowering incentive to list each unit in a building on Airbnb . . . . This . . . spurs displacement, gentrification, and segregation.<sup>129</sup>

The only real way to curb the effects of this overpowering market incentive is to offset it by regulations limiting the conversion of long-term housing to short-term vacation rentals.<sup>130</sup>

STLUs also pose a threat to community character. While the actual nature of a community's character is debatable, California's Sixth District Court of Appeals held that the "residential character" of a community is threatened when a significant amount of the homes are converted to STLU use.<sup>131</sup> Such primarily transient uses threaten the neighborhood's stability:

Short-term tenants have little interest in public agencies or in the welfare of the citizenry. They do not participate in local government, coach little league, or join the hospital guild. They do not lead a scout troop, volunteer at the library, or keep an eye on an elderly neighbor. Literally, they are here today and gone tomorrow – without engaging in the sort of activities that weld and strengthen a community.<sup>132</sup>

While it is difficult to differentiate the potential effects threatened by STLU guests (under thirty days) from thirty-one-day renters (a constitutionally protected use of property), cities regulating STLUs have assumed that neighborhood stability and owner investment are linked to neighbor-to-neighbor accountability, pride of ownership, and related public welfare considerations.<sup>133</sup>

---

128. Lee, *supra* note 7, at 235.

129. *Id.* at 230.

130. Cloonan, *supra* note 4, at 47.

131. Ewing v. City of Carmel-by-the-Sea, 286 Cal. Rptr. 382, 388 (Ct. App. 1991). In this case, the court loosely held that twelve percent of homes rented as STLUs was a significant enough amount to threaten the character of the community.

132. *Id.*

133. Cloonan, *supra* note 4, at 45.

STLU popularity often leads to a variety of neighbor complaints. Permanent residents see STLUs in their neighborhoods as sources of extraordinary noise, trash, and crime.<sup>134</sup> Others complain of scarce parking being taken up by travelers and party-goers.<sup>135</sup> More specific complaints include “dealing with loose dogs on their lawn, seeing people littering and hearing drunken fights in the early morning hours.”<sup>136</sup> Cities even complain that increased commercial activity in residential areas from STLUs strains local police, fire, and medical emergency resources.<sup>137</sup>

STLU hosts maintain that their guests are peaceful and neat and that transients’ impacts on neighborhoods are indistinguishable from the impacts of long-term residents.<sup>138</sup> Others argue that STLU guests do not pose any increased nuisance threat compared to everyday bad neighbors. Both produce noise, trash, crime, parked cars, dogs, and fights.<sup>139</sup> However, STLU guests differ in that they do not suffer any kind of reputational sanctions for upsetting neighborhood residents. Everyday bad neighbors, on the other hand, must face their neighbors at some point and account for their behavior. STLU guests can just leave at week’s end.

### *B. Threat Abatement*

Cities are well-suited and empowered to deal with the dynamic threats to public welfare posed by STLUs. Under their police power, cities have broad constitutional authority to address STLUs’ threat to public welfare by regulating behaviors such as noise and parking through nuisance regulations or by setting locational criteria that sites uses where they are most compatible. By contrast, the Commission has one mission only: to hold the California coast

---

134. *Id.* at 43.

135. Valerie Osier, *Potential Short-Term Rental Regulations Worry Long Beach Hosts*, LONG BEACH POST (July 21, 2018), <https://lbpost.com/news/city/potential-short-term-rental-regulations-worry-long-beach-hosts/>.

136. Cloonan, *supra* note 4, at 43 (quoting Amanda May Metzger, *Residents Make Arguments on Short-Term Rentals*, POSTSTAR (Aug. 20, 2014), [http://poststar.com/news/local/residents-make-arguments-on-short-term-rentals/article\\_2298004a-27ed-11e4-aa33-0019bb2963f4.html](http://poststar.com/news/local/residents-make-arguments-on-short-term-rentals/article_2298004a-27ed-11e4-aa33-0019bb2963f4.html)).

137. *Id.*

138. Phil Diehl, *Coastal Commission Tells Del Mar to Expand Short-Term Rentals*, SAN DIEGO UNION-TRIB. (June 17, 2018, 6:00 AM), <https://www.sandiegouniontribune.com/communities/north-county/sd-no-short-rentals-20180614-story.html>.

139. *Id.*

in public trust by using the Coastal Act and its policies to provide greater physical access, to limit development impairing that access, and to expand visitor accommodations wherever possible. The Coastal Act only obligates the Commission to consider STLU regulations' effects on public access, not the general public welfare.

Cities address STLUs' threat to the supply of affordable housing by imposing durational limits. A durational limit may take the form of a fixed number of days per year a host can rent out their home.<sup>140</sup> This type of regulation addresses the problem of investors purchasing property solely to convert it to year-round STLU use by requiring at least some owner occupation during the course of the year, even when that occupation is less profitable.<sup>141</sup> This regulation also incentivizes property owners to occupy their properties for the rest of the year, rather than leaving them vacant in the off-season. Although this type of limitation might decrease the amount of available STLUs during certain seasons, it would not actually decrease affordable accommodations if the STLUs would otherwise normally be left vacant. Durational limits can also protect community character because they force STLU owners to occupy their homes for part of the year and reduces the amount of transient traffic.

Cities can address nuisance concerns by imposing a minimum-length stay.<sup>142</sup> For example, a three-day minimum stay requirement essentially forces guests to stay for an entire weekend and diminishes the "weekday rentals that likely annoy permanent residents."<sup>143</sup> Although this type of limitation could theoretically decrease public access to overnight accommodations for fewer than three days, it would not likely decrease the gross total amount of available STLUs.

Occupancy limitations can serve to limit the nuisance impact of STLU guests and protect community character. Occupancy limits dictate the maximum amount of people who can stay at a given STLU or even the amount of people allowed to be present at an STLU at the same time.<sup>144</sup> These types of limits prevent the raucous

---

140. Cloonan, *supra* note 4, at 47-48.

141. *Id.* at 48.

142. *Id.*

143. *Id.*

144. *Id.* at 50.

parties or spring break getaways that bother neighbors.<sup>145</sup> Other occupancy limits may require a host to be present on an STLU property during guests' rental period.<sup>146</sup> However, STLU guests seem to prefer rentals of the entire residence, without a host present.<sup>147</sup> Therefore, this type of regulation would likely result in a decrease in STLU traffic.

City location limitations can prevent STLUs' adverse effects on primarily residential neighborhoods' community character. Location limitations can function as a part of normal zoning ordinances or fit as a part of a permitting process.<sup>148</sup> This type of regulation prevents STLU impacts on neighbors by limiting STLU use to areas that can accommodate visitors. It can also benefit consumers by giving them better access to transportation and restaurants.

While cities have the power to address STLUs' threat to public welfare in a variety of ways, the Commission is only obligated to provide public access.<sup>149</sup> The Commission has a statutory mandate and authority only to ensure that the Coastal Act's policies are carried out.<sup>150</sup> The Commission has no obligation in the current regulatory scheme to consider STLU effects on the affordable housing supply, nuisance, and threats to community character. These issues are best left to local communities to regulate with their concurrent police power jurisdiction.

## VII. CONCLUSION

While the proper balance between the Commission's authority to preempt city STLU restrictions and cities' police power remains unclear, public welfare considerations fall through the cracks of the current regulatory scheme. Although courts have historically interpreted "development" broadly, an interpretation that includes

---

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* at 51.

149. CAL. PUB. RES. CODE ANN. § 30001.5(c) (West 2018). This is an oversimplification. The Coastal Act sets out many policies. However, the Commission asserts its authority to permit city STLU restrictions under the Coastal Act's policy to provide overnight accommodations.

150. *San Diego Unified Port Dist. v. Cal. Coastal Comm'n*, 238 Cal. Rptr. 3d 671, 692-94 (Ct. App. 2018).

normal city regulations of nuisance and business, as the Commission suggests, would severely hinder cities' ability to respond to significant threats to public welfare.

The Commission's current prioritization of public access through STLUs over all else poses serious consequences for cities. Even if "development" is eventually construed so broadly as to include everyday city STLU limitations, a Coastal Act amendment or new state regulation could correct this imbalance by requiring the Commission to consider important city objectives in addition to the Coastal Act's policy of increasing overnight accommodations through STLUs. Such a change would prevent the Commission from increasing public access at the public's expense.

*Taylor Smith\**

---

\* J.D., 2020, J. Reuben Clark Law School, Brigham Young University.



