Cities Can Stem the Tide of Short-Term Coastal Rental Homes

Overview

The growing popularity of online rental platforms like Airbnb and HomeAway has increased short-term rentals in residential neighborhoods in California, especially along the coast.[1] Short-term rentals can lead to increased noise, trash, disorderly conduct, traffic congestion, and can deplete long-term rental housing in neighborhoods where they exist.[2] The city of Del Mar recently acted on this issue by passing an ordinance restricting short-term rentals in residential areas.[3] The Coastal Commission rejected the ordinance, contending that it impermissibly restricted public access to the coast.[4] Del Mar filed a writ petition to clarify the Coastal Commission's authority to reject the proposed ordinance.[5] This article analyzes the conflict between the Coastal Commission's mandate under the Coastal Act and a city's constitutional power to enact local land use regulations, and concludes that cities likely do not need commission approval to restrict short-term residential rentals because such ordinances do not contravene the Coastal Act.

The Coastal Act Prioritizes Public Access to the Coast

The legislature passed the Coastal Act in 1976, which the California Supreme Court characterized as "a comprehensive scheme to govern land use planning for the entire coastal zone of California."[6] The Coastal Act directs the Coastal Commission to conserve coastal resources and maximize public access to the coast.[7] It requires local governments in the coastal zone to prepare local coastal

programs that include zoning and land use plans that the Commission must then certify.[8]
The Coastal Act also assigns permitting authority to the commission for all development in the coastal zone.[9]

The Coastal Act sets standards for the commission
to use when analyzing the local coastal programs, program amendments, and proposed developments.[10]
The commission must prioritize public access: low cost visitor and recreational facilities are "encouraged," and public recreational facilities are "preferred."[11]
Similarly, private "visitor serving" facilities "have priority over" private residential, general industrial, and general commercial development.[12]
In a recent amendment to the Coastal Act, the legislature declared a "lack of affordable accommodations remains a barrier to coastal access."[13]

Del Mar Can Enact Local Ordinances That Do Not Implicate Statewide Concerns

The state constitution grants cities several
powers to enact local laws. Del Mar has a general police power under article XI, section 7.[14] And
Del Mar has charter city powers under article XI, section 5(a).[15]
Under the "home rule" provision, Del Mar has supremacy over its municipal affairs.[16] Yet
a city's power to enact local laws is not unlimited. In matters of statewide concern, state law will prevail. [17]
Here, if a court finds the legislature intended to fully occupy the field of public access to the coast, the Coastal Act will supersede Del Mar's ordinance restricting short-term residential rentals.[18]

The Coastal Commission Cannot Require Del Mar to Revise Its Ordinance

The commission rejected Del Mar's ordinance for
being too restrictive. The Coastal Commission could argue that it can preempt the ordinance because it conflicts with Coastal Act policies, either because it is an

amendment to the city's local coastal program and must be certified, or because it is a "development" under the Coastal Act that requires a permit. The commission can also argue that Del Mar's ordinance conflicts with the Coastal Act's enumerated goals of protecting coastal access and encouraging lower cost visitor and recreational opportunities.[19]
As explained below, none of those arguments should prevail.

A court is unlikely to find express preemption

The commission likely will argue that the Coastal Act expressly preempts Del Mar's ordinance because it should be broadly defined to encompass short-term rentals. Del Mar has the better argument here, because the legislature did not clearly manifest an intent to regulate short-term rentals when it passed the Coastal Act.

To determine whether Del Mar's ordinance is expressly preempted, a court will first look to the Coastal Act's language.[20] Section 30009 of the Coastal Act says it "shall be liberally construed to accomplish its purposes and objectives," including to "[m]aximize public access to and along the coast."[21]
Courts have also interpreted the Coastal Act's oversight scheme as necessary to ensure that state policies protecting public access to coastal resources prevail over local pressures.[22] Furthermore, the Coastal Act expressly requires Coastal Commission review of local land use plans for conformity with the statewide policy goals.[23]

The Act's wording demonstrates an intent to allow local governments to develop land use policies. Although the Coastal Commission can review local coastal programs, the commission cannot "diminish or abridge" a local government's power to establish the "precise content" of its land use plan.[24]
Neither of the Coastal Act's policies protecting lower cost visitor facilities explicitly requires a city to allow short-term residential rentals.[25]
The Coastal Act does not diminish Del Mar's ability to choose the precise

method of increasing access to the coast. Del Mar could restrict short-term rentals and increase coastal access by providing other public access opportunities. For example, Del Mar could expand public parks and areas zoned for other types of visitor accommodations. Such actions would advance the legislature's directive. When the legislature addressed a lack of affordable accommodations in a recent Coastal Act amendment, it mentioned various accommodations, including hotels, motels, hostels, cabins, and camping opportunities.[26] The legislature omitted short-term rentals from its list, which supports Del Mar's argument its ordinance is not expressly preempted.

No actual conflict exists

Del Mar can also argue an absence of conflict between the Coastal Act and its ordinance. Before reaching the question of statewide concern, a court will evaluate whether a genuine conflict exists between a charter city measure and a state law.[27] City and state initiatives conflict when they cannot be reconciled "short of choosing between one enactment and the other."[28] The commission may argue that Del Mar's restrictions on short-term rentals conflict with the Coastal Act policies that emphasize the need to protect lower cost visitor facilities because they would conceivably reduce the availability of overnight accommodations for visitors who wish to stay at a house or cannot afford to stay an entire week.[29] The commission could show that short-term rentals are more affordable than hotels and better serve people who require or prefer the amenities of houses.

Yet the legislature intended the commission to use the Coastal Act's policies as a guide to evaluate local coastal programs — not to mandate or prohibit specific land uses.[30] The Coastal Act acknowledges the possibility of conflicting policies and allows for a resolution that is "on balance" most protective of coastal resources.[31]

This means that the commission's policy interpretation is not outcome-determinative. Del Mar can argue that on balance the ordinance would protect the overall quality of the coastal environment in residential areas, and that other components of its local land use plans ensure that public access to the coast is expanded. On that basis, a court could uphold the ordinance as consistent with the Coastal Act, rather than resolving a dispute between them.

The evidence does not support implied preemption

The term "short-term rentals" do not appear in the Coastal Act, so the commission probably must make an implied preemption argument. Del Mar has a good argument that the policies regarding low-cost visitor facilities do not encompass the subject of short-term rental regulation to the exclusion of local action. Allowing residents to rent out their homes is just one of many possible ways a city can enable coastal access. And the Coastal Act recognizes a local government policy-making role in regulating land use: it requires a city's land use plan to adhere to its development priorities "only to the extent necessary to achieve the basic state goals."[32] If Del Mar can show its land use plans enable greater public access to the coast, then its ordinance restricting short-term rentals is an acceptable regulation. The legislature acknowledged that it is necessary to rely on local government for local land use planning procedures and enforcement to achieve "maximum responsiveness to local conditions."[33] A court would read this provision as legislative intent to allow cities to retain the ability to make policy decisions in accordance with local conditions. City governments can zone short-term rentals according to local needs even if the commission disagrees with the precise details of the regulations.

The commission's argument that the legislature impliedly manifested its intent to fully occupy the area of short-term rental regulation should fail. A court will look to the

following indicia of legislative intent: the general law so completely covers the subject as to clearly indicate the matter is exclusively one of state concern; the general law partially covers the subject in terms clearly indicating a paramount state concern that will not tolerate further local action; or the general law partially covers the subject and the adverse effect of a local ordinance on transient citizens of the state outweighs the possible municipal benefit.[34]

Here, the legislature did not completely cover the subject of short-term rentals because it did not explicitly address them in the Coastal Act. The commission can argue that Del Mar's ordinance is nonetheless preempted because the Coastal Act partially covers the subject in terms that indicate a paramount state concern. The legislature made maximizing public access to the coast a main goal of the Coastal Act and required the commission to prioritize public access when certifying programs and issuing development permits.[35] The commission can argue that by emphasizing how a lack of affordable accommodations acts as a barrier to coastal access, the legislature has indicated a preference for fewer restrictions on short-term rentals in areas with insufficient low-cost accommodations. The commission could also argue the Coastal Act implicitly preempts the ordinance because the adverse effects on transient citizens outweigh the possible municipal benefits.[36] The commission can rely on the legislature's declaration that a diminished supply of low-cost accommodations is a barrier to coastal access to argue Del Mar's ordinance will exacerbate the barriers to coastal access that exist for many Californians and out-of-state visitors.[37]

Del Mar may respond that the ordinance will result in significant benefits to its residents because it addresses the problems caused by online rental platforms, including increased noise, traffic, and disorderly conduct. The ordinance could arguably have more far-reaching benefits because it addresses the statewide dearth of affordable housing by preventing expensive short-term vacation rentals from

replacing more affordable long-term rentals. If Del Mar can present evidence that the ordinance provides benefits that outweigh adverse effects on transient citizens, then it will have a stronger argument that regulation of short-term rentals should not be preempted by the Coastal Act.

There is no clear indication that the legislature intended to preempt local regulation of short-term rentals when it enacted the Coastal Act. The Act contains no express reference to short-term rentals and the statutory language does not show an intent to preempt local regulation on the subject. Instead, the Act specifically recognizes the need for cities to zone as they see fit. Although the legislature recently declared that a lack of affordable accommodations remains a barrier to coastal access, it did not mandate that cities allow short-term residential rentals as a solution. A court is unlikely to conclude that the legislature intended the Coastal Act to be "so overshadowing that it obliterates all vestiges of local power as to a subject where municipalities have traditionally enjoyed a broad measure of autonomy."[38]

Del Mar's Ordinance Passes the Municipal Affairs Test

Even if a court found a conflict between the Coastal Act and Del Mar's ordinance, the city could argue that its ordinance should prevail over state law because regulating short-term rentals is a municipal affair.[39] The ordinance involves land use planning and zoning, which have been traditionally viewed as necessary and appropriate municipal government powers.[40] Where a charter city's initiative implicates a municipal affair, under the "municipal affairs test," the court must next analyze whether the conflicting statute implicates a statewide concern.[41] A charter city initiative is prohibited when a statute addressing a statewide concern is "reasonably related" and "narrowly tailored" to its resolution.[42]

The commission may argue that land use affecting coastal resources is an issue of statewide concern, and that Del Mar's ordinance would reduce coastal access for everyone from outside the city.[43] The Coastal Act's broad language about protecting lower cost visitor facilities supports the commission's argument that it addresses a statewide concern.[44] A court is likely to find that the Coastal Act implicates a statewide concern related to preserving access to the state's coastline.

But the Coastal Act is not narrowly-tailored to the issue of short-term rentals. Del Mar should argue that although the Act provides guidelines to inform local decision-making, they do not displace a charter city's ability to decide the precise content of its land use and zoning laws. If they did, chartered cities would lose almost all power to craft regulations affecting land use. Since courts do not interpret state laws to render constitutional provisions superfluous, a court will likely find that the specific issue of short-term rental regulation is not a statewide concern.

Even if the Coastal Act covers short-term rental regulation, Del Mar's ordinance may still be upheld based on how the Coastal Act allocates authority between the commission and local governments. The statutory scheme imposes some procedural restrictions but leaves cities with a measure of local autonomy.[45] The Coastal Act neither mandates nor prohibits specific coastal land uses, which shows that the legislature anticipated that local governments would continue to control the location of particular land uses. When a court reviews the meaning and scope of the Coastal Act, it is likely to conclude that the state law is not "narrowly tailored" to the concern of short-term rentals.[46] Consequently, Del Mar need not yield to the commission's requirement to permit more lenient short-term rental regulations as long as there are sufficient lower-cost visitor facilities.

Del Mar's Ordinance is Not a Development

Even if a court finds that state law does not preempt Del Mar's ordinance, the commission could argue that the regulation constitutes "development" under the Coastal Act and cannot proceed without a permit. The Coastal Act defines development as "the placement or erection of any solid material or structure" or "change in the density or intensity of use of land."[47]

There is some support for the commission's argument that the ordinance changes the intensity of use of land because it would reduce the number of visitors to the city's residential coastal areas. For example, in *Greenfield v. Mandalay Shores Community Association*, the court adopted a broad definition of "development" when it noted a homeowners association's resolution banning short-term rentals would change the intensity of use and access to single family residences along the coast.[48] The court held that "development" under the Coastal Act "is not restricted to activities that physically alter the land or water" and relied on cases where courts found locking a gate and posting "no trespassing" signs on property that the public had regularly used to access the beach required a permit.[49]

Yet Del Mar could convincingly argue its ordinance is not a development. Del Mar can distinguish the cases the *Greenfield* court relied on, because unlike access pathways, the public never had guaranteed access to private coastal residences. Homeowners make the decision whether to rent out a residence, which inevitably results in only a small percentage of the public having this kind of access to the coast. In *HomeAway.com, Inc. v. Santa Monica* the court rejected the online rental platform plaintiffs' claim that Santa Monica's short-term rental regulation amounted to "development" because it found no support for departing from the "common sense definition and understanding of the term."[50] Although this ordinance may change the intensity of land use, Del Mar could argue that adopting such a broad view of "development" would be contrary to legislative intent, because it would subject all city land use regulations to commission

review. This proves too much, and it is inconsistent with the Coastal Act's clear language that general land use plans and zoning decisions are to be reviewed within the context of a local coastal program, not as individual developments.

The commission could argue that, as the administrative agency charged with implementing the Coastal Act, its interpretation of the statute should be given considerable weight.[51] But the commission's view is not entitled to deference here because determining the scope of the agency's authority is a court's task.[52] No case holds that land use regulations constitute "development" under the Coastal Act. And the statutory scheme gives permitting authority to both the commission and local governments. Accordingly, it is unlikely that a court will conclude that Del Mar's ordinance requires a coastal development permit.

Conclusion

Due to the inherently local nature of land use, the Coastal Act highlights the tension that exists between statewide policies and the constitutional power of local governments. A court will likely conclude that the Coastal Act does not prohibit Del Mar's ordinance restricting short-term rentals. Additional conflicts over meaningful coastal access are likely, given that the priorities of private property owners, online rental platforms, local governments, and the commission are often not aligned. Here, it is unnecessary to reduce local government power to achieve the Coastal Act's objectives: Del Mar's ordinance can be upheld as consistent with those goals.

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Jill Replogie, *Do Californians Have a Right to Airbnb on the Coast?*, KQED (Feb. 3, 2017) https://www.kqed.org/news/11300011/do-californians-have-a-right-to-airbnb-on-the-coast.

[2] *Ibid.*

[3] Del Mar is a small coastal city approximately twenty miles north of San Diego. https://www.delmar.ca.us/. Phil Diehl, *Del Mar Takes State to Court Over Short-Term Rentals*, The San Diego Union-Tribune (Jul. 19, 2018) https://www.sandiegouniontribune.com/communities/north-county/sd-no-delmar-court-20180719-story.html.
Lori Weisberg, *How Will San Diego Fend off Coastal Commission, Legal Challenges to Airbnb Rules?*, The San Diego Union-Tribune (Jul. 21, 2018) https://www.sandiegouniontribune.com/business/tourism/sd-fi-airbnb-cities-regulations-20180721-story.html.

[4] Lori Weisberg, *How Will San Diego Fend off Coastal Commission, Legal Challenges to Airbnb Rules?*, The San Diego Union-Tribune (Jul. 21, 2018) https://www.sandiegouniontribune.com/business/tourism/sd-fi-airbnb-cities-regulations-20180721-story.html.
Del Mar's ordinance would limit vacation rentals in residential areas to a minimum of seven days at a time and no more than twenty-eight days per year. The Coastal Commission rejected the ordinance and proposed changes that would set the minimum stay at three days and the yearly maximum at 100 days.

[5] Petition for Writ of Mandamus, *The City of Del Mar v. The California Coastal Commission* (2018).

[6] *Pacific Palisades Bowl Mobile Estates, LLC v. City of Los Angeles* (2012) at 793; Pub. Resources Code § 30103. The coastal zone extends inland generally 1,000 yards from the coast. All further statutory references are to the Coastal Act contained in the Public Resources Code unless otherwise indicated.

[7] A 1972 voter initiative (Proposition 20) established the Coastal Commission, an independent quasi-judicial agency. The adoption of the Coastal Act made this commission permanent. §§ 30001, 30001.5(c); *Ibarra v. Cal. Coastal Com.* (1986) at 693.

[8] §§ 30500, 30108.6.

[9] §§ 30500, 30108.6, 30600, subd. (a).

[10] See §§ 30512, subds. (a)–(c); 30514; 30620.

[11] § 30213.

[12] § 30222. Private recreational facilities do not have priority over "agriculture or coastal-dependent industry."

[13] § 31411, subd. (d), added by Stats. 2017, ch. 838, § 3, eff. Jan. 1, 2018. The legislature emphasized that "[l]ower cost accommodations, including hotels, motels, hostels, cabins, and camping opportunities, are essential elements of coastal and park access because they enable Californians and visitors from a variety of backgrounds, including those of low and moderate income, to enjoy California's beaches and parks and experience the full range of recreational, educational,

spiritual, and other experiences offered."

[14]
Land use regulation is a legitimate exercise of a city's constitutional police power if it provides for the public health, safety and general welfare of its citizens. *Associated Home Builders etc., Inc. v. City of Livermore* (1976) at 604; *Village of Euclid v. Ambler Realty Co.* (1926) at 388; *Miller v. Board of Public Works* (1925) 195 Cal. 477, 488.

[15]
Del Mar was incorporated as a charter city, but the charter was limited to imposing an admissions tax at its fairgrounds. Voters approved a charter amendment related to land use and zoning in November 2018. Bianca Kaplenek, *Del Mar Seeks Land-Use Changes With Charter Amendment*, The Coast News (Apr. 12, 2018) https://www.thecoastnews.com/del-mar-seeks-land-use-changes-with-charter-amendment/; Lexy Brodt, *Gaasterland, Worden Claim Del Mar Council Seats, Measure R Defeated*, The Coast News (Nov. 8, 2018) https://www.thecoastnews.com/gaasterland-worden-claim-del-mar-council-seats-measure-r-defeated/.

[16] See *Cal. Fed. Savings & Loan Assn. v. City of Los Angeles* (1991) at 17 (*Cal. Fed. Savings*); *Bishop v. City of San Jose* (1969) at 61; *Fisher v. City of Berkeley* (1984) at 704.

[17] *Cal. Fed. Savings, supra* note 16, at 7;*Professional Fire Fighters, Inc. v. City of Los Angeles* (1963) at 292, fn. 11.

[18] See

Viacom
Outdoor Inc. v. City of Arcata (2006) at 303; see also *Cal. Fed. Savings, supra* note 16, at 13.

[19]
§§ 30213, 30222.

[20] *Brown*
v. Kelly Broadcasting Co. (1989) at 724.

[21] §
30001.5.

[22] See *City*
of Dana Point v. Cal. Coastal Com. (2013) at 186.

[23] §
30512.

[24] §
30512.2.

[25]
§§ 30213, 30222.

[26] §
31411.

[27] See *Cal. Fed. Savings, supra* note 16, at 16–17.

[28] *Id*. at 17.

[29] §§
30213, 30222.

[30] §
30512.2, subd. (a).

[31]
§ 30007.5.

[32] § 30512.2.

[33] §
30004.

[34] *People*
ex rel. Deukmejian v. County of Mendocino (1984) at 485 (*Deukmejian*).

[35] §§ 30001.5, 30200.

[36] See *Deukmejia*n*, supra* note 34.

[37] §
31411.

[38]
See *Waste*
Resource Technologies v. Dept. of Public Health (1994) at 306.

[39] Cal. Const., art. XI, § 5, subd. (a); see *Cal. Fed. Savings, supra* note 16.

[40]
See *City*
of Los Angeles v. State of California (1982) at 533.

[41] See *Cal. Fed. Savings, supra* note 16, at 17.

[42] *Ibid*.

[43] See *Bishop v. City of San Jose, supra* note 16; see also *In People ex rel. Younger v. County of El Dorado* (1971) at 498.

[44]
See *State*
Building and Construction Trades Council v. City of Vista (2012)

at 564.

[45]
§ 30512; See *Committee of Seven Thousand v. Superior Court* (1988) at 511.

[46] See *Cal. Fed. Savings, supra* note 16, at 24.

[47] § 30106.

[48] See *Greenfield v. Mandalay Shores Community Assn.* (2018) at 901.

[49] *Id.* at 900.

[50] See *HomeAway.com, Inc. v. Santa Monica* (2018) at 4, app. pending (*HomeAway*)

[51] See *Reddell v. Cal. Coastal Com.* (2009) at 965–966.

[52] See *HomeAway, supra* note 57, at 5; *Yamaha Corp. of America v. State Bd. Of Equalization* (1998) at 11, fn. 4 (conc. opn. of Mosk, J.).