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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

SAN FRANCISCO SRO HOTEL
COALITION, et al.,

Plaintiffs and Appellants,

v.

CITY AND COUNTY OF SAN
FRANCISCO, et al.,

Defendants and Respondents.

A151847

(San Francisco County
Super. Ct. No. CPF17515656)

In 2017, the City and County of San Francisco (City) amended section 41.20 of the San Francisco Administrative Code to require the rental of residential single room occupancy units (SROs) for terms of at least 32 days, when protections under the City's rent control ordinance arise. Previously, SROs could be rented for periods between seven and 31 days. Plaintiffs San Francisco SRO Hotel Coalition (Coalition), Hotel des Arts, LLC and Brent Haas brought this action for administrative mandate, seeking, among other things, the invalidation of the 2017 Amendments as an unlawful taking under article 1, section 19 of the California Constitution. We reverse the superior court's order denying plaintiffs' request for a preliminary injunction enjoining the enforcement of the 2017 Amendments on the ground that plaintiffs were unlikely to prevail. We remand the case for a determination of the balance of hardships.

I. BACKGROUND

An SRO is a small hotel room that typically lacks a private kitchen or bathroom, similar to a college dormitory room. Many low income, elderly and disabled persons reside in SROs throughout the City. Our Supreme Court has recognized that while SRO units “may not be an ideal form of housing, such units accommodate many whose only other options might be sleeping in public spaces or in a City shelter.” (*San Remo Hotel v. City and County of San Francisco* (2002) 27 Cal.4th 643, 674 (*San Remo*).

In 1979, responding to a “severe shortage” of affordable rental housing for low income, elderly and disabled residents, the San Francisco Board of Supervisors imposed a temporary moratorium on the conversion of residential hotel rooms into tourist hotel rooms. (S.F. Admin Code, §§ 41.3(a)-(g).) In 1981, the City enacted a permanent Hotel Conversion Ordinance (HCO) to regulate future residential hotel room conversions. (S.F. Ord. No. 330-81, S.F. Admin. Code, § 41.1 et seq.)

The HCO required hotel owners in San Francisco to identify all residential hotel units as of September 23, 1979, which were then placed on a registry. (S.F. Admin. Code, § 41.6.) A “Residential Unit” was defined as a “guest room” occupied by a “Permanent Resident” on September 23, 1979. (S.F. Admin. Code, former § 41.4(q).) A “Permanent Resident” was defined as “[a] person who occupies a guest room for at least 32 consecutive days.” (S.F. Admin. Code, former § 41.6(n).) Under the San Francisco Rent Control Ordinance, “housing accommodations in hotels, motels, inns, tourist houses, rooming and boarding houses” are subject to rent control and related protections “at such time as an accommodation has been occupied by a tenant for [thirty-two] 32 continuous days or more.” (S.F. Admin. Code, § 37.2(r)(1).)

The HCO provided that residential hotel rooms could only be converted into tourist units by obtaining a permit with the Department of Building Inspection, which in turn could only be obtained if the owner constructed new residential units, rehabilitated existing residential units, or paid an “in lieu” fee to the City’s Residential Hotel Preservation Fund. (S.F. Admin. Code, §§ 41.4, 41.12-41.13, 41.20) Additionally, Section 41.20(a) of the HCO provided, “(a) Unlawful Actions. It shall be unlawful to: [¶]

(1) Change the use of, or eliminate a residential hotel unit or to demolish a residential hotel unit except pursuant to a lawful abatement order, without first obtaining a permit to convert in accordance with the provisions of this Chapter; [¶] (2) Rent any residential unit for a term of tenancy less than seven days, except as permitted by Section 41.19 of this Chapter; (3) Offer for rent for nonresidential use or tourist use a residential unit except as permitted by this Chapter.” (Former S.F. Admin. Code, § 41.20(a).)¹ The HCO was the subject of numerous lawsuits, and the courts have upheld the ordinance against claims that it violates the principles of due process and equal protection (*Terminal Plaza Corp. v. City and County of San Francisco* (1986) 177 Cal.App.3d 892, 907–908) or effects an unconstitutional taking of property without just compensation (*id.* at p. 912; *Bullock v. City and County of San Francisco* (1990) 221 Cal.App.3d 1072, 1089 (*Bullock*)).

In 2017, the City revisited the HCO due to concerns that certain SROs were being advertised and rented as tourist units. As relevant here, section 41.20(a) was amended as follows: “(a) Unlawful Actions. It shall be unlawful to: [¶] (1) Change the use of, or eliminate a residential hotel unit or to demolish a residential hotel unit except pursuant to a lawful abatement order, without first obtaining a permit to convert in accordance with the provisions of this Chapter; [¶] (2) Rent any residential unit for Tourist or Transient Use a term of tenancy less than seven days except as permitted by Section 41.19 of this Chapter; [¶] (3) Offer for rent for ~~nonresidential use or T~~tourist or Transient Use a residential unit except as permitted by this Chapter.” (S.F. Admin Code, § 41.20(a), 2017 Amend.) The amended HCO defined “Tourist or Transient Use” as “[a]ny use of a guest

¹ Section 41.19 allowed for temporary tourist rentals of residential units for less than seven days during the summer season (May 1 through September 30) so long as those units were vacant due to the voluntary vacation or lawful eviction of a permanent resident. (S.F. Admin. Code, former § 41.19(a)(3)(b).) A 1990 revision to the HCO restricted summer tourist rentals of residential units by, among other things, limiting such rentals, absent special permission from the City’s Bureau of Building Inspection, to 25 percent of a hotel’s residential rooms. (S.F. Admin. Code, former § 41.19(a)(3).) The revision also allowed a limited number of residential rooms to be rented to tourists during the winter months as well. (S.F. Admin. Code, § 41.19(c).) (See *San Remo, supra*, 27 Cal.4th at pp. 651–652.)

room for less than a 32-day term of tenancy by a party other than a Permanent Resident.” (S.F. Admin. Code, § 41.4.)²

Plaintiffs filed the instant action seeking a writ of administrative mandate and declaratory relief. The first cause of action alleged that the 2017 Amendments to the HCO was a “project” under the California Environmental Quality Act (CEQA; Pub. Res. Code, § 21000 et seq.) requiring environmental review. The second cause of action, brought as to plaintiffs Coalition and Hotel des Arts only, alleged that the 2017 Amendments amounted to a taking of private property without just compensation under the California Constitution (Cal. Const., art. 1, § 19) to the extent they precluded rentals for seven days to 31 days, which had been allowed under the previous law. The third and fourth causes of action, brought as to plaintiffs Coalition and Hotel des Arts, sought injunctive and declaratory relief based on a violation of due process and equal protection. The fifth cause of action, brought as to plaintiffs Coalition and Hotel des Arts, sought injunctive relief for a violation of civil rights under 42 United States Code section 1983.

Plaintiffs sought a preliminary injunction to enjoin the enforcement of the 2017 Amendments with respect to existing SROs. They argued the 2017 Amendments infringed upon their vested right as owners and representatives of the owners of residential hotel rooms to rent SROs for periods of seven to 31 days under the former version of the HCO, thus eliminating a lawful use of the land without just compensation or some other mechanism to avoid constitutional infirmity. Plaintiffs argued that by requiring SROs to be offered for an initial rental period of at least 32 days, the City was effectively forcing them out of the hotel business and into the landlord/tenant business, “subject to the onerous requirements of the Rent Ordinance, including eviction controls.”

² The 2017 Amendments also eliminated seasonal tourist rentals of vacant residential units for hotels which had violated the HCO during the last calendar year (S.F. Admin. Code, § 41.19(a)(3)(D)), updated the requirements for conversion permit applications (*id.*, § 41.12), authorized the use of administrative subpoenas to compel production of hotel records (*id.*, § 41.9(a), 41.11(c)), and updated provisions regarding penalties and administrative costs (*id.*, §§ 41.11(g), 41.20(c)). These provisions are not at issue in this appeal.

The trial court denied the preliminary injunction. “The pre-2017 Amendments version of the [HCO] did allow certain types of rentals of residential units that are now prohibited by the Amendments, e.g., seven day[s] (or longer) rentals for residential use to non-permanent residents. However[,] plaintiffs have not demonstrated the existence of a vested right of which they have been wrongfully and unlawfully deprived. Because plaintiffs failed to demonstrate a likelihood of succeeding on the merits of their takings claim, the Court may not issue a preliminary injunction and thus it does not reach the issue of whether the balance of harms favors granting a preliminary injunction.”

II. DISCUSSION

A Appealability and Standard of Review

The general purpose of a preliminary injunction is to preserve the status quo pending a determination on the merits of the action. (*Jamison v. Department of Transportation* (2016) 4 Cal.App.5th 356, 361 (*Jamison*)). “ “In deciding whether to issue a preliminary injunction, a trial court must evaluate two interrelated factors: (i) the likelihood that the party seeking the injunction will ultimately prevail on the merits of his [or her] claim, and (ii) the balance of harm presented, i.e., the comparative consequences of the issuance and nonissuance of the injunction. [Citations.]” [Citation.] “The trial court’s determination must be guided by a ‘mix’ of the potential-merit and interim-harm factors; the greater the plaintiff’s showing on one, the less must be shown on the other to support an injunction. [Citation.]” [Citation.] However, ‘[a] trial court may not grant a preliminary injunction, regardless of the balance of interim harm, unless there is some possibility that the plaintiff would ultimately prevail on the merits of the claim.’ ” (*Id.* at pp. 361–362.)

An order denying a preliminary injunction is appealable. (Code Civ. Proc., § 904.1, subd. (a)(6).) “ ‘Ordinarily, appellate review is limited to whether the trial court abused its discretion in evaluating the foregoing factors. [Citation.] “Occasionally, however, the likelihood of prevailing on the merits depends upon a question of pure law rather than upon [the] evidence to be introduced at a subsequent full trial. This issue can arise, for example, when it is contended that an ordinance or statute is unconstitutional on

its face and that no factual controversy remains to be tried. ” ’ ” (*Jamison, supra*, 4 Cal.App.5th at p. 362.) Such questions of law are subject to de novo review. (*Ibid.*)

B. Were Plaintiffs Likely to Prevail on Their Takings Claim?

Plaintiffs³ contend the trial court erred in concluding they were not likely to prevail on the merits of their takings claim. They argue that by prohibiting the rental of residential units for “tourist or transient use,” and by defining “tourist or transient use” to mean any rental to someone other than a “permanent resident,” i.e., a person who occupies a room for at least 32 days, the 2017 Amendments to the HCO impermissibly eliminated their business of renting residential units for periods between seven and 31 days as they had been allowed to do under the previous version of the Ordinance. Plaintiffs contend that because 32-day rentals are subject to San Francisco’s rent control ordinance, this will change the nature of their business in significant and detrimental ways. We agree.

We begin by analyzing the extent to which the 2017 Amendments changed the law. Key to this is our interpretation of San Francisco Administrative Code former section 41.20(a)(2) and (a)(3). Section 41.20(a)(2) made it illegal to “[r]ent any residential unit for a term of less than seven days.” Section 41.20(a)(3) made it illegal to “offer for rent for nonresidential use or tourist use a residential unit.” The former version of the HCO does not define “nonresidential,” although it defines a “permanent resident” as someone who has lived in the room for 32 days or longer. Section 50519 of the Health and Safety Code (which is incorporated in Civil Code section 1940.1, cited by the City) defines a “residential hotel” as a hotel containing six or more units “intended or designed to be used, or which are used, rented, or hired out, to be occupied, or which are occupied, for sleeping purposes by guests, which is also the primary residence of those guests.”

Thus, there is more than one possible interpretation of the provision making it illegal to “offer for rent for nonresidential use or tourist use a residential unit” within the

³ Only two of the plaintiffs, the Coalition and Hotel des Arts, alleged inverse condemnation as a cause of action.

meaning of San Francisco Administrative Code, former section 41.20(a)(3). A use might be deemed illegal if a room was offered for a term of less than 32 days, the amount of time necessary to become a permanent resident, but this does not jibe with former section 41.20(a)(2)'s prohibition of a term of occupancy of less than seven days. Or it might be deemed illegal to offer a tenancy of less than seven days, which would be consistent with the period in section 41.20(a)(2). Or it could mean that it was illegal to offer the room as something other than a renter's primary residence, although as counsel for plaintiffs notes, this could be difficult to accurately and lawfully ascertain.

In the trial court below, the City offered another interpretation of "nonresidential" in San Francisco Administrative Code former section 41.20(a)(3), and argued that it has always required the occupants of residential rooms to be residents of San Francisco, making it illegal to offer residential rooms to persons who are not residents of San Francisco. In their respondent's brief, the City reiterated that the former version of the law required the owners of SROs to rent residential rooms to permanent residents of San Francisco. But this runs contrary to previous briefing filed in this Court by the City in 1997 and 1998, in which the City asserted that the former version of the HCO prohibited only rentals of less than seven days and equated the seven-day period of section 41.20(a)(2) with the demarcation between "residential" and "tourist" use. (*Tenderloin Housing Clinic v. Patel*, A177469/A080669, Applications to File Amicus Briefs.)

It appears the City has historically allowed the rental and offering of residential units for any period of seven days or longer, regardless of the reason for the rental, and has foregone the enforcement of San Francisco Administrative Code section 41.20(a)(3) to the extent that part of the HCO might be otherwise construed.⁴ The City does not now actively dispute this. The trial court found that the former version of the HCO "did allow certain types of rentals of residential units that are now prohibited by the Amendments,

⁴ Evidence Code section 623 provides, "Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it."

e.g., seven day (or longer) rentals for residential use to non-permanent residents,” although it disagreed that these rentals gave rise to a vested right that had been abridged. This is the interpretation of the former version of section 41.20 that we adopt: It precluded rentals of less than seven days, regardless of a showing of the renter’s purpose, and it is the seven-day period which demarcates residential from tourist rentals.

Having concluded that the former version of the HCO allowed rentals of seven days or more regardless of purpose, the 2017 Amendments effected a substantial change by making the minimum term 32 days unless the person was already a permanent resident. This means that shorter-term tenancies to nonpermanent residents are no longer allowed and that hotel owners will be subject to rent control at the end of the initial term of tenancy unless the occupant voluntarily vacates the premises or is lawfully evicted. Whether or not this is a desirable result, a subject on which we express no opinion (*Santa Monica Beach, Ltd. v. Superior Court* (1999) 19 Cal.4th 952, 962), it is certainly a change. The City minimizes the nature of this change, arguing that a room’s occupant could always refuse to leave before 32 days were up, regardless of the length of the original rental, and state law makes it illegal to move the occupant of an SRO for the purpose of evading rent control. (Civ. Code, § 1940.1, subd. (a).) But the former version of the HCO allowed hotel owners to target shorter-term, more traditional hotel stays by people who had another home. Someone who has another home seems very unlikely to make a room her residence or overstay the terms of the rental. The remote possibility that renters would behave as the City suggests does not change the fundamental nature of the business allowed under the statute.

A local government’s power to eliminate an existing land use through a new regulation is restricted: “[I]f the law effects an unreasonable, oppressive, or unwarranted interference with an existing use. . . the ordinance may be invalid as applied to that property unless compensation is paid. . . . [¶] Accordingly, a provision which exempts existing nonconforming uses ‘is ordinarily included in zoning ordinances because of the hardship and doubtful constitutionality of compelling the immediate discontinuance of nonconforming uses.’ ” (*Hansen Brothers Enterprises, Inc. v. Board of Supervisors*

(1996) 12 Cal.4th 533, 551–552.) In this context, a “nonconforming use” is “ ‘ ‘ ‘ a lawful use existing on the effective date of the [] restriction and continuing since that time in nonconformance to the ordinance.’ ” ” (*Id.* at p. 579.) “ ‘ [A] city seeking to eliminate nonconforming uses may pursue [one of] two constitutionally equivalent alternatives: It can eliminate the use immediately by payment of just compensation, or it can require removal of the use without compensation following a reasonable amortization period.’ ” (*United Business Com. v. City of San Diego* (1979) 91 Cal.App.3d 156, 179; see *Tahoe Regional Planning Agency v. King* (1991) 233 Cal.App.3d 1365, 1394–1395 (*Tahoe*).)

Plaintiffs rely on a number of authorities to support their argument that the 2017 Amendments to the Ordinance should have been accompanied by either compensation to hotel owners or a reasonable amortization period. In *Jones v. City of Los Angeles* (1930) 211 Cal. 304, the city rezoned the neighborhood in which the plaintiff was operating a sanitarium to prohibit residential mental health facilities, and the court ruled that compensation was required because the rezoning had “destroyed” or “eradicated” the business, rendering it completely without value. (*Id.*, at pp. 310, 314, 319.) In *City of Los Angeles v. Gage* (1954) 127 Cal.App.2d 442, 447–448, the city rezoned an area in which plaintiffs were operating a plumbing business, restricting the property to residential use only, and provided that nonconforming uses had to be eliminated within five years. The court upheld the zoning ordinance as a lawful exercise of the city’s police powers due to the amortization period, and reversed a trial court judgment denying the city’s suit for an injunction requiring the plaintiffs to cease operations. (*Id.* at pp. 447, 455, 460–462.) In *Livingston Rock & Gravel Co. v. County of Los Angeles* (1954) 43 Cal.2d 121, 123–128, the court held that the county was entitled to enforce a zoning provision that eliminated the operation of a plaintiff’s cement mixing plant as a permissible use, but provided an automatic exception allowing the plant to continue operations for 20 years. In *Castner v. City of Oakland* (1982) 129 Cal.App.3d 94, 96–97, the court upheld an order denying a petition for writ of mandate to compel the city to grant a conditional use permit to an adult bookstore following the enactment of an

ordinance that banned adult entertainment within 1,000 feet of a residential zone and provided a grace period of one year. Other cases cited by plaintiffs involve ordinances that required the physical removal of existing outdoor signage, upholding those ordinances when they provided for an adequate amortization period within which the sign owners could recoup their costs of the investment. (*National Advertising Co. v. County of Monterey* (1970) 1 Cal.3d 875; *Tahoe, supra*, 233 Cal.App.3d 1365; *National Advertising Co. v. County of Monterey* (1962) 211 Cal.App.2d 375; *City of Santa Barbara v. Modern Neon Sign Co.* (1961) 189 Cal.App.2d 188.)

The ordinances or zoning laws analyzed by each of these decisions had the effect of rendering it impossible to continue operating a legal, existing business; accordingly, the local government was required to either pay compensation or provide a reasonable amortization period for the business owners. The 2017 Amendments do neither. True, they do not require plaintiffs to shut their doors completely. But they do, on their face, require owners of SROs to forego more classically styled hotel rentals in favor of more traditional tenancies. This changes the fundamental nature of their business, by making them landlords rather than hotel operators.

We recognize that one of the plaintiffs' arguments is based on the application of rent control, and rent control regulations are permissible against a takings claim "if they are 'reasonably calculated to eliminate excessive rents and at the same time provide landlords with a just and reasonable return on their property.'" (*Colony Cove Properties LLC v. City of Carson* (2013) 220 Cal.App.4th 840, 865, citing *Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 158–159.) In their facial challenge to the 2017 Amendments, plaintiffs make no showing they have been denied a just and reasonable return on their property. (See *California Bldg. Industry Assn. v. City of San Jose* (2015) 61 Cal.4th 435, 464–465.) But the issue here is not the application of rent control to an existing landlord-tenant business; it is a forced change in the nature of the business without compensation or a reasonable amortization period.

The City argues that a preliminary injunction enjoining enforcement of the 2017 HCO Amendments is inappropriate because the different hotel owners represented by

plaintiff Coalition will not be similarly situated and the inverse condemnation claim involves a facial challenge to the Amendments rather than an assessment of each owners' situation. They also argue that property owners are entitled to money damages if they prove their inverse condemnation claim, making a preliminary injunction inappropriate. While these may be factors for the trial court to consider, remand is appropriate so it can consider in the first instance the balance of the hardships.

III. DISPOSITION

The order denying the preliminary injunction is reversed and the case is remanded for a determination of the balance of the hardships. Appellants are entitled to their ordinary costs on appeal.

NEEDHAM, J.

We concur.

JONES, P.J.

SIMONS, J.

(A151847)