IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF EL DORADO

SOUTH LAKE TAHOE PROPERTY OWNERS GROUP, Plaintiff, vs. CITY OF SOUTH LAKE TAHOE, a General Law California Municipality Defendant.	Case No.: SC20180243 **RULING ON SUBMITTED MATTER**

The above-entitled matter was set for trial on November 27, 2024 in Department 9 of the above-entitled court, the Honorable Gary S. Slossberg, Superior Court Judge, presiding. Plaintiff, SOUTH LAKE TAHOE PROPERTY OWNERS GROUP (SLTPOG), appeared through its counsel, Andrew F. Pierce. Defendant, CITY OF SOUTH LAKE TAHOE (City), appeared through its counsel, Heather L. Stroud and Daniel J. Bardzell.

For the reasons discussed below, the court finds that SLTPOG has standing to maintain this lawsuit, that the permanent resident exception in Measure T is unconstitutional in violation of the Dormant Commerce Clause, and that the permanent resident exception is not severable from the rest of Measure T. As such, the court strikes Measure T as a whole.

I. FACTUAL BACKGROUND[1]

The City began regulating vacation home rentals (VHRs) in 2003. In 2008, 2011, 2014, 2015, 2016, 2017, and 2018, the City amended its VHR ordinance to increase parking requirements, to regulate nuisance issues (e.g., after-hours noise, hot tub usage hours, and trash), and to increase the penalties for violations. In 2016, the City increased its transient occupancy tax applicable to short-term VHRs by two percent.

On November 6, 2018, voters of South Lake Tahoe passed Measure T, a citizen's initiative. Measure T became effective on December 20, 2018. As a general rule, Measure T prohibits short-term VHRs in residentially-zoned areas after 2021, but continues to allow VHRs in the Tourist Core and non-residentially-zoned areas. However, Measure T created an exception for VHRs of permanent residents' dwellings, termed qualified VHRs (QVHRs). It authorized a permanent resident to let the resident's dwelling up to a total of 30 days per year, subject to obtaining a permit. For the purposes of the exception, a permanent resident is a person who lives in his or her home for the majority of the year and claims a homeowner's property tax exemption.

II. PROCEDURAL HISTORY

SLTPOG is an unincorporated association of owners and managers of VHR properties in the City's residential zones. It brought this action for declaratory and injunctive relief. It claims Measure T violates the federal and state constitutions, state statutes, and common law rights and in particular the rights of due process, privacy privileges and immunities, obligation of contracts, travel, vested rights, and equal protection. SLTPOG also alleges that the initiative

[1]The factual background is copied almost verbatim from the order denying SLTPOG's second motion for summary judgment and is consistent with the parties' Statement of Uncontested Facts, admitted into evidence as Exhibit 0.

violates state and county laws regulating land use in the Lake Tahoe Basin, was vague and ambiguous, and was beyond the voters' power to adopt.

The parties previously filed cross-motions for summary judgment or adjudication. The court denied SLTPOG's motion and granted the City's motion for summary adjudication on all issues except impairment of contracts.

SLTPOG filed a petition for writ of mandate with the appellate court. The appellate court denied the petition.

Thereafter, the parties stipulated that SLTPOG would dismiss the impairment of contracts claim with prejudice as moot. The City also agreed not to enforce Measure T's occupancy limits during the pendency of this action. The court entered the stipulated order and granted the City's motion for summary judgment.

SLTPOG appealed that decision. The appellate court reversed the judgment to the extent the court found that Measure T's exception for resident owners did not violate the Dormant Commerce Clause and remanded the matter for further proceedings. In all other respects, the appellate court affirmed the judgment.

The parties then again filed cross-motions for summary judgment or adjudication, both of which were denied by the court. The matter was set for trial on November 27, 2024, at which time no witnesses were called to testify and instead the parties solely made argument relying upon the exhibits admitted into evidence. The court also ruled on the City's objections to portions of the declarations submitted by SLTPOG in support of its claim of standing. The parties stipulated that they each would submit closing briefs by December 13, 2024, at which time the matter would be deemed under submission. Both parties submitted closing briefs by the deadline, and the court took the matter under submission on December 13, 2024.

III. DISCUSSION

A. Standing

As an initial matter, the City claims that SLTPOG lacks standing. "A litigant's standing to sue is a threshold issue to be resolved before the matter can be reached on its merits." (*Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2006) 136 Cal.App.4th 119, 128.) The City argues SLTPOG cannot establish it has standing because (1) at trial SLTPOG failed to submit "any viable evidence that its purported members have mutually consented to join SLTPOG" (Defendant's Closing Brief at 13:17-18) and (2) SLTPOG "failed to show its purported members have been harmed by Measure T's QVHR Provisions" (Defendant's Closing Brief at 13:19).

SLTPOG contends that, since the City did not appeal the court's prior determination that SLTPOG had standing before the case went up on appeal and given the Court of Appeal issued a ruling on the merits in its decision, implicitly finding that SLTPOG had standing, it is the law of the case that SLTPOG has standing. (Plaintiff's Closing Brief at 15:19-16:5.) The court rejects this argument and instead agrees with the City that "contentions based on a lack of standing involve jurisdictional challenges and may be raised at any time in the proceeding. [Citations.]" (*Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 438.) As such, the court addresses the challenges to standing brought by the City at trial.

1. Sufficiency of evidence that purported members mutually consented to join SLTPOG

The City claims that SLTPOG failed to follow the minimal level of formality required of unassociated associations to bring a representative lawsuit, particularly evidence of the required mutual consent of its purported members to join SLTPOG. (Defendant's Closing Brief at 13:23-26.)

"[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." (*Hunt v. Washington State Apple Advertising Com.* (1977) 432 U.S. 333, 343; see *Brotherhood of Teamsters & Auto Truck Drivers v. Unemployment Ins. Appeals Bd.* (1987) 190 Cal.App.3d 1515, 1521–1522.)

Code of Civil Procedure § 369.5, subdivision (a) provides that, "[a] partnership or other unincorporated association, whether organized for profit or not, may sue and be sued in the name it has assumed or by which it is known." (Code Civ. Proc., § 369.5, subd. (a).)

The City argues that SLTPOG does not even qualify as an unincorporated association under Corporations Code § 18035[2] as it has no defined membership, no written record of membership, no appointed leaders, and no decision-making or voting process. However, as was the case when this same issue was raised in the City's second motion for summary judgment, the City provides no authority for the proposition that an unincorporated association must have this level of formality to maintain a lawsuit. Nor has the City cited any authority for the proposition that there must be a formal acceptance of members into the group. Corporations Code § 18035 merely requires "two or more persons joined by mutual consent." (Corp. Code, § 18035, subd. (a).)

"The criteria applied to determine whether an entity [is capable of suing or being sued as] an unincorporated association are no more complicated than (1) a group whose members

[2] Corporations Code section 18035, subdivision (a) provides, " 'Unincorporated association' means an unincorporated group of two or more persons joined by mutual consent for a common lawful purpose, whether organized for profit or not." (Corp. Code, § 18035, subd. (a).)

share a common purpose, and (2) who function under a common name under circumstances where fairness requires the group be recognized as a legal entity." (*Barr v. United Methodist Church* (1979) 90 Cal.App.3d 259, 266 (*Barr*).)

In its closing brief, the City focused on what it deemed to be insufficient evidence that there was mutual consent among SLTPOG's purported members – that is, that the purported members all agreed "upon the same thing in the same sense." (*Herzog v. Superior Court* (2024) 101 Cal.App.5th 1280, 1293 (*Herzog*), quoting *Sellers v. JustAnswer LLC* (2021) 73 Cal.App.5th 444, 460.) The City asserts that the declarations of purported members admitted at trial fail to establish mutual assent.

Upon review of the declarations admitted at trial,[3] the court disagrees. Per the declarations, the court finds that several individuals joined SLTPOG and that the members of SLTPOG share a common purpose – that is, to oppose Measure T through litigation. Specifically, per the Declaration of Andrew F. Pierce, SLTPOG's counsel, Michael Szypula and other homeowners met with counsel regarding a potential legal challenge to Measure T and ultimately hired him for this purpose, and counsel has continued to represent SLTPOG since that time. (Exhibit 14 at 1:23-24, 1:27-2:1, 2:3-11, 2:16-23, 3:11-25.) The organization of the group to oppose Measure T is further corroborated by the Declaration of Mark Salmon. (Exhibit 16 at ¶1-4 and 2:14-16.)

At trial, SLTPOG admitted into evidence declarations of purported members Elisa Erminero, Michael Szypula, Duggan Smith, Robert McIntyre, and Kimberly Ellis McFadden. (Exhibits 17-21.) Each purported member states in the first sentence of their declaration that they are a member of SLTPOG, and the substance of the declarations makes clear that each is

[3]At trial, the court heard the City's evidentiary objections to the declarations submitted by SLTPOG, sustaining in whole or in part many of them. As such, several portions of the declarations were not part of the court's analysis.

aligned with the mission of SLTPOG as articulated in both the Declarations of Andrew F. Pierce and Mark Salmon.

Nonetheless, the City argues that there is insufficient evidence of mutual consent between the purported members to form SLTPOG. The court is not persuaded by the City's arguments. Erminero and Szypula are a married couple, and each declares that they have followed the developments of this lawsuit as members of SLTPOG. (Exhibit 17 at 1:28-2:3; Exhibit 18 at 1:28-2:3.) The City points to the fact that Erminero contacted members through a Facebook group for a different organization and that, although Szypula attended a meeting with other homeowners, this meeting was not identified as a meeting of SLTPOG. However, as noted in the Declaration of Andrew F. Pierce, the same Facebook page referenced by Erminero, although for a different organization, was used as an organizing tool for SLTPOG during the initial phase of the litigation. (Exhibit 14 at 2:25-27; see also Exhibit 16 at ¶4.) As to Szypula, the fact that he met with homeowners prior to SLTPOG's formation does not negate his sworn statement that he is a member of SLTPOG and has followed the progress of the litigation. Minimally, the court finds that Erminero and Szypula as a married couple who co-own a property that they allege is affected by Measure T and jointly have followed the litigation as self-identified members meet the threshold of mutual consent to form SLTPOG.

As to the remaining purported members who had declarations admitted at trial, the City stresses the lack of evidence that the purported members communicate with, let alone know, each other. The City's argument appears to be that to form an unincorporated association with the capacity to sue the members must meet, whether personally or remotely, and reach agreements as to the purpose of the group. The court finds this formulation overly rigid and unsupported by any authorities cited by the City. If a group exists with a clear purpose and

individuals state their intention to be members of the groups, whether by joining an online group or by reaching out to a common point of contact, the court finds such would be sufficient to form an unincorporated association with the capacity to sue. Even if the individual members in this hypothetical had no contact with one another, in the court's view this would not change the fact that the members share a common purpose organized under a group with a common name (*Barr* at 266) and that they all agreed "upon the same thing in the same sense" (*Herzog* at 1293). In the present matter, the court finds per the declarations that there were common points of contact, SLTPOG's counsel and Mark Salmon, that brought the purported members together for a common purpose. This is sufficient to the court to find mutual consent to form SLTPOG. Thus, in addition to Erminero and Szypula, who on their own as discussed above meet the threshold to be members of SLTPOG, the court finds that Duggan Smith, Robert McIntyre, and Kimberly Ellis McFadden also meet the threshold based on their declarations.

The court is mindful of the City's contentions that the deposition testimony of Erminero and Smith contradict claims of membership in SLTPOG. (Defendant's Closing Brief at 14:24-15:6.) The central points the City appears to make is that Erminero admitted not attending any in-person meetings of SLTPOG and that her only action to join SLTPOG was joining a Facebook group, a group which Smith testified SLTPOG does not have. The court finds credible the claim per the Declaration of Andrew F. Pierce (Exhibit 14), as discussed above, that a Facebook group for a different organization was used as an organizing tool for SLTPOG in its early stages. The court as well does not find attendance at in-person meetings to be a prerequisite to be a member of SLTPOG. Thus, the court rejects the City's contentions regarding the deposition testimony, and the court's analysis remains unchanged.

As such, the court finds sufficient evidence to deem SLTPOG an unincorporated association with standing to sue.

2. Whether SLTPOG members have been harmed by Measure T's QVHR provisions

The second issue is whether SLTPOG's individual members would otherwise have standing to sue in their own right. So long as one member of the group would have standing, the group does as well. (See *Property Owners of Whispering Palms, Inc. v. Newport Pacific, Inc.* (2005) 132 Cal.App.4th 666, 673 ["The United States Supreme Court has repeatedly recognized that an association has standing to sue when 'its members, *or any one of them*, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit" (original emphasis)].)

The City argues that to have a standing SLTPOG must establish that at least one of its members was harmed by the QVHR provisions, as opposed to the general provisions of Measure T already upheld by the Court of Appeal. As to Smith, the City contends that he has a QVHR permit and therefore has not been harmed by the QVHR provisions. As to McIntyre, the City claims that the only properties he owns that would be affected by the QVHR provisions are owned by an LLC, not by McIntyre personally.

Even assuming arguendo that Smith and McIntyre would not have standing on their own to challenge the QVHR provisions, the court finds that the remaining three members, Erminero, Szypula, and McFadden would have standing on their own. All three declared that they previously used their properties for short-term rentals but that they no longer can do so after the passage of Measure T. Importantly, all three declared that "[h]ad Measure T passed, I would have continued to engage in short-term rentals in compliance with local laws and would do in

the future if Measure T is void or altered by the Court to allow short-term rentals by **individuals who do not qualify as permanent residents under the terms of Measure T**." (Exhibit 17 at ¶4, Exhibit 18 at ¶4, Exhibit 21 at ¶3 (emphasis added).)

Based on these declarations, the court finds that SLTPOG has made a sufficient showing that at least one of its members would have standing to sue on their own. As such, the court finds that SLTPOG has standing to maintain this lawsuit.

B. The Dormant Commerce Clause

The appellate court previously held in this matter that Measure T's permanent resident exception facially discriminates against interstate commerce and is per se invalid unless the City can justify the discrimination by showing that the permanent resident exception advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives. (*South Lake Tahoe Property Owners Group v. City of South Lake Tahoe* (2023) 92 Cal.App.5th 735, 766–767.)

At trial, the City argued that Measure T advances the legitimate local purpose of preventing nuisances. There is no reasonable dispute that the prevention of nuisances is a legitimate public purpose, as recognized by the appellate court decision in this matter. (*Id.* at 767, citing *Hignell-Stark v. City of New Orleans* (2022) 46 F.4th 317, 328–329 (*Hignell-Stark*).)

The challenge for the City is establishing that this legitimate local purpose cannot be adequately served by reasonable nondiscriminatory alternatives. The City contends it has "tried everything under the sun to curtail the nuisance issues." (Defendant's Closing Brief at 1:8.) The court finds that the evidence admitted at trial tells a different story.

As observed in *Hignell-Stark*, the "conclusion that the residency requirement is discriminatory puts it on death's doorstep." (*Id.* at 328.) Unquestionably, the City has

implemented several measures over the past 20 years to address nuisances caused by the VHRs. They include increasing enforcement efforts, increasing penalties for nuisance violations, stripping repeat offenders of their VHR permits, increasing taxes to discourage younger guests from renting, and so forth, as detailed on the table included in Defendant's Closing Brief. (Defendant's Closing Brief at 6:4-7:22.) Yet, some of the measures taken were implemented after or concurrently with the passage of Measure T on November 6, 2018, such as allowing a so-called "hosted rental," implemented on November 17, 2020, and restricting VHRs to certain zones and establishing an overall maximum occupancy limit irrespective of home size, both implemented on November 6, 2018. (*Id.*) Minimally, the court finds the City cannot establish that the legitimate local purpose of preventing nuisances cannot be adequately served by these three measures, implemented after or concurrently with Measure T's passage, which the court finds are reasonable nondiscriminatory alternatives.

Additionally, SLTPOG suggests several other measures as purported reasonable nondiscriminatory alternatives, many of which are noted in the June 5, 2017 study sponsored by the City. (See Exhibit 23, "Socioeconomic Impacts of Vacation Home Rentals in South Lake Tahoe" at 4-11 to 4-14.). Among them are the following:

- Putting a cap on VHR permits without discrimination on the basis of residency,
- Providing for VHR and neighborhood permit parking,
- Requiring minimum stays (e.g. a seven-night minimum),
- Implementing full cost recovery for calls for service for VHR complaints,
- Requiring a contract signed by visitors with penalties for compliance with the City's nuisance regulations, and

- Requiring certified managers, with the manager to be available at all times the unit is occupied,

(Plaintiff's Closing Brief at 10:5-11:16.) Moreover, Plaintiff notes measures taken by the City (or County) after the passage of or as part of Measure T, that were not tried prior to its passage to assess its effectiveness before implementing the permanent resident exception. For instance, after the passage of Measure T, the City (and the County) adopted measures to prevent the clustering of VHRs. (Plaintiff's Closing Brief at 10:14-16.) Moreover, while Measure T limited the number of days a VHR can be rented, the City did not try imposing this limitation on VHRs as a whole without regard for the residency of the owner to assess whether this limitation would prevent nuisances without having to resort to the permanent resident exception.

The City argues that, while SLTPOG can list ideas to address nuisances, they have provided no evidence that these ideas actually would prevent nuisances. This begs the question of how any person would be able to show that these suggestions would work when it is the City (and the County) alone with the authority to implement regulations regarding VHRs. Absent already existing data that certain ideas are unlikely to reap substantial benefit, it would seem the only way to determine if a particular suggestion is a reasonable nondiscriminatory alternative is by making a logical inference. The court concedes that the City may have a point that requiring a local manager for VHRs may be ineffective given that 45 percent of nuisance citations since January 1, 2017 were for VHRs with managers. (Defendant's Closing Brief at 5:18-22, Exhibit G at ¶10, Exhibit H.) However, for the remaining ideas noted above, the court reasonably and logically infers that they may prevent nuisances. For instance, simply limiting the number of days per year that a VHR can be rented (e.g., imposing the 30-day limit for all VHRs regardless

of the residency of the owner) and/or requiring minimum stays (e.g., a seven-day minimum) in the court's estimation likely would significantly reduce nuisances.

To its credit, the City acknowledges that it has not tried "full cost recovery for VHR complaints, establishing a required minimum stay, limiting the number of VHR nights per year, or restricting VHRs from operating in single-family structures." (Defendant's Closing Brief at 5:23-25.) The court finds that these four ideas, that the City acknowledges it has not tried, are reasonable nondiscriminatory alternatives to the permanent resident exception. Moreover, with the possible exception of requiring a professional manager, the court finds that the rest of the ideas noted above as well are reasonable nondiscriminatory alternatives.

The court notes that the City previously argued in its second motion for summary judgment that providing income to offset housing costs to promote housing affordability for residents was another legitimate local purpose served by Measure T's permanent resident exception.[4] The City declined to pursue this argument in trial or in its closing brief, and the court therefore deems this argument waived.

---

[4]While the *Hignell-Stark* court found that promoting housing affordability is a legitimate local purpose, the court discussed this objective in terms of the supply and demand of the housing market and the effect on housing costs. (*Id.* at 328 ["…the City says that the residency requirement helps to preserve affordable housing. That might be true, given that the provision reduces demand—and therefore the price—for housing by restricting the number of persons who can participate in the [short-term rental] market."].) That distinction is important as the City in its second motion for summary judgment appears to limit the purported objectives to providing rental income to permanent resident owners, which can be accomplished without a permanent resident exception. (Memorandum in Support of City's MSJ at 11:4-5, 13:1-12.) The court notes that the ballot materials (see Exhibit A) do reference the lack of available housing, undoubtedly impacted by the market's supply and demand; yet, nowhere does the City advance this local purpose in its argument. Had it been advanced, it nonetheless may have been unavailing, as *Hignell-Stark* rejected the argument of the city in that case that there were no reasonable nondiscriminatory alternatives to the supply and demand concerns raised there.

Nonetheless, to the extent the court should consider this argument, it finds that there certainly are reasonable nondiscriminatory alternatives to this exclusionary provision. For instance, if the City attempted to prevent nuisances by implementing some of the measures noted above (e.g., preventing clustering, requiring minimum stays, limiting the number of rental days per year regardless of residency of the owner), permanent resident owners still could rent out their homes to provide additional income to offset housing costs, without the need for the permanent resident exception. The court cannot see how the permanent resident exception is needed to provide this benefit to residents.

Thus, upon consideration of the evidence admitted at trial and the arguments of the parties, the court finds that the City cannot establish that Measure T's permanent resident exception advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives. As such, the court finds that Measure T's permanent resident exception violates the Commerce Clause and is unconstitutional.

C. Severability

Given the court's finding that Measure T's permanent resident exception is unconstitutional, the court must determine whether the remainder of Measure T is severable from the invalid portion, thereby permitting the remaining provisions to survive.

"The cases prescribe three criteria for severability: the invalid provision must be grammatically, functionally, and volitionally separable. [Citations.]" (*Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 821 (*Calfarm*).) Measure T contains a severability provision. '"Although not conclusive, a severability clause normally calls for sustaining the valid part of the enactment, especially when the invalid part is mechanically severable. [Citation.]' (*McCafferty v. Board of Supervisors, supra*, 3 Cal.App.3d at p. 193.) Such a clause

plus the ability to mechanically sever the invalid part while normally allowing severability, does not conclusively dictate it. The final determination depends on whether 'the remainder ... is complete in itself and would have been adopted by the legislative body had the latter foreseen the partial invalidation of the statute' (*In re Bell, supra,* 19 Cal.2d 488, 498) or 'constitutes a completely operative expression of the legislative intent ... [and] are [not] so connected with the rest of the statute as to be inseparable.' (*In re Portnoy, supra,* 21 Cal.2d at p. 242.)" (*Santa Barbara Sch. Dist. v. Superior Court* (1975) 13 Cal.3d 315, 331 (*Santa Barbara*).)

As observed by Justice Arabian in his dissenting opinion in *Gerken v. Fair Political Practices Com.* (1993) 6 Cal.4th 707, 725-726 (*Gerken*), the element of mechanical severability, originally one prong of the test, was later divided into two parts – grammatical and functional – by the case law. (*Id.* at 725-726.) Upon review of ballot materials for Measure T, it is clear that the remainder of Measure T is grammatically and functionally severable. As illustrated in the City's briefing, the permanent resident exception easily can be excised without any adverse effect on the clarity of the remainder of the measure, thereby making it grammatically severable. (Defendant's Closing Brief at 10:15-11:6.) The remainder of Measure T also is functionally severable; the remaining provisions can be enforced without issue, as the permanent resident exception is not essential to their implementation. SLTPOG does not dispute these determinations.

The whole dispute revolves around whether the permanent resident exception is volitionally severable. "The test [for volitional severability for an initiative] is whether it can be said with confidence that the electorate's attention was sufficiently focused upon the parts to be severed so that it would have separately considered and adopted them in the absence of the invalid portions." (*People's Advocate, Inc. v. Superior Court* (1986) 181 Cal.App.3d 316, 333

(*People's Advocate*).) In applying this test, the court agrees with the City that it must consider whether "those who favor the proposition would be happy to achieve at least some substantial portion of their purpose" (*Santa Barbara* at 332) and whether the invalid provision is "so critical to the enactment…that the measure would not have been enacted in its absence" (*Calfarm* at 822.)

It is inescapable that the task of ascertaining the mindset of the electorate is a difficult one indeed. Voters may have supported Measure T due to an opposition to all VHRs in residential areas, regardless of who owned or managed them. Others may have supported Measure T, but only if it included an exception to allow permanent residents to rent their homes for up to 30 days per year. The best gauge in determining how significant the permanent resident exception was to the voters' analysis are the ballot materials themselves.

Upon review of the ballot materials, the court finds that the permanent resident exception was an integral part of the measure. Per the Notice of Intent to Circulate Petition (Exhibit A), the second purpose noted is to allow "only 'Qualified' vacation home rentals in residential neighborhoods" upon implementation. Further, the title of the measure frames it as a measure "to Eliminate **Most** Vacation Rome Rentals…in Residential Zones. (Exhibit B (emphasis added).) Item 5 of the ballot summary states that the measure would eliminate VHR permits in residential zones, except for QVHRs, followed by item 6 which sets forth the criteria for a QVHR. (*Id.*) In fact, the argument in favor of Measure T included in the Voter Guide states that "MEASURE T: is **NOT** a **BAN** on Vacation Rentals," adding that the measure "will provide income to resident property owners who can short-term rent their homes for 30 days each year." (Exhibit C, Exhibit 13.)

Not only is the permanent resident exception an integral part of the measure; it is intertwined with the valid provisions of the measure regulating VHRs in residential zones. The measure could have been to eliminate all VHRs in residential zones. Instead, as a result of the inclusion of the invalid permanent resident exception, it is a measure to eliminate **most** VHRs in residential zones, excepting those owned by residents, who presumably were eligible to vote for or against the measure. As reflected in the ballot materials, this exception is one of the defining features of the measure, not a mere afterthought. As such, the court cannot say "with confidence that the electorate's attention was sufficiently focused upon the parts to be severed so that it would have separately considered and adopted them in the absence of the invalid" permanent resident exception. (*People's Advocate* at 333.) Rather, the court finds it more likely than not that the invalid provision is "so critical to the enactment…that the measure would not have been enacted in its absence." (*Calfarm* at 822.)

The court is mindful of the City's contention that severability is appropriate because the proponents of the measure likely "would be happy to achieve at least some substantial portion of their purpose" (*Santa Barbara* at 332) – that is, a ban on VHRs in residential zones even without the resident exception. Given how intertwined the permanent resident exception is to the remainder of the measure, the court declines to reach that conclusion. The facts of the cases cited by the parties is instructive in making this determination.

For instance, in *Santa Barbara*, while the court found that a provision banning forced school busing was unconstitutional, it found that the repeal of a statutory commitment to achieve racial balance in schools was constitutional and severable. (*Santa Barbara* at 331-332.) While related, the two provisions clearly functioned independently of one another and were not

so interdependent that the removal of the ban on busing changed the character of the provision effectuating the repeal.

In *People's Advocate*, while invalidating restrictions placed on the Legislature regarding the amount used of its contingent fund, the court found valid and severable a provision requiring public reports concerning the use of this fund. (*People's Advocate* at 321.) The California Supreme Court in discussing *People's Advocate* writes, "the court concluded the reporting provisions were severable, in part because the initiative set out 'anti-secrecy' policy arguments that supported the public reports requirement, **separate and distinct** from the arguments related to the invalid contingency fund restrictions." (*Gerken* at 715-716 (emphasis added).) While related, the invalid and valid portions served distinct functions and were supported by distinct rationales.

Likewise, in *Calfarm*, while invalidating a provision which precluded rate adjustments by insurance providers unless they were threatened by insolvency, the court held that the remainder of the initiative, which regulated the setting of insurance rates and procedures for adjustments of the rates was severable and enforceable. (*Id.* at 815.) In *Calfarm*, the valid provisions were not so interconnected with the invalid provisions that the former relied upon the later. Rather, the provisions were separate and distinct from one another.

The court finds that the present case is most akin to *Metromedia, Inc. v. City of San Diego* (1982) 32 Cal.3d 180, in which the court struck an ordinance banning noncommercial offsite billboards and found that the otherwise valid provision of the ordinance banning commercial offsite billboards was not severable from the invalid portion. In reaching this determination, the California Supreme Court writes that, "it is doubtful whether the purpose of the original ordinance is served by a truncated version limited to commercial signs."

Similarly, this court doubts whether the voter's intent in passing Measure T is served by a truncated version that removes the permanent resident exception. The court finds that Measure T's provisions, including the invalid provision, were intended to form an overarching statutory scheme for regulating VHRs in residential zones. The valid and invalid provisions are not related but independent, as in *Santa Barbara*, *People's Advocate*, and *Calfarm*; they are interdependent. The stated objective of the measure was to prohibit VHRs in residential zones with an exception. The character of the measure is altered by the removal of the exception. Finding that the remainder of Measure T is severable would be putting in place a prohibition on *all* VHRs in residential zones, a measure that was never put before the voters and therefore not fully considered by them. As such, the court finds that the valid provisions of Measure T are not severable from the invalid permanent resident exception.

SLTPOG further argues that the fact that the vote was so close cuts against a finding of severability. Measure T passed by a vote of 3,517 to 3,459, a margin of 58 votes. (Exhibit 0 at 1:13-15.) Thus, had 30 voters who voted for the measure instead voted no, Measure T would have failed. At trial, the parties disputed whether the vote margin is a factor for determining severability. (Trial Transcript at 107:11-108:9) Yet, neither at trial nor in the briefs did either party refer the court to a case clearly on point on this issue. The court as well could find no case law that definitely answers this question.

If the court were able to consider the vote margin, the court finds that the razor thin margin of the Measure T vote would be yet another factor weighing in favor of finding that the valid provisions of the measure are not severable from the invalid provision. Given the fact that as of March 21, 2024 there were only 27 QVHRs (Exhibit 0 at 2:5-6), assuming at least three of the homes with QVHR permits had more than one resident owner (equating to at least 30 voters

total) and that all of those voters had voted for Measure T (a reasonable inference), that group of voters alone would be sizeable enough to defeat the measure if they all instead had opposed the measure. It certainly is reasonable to expect such a change in their votes if the provision from which these voters benefit – that is, the permanent resident exception – was removed from the measure. Even setting aside the voters who obtained QVHRs after the implementation of Measure T, the close margin of the vote is sufficient to conclude that removing an integral portion of the measure would be more likely than not to change the outcome. As such, the court finds, as a separate and independent basis for declining to find the measure severable, that based on the close vote margin it is more likely than not that the invalid permanent resident exception is "so critical to the enactment…that the measure would not have been enacted in its absence." (*Calfarm* at 822.)

Yet, even if the court were unable to consider the vote margin, as noted above, the court, based solely on the ballot materials, finds that the valid provisions of Measure T are not severable from the invalid permanent resident exception. Therefore, the court strikes the entirety of Measure T as void as a matter of law.

IV. DISPOSITION

The court finds that SLTPOG has a standing to maintain this lawsuit as an unincorporated association and given that members of SLTPOG have been harmed by the permanent resident exception of Measure T.

The court finds that the permanent resident exception in Measure T is unconstitutional in violation of the Dormant Commerce Clause.

Finally, the court finds that the permanent resident exception is not severable from the remainder of Measure T. Therefore, the court strikes Measure T in its entirety as void as a matter of law.

IT IS SO ORDERED.

Dated: March 13, 2025

GARY SLOSSBERG
Superior Court Judge