

Finding a Path to Recovery of Property Rights in Difficult Times



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There is no sugar coating it. It has been a tough year for those of us fighting for property rights. In the manufactured housing industry, there have been some hard fought victories for individual property owners, but there have also been some significant defeats. More importantly, the political winds are heading in decidedly the wrong direction, particularly in California and some other western states. Those park owners suffering from the irrational, confiscatory application of rent control more than ever need to find a path to recover the value of their property.

Many park owners have pursued subdivision “conversions”—the right to sell individual lots to the tenants at fair market value. For those park owners, the past year has been a “mixed bag.” A series of cases have generally affirmed the limited role of local governments in reviewing these applications. In non-rent controlled jurisdictions which aren’t in a coastal zone, the path to a low cost conversion is generally clear. In rent controlled jurisdictions, the resident survey has become a critical issue and the

courts have literally been all over the place on whether and how the survey results can be used by local governments. Unfortunately, in the *Palisades* case, the California Supreme Court held that for parks located in coastal zones, local governments can require a coastal permit and impose requirements related to affordable housing. This will not necessarily have a long-term impact on the economic benefit of conversion. Conversion remains a viable strategy worth considering for many park owners. More and more park owners are pursuing closure, particularly in coastal or other strong locations where another use is economically viable.

On the rent control front, there weren’t any reported California state court decisions of note in the last year which addressed taking claims or similar property rights issues. On the federal front, there was similarly little activity. One bit of good news has come out of a 2012 District Court case, *MHC Finance v. City of Santee*. In that case, the park owner filed suit in federal court after a rent increase application was denied. The District

Court granted a motion to dismiss the “regulatory taking” claim as not ripe, but denied a request to dismiss “private taking” and substantive due process claims. Without getting into the nuances of what these different claims represent, the bottom line result was the case was not dismissed. While winning a motion to dismiss is a far cry from winning a case, any strategy that opens the door to a trial on the merits in federal court is a very important step in the right direction and one that could potentially lead to successful results. For example, the City of Capitola abandoned rent control literally on the doorsteps of a trial in U.S. District Court. Local governments wisely reassess the risk of an adverse judgment when a trial is actually going to proceed.

There also remains a path to a broader victory in challenging rent



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control as a taking. We all know the Ninth Circuit in *Guggenheim* denied a regulatory taking claim in 2011 to a park owner who bought a mobilehome park that was already subject to rent control. In 2012, the Ninth Circuit in *Laurel Park Cmty., LLC v. City of Tumwater* also denied a facial taking claim by a park owner who had become subject to exclusive mobilehome park zoning. The result was hardly a surprise, but the case is interesting because it illustrates the kind of claim that could be the basis for a successful takings claim.

The court applied a three factor balancing test which examines (1) the economic impact of the regulation, (2) the property owner's investment backed expectations, and (3) the nature of the governmental regulation. The court concluded there was no significant economic impact because the evidence did not show the rezoning impacted the property value. The court found the park owner's "investment backed expectations" was something of a mixed bag but did not support a taking claim because it did not buy the property with the intention of a different use and the purchase price was not impacted by a potential alternative use. Finally, the court agreed that character of regulation *supported the finding of a taking* because the regulation was designed to serve a public purpose of protecting mobilehome tenants.

If we imagine this same analysis in a different context, the result could be much different. First, if the park owner was challenging the application of rent control requiring rent at a small fraction of fair market rents, the property owner could demonstrate a substantial economic impact. Second, if the property

owner had purchased the property without rent control, it could demonstrate its investment backed expectation was for fair market returns—avoiding the problem of the park owner in *Guggenheim*. Finally, the third factor—the character of government regulation would apply with even more force where the impact of the government regulation was to impose space rents at a fraction of fair market values. Thus, recent cases continue to show a path to victory for the right park owner who purchased before rent control was adopted and is willing to press forward with taking claims.

Despite the overall trend of the last election, there have been some important positive political changes in various local governments. For example, Chula Vista adopted va-

cancy decontrol. Yucaipa, well known for its pro-tenant bent, may be in the midst of a change. The Oceanside City Council voted to adopt vacancy decontrol as well. While that vote was overturned by a referendum, it was nothing short of inspiring to hear City Councilman Jerry Kern speak up clearly and unambiguously against rent control as a matter of principle. Escondido, which now has a strong majority pro-property rights council, recently granted a park owner a rent increase of \$262. While there are many reasons for some of these improvements, the political involvement of organizations like the WMA and their members have been an important factor in bringing about these changes. ■



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