No. 16-56255

United States Court of Appeals for the Ninth Circuit

COLONY COVE PROPERTIES, LLC, a Delaware limited liability company,

Plaintiff-Appellee,

– v. –

CITY OF CARSON, a municipal corporation; CITY OF CARSON MOBILEHOME PARK RENTAL REVIEW BOARD, a public administrative body,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL CALIFORNIA
THE HONORABLE PHILIP S. GUTIERREZ, JUDGE
CASE NO. CV 14-03242 PSG (PJWx)

BRIEF FOR PLAINTIFF-APPELLEE COLONY COVE PROPERTIES, LLC

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Counsel for Plaintiff-Appellee Colony Cove Properties, LLC hereby certifies that Colony Cove Properties, LLC is wholly owned by El Dorado Palm Springs, L.P. as its sole member. James Goldstein is El Dorado Palm Springs, L.P.'s sole limited partner. Goldstein Properties, Inc. is the sole general partner of El Dorado Palm Springs, L.P., and is a privately held corporation. Goldstein Properties, Inc. has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Dated: June 2, 2017

By: /s/ Anton Metlitsky
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Attorney for Plaintiff-Appellee Colony Cove Properties, LLC

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INTRODUCTION[1]

In 2006, plaintiff Colony Cove Properties, LLC ("Colony Cove") purchased a mobilehome park known as Colony Cove Mobile Estates ("CCME" or the "Park") in the City of Carson. It is undisputed that this purchase was the result of a competitive bidding process, that Colony Cove paid a fair market price, and that the terms of the purchase—including that it was financed with approximately $5 million in equity and $18 million in debt—were commercially reasonable.

The rent-control rules governing the Park allow owners to apply to Carson's Mobilehome Park Rental Review Board (the "Board" and, with Carson, "the City") for rent increases, and the Board evaluates those applications by balancing the need to allow owners a fair return based on their operating expenses, while at the same time maintaining rents below market levels. Crucially, until Colony Cove purchased the Park in 2006, the Board had considered acquisition debt service—i.e., interest payments on the debt used to finance the property's acquisition—as part of the property's expenses when evaluating the reasonableness of the owner's returns. The evidence showed that if the level of debt financing was commercially reasonable—as is the case here—the Board approved rent increases to cover the property owner's interest and other operating expenses. Indeed, at around the time of the purchase, when the City did not consider debt service in evaluating a rent-

[1] Unless otherwise noted, all emphasis is added and all internal quotation marks and citations are omitted.

increase application, the California courts required it to do so because it had been the City's consistent practice and what its rent-control rules required.

The dispute here arises from the City's decision, made *after* Colony Cove purchased the Park, *not* to consider debt service in evaluating Colony Cove's rent-increase applications. The City denied two such applications, even though the City knew that its denial would cause Colony Cove immediately to operate at significant cash losses, and even though granting the application in an amount sufficient to cover Colony Cove's debt service would have left rents 25% *below* market.

Colony Cove brought suit alleging that the City's reversal constituted a regulatory taking in violation of the Fifth and Fourteenth Amendments. That question was decided by the jury after a four-day trial, and after the district court instructed the jury to evaluate Colony Cove's takings claim by balancing the factors set forth in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978)—i.e., the economic impact of the City's conduct, whether that conduct interfered with Colony Cove's reasonable, investment-backed expectations, and the character of the government's conduct. The jury heard evidence as to each of those factors, including that:

- The City's refusal to consider debt service resulted in Colony Cove suffering cash operating losses of more than $2 million over two years,

decreased the property's rental value by nearly $6 million, and could have put the Park into foreclosure.

- James F. Goldstein, the President of Goldstein Properties—the general partner of the entity that owned Colony Cove—reasonably expected when Colony Cove purchased the Park that the City *would* consider debt service, based (among other things) on (i) Goldstein's and others' past experience with the City, (ii) the written rules governing the City's evaluation of rent applications, (iii) contemporaneous court decisions requiring the City to account for debt service in evaluating rent-increase applications, and (iv) the testimony of *the City's own witnesses* affirming that, at the time of the purchase, a reasonable property owner would have expected the City to consider debt service.
- The City's decision to change its rules and decline to consider debt service was not based on the public interest, but on an effort to target Goldstein and political pressure to reject rent-increase applications.

In light of this evidence and the *Penn Central* factors, the jury concluded that the City had effected a regulatory taking, and entered a verdict for Colony Cove. Under this Court's long-established precedent, that verdict must be upheld on appeal so long as it is supported by substantial evidence. The City cannot offer any plausible argument for reversing the verdict under that forgiving standard.

Indeed, the City's appellate strategy is to avoid this standard of review, and instead to make this case about anything *other than* whether the jury's verdict was supported by substantial evidence. That effort is understandable—the answer to that question, obviously, is yes—but it is nevertheless meritless.

The City argues, for example, that this case is really about the constitutionality of rent control, and contends that "the verdict will become a roadmap to circumvent constitutional rent control." Br. 6. But Colony Cove fully accepts that rent control is constitutional. This case is not a *challenge* to rent-control rules; it is an effort to *enforce* them, consistent with the Fifth and Fourteenth Amendments and the reasonable expectations of those who purchase rent-controlled properties in reliance on municipalities following their own rent-control rules. This case, in short, does not present any of the important legal questions at issue in the rent-control takings cases on which the City so heavily relies, all of which (unlike this case) involved challenges to municipal rent-control rules. Rather, this case presents the highly fact-bound question whether the jury's determination that a regulatory taking occurred on the particular facts here is so contrary to the evidence that this Court should overturn the verdict below. The answer is no.

Nor is there a serious question about whether regulatory takings cases can be decided by a jury. As an initial matter, the answer to this question does not matter

here, because the district court expressly held that it would have decided the case the same way the jury did. But in any event, the Supreme Court has already squarely rejected the City's position in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), which held that there is a Seventh Amendment jury right in regulatory takings cases. The City's argument to the contrary appears to rest almost entirely on the fact that this Court has often decided regulatory takings as a matter of law, such as on a motion for summary judgment. But no one doubts that takings claims, like any other claim, can be decided as a matter of law if the pleadings are deficient or if there is no genuine dispute of material fact. Here, the City *did not move for summary judgment*, and until the eleventh hour *the City demanded a jury*. The City was certainly right not to bother arguing that it was entitled to judgment as a matter of law, but its position that this case nevertheless should have been kept from the jury is foreclosed by the Seventh Amendment and on-point Supreme Court precedent. This Court must thus uphold the jury's verdict so long as it is supported by substantial evidence, as it plainly is here.

Unable to mount any plausible legal objection to the jury's verdict, the City's appeal also includes a grab bag of evidentiary and other arguments. Many were never presented to the district court, and those that were the district court acted well within its discretion in rejecting. For these reasons, and those

elaborated in detail below, the City's appeal should be rejected and the judgment enforcing the jury verdict below affirmed.

ISSUES PRESENTED

1. Whether the district court correctly concluded that substantial evidence supported the jury's conclusion that Colony Cove suffered a regulatory taking.

2. Whether the district court correctly concluded that Colony Cove was entitled to have its regulatory takings claim determined by a jury, as the Supreme Court concluded in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999).

3. Whether the jury's verdict should be reversed because the district court's *Penn Central* charge, which the City did not challenge, correctly instructed jurors as to the *Penn Central* factors but failed to elaborate how each of those factors have been construed by courts.

4. Whether the district court abused its discretion in permitting Colony Cove to offer evidence and argument that the City "changed the rules" based on this Court's decision in a prior iteration of this litigation, which did not resolve any question relevant to the disputed questions at issue in this case.

5. Whether the district court abused its discretion in permitting Colony Cove to offer evidence, testimony, and argument related to various judicial

decisions, and in particular how Colony Cove's principal *read* and *understood* those decisions, in support of the reasonableness of its investment-backed expectations.

6. Whether the district court abused its discretion in permitting Colony Cove to offer evidence related to the motivations and political pressure underlying the City's actions where the City first inquired as to such topics during the examination of its own witness, and where the character of the City's actions is a *Penn Central* factor.

7. Whether the district court's brief erroneous admonition of the City's counsel, which was followed by a curative instruction, substantially prejudiced the City.

8. Whether Colony Cove's *Penn Central* claim was ripe for adjudication after Colony Cove unsuccessfully litigated a writ petition to the California Supreme Court, as this Court had held Colony Cove is required to do to ripen its claim, particularly where the City did not challenge ripeness below.

9. Whether the district court correctly awarded Colony Cove its reasonable attorneys' fees for the state-court litigation required to ripen its claim.

STATEMENT OF THE CASE

A jury found that the City's actions resulted in a regulatory taking of Colony Cove's property without just compensation in violation of the Fifth and Fourteenth

Amendments. The factual and procedural background relevant to evaluating the City's appeal of that verdict is set forth below.

A. General Factual Background

1. *The Parties*

a. The plaintiff here is Colony Cove Properties, LLC, which owns CCME. ER-5:738:14-739:7. It is wholly owned by El Dorado Palm Springs, L.P., whose general partner is Goldstein Properties, Inc. *Id.* James F. Goldstein is President of Goldstein Properties. *Id.*

Goldstein has successfully operated mobilehome parks throughout California for nearly 40 years. SER-11. He currently owns five parks, including the Carson Harbor Village Mobilehome Park ("Carson Harbor"), which is across the street from CCME. SER-12-14.

In his decades of operating mobilehome parks, Goldstein has strived to provide residents with a top-quality park to call home, SER-12-13, and has helped ensure that residents are able to stay in their homes even in times of financial difficulties. SER-24-25. He once served on the Board, where he received training on Carson's rent-setting practices. SER-16-18.

b. The defendant is the City of Carson, a municipal corporation in south Los Angeles County. ER-5:739. The Board is a public administrative body

created by Carson's Ordinance to consider mobilehome park rent-adjustment applications. ER-5:739-40.

2. *The Park*

CCME is a 404-space mobilehome park in Carson. It was built in the 1970s and owned since that time by Colony Cove Associates ("CCA"). ER-5:740.

In late 2005, CCA's agent directed one of the nation's largest commercial real estate brokers to list and market the Park. ER-5:740. The Park was listed for $28 million, and CCA received at least three written offers ranging from $21.5 to $24 million, including one from Goldstein. *Id*. On April 4, 2006, in an arm's-length market transaction, Colony Cove purchased the Park for $23.05 million, approximately 20% below its initial list price. ER-5:741. The purchase price represented the Park's fair market value. SER-52-53, 57, 61.

Colony Cove made a $5,050,000 initial equity investment and borrowed $18,000,000 from GE Capital, a reputable lender that extended considerable financing to mobilehome parks at that time. SER-13-14, 118. This mix of debt and equity was commercially reasonable and was the result of an arm's-length mortgage transaction. ER-5:687-88, 741; SER-116-17.

Since Colony Cove began operating the Park, it has significantly upgraded the facilities, has offered residents numerous high-quality amenities, has been

ranked as a five-star mobilehome park, and has been consistently recognized by the City for its exceptional service. ER-4:517-20, 5:739; SER-12-14, 76-77.

3. *The City Of Carson Rent-Control Ordinance And Guidelines*

The City adopted the Ordinance in 1979, and its stated purposes are to protect homeowners from excessive rents and to allow park owners to earn a "fair return on investment," or "a reasonable percentage of profit in comparison with the person's investment." ER-4:581, 5:675-76; SER-17-18, 28-29. The City also adopted the Guidelines. ER-5:741-42. As the City's own witness testified, the Guidelines govern implementation of the Ordinance and are considered more important than the Ordinance when determining rent increases. ER-5:672, 771-72; SER-69-70, 93-95.

Carson does not permit an automatic rent increase based on a set formula; a park owner must submit a rent-increase application. ER-5:741-42. Park owners are required to provide in the application a history of the park's income and operating expenses. ER-5:672-73. City staff analyze "allowable" expenses and compare them against the park's income to determine the rents that would provide the park owner a fair return. *Id.*; ER-4:581-94.

When Colony Cove purchased the Park in 2006, the Guidelines provided that acquisition debt service—i.e., interest payments made on a loan to purchase a park—was an "allowable operating expense," so long as "the purchase price paid

was reasonable in light of the rents allowed under the Ordinance and involved prudent and customary financing practices." ER-4:584; 5:673-74. In the years leading up to Colony Cove's purchase of the Park, the Board consistently took into account a park owner's debt service. ER-6:791-92. This was done most often through a gross-profits maintenance ("GPM") analysis, which focused on maintaining a park's level of profits, i.e., income after interest payments and other operating expenses. ER-6:791-92; SER-82-84, 92.

On October 31, 2006, approximately six months *after* Colony Cove purchased the Park, the Carson City Council voted to amend the Guidelines to provide for the first time that acquisition debt service could be *ignored* when setting rents ("the Amendment"). ER-5:688-89, 742. The Amendment provided that the Board could use an analysis based on maintenance of net operating income ("MNOI"), such that "changes in debt service expenses are not to be considered in the analysis." ER-4:601-03. The Amendment "govern[ed]" the Board's determination of rent-increase applications. *Id.*; SER-93-95.

4. *Colony Cove's Rent-Increase Applications*

The City applied the amended Guidelines to the Colony Cove rent-increase applications at issue in this litigation, which were timely submitted on September 28, 2007, and September 28, 2008 ("Year 1 Application" and "Year 2 Application," respectively). In its Year 1 Application, Colony Cove ultimately

requested an increase of approximately $200 to cover its debt service. ER-5:689-91; SER-119-20. Although Board staff calculated that a $200 increase would be appropriate under the GPM analysis to cover debt service, and that such an increase would leave Park rents over 25% *below* market, ER-5:689-90, 692, the Board utilized the MNOI analysis and granted an increase of only $36.74, leaving rents insufficient to pay the Park's operating expenses. ER-4:536-41, 5:692-93. The Board similarly disregarded Colony Cove's debt service in the Year 2 Application, and granted an increase of $25.02, again insufficient to cover Colony Cove's operating expenses. ER-4:546-53.

B. Effect Of The City's Actions

As relevant here, Colony Cove challenged the City's retroactive decision to disregard debt service as a regulatory taking under the three-part analysis set forth in *Penn Central*, 438 U.S. at 124, which requires considering: (i) the character and extent of economic impact of the City's action on Colony Cove; (ii) the extent of the interference with Colony Cove's reasonable, investment-backed expectations; and (iii) the character of the governmental action. The trial testimony as to each factor, read in the light favorable to the jury's verdict, was as follows:

1. *Economic Impact Of The City's Actions*

Trial testimony and evidence showed that the City's decision to disregard Colony Cove's acquisition debt service expenses caused a severe economic impact

on Colony Cove. Goldstein and Noelle Stephens, Colony Cove's bookkeeper, testified that the rent increases the City granted were insufficient to cover Colony Cove's operating expenses and, as a result, it suffered cash operating losses of nearly $2 million from the time of purchase until the Board decided the Year 2 Application, ER-5:692; SER-33, 41-44, 46-51. Colony Cove's expert appraiser, Rob Detling, testified that such substantial operating losses raised the risk of foreclosure. SER-62-64. In addition, Peter Salomon, Colony Cove's damages expert, testified that as a result of the City's decision, Colony Cove's rental value, i.e., discounted rental income, decreased by $5,738,050. ER-5:730-33; SER-68, 194-208. The City offered no expert testimony rebutting these figures, and did not call an expert appraisal witness at all.

The jury also heard unrebutted testimony from Goldstein and Detling that the City's land-use decisions added minimal value (at most) to the Park. Goldstein testified that, although the City granted approvals necessary for subdividing the Park and for new mobilehome spaces in the Park, the approvals did not necessarily increase the Park's value for several reasons—for example, because of the City's unjustifiable years-long delays in providing such approvals, and because the new spaces were located on capped oil wells. ER-5:695-96, 712-14; SER-54-55.

2. *Goldstein's Reasonable, Investment-Backed Expectations*

Goldstein testified that he expected the City would consider his acquisition debt service and he would not have otherwise paid $23 million for the Park. ER-5:693.

Goldstein explained that the stated purpose of the Ordinance and Guidelines was to ensure that residents were protected from excessive rents and to ensure that property owners received a fair return on their investments. SER-16-23; *see supra* at 10. Goldstein believed that considering debt service would serve both purposes because resulting rents in the Park would have been over 25% *below* market. ER-5:670-71, 686-90.

Goldstein also relied on the language of the Guidelines at the time he purchased the Park, which explicitly established the GPM analysis and provided for the consideration of acquisition debt service, ER-5:673-74, and which the City's own witness, Ken Freschauf—who worked for the City for decades on rent-control matters and applications—testified were "more important" than the Ordinance in deciding rent-increase applications. ER-5:672, 771-72; SER-69-70, 93-95.

Goldstein also relied on his extensive experience with the Ordinance and Guidelines in expecting that reasonable acquisition debt service would be considered. He purchased Carson Harbor, a comparably sized park, in the early

1980s. SER-14. In over 20 years of ownership, the City always considered some portion of Goldstein's acquisition debt service in setting rent increases. ER-5:674-77.

Finally, Goldstein testified that he relied on a California Court of Appeal decision published shortly before he purchased the Park, which described how the City was required by court order to consider acquisition debt service in setting rents. ER-5:677-79.

In that case, the park owner purchased a mobilehome park in the City in 1997, and sought a rent increase based on the expectation that the Board would consider acquisition debt service. *Carson Gardens, LLC v. City of Carson Mobilehome Park Rental Review Bd.*, 135 Cal. App. 4th 856, 859-61 (2006). The Board disregarded the park owner's acquisition debt service and awarded a small rent increase. *Id.* The park owner challenged the decision, and in 2003, the Los Angeles Superior Court ordered the Board to apply the GPM analysis "or another reasonable analysis or methodology" that took account of debt service, consistent "with the requirements of the pre-existing Ordinance and the Guidelines." *Id.* at 862. The writ was based in part on the Board's historical practice of considering debt service in connection with rent-increase applications. *Id.* at 864. The Board did not appeal the superior court's writ and disregarded it on remand, instead choosing to apply the MNOI analysis. *Id.* at 862-64. When the park owner sought

further enforcement of the writ, the superior court found that the Board had failed to comply with the writ by adopting the MNOI analysis "because that methodology would allow [the Board] to exclude financing costs as an operating expense." *Id.* at 864-65. The Court of Appeal affirmed and ordered the Board to grant a rent increase that considered reasonable acquisition debt service. *Id.* at 867-69.

Goldstein testified that he was aware of *Carson Gardens* when choosing to purchase the Park for $23 million only four months later and relied on the court's ruling that the Board must consider a park owner's acquisition debt service in setting rents. ER-5:677-79. The City was also undoubtedly aware of the significance of the *Carson Gardens* holding, as it moved to change the rules and amend the Guidelines several months after *Carson Gardens* was decided and Colony Cove's purchase of the Park.

Goldstein also relied on another Court of Appeal case, *Palacio de Anza v. Palm Springs Rent Review Commission*, 209 Cal. App. 3d 116, 120 (1989), which held that a property owner who purchased a park under a rent-control scheme permitting debt service would be protected from sudden rule changes. ER-5:679-81.

Based on the foregoing, Goldstein believed that at least some portion of his acquisition debt service would be considered when calculating his rent increase. ER-5:686-87. And the reasonableness of that belief was underscored by the City's

own witnesses. Freschauf testified that in the years leading up to Goldstein's purchase of the Park, the City almost always considered debt service. ER-6:791-92; SER-82-84. He also admitted that it would have been "reasonable" for a park owner in 2006 to believe that the City would set rents at a level sufficient to cover operating expenses, including debt service. SER-78-79. Finally, Douglas Danny, a real estate broker with extensive experience in Carson called by the City, testified that an increase in debt service from a previous owner to a new owner would be an allowable expense under the City's rules and practices in 2006. SER-88-89.

3. *The Character Of The City's Actions*

The third *Penn Central* factor concerns the character of the governmental action, *Penn Central*, 438 U.S. at 123, which, as the district court recognized, includes considerations such as the underlying motivation for the action, whether the regulatory action is necessary to the effectuation of a substantial public purpose, and whether the regulation allocates burdens among all taxpayers or singles out an individual. ER-6:825-27.

The jury heard testimony demonstrating that the City's decision to retroactively ignore debt service in rent-increase applications was not reasonably necessary to effectuate rent control and, instead, was the most recent in a pattern of unfair behavior by the City.

Specifically, the jury heard evidence that Goldstein had a history of contentious battles with the City, and had been singled out by the City here. For example, he was removed from the Board without explanation shortly after being appointed. SER-16-18. The jury also heard from Freschauf that the Board had in the past granted substantial rent increases for other park owners—even those who had inherited their property rather than paying millions in a market transaction—by phasing them in, and that Goldstein was never offered the option of a phased-in rent increase. SER-74-76, 119-21.

Goldstein also testified about the political clout and voting power of park residents. Goldstein explained that there are more than 30 mobilehome parks in Carson and mobilehome park residents vote in far greater numbers than other residents of Carson—in some municipal elections more than 75 percent of the voters are mobilehome park residents. ER-5:693-94. Given the "tremendous political clout" of mobilehome park residents, Goldstein testified that the City would often go to great lengths to minimize or eliminate rent increases. ER-5:693-94; SER-39-40. One such attempt to minimize and eliminate rent increases was the City's approval of the Amendment several months after the *Carson Gardens* decision, which had required the City to consider acquisition debt service under the Ordinance and Guidelines. *See supra* at 10-11.

The jury also heard about the longtime former Mayor of Carson, Jim Dear, who was Mayor during the relevant time period. Freschauf testified that Dear, who was still in office when the Guidelines were changed, has a history of controlling members of the Board, pressuring them to vote against rent increases, and removing Board members who were neutral and fair-minded. ER-5:774-76; SER-73.

C. The Prior Litigation

1. On October 27, 2008, Colony Cove filed a federal complaint alleging facial and as-applied challenges to the Ordinance and Guidelines on takings and substantive due process grounds. *See Colony Cove Props., LLC v. City of Carson*, 640 F.3d 948, 953-54 (9th Cir. 2011). The district court dismissed Colony Cove's claims, holding (among other things) that the as-applied taking claim was unripe under *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). *Id.* at 957-58 (referencing district court order).

Colony Cove appealed, and this Court affirmed the district court's judgment, *Colony Cove*, 640 F.3d at 953-61, including on the ground that the as-applied takings claims were unripe under *Williamson County*. *Id.* at 957-60. The court also held Colony Cove's facial takings challenge to the validity of the Ordinance time-barred, because it held that the 2006 Amendment did not have the "force and

effect of law" for purposes of restarting the applicable statute of limitations. *Id.* at 957.

2. While the just-described appeal was pending, Colony Cove filed state writ claims related to the City's decisions on the Year 1 and Year 2 Applications to ripen its federal claims under *Williamson County*. *See Colony Cove Props., LLC v. City of Carson*, 220 Cal. App. 4th 840, 847 (2013). Colony Cove alleged, *inter alia*, that the methodology employed by the City to determine Colony Cove's rents was unfair and contrary to California law. It also expressly reserved its rights to return and litigate its federal claim in federal court as authorized under *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964). The superior court struck the *England* reservation and subsequently denied Colony Cove's writs.

On appeal, the California Court of Appeal affirmed the denial of the writs for the Year 1 and Year 2 Applications, *Colony Cove*, 220 Cal. App. 4th at 872, but reversed the order striking the *England* reservation and confirmed that the writ proceedings were premised on California law and that federal issues had not been litigated, *id.* at 877-79.

D. The Present Litigation

1. *The Court Denies The City's Motions To Dismiss The* Penn Central *Claim*

After the state court denied relief, Colony Cove filed the instant action, challenging the City's denial of Colony Cove's rent-increase applications filed between 2007 and 2012. ER-3:386.

The Complaint alleged (as relevant here) as-applied regulatory takings claims. ER-3:369-71, 404-05. The City moved to dismiss, contending that the *Penn Central* claims based on the Year 1 and Year 2 Applications were barred by issue and claim preclusion based on this Court's and the California Court of Appeal's earlier decisions, and that Colony Cove in any event failed to state a claim. ER-3:375-85. The district court denied the motion in relevant part. ER-1:68-70. Colony Cove later filed an amended complaint, ER-3:353, and the district court again denied the City's motion to dismiss that complaint. ER-1:52-55, 3:345-52.

2. *The Litigation Proceeds To Trial*

The City then filed its Answer and requested a jury trial on Colony Cove's *Penn Central* claim. ER-3:328, 340. For the next eight months, the parties undertook discovery without any need for judicial intervention or extensions of case management deadlines.

The City did not file a motion for summary judgment. During the exchange of pretrial materials, the City argued for the first time that Colony Cove had no right to a jury trial on its claim. ER-3:252-54. At the pretrial conference, when the court asked the City to explain why it had not raised the issue earlier, counsel stated that the City believed that a jury trial "was appropriate" as to the first *Penn Central* factor and damages, but not as to the remaining factors or liability determination. SER-133-36. The City's proposed instruction reflected this position. SER-211-14.

The City never offered a complete *Penn Central* instruction; instead, it raised a number of objections to Colony Cove's proposed charge, without offering any instruction reflecting its objections. ER-2:211-18. At the charge conference, the court presented the parties with an instruction that closely tracked the phrasing of the relevant factors as set forth in *Penn Central*. ER-6:825-30. When the court invited the City to state any objections, it made no objection to the court's formulation of the *Penn Central* factors and did not assert that the instruction was an incomplete statement of the law. *Id.* Nor did the City object to the court's final verdict form, or request a special verdict form asking the jury for special findings as to the *Penn Central* factors. SER-126-29.

3. *The Jury Finds For Colony Cove*

The jury returned a unanimous verdict in Colony Cove's favor, concluding that the City's treatment of Colony Cove's Year 1 and 2 Applications constituted a regulatory taking. ER-2:105-06. The jury concluded that Colony Cove was entitled to $3,336,056 in damages. *Id.* The jury did not award Colony Cove prejudgment interest. *Id.*

4. *The Court Enters Judgment On The Jury's Verdict And Denies The City's Post-Trial Motions*

On May 16, 2016, the court entered judgment on the jury's verdict. ER-2:96-98. Colony Cove then moved for attorneys' fees and costs, ER-2:94-95, and to alter or amend the judgment to include prejudgment interest, ER-2:86-88. The City moved for relief from judgment, ER-2:91-92, and for judgment as a matter of law ("JMOL"), ER-2:89-90. The court granted Colony Cove's motions, amending the judgment to reflect prejudgment interest, ER-2:80-83,[2] and awarding attorneys' fees and costs of $3,009,118.58, ER-1:4-16.[3]

The court denied the City's motions. ER-1:17, 2:80-83. The court declined to disturb the jury's verdict but also amended the judgment to reflect its finding

[2] The City claims that the "district court erroneously awarded interest," Br. 23, but does not challenge this ruling on appeal. *See* Dkt. No. 22, 5.

[3] The court subsequently awarded Colony Cove taxable costs of $36,579.59 and supplemental attorneys' fees and costs of $352,616. The City does not challenge either of these awards on appeal.

that, upon independently weighing and considering the evidence, it agreed with the jury's finding that a taking occurred, as well as the amount of damages. ER-1:17.

This appeal followed.

SUMMARY OF ARGUMENT

The district court's judgment should be affirmed in all respects.

I. A. This Court must affirm the jury's verdict if it is supported by substantial evidence. The City's contention that de novo review applies conflicts with this Court's precedent and the Seventh Amendment.

B. The City and its amici erroneously rely on this Court's cases rejecting broadside challenges to rent-control regimes. Those cases are inapposite because Colony Cove does not challenge rent control. Colony Cove challenges the City's failure to enforce its own rent-control rules in a manner consistent with the Takings Clause. No precedent of this or any other court holds that municipalities can immunize themselves from ordinary regulatory-taking scrutiny simply by enacting rent control. Nor does any precedent authorize reversal of a jury's determination that a taking has occurred when that verdict was supported by substantial evidence.

C. Colony Cove presented substantial evidence that each of the primary *Penn Central* factors—considered both individually and balanced together—supported finding a regulatory taking.

1. Substantial evidence showed that the City's decision not to consider debt service had a severe economic impact on Colony Cove. Colony Cove offered unrebutted evidence that it suffered millions of dollars in operating losses for several years. The City contends that operating losses are not a proper measure of economic impact, and that only lost value counts under *Penn Central*. But Colony Cove *also* presented evidence that the City's conduct caused a rental value decrease of nearly $6 million. And in any event, lost operating income *is* the appropriate measure of economic impact in cases like this one, as the City's own authorities demonstrate. The City also cites its own contested evidence, which the jury was free to reject.

2. Colony Cove introduced substantial evidence that the City's conduct interfered with Colony Cove's reasonable, investment-backed expectations. Goldstein testified that he expected the City to consider debt service when evaluating Colony Cove's rent-increase application based on (among other things) the City's consistent past practices (including his own experience with other parks), the written rules in effect at the time, and contemporaneous court decisions that had required the City to consider debt service. The City's own witnesses confirmed the reasonableness of this expectation.

3. Colony Cove also offered evidence that the character of the government conduct supported a taking, because it risked putting the Park into foreclosure if

the owners were unable to fund the losses—and was thus akin to a physical occupation—and was based on personal and political considerations rather than the public interest.

4. Finally, no one *Penn Central* factor is dispositive, and the jury must weigh the totality of the circumstances to determine whether there was a taking. Even if substantial evidence did not support any one factor, it certainly supports the jury's ultimate conclusion that Colony Cove was subject to a regulatory taking.

II. A. The district court properly submitted this case to the jury, as the Seventh Amendment requires. The Supreme Court expressly held in *Del Monte* that § 1983 damages claims in general, *and regulatory takings claims in particular*, fall under the Seventh Amendment. The City cites cases in which this Court decided *Penn Central* claims as a matter of law, but those cases were decided either on the pleadings, at summary judgment, or through a stipulated bench trial. The City is of course correct that regulatory takings claims *can* be decided as a matter of law—such as when there are no disputes of material fact—but the City did not even move for summary judgment in this case. And *Del Monte* holds regulatory takings cases that cannot be decided as a matter of law *must* be resolved by a jury, since they involve "essentially ad hoc, factual inquiries." *Penn Central*, 438 U.S. at 124.

To the extent the City argues that any of the *Penn Central* factors should have been decided as a matter of law in its favor, that is wrong for the reasons explained above—substantial evidence supports Colony Cove's position as to each factor. Nor is there any merit to the City's contention that the jury should not have been allowed to balance the various factors. The City forfeited that argument by failing to request a special verdict form, but even if it had not, its argument would be meritless because *Del Monte* holds that the Seventh Amendment protects the right to have a jury decide the "ultimate dispute" between the parties, *Del Monte*, 526 U.S. at 718, which in this case is whether the City effected a regulatory taking.

Finally, and in any event, any error in submitting this case to the jury was harmless because the district court concluded on the record that it would have reached the same result as the jury.

B. There was no error in the district court's instruction to the jury, which was a near verbatim recitation of the legal test for regulatory takings set forth in *Penn Central* itself. The City does not dispute that the charge correctly stated the law, but argues it should have further elaborated the *Penn Central* factors based on the judicial precedent interpreting them. That argument is forfeited, and it is in any event wrong: The court's charge correctly set forth the *Penn Central* test, and there is no requirement that courts elaborate jury instructions with nuance from case law.

III. The City's evidentiary claims are meritless.

A. The City asserts that the district court should have precluded Colony Cove from offering evidence and argument that the City's 2006 decision to stop considering debt service "changed the rules" based on this Court's prior decision in *Colony Cove*. The argument to which the City objects concerned whether Goldstein reasonably expected at the time of purchase that the City would consider debt service in evaluating rent-increase applications. This Court's prior decision did not decide that issue. There is accordingly no basis for preclusion of such evidence or argument, and the district court did not otherwise abuse its discretion in allowing such evidence and argument.

B. The district court did not abuse its discretion in permitting Colony Cove to offer evidence of Goldstein's reliance on the *Carson Gardens* decision, which like the Guidelines themselves directly supported his argument that he reasonably expected at the time of purchase that the City would consider debt service, as *Carson Gardens* directed it to do.

C. The district court did not abuse its discretion by allowing testimony regarding political motivation. The City forfeited its challenge to the admissibility of such evidence by opening the door and inviting any error and, in any event, the evidence is relevant under *Penn Central*, which charges the jury to consider all relevant circumstances and the character of the government's actions.

D. The court's erroneous admonition of the City's counsel did not cause any serious prejudice to the City because it was an isolated incident and the court gave a curative instruction.

IV. The City's contention that Colony Cove failed to ripen its federal takings claim because it did not make a *Penn Central* takings claim in state court is forfeited because the City never raised the argument below and, in fact, conceded that the claim was ripe. Moreover, the City's argument is meritless. This Court in *Colony Cove* dismissed the as-applied takings claim because it was unripe under *Williamson County*, holding that Colony Cove must first litigate a writ petition in state court under California's rent-adjustment procedure before bringing a federal takings claim. That is exactly what Colony Cove did, while at the same time expressly reserving in state court its right to later bring federal takings claims in federal court. There is no requirement that a federal takings plaintiff first file a takings claim in state court—nor could there be, since such a rule would absurdly preclude all federal takings claims.

V. The district court did not abuse its discretion in awarding Colony Cove reasonable attorneys' fees incurred in state court because that litigation, which was undertaken at the City's insistence in *Colony Cove*, was necessary to ripen the *Penn Central* claim, and thus is subject to the fee-shifting provision of 28 U.S.C. § 1988 under established Supreme Court precedent.

ARGUMENT

I. THE JURY'S VERDICT IS SUPPORTED BY SUBSTANTIAL EVIDENCE

The City's argument for reversing the verdict is based on two premises: that the judgment is reviewed de novo, and that this Court's takings precedents in the rent-control context preclude the jury's finding of a taking as a matter of law. Both premises are categorically false. The judgment here resulted from a jury verdict and is thus reviewed only for substantial evidence. Nothing in this Court's takings jurisprudence prevented the jury from concluding that a taking occurred. And the jury's determination that a taking did occur was supported by more than substantial evidence.

A. An Appellate Court Reviews A Jury Verdict For Substantial Evidence

1. The district court entered judgment for Colony Cove after denying the City's renewed JMOL motion. "The standard of review for the denial of a motion for judgment as a matter of law after a jury trial is the same as the standard of review for reviewing a jury's verdict: both the verdict and the denial of the motion must be affirmed if there is substantial evidence to support the verdict." *Gilbrook v. City of Westminster*, 177 F.3d 839, 856 (9th Cir. 1999).

Under the substantial evidence standard, the court may not weigh the evidence. *Wallace v. City of San Diego*, 479 F.3d 616, 624 (9th Cir. 2007). Rather, the court must review the entire record, disregarding "all evidence

favorable to the moving party that the jury is not required to believe"[4] and viewing all other evidence "in the light most favorable to the nonmoving party, and [with] all reasonable inferences [ ] drawn in favor of that party." *Id.* And a district court's denial of a motion for judgment as a matter of law may only be reversed if "the evidence, construed in the light most favorable to the nonmoving party, permits only one reasonable conclusion, which is *contrary* to the jury's verdict." *Gilbrook*, 177 F.3d at 864.

2. The City ignores this established precedent, instead arguing that the *Penn Central* regulatory takings inquiry is a legal question that must be reviewed de novo. Br. 27-30. The takings cases the City cites are inapposite because none involved a jury trial—all were decided following stipulated bench trials, motions for summary judgment, or motions to dismiss. Br. 29-30. No case allows de novo appellate review of a jury verdict, since the "Seventh Amendment does not allow another court's review of facts found by the jury with no standard of deference and with the authority to redecide those matters in the first instance." *In re Cinematronics, Inc.*, 916 F.2d 1444, 1451 (9th Cir. 1990). The City does argue

[4] Evidence the jury is "required to believe" is "evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 151 (2000).

that Colony Cove was not entitled to a jury here, but the City is wrong. *See infra* Part II.

The City's principal case—*United States v. McConney*, 728 F.2d 1195 (9th Cir. 1984)—has no application here. *McConney* was a *criminal case* where the defendant *waived* a jury trial, and this Court determined that whether there were "exigent circumstances" under a particular federal statute was a "mixed question of law and fact" that was essentially legal because it required the court to "consider legal concepts ... and to exercise judgment about the values that animate legal principles." *Id.* at 1202; *see id.* at 1197-1204. But the standard of review of a statutory question in a criminal non-jury case is irrelevant to the proper standard for review of a civil (i.e., Seventh Amendment-governed) jury trial. And this Court has expressly rejected the City's argument that a jury's verdict is reviewed de novo if the "questions presented are 'mixed questions of law and fact,'" holding that this "contention is without merit." *Harper v. City of L.A.*, 533 F.3d 1010, 1021 n.9 (9th Cir. 2008). The court in *Harper* found "inappropriate" the "City's attempt to have this court perform a *de novo* review that would disregard the jury's verdict," *id.*, and expressly refused to extend *McConney* to the civil jury-trial context, *id.* at 1022 n.11. Thus, *Harper*, like every other case reviewing a jury verdict, applied the deferential substantial-evidence standard. *Id.* at 1021. That is the standard that applies here.

B. Nothing In This Court's Jurisprudence Precluded The Jury From Finding A Taking Here

The City argues that the verdict "flouts this Court's consistent rejection of takings claims aimed at mobilehome rent control." Br. 4; *see also id.* 29-30, 45. The City's amici devoted an entire brief to that contention. *See generally* Br. of Amici Curiae California Rural Legal Assistance. But the City misconstrues this Court's takings precedent. This Court has rejected facial challenges to rent control itself. But this is not a challenge to rent control. It is a challenge to how the City *administered* and then *changed* its established rent-control rules. Nothing in this Court's precedent holds, or even suggests, that a municipality's administration of rent regulatory conduct is immune from Takings Clause scrutiny.

The City's argument is based almost entirely on this Court's decisions in *Guggenheim v. City of Goleta*, 638 F.3d 1111 (9th Cir. 2010), *MHC Financing Ltd. Partnership v. City of San Rafael*, 714 F.3d 1118 (9th Cir. 2013), and *Rancho de Calistoga v. City of Calistoga*, 800 F.3d 1083 (9th Cir. 2015). *See* Br. 29-30. Each of those cases were broadsides against the validity of rent control. *See Guggenheim*, 638 F.3d at 1118; *MHC*, 714 F.3d at 1126 n.3, *Rancho*, 800 F.3d at 1089. This Court concluded that no property owner can reasonably expect to be "free from rent control." *Rancho*, 800 F.3d at 1091; *accord Guggenheim*, 638 F.3d at 1120-21; *MHC*, 714 F.3d at 1128. Moreover, this Court explained that invalidating rent-control rules would interfere with residents' investment-backed

expectations that they would be free from illegal rent increases. *See, e.g.*, *Guggenheim*, 638 F.3d at 1120-22.

Colony Cove, in contrast, does not seek to be free of rent control. It did not purchase the Park with the "starry-eyed hope of winning the jackpot if the law changes." *Id.* at 1120. To the precise contrary, Colony Cove's central contention is that the City retroactively altered its *existing* rent-control rules in a manner that caused Colony Cove significant economic harm. No precedent of this or any other court holds that a property owner is not entitled reasonably to expect that the existing rent-control rules would continue to be enforced when considering an investment in a regulated property. And, contrary to the City's contention, Br. 45, there is likewise no basis to immunize such municipal conduct from takings scrutiny based on residents' expectations—while residents can reasonably expect that they will not be subject to rent increases above existing legal limits, *Guggenheim*, 638 F.3d at 1120-22, they have no reasonable expectation to be free of increases *within* those limits.

The cases on which the City relies, in short, are nothing like this case. The narrow, fact-bound question here is whether substantial evidence supported the jury's determination that Colony Cove suffered a regulatory taking when the City changed its rules, targeted a single park owner, and forced that park owner to

operate at multi-million dollar losses driving the park to the brink of foreclosure. The answer to that question, as shown directly below, is yes.

C. The Jury's Verdict Is Supported By Substantial Evidence

Substantial evidence supported a finding for Colony Cove as to each *Penn Central* factor, and certainly for the jury's verdict that Colony Cove was subject to a regulatory taking considering the totality of the circumstances.

1. *Colony Cove Offered Substantial Evidence That The City's Actions Caused A Severe Economic Impact*

a. Colony Cove offered more than substantial evidence that the economic impact resulting from the City's conduct was severe.

Specifically, Colony Cove's evidence showed that it sustained operating losses of nearly $2 million for multiple years after the purchase of the Park.[5] ER-5:692; SER-33, 41-51. Moreover, Colony Cove's expert appraiser, Rob Detling, testified that a mobilehome park, like CCME, could be foreclosed upon if it did not pay its mortgage interest and operating expenses. SER-62-64. This testimony, combined with evidence that rents were insufficient to cover the Park's operating

[5] Evidence of economic impact was limited to the period between Colony Cove's purchase of the Park and the City's Year 2 Application decision (July 2009) because economic impact is judged by comparing the property's value before the government action to the value just after the government action. *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987). The City's passing assertion that the court's decision so limiting the evidence was erroneous, Br. 34 n.6, is contrary to *Keystone* and in any event insufficient to preserve the matter for appellate review. *See Christian Legal Soc'y Chapter of Univ. of Cal. v. Wu*, 626 F.3d 483, 485 (9th Cir. 2010).

expenses, supported a reasonable inference that the City's actions put the Park at risk of foreclosure. Moreover, Colony Cove's damages expert, Peter Salomon, testified that Colony Cove's rental value decreased by $5,738,050 as a result of the City's refusal to consider Colony Cove's debt service. ER-5:730-33; SER-68, 194-208.

b. The City's principal argument is that lost income is not a permissible basis to judge economic impact, and that the only appropriate measure is the effect on the property's market value (i.e., sale value). Br. 31-33. On that theory, the City contends that Colony Cove's evidence was insufficient as a matter of law because it allegedly did not reflect "the market value of the park (with or without the challenged rent decisions)." *Id.* The City argues that Colony Cove can only properly show economic impact by demonstrating a significant reduction in discounted cash flow over the entire remaining useful life of the property (rather than a significant loss in income over the period of the temporary taking as Colony Cove proved). The City is wrong, both as a matter of fact and as a matter of law.

As a factual matter, Colony Cove presented evidence showing it suffered lost rental value of at least $5.7 million as a result of the regulation. The City now says this evidence had nothing to do with Colony Cove's value. But an experienced mobilehome park broker called by the City testified that the value of a mobilehome park *does* relate to its potential to produce rental income for its owner.

SER-91. And the City's own expert confirmed that Colony Cove's expert, Salomon, rendered an opinion about Colony Cove's value. SER-114-15.

The City is also wrong as a legal matter, because sale value is *not* the only permissible basis to consider economic loss, and the jury could consider Colony Cove's operating losses in assessing economic impact. Indeed, this Court has expressly held in another case concerning rents at mobilehome parks that value should be defined as representing the amount that challenged "amendments reduced … revenue streams." *MHC*, 714 F.3d at 1127.

The City's argument to the contrary focuses on several Federal Circuit cases, but that court's precedent supports Colony Cove. The City's main case is *Cienega Gardens v. United States*, 503 F.3d 1266 (Fed. Cir. 2007), but that case merely held that "there appear to be *at least two ways*" of analyzing economic impact, one of which was the method now advanced by the City. *Id.* at 1282. By its terms, *Cienega* did not hold that market value was the *only* appropriate measure of economic impact.

A more recent Federal Circuit case, moreover, expressly rejects the City's approach in favor of Colony Cove's. In *CCA Associates v. United States*, 667 F.3d 1239 (Fed. Cir. 2011), that court held that in most *Penn Central* cases, the plaintiff must demonstrate "the impact the regulation had on the property during the time it was in effect, *such as the amount of money the plaintiffs actually lost in rents*

during that time period," *id.* at 1246, which is precisely what Colony Cove did here. What is more, the Federal Circuit *rejected* the City's approach as applied to "temporary regulatory restrictions on fee simples," explaining that if courts were required to consider "all income earned over the entire remaining useful life of the real property [as] the denominator," then such an analysis "would virtually eliminate all regulatory takings." *Id.* at 1247. Recognizing the approach Colony Cove presented—"lost rent or return on equity"—as the "traditional [] approach," it limited the application of *Cienega* to cases arising out of two narrow federal low-income housing statutes, and explicitly excluded from its application cases (like this case) involving regulation of fee simples. *Id.* at 1247.[6]

c. Finally, the City cites its own evidence and urges the Court to disregard Colony Cove's. Br. 32-33, 36. But that approach ignores the standard of review. *Wallace*, 479 F.3d at 624.

The City's argument is in any event meritless. The City *does not dispute* that Colony Cove sustained millions of dollars in operating losses and diminution

[6] The City also cites *Rose Acre Farms, Inc. v. United States*, 559 F.3d 1260 (Fed. Cir. 2009), but that case is also inapposite. For one thing, *Rose Acre does not* hold that the City's is the only permissible approach to measuring economic impact, instead recognizing that multiple measures are appropriate. *Id.* at 1267 (discussing different analytical modes). And in any event, *Rose Acre* involved a takings claim based on diminution in value of tangible assets (eggs), not a fee simple. *See id.* at 1274-75. The Federal Circuit's methodology for determining economic impact of a regulation on a fee simple is governed by *CCA Associates*, and directly supports the approach Colony Cove presented to the jury.

in rental value, instead arguing that the City added value in other ways. But that evidence was disputed, and the jury was entitled to resolve factual disputes in Colony Cove's favor.

For example, the City presented evidence that it approved small rent increases, but Colony Cove's evidence showed that the increases were not attributable to debt service and were insufficient to cover its operating expenses. ER-5:724; SER-43-51. The City also presented evidence that it approved Colony Cove's applications for subdivision and to develop new spaces. Br. 33. But Colony Cove's witnesses testified that these approvals had limited value, including because of unjustified approval delays and because potential new spaces sat on top of capped oil wells. *See supra* at 13.

The jury, in short, was entitled to conclude from substantial evidence that the economic impact of the City's regulatory conduct supported a taking.

2. *Colony Cove Presented Substantial Evidence That The City Interfered With Reasonable, Investment-Backed Expectations*

When he purchased the Park, Goldstein reasonably expected that the City would consider Colony Cove's debt service, so long as the purchase price and the mortgage were negotiated in arm's-length, market transactions. Substantial evidence demonstrates that these expectations were objectively reasonable.

a. The relevant question under *Penn Central* is whether Colony Cove presented substantial evidence of a "reasonable probability" that the City would

give due consideration to its debt service. *See Guggenheim*, 638 F.3d at 1120-21. Colony Cove need not show any "vested rights" or "guarantees" that the City would consider debt service in analyzing a rent increase; only that Colony Cove had a reasonable "*expectation*" that it would. *Penn Central*, 438 U.S. at 124.

The City contends that, under this Court's precedent, a mobilehome park owner lacks *any* reasonable expectation of *any* profitable return because of the regulated nature of the mobilehome park industry. Br. 38. Wrong. As already explained, the question here is not whether Goldstein reasonably expected the law to change, as it was in the rent-control challenges on which the City relies. *See supra* Part I.B. The question instead is whether Goldstein reasonably expected that the City's approach would *not* change suddenly, i.e., that it would adhere to and apply its own rent-control rules and practices as it had for decades. The jury was entitled to answer yes, for multiple reasons.

First, Goldstein reasonably relied on the text of the Guidelines, which governed the Board's consideration of rent-increase applications, ER-5:672, 771-72; SER-69-70, 93-95, and which explicitly provided that reasonable acquisition debt service was an allowable operating expense. ER-4:584; *supra* at 10-11.

Second, the reasonableness of Goldstein's expectation was recognized by *the City's* own witnesses. Danny and Freschauf both testified that in 2006, it would have been reasonable for a park owner to believe that the City would set rents at a

level sufficient to cover operating expenses, *including debt service*. SER-78-79, 88-89. Moreover, multiple witnesses admitted that the probability of rent increases allowable under the Ordinance, including those reflecting consideration of acquisition debt service, affected the purchase price. SER-56, 88-89.[7] *See Guggenheim*, 638 F.3d at 1120-21 ("reasonable probability" is "probable enough materially to affect the price").

Third, Goldstein's reasonable expectation is supported by the Ordinance's stated purpose to ensure that property owners receive a reasonable percentage of *profit* compared to the investment. ER-5:686:12-687:13; SER-16-23. The requested rent increase of $200 would have left CCME rents well below market levels, *see supra* at 11-12, and could have been phased in over several years, SER-74-76. This evidence, viewed in Colony Cove's favor, shows that Goldstein reasonably believed that the City would consider debt service; such an increase would have ensured that Colony Cove received a reasonable return while maintaining sub-market rents in furtherance of the Ordinance's purpose of

[7] The City asserts that there could be no reasonable expectation that the Board would "allow a park owner to pass through its interest expense" because the terms of the Ordinance and Guidelines gave the Board "virtually plenary control of rent-increase decisions." Br. 39-40. The City made this argument a central part of its defense, *e.g.*, ER-5-704, 718-19, 875-80, and the jury correctly rejected it. The jury was fully entitled to conclude, consistent with the City's witnesses' testimony, that Goldstein reasonably expected that the City would continue its past practice of consistently taking debt service into account.

protecting homeowners from excessive rents. Ignoring debt service, in contrast, would ignore Colony Cove's reasonable profit, and would thus be inconsistent with the Ordinance's purpose.

Fourth, Goldstein reasonably relied on contemporaneous California precedent that had required the City to consider debt service. Indeed, while the City remarkably contends that Colony Cove "failed to cite any authority suggesting the City could not exercise its broad discretion under the Ordinance to apply the MNOI methodology to decide its rent-increase applications," Br. 42, Goldstein showed at trial that he relied on the *Carson Gardens* decision, which *did* require the City to take debt service into account in considering rent-increase applications, and *did* preclude the City from instead using MNOI. *See Carson Gardens*, 135 Cal. App. at 856-67; *supra* at 15-16. Goldstein's awareness of authority that expressly *rejected* the City's discretion to ignore debt service directly supports a reasonable expectation that it would not do so in this case.

b. In response to this evidence, the City again improperly relies only on its own evidence, Br. 42-45, contrary to the applicable standard of review, *see supra* at 38. But nothing in the City's presentation would prevent a jury from concluding that Goldstein's expectations were objectively reasonable.

First, the City contends that a reasonable park owner would have consulted the Board before a purchase, Br. 43, but relies on nothing but its own *ipse dixit*.

The City also cites the fact that a $200 rent increase was larger than the City's prior rent increases, but that hardly renders unreasonable a belief that the City would grant such an increase, particularly when considering that resulting rents would have remained far below market if the increase had been granted, and that the Board had the option of phasing in rent increases. The City further relies on its purported expert on Colony Cove's reasonable expectations, Kenneth Baar, who testified that the City had not granted substantial rent increases using GPM or that the City did not grant applications in full when a park had substantial debt service, Br. 43, but the jury could have disregarded that testimony because on cross-examination, Baar admitted he had not reviewed the applications and could not provide any detail regarding these past decisions. ER-6:819-20; SER-110-13.

Second, as noted above, Goldstein's own experience with Carson Harbor, Br. 43-44, *supported* his expectation. Although the Board had not passed through *all* debt service, Colony Cove presented evidence that the Board *always* took into account all or almost all of Carson Harbor's *acquisition* debt service. SER-18-23, 51. By crediting Colony Cove's evidence, the jury could have inferred that the only debt service the Board did not credit in the past was *non*-acquisition debt

service, which would have been irrelevant to Goldstein's expectations as to acquisition debt service. SER-84, 102-06.[8]

Third, the City relies on three instances in which the City considered MNOI before 2006 at small parks, arguing that it was unreasonable for Goldstein not to have been aware of them. Br. 44. But a jury was permitted to credit Goldstein's explanation for his practice of only following rent-increase decisions for parks of a similar size to Carson Harbor and CCME, ER-5:700-01, and could conclude that Goldstein's practice of not following small-park rent increases was reasonable. Indeed, these decisions are particularly unpersuasive because they predate *Carson Gardens*, and because the City's own witnesses testified that it would have been reasonable for a buyer in Goldstein's position in 2006 to believe that debt service would be considered. SER-78-79, 88-89. Certainly, a reasonable jury could have so concluded.

Finally, the City argues that Goldstein's expectations were unreasonable because his attorney allegedly "warned him" that he could not rely on collecting increased rents. Br. 44-45. As the City is well aware, Goldstein explained at

[8] Goldstein testified that the 1983 application may have been started by the prior owner and submitted by Goldstein on behalf of the prior owner of the property. SER-26-27. The City concedes that *some* debt service was considered in setting rents. Br. 43-44. In other exhibits, the Board later admitted that it "allowed as an operating expense" that portion of "debt service attributable to the Park's prior acquisition loan." SER-140; *see also* SER-146. That the Board may have excluded some portion attributable to non-acquisition is irrelevant.

length at trial that the letter was a tool meant to drive down the price during negotiations with the seller. ER-5:682-87; SER-35-38. As Goldstein testified, given his extensive experience with the City and its rent-control rules over the decades that he owned Carson Harbor, there was no reason for the letter to be prepared for Goldstein other than to use it as a negotiation tactic in an attempt to drive the price of the Park down. *Id.* Although the City characterizes this evidence as "self-serving and counterintuitive," it was corroborated by Goldstein's contemporaneous handwritten notes showing that he shared his attorney's communication with the seller during price negotiations. ER-4:421-22. And the jury is in any event exclusively entrusted to make credibility determinations. *See Wallace*, 479 F.3d at 624.

3. *Colony Cove Offered Substantial Evidence That The Character Of The City's Conduct Supported A Taking*

a. While this Court has given its "imprimatur to the underlying public purpose of mobilehome rent control ordinances," Br. 46, it has never held that amendments to rent-control rules are legally immune from being characterized as regulatory takings.[9] Courts have considered the character of a government action to weigh in favor of a taking when the regulatory interference "can be

[9] In *Rancho* and *MHC*, the court concluded that the factor weighed against a taking on the facts of those cases. *Rancho*, 800 F.3d at 1091; *MHC*, 714 F.3d at 1128. In neither case, however, did the court hold that *every* amendment to rent-control regulation would weigh against a taking.

characterized as a physical invasion by government" rather than "adjusting the benefits and burdens of economic life." *MHC*, 714 F.3d at 1128. Colony Cove offered substantial evidence that the City's actions here fell into the former category.

First, Colony Cove presented evidence that the City's change to the rent rules caused Colony Cove to lose all profitable use of the Park and that if Colony Cove had not been able to invest additional resources into the Park, it would have gone into foreclosure. *See supra* at 12-13. The jury could have reasonably concluded that being forced to operate on the brink of foreclosure was akin to a physical invasion by the government.

Second, the jury could have concluded that the City's decision to swiftly change the Guidelines and depart from establish practice in reaction to Goldstein's purchase of the Park and a court order requiring the City to consider debt service was the latest in a pattern of behavior that targeted Goldstein for seeking reasonable rent increases in response to pressures from residents and City officials.

In assessing this factor, courts have found relevant: (i) whether a regulation is reasonably necessary to effectuate the stated public purpose, *Penn Central*, 438 U.S. at 127; (ii) whether the regulation targets a single individual for a burden that should be borne by the public at large, *Lingle v. Chevron*, 544 U.S. 528, 539 (2009); and (iii) the underlying motivations for the regulation, *David Hill Dev.*,

LLC v. City of Forest Grove, 2012 WL 5381555, at *12 (D. Or. Oct. 30, 2012); *Norman v. United States*, 56 Fed. Cl. 255, 269 (Fed. Cl. 2003).[10]

Colony Cove presented evidence that the sudden change to the Guidelines was not reasonably necessary to effectuate rent control, since debt service had consistently been considered during prior decades. ER-5:676-77, 6:791-92. The evidence also suggested that Goldstein had been singled out—the City had granted substantial rent increases for other park owners by phasing them in, but did not offer that option to Goldstein. SER-75-76, 119-21. Finally, Colony Cove offered evidence of improper motivations underlying the City's challenged actions, including its attempts to minimize rent increases in response to the substantial political clout from residents at Carson's 30 mobilehome parks, ER-5:693-94; SER-39-40, and evidence that the City's Mayor "controlled" members of the Board, ER-5:774-76; SER-73.

b. In response, the City does not even contend that the evidence at trial was insufficient for the jury to find that this factor favors Colony Cove. The City's only argument, apparently based on the law-of-the-case doctrine, is that the district

[10] Colony Cove asked that the jury be instructed on six factors: the three *Penn Central* factors as well as the preceding three factors. ER-2:158-62. The court ruled, without objection from the City, that counsel could argue that each of these factors fell within *Penn Central*'s third factor. ER-6:826-27.

court noted in its decision *denying* the City's motion to dismiss that this factor weighed against a taking. Br. 46-47.[11]

The City's argument is meritless. The law-of-the-case doctrine would only apply if the district court at the pleadings stage had decided, either "explicitly or by necessary implication," that the character of the City's conduct *could not* support a taking as a matter of law. *United States v. Jingles*, 702 F.3d 494, 499 (9th Cir. 2012). But the court held no such thing; it held only that the "complaint fail[ed] to plead ... sufficient facts that the character of the government's action supports a *Penn Central* taking." ER-1:54-56, 69-70. It did not assess the merits of the claim—again, the court *denied* the City's motion to dismiss—and it certainly did not prevent Colony Cove from developing further evidence after the pleading stage. As a result, the law-of-the-case doctrine does not apply to the court's denial of the City's motions to dismiss. *See, e.g.*, *Pearson v. Dennison*, 353 F.2d 24, 28 (9th Cir. 1965) (ruling on motion to dismiss was not "law of the case"); *Sanders v. Gen. Servs. Admin.*, 707 F.2d 969, 972 (7th Cir. 1983) ("An initial denial does not become the 'law of the case,' and is thus not inconsistent with a later judgment on

[11] The City does not make explicit the doctrine upon which it relies for this position, but based on its citation to *United States v. Washington*, 235 F.3d 438, 441 (9th Cir. 2000), it appears to be the law-of-the-case doctrine. This Court's decision in *Washington* is inapposite. *Washington* treated certain holdings entered *following* a trial in an order implementing a permanent injunction as law of the case where the underlying order was not appealed. *Id*. at 441.

the merits in defendant's favor."). In any event, the law-of-the-case doctrine is one of discretion, and "any order or other decision, however designated … may be revised at any time before the entry of a judgment." Fed. R. Civ. P. 54(b). The jury, in short, was fully entitled to conclude that this factor favored a taking.

4. *All Factors Must Be Weighed Together And No Single Factor Is Dispositive*

The above discussion has shown that the jury was entitled to find in Colony Cove's favor as to each *Penn Central* factor. But the City's burden in reversing the jury's verdict is particularly high because no single *Penn Central* factor is dispositive. *See, e.g.*, *Palazzolo v. Rhode Island*, 533 U.S. 606, 635-36 (2001) (O'Connor, J., concurring) (no single factor should be given "exclusive significance"). Rather, the *Penn Central* inquiry requires a "careful examination and weighing of all the relevant circumstances." *Id.*; *see also Rancho*, 800 F.3d at 1089.

Here, the jury was properly instructed to consider and balance all circumstances and that "no single factor is controlling and Plaintiff does not need to establish each of these factors to prevail." ER-4:102-03. Therefore, even if the Court agrees with the City that any one factor weighed against Colony Cove as a matter of law, the Court must affirm the jury's verdict if the evidence supporting the other factors, viewed in Colony Cove's favor, would support a finding of a regulatory taking.

Indeed, the City forfeited any attempt to single out a particular factor, because it never proposed that the jury answer a special verdict form as to each factor. SER-126-29. As a result, the Court must uphold the jury's verdict if it concludes that sufficient evidence exists from which the jury could have found in Colony Cove's favor on any theory. *See, e.g.*, *McCord v. Maguire*, 873 F.2d 1271, 1274 (9th Cir. 1989) ("Maguire's failure to request a special verdict as to each factual theory in the case prevents him from pressing this argument on appeal."). And as demonstrated above, there was more than sufficient evidence for the jury to conclude that a taking occurred here.

II. THE DISTRICT COURT PROPERLY ORDERED A JURY TRIAL AND CORRECTLY INSTRUCTED THE JURY

A. The District Court Properly Submitted This As-Applied *Penn Central* Claim To The Jury

The Supreme Court held in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), that the Seventh Amendment guarantees a right to a jury in a takings case. The City and its amici at times appear to argue that regulatory takings claims like this should never be submitted to a jury. *E.g.*, Br. 47-48; Br. of Amici Curiae League of California Cities 3-10. But *Del Monte was a regulatory takings case*, 526 U.S. at 694, and the Court held that the jury right applies because such cases involve "essentially ad hoc, factual inquiries," *id.* at 720, and present a "mixed question of fact and law," *id.* at 721.

Indeed, the City in the end appears to acknowledge that regulatory takings claims "*can* be found by a jury," at least in part. Br. 51. But the City presents two main arguments for why this case should not have been. *First*, the City contends that none of the individual *Penn Central* factors are properly resolved by a jury. *Id.* 51-53. Not so. The facts underlying each factor were disputed, and there is no reason why a jury would be unable to resolve those factual disputes. *Second*, the City argues that the jury should not have been allowed to weigh the factors to determine whether a taking had occurred. *Id.* 48-50. But the Supreme Court has made clear that the right "guaranteed by the Seventh Amendment" is "the right to a jury's resolution of the *ultimate dispute*" between the parties. *Del Monte*, 526 U.S. at 718. The "ultimate dispute" here is whether Colony Cove suffered a taking when the City altered its practice of considering debt service in rent-increase applications, which is exactly what the jury was asked to decide.

The district court, in short, properly preserved Colony Cove's Seventh Amendment jury right. And any error was in all events harmless because the court subsequently made clear that it would have come to the same conclusion as the jury. The City offers no basis to disturb the judgment below on this ground.

1. *Each* Penn Central *Factor Was Properly Submitted To The Jury*

The City contends that none of the *Penn Central* factors should have gone to the jury. It is not entirely clear whether the City argues that these factors are not

amenable to jury resolution as a general matter, or whether there are no factual disputes as to any of them in this case. Either way, the City is wrong.

There is no plausible dispute that each of the three *Penn Central* factors was subject to factual dispute. As the discussion in the previous Part makes clear, there was substantial evidence to support a finding in Colony Cove's favor as to each factor. Indeed, the City implicitly acknowledged that no part of this case could be resolved as a matter of law based on undisputed facts by failing to move for summary judgment.

Moreover, to the extent the City is arguing that none of the *Penn Central* factors can *ever* be resolved by a jury, that too is wrong. Indeed, *Penn Central* itself described each of the three principal factors as "essentially *ad hoc*, factual inquiries." 438 U.S. at 124. The City's contention that any of these factors is purely legal and thus not amenable to jury resolution is contradicted by *Penn Central* itself.

Economic Impact. The economic impact of a particular regulation is "mainly a factual question." *Rose Acre*, 559 F.3d at 1267. *Del Monte* itself held that "whether a landowner has been deprived of all economically viable use of his property is a predominantly factual question" to be decided by a jury, 526 U.S. at 720—the same analysis necessarily applies to the *extent* of the economic impact of a regulation. In fact, the City *admitted* that "economic impact" could be decided

by the jury. *See supra* at 22. The City's position now appears to be that Colony Cove allegedly failed to introduce evidence of an economic impact, Br. 51, which is wrong. *See supra* at 12-13, 35-39.

Interference With Reasonable, Investment-Backed Expectations. The City concedes that Colony Cove's "actual expectations" are factual, but nonetheless contends that the court must determine whether the expectations were objectively reasonable. Br. 51-52. Yet this Court has held that "objective reasonableness" is "not a legal inquiry, but rather a question of fact best resolved by a jury." *Wilkins v. City of Oakland*, 350 F.3d 949, 956 (9th Cir. 2003).

The fact that the second *Penn Central* factor judges reasonableness based on all circumstances, including the law existing at the time of the investment, does not render the determination "essentially legal." Br. 52-53. Nor does the fact that Goldstein relied on two court opinions to show his expectations. *Id*. To the contrary, the state of the law at the time "is an operative fact and may have consequences which cannot justly be ignored." *Chicot Cty. Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 374 (1940). Goldstein testified at length about his reliance on these opinions, ER-5:677-79, 716-17, as did Baar (the City's expert) in challenging the reasonableness of Goldstein's expectations and reliance. ER-6:803-10; *see generally* SER-151-91. The jury was entitled to review all the facts and circumstances and determine whether Goldstein's reliance on all the

facts, including the extant case law, was reasonable. Indeed, for all of the City's assertions that the court should have excluded judicial decisions from evidence, Br. at 52-53, the City *did not object* to the introduction of the *Carson Gardens* opinion. ER-5:677.

Character Of Government Conduct. The Supreme Court has explained that determining the character, purpose, and application of a municipal ordinance "entails complex factual assessments." *Yee v. City of Escondido*, 503 U.S. 519, 523 (1992). Thus, the City's *ipse dixit* assertion that this is a pure question of law is simply incorrect. The City is of course right that this factor *can* be resolved as a matter of law, either at the pleadings stage or on summary judgment, Br. 53, but that is true of *any* issue. The question here is simply whether the jury was permitted to find for Colony Cove on this factor by resolving disputed facts. The answer is yes, as already explained. *See supra* at 45-49.

The district court thus committed no error in submitting any individual *Penn Central* factor to the jury.

2. *The Jury Properly Resolved Whether A Taking Occurred Here, Which Is The "Ultimate Dispute" To Which The Jury Right Applies*

Nor did the district court err in submitting to the jury the question whether Colony Cove suffered a taking. That is the ultimate dispute here, and the right "guaranteed by the Seventh Amendment" is the "right to a jury's resolution of the

ultimate dispute." *Del Monte*, 526 U.S. at 718. The City's arguments ignore this fundamental point.

The City contends that determining whether there has been a taking is "vexing," "complex," and that it involves multi-factor balancing and weighing. Br. 49-50. But that is an argument *in favor* of a jury rather than against it—the Seventh Amendment jury right "should be jealously guarded by the courts," *Jacob v. City of N.Y.*, 315 U.S. 752, 753 (1942), and jealously guarding the jury right means assuring that juries rather than courts get to decide difficult questions. Indeed, juries are routinely entrusted to make difficult decisions involving balancing various factors. *See, e.g.*, *Brewer v. City of Napa*, 210 F.3d 1093, 1097 (9th Cir. 2000) (jury must weigh "totality of the circumstances" to determine whether use of force was excessive); *Howell v. Polk*, 532 F.3d 1025, 1027 (9th Cir. 2008) ("the jury decides whether the police had probable cause to search," which is "a tricky and legalistic doctrine if ever there was one"); *id.* ("The Howells argue that, because the case requires balancing competing interests in privacy and law enforcement, only the district judge may determine whether the conduct was reasonable. But we frequently entrust juries with the task of determining the reasonableness of police conduct."); *Forrester v. City of San Diego*, 25 F.3d 804, 806 (9th Cir. 1994) (jury must undertake "careful balancing of the nature and

quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake").

Certainly, there is no merit to the City's assertion that *Penn Central* claims are fundamentally legal in nature. Again, the Supreme Court has emphasized that such claims are "essentially ad hoc, factual inquiries," *Penn Central*, 438 U.S. at 124, requiring "careful examination and weighing of all the relevant circumstances." *Palazzolo*, 533 U.S. at 636 (O'Connor, J., concurring). The City also appears to contend that no jury right exists because regulatory-takings analysis involves mixed questions of law and fact. Br. 49. Even if the City's characterization were correct, its argument would be foreclosed by *Del Monte*, which holds that a "mixed question of fact and law" is for the jury to decide in this context. 526 U.S. at 721.

Finally, the City cites this Court's past cases that have resolved *Penn Central* cases as a matter of law. Br. 29-30, 50. But the City's cites involve appeals of summary judgment motions, *e.g.*, *Guggenheim*, 638 F.3d at 1116; motions to dismiss, *e.g.*, *Rancho*, 800 F.3d at 1083; or circumstances where the parties stipulated to a bench trial, *e.g.*, *MHC*, 714 F.3d at 1124-25. These cases thus prove only that *Penn Central* claims—*like all claims*—are subject to resolution as a matter of law if the pleadings fail to state a claim or if there is no material dispute of facts. That does not mean that juries cannot decide takings

claims where there *are* disputed facts, or that recognizing such a jury right would "prevent takings claim from being resolved without trial." Br. 50. Indeed, the City itself cites cases holding that *Del Monte* does *not* mean that regulatory takings cases cannot be resolved as a matter of law on the pleadings or at summary judgment. *Buckles v. King Cty.*, 191 F.3d 1127, 1141-42 (9th Cir. 1999); *Hotel & Motel Ass'n of Oakland v. City of Oakland*, 344 F.3d 959, 967 (9th Cir. 2003). Of course they can, but the point is that if such claims turn on factual disputes, those disputes must be resolved by a jury rather than the court, just as *Del Monte* expressly held.

Had the City thought this case should be decided as a matter of law on the undisputed facts, it should have moved for summary judgment. The natural consequence of its failure to do so, under the Seventh Amendment and *Del Monte*, is a jury trial. The City's objections to jury resolution of takings claims is meritless, and should be rejected out of hand.

3. *Any Error In Submitting This Case To A Jury Was In Any Event Harmless*

Even if the district court erred in submitting this case to the jury, that error was necessarily harmless because the court made a special finding in its judgment that it "agree[d] with the jury's finding." ER-1:3. An error does not result in reversal of a judgment if it "more probably than not had no effect" on the outcome. *Haddad v. Lockheed Cal. Corp.*, 720 F.2d 1454, 1459 (9th Cir. 1983). And here,

there is *no* probability that the case would have come out differently without a jury because the district court itself made clear that the result would have been the same had the court decided the question in the first instance. *See, e.g.*, *Kelly v. Shamrock Oil & Gas Corp.*, 171 F.2d 909, 911 (5th Cir. 1948); *Great Am. Ins. Co. v. Johnson*, 25 F.2d 847, 850 (4th Cir. 1928).

The City's contention that the district court erred in submitting this case to the jury is meritless and should be rejected.

B. The City Failed To Preserve Its Objection To The District Court's *Penn Central* Charge, Which Was In Any Event Correct

Similarly unavailing is the City's contention that the district court's *Penn Central* instruction requires reversal. That instruction tracked the language of *Penn Central*, and charged the jury to balance the *Penn Central* factors to determine whether a taking occurred. Indeed, the City does *not* argue that the court misstated the law in any way. Rather, the City argues that the court should have provided additional detail to its concededly correct recitation of the *Penn Central* standard by: (i) stating that Colony Cove must show "a diminution in value so severe that the [government action] has essentially appropriated their property for public use"; (ii) stating that the Constitution requires compensation only for regulatory actions "that are functionally equivalent to the classic taking"; and (iii) defining the character of the government action factor. Br. 54-56. But the

City forfeited these objections by not raising them below. In any event, its objections are unavailing.[12]

1. *The City Did Not Preserve Its Objections To The Trial Court's* Penn Central *Instruction*

Rule 51 provides that a party may only challenge a jury instruction if it states "distinctly the matter objected to and the grounds for the objection." Fed. R. Civ. P. 51. This Court has applied Rule 51 strictly in furtherance of the rule's purpose, which is "to enable the trial judge to avoid error by affording him an opportunity to correct statements and avoid omissions in his charge before the cause has been decided by the jury." *Chess v. Dovey*, 790 F.3d 961, 971 (9th Cir. 2015); *see also McGonigle v. Combs*, 968 F.2d 810, 823 (9th Cir. 1992).

Here, both Colony Cove and the City proposed their own *Penn Central* instructions. The City's proposed instruction did not include the detailed description of case law it now says is required—indeed, the City's proposal was limited to the economic-impact factor. ER-2:131. And while the City identified several areas where *Colony Cove's* proposed instruction allegedly failed to adequately state the law, ER-2:246-50, the court *rejected* both Colony Cove's

[12] This Court reviews de novo instructions where, as here, they allegedly contained "an incomplete, and therefore incorrect, statement of the law," *Norwood v. Vance*, 591 F.3d 1062, 1066 (9th Cir. 2010). If the instruction accurately states the law, this Court reviews the instruction for an abuse of discretion, recognizing the district court's "substantial latitude in tailoring jury instructions." *Gilbrook*, 177 F.3d at 860.

instruction and the City's, and instead provided its own charge that "track[ed] more closely *Penn Central*." ER-6:825-27. Yet when the court gave both parties an opportunity to react to its proposed instruction, the City did not argue, as it now does, that "[t]he instruction utterly fail[ed] to explain the wealth, and nuance, of the law that courts have developed in applying these factors." Br. 54. Nor did it assert that the factors were incomplete statements of the law. *Id*. 56-57. To the contrary, the City *agreed* with the court's formulation, and its only objection related to language not challenged on appeal. ER-6:827-29. The trial court conscientiously solicited objections, signaling the instruction may have changed had the City proffered any. The City did not give the trial court any opportunity to address those objections, and thus waived its objections to the court's *Penn Central* charge. *See Hammer v. Gross*, 932 F.2d 842, 847 (9th Cir. 1991) ("[D]efendants are in no position to complain about the instruction … because they did not object to it.").

2. *The Trial Court's* Penn Central *Instruction Was Correct*

The City's objections also fail on the merits. The City contends that the court's instruction was erroneous because it failed "to explain the wealth, and nuance, of the law that courts have developed in applying these factors." Br. 54-55. But no rule requires jury instructions to cover all legal nuances. And for good reason—*any* claim presented to a jury is generally supported by a

developed and nuanced body of law. Juries are frequently charged, for example, with determining the reasonableness of police conduct, *Howell*, 532 F.3d at 1027, and this Court has routinely upheld instructions in such cases that do not quote extensively from appellate court decisions. *See Brewer*, 210 F.3d at 1097 (no error in jury instructions that did not include "more detailed instructions addressing the specific factors").

Thus, this Court has expressly held that a "court is not required to use the exact words proposed by a party, incorporate every proposition of law suggested by counsel or amplify an instruction if the instructions as given allowed the jury to determine intelligently the issues presented." *Roberts v. Spalding*, 783 F.2d 867, 873 (9th Cir. 1986). This is particularly true where, as here, proposed language is taken directly from court decisions. *See, e.g.*, *Hammer*, 932 F.2d at 849 (no error denying instructions that "were segments taken from the Court's reasoning" and thus may have "distorted the balancing process in which the jury was to engage"); *Kent v. Smith*, 404 F.2d 241, 244 (2d Cir. 1968) ("[I]t is generally not helpful to take quotations from the opinions of appellate courts, that were never intended to be used as instructions to juries, and submit these in the form of requests to charge.").

Consistent with this standard, this Court has repeatedly rejected challenges to instructions where the jury was instructed as to the relevant factors, charged

with considering the totality of the circumstances, and each party was given an opportunity to argue their theory of the case. *See, e.g.*, *Brewer*, 210 F.3d at 1097. Here, the City does not argue that the instructions were *wrong*; only that they were not sufficiently detailed. Yet the court's charge *did* allow the City to argue its case, which is exactly what the City did. *E.g.*, ER-5:664-68, 6:876-98, 877, 893-96. The instruction here thus correctly stated the law, "fairly and adequately covered the issues presented, and provided [the parties] with ample room to argue" their theories of the case to the jury. *Brewer*, 210 F.3d at 1097. That is all that this Court's precedent requires.

The City relies on *Norwood v. Vance*, 591 F.3d 1062 (9th Cir. 2010), and *Hunter v. County of Sacramento*, 652 F.3d 1225 (9th Cir. 2011), but those cases are inapposite. In *Norwood*, a § 1983 action brought by a prisoner alleging violations of the Eighth Amendment, this Court concluded that a deliberate indifference jury instruction was erroneous. 591 F.3d at 1065-67, 1070. While recognizing that the instruction correctly stated the deliberate indifference standard, the court nonetheless found that the instruction was "incomplete and misleading" because it did not cover the special deference that must be afforded to prison officials in Eighth Amendment cases relating to conditions of confinement. *Id.* at 1066-67. And in *Hunter*, this Court found the district court's *Monell* instruction, based on the Ninth Circuit Model, to be erroneous because it was not

supplemented to encompass the failure-to-investigate theory that plaintiffs made a central theme of their case. 652 F.3d at 1233-36.

In each case, in other words, case-specific facts rendered a model instruction incorrect or misleading. The City does not argue here, however, that the general *Penn Central* standard is wrong or inapplicable for some case-specific reason. Rather, the City simply argues that the court should have given the jury additional detail explaining how the *Penn Central* factors have been elaborated in case law. No precedent requires a court not only to correctly instruct the jury on the law but to elaborate the instructions with doctrinal nuance developed over decades.

Moreover, unlike in *Norwood* and *Hunter*, any error here would be harmless, as the City in its summation made the arguments it says should have been in the jury charge without objection. *E.g.*, ER-6:877. The City makes no effort to show that the district court's failure to add the language the City now says was missing made it more likely than not that the result would have been different.

III. THE CITY'S CLAIMS OF EVIDENTIARY ERROR ARE MERITLESS

The City also complains about a series of *in limine* and other evidentiary rulings, which are reviewed for abuse of discretion. *See McEuin v. Crown Equip. Corp.*, 328 F.3d 1028, 1032 (9th Cir. 2003). The City's complaints are meritless.

A. The Court Did Not Err In Allowing Colony Cove To Offer Evidence And Argument That The City "Changed the Rules"

The City contends, as it did in its first motion *in limine*, ER-4:284-93, that this Court's prior *Colony Cove* decision precluded Colony Cove from offering evidence and argument that the City "changed the rules," in support of its contention that the City's conduct contravened Colony Cove's reasonable, "investment-backed expectations." Br. 59-62. The district court correctly rejected that contention.

The City's principal argument is that *Colony Cove* decided and rejected the proposition that the 2006 Amendment "changed the rules," so Colony Cove was issue-precluded from offering such evidence and argument at trial. But there is no issue preclusion unless "the issue necessarily decided at the previous proceeding is identical to the one which is sought to be relitigated." *Hydranautics v. FilmTec Corp.*, 204 F.3d 880, 885 (9th Cir. 2000). And the issue decided in *Colony Cove* has nothing to do with the question litigated below and decided by the jury.

As the City acknowledges, Br. 63, the relevant question in *this* litigation concerns Colony Cove's *reasonable, investment-backed expectations*—i.e., whether Goldstein reasonably expected in 2006 that the City would take into account debt service in evaluating any rent-increase application. *See supra* at 14-17. Evidence and argument that Goldstein reasonably understood the 2006

Amendment to the Guidelines as having "changed the rules" are directly relevant to that question.

This Court's decision in *Colony Cove* had nothing to do with Colony Cove's reasonable, investment-backed expectations—a question the court did not even consider, let alone decide, because it never reached the merits of Colony Cove's takings claim. *See* 640 F.3d at 957 (dismissing facial takings claim as time-barred and as-applied takings claim as unripe under *Williamson County*). The portion of this Court's opinion on which the City relies instead concerned only when the statute of limitations for Colony Cove's facial challenge to the Ordinance began to run. The court held the claim time-barred because the original Guidelines were adopted in the 1970s, and the 2006 Amendment to the Guidelines did not have "the force and effect of law," and thus was not a "substantive amendment" that would restart the limitations period. *Colony Cove*, 640 F.3d at 957. The court also held, in the context of Colony Cove's due process claims, that the City had not acted irrationally in applying the amended Guidelines to Colony Cove's applications. *Id.* at 961.

Neither of those two questions decided in *Colony Cove* have anything to do with the question at issue here, i.e., whether the City interfered with Goldstein's reasonable, investment-backed expectations by refusing to consider debt service in evaluating Colony Cove's rent applications. That question has never been

considered or decided by any court before the proceedings below, and the district court did not err in allowing the jury to consider evidence directly relevant to its consideration of the question here.[13]

Certainly, the district court did not abuse its discretion in allowing Colony Cove's counsel to *argue* that the City "changed the rules," which appears to be the City's main objection. Br. 59-60 (referencing Colony Cove's counsel's questioning, opening, and closing). There is no basis for preclusion, as just discussed. And the district court has "broad discretion" in managing trial, *Navellier v. Sletten*, 262 F.3d 923, 942 (9th Cir. 2001), including as to opening and closing arguments, *United States v. Guess*, 745 F.2d 1286, 1288 (9th Cir. 1984). The City's position appears to be that Colony Cove should have ignored the resolution changing the Guidelines, despite the fact that it was admitted into evidence without objection, ER-4:601-03, and the amended Guidelines were the basis for the challenged rent-increase decisions. If the City felt that Colony Cove's argument went too far or was prejudicial, it could have made an appropriate

[13] The City also argues that the district court was bound to preclude this evidence "as a matter of stare decisis." Br. 62. That is simply an attempt to recast its meritless preclusion argument in a different light. Preclusion does not apply because this Court in *Colony Cove* did not decide Goldstein's reasonable, investment-backed expectations—the question at issue here—which by definition means that this question is not stare decisis.

objection at trial; it did not do so. *Cf.* ER-5:640-57 (opening), 6:840-71 (closing), 6:898-910 (rebuttal).

The district court reasonably exercised its "broad discretion" to permit counsel for both parties to argue their respective theories of the case—Colony Cove's counsel argued (among other things) that the City "changed the rules," and the City argued that it never changed the rules and had no obligation to use any methodology or consider debt service. *E.g.*, ER-5:658, 659-60, 6:875, 878-80, 897-98. That is the question the jury was tasked with deciding, and the district court did not abuse its discretion in allowing each side's counsel to present their arguments to the jury.[14]

B. The Court Did Not Abuse Its Discretion In Permitting Evidence And Testimony Related To *Carson Gardens*

Colony Cove relied on *Carson Gardens* as evidence of its reasonable, investment-backed expectations. *See supra* at 15-16. The City argues that the

[14] The court did not err in refusing to give the City's proposed instructions that the Ordinance and Guidelines "never required" any methodology and that the Amended Guidelines did not "change the rules." Br. 62-63. As the court correctly noted, the jury was tasked with considering as a factual matter whether Goldstein's investment-backed expectations were reasonable, so the instructions the City proposed were not statements of law but conclusions it wanted the jury to draw. ER-6:831. The district court did not abuse its discretion in declining to argue the City's case for it. *Cf. Fiorito Bros. v. Fruehauf Corp.*, 747 F.2d 1309, 1316 (9th Cir. 1984) ("A party is not entitled to a jury instruction phrased exactly as it desires; rather, an instruction is proper if it adequately allows the party to argue its theory of the case to the jury.").

court erroneously allowed testimony and evidence on this topic. Br. 63-68. The City's objections are both forfeited and incorrect.

1. As an initial matter, the City's objection to the district court's decision allowing Colony Cove to offer evidence or argument relating to *Carson Gardens* is forfeited. The City made this argument in a motion *in limine*, which the district court denied. ER-1:37. But rulings on motions *in limine* "are not binding on the trial judge [who] may always change his mind during the course of a trial." *Ohler v. United States*, 529 U.S. 753, 758 n.3 (2000). Thus, to preserve an evidentiary issue for appellate review, a party normally must make a timely and specific objection at trial. *United States v. Gomez-Norena*, 908 F.2d 497, 500 (9th Cir. 1990). Yet the City made no objection at trial, notwithstanding the court's willingness to consider such objections and its suggestion that its *in limine* rulings were not necessarily final. ER-5:677; SER-4-7. The City thus failed to preserve its objections to this evidence for appellate review. *See Scott v. Ross*, 140 F.3d 1275, 1286 (9th Cir. 1998) (*in limine* objection not preserved where court expressed willingness to consider objections to expert's testimony).

2. In any event, the City's contention is meritless.

The second *Penn Central* factor requires a consideration of (i) the plaintiff's *actual* investment-backed expectations and (ii) the *reasonableness* of those expectations. The reasonableness inquiry focuses on "what a reasonable owner in

the [plaintiff's] position should have anticipated," *Chancellor Manor v. United States*, 331 F.3d 891, 904 (Fed. Cir. 2003), at the time the plaintiff purchased the property. *Cienega*, 503 F.3d at 1288. As already discussed, and as the City does not dispute, Colony Cove offered the *Carson Gardens* decision to support its argument that Goldstein actually and reasonably expected that the City would consider debt service in evaluating Colony Cove's rent applications.

The City's argument is not that judicial opinions are generally irrelevant to this *Penn Central* factor—indeed, the City's own witness relied extensively on judicial opinions and case law in his testimony. *See* SER-96-101; *see generally* SER-151-91. Rather, the City contends that *Carson Gardens* did not accurately reflect the state of the law *at the time of trial*. Br. 64-66. But even if that were true, the relevant question is Goldstein's reasonable expectations when Colony Cove purchased the Park *in April 2006*. At that time, the City does not dispute that Goldstein was aware of, and relied upon, *Carson Gardens*, which ordered the City to employ a "reasonable analysis or methodology that gives due consideration to the Park's actual reasonable operating expenses," including acquisition debt service. *Carson Gardens*, 135 Cal. App. 4th at 862. This fact was clearly relevant to whether Goldstein's expectation that the City would consider some portion of Colony Cove's debt service was reasonable.

3. The City also contends that Colony Cove unfairly used *Carson Gardens* to impugn the City's good faith by arguing that the City violated the law when it applied MNOI. Br. 66. Nonsense. Colony Cove did not use *Carson Gardens* to "smear the City as a dishonest scofflaw," Br. 67, but to demonstrate Goldstein's expectations and their reasonableness. Although Colony Cove did reference that the City violated the superior court's order in *Carson Gardens*, Br. 66, 68, that question was directly relevant to Goldstein's expectations—the court of appeal, after all, required the City to comply with the trial court's ruling, bolstering the reasonableness of Goldstein's expectation that the City would take debt service into account. That evidence may be damaging to the City's case, but that does not mean it constitutes *unfair* prejudice under Rule 403. *Old Chief v. United States*, 519 U.S. 172, 180 (1997). Indeed, if Colony Cove's references to the City's violation of the *Carson Gardens* order were so unfair, the City presumably would have objected at trial. It did not. In any event, the City has made no effort to show that any prejudice "substantially outweigh[s]" the evidence's significant probative value. Fed. R. Evid. 403. The City's challenge to this evidence should be rejected.

C. The Court Did Not Abuse Its Discretion By Allowing Testimony Regarding Political Motivation

The City asserts that the court erroneously permitted testimony related to the City's investigation of its former Mayor, Jim Dear, and alleged misconduct during

his tenure, because it was irrelevant and unduly prejudicial. Br. 68-69. The City is wrong.

1. As an initial matter, the City has forfeited its challenge to the admissibility of such evidence by opening the door and inviting any error. The City's counsel was the first to ask about Dear and his interactions with the Board. SER-71-73. Only after that did Colony Cove ask Freschauf about the control that Dear would assert over Board members. ER-5:773-77. As this Court has recognized, "[a] party's preemptive use of evidence at trial before its introduction by the opposing party constitutes a waiver of the right to challenge the admissibility of the evidence on appeal." *McCollough v. Johnson, Rodenburg & Lauinger, LLC*, 637 F.3d 939, 955 (9th Cir. 2011). Having elicited testimony relating to Dear and his relationship with the Board, the City cannot challenge the court's decision to permit Colony Cove's inquiry into such topics.[15]

2. In any event, there is no basis to conclude that the district court abused its discretion in permitting the evidence. The City argues that evidence of political pressure or improper motivation is irrelevant because it says nothing about "the

[15] The City may argue that it opened the door to this testimony because the district court earlier denied a motion *in limine* to preclude it. But as explained above, motions *in limine* are by nature tentative, and that is especially so when, as here, the district court suggested that it was open to reconsidering them at trial. *See supra* at 68. And regardless, the City had no reason to raise the issue; it could have explored and clarified Freschauf's testimony on re-direct examination if Colony Cove raised the subject.

actual burden imposed on property rights, or how that burden is allocated." Br. 68-69. But the jury was not instructed that it was required to consider evidence of political pressure or motivation. Instead, it was instructed to consider the character of the government action and to undertake a "careful examination and weighing of all the relevant circumstances" in evaluating that and the other *Penn Central* factors. *Palazzolo*, 533 U.S. at 635-36; *Rancho*, 800 F.3d at 1089. It was not "unfair" to the City in any way, Br. 67-69, to allow evidence of the City's Mayor's misconduct—his tendency to "control" Board members, pressure how they voted, and remove neutral Board members, ER-5:774-76; SER-73—and political motivation to be presented to the jury and considered among the totality of the circumstances.[16] *See, e.g.*, *Penn Central*, 438 U.S. at 127 (all relevant circumstances may be considered); *David Hill*, 2012 WL 5381555, at *12 (jury permitted to consider evidence related to underlying motivation); *Norman*, 56 Fed. Cl. at 269 (evidence of motivation relevant). The question of the character of the City's conduct in refusing to consider debt service in evaluating Colony Cove's rent applications is directly relevant to whether the City effected a taking. Certainly, once the City introduced evidence of Dear's action, Colony Cove was entitled to question the City's witness on the same subject and discuss that

[16] To the extent that the court believed that certain testimony or evidence related to this topic was irrelevant or unduly prejudicial, it sustained the City's objection and excluded the evidence. *E.g.*, ER-5:779; SER-81, 122-25.

testimony in closing. The City's effort to exclude evidence of the character of the City's conduct should be rejected.[17]

D. The District Court's Admonition Of The City's Counsel Was Harmless Error Cured At Trial

The City next argues that the district court erred in admonishing the City's counsel during her questioning of Freschauf based on the court's belief that counsel had for a second time violated the court's order. Br. 69-71. But the district court's admonition did not substantially prejudice the City, and even if it did, any prejudice was ameliorated by a prompt curative instruction.

"The standard for reversal on the basis of judicial misconduct in a civil trial is[ ] quite high." *Kern v. Levolor Lorentzen, Inc.*, 899 F.2d 772, 780 (9th Cir. 1990). The Court considers the entire record and will only reverse if the party was "deprived of a fair opportunity to prove it[s] case." *Penk v. Or. State Bd. of Higher Educ.*, 816 F.2d 458, 466-67 (9th Cir. 1987); *cf.* Fed. R. Civ. P. 61. As this Court noted, "[c]omments by the court which reflect unfavorably on counsel's conduct at trial are not prejudicial unless of a serious nature." *Shad v. Dean Witter Reynolds, Inc.*, 799 F.2d 525, 531 (9th Cir. 1986). The City does not address this standard because it cannot make such a showing.

[17] The City's citation to cases concerning the *validity* of a regulation, Br. 68-69, are irrelevant; a "regulation's underlying validity… is logically prior to and distinct from the question whether a regulation effects a taking. *Lingle*, 544 U.S. at 543. Colony Cove challenges a single action against a single park owner, and the jury was entitled to know the character and circumstances surrounding that action.

The court's rebuke represented a single instance over the course of four days of testimony and argument. This brief exchange did not address the merits of the City's case or the ultimate issues in dispute, but instead focused solely on the *conduct* of the City's counsel. Under this Court's precedent, the district court's admonition is not reversible error. *See, e.g.*, *Pau v. Yosemite Park & Curry Co.*, 928 F.2d 880, 885 (9th Cir. 1991) (no reversible error where court portrayed counsel as "incompetent and deceitful"; court stopped counsel from pursuing questioning by disclosing sidebar admonishment and threat of contempt); *Kern*, 899 F.2d at 779-80 (no reversible error where comments did not address merits, even though court stated that counsel's question was "idiotic" and threatened to sanction counsel).[18]

[18] The City's cases are nothing like this one. Br. 70-71. In *United States v. Kelley*, 314 F.2d 461 (6th Cir. 1963), the court threatened counsel with contempt on multiple occasions in the presence of the jury. *Id*. at 463. In *United States v. Spears*, 558 F.2d 1296 (7th Cir. 1977), the court also threatened to sanction counsel in the presence of the jury, after the court accused counsel of lying and suggesting that the jury should not believe him. *Id.* at 1296-98. In *United States v. Dellinger*, 472 F.2d 340 (7th Cir. 1972), the court made several hundred deprecatory comments about defense counsel, 150 of which were in front of the jury. *Id*. at 385-91 & n.83. As this Court has recognized, "[v]ery few cases outside of the criminal law area support an appellate finding of judicial misconduct during trial." *Handsgards, Inc. v. Ethicon, Inc.*, 743 F.2d 1282, 1289 (9th Cir. 1984). Each of the criminal cases proffered by the City involved repeated comments addressing the merits and indicating bias for one party. And in the only civil case the City cites, *Nationwide Mutual Fire Insurance Co. v. Ford Motor Co.*, 174 F.3d 801 (6th Cir. 1999), the court interrupted and admonished counsel on multiple occasions in front of the jury and blatantly showed favoritism to defendants. *Id.* at 805-10.

Moreover, and in any event, the City does not dispute that the district court provided a curative instruction early the next morning. ER-6:836-38. That instruction ameliorated any prejudice that would otherwise have existed. *See United States v. Scott*, 642 F.3d 791, 800 (9th Cir. 2011) (curative instructions addressed any prejudice). Although the City contends that the court's instruction was a "dollar short," Br. 70, the City did not propose a stronger instruction. Moreover, juries are presumed to follow instructions, *see Brown v. Ornoski*, 503 F.3d 1006, 1018 (9th Cir. 2007), and the City's *ipse dixit* does not overcome that presumption. Further, the City did not at the time contend that the prejudice was incurable by, for instance, moving for mistrial.

The City also contends that the court's admonition precluded it from eliciting what it believed to be relevant evidence. Br. 71. But it does not explain why. To the extent the City believed that the district court had cut off evidence it believed necessary, it could have requested leave to offer such evidence by recalling and further examining Freschauf—its own witness, former employee, and consultant—after the court reconsidered its admonishment. And in any event, the City makes no effort to explain in its appellate brief how the evidence it says it was precluded from offering so severely prejudiced the City as to require reversal of a jury verdict.

IV. COLONY COVE'S *PENN CENTRAL* CLAIM WAS RIPE

The City next asserts that Colony Cove's claim is not ripe because Colony Cove did not first file its *Penn Central* claim in California court. Br. 71-74. The City's argument is meritless, which may explain why the City *never raised this argument* before the district court and, in fact, recognized that Colony Cove's claims were ripe. SER-228-29 (moving to dismiss unrelated claims on ripeness grounds under *Williamson County*, but not moving to dismiss the present claims). The City's argument that Colony Cove did not properly present its arguments in state court is thus waived. *See Armstrong v. Brown*, 768 F.3d 975, 981 (9th Cir. 2014) (issues not raised in trial court are waived on appeal).

In any event, the City's position is wrong as a matter of law. This Court recognized in *Colony Cove* that a plaintiff cannot bring a takings claim in federal court until it is denied compensation in state court. 640 F.3d at 958. This requirement follows from *Williamson County*, which held that before asserting an as-applied takings claim in federal court, a plaintiff must have sought, and been denied, "compensation through the procedures the State has provided for doing so." 473 U.S. at 194. In *Colony Cove*, this Court explained that Colony Cove was required to ripen its claim through "a *Kavanau* adjustment, which involves filing a writ of mandamus in state court and, if the writ is granted, seeking an adjustment of future rents from the local rent control board." *Colony Cove*, 640 F.3d at 958

(citing *Kavanau v. Santa Monica Rent Control Bd.*, 16 Cal. 4th 761 (1997)); *see also Equity Lifestyle Props., Inc. v. Cty. of San Luis Obispo*, 548 F.3d 1184, 1192 (9th Cir. 2008) (takings plaintiff must ripen claim through the *Kavanau* adjustment).

That is exactly what Colony Cove did here. But the City now contends that this was not enough. Its argument is that to exhaust a federal takings claim, Colony Cove was required to bring the identical *takings* claim under either the federal or California constitution in state court. That contention is not only contrary to this Court's express direction in *Colony Cove*, but also to the precedent on which *Colony Cove* is based. A plaintiff may not in the first instance bring a takings claim in federal court because it is a prerequisite to any taking for a state to have denied "compensation through the procedures the State has provided for doing so," *Williamson Cty.*, 473 U.S. at 194—in California, a *Kavanau* adjustment. It is irrelevant that "California courts construe the state takings clause 'congruently' with the federal clause" and have applied *Penn Central*. Br. 72. Under *Williamson County*, the prerequisite to a federal takings claim is denial of compensation, not an unsuccessful state-court takings claim.

Indeed, the City's position is facially absurd—if taken seriously, it would prevent *any* takings claim from *ever* being brought in federal court, because if a plaintiff were required first to bring a takings claim in state court, any subsequent

federal claim would either be (i) moot, if the state-court takings claim was successful, or (ii) precluded, if the state-court takings claim were rejected. That is precisely why this Court has recognized, after dismissing a takings claim under *Williamson County*, that a plaintiff "may reserve its federal claims while it pursues its state remedies," *Hacienda Valley Mobile Estates v. City of Morgan Hill*, 353 F.3d 651, 661 (9th Cir. 2003)—again, exactly what Colony Cove did here. *See Colony Cove*, 220 Cal. App. 4th at 879 (noting Colony Cove's *England* reservation in state court).

Colony Cove, in other words, did everything this Court, consistent with governing precedent, held it was required to do to ripen its federal takings claim. The City's belated, unpreserved attempt to evade the jury's verdict should be rejected.

V. THE DISTRICT COURT PROPERLY AWARDED COLONY COVE ATTORNEYS' FEES INCURRED IN THE STATE COURT PROCEEDINGS

Finally, the City erroneously contends that it is not liable for Colony Cove's reasonable fees incurred in the several years of state court litigation necessary to ripen its federal takings claim. As explained below, these fees fall squarely under § 1988. The City should not now be heard to complain about these fees, particularly considering that it was the City that insisted, in *Colony Cove*, that Colony Cove ripen its as-applied claims in California court.

In *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980), the Supreme Court concluded that an award of fees incurred in administrative proceedings necessary to ripen a Title VII claim was "inescapable" because the plaintiff was required to undertake such proceedings as prerequisite to her Title VII claim. *Id.* at 60-65. Under Title VII, the Court reasoned, "[i]nitial resort to state and local remedies is mandated, and recourse to the federal forums is appropriate only when the State does not provide prompt or complete relief." *Id.* at 65. Exactly the same is true here—as just explained, a plaintiff must seek and be denied compensation under "the *Kavanau* adjustment process prior to filing suit in federal court." *Colony Cove*, 640 F.3d at 958. Colony Cove is entitled to fees incurred litigating the state-court prerequisite under *Carey*.

The City contends that by making an *England* reservation, Colony Cove made clear that it was *not* pursuing a takings claim in state court. Br. 75. That is true but irrelevant. Again, "time spent on administrative [or court] proceedings to enforce the civil rights claim *prior to the litigation*" asserting a § 1983 claim is compensable under § 1988. *N.C. Dep't of Transp. v. Crest St. Cmty. Council, Inc.*, 479 U.S. 6, 15 (1986). And the state-court proceedings here were ordered by this Court as a prerequisite to this § 1983 litigation.

The City's only authority, *Webb v. Board of Education of Dyer County*, 471 U.S. 234 (1985), is inapposite. *Webb* merely holds that a § 1983 plaintiff could not

recover fees for *optional* proceedings. *Id*. at 241. But unlike in *Webb*, Colony Cove could not have gone "straight to court to assert it[s]" claim, *id.*, because this Court required it, under *Williamson County*, to first exhaust state-court remedies. Colony Cove is thus entitled to fees under established Supreme Court precedent.

CONCLUSION

The judgment below should be affirmed.

Dated: June 2, 2017

Respectfully submitted,

By: /s/ Anton Metlitsky

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1, and pursuant to this Court's order of April 5, 2017, enlarging the word limit for Defendants-Appellants' Opening Brief and Plaintiff-Appellee's Answering Brief, ECF No. 37, the attached Answering Brief of Plaintiff-Appellee Colony Cove Properties, LLC is proportionally spaced, has a typeface of 14 points or more, and contains 18,963 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

Dated: June 2, 2017

By: /s/ Anton Metlitsky
Anton Metlitsky
Attorney for Plaintiff-Appellee
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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Plaintiff-Appellee Colony Cove Properties, LLC certifies that it is aware of no related cases currently pending before this Court.

Dated: June 2, 2017

By: /s/ Anton Metlitsky
Anton Metlitsky
Attorney for Plaintiff-Appellee Colony Cove Properties, LLC

CERTIFICATE OF SERVICE

I hereby certify that on June 2, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: June 2, 2017

By: */ s/ Anton Metlitsky*
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