06-56306

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT, EN BANC

DANIEL GUGGENHEIM, SUSAN GUGGENHEIM and MAUREEN H. PIERCE,

Plaintiffs and Appellants,

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vs.

CITY OF GOLETA, a municipal corporation,

Defendant and Appellee.

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF *AMICUS CURIAE*, CALIFORNIA ASSOCIATION OF REALTORS® IN SUPPORT OF PLAINTIFF-APPELLANT'S ON REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, amicus curiae California Association of REALTORS® avers that it is a nonprofit corporation which does not issue stock and which is not a subsidiary or an affiliate of any publicly owned corporation.

April 15, 2010

Honorable Judges
United States Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103

Re: *Guggenheim v. City of Goleta*
9th Circuit # 06-56306
District Court # CV 02-02478 FMC

Motion for Leave to File an *Amicus Curiae* Brief
In Support of Plaintiff-Appellant in Rehearing En Banc

Dear Honorable Judges:

Under Federal Rules of Appellate Procedure ("FRAP") Rule 29(a) and Ninth Circuit Rule 29-2(a), the California Association of REALTORS® ("C.A.R.") moves for leave to file an *amicus curiae* brief in support of Plaintiffs-Appellants Daniel Guggenheim, Susan Guggenheim, and Maureen H. Pierce. C.A.R. supports affirmance of the Slip Opinion, issued on September 28, 2009 by the appointed panel, Judges Goodwin, Kleinfeld and Bybee.

C.A.R. is a voluntary trade association whose members consist of local Boards and Associations of REALTORS® and more than one hundred seventy thousand (170,000) persons licensed as real estate brokers and salespersons by the

State of California. REALTORS® assist members of the public in buying and selling real property.

As a representative of the real estate brokerage community which is involved in the sale of all properties, including mobilehomes in mobilehome parks, C.A.R. believes it can provide an important perspective to this case. C.A.R. has advocated for protections for private property owners and preserving the alienability of real property. Furthermore, C.A.R. believes in the goal of affordable housing, and has created a Housing Affordability Fund in order to advance such interests. C.A.R. has seen many iterations of rent control during the years at the local level, and believes that certain standards for such provisions are necessary in balancing the private interests of property owners against the legitimate interests of local governments, and if such regulations go too far, then appropriate compensation for the property owners is appropriate. Given the history of rent control in general, C.A.R. believes that the case presents an important juncture to weigh in on this matter. In the seminal case of *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), the U.S. Supreme Court identified certain factors that need to be considered to determine whether a regulatory taking can occur. Under these present circumstances, we believe that

the local government action has gone too far and that the landowners are entitled to compensation for the regulatory taking.

C.A.R. has read the Opinion issued on September 28, 2009 by the appointed panel in the above referenced case on appeal from the United District Court for the Central District of California, and believes that the Opinion is consistent with the trends and recent cases issued by the Supreme Court of the United States and the Ninth Circuit Court of Appeal, except that the due process violation claim deserves greater attention and closer examination. Furthermore, C.A.R. believes that in the interests of private property rights, clarification on the question of when a regulation which does not physically occupy the property or prevent all use of the property can be considered to be a taking under Fifth Amendment of the U.S. Constitution.

C.A.R. has read the Petition for Panel Rehearing and Rehearing En Banc filed by Defendant-Appellee, Appellant's Response, and the *amici curiae* in support of Defendant-Appellee, and respectfully requests that this Court accept the accompanying brief, *amicus curiae,* in the En Banc Rehearing that was granted on March 12, 2010.

Respectfully submitted,

CALIFORNIA ASSOCIATION OF REALTORS®
June Babiracki Barlow, Vice President and General Counsel, SBN 093472
Grant Habata, Counsel, SBN 170004

By: /s/ Grant Habata
Grant Habata

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BRIEF OF *AMICUS CURIAE*, CALIFORNIA ASSOCIATION OF REALTORS® IN SUPPORT OF PLAINTIFF-APPELLANT ON REHEARING EN BANC

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I

INTRODUCTION AND ISSUES PRESENTED

This case is being reheard in the Ninth Circuit Court of Appeals en banc after a panel of three judges of the same court found that a regulatory ordinance, namely a mobilehome rent control ordinance adopted by the City of Goleta ("RCO"), was a violation of federal takings law under the U.S. Constitution, reversing the District Court's ruling which had been in the city's favor. Although many federal cases have ruled on the issue of regulatory takings, certain questions still remain to be addressed, and property owners and governmental entities will both benefit from additional clarity in this area.[1] One key topic that needs further clarification is whether a regulatory taking can occur without an actual occupation of the property, or without denying an owner all economic use of the land. The Supreme Court has left this question open, and additional guidance is required in this area, as regulations can on occasion become so burdensome on a landowner that they constitute a taking even without denying *all* use of the land. In this circumstance, the City of Goleta has crossed the line by continuing a practice which leads to an ongoing extraction of value and usefulness of the land even

[1] Even though governmental entities benefit from this clarification, they would likely still prefer a judicially murky rule which only rarely finds a taking.

many years after history demonstrates that such practice is a failure at providing affordable housing and keeping rents stable.

Finally, as Justice Kennedy indicated in his concurrence in the *Lingle* case, there remains the "possibility that a regulation might be so arbitrary or irrational as to violate due process." *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 548 (2005). The RCO deserves a closer look under these standards of due process.

II

ANALYSIS OF FACIAL TAKINGS CLAIMS UNDER *PENN CENTRAL* AND SUBSEQUENT AUTHORITY

For governmental actions which do not result in either a physical invasion of the property, or a complete deprivation of all economically use of the property, the Supreme Court laid the basis for regulatory takings in *Penn Central* indicating that courts look at the "severity of the impact of the law on appellant's [claimant's] parcel…[which] in turn requires a careful assessment of the impact of the regulation" on the property of the landowner challenging the regulation. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 136 (1978). That Court identified several factors which need to reviewed, including whether the plaintiff is one of a very small number negatively impacted by the regulation,

whether the character of the governmental action is too severe, and whether the regulation interferes with the investment-backed expectations of the landowner. The analysis of these factors, even under a facial challenge to the law, favors the conclusion that the government has indeed interfered with the landowner's property such that compensation is required.

A. FACIAL CHALLENGES ARE ANALYZED UNDER THE CONTEXT OF WHETHER THE MERE ENACTMENT CONSTITUTES A TAKING.

A facial challenge asserts that governmental action is invalid in the abstract, or that "no set of circumstances exists under which the [a]ct would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). Despite the fact that a facial challenge has a higher threshold on the merits than an as-applied challenge, these challenges are not impossible. In takings contexts, the Supreme Court has provided additional guidance in indicating that the factors to be analyzed include the following: "[t]he economic impact of the regulation on the claimant…, the extent to which the regulation has interfered with distinct investment-backed expectations…, [and] the character of the governmental action…." *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 538-539 (2005). Tackling the character of the

governmental action first will help to clarify the nature of mobilehome rent control, so that the economic factors can be examined in more detail.

1. Character of Governmental Action Is Too Severe

To interpret "the character of governmental action," the Supreme Court has indicated that this element helps "identify those regulations whose effects are functionally comparable to governmental appropriation or invasion of private property…." *Lingle*, 544 U.S. at 542. Under the context of restrictive rent control, severely restrictive rent control does equate to governmental appropriation of private property, and transfer of that property to others.

In the context of mobilehome rent control, an understanding of the mobilehome purchase process provides useful context for the regulations. When a purchaser has decided to purchase a mobilehome unit, that purchaser has a number of options. The purchaser can choose to buy: 1) an existing mobilehome unit in a mobilehome park where all mobilehome unit owners will own the park jointly (similar to a existing condominium and homeowners association); 2) an existing mobilehome unit in a mobilehome park where they will be tenants on the land (similar to an existing apartment tenant in a typical landlord-tenant relationship); 3) a new mobilehome unit where they will own the underlying land individually (similar to a newly built detached single family residence); 4) a new mobilehome

unit where it will be placed in a park where they will own the park; or 5) a new mobilehome unit where it will be placed in a park where they will be tenants on the land (similar to a newly built apartment unit in a landlord-tenant relationship). The mobilehome rent control provisions only apply to the second and fifth situations, and even in that case, the mobilehome unit purchaser has options about whether to enter into a month-to-month lease, a medium term lease (usually one year but less than five years), or a long-term lease (thirty years of more). Of course, certain options are more affordable than others, and all options have merits, but the mobilehome unit purchaser should get the advantages and the disadvantages of the type of property that they have chosen.

To understand how mobilehome rent control provisions might apply, a broad overview of the structure of mobilehome rent control schemes is helpful. Mobilehomes located in mobilehome parks[2] have slightly different characteristics compared to typical residential rental properties. For mobilehomes located in mobilehome parks, the park owner still acts as the landlord but the mobilehome units are owned by each tenant. Unlike a typical lease where an exiting tenant has nothing to transfer to a new tenant, in a mobilehome park, the mobilehome units

[2] For purposes of discussion, mobilehome parks will refer to parks where a landlord owns the park, and rents out "pads" to the tenants who own the actual mobilehome unit. Mobilehome parks in which the land is owned by the tenants have different characteristics, and are not addressed here.

are sold by the existing tenants to the new tenants. A private property transaction occurs between the current mobilehome unit owner/park tenant and the subsequent unit owner/tenant. When the mobilehome unit is sold, the lease in the mobilehome park typically allows the new owner to keep the mobilehome in the same space in the park, and keep paying the same rent (or a slightly higher amount) as the previous mobilehome owner/park tenant. In the present case, for example, mobilehome units located in the present park owned by the Plaintiffs sell for roughly $119,000 whereas the value of an actual mobilehome unit is roughly $14,000, according to testimony that was presented by the park owners in the federal District Court. *Guggenheim v. City of Goleta*, 582 F.3d 996. 1019, n.14 (9th Cir. 2009), *en banc reh'g granted* (9th Cir. 2010) (this present case, Docket file, p.61). As a result of the lack of vacancy decontrol[3] (or other compensating factors), the land rents remain below market and that premium gets built into the pricing of the unit upon its resale. The effects of these rent control provisions is three-fold: creating stability in mobilehome "pad" rents for current owners of units in the mobilehome park, increasing the value of mobilehome units when they are

[3] Vacancy decontrol refers to a provision which would allow rents to reset to market rates when the current tenant (or mobilehome unit owner in this case) leaves the property. Vacancy decontrol allows for adjustment to market forces, which has many benefits. When markets are allowed to work, then landowners (or developers) will choose to build new mobilehome parks when the demand for pad space rentals is high and pricing (i.e. the rent for the pads) is adequate to allow a competitive rate of return.

resold, and reducing future development of mobilehome parks. In areas where strong mobilehome rent control provisions have been passed, no new mobilehome parks have been built since. In fact, given the likelihood of greater returns on other real estate investments, over many years in areas with overly restrictive rent control ordinances, existing mobilehome parks are likely to go out of business.

In light of this, examination of the exact rent control ordinance illustrates whether the character of the regulation amounts to governmental action that goes too far. One critical element of this rent control ordinance is that normally, the owner is able to pass on only seventy-five percent (75%) of the local consumer price index ("CPI") increase, with an additional ten percent increase upon the vacancy of the unit.[4] RCO §§ 11A-5(a)(2), 11A-5(a)(3), 11A-5(g), 11A-14.

Residential property values in California are available from the U.S. Census, and the state government provides records about inflation in California; furthermore, C.A.R. creates and maintains its own housing economic data. Using U.S. Census data, the median price of a home went from $3,527 in 1940 to

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[4] Although the rent control ordinance has other elements which allow for adjustments for the rent, these are based on an arbitration procedure, and are meant to allow for other increases when the landowner incurs capital expenses to improve the property in general. As a result, an analysis including this would need to factor in the capital expenditures made by the park owner. These capital expenses can only be passed on without a return on investment (RCO §11A-5), so the effect is fairly neutral. For simplicity sake, these calculations are not included in this analysis.

$211,500 in 2000, unadjusted for inflation. U.S. CENSUS BUREAU, HOUSING AND ECONOMIC STATISTICS DIVISION, HISTORICAL CENSUS OF HOUSING TABLES: HOME VALUES (2004). During that period, the average increase in the median residential home price throughout California has been approximately seven percent (more specifically 7.06%). Rents generally track the increase in value of the property when the government does not intervene, although some time-lag does occur. From 1955 to 2000, the consumer price index (CPI) in California has increased approximately four and a third percent (more precisely 4.35%) on a yearly basis. CAL. DEPT. OF INDUSTRIAL RELATIONS, CALIFORNIA CONSUMER PRICE INDEX CHART (2010). To look at comparable periods for which data exists, 1960 to 2000 will provide a baseline analysis. During this time, residential home prices in California increased slightly less than seven percent (more specifically 6.821%), while CPI in California was a little more than four and a half percent (more precisely 4.575%).

Over time, this restriction which starts out as a minor reduction in rent leads to dramatic results. Using round numbers as a baseline, a mobilehome unit (assuming individual unit value of $1,000 and pad value of $10,000) would cost the unit purchaser $1,000, and the rent would be $1,000 per year (market rent right before the ordinance is passed). The value of rental income property is oftentimes calculated at a fixed multiple of rents, called a gross rent multiplier (which is

assumed as ten times for simplicity). After thirty years, the rent will have increased to $2,751 per year (assuming a 3.43125% yearly increase, which is 75% of the 4.575% CPI increases). In the meantime, the mobilehome space (pad value) will have increased to $72,393 using the 6.821% per year increase in value. Assuming the gross rent multiplier to be the same, however, the value of the property owned by the mobilehome park owner upon sale will only be ten times the new rent including the ten percent increase ($2,751 plus ten percent equals $3,026), or $30,261. Since mobilehome unit owners in a park transfer the reduced rental rate upon moving, and nothing in the ordinance prevents the unit owner from reaping the benefits of the reduced rental rate in the future, the new unit owner would profit the remaining $42,132. Much of this value will be reaped by the old unit owner into a premium for the $1,000 mobilehome unit. Thus, the regulation will cause approximately fifty-eight percent (58%) of the value of the land to be transferred from the park owner to the mobilehome unit owner.

While the example above demonstrates a forced transfer of 58% of land value from the park owner to the mobilehome unit owner/tenant, where such rent control is in place, the old tenant (previous unit owner) not only gets the advantage of reduced rents but also a transfer of the park owner's land value as built into the purchase price of the mobilehome when the mobilehome is sold. This is true regardless of the tenant's individual circumstances and due solely to the rent

control ordinance. Meanwhile, the purchaser of the mobilehome, and new park tenant, who supposedly needs rent restrictions, is somehow able to pay this premium, not because of the true value of the mobilehome but rather because of the value of the park owner's land. Who gets to reap the benefits of the land value on sale of the mobilehome? Not the landowner but rather the departing park tenant. And, the cycle starts over again with the new park tenant receiving regulatory reduced rents during occupancy and a premium for the park owner's land value on sale to a new tenant.

In situations where property values increase faster than the median for the state (such as coastal communities in California where the subject challenge is brought), the percentage of wealth transferred from the mobilehome park owner to the tenant (mobilehome unit owner) would be substantially greater. C.A.R. does not suggest what percentage of the value is sufficient to rise to the level of a taking. However, given the structure of rent control ordinances which do not have significant vacancy decontrol (or some other adjustment factor), the transfer will continue unabated. As a result, the longer the period of time, the greater the transfer of wealth from the park owner to the park tenant such that eventually almost all value will be transferred to the tenant. At some point, the wealth transfer will exceed 95% of the value of the property – it is only a matter of time, strongly confirming that such regulation is *facially* invalid, and becomes

increasingly closer to a total governmental exaction on a landowner. This slow erosion of the transfer of property rights is in contrast to an abrupt one. The latter leads to a clear facial challenge, while the former is more difficult to decipher at the outset. A frog put into water slowly heating to boiling has the same result as one forced directly into boiling water, but the end result is the same.

2. Denying Economically Viable Use of the Land

Denying the economically viable use of the land is analyzed by considering the "economic impact of the regulation on the claimant, and particularly, the extent to which the regulation has interfered with distinct investment backed expectations." *Lingle*, 544 U.S. at 538-539, citing *Penn Central*, 438 U.S. at 124.

Various theories have been used to determine the economic impact of the regulation on the landowner. In many situations, courts have looked at the diminution in value of the property to gauge the extent of the economic impact. In a 1998 Ninth Circuit, one judge has argued that the plaintiffs "must show that the diminution in value is so severe that the…[regulation] has essentially appropriated their property for public use." *Garneau v. City of Seattle*, 147 F.3d 802, 807-8 (9th Cir. 1998). Although this was the published opinion of the court, only one judge

supported such language, and does not necessarily reflect the Ninth Circuit Court of Appeals position on this issue.[5]

The Supreme Court has slowly eroded the doctrine that no regulatory taking is subject to compensation, albeit not directly in rent control ordinances. See *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (cases relating to exactions as part of regulatory ordinances). Furthermore, other courts have applied less exacting standards in assessing whether regulations can have enough economic impact as to deny the viable use of the land. See *Cienega Gardens v. United States*, 331 F.3d 1319 (Fed. Cir. 2003).

Even though the courts have not laid out a bright-line test of how to determine whether a regulation denies the viable use of the land especially in the context of rent control regulation, C.A.R. believes that more clarity is warranted. Although government and its various agencies require some leeway in order to pursue legitimate goals and policies, when the government appropriates significant value of the property without just compensation, and places that burden on a few

[5] However, even using this standard, this RCO might meet this high threshold. As indicated earlier, the value of the property has been gradually transferred from the park owner to the tenants. As a result, the *real* value of the property, taking into account lower purchasing power due to increases in CPI, has diminished significantly, especially over forty years. Because this is not the widely held standard applied, further discussion of this is not contained here.

limited landowners, then such government action should constitute a taking of the property which requires compensation. C.A.R. promotes and encourages the establishment of reasonable standards to govern the transfer of real estate and the protection of private property rights, and believes that regulatory ordinances should have some threshold beyond which those ordinances have gone too far, and that government must pay the landowner after crossing that threshold. In the present case, the District Court credited reports indicating that the rent control ordinance required the claimants to rent the entire mobilehome park at about an 80% discount below market rates, and that 90% of the sale price of mobilehomes in the park has been transferred to the incumbent tenants. Even though this is particular to this specific property and the current owners of the mobilehome park, studies indicate that such redistribution by restrictive mobilehome rent control ordinances is fairly standard. *See, e.g.*, Kenneth Barr, *The Right to Sell the "Im"mobile Manufactured Home in Its Rent Controlled Space in the "Im"mobile Home Park: Valid Regulation of Unconstitutional Taking?*, 24 URB. LAW. 157 (1992); Werner Z. Hirsch and Joel G. Hirsch, *Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol*, 35 UCLA L. REV. 399 (1988); *Cashman v. City of Cotati*, 124 F.3d. 1150 (9th Cir. 1997).

3. Balancing the Factors in Determining a Taking

As various cases have made clear, courts have not used only a single factor to determine if the landowners use of the land has been deprived enough to constitute a taking. However, it is instructive that these burdens have been focused on a small number of landowners (namely, a small number of mobilehome park owners in the area who fall under the regulation) in order to achieve a governmental objective.

Even if the landowner has been able to achieve some rate of return, that is not the sole standard by which the economic viability of property must be judged. As stated by Justice O'Connor in her concurrence in *Palazzo v. Rhode Island*, "interference with investment-backed expectations is one of a number of factors that a court must examine." *Palazzo v. Rhode Island*, 533 U.S. 606, 633 (2002). Even if the court concludes that the park owner's investment expectations were not thwarted, the other factors require consideration. As discussed previously, these other factors relating to the character of governmental action as well as the economic impact on the property, buttressed with the magnified effect on the few landowners who are subject to this regulation, still favors that a taking has occurred on the park owner. Under these circumstances, compensation is required for governmental "seizure" of the property, even when such "seizure" is justified.

B. PUBLIC POLICY ARGUES THAT RENT CONTROL IS A FACIAL TAKING WHEN ITS PROVISIONS ARE CONFISCATORY.

Beyond the analysis using the factors enumerated by the courts, certain policy considerations also argue for establishing certain standards for a regulatory taking. The whole concept behind the Takings Clause of the Fifth Amendment to the U.S. Constitution, and the California Constitution is "that private property shall not 'be taken for public use, without just compensation.'" *Lingle*, 544 U.S. at 536. Even though the courts have made a broad distinction between the physical occupation of the property by the government, and regulatory confiscation of the property, landowners need some assurance that they will be able to use their property. Although government benefits from some flexibility in order to promote zoning and other legitimate interests, at some point regulatory control becomes as severe (or even more severe) than the physical occupation of the property. No one is arguing for a standard which makes any regulation by the state suspect to challenge, but private citizens rely on reasonable standards, and at some point, the threshold is crossed by government regulations even though they do not prohibit all economic use of the property.

Of course, a bright-line test would be the most administrable in balancing the interests of private citizens and the state, without opening up the floodgates to

challenge every single reasonable regulation. Again, C.A.R. does not suggest that a low hurdle be set for such a determination, as courts should be the last resort in balancing strong competing interests. Yet, in today's increasingly complex and interconnected economic environment, the guidelines which the courts and the policies which government establishes can both create huge problems, and the unintended consequences of such governmental actions can destroy the originally intended benefit. As the Constitution was developed to protect the rights of individuals against certain government actions, the complexity of the economic environment makes it necessary to recognize that government regulation today can act to unfairly burden a small minority to bear the costs which government should spread among its entire citizenry. This has become an increasing problem when the legislative and executive branches of government do not take on their responsibilities for raising revenue, budget cuts, and other means to pay for priority government programs without unconstitutionally trampling on the rights of a few. As a last resort, the judicial branch must act as a brake to prevent the other branches of government who may blithely joyride over the constitutionally protected rights of a minority who are unable to effectively voice their opposition.

A number of opinions have suggested that such examination by the courts will open up the floodgates to challenges to government regulation, and the courts are not the proper forum for assessing whether regulations are effective or

ineffective. However, these fears can be allayed with clear guidance about when these regulations do indeed go too far, and at a certain point, even regulations go too far without preventing all use of the land.

It is in this context that extreme rent control ordinances should be examined. The government initiated this experiment in an era when housing prices were increasing drastically, and runaway inflation seemed like a chronic concern. As stated previously, this current mobilehome rent control ordinance does not have a sunset period, and continues to transfer wealth and value from the park owner to the tenants, gradually yet insidiously. Under the context of ripeness and standing issues, landowners have not been able to bring any effective challenge to these regulations in the courts, and the landowners are not able to impress upon the public at large that these wealth transfers should not be tolerated. However, if instead of through a gradual process, these redistributions were done at one time from the park owner to the tenants as a one-time payment (i.e. park owners were required to pay each tenant $90,000), these landowners would certainly have redress in the courts, as well as likely through the political process that such transfer was arbitrary and capricious.[6] The advantage of time may make the

[6] This is unlike general taxes by which the government collects from society at large and then creates affordable housing units to help the disadvantaged. In this case, the cost is borne by a very select few, namely the mobilehome park owners, and it is not even clear that it achieves its objective of affordable housing as the transfer of wealth upon sale absorbs the benefit of the rental rate suppression.

redistribution survivable by the park owner, but it does not hide the fact that the government has made a confiscatory taking of property (albeit not a naked taking as it was clothed in the wool of supposed legitimate state interest) for which some compensation is due.

Here, what the judges of the original Ninth Circuit Court of Appeals panel did might be instructive. That panel of judges looked at the three factors (namely, the character of governmental action, interference with investment backed expectations, and the economic impact on the landowner), and determined that cumulatively, the City of Goleta's mobilehome rent control provisions were a taking. Even though that court did not say precisely how those factors should be weighed, they did focus significantly on the transfer of wealth from the landowner to the tenants by the governmental action. A vacancy decontrol feature would at least allow for a measured market based adjustment for housing needs and other interests attempted through rent control. This standard could create a rebuttable presumption which the government could overcome with a compelling state interest, or else constitute a taking requiring compensation. The courts are best qualified to balance the rights of landowners against legitimate state interests, but clearer guidance for all would be beneficial, and prevent governments from going too far, as well as provide landowners with reasonable expectations for their property.

III

SUBSTANTIVE DUE PROCESS VIOLATION

Even though federals courts have generally found that rent control ordinances are not a violation of substantive due process, a more thorough examination of this issue may now be necessary. The Ninth Circuit has itself held the following:

> A generally applicable rent-control ordinance will survive a substantive due process challenge if it is *designed* to accomplish an objective within the government's police power, and if a rational relationship existed between the provisions and the purpose of the ordinances…This deferential inquiry does not focus on the ultimate effectiveness of the law, but on whether the enacting body could have rationally believed at the time of enactment that the law would promote its objective.

Carson Harbor Vill. Ltd. v. City of Carson, 37 F.3d 468, 472 (9th Cir. 1994), overruled on other grounds by *WMX Techs., Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc). The Supreme Court has not addressed this issue directly, and at least one justice has clearly indicated that this remains an open question. *Lingle*, 544 U.S. at 548 (Kennedy, J. concurring). Even using this deferential basis, this severe rent control regulation adopted by the City of Goleta in 2002 may not meet these criteria.

The history of rent control on residential properties in general provides some insight into this issue. The goal of rent control has been to foster affordable

housing by keeping rents in the community lower than otherwise, and also to create stability in housing prices for non-owners. In most cases, this results in wealth transfers as certain people (usually tenants) benefit at the cost of others (the landlords, or owners). Under a typical residential rent control ordinance, tenants are able to lock in their rents at the prevailing market rents and are then able to keep cost increases at a reasonable rate following procedures laid out in the rent control regulations. In California, the experiment of rent control included other more restrictive types of rent control which were notorious in certain communities, such as Santa Monica, Berkeley, and West Hollywood, where the rents were set below market even at the outset of the tenancy. Although these rent control ordinances prohibited the payment of "key money" (which was money that the new tenant paid to the past tenant for the opportunity to have a rent controlled unit), such practices still occurred regularly in those highly restrictive rent control areas. *See, e.g.* U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, REPORT TO CONGRESS ON RENT CONTROL, p. 10 (1991). After many years of seeing the unintended consequences and pernicious effects of residential rent control, including the deterioration of rental housing stock, the unavailability of new rental stock being produced, and landlords unresponsive to tenant complaints on rental properties, the California Legislature adopted and enacted Assembly Bill 1164 in 1995 (commonly referred to as the Costa-Hawkins Rental Housing Act

and codified as California Civil Code §§1954.50 et seq.) which eliminated one of the most troublesome elements of rent control and instituted vacancy decontrol, allowing rents to reset to market rates upon a tenant moving out of the property. This major legislation recognized that rent control in certain guises did not promote the stated goal of affordable housing, and had to be modified accordingly after twenty-five years of experience.[7] Rent control without vacancy decontrol (or some other adjustment factor) may promote stability of housing prices for non-owners but the secondary effects swamp other goals, and eventually wipe this goal out as renters become increasingly unable to find any rent controlled properties as market incentives and forces remain undeterred.

Based on this track record that applies to residential properties in general, the question is now whether local government can believe that severe rent control provisions for mobilehome parks which do not have some form of vacancy decontrol do support the goals of affordable housing, or even of keeping rents lower and more stable. In essence, these restrictive rent control provisions controlling mobilehomes have prevented other such mobilehome parks from being

[7] The Court may ask why the Legislature is not the proper decision-making body to address the problems of rent control. Although responsible legislative action, either locally or by the state, is preferable, it does not negate the constitution or the judicial remedies to enforce those rights. In these cases, courts must step in to protect the established rights of the landowner, and that is why the courthouse is the forum of last redress for whether these laws violate substantive due process.

constructed, and have made new tenants pay a premium in order to benefit as a tenant in the property. In other words, in the context of mobilehome rent control, the tenants have to prepay for their reduced rents, and so it becomes questionable whether the tenant saves any money at all under these circumstances.[8]

Even if the County of Santa Barbara could have believed that the rent control was rationally related to its purposes in 1979 and thus survived a substantive due process challenge when first enacted, the City of Goleta cannot meet this threshold when it re-adopted, seven years after Costa-Hawkins, the same rent control regulations in 2002 as permanent city ordinances after the significant history of rent control was established.[9]

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[8] C.A.R. believes that the mobilehome unit owners now have a legitimate property interest as well, and even if the Ninth Circuit Court of Appeal finds that the City of Goleta's rent control provision did not survive a substantive due process challenge, then the Ninth Circuit Court of Appeal should remand the case to the federal district court to fashion a proper remedy in order to allow a gradual transition away from this severe rent control structure. As C.A.R. explained previously, mobilehome unit owners make various choices at the outset of their decision to purchase, and their property interests and protections should reflect those decisions.

[9] Although this issue is raised in the context of substantive due proces, the discretionary adoption of the same RCO by the newly incorporated city also has impact on the standing issue which the League of California Cities, California State Association of Counties, and APA California raise in their *amici* filing. Although C.A.R. does not address the standing issue here, C.A.R. does believe that this information does bear against the claim by *amici* that the park owners have no standing to sue.

IV

CONCLUSION

The Supreme Court of the United States has through *Penn Central* and a number of subsequent cases provided guidance as to whether a regulatory taking can occur without a physical occupation of the property, or denying all economically viable use of the land. The courts have provided guidance that these regulatory takings where some use of the property remains should look at a number of factors, emphasizing the character of the governmental action and the viable use of the land. Even though the mobilehome park owner might be receiving some return from their initial investment, the nature of this severe rent control restriction ultimately amounts to a near complete exaction of the property owner's economic interest, over enough time. Under these circumstances, the ordinance constitutes a *facial* taking of the property, even if the value is not taken immediately upon the law's enactment as property owners deserve a living pond, not a pot of hot water.

Furthermore, the history of rent control provides a perspective in what provisions should be contained in rent control, and whether such laws violate substantive due process rights as well. Even if the conclusion is that a local government can still overcome this threshold of rational state interest after over thirty years of history on rent control, the analysis under the factors in *Penn*

Central entitles the landowner to fair compensation for the government's redistribution of the land.

Date: April 15, 2010

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Federal Rule of Appellate Procedure 32(a)(7) and Ninth Circuit Rule 29-2(b), the Brief of Amicus Curiae is produced using at least 14-point Times New Roman type including footnotes, and contains approximately 5,656 words, which is less than the total words permitted by the Rules of Court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: April 15, 2010

CALIFORNIA ASSOCIATION OF REALTORS®
Grant Habata, Counsel, SBN 170004

By: /s/ Grant Habata
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CERTIFICATE OF SERVICE

I hereby certify that on April 15, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeal for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, to the following non-CM/ECF participants:

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