Docket No. 06-56306

United States Court of Appeals
For The Ninth Circuit, En Banc

DANIEL GUGGENHEIM, SUSAN GUGGENHEIM AND MAUREEN H. PIERCE,
***Plaintiffs and Appellants*,**

v.

CITY OF GOLETA, a municipal corporation,
Defendant and Appellee

Appeal from the United States District Court for the Central District of California, Florence Marie Cooper, District Judge, Case No. CV-02-02478-FMC (RZx).

BRIEF OF AMICUS CURIAE CALIFORNIA MOBILEHOME PARKOWNERS ALLIANCE IN SUPPORT OF PLAINTIFFS AND APPELLANTS FOR AFFIRMANCE

Terry R. Dowdall (State Bar No. 79463)
DOWDALL LAW OFFICES, A.P.C.
284 North Glassell Street, Orange, California 92866
Telephone (714) 532-2222
Facsimile (714) 532-3238

Attorneys for Amicus Curiae
California Mobilehome Parkowners Alliance.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATUTES

OTHER AUTHORITIES

PERIODICALS AND SECONDARY SOURCES

CORPORATE DISCLOSURE STATEMENT

The California Mobilehome Parkowner's Alliance has no parent corporation, and no publicly traded company owns 10% or more of its stock. Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* avers that it is a nonprofit corporation which does not issue stock and which is not a subsidiary or affiliate of any publicly-owned corporation.

I. INTRODUCTION

Appeasing special interest groups is the veritable currency of politics. Axiomatically, majoritarian sway dominates minority interests. All property rights jurisprudence reflects the effort of government to extract 'sticks' in the 'bundle' of private ownership. Only the constitution stands between a lawless invasion and the outermost limits of constitutionally tolerable intrusion.

Plainly, there are more tenants than park owners.[1] Hence rent controls are passed and rationalized by local police powers. But empowering profiteering to the detriment of the protected is not protection. Profiteering morphs a putative laudable basis into pernicious exploitation. And this is the Goleta law.

Suppose this: a regulation aiming to insulate a discretely identified group from exposure to a specified evil (exploitive rent). But, all benefit is withheld unless the protected populous pays for it; else, the commodity is denied altogether. Payment saps any prophylactic effect. This is a plain, clear and utter disconnect from a rational governmental objective. Indeed, under virtually all rent control, such conduct is a pernicious, immoral practice outlawed as a misdemeanor. It is commonplace to outlaw such practices.[2] In Goleta, it was the law. But on appeal:

---

[1] "If a majority be united by a common interest, the rights of the minority will be insecure." James Madison, "Federalist, No. 51." (1788).

[2] As discussed, *infra*, p.6, *et seq*.; "key money" ("under the table" payment for a rent controlled apartment), is often demanded. U.S. DEPARTMENT OF HOUSING

> The net effect is that the cost of the home and the rental site is approximately the same whether there is an RCO or not; the difference is that under the RCO, the value of the capitalized rent is paid to the mobile home owner instead of to the park owner. Accordingly, in the end, the RCO does not actually decrease housing costs at all for the new tenant. If a new tenant purchases the home, the new tenant will have to pay an amount equal to the rental discount in the form of the transfer premium.

Guggenheim v. City of Goleta, 582 F.3d 996,1019 (9th Cir. 2009).

The purpose of all rent controls is to protect against exploitive rent increases based on a housing shortage. Not to allow the sale of shabby old trailers "worth $12,000 . . . for approximately $100,000."[3] And the protection is for the entire class of renters for generations to come. Incumbents are but an ephemeral fraction of those in need of housing now and in the future.

Of course, a legislature may proceed to address a social evil "one step at a time." But in the mobilehome park context, vacancy controls do not merely *fail* to relate to rational bases, they exacerbate the very evil to be curbed. Once the incumbent subclass has sapped all benefits of the rent control law by profiteering in the value of restricted rents, the ordinance is void of legitimate function. Incumbent "equity" protection or gain (urged by resident organizations) is *pure* misnomer; sale

---

AND URBAN DEVELOPMENT, REPORT TO CONGRESS ON RENT CONTROL, at 10 (1991).

[3] "More simply, 'an average mobile home worth $12,000 would sell for approximately $100,000.'" *Id., Guggenheim v. City of Goleta*, 582 F.3d 996,1022 (9th Cir. 2009).

of rent controls is naked profiteering in furtherance of selfish greed. Preying on the masses in need of housing is not legitimate.[4]

II. ARGUMENT

A. THERE IS NO LEGITIMATE GOVERNMENT INTEREST WHICH RELATES TO VACANCY CONTROLS IN MOBILEHOME PARK HOUSING. VACANCY CONTROL IS ANTITHETICAL TO ANY LEGITIMATE PURPOSE FOR RENT CONTROLS.

1. Rent Controls Are Intended to Protect All Tenants, Particularly its Underprivileged Groups.

Rent controls address a harm to *all* those in need of housing. Rent controls are properly aimed at:

> . . . the alleviation of the ill effects of the exploitation of a housing shortage by the charging of exorbitant rents to the detriment of the public health and welfare of the city and *particularly* its *underprivileged groups*.

Fisher v. City of Berkeley, 37 Cal.3d 644, 209 Cal. Rptr. 682 (1984) (emphasis supplied), citing *Birkenfeld v. City of Berkeley*, 17 Cal.3d 129, 160 (1976).

The scope of the protected class is "underprivileged groups." *Fisher, id. See, Pennell v. City of San Jose,* 485 U.S. 1, 11-13, 108 S.Ct. 849, 857-58, (1988) ("consumer welfare"); *Tenants of 738 Longfellow Street, N.W. v. District of Columbia*

[4] The Court will note that there is *not a single voice* speaking for the disenfranchised in this proceeding; the current and all future prospective customers of the incumbents.

Rental Housing Commission, 575 A.2d 1205 (1990) at 1219 (rights of low or moderate income in particular).

The Goleta Ordinance states all its reasons for rent control, conspicuously omitting mention of reasons for vacancy control.[5] Respectfully, none exist.

2. The Goleta Law Does Not Even Purport To Protect the Public, Prospective Tenants, Future Tenants

The Goleta recitations ignore all Goleta residents seeking accommodation. But the unarticulated reasons for vacancy controls are clear, and *are* addressed by large tenant organizations such as the GSMOL. Their *amicus* application states, at 2:

> Mobilehome rent control ordinances mitigate some of the inequities associated with this captive relationship by affording homeowners a measure of security regarding future rent obligations, which, in turn, *allows them to gain equity in their homes.*

---

[5] The Ordinance states all purposes: "A growing shortage of housing units resulting in a critically low vacancy rate and rapidly rising and exorbitant rents exploiting this shortage. . . constitutes serious housing problems affecting a substantial portion of those City residents who reside in rental housing. These conditions endanger the public health and welfare of the City. Especially acute is the problem of low vacancy rates and rapidly rising and exorbitant rents in mobilehome parks in the City. Because of such factors and the high cost of moving mobilehomes, the potential for damage resulting therefrom, requirements relating to the installation of mobilehomes, including permits, landscaping and site preparation, the lack of alternative homesites for mobilehome residents and the substantial investment of mobilehome owners in such homes, the City Council finds and declares it necessary to protect the owners and occupiers of mobilehomes from unreasonable rents while at the same time recognizing the need for mobilehome park owners to receive a fair return on their investment and rent increases sufficient to cover their increased costs. The purpose of this chapter is to alleviate the hardship caused by this problem by imposing rent controls in mobilehome parks within the City. (Ord. 02-01 § 1)

(Emphasis supplied)

GSMOL admits the true purpose and the effect of vacancy control is to "gain equity." "Equity" paid by the disenfranchised, excluded from protection of the ordinance, exposed to the very dysfunctional market initially justifying rent controls.

The subclass of needy renters is subjected to purchase of the trailers at dysfunctional market levels, with financing at chattel rates (more expensive than conventional residential housing). Goleta's law anomalously institutionalizes this profiteering and greed without any regard for all the current disenfranchised and future generations.

Under appropriate circumstances not present here, the actions of a legislature are deferentially reviewed by the Courts, and the wisdom of legislative judgments are immune from judicial scrutiny. *E.g.*, *Nebbia v. New York,* 291 U.S. 502, 54 S.Ct. 505 (1934), where the court declared:

> If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court functus officio.

291 U.S. at 537.

So, price controls on rents have been deemed permissible if they promote public welfare. But not in a case like this – where a regulatory taking has been

squarely presented and proven, the effects of vacancy control have been established beyond cavil, and the mobilehome sellers will bleed all the benefits dry.

Is there any rational basis for an imprimatur entitling predatory practices upon those seeking accommodation? This is not possible, conceivable, as such price controls actually inflict harm on the class intended to be protected. In Goleta, the incumbent is given license to prey on other consumers. Once sold the benefits are lost. In other contexts, such profiteering is illegal or criminal. *Infra.*

3. Goleta's Ordinance is Bereft of Any Rational Basis Because it Fails to Provide Protection to Any of the Public Except One-time Current Incumbents - in Other Contexts Such a Practice Would Be Criminal

New York has the longest experience with rent control in the nation (more than fifty years).[6] No matter the controversy about the wisdom of rent control,[7] in the oldest rent control jurisdiction in the nation, the condemnation of profiteering by a departing tenant is absolutely condemned and defined as a misdemeanor.

---

[6] "New York State's half century experience with rent regulation is the longest in the nation." Shulman, Art, New York Office of Rent Administration, New York Division of Housing and Community Renewal, Rent Regulation After 50 Years: An Overview of New York State's Rent Regulated Housing (1993), available athttp://www.tenant.net/Oversight50yrRentReg/ history.html)

[7] Edward H. Rabin, The Revolution in Residential Landlord-Tenant Law: Causes and Consequences, 69 Cornell L. Rev. 517, 555 (1984) (citing "Arnott, Rent Control: The International Experience, reprinted in Perspectives on Property Law 415 (2002) (rent control reduces maintenance...incites gentrification...does not make the units more affordable due to key money issues and black market transactions)."

Selling rent control entitlements at value is no different from "key money,"[8] or "side money."[9] The practice is universally regarded as immoral and socially reprehensible. New York criminalizes extractions of "key money" as a third degree misdemeanor.[10]

> The law, 'designed to prevent the exploitation of those in desperate need of rental accommodations', People v. Greenwald, 299 N.Y. 271, 86 N.E.2d 745, 746, is aimed at the recipient of the bonus, not against the person who under stress yields to the exaction. *The one who pays is a victim, not a participant in the crime.*

Gardner v. Miller, 2 Misc.2d 788, 788, 153 N.Y.S.2d 170, 171 (1956) (emphasis supplied).

The "victim" is the next generation tenant, the newcomer, the disenfranchised. Much like the polemical divergence and thematic variation in describing the operation and effect of a 'monetization' of the rent-controlled lease at sale, the plain

---

[8] Carl Mason and John M. Quigley (2006), The Curious Institution of Mobile Home Rent Control: An Analysis of Mobile Home Parks in California. UC Berkeley: Berkeley Program on Housing and Urban Policy. Retrieved from: http://www.escholarship.org/uc/item/44d7h9hs.

[9] Stephen Malpezzi, Welfare analysis of rent control with side payments: a natural experiment in Cairo, Egypt, Regional Science and Urban Economics 28 (1998) 773–795.

[10] Mckinney's Consolidated Laws of New York Annotated Currentness Penal Law §180.55 ("A person is guilty of rent gouging in the third degree when, in connection with the leasing, rental or use of real property, he solicits, accepts or agrees to accept from a person some consideration of value, less than two hundred fifty dollars, in addition to lawful rental and other lawful charges, upon an agreement or understanding that the furnishing of such consideration will increase the possibility that any person may obtain or renew the lease, rental or use of such property, or that a failure to furnish it will decrease the possibility that any person may obtain or renew the same. ¶Rent gouging in the third degree is a class B misdemeanor").

reality of its *substance* should be as incontrovertible and familiar to the courts as defining criminal *animus* where "key money" is expressly illegal.[11] Even the Supreme Court has acknowledged the widespread condemnation of "key money."[12]

"Key money" capitalizes rent control benefits from the desperately needy.[13] It exists to exploit a market which is already dysfunctional, upon the shoulders of the victim seeking housing. And the amount of the transfer of value is significant.[14] No one calls "key money" an "equity" interest of a *residential* tenant.

---

[11] *People v. Greenwald*, 299 N.Y. 271, 281, 86 N.E.2d 745, 747 (1949) ("While the fact issue raised may in the abstract seem difficult, it is of a type with which the criminal courts are entirely familiar, of a sort with which they are constantly called upon to deal. A similar issue is met in the prosecution of a labor racketeer for extortion, when the defendant concedes receipt of the alleged extortionate payment but claims that it was accepted in return for some legitimate service to labor or management. *Cf.*, *e.g.*, *People v. Parkinson*, 297 N.Y. 749, 77 N.E.2d 516; *People v, Fay*, 296 N.Y. 510, 68 N.E.2d 453")

[12] "Most apartment tenants do not sell anything to their successors (and are often prohibited from charging "key money"), so a typical rent control statute will transfer wealth from the landlord to the incumbent tenant and all future tenants." *Yee v. City of Escondido*, 503 U.S. 519, 530, 112 S.Ct. 1522, 1530 (1992).

[13] "In apartment rent control, 'key money' is typically paid to the landlord or her agent, while in mobile home rent control the value of the regulated site rent is paid to the vacating tenant. Analytically this makes no difference." Mason, Carl, & Quigley, John M., *supra* at 191, *n.*4. And see, *id*., at 192 ("The tied sale of the coach together with the right to occupy a site is analytically equivalent to the transfer of rental rights together with a payment of ''key money" in apartment rent control").

[14] "The markups over the appraisal guide values of the coaches in these transactions average between 250% and 900%." Mason, Carl, & Quigley, John M., *supra* at 200.

4. The New York "Loft Law" Prohibits the Sale of the Leasehold above Market Value of the Tenant Improvements - Not Leasehold Value

Local governments claim that mobilehome housing is unique, due to the tie-in between trailer and space. Trailers are allegedly trouble to move; site improvements have been made; relocation is difficult.

What of a *residential* tenant's substantial improvements?

The New York Loft Law[15] ("Loft Law") is a directly apposite situation. The loft tenant spends tens of thousands of dollars adding improvements to a mere leasehold. Then, the tenant may seek to assign the tenancy. The Loft Law *allows* for the recovery of the improvements, *but not the value of the leasehold* - *that* would be illegal. A 'mobilehome' is no different from the 'loft,' except that the loft improvements may never be removed (trailer tenants can move away with their investment).

The purpose of the Loft Law is, *inter alia*, to protect against profiteering on under-market leaseholds.[16] Note that the *only* difference between "loft improvements"

[15] Multiple Dwelling Law, article 7-C, §§ 280-287 (L 1982, ch 349, § 1, entitled "Legalization of Interim Multiple Dwellings."

[16] *Gavish v. Rapp*, 127 Misc.2d 255, 259, 485 N.Y.S.2d 407, 411 (N.Y.Sup.Ct.1984) ("The law, however, was not designed to permit an outgoing tenant to make a killing by demanding whatever the traffic would bear for "improvements" when what is really being sold is the key. . . ").

and "a mobilehome" is that the latter can be *removed intact*–the investment is preserved; the loft tenant has no choice.

In *Gavish v. Rapp*, 127 Misc.2d 255, 259, 485 N.Y.S.2d 407, 411 (N.Y.Sup.Ct.1984) ("Gavish"), the incumbent sought to assign her loft for *$64,000.00* and procured a willing assignee. *Gavish*, 127 Misc.2d at 259, 485 N.Y.S.2d at 411. Landlord disputed the value, contending that it constituted "key money." [17]

The court noted that the purpose of the law is defeated by providing the departing tenant with a *profit*, which is the property of the *landlord.*

> To say that an incoming tenant is prepared to pay the price does not establish the fair market value-there are tenants desperate for accommodation in a particular location who would pay virtually any demanded price regardless of value. Unfortunately, it is all too well known that a tenant may be presented with the necessity of buying a few rickety pieces of furniture and creaking appliances to get access to a dwelling. *The law, however, was not designed to permit an outgoing tenant to make a killing by demanding whatever the traffic would bear for "improvements" when what is really being sold is the key to the premises. The right to confer occupancy upon another is the right of the landlord, and not the tenant.*

Id. (Emphasis added).

Consider *Krax Peripatie Apanu Stu Krokodrilus Tus Platos v. Dexter*, 124 Misc.2d 381, 476 N.Y.S.2d 745 (1984), where the tenant demanded *$19,000.00* from

---

[17] *Id.* ("that sum includes not only such items as may properly be categorized as 'improvements,' but the assignment of the leasehold as well (the equivalent of 'key money') and the sale of movable personalty. The law permits the outgoing tenant to sell only the 'improvements' for an amount equal to their fair market value").

landlord for lease improvements, advising that he wished to assign his lease (complying with the right of first refusal under the Loft Law). *Id.*, 124 Misc.2d 381, 382, 476 N.Y.S.2d 745, 746. The landlord claimed the improvement value was overstated, and refused. Incumbent lessee argued that the right to sell improvements implied the right to assign the lease to anyone he wished. Again, New York law prohibits such profiteering to the detriment of the newcomer:

> If the outgoing tenant had the unfettered right to assign to anyone he pleased regardless of the landlord's agreement to purchase, *we would then be permitting such tenant to profit from the sale of the leasehold*. The elimination of the right to assign in the Emergency Tenant Protection Act (Chapter 403) shows an intent to eliminate such a practice. *The findings contained therein refer to the "profiteering practice on the part of certain holders of apartment leases."*

Id., at 384 (emphasis supplied).

The court enjoined the assignment.

Profiteering on the heads of the disenfranchised is a social evil, not a rational basis.

5. Courts Have Allowed Rent Controls When They Promote Welfare. But Vacancy Controls Insidiously Inflict an Even Greater Harm on the Desperate Seeking Accommodation

It cannot be more plain that vacancy control in the mobilehome park context perniciously exploits the needy seeking accommodation. Even the oldest rent control system in the country recognizes and renders attempts to profiteer as criminal conduct.

Seeking to varnish "key money" with the gloss of social welfare or claims of "equity gains" is a patently specious effort to cover up the obvious. The premium exacted, by whatever name or label, is all the same to the victim.

B. SUBSTANTIVE DUE PROCESS IS VIOLATED BY REASON OF THE VACANCY CONTROL PROVISIONS OF THE GOLETA LAW.

The substantive due process test is a threshold inquiry which upsets the entire 'apple cart' if it succeeds. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 541-542,125 S.Ct. 2074, 2084 (2005):

> An inquiry of this nature has some logic in the context of a due process challenge, for a regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause. See, e.g., County of Sacramento v. Lewis, 523 U. S. 833, 846 (1998) (stating that the Due Process Clause is intended, in part, to protect the individual against "the exercise of power without any reasonable justification in the service of a legitimate governmental objective").

If arbitrary and irrational, failing to reflect a relationship to a legitimate governmental interest, the ordinance fails.

> But such an inquiry is logically prior to and distinct from the question whether a regulation effects a taking, for the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose. . . Conversely, if a government action is found to be impermissible--for instance because it fails to meet the "public use" requirement or is so arbitrary as to violate due process--that is the end of the inquiry. No amount of compensation can authorize such action.

Id., 544 U.S. 528, 543, 125 S.Ct. 2074, 2084.

Hence, the threshold issue, antecedent to further regulatory taking analysis applied in light of *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646 (1978) ("*Penn Central*")[18] is whether the Goleta regulation is so irrational it fails to pass muster at all. It is not necessary to even reach the *Penn Central*[19] analysis if, as is demonstrably clear, the Goleta law is bereft of protecting the interests of the disenfranchised populous seeking housing in Goleta.

To show a violation of substantive due process, Plaintiffs must, as they have, demonstrate that the City's actions "lacked a rational relationship to a government interest." *North Pacifica LLC v. City of Pacifica*, 526 F.3d 478, 485 (9th Cir.2008); *see also Christensen v. Yolo County Bd. of Supervisors*, 995 F.2d 161, 165 (9th Cir.1993) ("The rational relationship test . . . applies to substantive due process challenges to property zoning ordinances.").

---

[18] *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 125 S.Ct. 2074 (2005) at 544 U.S. 528, 537-539, 125 S.Ct. 2074, 2081-2082) (". . . regulatory takings challenges are governed by the standards set forth in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978).

[19] "Under Penn Central, the primary factors a court is to consider are '[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations.' In addition, the 'character of the governmental action'--for instance whether it amounts to a physical invasion or instead merely affects property interests through 'some public program adjusting the benefits and burdens of economic life to promote the common good'--may be relevant in discerning whether a taking has occurred." Lingle, 125 S.Ct. at 2081-82 (citing Penn Central, 438 U.S. at 124, 98 S.Ct. 2646).

To establish a violation of substantive due process, the Plaintiff must plead and ultimately prove that the Board's action was "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Sinaloa Lake Owners Ass'n. v. City of Simi Valley*, 882 F.2d 1398, 1484 (9th Cir.1989).

> . . . municipal zoning ordinances survive substantive due process challenges unless they are "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." Id. Two years later, the Court repeated this formulation in holding that a municipal zoning ordinance that "[did] not bear a substantial relation to the public health, safety, morals, or general welfare" could not be sustained under the Fourteenth Amendment. Nectow v. City of Cambridge, 277 U.S. 183, 188-89, 48 S.Ct. 447, 72 L.Ed. 842 (1928).

Crown Point Development, Inc. v. City of Sun Valley, 506 F.3d 851, 856 (9th Cir. 2007).

Under *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) and *Lingle*, a due process claim is not precluded whatever the outcome of a takings analysis. *Lingle*, 544 U.S. at 542, 125 S.Ct. 2074 ("[A] regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause."). See *Lingle*, 544 U.S. at 549, 125 S.Ct. 2074 (Kennedy, J. concurring) (noting that *Lingle* "does not foreclose the possibility that a regulation

might be so arbitrary or irrational as to violate due process"); see also *Kamaole Pointe Dev. LP v. County of Maui*, 573 F.Supp.2d 1354, 1377 (D.Haw. 2008).[20]

C. THE GOLETA ORDINANCE HAS NO STATED RATIONAL RELATION TO A LEGITIMATE OBJECTIVE, AND NO OTHER CONCEIVABLE RATIONAL BASES.

Goleta's law allows for the hawking of all tangible rent control benefit from those with fewer resources (and desperate for accommodation), to incumbent profiteers in a one-time drain of all benefits. The parallels to due process jurisprudence from the *Kelo* decision are obvious.[21] Justice Kennedy iterated that *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 125 S. Ct. 2074 (2005) did nothing to

---

[20] "For reasons previously discussed, the Court first finds County Defendants' contention that the Ordinance is valid based on a comparison with other jurisdictions wholly unpersuasive. To reiterate, this argument says nothing about whether the Ordinance at issue here is valid and, as a result, is an inadequate ground upon which to premise a motion for summary judgment. Additionally, Plaintiffs are correct that County Defendants misapprehend the relevant standard for a due process challenge to legislation. This standard is not, as County Defendants urge, whether the legislation 'shocks the conscience.' . . . Rather, a substantive due process challenge to legislation that neither utilizes a suspect classification nor draws distinctions implicating fundamental rights is reviewed pursuant to the *'arbitrary and irrational' standard*. Richardson v. City and County of Honolulu, 124 F.3d 1150, 1162 (9th Cir.1997). . . County Defendants' Motion is DENIED as to Plaintiffs' substantive due process claim."

[21] Justice O'Connor recently declared that: 'As for the victims, the government now has license to transfer property from those with fewer resources to those with more. The Founders cannot have intended this perverse result. '[T]hat alone is a just government,' wrote James Madison, 'which impartially secures to every man, whatever is his own.'" *Kelo v. City of New London*, 125 S.Ct. 2655 (2005) Id. at 2677 (O'Connor, J., dissenting) (citing the National Gazette, "Property," Mar. 29, 1792, reprinted in 14 Papers of James Madison 266 (R. Rutland et al. eds.1983).

weaken due process jurisprudence. *Id.* at 2087 (Kennedy, J., concurring) ("this separate writing is to note that today's decision does not foreclose the possibility that a regulation might be so arbitrary or irrational as to violate due process").

A park owner is constitutionally entitled to "a freedom from all substantial arbitrary impositions and purposeless restraints, . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment." *Poe v. Ullman*, 367 U.S. 497, 542-543 (1961) (dissenting opinion) cited in *Moore v. East Cleveland*, 431 U.S. 494, 502 (1977). Moreover, even the "substantial advancement" test is not a dead letter. *Lingle* did not *overrule* it, but held it inapplicable to the Takings Clause. No inference can be rightly drawn that it does not apply to the Due Process Clause. *Lingle, supra*, 544 U.S. 528, 543, 125 S. Ct. 2074 (2005) ("Instead of addressing a challenged regulation's effect on private property, the 'substantially advances' inquiry probes the regulation's underlying validity"). The Court concluded "this formula prescribes an inquiry in the nature of a due process, not a takings, test, and that it has no proper place in our takings jurisprudence," but said *nothing* about its continuing efficacy relative to other constitutional provisions.

For example, in *Herrington v. Sonoma County*, 834 F.2d 1488 (9th Cir. 1987), *amended*, 857 F.2d 567 (9th Cir. 1988), *cert. denied*, 489 U.S. 1090, 109 S.Ct. 1557, the Court applied substantive due process principles to an unconstitutional rejection

of a subdivision application based on a jury verdict. The case went to the jury on, *inter alia*, a claim of violation of substantive due process. Sonoma County rejected Plaintiffs' application and subsequently down-zoned the property. Plaintiffs averred that the governmental actions were "irrational, arbitrary, and capricious because the decisions were unsupported by the evidence." The claims do not necessitate proof that all use of the property had been denied.

The *Goleta* ordinance states all its reasons for enactment. Not a single stated objective protects current and future newcomers (the "underprivileged groups" referred to in *Fisher v City of Berkeley*, *supra*). Indeed, the law predestines their exploitation. Ensconced in a dysfunctional market, departing profiteers sap all rent control benefits in a lump sum. Allowing the departing incumbent to abscond with key money is immoral and criminal. Preying on homeless victims is no rational basis.

D. NONE OF THE STATED PURPOSES OF THE GOLETA LAW ARE RATIONAL BASES WHERE ALL BENEFITS ARE EVISCERATED BY INCUMBENT PROFITEERS.

The Goleta law is not simply *not* rational, it is *punitive*. It makes matters much worse for the home-seeker who is usually relatively disadvantaged. [22]

[22] *Cf., Adamson Companies v. City of Malibu*, 854 F.Supp. 1476, 1486 (C.D.Cal. 1994) ("Perhaps the protection of low income tenants was not adopted as an official purpose due to a recognition by the City Council that the population of the parks is, in fact, wealthier than average").

The ordinance contains a fixed set of justifications, but all are void of efficacy when vacancy control denudes them and all conceivable bases of any effect. Plaintiffs were properly permitted to introduce evidence to prove that claim. *United States v. Carolene Products Co.*, 304 U.S. 144, 152-54, 58 S.Ct. 778, 783-85, 82 L.Ed. 1234 (1938) (although the existence of facts upon which the validity of an enactment depends is presumed, their non-existence can properly be established by proof).[23] Goleta's law turns legitimate intent on its head. GSMOL's "equity gains" are no more than flagrant "key money." Goleta's purported objectives are mere theater. Goleta's law is an utter disconnect from any proper goal. For example:

> *1. Vacancy Controls Eviscerate Any Relation Between the Operation of the Ordinance and "A Growing Shortage of Housing Units Resulting in a Critically Low Vacancy Rate and Rapidly Rising and Exorbitant Rents Exploiting this Shortage Constitutes Serious Housing Problems Affecting a Substantial Portion of Those City Residents Who Reside in Rental Housing.. . ."*

Incumbent profiteering makes it impossible for the law to increase "affordability of housing." The sale of a rent controlled tenancy lashed to a fixturized

---

[23] Even in a facial challenge, the court may consider evidence related to the individual property owner that illustrates the economic impact that the mere enactment of the statute had on that owner and proves that the owner has suffered the injury of which he complains. *See, Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987) at 496-99 (considering evidence of the actual tonnage of coal the regulations rendered unremovable); *Garneau v. City of Seattle*, 147 F.3d 802 (9th Cir. 1998) at 807-08 (stating that plaintiffs bringing a facial challenge "must show that the value of their property diminished as a consequence" of the regulation); *Richardson v. City and County of Honolulu*, 124 F.3d 1150 (9th Cir. 1997) at 1154 n.2 (providing an example using exact dollar amounts as "illustrative" of the economic impact of the regulation in a facial challenge).

trailer morphs the lucky incumbent into a pure profiteer, charging the market price for the passage onto a rent controlled pad. The small number of mobile home sellers in the large market for housing services capture, totally and completely, all rent control value.

Because financing on used mobilehomes as chattels, are at chattel rates, the carrying costs to repay rent control benefits is at a higher cost than conventional residential real property rates, all without the warranties of a new home, without favorable financing rates applicable to a new manufactured home. In other words, the newcomer pays chattel rates for rent control benefits, while purchasing inferior, depreciating, used product.[24] The "housing package" is no more "affordable"

[24] Carl Mason a, John M. Quigley, the Curious Institution of Mobile Home Rent Control, Journal of Housing Economics 16 (2007) 189–208, 202 ("Incoming tenants to the park pay the market price for housing. Through the operation of the housing market, the capitalized values of the below-market site rents mandated by the ordinance are reflected in increased prices when coaches and rental rights to sites are transferred among housing consumers. Increased sale prices, in turn, lead to higher carrying costs for the purchase of mobile homes"); at 205 ("The more stringent financing terms for mobile home purchases raises the income required for purchase. Since rent control forces buyers to pay higher capital costs, rent control increases monthly housing costs more with more stringent financing terms. The less favorable the financing terms, the less favorable is rent control").

afterwards than it was before the ordinance was adopted.[25] If the trailer were an improvement to a New York Loft, this practice would be illegal.

2. *Vacancy Controls Eviscerate Any Relation Between the Operation of the Ordinance and ". . . the Problem of Low Vacancy Rates and Rapidly Rising and Exorbitant Rents in Mobilehome Parks in the City. Because of Such Factors and the High Cost of Moving Mobilehomes, the Potential for Damage Resulting Therefrom, Requirements Relating to the Installation of Mobilehomes, Including Permits, Landscaping and Site Preparation, the Lack of Alternative Homesites for Mobilehome Residents and the Substantial Investment of Mobilehome Owners in Such Homes, . . ."*

Vacancy control and the extraction of under-market value on sale, exacerbates the harm. Rent controls discourage the investment of capital in supplying mobile home parks. Mason, Carl, & Quigley, John M. (2006), The Curious Institution of Mobile Home Rent Control: An Analysis of Mobile Home Parks in California.[26]

> "Indeed, it is hard to imagine that the imposition of price controls would have any impact on mobile home park space, except to reduce the amount of available space. When price goes down, demand goes up, and supply decreases."

---

[25] Carl Mason a, John M. Quigley, *supra*, at 205 ("Using reasonable financing assumptions, we find that the effect of a regime of vacancy control rent regulation in these three markets increases the variance in the costs of occupying mobile homes, but has no systematic effect upon the average monthly costs of housing to consumers. Specific individual mobile homes might be more or less 'affordable' as a result of the regulation, but on balance, the effect of lower mandated rents to consumers is offset by the higher purchase prices of mobile homes") (emphasis supplied).

[26] UC Berkeley: Berkeley Program on Housing and Urban Policy. Retrieved from: http://www.escholarship.org/uc/item/44d7h9hs

If trailers worth $12,000 are selling for approximately $100,000, it is clear that the value of the leasehold, sold and sapped in one sale, contribute nothing to affordable housing, but inflict hardship on those desperate for accommodation.

3. *Vacancy Controls Eviscerate Any Relation Between the Operation of the Ordinance and the Objective To ". . . Protect the Owners and Occupiers of Mobilehomes from Unreasonable Rents While at the Same Time Recognizing the Need for Mobilehome Park Owners to Receive a Fair Return on Their Investment and Rent Increases Sufficient to Cover Their Increased Costs. The Purpose of this Chapter Is to Alleviate the Hardship Caused by this Problem by Imposing Rent Controls in Mobilehome Parks Within the City.*

However, "[T]he regulations have an inhibiting effect upon the supply of housing suitable for moderate income households in the region. Incoming tenants to the park pay the market price for housing. Through the operation of the housing market, the capitalized values of the below-market site rents mandated by the ordinance are reflected in increased prices when coaches and rental rights to sites are transferred among housing consumers. Increased sale prices, in turn, lead to higher carrying costs for the purchase of mobile homes. . .Any benefits of below-market rents mandated for residents are simply undone by the capitalization of these benefits in the marketplace" *Id.*, at 29-34.

III. CONCLUSION

Under the Goleta law, the disenfranchised newcomer, now and forever, would be required to pay for rent control. Once paid, the benefit is gone. The price is

measured by the housing value of the unit and the value of a rent-controlled lease compared to other alternate housing opportunities.

There is no equity in a tenancy. And there is no right to depart with the real value of rent controls in hand, by the incumbent profiteer. As shown above, in any other situation, such profiteering would itself be deemed injurious to the health and welfare and indeed criminalized. There is nothing affordable about it.

Not a single purpose of the Goleta ordinance is promoted when it merely re-defines all disenfranchised citizens as prospective prey for the incumbent profiteer. The Goleta law has no relation to protecting any renters after incumbents bleed all benefits from occupancy of the pad.

The disenfranchised citizens seeking accommodation are not represented in this proceeding and like in so many other cases, have no voice. They are absent, and yet it is their interests so directly at stake. They likely do not vote in the numbers organized by the GSMOL, pay dues to advocacy groups, always speak English, and in some cases are not of age. City's retort is that "economic ruin" will befall incumbent tenants in the absence of vacancy control; however, that form of transparently suspect assertion is not backed by any form of logic or experience. For if hardships were in fact a possibility, why do all the cities and counties with no rent control at all continue to thrive? Why do all the rent control jurisdictions with vacancy decontrols continue to thrive? Park owners fear dislocation of trailers and

homes, *i.e.*, space vacancies, more than any other event. It would be sheer anathema for a park owner to self-inflict such injury, engender ill will and cause such harm. For the "mom and pop" owner throughout the state, it is likely they will act as they always have and will— with fairness and consideration for their residents.

The question for the court is whether all the future generations of Goleta residents are to be deprived of the benefit of rent control. The panel in this case held, correctly, that no purpose is served by vacancy controls. Indeed, there is no rational basis at all for vacancy control and hence the ordinance is irrational, discriminatory and fails to have any rational basis to a legitimate governmental objective. *Carolene Products, supra.*

The decision of this court should be upheld.

Respectfully submitted this day, April 16, 2010.

DOWDALL LAW OFFICES, A.P.C.

By: /Terry R. Dowdall/
Terry R. Dowdall, Esq.
Attorneys for Amicus Curiae
California Mobilehome Parkowners Alliance.

CERTIFICATE OF COMPLIANCE

Counsel 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 6894 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.

Respectfully submitted this day, April 16, 2010.

DOWDALL LAW OFFICES, A.P.C.

By: /Terry R. Dowdall/
Terry R. Dowdall, Esq.
Attorneys for Amicus Curiae
California Mobilehome Parkowners Alliance.