IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 09-16447, 09-16451, 09-16612, 09-16613

MHC FINANCING LIMITED PARTNERSHIP, an Illinois limited partnership; and GRAPELAND VISTAS, INC., an Illinois corporation,

Plaintiffs-Appellees Cross-Appellants,

v.

CITY OF SAN RAFAEL,

Defendant – Appellant Cross-Appellee,

CONTEMPO MARIN HOMEOWNERS ASSOCIATION,

Defendant-intervenor – Appellant Cross Appellee.

From the United States District Court,
Northern District of California
Case No. 00-3785-VRW
The Honorable Vaughn R. Walker, Chief Judge, Presiding

APPELLANT CITY OF SAN RAFAEL'S JOINDER IN APPELLANT CONTEMPO MARIN HOMEOWNERS ASSOCIATION'S MOTION FOR STAY OF INJUNCTION PENDING APPEAL

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I. INTRODUCTION

After nearly nine years of litigation – most of which was spent waiting for the district court's decisions at various points in time and as a result of the court allowing plaintiffs to bring new claims over three years after trial when the basis for their original claims was rejected by the United States Supreme Court – the district court issued an unprecedented judgment finding that San Rafael's Mobilehome Rent Stabilization Ordinance is an unconstitutional taking under the public use clause and under the Penn Central Transp. Co. v. New York, 438 U.S. 104 (1978) test. The district court also refused to sever the challenged 1999 amendments to the ordinance, revoking the entire ordinance and leaving the plaintiffs with a 100 million dollar windfall.

The City of Cotati lies less than 30 miles north of San Rafael. While this case was pending in the district court, a different judge of the same district court found that Cotati's mobilehome rent and vacancy control ordinance –identical in all relevant parts to San Rafael's – was *not* a taking. After the Supreme Court's decision in Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005), this Court affirmed that decision.[1] The same law cannot be constitutional in Cotati and unconstitutional thirty miles south in San Rafael. Yet that is exactly what happened here, with the district court conducting precisely the type of intrusive,

[1] Cashman v. City of Cotati, 415 F.3d 1027 (9th Cir. 2005).

heightened scrutiny to reach its own "factual" conclusions about the ordinance that Lingle emphasized is inappropriate. Lingle, 544 U.S. at 544-545. The Court reached its conclusions despite recognizing that the challenged law satisfied due process as a matter of Circuit law, and despite similar laws being upheld by this Court and the California courts on numerous occasions.

The Contempo Marin Homeowners' Association ("CMHOA") has filed a motion to stay the district court's injunction – which would reduce the residents' ownership interest in their homes to a salvage value[2] – so that they do not lose their entire investments if they have to sell pending appeal. The City of San Rafael files this joinder in support of that motion, and supplements the arguments made by the CMHOA to discuss several additional issues demonstrating likelihood of success on appeal. First, the City will discuss the basic illogic of the district court's "private takings" conclusion. Second, the City will discuss flaws in the unprecedented Penn Central analysis. Third, the City will discuss the district court's failure to sever the purportedly unconstitutional 1999 amendments challenged in this action as required by California law.

The district court's judgment represents precisely the type of Lochnerean

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[2] See Findings of Fact and Conclusions of Law ("FF&CL"), attached as Exhibit 15 to the Declaration of Brett Kingsbury ("Kingsbury Decl.") filed by the CMHOA, p. 42:21-27 ("the mobilehome owners' equity in their mobilehomes is limited to the salvage value of the mobilehome.").

intrusion into the legislative sphere that the Supreme Court was trying to prevent in Lingle. The judgment strips the residents of virtually their entire investment in their homes, and provides MHC with a 100 million dollar windfall. The result is plainly contrary to law and must be reversed on appeal. A stay is necessary to preserve the status quo pending appeal and the City respectfully joins the CMHOA's request that such a stay be entered.

II. RELEVANT LEGAL BACKDROP

This is by no means a case of first impression. Mobilehome park owners have been making the same economic theory challenges to vacancy control[3] ordinances for decades. Every time their challenges are rejected, the park owners simply slap a new legal label on the old claim and start over. That is exactly what the district court allowed here.

Park owners have repeatedly advanced an economic theory that vacancy control does not work, but simply raises the price of mobilehomes while not providing any benefit to the tenants – the *same* arguments MHC and its economists made below. The notion that vacancy control is constitutionally irrational was rejected by this Circuit almost eighteen years ago:

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[3] "Vacancy control precludes park owners from raising rents immediately to new tenants. It is a form of rent control which courts have held to be a legitimate economic regulation. . . ." Sandpiper Mobile Village v. City of Carpinteria, 10 Cal. App. 4th 542, 550 (1992).

> Sierra Lake also alleges a substantive due process violation based on the enactment of the vacancy control provision of the ordinance…. To prevail on this claim, Sierra Lake must show that no rational relationship exists between the vacancy control provision and the purpose of the ordinance. … Sierra Lake cannot meet this heavy burden. Although it may be true that the ordinance in some cases takes money from the landlord and puts it into the pocket of a tenant who no longer resides at the park, the City Council could reasonably believe that in the majority of cases the ordinance serves the valid public purpose of keeping mobile home rent from becoming prohibitively high. … How well the ordinance serves this purpose is a legislative question, one the court will not consider.

Sierra Lake Reserve v. City of Rocklin, 938 F.2d 951, 958 (9th Cir. 1991) (citations omitted), vacated in other part 987 F.2d 662 (9th Cir. 1993). The same argument was again rejected, with greater explication, in Levald, Inc. v. City of Palm Desert, 998 F.2d 680 (9th Cir. 1993):

> "[O]rdinances survive a substantive due process challenge if they were *designed* to accomplish an objective within the government's police power, and if a rational relationship existed between the provisions and purpose of the ordinances." …
>
> Here, the stated purposes of the ordinance were to alleviate hardship created by rapidly escalating rents; to protect owners' investments in their mobile homes; to equalize the bargaining position of park owners and tenants; and to protect residents from unconscionable and coercive changes in rental rates. These purposes are similar to those advanced in support of other rent control ordinances; the Supreme Court has held that these goals are legitimate.
>
> Moreover, a rational legislator could have believed that the rent control ordinance would further the stated goals, at least insofar as the purpose is to protect existing tenants. For example, a rational legislator could have believed that the unfettered right of a park owner to raise the rent on a space when ownership of a mobile home was transferred might make it difficult for a mobile home owner to sell.

> The legislator thus could have believed that the ordinance protects owners' investments in their units. … [W]hile one might believe that the ordinance is an ineffective-and indeed draconian-means by which to effect its goals, "[h]ow well the ordinance serves [its] purpose[s] is a legislative question, one the court will not consider" in the context of a substantive due process challenge. Dismissal of the substantive due process claim was proper.

Levald, 998 F.2d at 690 (citations omitted) (emphasis in original); see also Carson Harbor Village Ltd. v. City of Carson, 37 F.3d 468, 472 (9th Cir. 1994); Ventura Mobilehome Communities Owners Ass'n v. City of San Buenaventura, 371 F.3d 1046, 1055 (9th Cir. 2004); see also Adamson Cos. v. City of Malibu, 854 F. Supp. 1476, 1492-93 (C.D. Cal. 1994). Just last Fall, this Circuit re-affirmed that vacancy control *is* rationally related to a legitimate government interest in another case brought by MHC (the same plaintiff here, now called Equity Lifestyle Properties) against a different California locality. Equity Lifestyle Properties, Inc. v. County of San Luis Obispo, 548 F.3d 1184, 1193-94 (9th Cir. 2008).

Park owners have also tried several takings theories, all on the same "premium" analysis. Each time, the Supreme Court has ultimately rejected the claim. Yee v. City of Escondido, 503 U.S. 519, 527-32 (1992) (vacancy control not a physical taking); Lingle, 544 U.S. at 540-45 (rejecting "substantially advances" test); Cashman, 415 F.3d 1027 (affirming district court's judgment that Cotati's mobilehome rent and vacancy control ordinance is constitutional).

The touchstone of all of these analyses is that the economic "premium" arguments are really policy arguments, not legal ones. Judge Pfaelzer of the Central District of California explained this well in Adamson Cos.:

> [R]ent control in the mobile home market effects an adjustment of the allocation of placement value. . . . [¶] The problem with the park owners' position is that placement value has always been shared between the park owners and the tenants.
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> ***
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> Regardless of the wisdom of the tenants' decisions to live in the parks, the City has the power to legislate to protect the tenants' investments. Without vacancy control, the park owner could force existing tenants to sell the coach-in-place at "distress-sale prices." (citation omitted). By enacting the vacancy control provision, the City favored the tenants' share of the placement value over the park owners'. However, it is within the City's power to adjust the balance of competing investment backed expectations for the purpose of protecting consumer welfare and, in doing so, it may make a choice which favors the tenants' investment over that of the park owners. …
>
> ***
>
> Likewise, the incidental windfall received by the tenants in possession at the time the ordinance was enacted does not support a finding that the ordinance is a taking. That windfall is substantially related to the City's interest in giving buyers security as to what their future rent will be when they assume their tenancy. . . . Since it is within the City's power to make such an adjustment, the incidental effect of a greater benefit to the initial group of tenants does not affect the validity of the ordinance because the later tenants also share the enhanced investment security that the ordinance was intended to create.

Adamson Cos., 854 F. Supp. at 1489, 1493, 1502.

It is also important to remember that property rights are created by state, not federal, law, Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577

(1972), and that the majority of takings cases are litigated in the state courts with review to the United States Supreme Court, not the federal district courts. San Remo Hotel, L.P. v. San Francisco, 545 U.S. 323, 346-47 (2005). California state courts have also long held that mobilehome vacancy control supports important policies and does ***not*** constitute a taking. E.g., Sandpiper Mobile Village, 10 Cal. App. 4th at 549-51; Westwinds Mobile Home Park v. Mobilehome Park Rental Review Board, 30 Cal. App. 4th 84, 95 (1994).

III. RENT/VACANCY CONTROL IS A PUBLIC USE

Disregarding the well established law discussed above, the district court reached the astonishing conclusion that a mobilehome rent and vacancy control law is a private taking in violation of the public use clause of the Fifth Amendment. Relying on language from Justice Kennedy's concurring opinion in Kelo v. City of New London, 545 U.S. 469 (2005), rather than the deferential rule actually stated by the Kelo majority opinion, the district court determined that a private takings claim is subject to a heightened scrunity and "extensive fact-finding" by the district court. (FF&CL pp. 37-38.) But see Kelo, 545 U.S. at 488 ("When the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings … *are not to be carried out* in the federal courts. . . .The disadvantages of a heightened review are especially pronounced in this type of case.") (emph. added). The district court

then went on to find that "the creation and transfer of the premium weighs against a finding that the operative provisions of the Ordinance bear relation to the public goals it is meant to further." (FF&CL p. 40.) But see Levald, 998 F.2d at 690.

The district court thus applied the same means-end inquiry that was called for by the now-debunked substantially advances test, under the guise of a "private takings" analysis. (FF&CL pp. 40-51.) The court held two bench trials, decided whose evidence it found more persuasive, and purported to make detailed findings of fact based on its assessment of the expert battle concerning how the ordinance actually operates. This was exactly the type of proceeding that the Supreme Court decried in Lingle as "remarkable, to say the least, given that we have long eschewed such heightened scrutiny…." Lingle, 544 U.S. at 544-45. The public use provision is not a backdoor path toward heightened scrunity of legislative judgments, and it is inappropriate for a court to test whether a law works or not as part of a takings analysis. Id. at 545, 548; Kelo, 545 U.S. 487-88.

The correct public takings test is whether the law is "rationally related to a conceivable public purpose." Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 240-41 (1984) ("The 'public use' requirement is thus coterminous with the scope of the sovereign's police powers."). In Kelo, the Supreme Court affirmed this rule, emphasizing courts are *not* to engage in "empirical debates over the wisdom of takings." Kelo, 545 U.S. at 488.

This Circuit has previously held that mobilehome rent and vacancy control *are* rationally related to a legitimate government purpose and thus do *not* violate either due process or the equal protection clause. Equity Lifestyle Properties, 548 F.3d at 1193-94; Ventura Mobilehome Communities Owners Ass'n, 371 F.3d at 1055; Carson Harbor Village Ltd., 37 F.3d at 472; Levald, 998 F.2d at 690; Sierra Lake Reserve, 938 F.2d at 958.[4] The district court recognized this law in the due process context, rejecting MHC's due process claim as barred by Levald *and* by the due process portion of the decision in Richardson v. City and County of Honolulu, 124 F.3d 1150, 1162 (9th Cir. 1997).[5] The court specifically held that San Rafael's law was not distinguishable from the ordinance in Levald. (FF&CL p. 56:7-8.) Accordingly, the district court held that San Rafael's challenged ordinance complies with due process. (FF&CL p. 57.)

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[4] California cases agree. "Mobilehome rent control ordinances are accorded particular deference as rational curative measures to counteract the effects of mobilehome space shortages that produce systematically low vacancy rates and rapidly rising rents." Carson Harbor Village, Ltd. v. City of Carson Mobilehome Park Rental Review Bd., 70 Cal. App. 4th 281, 290 (1999); Sandpiper Mobile Village, 10 Cal. App. 4th at 550 ("Vacancy control precludes park owners from raising rents immediately to new tenants. It is a form of rent control which courts have held to be a legitimate economic regulation. . . ."); see also Yee, 503 U.S. at 523-24 (discussing public policy of protecting mobilehome owners).

[5] The court notably asserted in its opinion that the Lingle case "appears to counsel against the deferential review mandated by *Levald*." (FF&CL p. 56:10-12.) This remarkable statement – which is the exact opposite of what Lingle instructs (see Lingle, 544 U.S. 544-45) – goes a long way toward explaining the district court's repeated use of heightened scrutiny despite the Supreme Court's clear instructions *not* to do so.

If a law is rationally related to a legitimate government purpose under the due process clause, it is necessarily also rationally related to a *conceivable* public purpose under the Fifth Amendment.[6] Circuit cases applying Kelo have consistently applied the broad Midkiff standard re-affirmed in Kelo, which is "coterminous" with the government's due process police powers. See United States v. 14.02 Acres, 546 F.3d 943, 952 (9th Cir. 2008); Carole Media LLC v. New Jersey Transit Corp., 550 F.3d 302, 309 (3d Cir. 2008); Goldstein v. Pataki, 516 F.3d 50, 61-63 (2d Cir. 2008). The district court, however, applied a heightened scrutiny to the public use inquiry, purporting to find authority for such lack of deference in Justice Kennedy's solo concurrence in Kelo.

With all due respect to Justice Kennedy, Kelo was decided by majority opinion, and it is the majority opinion that is law, not the viewpoints of a single justice with whom no other justice agreed. Bronson v. Board of Ed. of School Dist. of City of Cincinnati, 510 F. Supp. 1251, 1265 (S.D. Ohio 1980) ("concurring opinions have no legal effect, and thus, are in no way binding on any court"). The Supreme Court itself made this point – in an opinion Justice Kennedy joined –

[6] Justice Kennedy himself recognized this point in his Kelo concurrence. "This Court has declared that a taking should be upheld as consistent with the Public Use Clause … as long as it is 'rationally related to a conceivable public purpose.' … This deferential standard of review echoes the rational-basis test used to review economic regulation under the Due Process and Equal Protection Clauses…" Kelo, 545 U.S. at 490 (Kennedy, J. concurring).

when it noted that the views of three concurring Justices were not precedent in later cases simply because the majority did not expressly reject their arguments:

> It is true, as the dissent points out... that three Justices who concurred in the result … relied on regulations promulgated under § 602 to support their position, ... But the five Justices who made up the majority did not, and their holding is not made coextensive with the concurrence because their opinion does not expressly preclude (is "consistent with," see *post,* at 1525) the concurrence's approach. The Court would be in an odd predicament if a concurring minority of the Justices could force the majority to address a point they found it unnecessary (and did not wish) to address, under compulsion of Justice Stevens' new principle that silence implies agreement.

Alexander v. Sandoval, 532 U.S. 275, 285 n. 5 (2001). There is no basis for the proposition that Justice Kennedy, or any other single Justice, can unilaterally create legal standards by filing a separate opinion to expand on his or her view of the majority's controlling decision.[7]

The majority opinion in Kelo does not endorse Justice Kennedy's theories that takings are subject to some undefined heightened scrutiny despite a century of law to the contrary, or that courts can determine whether a legitimate government purpose is really a "pretext" for something else. Indeed, Kelo says the opposite.

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[7] This is very different from the situation where there is no majority opinion and lower courts must parse concurrences and pluralities to find the *narrowest grounds* on which five or more Justices agree. See Marks v. United States, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds…'").

Kelo, 545 U.S. 488. Allowing district courts to test laws to see if they "really" work or are just "pretext" invites precisely the heightened scrutiny and "fact finding" that Lingle and Kelo prohibit.[8]

The district court's conclusion that vacancy control does not work, and just transfers wealth from the landlord to the tenants, is totally irrelevant to this analysis. As the Supreme Court noted in Yee, all rent control (and even zoning) transfers wealth in this fashion. 503 U.S. at 529. The property at issue in Kelo was *actually taken* from one person and given to another private party in its entirety. Kelo, 545 U.S. at 474-75. The Court still found *no* violation of the public use clause. Id. at 487-88. The assertion that such a naked transfer of fee ownership is *not* a private taking, but a rent control law is, is wholly illogical.

The district court's heightened scrutiny approach to these issues is well revealed up in paragraph 149 of its Findings, where the court stated: "But a

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[8] Justice Kennedy's lone suggested pretext approach is simply inconsistent with the fundamental principle that rational basis analysis does not examine the actual views of the legislature. "[B]ecause we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature. … Thus, the absence of 'legislative facts' explaining the distinction '[o]n the record,' … has no significance in rational-basis analysis." F.C.C. v. Beach Communications, Inc., 508 U.S. 307, 315 (1993); Heller v. Doe by Doe, 509 U.S. 312, 320-21 (1993) ("'[T]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it' … whether or not the basis has a foundation in the record." A city, moreover, "has no obligation to produce evidence to sustain the rationality" of its laws.).

legislative enactment cannot find refuge in its purported purposes, no matter how noble or valid, if it also effects a constitutional injury. The court must look to the regulation's operation, not just its aim, to ascertain its true nature." (FF&CL p. 48 ¶ 149.) That is, of course, precisely what the Supreme Court has said lower courts *must not* do. Kelo, 545 U.S. at 482 ("'it is only the takings purpose, and not its mechanics' … that matters in determining public use"); Lingle, 544 U.S. at 542. The regulation's "operation" is not subject to testing at a trial. "[A] legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." Beach Communications, Inc., 508 U.S. at 315. "Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function." Id. (citations omitted).

As a matter of law, mobilehome rent and vacancy control laws fall within the public use clause of the Fifth Amendment, and do *not* constitute a private taking, because – as this Circuit (and even the district court in this case) has already held – they are rationally related to a legitimate public purpose. The district court's decision that this law satisfies due process but somehow is still a private taking was error and requires reversal on that claim.

IV. RENT/VACANCY CONTROL IS NOT A *PENN CENTRAL* TAKING

The district court's Penn Central analysis is also unprecedented. MHC has never cited – and the City is unaware of – any case finding a rent control ordinance to violate Penn Central when the ordinance provides for discretionary rent increases (as San Rafael's does). While every aspect of the Penn Central analysis deserves scrutiny on appeal, three errors in particular stand out.

First, the district court again applied a heightened scrutiny despite the clear prohibition of such in takings cases. Nothing in the Penn Central test subjects municipalities to an expert battle where district courts make credibility findings in adjudicating the constitutionality of their land use laws. Indeed, that is precisely the lack of deference that the Supreme Court has said has "no proper place in our takings jurisprudence." Lingle, 544 U.S. at 540-45, 548.

Second, in considering the economic impact of the challenged ordinance, the district court erred by comparing the *wholly unregulated* value of the land to its fully regulated value. (FF&CL pp. 23-27.) That is not the test. MHC came to court challenging the 1999 amendments to the ordinance. (FF&CL pp. 66-69.) In measuring the economic impact under Penn Central, the court was supposed to measure the value of the land before and after the challenged enactment. "The legal standard for evaluating the economic impact ... is 'a comparison of the market value of the property immediately before the governmental action with the

market value of that same property immediately after the action.'" Cane Tennessee, Inc. v. United States, 71 Fed. Cl. 432, 437 (2005). This is a causal inquiry, looking at the "change, if any, in the fair market value caused by the regulatory imposition." Forest Properties Inc. v. United States, 177 F.3d 1360, 1367 (Fed. Cir. 1999).

The district court, however, did not compare the value of the land in question before and after the challenged 1999 amendment. Instead, it compared the value of the land without *any* rent control to the current rent controlled value. If only the effect of the challenged 1999 amendments were considered, the impact would be minimal. (Kingsbury Decl. Ex. 19, 4/17/09 Order p. 14:28-16:7.) In its Order for Judgment, the district court called this issue "difficult and unsettled" and conceded "fair grounds for disagreement." (Id. p. 19:6-10.) With respect, the causal standard discussed above is neither difficult nor unsettled, and no law supports MHC's side of the disagreement.

Third, the court failed properly to apply an objective standard to the "investment backed expectations" inquiry. The court found that MHC had a reasonable expectation when it bought this property – already subject to both rent and vacancy control and after the existing law had been unsuccessfully challenged in state court – that it would nonetheless achieve market rents from the property.

(FF&CL pp. 29-30.) The district court's expectations findings are wholly inconsistent with the objective nature of this test.

"The purpose of consideration of plaintiffs' investment-backed expectations is to limit recoveries to property owners who can demonstrate that 'they bought their property in reliance on a state of affairs that did not include the challenged regulatory regime.'" Cienega Gardens v. United States, 331 F.3d 1319, 1345-46 (Fed. Cir. 2003); Daniel v. County of Santa Barbara, 288 F.3d 375, 383-84 (9th Cir. 2002) (accord). "A 'reasonable investment-backed expectation' must be more than a 'unilateral expectation or an abstract need.'" Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005 (1984). In a highly regulated industry, like mobilehome parks, such expectations include not only the existing laws but also reasonably foreseeable modifications to the law. "Those who do business in [a] regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." Concrete Pipe & Prods., Inc. v. Construction Laborers, 508 U.S. 602, 645 (1993). See Raceway Park, Inc. v. Ohio, 356 F.3d 677, 685 (6th Cir. 2004) ("plaintiffs were well aware of the [challenged laws] prior to making any investments …, and could not, therefore have reasonably expected a greater return.").

The district court's analysis of this factor fails to comply with these standards. First the court finds that MHC had a reasonable expectation of a

reasonable return on the property's *value*. (FF&CL p. 29.) The legal standard is return on *investment*, not "return on value."[9] Then, the court stated that the 1999 amendments "increased dramatically the burden of the Ordinance on MHC" but went on to analyze the effect of the entire ordinance, not the 1999 amendments. (FF&CL 29:25-30:17.)

Under the proper legal standard it is unreasonable, as a matter of law, for someone to buy a rent controlled property (at a price reflecting those controls no less) but argue that it has a reasonable investment backed expectation of achieving *uncontrolled* rents. No case has ever applied Penn Central in that manner, and the District Court's conclusion that MHC had such an *objectively reasonable* expectation is erroneous as a matter of law.

V. THE 1999 AMENDMENT WAS SEVERABLE

Although the 1999 amendment was perfectly constitutional (and, indeed, MHC made basically no effort to challenge the amendment itself at trial, using it as

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[9] The "return on value" argument has been uniformly rejected in rent control cases because the "value" of a rental property is determined by the rent stream, making any "return on value" argument circular. See Cotati Alliance for Better Housing v. Cotati, 148 Cal. App. 3d 280, 287 (1983) (explaining how a "return on value" approach would mean no rent control at all); Kavanau v. Santa Monica Rent Control Bd., 16 Cal. 4th 761, 771-73 (1997) (same). Federal rent control cases have consistently analyzed return on investment, not return on "value." Pennell v. City of San Jose, 485 U.S. 1, 13 (1988); Schnuck v. City of Santa Monica, 935 F.2d 171, 174 (9th Cir. 1991); see also Levald, 998 F.2d at 689 ("it seems that an as-applied challenge would have to focus on the reasonableness of the return on Levald's investment").

an excuse for a broader challenge to pre-existing law), the Court also erred by not severing that amendment from the pre-existing law once it found it to be unconstitutional. Despite a clear severance clause in the 1999 amendments (FF&CL 75:7-12), the Court found that invalidation of an amendment does not restore the pre-existing law. That conclusion is plainly wrong.

Under California law,[10] when an amendment to an existing statute is found to be unconstitutional, the amendment is stricken and the preexisting law restored:

> Generally stated, the rule is that when discrimination or unconstitutionality results from a statutory amendment, as is the case here, it is the amendment which is invalid and not the original portions of the statute.

Miller v. Union Bank & Trust Co., 7 Cal. 2d 31, 36 (1936), citing Frost v. Corporation Commission, 278 U.S. 515, 526 (1929); see also Skyline Materials, Inc. v. City of Belmont, 198 Cal. App. 2d 449, 459 (1961) ("When a valid act is amended by an unconstitutional provision, the usual rule is that only the amendment is invalid."); Ex parte Mascolo, 25 Cal. App. 92, 94 (1914) ("We ... hold the act of 1913 to be void. … Being void, it was inoperative for any purpose and effected no change whatsoever in the act of 1911."); Danskin v. San Diego Unified School Dist., 28 Cal. 2d 536, 555 (1946) ("When an act that has stood valid over the years is amended by an unconstitutional provision, ordinarily the

[10] "Severability of a local ordinance is a question of state law…" City of Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 772 (1988).

amendment alone is invalid."); Bess v. Park, 144 Cal. App. 2d 798, 806 (1956) (invalidating amendment but holding that statute "as it was before the amendment of 1953, remains in full force.").

Put another way, "[T]he constitutional invalidity of amendatory legislation does not affect the validity of preceding enactments." Valdes v. Cory, 139 Cal. App. 3d 773, 792 (1983); see also, Schettler v. Santa Clara County, 74 Cal. App. 3d 990, 1002 (1977) ("It is axiomatic that when, as here, the discrimination results from a statutory amendment, it is the amendment which is invalid, not the original portion of the statute.").[11]

The district court did not cite or distinguish any of this law, resting its conclusion that "invalidation of an enactment does not restore the law as it existed prior to the enactment" solely on California Government Code section 9607(a). That statute has nothing to do with court invalidations of laws – it governs what happens when the California legislature repeals a statute and then later repeals the repealing statute: "no statute or part of a statute, repealed by another statute, is revived by the repeal of the repealing statute without express words reviving such

[11] The United States Supreme Court has applied similar state rules to the same effect: "[A] statute in itself constitutional is not affected by an unconstitutional amendment;—the amendment dropping out and the original act remaining in force." Reitz v. Mealey, 314 U.S. 33, 39 (1941) (applying New York law), see also Truax v. Corrigan, 257 U.S. 312, 342 (1921) ("The exception introduced by amendment [ ] proving invalid, the original law stands without the amendatory exception.").

repealed statute or part of a statute." Cal. Gov't Code § 9607(a). Government Code section 9607 has nothing to do with the severance question before the court, and it does not support the district court's decision to eliminate the entire ordinance, most of which was in place when MHC purchased the park and had previously been upheld by the California courts, rather than simply the 1999 amendments MHC challenged.

VI. CONCLUSION

The above arguments are just a summary and do not, of course, represent the only errors presented by the judgment below. The City intends to fully brief these and other issues in its Opening Brief. At this stage, however, it should be beyond dispute that the appeal in this case raises numerous and serious questions about the district court's unprecedented order, and those questions weigh heavily in favor of the stay requested by the CMHOA.

DATED: August 5, 2009 **KERR & WAGSTAFFE LLP**

By _/s Michael von Loewenfeldt_____
MICHAEL VON LOEWENFELDT
Attorneys for CITY OF SAN RAFAEL

9th Circuit Case Number(s) 09-16447, 09-16451, 09-16612, 09-16613

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When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that 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 on (date) Aug 5, 2009 .

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

Signature (use "s/" format) s/Andrew Hanna

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CERTIFICATE OF SERVICE
When Not All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that 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 on (date) .

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, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Signature (use "s/" format)