No. _____

In the Supreme Court of the United States

MHC FINANCING LIMITED PARTNERSHIP AND GRAPELAND VISTAS, INC.,

Petitioners,

v.

CITY OF SAN RAFAEL AND CONTEMPO MARIN HOMEOWNERS ASSOCIATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit effectively nullified the regulatory taking doctrine recognized in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), and created clear conflicts with rulings of the Federal Circuit by refusing to recognize a regulatory taking caused by a rent control law that singled out one property owner to bear the burden of an 80% loss in the value of its property and denied the owner return on capital in an escalating real estate market, because the property had already been subject to less onerous regulation at the time of purchase and because it did not lose 100% of its value.

2. Whether the Ninth Circuit erred under *Kelo v. City of New London*, 545 U.S. 469 (2005), and *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005), in refusing to give any weight to the district court's factual findings that the government's asserted public use justification for a taking was a mere pretext for transferring the value of the land to a private group and that the transfer did not serve any legitimate purpose—thereby exacerbating the confusion in the lower courts about the effect of a finding that a regulation was enacted pretextually in establishing a private taking and/or a substantive due process violation.

PARTIES TO THE PROCEEDING

All parties to the proceedings below are listed in the caption.

CORPORATE DISCLOSURE STATEMENT

Petitioners MHC Financing Limited Partnership and Grapeland Vistas, Inc. ("MHC") are owned by Equity LifeStyle Properties, Inc. Equity LifeStyle Properties, Inc. has no parent corporation and no publicly held company owns 10% or more of its stock.

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The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 714 F.3d 1118 and reprinted in the appendix at 1a. The opinion of the United States District Court for the Northern District of California is unreported and reprinted in the appendix at 29a-136a.

JURISDICTION

The judgment of the Court of Appeals was entered on April 17, 2013. A timely petition for rehearing *en banc* was denied on June 3, 2013. Petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

The Fifth Amendment provides in relevant part: "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

The Fourteenth Amendment provides in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, sec. 1.

The San Rafael, California 1993 and 1999 rent control ordinances at issue are reprinted in the appendix at 170a-203a and 204a-208a.

INTRODUCTION

Twenty years ago, this Court explicitly reserved the "important" question of whether a municipal rent control ordinance that transferred nearly all of the value of the land in a mobile home park from the owners to the tenants constituted a regulatory taking. The Court did so because it was "awaiting a case in which the issue was fully litigated below." *Yee v. City of Escondido*, 503 U.S. 519, 538 (1992). This is that case. On a full trial record, the district court below found that application of the City of San Rafael's rent control regulations had the effect of transferring over 80% of the value of a mobile home park from the owner to the tenants, and would continue to transfer even more value over time by holding rent increases below the rate of inflation. The district court further found that the owner had been singled out for regulation and that this regulation was enacted and applied "pretextually" for the sole purpose of transferring property rights to the tenants, who were more politically influential than the penalized owner. The court held that the laws effected both a regulatory and a private taking, but the Ninth Circuit reversed.

That appellate decision warrants review because it effectively eliminates any meaningful constraints on local regulation of property rights based on claims of regulatory or private takings, and does so in violation of this Court's relevant rulings and in conflict with decisions of the Federal Circuit. If left to stand, the Ninth Circuit's decision will likely mean that there will never be another fully-litigated regulatory taking case from that circuit for this Court to review, because all

cases will be dismissed prior to trial regardless of their merit.

STATEMENT OF THE CASE

1. Petitioners MHC Financing Limited Partnership and Grapeland Vistas, Inc. (collectively, "MHC") brought this action to challenge the application of rent control ordinances of the City of San Rafael, California, under the Takings Clause and the Public Use Clause of the Fifth Amendment and under the Due Process Clause of the Fourteenth Amendment.

MHC bought the Contempo Marin manufactured home community in San Rafael—located just north of San Francisco in Marin County—in 1994, as part of a portfolio acquisition. Pet. App. 59a. Under a special San Rafael zoning ordinance, the Contempo Marin property can be used only as a manufactured home community. *Id.* at 56a.

Contempo Marin tenants own their homes, but lease the land on which their homes sit (called "sites") from MHC. *Id.* at 33a. At the community, MHC maintains private roads, community grounds, a lagoon, and recreational facilities for tenants' use. *Id.* There are approximately 396 home spaces at Contempo Marin, and approximately 1,000 people live there. *Id.* at 32a.

Contempo Marin tenants "hold[] an ongoing tenancy that can be terminated only at the option of the tenant"; MHC may terminate a tenancy only for cause, such as failure to pay rent or obey community rules. *Id.* at 37a (citing California Mobilehome Residency Law, Cal. Civ.

Code § 798.56).[1] California law "also permits mobile home owners to sell their [homes] in-place to purchasers who must be offered a tenancy for the [space]." *Id.* (citing Cal Civ. Code §§ 798.17-.18, 798.73, 798.75). As a consequence, MHC must continue to allow current tenants and their chosen successors to occupy its land on whatever terms the City requires.

San Rafael passed its first manufactured home rent control ordinance in 1989. The 1989 Ordinance allowed rent increases to keep pace with inflation up to 5% a year, and permitted more graduated increases above 5%. *Id.* at 37a-38a. There were no restrictions on the initial rent that new tenants could agree to pay. *Id.* at 39a. The community owner was thus able to negotiate for increased rent whenever a new tenant took over the prior tenant's site, irrespective of rent control. *Id.*

In 1993, San Rafael amended the 1989 ordinance to include so-called "vacancy control provisions," which prohibited MHC from negotiating higher rent on entering a lease with a new tenant. *Id.* at 39a. Under the vacancy control provisions, MHC must allow the new tenant to take over the site lease at the same rental rate as the previous tenant. *Id.* at 182a.

The City further amended its mobile home rent control laws in 1999. *Id.* at 41a-42a. Just before the City's adoption of the 1999 amendments, the City had been in discussions with Contempo Marin's tenants about how the City could assist them in acquiring

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[1] Under the California Mobilehome Residency Law and for purposes of this case, a "manufactured home community" is synonymous with a "mobile home park."

ownership of the park, including by evaluating use of the City's eminent domain power to take the park and transfer it to the tenants. *Id.* at 80a.

The 1999 Ordinance eliminated the ability of MHC to increase rents to keep pace with inflation and enacted "a single formula that limited increases to 75 percent of any increase in the CPI[]." *Id.* at 42a. Thus, under the 1999 Ordinance, rent increases can never match the inflation rate; in real dollars, rents are constantly being *reduced* and cannot make up ground even when a home is sold from one tenant to another. The 1999 Ordinance also "changed the 'fair return' standard" to "impede MHC's ability to obtain a return on capital expenditures." *Id.* at 60a. Under the 1999 Ordinance, MHC may no longer include the costs of capital improvements in the tenants' base rent, *id.* at 206a, and thus cannot receive a return on that invested capital.[2]

2. In 2000, following enactment of the 1999 Ordinance, MHC brought this lawsuit, alleging claims under the Takings Clause, the Public Use Clause, and the Due Process Clause, among others. After discovery, the district court held two trials. Between 2002 and 2007, the district court heard testimony from 32 different witnesses. Following these trials, the court

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[2] Although, as the Ninth Circuit noted, there is "an administrative procedure by which . . . MHC may seek rent increases beyond that which the regulation's formula provides," Pet. App. 5a, the district court found this procedure was not a "reasonable means to recoup [MHC]'s capital, recover its costs of financing the same or obtain[] a return on the same." *Id.* at 54a. The Ninth Circuit never held this factual finding clearly erroneous.

ruled in favor of MHC both on its claim that the City had effected a regulatory taking under the test set forth by this Court in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), and on its claim that the City had effected a private taking in violation of the Public Use Clause. *Id.* at 64a, 81a. The court ruled against MHC on its substantive due process claim. *Id.* at 88a.[3]

Applying *Penn Central*'s three-part test, the district court found that the application of the City's rent control ordinances caused a regulatory taking. On *Penn Central*'s first factor, "[t]he economic impact of the regulation on the claimant," 438 U.S. at 124, the district court found that the ordinances had transferred from MHC to the Contempo Marin tenants 81% of the value of the Contempo Marin property. Pet. App. 55a. Whereas the capitalized value of future tenant rent savings due to the rent control ordinances had created on average a $67,000 premium on the sales prices of the tenants' mobile homes, increasing the average mobile home sale price from $27,000 to $94,000, the ordinances had commensurately decreased the value of the Contempo Marin property itself from $118 million to $23 million. *Id.* at 46a, 55a. That, the court held, was "functionally equivalent to a physical taking of all or an overwhelming percentage of the value of MHC's land." *Id.* at 57a.

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[3] Separately, a jury ruled for the City on MHC's breach-of-contract claim arising out of a settlement agreement. Issues relating to that claim are not presented in this Petition.

On *Penn Central*'s second factor, "the extent to which the regulation has interfered with distinct investment-backed expectations," 438 U.S. at 124, the district court found that when MHC bought Contempo Marin in 1994, it "had a reasonable expectation that it would be provided a reasonable return on its property value" and that "[t]he City's amendments to the ordinance in 1999 frustrated MHC's expectations by increasing dramatically the burden of the ordinance on MHC." Pet. App. 59a. The court further found that "much of the economic injury suffered by MHC" was incurred after the enactment of the 1999 Ordinance because the ordinance transferred "much of the park's value to third parties" and "den[ied] MHC return on its capital in an escalating real estate market." *Id.* at 60a. The court found that MHC could not have expected this when it purchased the community.

On *Penn Central*'s third factor, "the character of the governmental action," 438 U.S. at 124, the district court found that the ordinances unfairly "singled out" MHC to bear the burden of providing affordable housing, even though MHC "ha[d] not contributed disproportionately to the problem of affordable housing in San Rafael." Pet. App. 61a-62a. The court observed that "no other landowner in San Rafael suffers a burden that is remotely comparable," and thus the ordinances "impose[d] a virtually unique burden on MHC." *Id.* at 62a-63a The court concluded that the ordinances forced MHC "to bear a public burden that, in all fairness and justice, should be borne by the public as a whole." *Id.* at 64a.

Separately, the district court also found that application of the 1999 Ordinance gave rise to an unconstitutional private taking. The testimony and documentary evidence—including proof that the City first explored the feasibility of using eminent domain to transfer ownership of the community to the tenants—convinced the district court that the City's asserted "public use" of promoting affordable housing was a pretext for "the City's blatant efforts to confer a private benefit to particular, favored private entities." *Id.* at 80a-81a. Expressly relying on the reasoning of Justice Kennedy's concurring opinion in *Kelo v. City of New London*, 545 U.S. 469, 490 (2005) (Kennedy, J., concurring), the district court found that the 1999 Ordinance was passed "for the singular purpose of transferring the value of land from one private party," MHC, "to another," the Contempo Marin tenants. *Id.* at 81a. Rather than serving the asserted purpose of promoting affordable housing, the evidence showed that the ordinance was designed to serve the current tenants by enabling them to charge a massive, upfront premium to incoming tenants. In so doing, the effect of the ordinance was to increase housing costs, not make housing more affordable. The court thus found that "the proffered public purposes asserted as justification for the Ordinance are palpably without reasonable foundation." *Id.* at 79a.

Finally, the district court denied MHC's substantive due process challenge. Although the court found that the regulation did not substantially advance any legitimate public purpose, the court found itself constrained by Ninth Circuit precedent to refuse to

recognize a substantive due process claim. The court noted that this Court's decision in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005), "plainly suggests the availability of a substantive due process challenge to a regulatory taking," *id.* at 82a, but it ultimately concluded that the relevant language in *Lingle* was dicta that had not yet been construed by the Ninth Circuit, *id.* at 87a. Given this, the district court found it was obligated to reject any substantive due process challenge. *Id.* at 87a-88a.

3. On appeal, the Ninth Circuit reversed both the Takings Clause and Public Use Clause holdings and upheld the Due Process Clause holding. *Id.* at 28a. On the regulatory taking claim, the Ninth Circuit overturned the district court's holdings on all three *Penn Central* factors. *Id.* at 12a-18a.

On the first *Penn Central* factor, the "economic impact," the Ninth Circuit held that the diminution in property value could be permissibly measured only by considering the delta between "the economic impact of the 1993 Ordinance in effect when MHC purchased the mobile home park" and "the economic effect of the 1999 Ordinance enacted after the property acquisition." *Id.* at 15a. Thus, the court effectively immunized the 1993 Ordinance from review, even though an as-applied challenge to the effects of the 1993 Ordinance had not ripened at the time MHC bought the community in 1994.[4] The court also held that, even considering the

[4] The district court found that MHC "fully exhausted state remedies" for an as-applied challenge to the 1993 Ordinance through a 1996 inverse condemnation proceeding that became final

full 81% diminution of value, no taking could have occurred because "mere diminution in the value of property, however serious, is insufficient to demonstrate a taking." Pet. App. 15a (quotation marks omitted). The Ninth Circuit thus effectively adopted a rule requiring the complete *elimination* of value, not just a diminution "however serious," to establish a regulatory taking.

For the second *Penn Central* factor, "the extent to which the regulation has interfered with distinct investment-backed expectations," the Ninth Circuit found the mere existence of rent control at the time MHC bought the property "fatal" to MHC's claim. *Id.* at 17a. Citing this Court's decision in *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602 (1993), the court held that "'[t]hose who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end.'" *Id.* at 16a-17a. The Ninth Circuit ignored this Court's decision in *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001), holding that an unreasonable regulation of property remains subject to a taking challenge after an intervening ownership change, particularly where, as here, the as-applied challenge did not ripen until after the ownership change. Rather than following *Palazzolo*, the court purported to follow the circuit's *en banc* decision in *Guggenheim v. City of Goleta*, 638 F.3d 1111 (9th Cir.

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in 2005. *Id.* at 95a. The Ninth Circuit did not question that finding.

2010) (*en banc*), without recognizing that *Guggenheim* was expressly limited to facial challenges. *See* Pet. App. 17a.

For the third *Penn Central* factor, "the character of the governmental action," the Ninth Circuit did not consider it relevant that the law "singl[ed] out" MHC to bear a burden that was "functionally equivalent to a physical taking" and "virtually unique" in that "no other landowner in San Rafael bears a burden that is remotely comparable." *Id.* at 61a-63a. Instead, the court held that all rent control ordinances are simply adjustments of relative benefits and burdens, essentially rendering it irrelevant whether a particular land owner was forced to bear a disproportionate burden. *Id.* at 17a-18a.

On the private taking claim, the Ninth Circuit rejected out-of-hand the idea that it should consider the district court's findings that the City acted "pretextual[ly]" under the standard identified in Justice Kennedy's *Kelo* concurrence, *id.* at 81a, though it did not hold any of those findings clearly erroneous, *id.* at 18a-20a. Instead, it held that the City was due "extreme deference," meaning that the rent control regulation must be upheld so long as the City could put forward any "conceivable public purpose," *id.* at 19a—even if the City's asserted public purposes were entirely pretextual and, as the district court found, "palpably without reasonable foundation," *id.* at 69a. Concluding baldly that the City *had* put forward a "conceivable public purpose," and utterly ignoring the district court's well-founded findings that the purpose

was pretextual, the Ninth Circuit ruled for the City on the private taking claim. *Id.* at 20a.

Applying that same deferential standard of review, the Ninth Circuit upheld the district court's finding that there had been no substantive due process violation. *Id.* at 22a-23a.

4. MHC filed a timely petition for rehearing *en banc*, which was denied. *See id.* at 168a. This Petition followed.

REASONS FOR GRANTING THE PETITION

This case warrants review because the Ninth Circuit's ruling, if left undisturbed, will effectively eliminate any constitutional limits on the ability of local governments to impose extreme regulations that transfer most of the value of a parcel of land from its owner to other politically influential private parties solely to benefit those other parties. If a city can use the pretext of fostering affordable housing through rent control to justify transferring virtually all of the value of land to other private citizens, without actually advancing either the goal of making housing more affordable or any other public purpose, then no constitutional limits are left. Regulatory taking claims and private taking claims will continue to exist only in theory and will have lost any practical usefulness as checks on governmental abuses.

This Court's review is necessary because the Ninth Circuit decision nullifies *Penn Central* as a meaningful restraint on regulations that single out one property owner "alone to bear public burdens which, in all fairness and justice, should be borne by the public as a

whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). The decision also creates a direct conflict with the Federal Circuit as to the application of all three *Penn Central* factors. This results in the anomalous situation that a property owner in the Ninth Circuit can succeed on a regulatory taking claim in the Federal Circuit when his or her property is taken through federal regulation, but cannot succeed on such a claim in the Ninth Circuit if the exact same regulation is imposed by state or local government. This Court's review is needed to restore uniform application of the *Penn Central* factors as established by this Court and properly interpreted by the Federal Circuit.

This case presents the ideal vehicle to address these issues. In *Yee*, this Court expressly reserved ruling on the "important" question of whether a mobile home rent control regulation could give rise to a regulatory taking, deferring that question to a future case in which the issue was fully litigated. 503 U.S. at 537-38. Here, the district court found after extensive trial proceedings that the regulations at issue take every stick in the bundle of property rights, other than mere title to the property and some trifle of value, and are "functionally equivalent to a physical taking of all or an overwhelming percentage of the value of MHC's land." Pet. App. 57a.

MHC has lost 81% of the value of its property, cannot exclude third parties from its property, cannot determine what price to charge those who occupy its property, does not receive a fair return on capital, and cannot change the use of its property. Without rejecting any of these findings—many of which turned

on assessments of witness credibility, *see, e.g.*, *id.* at 49a—the Ninth Circuit nonetheless found no regulatory taking. If this type of regulation does not give rise to a *Penn Central* taking, then the *Penn Central* doctrine is no longer viable in the Ninth Circuit.

Finally, this Court's review is needed because the Ninth Circuit applied an erroneous legal rule in rejecting Petitioners' private taking and substantive due process claims. The Ninth Circuit held that even when it is proved that a municipality transferred real property from one private party to another solely to benefit the recipient and with asserted public purposes that were entirely pretextual, a private taking claim must be addressed by applying the traditional rational-basis test—and thus rejected if there is any conceivable public purpose rationally related to the regulation, regardless of the actual purpose or effect. The Ninth Circuit's decision accords no importance to Justice Kennedy's pivotal concurrence regarding pretext in *Kelo*, nor to his important concurrence regarding due process in *Lingle*. Unless this Court grants review, it is unclear how a plaintiff who asserts a private taking or substantive due process claim based on a pretextual transfer of property could ever obtain redress.

I. The Ninth Circuit Effectively Nullified the Regulatory Taking Doctrine Recognized in *Penn Central*.

As this Court has long held, the strictures of the Takings Clause are not limited to government appropriations of property, such as by eminent domain; the clause applies to government regulations as well. "[W]hile property may be regulated to a certain extent,

if regulation goes too far it will be recognized as a taking." *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (Holmes, J.).

For regulations that do not involve physical intrusions on property or exactions, this Court has developed two standards. If regulations "eliminate all economically beneficial or productive use" from property, there is a *per se* rule: such regulations are always deemed takings. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019, 1029 (1992). But for regulations that eliminate less than 100% of the value of property, this Court has applied the three-pronged *Penn Central* test. The relevant factors for determining whether a taking has occurred include (1) "[t]he economic impact of the regulation on the claimant," (2) "the extent to which the regulation has interfered with distinct investment-backed expectations," and (3) "the character of the governmental action." 438 U.S. at 124.

The Ninth Circuit got it wrong on all three prongs, creating direct conflicts with both this Court's jurisprudence and that of the Federal Circuit. If the regulatory taking doctrine recognized in *Penn Central* is to continue as a viable deterrent against excessive regulation in the Ninth Circuit, this Court's intervention is needed.

A. The Ninth Circuit Flouted This Court's Regulatory Taking Jurisprudence.

The decision below effectively nullified the regulatory taking doctrine throughout the Ninth Circuit. The district court found that the regulations at

issue took away nearly every stick in the bundle of property rights, leaving the owner with title to the land and a mere trifle of value. Yet the Ninth Circuit refused to recognize a regulatory taking based on its misreading of this Court's precedents.

1. First, the Ninth Circuit created a direct conflict with this Court's decisions establishing that a taking may be found even when regulation does not eliminate all economically beneficial use of a property. As this Court has repeatedly explained: "Where a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors [set forth in *Penn Central*]." *Palazzolo*, 533 U.S. at 617 (emphasis added)); *see also Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 330 (2002) ("Anything less than a 'complete elimination of value,' or a 'total loss' . . . require[s] the kind of analysis applied in *Penn Central*." (quoting *Lucas*, 505 U.S. at 1019-20 n.8)). Here, despite the district court's findings that MHC lost almost all economically beneficial use of its property, the Ninth Circuit refused to find a taking, apparently because MHC is still left with title to its property and a small residue of value.

In assessing the economic effect of the regulations, the district court found that the combination of the 1993 and 1999 Ordinances had caused Petitioner's "net operating income [to] decline[]" and diminished the value of the Contempo Marin property relative to its unregulated market value by at least 81%. Pet. App. 54a-55a. The court found that the ordinances made it "commercially impracticable for MHC to change the

use of its land," "frustrated" MHC's "ability to attract capital," and were "functionally equivalent to a physical taking of all or an overwhelming percentage of the value of MHC's land." *Id.* at 57a, 63a.

The Ninth Circuit nonetheless held this was not enough. Brushing aside the district court's findings of an 81% diminution in value, the Ninth Circuit held that mere diminution of value, "however serious," would be "insufficient to demonstrate a taking." *Id.* at 15a. And it refused to recognize that what was at issue was not "mere diminution," but rather a loss of virtually every property right an owner has, combined with the "singling out" of this property owner to bear a "unique" burden that no other property owner was forced to bear. *Id.* at 62a. In effect, the Ninth Circuit adopted a categorical rule requiring a *complete* elimination of all of the value of property to establish a regulatory taking.

This all-or-nothing approach stands in clear conflict with this Court's precedents. To be sure, this Court has held that a complete destruction of property value is *sufficient* to establish a taking; a regulation that eliminates "all economically beneficial uses" is a *per se* taking under *Lucas*, 505 U.S. at 1019. But this Court has never held that a complete loss of value is *necessary* to establish a regulatory taking. To the contrary, this Court created the *Penn Central* test precisely for the purpose of evaluating regulations that eliminate less than 100% of a property's value. *See Palazzolo*, 533 U.S. at 617.

Thus, by requiring a complete loss of property value to establish a regulatory taking, the Ninth Circuit

adopted *Lucas*'s *per se* rule as the only standard available in the Ninth Circuit for establishing a regulatory taking. The *Penn Central* test was effectively eliminated, because it is now impossible in the Ninth Circuit to demonstrate a taking "[w]here a regulation places limitations on land that fall short of eliminating all economically beneficial use," *Palazzolo*, 533 U.S. at 617, even where the property owner shows that the regulation singles him out to bear a burden that ought to be borne by the public as a whole.

2. Second, the Ninth Circuit created a direct conflict with this Court's decision in *Palazzolo* through its holding that MHC may not challenge any loss of value it suffered as a result of the 1993 Ordinance that already existed at the time MHC bought the property, despite the fact that an as-applied challenge to the 1993 Ordinance had not ripened as of the date of purchase and thus had never been litigated.[5] This aspect of the Ninth Circuit's decision cannot be reconciled with this Court's decision in *Palazzolo*.

In *Palazzolo*, this Court explicitly rejected the notion that "a purchaser or a successive title holder . . . is deemed to have notice of an earlier-enacted restriction and is barred from claiming that it effects a

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[5] Although the prior owner brought its own unsuccessful facial claim against the 1993 Ordinance, an as-applied claim was not ripe when it conveyed the property. Under *Palazzolo*, the right to bring that as-applied claim was transferred to MHC with the property. 533 U.S. at 629 ("the prior owners must be understood to have transferred their full property rights"—including their Fifth Amendment right to just compensation for takings—"in conveying the lot").

taking." 533 U.S. at 626. This Court particularly recognized that in circumstances in which an as-applied challenge to the pre-purchase regulation had not ripened at the time of purchase, such a rule would immunize the effects of the pre-purchase law from any challenge. As the Court explained: "It would be illogical, and unfair, to bar a regulatory takings claim because of the post-enactment transfer of ownership where the steps necessary to make the claim ripe were not taken, or could not have been taken, by a previous owner." 533 U.S. at 628.

In so holding, this Court reiterated the principles announced in *Nollan v. California Coastal Commission*, 483 U.S. 825, 833 n.2 (1987), which held that a prior property owner's right to compensation for an easement in place at the time of the sale would have passed to the new owner. If the rule were otherwise, *Palazzolo* reasoned, "[a] State would be allowed, in effect, to put an expiration date on the Takings Clause," a result that would be "illogical, and unfair." 533 U.S. at 627-28.

Palazzolo thus establishes that a regulation that would be unconstitutional absent compensation is "not transformed into a background principle of the State's law by mere virtue of the passage of title." *Id.* at 629. This was a point further emphasized by Justice Scalia in his *Palazzolo* concurrence, which explained that the purchaser of property subject to existing regulation is not required to assume the validity of the existing regulations. As Justice Scalia noted, "[t]he 'investment-backed expectations' that the law will take into account do not include the assumed validity of a

restriction that in fact deprives property of so much of its value as to be unconstitutional." 533 U.S. at 637 (Scalia, J., concurring).

The Ninth Circuit's decision flouts *Palazzolo*. The Ninth Circuit held that the district court should not have considered any loss of value MHC suffered as a result of the 1993 Ordinance in place when MHC bought the property, and should have instead looked only to the diminution of value caused specifically by the 1999 Ordinance. Pet. App. 14a-15a. The reasoning adopted by the Ninth Circuit here leads to exactly the illogical, unfair result that *Palazzolo* expressly rejected. By holding that the court could consider only the incremental diminution of value caused by the 1999 Ordinance, relative to the effects of the 1993 Ordinance, the Ninth Circuit effectively immunized the as-applied effects of the 1993 Ordinance from judicial review. That provided just the kind of "windfall" for San Rafael that *Palazzolo* condemned. 533 U.S. at 627-28; *see also id.* at 627 ("[T]o accept the State's rule, the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable.").

In fact, the Ninth Circuit not only insulated the effects of the 1993 Ordinance from review, it further held that the mere existence of the 1993 Ordinance was "fatal" to MHC's claim that the *1999* Ordinance effected a regulatory taking because MHC should have assumed the validity of the existing regulation, and therefore should have expected even worse regulation. The court endeavored to explain that non-sequitur by stating that because the property was subject to some degree of

rent control at the time MHC bought it in 1994, MHC therefore could not "'object if the legislative scheme [was] buttressed by subsequent amendments to achieve the legislative end.'" Pet. App. 17a (quoting *Concrete Pipe*, 508 U.S. at 645). Thus, the Ninth Circuit not only prohibited MHC from challenging the effects of the 1993 Ordinance in place when MHC bought the property, it also effectively prohibited MHC from challenging even the effects of the 1999 Ordinance, which passed five years *after* MHC bought the property. In essence, the Ninth Circuit barred the doors of the courthouse to anyone in an already-regulated environment seeking to assert a taking challenge.

The Ninth Circuit apparently felt justified in disregarding *Palazzolo* by declaring it was instead bound by the circuit's *en banc* decision in *Guggenheim*. Relying on *Guggenheim*, the Ninth Circuit found that the mere existence of regulation at the time MHC bought the property was "fatal" to its claims because the price that MHC paid for the property "doubtless reflected the burden of rent control they would have to suffer." Pet. App. 17a.[6] But *Guggenheim* expressly

[6] The City argued that MHC had paid only $19 million for the community, but the district court never made that finding. *See* Pet. App. 16a n.4. The evidence showed the community was purchased as part of a portfolio transaction in which the company acquired approximately eleven properties. *Id.* at 59a. The evidence also showed that MHC had an expectation at the time of purchase that it could obtain a return on capital expenditures and benefit from appreciation in local land values. *Id.* The district court found that the 1999 Ordinance eliminated MHC's ability to recoup a return on capital expenditures, caused its rents to decline exponentially in

limited its holding to facial challenges, declaring it had "no bearing one way or the other on whether an as applied challenge might succeed." 638 F.3d at 1119 n.37. The panel in this case ignored that distinction, instead holding that MHC was bound to assume the validity of the pre-existing regulation.

The irrationality and unfairness of presuming the constitutionality of a pre-purchase regulation is squarely presented by the circumstances of this case. When MHC bought Contempo Marin in 2004, this Court had just declared in *Yee* that the constitutionality of California's mobile home rent control laws was an open question. 503 U.S. at 538. All of the factors the Court identified as "relevant to a regulatory taking argument" in *Yee* are equally, if not more, present here. *Id.* at 531. Given *Yee* and the other background principles of law at the time, MHC had no reason to assume the validity of the existing regulation when it bought the property, and every incentive to challenge it.

This case presents this Court with a unique opportunity to resolve on a full record the issues left open in *Yee*. If the Ninth Circuit decision is allowed to stand, no *Penn Central* regulatory taking claim can survive to present again on a full record these important issues. This Court's review is needed to address the Ninth Circuit's aberrant approach to

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inflation-adjusted dollars, and caused its net operating income to decline even in absolute dollars, all in the face of dramatically increasing property values. *See, e.g.*, *id.* at 46a, 55a, 57a, 59a, 61a-63a.

regulatory taking claims and to resolve the important questions on which this Court deferred ruling in *Yee*.

B. The Ninth Circuit's Decision Conflicts with the Federal Circuit on All Three *Penn Central* Factors.

The Ninth Circuit not only flouted this Court's precedent, it also created a direct split of authority with the Federal Circuit on all three *Penn Central* factors. Because the Court of Federal Claims—and, on appeal, the Federal Circuit—possesses exclusive jurisdiction over "any claim against the United States founded . . . upon the Constitution," 28 U.S.C. § 1491, the circuit split established here creates a critical disparity in takings jurisprudence between state and local action, on the one hand, and federal action, on the other—a disparity that exists even within the Ninth Circuit. Thus, had the *federal government* deprived MHC of its property's value, MHC would have had recourse in the Court of Federal Claims. As it happens, however, a *municipal* law deprived MHC of its property value, and thus MHC was denied compensation by the Ninth Circuit's erroneous approach to regulatory takings. There is nothing to suggest that the meaning of the Takings Clause differs depending on the level of government that effects the taking. The aberrant outcomes created by the split of authority between the Ninth and Federal Circuits must therefore be resolved.

1. As to *Penn Central*'s first factor—loss of economic value—the Ninth Circuit's requirement that an owner establish a complete loss of value in order to make out a regulatory taking claim creates a clear split

of authority with the Federal Circuit, which has found regulatory takings under *Penn Central* where regulations effected *less* diminution of property value than did the rent control laws at issue here.

In *Yancey v. United States*, 915 F.2d 1534, 1539 (Fed. Cir. 1990), the Federal Circuit held that a taking had occurred where a government regulation diminished the value of the property at issue by 77%. The Federal Circuit expressly rejected the government's argument that a 77% diminution in value was insufficient to satisfy the "economic impact" prong of *Penn Central*. *Id.* at 1541. Rather, the court held that a 77% diminution in value was a "severe economic impact" that was not "too small to warrant a taking." *Id.* The Circuit further confirmed that principle in *Cienega Gardens v. United States*, 331 F.3d 1319, 1343 (Fed. Cir. 2003), holding that it was "clearly not the law that only such 100% value regulatory takings are compensable."

Likewise, in *Florida Rock Industries, Inc. v. United States*, 45 Fed. Cl. 21, 43 (1999), the Court of Federal Claims concluded that a taking had occurred where government action diminished the value of property by 73.1%. Relying on *Yancey*, the court found that a 73.1% decline in value amounted to a "very substantial loss," and thus "the economic impact of the regulation" under *Penn Central* was "severe." *Id.* at 41. In so holding, the court expressly rejected an "all-or-nothing" approach to the economic impact prong of *Penn Central*: "The notion that the government can take two thirds of your property and not compensate you but

must compensate you if it takes 100% has a ring of irrationality, if not unfairness, about it." *Id.* at 23.

There is, therefore, a split of authority between the Ninth and Federal Circuits as to the first *Penn Central* factor that requires resolution by this Court.

2. The Ninth Circuit's resolution of the second factor, regarding investment-backed expectations, has also created a split with the Federal Circuit, which has long held that purchasing property that is subject to regulation does not preclude a taking challenge to that regulation. In contrast to the Ninth Circuit, the Federal Circuit has correctly interpreted this Court's decision in *Palazzolo* as "reject[ing] the theory that 'a person who purchases property after the date of the regulation may never challenge the regulation.'" *Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1349 (Fed. Cir. 2004) (quoting *Rith Energy, Inc. v. United States*, 270 F.3d 1347, 1350 (Fed. Cir. 2003)).

While the Ninth Circuit found the existence of prior regulation "fatal" to MHC's regulatory taking claim (even though no as-applied challenge to the regulation had ripened as of the time of purchase), Pet. App. 17a, the Federal Circuit has emphatically rejected such a categorical rule. As the *en banc* Federal Circuit explained, "[w]here a regulatory taking of real property is alleged, the state cannot defeat liability simply by showing that the current owner was aware of the regulatory restrictions at the time that the property was purchased." *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1350 n.22 (Fed. Cir. 2001) (*en banc*); *see also Schooner Harbor Ventures, Inc. v. United States*, 569 F.3d 1359, 1366 (Fed. Cir.

2009) ("knowledge of the regulation is not per se dispositive, although it is a factor that may be considered depending on the circumstances").

This Court's review is therefore needed to bring the Ninth Circuit into line with the proper interpretation of *Palazzolo* as articulated by the Federal Circuit.

3. The Ninth Circuit's third conflict with the Federal Circuit arose from the utter disregard the Ninth Circuit showed for the "character of the ordinance" factor in the *Penn Central* analysis. Blithely asserting that the "character" of all rent control laws is simply to adjust benefits and burdens, and that the 1999 Ordinance was "only a slight modification to an already-existing rent control ordinance," the Ninth Circuit effectively held that a rent control law's "character" can never weigh in favor of finding a taking. Pet. App. 18a-19a.

This Court has found otherwise, stating that the "character" prong of *Penn Central* is designed to determine whether a landowner has been "singled out" to bear a burden that should be "spread among taxpayers through the payment of compensation." *Lingle*, 544 U.S. at 543. Indeed, the classic definition of a taking is a law "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong*, 364 U.S. at 49.

By not even addressing the district court's findings that MHC had been "singled out" in exactly the manner forbidden by the Takings Clause, the Ninth Circuit created yet another split with the Federal Circuit. In

Cienega Gardens v. United States, 331 F.3d 1319, 1343 (Fed. Cir. 2003), the Federal Circuit expressly relied on the "character" of the ordinance in finding a regulatory taking, concluding that Congress had placed the burden of low-cost housing programs disproportionately on a few property owners. The court found that "forc[ing] some owners to keep accepting below-market rents is the kind of expense-shifting to a few persons that amounts to a taking." 331 F.3d at 1338-39. That disproportionate burden is even more pronounced here, where MHC was "singled out" to bear a "unique" burden that no other property owner in the City bears. *See* Pet. App. 61a-62a.

The conflicts with the Federal Circuit on all three *Penn Central* factors merit this Court's review to establish uniformity of the law such that a property owner's success on a regulatory taking claim does not depend on whether the regulation that takes its property is federal, state, or local.

II. The Ninth Circuit Added to the Confusion in the Lower Courts About Whether a Pretextual Transfer of Property Rights from One Private Party to Another That Does Not Reasonably Advance a Public Purpose May Be a Private Taking or Substantive Due Process Violation.

Certiorari is further merited because the Ninth Circuit created further confusion in the lower courts through its treatment of MHC's private taking and substantive due process claims.

A. The Ninth Circuit Exacerbated the Confusion About the Role of Pretext in Takings Claims.

1. The Public Use Clause of the Fifth Amendment requires that all takings be "for public use." U.S. Const. amend. V. A taking not "for public use"—a so-called *private* taking—is invalid, even if the government pays "just compensation." *See, e.g.*, *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984) ("[T]he Court's cases have repeatedly stated that 'one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid.'"); *Kelo*, 545 U.S. at 477 ("[T]he sovereign may not take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation.").

In *Kelo*, this Court reiterated that, although "deference" is owed to "legislative judgments in this field," courts nevertheless perform the important function of determining whether a proposed taking is "for a 'public use' within the meaning of the Fifth Amendment to the Federal Constitution." 545 U.S. at 480, 489-90; *accord Midkiff*, 467 U.S. at 240 (recognizing the "role for courts to play in reviewing a legislature's judgment of what constitutes a public use"). *Kelo* held that the taking of property by the City of New London was justified under the Public Use Clause where it "would be executed pursuant to a 'carefully considered' [economic] development plan," and where the lower courts all "agreed that there was no evidence of an illegitimate purpose." 545 U.S. at 478. But *Kelo*

clarified that, in a different case, "the City would no doubt be forbidden from taking petitioners' land for the purpose of conferring a private benefit on a particular private party," and "the City [would not] be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit." *Id.* at 477-78.

Kelo's teachings were further explicated in the concurrence of Justice Kennedy, who provided the critical fifth vote, joining the majority but writing separately to caution that, although the "rational-basis" test applies to Public Use Clause claims, that test "does not, however, alter the fact that transfers intended to confer benefits on particular, favored private entities, and with only incidental or pretextual public benefits, are forbidden by the Public Use Clause." *Id.* at 490 (Kennedy, J., concurring). Thus, a "court confronted with a plausible accusation of impermissible favoritism to private parties should treat the objection as a serious one and review the record to see if it has merit." *Id.* at 491. Having undertaken that inquiry, a court "should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits." *Id.*

Accordingly, Justice Kennedy's concurrence established that the deference usually paid to legislative judgments under the rational basis test is cabined where there is "a plausible accusation of impermissible favoritism to private parties." *Id.* Under those circumstances, the rational basis test is not the near-rubber-stamp standard that applies in other contexts; rather, courts must evaluate "a

plausible accusation of impermissible favoritism" with special care, applying a heightened standard of review.

2. Here, the district court followed Justice Kennedy's *Kelo* concurrence, *see* Pet. App. 67a-69a (quoting Justice Kennedy's instructions in *Kelo*), and conducted a searching review of the record, examining voluminous written evidence and hearing multiple days of trial testimony. On the basis of that review, the court unequivocally found that the asserted public benefits of the San Rafael rent control law were "pretextual." *Id.* at 81a. Recounting the context in which the 1999 Ordinance was passed—in particular, that the law arose out of an effort by the politically connected Contempo Marin tenants to convince the City to use its powers of eminent domain to assist the residents in purchasing the community—the district court found that the ordinance was part of the City's "blatant efforts to confer a private benefit to 'particular, favored private entities,' namely the Contempo Marin tenants." *Id.* at 80a-81a (quoting *Kelo*, 545 U.S. at 490 (Kennedy, J., concurring)).

The court also rejected the City's asserted justification for the ordinance. Because the primary effect of the ordinance was to permit San Rafael tenants to command far-above-market prices in selling their manufactured homes, the court found that the ordinance made no progress whatsoever in making Contempo Marin housing affordable, as the City claimed. To the contrary, it made the housing "less affordable" and limited its availability to those wealthy enough to pay or finance an average premium of $67,000 representing the fully-capitalized value of

future rent savings. *Id.* at 75a-76a. The district court concluded, based on all the evidence, that the rent control ordinance was passed "for the singular purpose of transferring the value of land from one private party to another," and that the asserted public purposes were a "mere pretext" and "palpably without reasonable foundation." *Id.* at 81a. Thus, it held that the ordinance constituted an unconstitutional private taking. *Id.*

3. On appeal, the Ninth Circuit held that the district court had erred by applying the standard of Justice Kennedy's opinion. The Ninth Circuit rejected any notion that it "must apply a heightened standard of review to the Ordinance" based on a showing it was a mere pretext for transferring property from one private party to another. Pet. App. 18a. Rather, the court held that City was due "extreme deference." *Id.* at 19a. It then stated: "Because we conclude that the Ordinance is rationally related to a conceivable public purpose, the Ordinance does not amount to a private taking." *Id.* at 20a. The Ninth Circuit did not even mention the district court's finding that the City's asserted "public use" was a pretext and did not otherwise engage in any of the "searching review" that Justice Kennedy called for and the district court performed.

The Ninth Circuit's decision on the private taking claim merits certiorari because it directly conflicts with the precepts announced in Justice Kennedy's *Kelo* concurrence.

4. The Ninth Circuit's decision also merits review because it adds to the growing turmoil in the courts below about the role that a finding of pretext plays in

an analysis of private takings under *Kelo*. Unlike the Ninth Circuit here, the Second Circuit has at least explicitly addressed the role of pretext in a private taking claim, holding in *Goldstein v. Pataki*, 516 F.3d 50, 60 (2d Cir. 2008), that *Kelo* did not "open[] up a separate avenue for a takings challenge under which a plaintiff could claim a taking had been effectuated 'under the mere pretext of a public purpose, when [the] actual purpose was to bestow a private benefit.'" Thus, the Second Circuit, like the Ninth, apparently does not see any role for a claim of pretext in private takings, nor any responsibility for courts to inquire about whether a regulation is actually serving its asserted purpose.

The First Circuit, however, has left the door open for an analysis of pretext under *Kelo*. In *Fideicomiso De La Tierra Del Cano Martin Pena v. Fortuno*, 604 F.3d 7, 23 n.13 (1st Cir. 2010), the court refused to strike down a statute on its face, but expressly noted that it was not foreclosing a later as-applied challenge based on a claim that the land at issue was taken "under the mere pretext of a public purpose." Several state courts of last resort—including those of the District of Columbia and Hawaii—have likewise recognized that an analysis of pretext must play a role in any private taking claim. In *Franco v. National Capital Revitalization Corp.*, 930 A.2d 160, 171 (D.C. 2007), the District of Columbia Court of Appeals found that pursuant to *Kelo*, "there is room for a landowner to claim that the legislature's declaration of a public purpose is a pretext designed to mask a taking for private purposes." And in *County of Hawaii v. C & J*

Coupe Family Limited Partnership, 242 P.3d 1136, 1159 (Hawaii 2010), the Hawaii Supreme Court recognized that "a pretext defense is distinct from a just compensation challenge."

The confusion in the courts has been well documented. *Kelo* has spawned a cottage industry of legal commentators opining on the meaning of the Court's reference to "pretext" and calling upon the Court to clarify what is required of lower courts when faced with claims of pretextual private takings. *See, e.g.*, Lynn E. Blais, *The Problem with Pretext*, 38 Fordham Urb. L.J. 963 (2011); Daniel S. Hafetz, *Ferreting Out Favoritism: Bringing Pretext Claims After Kelo*, 77 Fordham L. Rev. 3095 (2009); Daniel B. Kelly, *Pretextual Takings: Of Private Developers, Local Governments, and Impermissible Favoritism*, 17 S. Ct. Econ. R. 173 (2009).

This Court should therefore take this case to put to rest the uncertainty about what *Kelo* demands of courts when faced with claims that an asserted public purpose is actually pretextual. Indeed, this case presents an ideal vehicle for the full Court to confirm the important protections against private takings articulated in Justice Kennedy's *Kelo* concurrence. This Court should grant certiorari to correct the Ninth Circuit's misinterpretation of the Public Use Clause and establish uniformity in the lower courts about what is required for an analysis of pretext.

B. The Ninth Circuit's Decision Raises Further Questions that Merit This Court's Review About the Standard for Substantive Due Process Claims.

The Ninth Circuit's decision also raises questions about the meaning of this Court's opinion and Justice Kennedy's concurrence in *Lingle*. In *Lingle*, the Court repudiated the statement in *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), that government regulation of private property "effects a taking if [such regulation] does not substantially advance legitimate state interests." *Lingle*, 544 U.S. at 532. The Court concluded that the "substantially advances" 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." *Id.* at 540-41. Justice Kennedy specifically concurred in the judgment to emphasize that the decision did "not foreclose the possibility that a regulation might be so arbitrary or irrational as to violate due process" and that the "failure of a regulation to accomplish a stated or obvious objective would be relevant to that inquiry." *Id.* at 548-49 (Kennedy, J. concurring). In *Lingle*, however, the plaintiff had not preserved its substantive due process challenge.

Lingle suggests that the "substantially advances" test is alive and well—so long as it is a test applied in the substantive due process context and not the takings context. As commentators have noted, in *Lingle*, "the Court did not repudiate its pronouncement that a regulation does not pass muster if it does not substantially advance legitimate state interests. To the

contrary, it ratified that formulation—not as a takings test—but rather as a test to determine if landowners have been accorded due process." Steven J. Eagle, *Property Tests, Due Process Tests and Regulatory Takings Jurisprudence*, 2007 B.Y.U. L. Rev. 899, 957 (2007) (quotation marks and footnotes omitted).

The Ninth Circuit's decision, however, makes no mention of the "substantially advances" test as the proper analysis for a substantive due process challenge, and instead holds that courts are required only to determine "whether the enacting body could have rationally believed at the time of enactment that the law would promote its objective." Pet. App. 22a. Under that deferential standard of review, it is highly unlikely any due process challenge to a regulation that takes an owner's property under the pretext of a public purpose will ever succeed. Even here, where the district court found that the regulation not only failed to advance, but actually *impeded* the City's asserted interest in creating more affordable housing, the deferential standard of review applied by the Ninth Circuit would preclude finding a substantive due process violation.

This Court's review is therefore necessary to establish the proper standard of review for a substantive due process challenge to a regulation that takes virtually all of the value of an owner's property in a manner that does not substantially advance—indeed, does not advance at all—any legitimate state interest.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

United States Court of Appeals,
Ninth Circuit.

MHC FINANCING LIMITED PARTNERSHIP, an Illinois limited partnership; Grapeland Vistas, Inc., a California corporation, Plaintiffs–Appellants,
v.
CITY OF SAN RAFAEL, a municipal corporation; Contempo Marin Homeowners Association, a California corporation, Defendants–Appellees.
MHC Financing Limited Partnership, an Illinois limited partnership; Grapeland Vista, Inc., an Illinois corporation, Plaintiffs–Appellees,
v.
City of San Rafael, Defendant–Appellant,
and
Contempo Marin Homeowners Association, Defendant–Intervenor.
MHC Financing Limited Partnership, an Illinois limited partnership; Grapeland Vista, Inc., an Illinois corporation, Plaintiffs–Appellees,
v.
City of San Rafael, Defendant–Appellant,
Contempo Marin Homeowners Association, Defendant–Intervenor–Appellee.
MHC Financing Limited Partnership, an Illinois limited partnership; Grapeland Vista, Inc., an Illinois corporation, Plaintiffs–Appellees,
v.
City of San Rafael, Defendant,
and

Contempo Marin Homeowners Association,
Defendant–Intervenor–Appellant.
MHC Financing Limited Partnership, an Illinois limited partnership; Grapeland Vista, 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.

Nos. 07–15982, 09–16447, 09–16451, 09–16612, 09–16613.

Argued and Submitted Feb. 13, 2013.
Filed April 17, 2013.

Before: JEROME FARRIS, SIDNEY R. THOMAS, and N. RANDY SMITH, Circuit Judges.

OPINION

THOMAS, Circuit Judge:

As Yogi Berra observed, "it's deja vu all over again" as we are being "called upon to consider, yet again, a takings challenge to mobile home rent control laws." *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 683 (9th Cir. 1993). In this appeal, we consider whether San Rafael's mobilehome rent regulation violates the park owners' substantive due process rights, constitutes a regulatory taking under *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978), or runs afoul of the 'public use' requirement of the Fifth Amendment under the

standards articulated in *Kelo v. City of New London*, 545 U.S. 469, 125 S. Ct. 2655, 162 L. Ed. 2d 439 (2005). We conclude that the regulation passes muster against all of these challenges.

I.

Contempo Marin is one of two mobilehome parks in San Rafael, California and is owned by MHC Financing Limited Partnership (now Equity LifeStyle Properties, Inc.) and Grapeland Vistas, Inc. (collectively, "MHC"). MHC owns the pads upon which the mobilehomes sit and pad lessees pay monthly rent to MHC for use of their respective pads and the facilities and services that MHC provides. Despite their name, mobilehomes located in mobile home parks are actually not very mobile: pad lessees at Contempo Marin, as elsewhere, who wish to relocate usually sell their mobilehomes in place to the new resident, and the purchaser—in addition to acquiring the mobilehome—takes over the pad leasehold. *See Yee v. City of Escondido*, 503 U.S. 519, 523, 112 S. Ct. 1522, 118 L. Ed. 2d 153 (1992). Mobilehome owners sell their mobilehome and pad lease rights for one lump sum, so value of the rent controls is figured into the total purchase price and "capitalized" into the value of the mobilehome; MHC receives less revenue because the rent it can charge for the pad is limited, and it claims that this is an unconstitutional taking without just compensation under the Fifth Amendment and violates its substantive due process rights.

A. The Rent Control Regime

In 1989, San Rafael enacted the Mobilehome Rent Stabilization Ordinance. That Ordinance imposed rent controls tied to the consumer price index ("CPI"): if the change in CPI was less than 5%, the park owner could increase pad rents by a percentage equal to the change; between 5–10%, pad rents could be increased at 75% of the CPI, and above 10%, pad rents could be increased at 66% of the CPI change. Under the 1989 Ordinance, park owners could seek a greater increase through a defined process.

In 1993, the City amended the Ordinance to add "vacancy control," which gave any new resident taking over a mobilehome pad lease the right to rent the pad at the same rate as the previous tenant. The then-owner of Contempo Marin sued in state court, alleging that the combination of pad rent control and vacancy control in the amended Ordinance was an unconstitutional taking. The superior court upheld the Ordinance. *See De Anza Assets, Inc. v. City of San Rafael*, Case No. A063017 (Cal. Dist. Ct. App. Oct. 6, 1994). While on appeal, MHC purchased Contempo Marin. The court of appeal concluded that the vacancy control amendments do not constitute a regulatory taking, but reversed and remanded on other grounds. *Id.*

In 1999, the City amended the Ordinance to remove the sliding scale for pad rent increases and instead limited increases to a flat 75% of the change in CPI. The Amendments also altered rent increases related to capital improvements. As before, the 1999 Amendments to San Rafael's mobilehome rent

regulation provide an administrative procedure by which park owners such as MHC may seek rent increases beyond that which the regulation's formula provides in order to obtain a "just and reasonable return."

B. Procedural History

On October 13, 2000, MHC commenced this suit challenging the constitutionality of the City's regulations on the ground that they violate the Takings Clause of the Fifth Amendment as made applicable to the states by the Fourteenth Amendment.

In 2001, the parties reached a settlement agreement whereby the City agreed to "initiate" amendments that would repeal vacancy control.[1] The City Council held

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[1] As relevant here, the agreement is as follows:

> 2. AGREEMENT
>
> The parties make the following agreement:
>
> 2.1 *Amendments to Mobilehome Rent Stabilization Ordinance.* Subject to approval by the City Council and following notice and public hearing, the City will initiate the following amendments of the City's Mobilehome Rent Stabilization regulations, Chapter 20 of the San Rafael Municipal Code:
>
> a. *Vacancy decontrol* ...
>
> b. *Calculation of automatic permissible annual rent increase* ...
>
> c. *Clarification regarding appeal of rent arbitration to City Council* ...
>
> d. *Applicability to subtenancies* ...
>
> ...

public hearings, but elected not to repeal vacancy control. MHC moved to enforce the settlement agreement, claiming that the City had committed itself to actually repealing vacancy control. The district court granted MHC's motion, holding that the City was contractually obligated to repeal vacancy control, but in 2002, the court granted the City's motion for reconsideration of the court's earlier holding that the settlement agreement was a valid contract. In October and November 2002, the district court held a jury trial on the contract claims, resulting in a jury verdict in favor of the City, and conducted a bench trial on MHC's constitutional claims. MHC filed motions for judgment as a matter of law notwithstanding the verdict and motions for a new trial, which the district court denied.

2.7 *Subject to approval by City.* The Agreement is expressly conditioned upon and subject to the approval of the Agreement by the San Rafael City Council. Following agreement by the parties on the final form and content of the Agreement, the City Council will meet in closed session to consider the Agreement with counsel. In the event the City Council fails to approve the Agreement as drafted, the Agreement shall be void and of no effect. In the event the form and content of the Agreement are approved as drafted, the Agreement will be circulated for signature by the parties and their respective counsel. The obligation of the City to process Ordinance amendments pursuant to paragraph 2.1 of this Agreement and to implement the same shall not arise until a fully executed Agreement has been received by the City Attorney's office. Further, MHC shall have no obligation hereunder if the Ordinance is not amended and effective by 120 days after the Agreement is fully executed.

After the bench trial, the district court stayed its ruling on the takings causes of action pending the Ninth Circuit's decision in *Chevron USA, Inc. v. Bronster*, 363 F.3d 846, 849 (9th Cir. 2004), *rev'd sub nom. Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005) and extended the stay after the Supreme Court granted certiorari in that case. *See Lingle v. Chevron U.S.A. Inc.*, 543 U.S. 924, 125 S. Ct. 314, 160 L. Ed. 2d 221 (2004) (granting certiorari).

In August 2004, while the case was stayed, MHC filed a second lawsuit, "*MHC II*," (3:04–CV–03325) seeking monetary damages for takings and equal protection violations, arguing that it was challenging acts subsequent to the filing of its first complaint. The district court determined that MHC had already waived its monetary damages as part of the first lawsuit, so it dismissed with prejudice that complaint in December 2006.

On May 23, 2005, the Supreme Court issued its decision in *Lingle,* and rejected the "substantially advances" theory of regulatory takings that had been the theory of MHC's claims.[2] *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005). MHC then requested leave to amend its complaint and file new constitutional claims, which the court granted in January 2006. *Id.*

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[2] The Supreme Court concluded that the question of whether a regulation "substantially advances" a legitimate state interest "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." *Lingle*, 544 U.S. at 540, 125 S. Ct. 2074.

MHC filed its Second Amended Complaint in February 2006, claiming that the Ordinance constitutes a regulatory taking under *Penn Central*, a private taking under *Kelo*, and that the Ordinance denied substantive due process under *Lingle*. The district court conducted a second bench trial in April and May 2007, issued preliminary findings of fact and conclusions of law on July 26, 2007, and issued a final order on January 28, 2008.

The district court held that "[p]urchasers of mobilehomes in Contempo Marin after the 1999 Amendments have paid a premium reflecting the present value of expected rent savings due to San Rafael rent regulation. This premium averages $67,000 for the right to enjoy the below market regulated rent." Because the premium is being paid to the Contempo Marin mobilehome owners, "the amendments reduced MHC's revenue streams from Contempo Marin and the value of its property by $10,609,136." The district court also held that "the whole Ordinance reduced MHC's net operating income by 75 percent and reduced the value of the park from $120 million to $23 million."

The district court held the ordinance to be "(a) unconstitutional and invalid as a private taking both on its face and as applied to Plaintiffs ... and (b) unconstitutional and invalid as applied to Plaintiffs ... as an uncompensated regulatory taking under the standards set forth in *Penn Central*...." The district court held that the Ordinance did not deny MHC due process of law under the Fourteenth Amendment.

The City brought motions to stay enforcement of the judgment pending appeal. The district court

permanently enjoined the City from enforcing the Ordinance, but phased out its enforcement. Current Contempo Marin residents could continue to pay controlled rents for ten years, and rent and vacancy controls would be lifted immediately for any new residents.

The district court awarded fees and costs to MHC under 42 U.S.C. § 1988 for having prevailed on its taking claims, and fees and costs to the City under the terms of the settlement agreement for successfully defending MHC's contract claims. MHC was awarded a total of $3,303,226.91, and the City was awarded a total of $1,249,550.43.

We have jurisdiction under 28 U.S.C. § 1291. The City and MHC timely appealed from the district court's June 30, 2009 final judgment and from all interlocutory orders that gave rise to that judgment. "In reviewing a final judgment, we have jurisdiction to review interlocutory rulings that may have affected the outcome of the proceedings in the district court." *U.S. Dominator, Inc. v. Factory Ship Robert E. Resoff*, 768 F.2d 1099, 1103 (9th Cir. 1985), *superseded on other grounds by* FED. R. CIV. P. 72(a); *see also Hall v. City of L.A.*, 697 F.3d 1059, 1070 (9th Cir. 2012).

II.

The district court properly rejected the City's arguments that MHC's claims were barred by the statute of limitations and precluded by res judicata, and the district court did not abuse its discretion in allowing MHC to amend its complaint.

A. Statute of Limitations

The City first contends that this suit is barred by the statute of limitations. All parties agree that the applicable statute of limitations in this case is one year. The City claims that MHC is challenging the 1993 Ordinance, which makes its complaint filed in 2000 untimely. "Whether a claim is barred by a statute of limitations and when a statute of limitations begins to run are reviewed de novo." *Manufactured Home Communities Inc. v. City of San Jose*, 420 F.3d 1022, 1025 (9th Cir. 2005); *see also Hooper v. Lockheed Martin Corp.*, 688 F.3d 1037, 1045 (9th Cir. 2012).

We agree with MHC and the district court that the complaint is a timely challenge to the Ordinance as amended in 1999. MHC is permitted to challenge the entire Ordinance as it existed in 1999 because the constitutionality of the Ordinance can only be determined by evaluating the totality of its provisions and effects and because the 1999 amendments cannot be evaluated in isolation. The 1999 amendments did substantively change the operation of the Ordinance, and provisions that were found in the predecessor Ordinance are not immunized from judicial scrutiny.

B. Res Judicata

Judicial proceedings of any state "have the same full faith and credit in every court within the United States ... as they have by law or usage in the courts of such State." 28 U.S.C. § 1738; *see San Remo Hotel, L.P. v. City & Cnty. of S.F.*, 545 U.S. 323, 347–48, 125 S. Ct. 2491, 162 L. Ed. 2d 315 (2005). Res judicata therefore precludes a party that has proceeded on federal claims

in state court from relitigating those claims in federal court. *San Remo Hotel*, 545 U.S. at 346–48, 125 S. Ct. 2491. "When applying res judicata to a state court decision, we 'give the same preclusive effect to [that] judgment as another court of that State would give,' meaning that we apply res judicata as adopted by that state." *Adam Bros. Farming, Inc. v. Cnty. of Santa Barbara*, 604 F.3d 1142, 1148 (9th Cir. 2010) (alteration in original) (citation omitted). "Under California law, res judicata precludes a party from relitigating (1) the same claim, (2) against the same party, (3) when that claim proceeded to a final judgment on the merits in a prior action." *Id.* at 1148–49 (citing *Mycogen Corp. v. Monsanto Co.*, 28 Cal.4th 888, 123 Cal. Rptr. 2d 432, 51 P.3d 297, 301 (2002)).

A claim is the "same claim" if it is derived from the same "primary right," which is "'the right to be free from a particular injury, regardless of the legal theory on which liability for the injury is based.'" *Id.* at 1149 (quoting *Fed'n of Hillside & Canyon Ass'ns v. City of L.A.*, 126 Cal. App. 4th 1180, 24 Cal. Rptr. 3d 543, 557 (2004)). Res judicata claims are reviewed de novo. *Manufactured Home Communities*, 420 F.3d at 1025 (citation omitted).

The district court held that, although there was a final judgment on the merits in the previous action and MHC was in privity with the *De Anza* plaintiffs, the City's res judicata argument failed because the *De Anza* litigation did not concern the same primary rights because this litigation involves the operation of the 1999 Amendments and their application to MHC's property. We agree that the *De Anza* litigation does

not speak to the constitutionality of the 1999 Amendments and whether they amount to an unconstitutional taking; therefore, res judicata does not bar MHC's claims. *See Adam Bros.*, 604 F.3d at 1148–49.

C. Amendment of the Complaint

The City also challenges the district court's grant of leave to amend the complaint three years after the bench trial had already occurred, which allowed MHC to add new theories of takings after the "substantially advances" theory it did advance was eliminated by the Supreme Court in *Lingle*.

A trial court's decision to grant leave to amend a complaint is reviewed for abuse of discretion. *See Metrophones Telecomms., Inc. v. Global Crossing Telecomms., Inc.*, 423 F.3d 1056, 1063 (9th Cir. 2005). "Discretion is abused when the judicial action is 'arbitrary, fanciful or unreasonable' or 'where no reasonable man [or woman] would take the view adopted by the trial court.' " *Golden Gate Hotel Ass'n v. City & Cnty. of S.F.*, 18 F.3d 1482, 1485 (9th Cir. 1994) (alteration in original) (quoting *Delno v. Market St. Ry. Co.*, 124 F.2d 965, 967 (9th Cir. 1942)). Because the district court's decision to allow MHC to amend its complaint was not arbitrary, fanciful, or unreasonable, the district court did not abuse its discretion. *See id.*

III.

The regulation did not constitute either a *Penn Central* or a private taking. Because we reach the merits of the takings issue, we need not resolve the question of ripeness. A district court's ruling on the

constitutionality of a statute is reviewed de novo. *See Am. Acad. of Pain Mgmt. v. Joseph*, 353 F.3d 1099, 1103 (9th Cir. 2004).

Here, the district court held the ordinance to be "(a) unconstitutional and invalid as a private taking both on its face and as applied to Plaintiffs ... and (b) unconstitutional and invalid as applied to Plaintiffs ... as an uncompensated regulatory taking under the standards set forth in *Penn Central*...." The district court concluded that the Ordinance as amended in 1999 effected a regulatory taking under the *Penn Central* test as well as a private taking under the Public Use Clause of the Fifth Amendment.[3]

A. *Penn Central* Regulatory Taking

"This Court has consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails." *Yee*, 503 U.S. at 528–29, 112 S. Ct. 1522 (internal quotation marks and citation omitted). However, under *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978), a regulatory taking may occur—and just compensation is required—when "regulatory actions [occur] that are functionally equivalent to the classic taking in which

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[3] "It is not clear that a facial challenge can be made under *Penn Central*. As we did in *Guggenheim*, we will 'assume, without deciding, that a facial challenge can be made under *Penn Central*.' " *Laurel Park Cmty., LLC v. City of Tumwater*, 698 F.3d 1180, 1188–89 (9th Cir. 2012) (internal citation omitted).

government directly appropriates private property or ousts the owner" with the inquiry "focus[ing] directly upon the severity of the burden that government imposes upon private property rights." *Lingle*, 544 U.S. at 539, 125 S. Ct. 2074. *Penn Central* identified "several factors that have particular significance" in determining whether a regulation constitutes a taking. *Id.* at 538, 125 S. Ct. 2074 (internal quotation marks and citation omitted). These include the regulation's economic impact on the claimant, the extent to which the regulation interferes with distinct investment-backed expectations, and the character of the government action. *Id.* "Primary among those factors 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." *Id.* at 538–39, 125 S. Ct. 2074 (internal quotation marks and citation omitted) (alteration in original).

1. Economic impact

In determining that the Ordinance resulted in a *Penn Central* taking, the district court analyzed the *Penn Central* factors by comparing the effect of the 1999 Ordinance with the hypothetical economic result assuming that there was no rent control ordinance in effect at all. Using that analysis, the district court concluded that, without any rent control, the park would be worth $120 million, but it was worth only $23 million in 1999 and even less at the time of the district court's decision.

However, that analysis assumes that MHC purchased the property prior to the enactment of the

original ordinance, when it did not. The ordinance was in effect when MHC acquired the property. Therefore, the appropriate analysis of the economic impact on MHC is a comparison of the economic impact of the 1993 Ordinance in effect when MHC purchased the mobilehome park, and the economic effect of the 1999 Ordinance enacted after the property acquisition. *See id.* (focusing on the "economic impact of the regulation"). The district court made this comparison when it held that "the [1999] amendments reduced MHC's revenue streams from Contempo Marin and the value of its property by $10,609,136." The district court should have used this value when analyzing the economic impact of the ordinance.

Furthermore, even if the district court's comparison were the correct one, the 81% diminution in value (from $120 million to $23 million) would not have been sufficient economic loss or interference with MHC's reasonable investment-backed expectations to constitute a taking. Supreme Court precedent has "long established that mere diminution in the value of property, however serious, is insufficient to demonstrate a taking." *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 645, 113 S. Ct. 2264, 124 L. Ed. 2d 539 (1993) (citing *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384, 47 S. Ct. 114, 71 L. Ed. 303 (1926) (approximately 75% diminution in value); *Hadacheck v. Sebastian*, 239 U.S. 394, 405, 36 S. Ct. 143, 60 L. Ed. 348 (1915) (92.5% diminution)); *see also William C. Haas & Co., Inc. v. City & Cnty. of S.F.*, 605 F.2d 1117, 1120 (9th Cir. 1979) (finding no taking where "the value of its

property was reduced from about $2,000,000 to about $100,000").

Similarly, MHC errs in claiming that the premium transfer was an effect of the 1999 Amendments. The transfer occurred when vacancy control was implemented in 1993, and MHC has not explained what effect, if any, the 1999 Amendments had on the premium.

2. Investment-backed expectation

As to *Penn Central* 's second prong, the district court held that MHC's investment-backed expectation was that it would be able to "increase rent at a rate consistent with the rate of increase in housing costs in the immediate area"—that is, MHC's expectation was that Contempo Marin would be subject to no rent control at all.

The district court explained that "MHC had no reason to expect that the City would amend the Ordinance, transferring much of the park's value to third parties, and denying MHC return on its capital in an escalating real estate market."[4] But MHC had even less reason to expect that the rent control regime would disappear altogether. "'[T]hose who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to

[4] The district court did not make a finding about the value of Contempo Marin under the 1993 ordinance when it was purchased by MHC, but the Executive Vice President and General Counsel for MHC testified that the purchase price allocated to Contempo Marin (it was purchased as part of a portfolio of mobilehome parks) was approximately $18.9 million."

achieve the legislative end.'" *Concrete Pipe*, 508 U.S. at 645, 113 S. Ct. 2264.

Indeed, sitting en banc in *Guggenheim v. City of Goleta*, 638 F.3d 1111 (9th Cir. 2010) (en banc), we recently held that the "'primary factor,' 'the extent to which the regulation has interfered with distinct investment-backed expectations'" to be "fatal" to the Guggenheims' takings claim, where the Guggenheims purchased a mobilehome park with a rent control ordinance already in place. 638 F.3d at 1120. "[T]he price they paid for the mobile home park doubtless reflected the burden of rent control they would have to suffer. They could have no 'distinct investment-backed expectations' that they would obtain illegal amounts of rent." *Id.* Therefore, this factor also favors the conclusion that no taking occurred.

3. Character of the Ordinance

As to the character of the City's Ordinance, a "'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Penn Cent.*, 438 U.S. at 124, 98 S. Ct. 2646 (internal citation omitted).

Here, the Ordinance is much more an "adjust[ment of] the benefits and burdens of economic life to promote the common good" than it is a physical invasion of property, and it is only a slight modification to an already-existing rent control ordinance, so this factor

also counsels against finding a *Penn Central* taking. *See id.*

The economic impact, investment-backed expectations, and character of the Ordinance all lead us to conclude that the 1999 Ordinance does not constitute a *Penn Central* taking.

B. Private Taking

We also conclude that the regulation does not constitute a private taking. The Fifth Amendment states that "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. MHC claims that the Ordinance does not qualify as a "public use," and therefore the taking is prohibited, regardless of compensation. *See Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 241, 245, 104 S. Ct. 2321, 81 L. Ed. 2d 186 (1984). "[T]he City would no doubt be forbidden from taking petitioners' land for the purpose of conferring a private benefit on a particular private party," "[n]or would the City be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit." *Kelo*, 545 U.S. at 477, 477–78, 125 S. Ct. 2655.[5]

MHC contends that we must apply a heightened standard of review to the Ordinance, but the Supreme Court "has declared that a taking should be upheld as consistent with the Public Use Clause as long as it is

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[5] We are aware of no court that has ever recognized a regulatory private taking, such as the one MHC alleges here. We assume without deciding that such a claim is possible, and reject the claim on the merits.

'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." *Id.* at 490, 125 S. Ct. 2655 (Kennedy, J., concurring) (citations omitted)(quoting *Haw. Hous. Auth.*, 467 U.S. at 241, 104 S. Ct. 2321).

This Court has also explained the extreme deference due to the legislature:

> [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. It may be true that in operation the ordinance does nothing more than take "money from the landlord and put [ ] it into the pocket of a tenant who no longer resides at the park." However, while 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"....

Levald, 998 F.2d at 690 (internal citation omitted) (alterations in original).

"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—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts." *Kelo*, 545 U.S. at 488, 125 S. Ct. 2655 (citation omitted). Because we conclude that the Ordinance is rationally related to a conceivable public purpose, the Ordinance does not amount to a private taking.[6]

C. Ripeness

The City argues that MHC's claims are not ripe, and therefore we should dismiss them. "Ripeness is a question of law, and it is reviewed de novo." *Manufactured Home Communities*, 420 F.3d at 1025 (citation omitted).

Generally, "a landowner may not establish a taking before a land-use authority has the opportunity, using

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[6] Because MHC has not prevailed on its claims, it is therefore not entitled to attorneys' fees or costs. *See McCown v. City of Fontana*, 565 F.3d 1097, 1101 (9th Cir. 2009) ("A trial court abuses its discretion if its fee award is based on an inaccurate view of the law or a clearly erroneous finding of fact."). We similarly do not need to decide whether an injunction was an appropriate remedy. *See Perry v. Brown*, 671 F.3d 1052, 1075 (9th Cir.), *cert. granted sub nom. Hollingsworth v. Perry*, —— U.S. ——, 133 S. Ct. 786, 184 L. Ed. 2d 526 (2012) ("We review the district court's decision to grant a permanent injunction for abuse of discretion, but we review the determinations underlying that decision by the standard that applies to each determination. Accordingly, we review the court's conclusions of law de novo and its findings of fact for clear error.").

its own reasonable procedures, to decide and explain the reach of a challenged regulation," *Palazzolo v. Rhode Island*, 533 U.S. 606, 620–21, 121 S. Ct. 2448, 150 L. Ed. 2d 592 (2001). The test for ripeness for takings claims was set out in *Williamson County Planning Commission v. Hamilton Bank*, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985), in which the Supreme Court refused to decide the merits of a takings claim because the claims under the Fifth Amendment and Due Process Clause were not yet ripe. *Id.* at 186, 105 S. Ct. 3108. *Williamson County* sets forth a two-prong test for ripeness for takings claims: first, an owner must "obtain [ ] a final decision regarding how it will be allowed to develop its property," *id.* at 190, 105 S. Ct. 3108, and second, "a plaintiff must have sought compensation for the alleged taking through available state procedures.... '[I]f a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.'"[7] *Daniel v. Cnty. of Santa Barbara*, 288 F.3d 375, 381 (9th Cir. 2002) (alteration in original) (quoting *Williamson Cnty.*, 473 U.S. at 195, 105 S. Ct. 3108).

Here, we follow the approach suggested by the en banc panel in *Guggenheim.* "In this case, we assume

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[7] MHC's private takings challenge needs not comply with *Williamson* County. "[I]f 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." *Lingle*, 544 U.S. at 543, 125 S. Ct. 2074.

without deciding that the claim is ripe, and exercise our discretion not to impose the prudential requirement of exhaustion in state court." *Guggenheim*, 638 F.3d at 1118. In *Guggenheim*, as here, "we reject the [takings] claim on the merits, so it would be a waste of the parties' and the courts' resources to bounce the case through more rounds of litigation." *Id.*

IV.

The district court did not err in granting judgment on MHC's substantive due process claims. "A municipal act ... will violate substantive due process rights when it is shown that the action is not 'rationally related to a legitimate governmental purpose.' We will strike down a statute on substantive due process grounds if it is arbitrary and irrational." *Richardson v. City & Cnty. of Honolulu*, 124 F.3d 1150, 1162 (9th Cir. 1997) (internal citation omitted).

The district court held that the Ordinance was permissible under the Due Process Clause because "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."

As discussed above, the threshold for a rationality review challenge asks only "whether the enacting body could have rationally believed at the time of enactment that the law would promote its objective." *Equity Lifestyle Props., Inc. v. Cnty. of San Luis Obispo*, 548 F.3d 1184, 1194 (9th Cir. 2008) (quoting *Carson Harbor Village Ltd. v. City of Carson*, 37 F.3d 468, 472 (9th Cir. 1994), *overruled on other grounds by WMX Tech. v.*

Miller, 104 F.3d 1133, 1136 (9th Cir. 1997) (citation omitted)). "[T]he Due Process Clause does not empower courts to impose sound economic principles on political bodies." *Guggenheim*, 638 F.3d at 1123 (footnote omitted). Therefore, the district court was correct that the Ordinance does not run afoul of substantive due process.

V.

The district court did not err in submitting the breach of settlement contract claims to the jury, denying the renewed motion for judgment as a matter of law on that question, denying the motion for a new trial, or awarding attorneys' fees.

A. Submission of the Claim to the Jury

MHC claims that the Settlement Agreement between it and the City was not ambiguous, so the district court erred in allowing a jury trial on the meaning of the Agreement. A district court's interpretation and meaning of contract provisions is reviewed de novo. *Conrad v. Ace Prop. & Cas. Ins. Co.*, 532 F.3d 1000, 1004 (9th Cir. 2008). The district court initially determined that the Settlement Agreement obligated the City to enact legislation to repeal mobilehome park vacancy rent control. On the City's motion for reconsideration, however, the district court concluded "that the settlement agreement is ambiguous whether the City was obligated to enact the amendments after it approved the settlement agreement in July 2001."

The district court was correct that the Agreement was ambiguous. Section 2.1 states that "Subject to

approval by the City Council and following notice and public hearing, the City will initiate the following amendments of the City's Mobilehome Rent Stabilization regulations...." MHC claims that this section "provides the 'how,' not the 'what' of the parties' respective obligations, which are set forth in Section 2.7." However, Section 2.1 does specifically state exactly *what* the amendments would accomplish (*e.g.*, "City Code section 20.08.030 will be amended to adjust the method of calculation of the annual rent increase exempt from review under the Ordinance, to provide for the increase (75% of the CPI) for each mobilehome space...."). The word "initiate" also suggests that passage was not required.

Section 2.7 states that the Agreement is conditioned on approval by the City Council, and that "The obligation of the City to process Ordinance amendments pursuant to paragraph 2.1 of this Agreement and to implement the same shall not arise until a fully executed Agreement has been received by the City Attorney's office." Again, it is ambiguous whether the City's obligation "to process" Ordinance amendments obligated it to pass the amendments, or rather it was only bound to consider the amendments via its normal process of initiating the amendments, providing notice, and holding a public hearing, and then decide whether to enact the amendments. These ambiguities are sufficient to have made the question of contract interpretation one for a jury.

B. Judgment as a Matter of Law

For the same reason, MHC was not entitled to judgment as a matter of law. "We review de novo the

district court's denial of a renewed motion for judgment as a matter of law." *Josephs v. Pac. Bell*, 443 F.3d 1050, 1062 (9th Cir. 2006); *see* FED. R. CIV. P. 50(b). "A district court may set aside a jury verdict and grant judgment as a matter of law only if, under the governing law, there can be but one reasonable conclusion as to the verdict." *Settlegoode v. Portland Pub. Sch.*, 371 F.3d 503, 510 (9th Cir. 2004) (internal quotation marks and citation omitted). The jury reasonably concluded that the City had not obligated itself to repeal vacancy control, and MHC has not shown that the opposite conclusion is the only reasonable one.

C. Motion for a New Trial Under Rule 59

MHC also seeks a new trial on its breach of settlement agreement claims because the jury's verdict resulted from prejudicial trial error and was not supported by the trial evidence. "A Rule 59 motion for a new trial is confided to the discretion of the district court, whose decision will be overturned on appeal only for abuse of discretion." *Kode v. Carlson*, 596 F.3d 608, 611 (9th Cir. 2010) (per curiam) (citation omitted). The district court held that there was no error entitling MHC to a new trial. "The trial court is in a far better position than we to gauge the prejudicial effect of improper comments." *Mateyko v. Felix*, 924 F.2d 824, 828 (9th Cir. 1990). MHC has shown neither error nor an abuse of discretion, so we affirm the district court's denial of MHC's Rule 59 motion.

D. Attorneys' Fees

MHC also claims that the district court erred in awarding attorneys' fees to the City on the Settlement Agreement claims because the litigation over the Agreement was neither an independent dispute nor a victory for the City. We disagree. MHC sought up to $45 million from the City on its claims, and the meaning of the Settlement Agreement was very much an independent dispute. "When a defendant obtains a simple, unqualified victory by defeating the only contract claim in the action, [Cal. Civ.Code] section 1717 entitles the successful defendant to recover reasonable attorney fees incurred in defense of that claim if the contract contained a provision for attorney fees." *Hsu v. Abbara*, 9 Cal. 4th 863, 39 Cal. Rptr. 2d 824, 891 P.2d 804, 813 (1995). Here, there was a provision in the Settlement Agreement that entitled the prevailing party to attorneys' fees. Therefore we affirm the district court's award of attorneys' fees to the City for its victory on the contract claims.

VI.

In its original lawsuit, MHC waived its claim for damages in order to have a bench trial on the constitutional claims. On August 16, 2004, while the main lawsuit was pending, MHC filed a second suit against the City, *MHC II*, (3:04–CV03325) seeking monetary damages for takings and equal protection violations, arguing that the conduct at issue in this case occurred subsequent to the filing of the First Amended Complaint in *MHC I* and thus the claims asserted in this case could not have been asserted in *MHC I*.

The district court granted the City's motion to dismiss with prejudice, holding that MHC waived the damages it now asserts in *MHC II* during proceedings in *MHC I* when MHC waived its claims for past and future constitutional damages and proceeded to trial on its constitutional claims seeking only declaratory and injunctive relief. Additionally, the district court determined that *MHC II* involves the same subject matter as the claims in *MHC I*. "Dismissal without leave to amend is proper only if it is clear, upon de novo review, that the complaint could not be saved by any amendment." *McKesson HBOC, Inc. v. N.Y. State Common Ret. Fund, Inc.*, 339 F.3d 1087, 1090 (9th Cir. 2003) (internal quotation marks and citation omitted).

MHC asserts without explaining that if the injunction is vacated, *MHC II* should be reinstated. However, a litigant has no right to maintain two separate actions involving the same subject matter at the same time in the same court and against the same defendant. *See Alltrade, Inc. v. Uniweld Products, Inc.*, 946 F.2d 622, 623 (9th Cir. 1991) (explaining the well-established rule that allows a "district court to transfer, stay, or dismiss an action when a similar complaint has already been filed in another federal court").

We affirm the district court's dismissal of *MHC II* with prejudice. The claims in both suits are the same, and MHC agreed to waive its damage claims in *MHC I*; it may not seek those waived damages in a separate suit. Furthermore, MHC was given an opportunity to amend its complaint in *MHC I* more than two years

after it filed *MHC II*, so it could have incorporated any non-waived claims into its Second Amended Complaint.

VII.

In summary, we reverse the district court's holding as to *Penn Central* and private takings, but affirm the judgment of the district court in all other respects. Each party shall bear its respective costs on appeal.

AFFIRMED IN PART; REVERSED IN PART.

APPENDIX B

United States District Court,

N.D. California.

MHC FINANCING, LTD., et al,
Plaintiffs,
v.
CITY OF SAN RAFAEL,
Defendant,
Contempo Marin Homeowners Association,
Defendant-Intervenor.

No. C-00-03785 VRW.
Jan. 29, 2008.

FINDINGS OF FACTS, CONCLUSIONS OF LAW AND ORDER THEREON

VAUGHN R. WALKER, Chief Judge.

MHC Financing Limited Partnership and Grapeland Vistas, Inc (collectively "MHC"), challenge the constitutionality of the City of San Rafael's mobilehome rent and vacancy control ordinance ("the Ordinance"). MHC owns the Contempo Marin Mobilehome Park ("Contempo Marin") in San Rafael. In its original complaint, MHC claimed the Ordinance violated the Takings Clause for failing substantially to advance a legitimate state interest. Doc # 1. Such an attack was then expressly allowed by the law of this circuit. See *Richardson v. City and County of Honolulu*, 124 F.3d 1150, 1164 (9th Cir. 1997). In *Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005), the Supreme Court disallowed this

ground of attack under the Takings Clause. In the meantime, there were substantial developments both in this litigation and in the applicable legal standards.

In July 2001, the parties entered a settlement agreement in light of the *Richardson* standard. In this settlement, the City agreed to "initiate" amendments to the Ordinance that would eliminate vacancy control. Doc # 23, Ex 1, § 2. In return, MHC agreed to dismiss the present suit and not challenge the constitutionality of the City's Ordinance. *Id.* The settlement unraveled, however, when the residents of Contempo Marin prevailed on the City council to back out of the settlement, leading MHC to amend its complaint to allege that the City had breached the settlement agreement. Doc # 78. The ensuing trial centered around the meaning of "initiate" in the parties' settlement agreement: MHC contended this meant to begin repeal while the City argued this meant only to consider repeal. In November 2002, a jury ruled in favor of the City on these claims (Doc # 350), and the court has since declined to disturb that verdict (Doc # 468).

The court also tried MHC's takings claim at the November 2002, trial but delayed its findings of fact and conclusions of law pending the Supreme Court's decision in *Lingle*, Doc # 412, which ended up eviscerating the "substantially advances" theory on which MHC's takings claim rested. *Lingle*, 544 U.S. at 528. After *Lingle* was decided, defendant-intervenor Contempo Marin Homeowners Association ("CMHA") renewed its motion to dismiss the remaining claims (Doc # 446), and MHC moved to amend its complaint (Doc # 450). On January 27, 2006, the court dismissed

certain declaratory relief claims while permitting MHC to amend its complaint to allege other theories by which the Ordinance violates the Fifth Amendment and to add a Fourteenth Amendment substantive due process claim. Doc # 468.

In its second amended complaint, MHC seeks injunctive and declaratory relief under 42 USC § 1983, asserting that San Rafael's mobilehome rent regulation violates MHC's substantive due process rights, constitutes a regulatory taking under *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978), and runs afoul of the "public use" requirement of the Fifth Amendment under the standards articulated in *Kelo v. City of New London*, 545 U.S. 469, 125 S. Ct. 2655, 162 L. Ed. 2d 439 (2005). Doc # 471 (SAC).

These claims were tried to the court without a jury on April 9, 11, 24 and 30, and May 1, 2007. Based on the testimony and evidence presented at the 2002 and 2007 trial, the court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Plaintiffs are MHC Financing Limited Partnership (now known as Equity Lifestyle Properties, Inc) and Grapeland Vistas, Inc. For ease of exposition, the court refers to plaintiffs collectively as "MHC" unless otherwise noted. MHC operates as a real estate investment trust, or REIT, and is publicly traded on the New York Stock Exchange. 10/30/02 Tr at 69:1-2. The REIT provides a structure for investors to pool their resources in real estate or rental

properties similar to that which mutual funds provide for investment in stocks and bonds. 10/30/02 Tr at 69:3-7.

2. Defendant is the City of San Rafael ("City" or "San Rafael"). Located approximately 15 miles north of San Francisco, San Rafael is the county seat of Marin County, California. 10/30/02 Tr at 74:9-11.

3. Contempo Marin Homeowners Association ("CMHA"), an unincorporated association, is a defendant-intervenor in this action. CMHA seeks to uphold the legality of the Ordinance.

4. A "mobilehome" or "manufactured home" is a dwelling constructed at a factory and then moved and installed at another site. 11/25/02 Tr at 38:22-39:6.

5. Contempo Marin Mobilehome Park ("Contempo Marin") is a mobilehome park located in San Rafael. There are 396 mobilehome spaces at Contempo Marin, and approximately 1000 people live at the park. 4/24/07 Tr at 467:25-468:10.

6. Contempo Marin is one of two facilities to which San Rafael applies the Ordinance. The other facility is known as RV Park of San Rafael, a 30-site park populated with "campers, RV's [and] trailers" rather than mobilehomes. 11/5/02 at 67:16-24; 4/11/07 Tr at 391:18-392:17. The units at the RV Park have wheels, are attached to wheeled vehicles or are capable of having wheels mounted. The RV Park has limited amenities. Due to the mobility of most of its units and its limited amenities, the RV Park is not comparable to Contempo Marin. Consequently, Contempo Marin is

the sole location of its type in San Rafael and thus offers a unique form of housing in San Rafael.

7. At Contempo Marin, MHC leases plots of land, called "pads" or "spaces" for the purpose of installing a mobilehome on the plot. At its own expense, MHC furnishes and maintains, for the use of pad lessees, their families and guests, private roads within the park and various community facilities including a clubhouse, walking trails, tennis courts, a lagoon, swimming pool, sauna, library and other recreational amenities. 10/30/02 Tr at 70:8-15.

8. Pad lessees at Contempo Marin who wish to relocate have usually sold their mobilehomes in place rather than pulling them from the park and moving them to another location. In the case of in-place transfers of mobilehomes at Contempo Marin, purchasers, in addition to acquiring the mobilehome, take over the pad leasehold on which the mobilehome is located and the right of access to and use of the various community facilities. California law entitles in-place transferees to assume the prior lessees' lease with its attendant rights.

9. Pad lessees at Contempo Marin are subject to rules created by MHC and its predecessor. Those rules allow only new mobilehomes to be placed on vacant pads. In addition, these rules require the removal of the mobilehome's axel once situated on a pad and provide that the cost of installing utility connections, a garage, steps, porches, decks and landscaping must be borne by the pad lessee. The cost of maintaining these improvements, as well as fencing, driveways and walkways, is also borne by the pad lessee.

10. Pad lessees at Contempo Marin own and maintain their individual mobilehomes. Pad lessees pay monthly rent to MHC for use of their respective pads and the community facilities and services that MHC provides. MHC holds legal title to the pads at Contempo Marin, as well as the community facilities. Pad lessees have no legal interest in the land at Contempo Marin except the possessory interest and other rights set forth in their pad leases. These leases do not grant any property rights to Contempo Marin. Paragraph 19 of the standard lease states that:

> all plants, shrubs and trees planted on the premises, as well as structures, including fences permanently imbedded in the ground if allowed in the park pursuant to the rules and regulations, blacktop or concrete, or any structures permanently attached to the ground shall become the property of the park as soon as they are installed and may not be removed by the resident without the prior written consent of the park. Residents shall maintain, repair, and when necessary at the park's sole discretion, remove and/or replace all of the above at resident's sole expense and responsibility and shall be completely responsible for each of them although they are the property of the park, which may remove them at its option." MHC Trial Ex 227, at Tab H.

11. As of 2002, the average tenure of Contempo Marin residents is about ten years. 10/30/02 Tr at 83:6-10; City Trial Ex EX.

12. Housing costs in the San Francisco Bay area are among the highest in the United States. Mobilehomes at Contempo Marin offer certain cost advantages over traditional or "stick built" housing: (a) mobilehomes at Contempo Marin are largely assembled in a factory employing mass production techniques; and (b) a mobilehome pad lessee at Contempo Marin avoids the capital outlay required to own the ground upon which the mobilehome sits. Offsetting these advantages, however, interest rates for the purchase of a mobilehome are generally higher than for stick built housing due to the lower residual value and shorter useful life of mobilehomes. MHC Trial Ex 105 at 15-17; 11/19/02 Tr at 76.

13. In 1977, the Department of Housing and Urban Development ("HUD") established certain guidelines for mobilehomes. As a general rule, mobilehomes produced before implementation of these guidelines command less value than mobilehomes produced in accordance with these guidelines. Availability of financing for the purchase of pre-HUD guideline mobilehomes is essentially non-existent from conventional lenders in the San Francisco Bay area. 10/30/02 Tr at 77:15-17, 79:6-21.

14. Post-HUD guideline mobilehomes are more comparable to "stick built" homes than pre-HUD guideline homes. Post-HUD mobilehomes average more than 1400 square feet and have features such as peaked roofs, porches, bay windows, fireplaces, designer kitchens and fully appointed baths. Post-HUD guideline mobilehomes sell on average for

approximately $60,000. City Trial Ex BV; 11/21/02 Tr at 88:12-89:15.

15. Formerly, most of the mobilehomes at Contempo Marin were manufactured before 1976 and thus were not subject to the HUD guidelines. In order to upgrade the park, MHC has purchased some of these older mobilehomes, obtained their offsite salvage values and replaced them with newer, post-HUD mobilehomes. This effort increased the desirability of Contempo Marin as a residential location and benefitted the remaining Contempo Marin pad lessees.

16. Contempo Marin contains less than 2 percent of the housing units in San Rafael and less than 4/10ths of 1 percent of the housing stock in Marin County. MHC Trial Ex 104 at 9. The housing markets in San Rafael and Marin County are part of the much larger housing market in the San Francisco Bay area. This market offers consumers a wide variety of housing alternatives. The resale prices that Contempo Marin residents can realize for their mobilehomes and the rentals that MHC can charge for pad leaseholds compete with and are limited by these housing alternatives.

Regulation of Mobilehome Parks

17. In 1978, California enacted the California Mobilehome Residency Law, Cal. Civ. Code §§ 798 et seq. The legislature found that "because of the high cost of moving mobilehomes, the potential for damage resulting therefrom, the requirements relating to the installation of mobilehomes, and the cost of landscaping or lot preparation, it is necessary that the owners of

mobilehomes occupied within mobilehome parks [i e, pad lessees] be provided with the unique protection from actual or constructive eviction afforded by the provisions of this chapter." Cal. Civ. Code § 798.55(a).

18. The California Mobilehome Residency Law provides pad lessees an ongoing tenancy that can be terminated only at the option of the pad lessee. A park owner may terminate a leasehold only for cause, as defined by the statute, such as the nonpayment of rent or the failure to abide by park rules. *Id.* § 798.56. The law also permits pad lessees to sell their coaches in-place to purchasers who must be offered a tenancy for the pad. *Id.* §§ 798.17, 798.18, 798.73, 798.75. This restriction on mobilehome park owners stands in contrast to California's property tax regime, under which municipalities that provide comparable services, such as roads, parks, walking trails, libraries and other recreational amenities, obtain a stepped-up tax upon the resale of property. See section 2 of article XIIIA of the California Constitution (enacted by Proposition 13) (establishing an acquisition-value assessment system).

19. The California Mobilehome Residency Law permits mobilehome landowners to negotiate rental agreements of longer than twelve months duration that are exempt from rent control. See Cal. Civ. Code § 798.17. But the statute grants tenants a right to refuse a long-term lease and be offered a rent controlled lease with "the same rental charges, terms, and conditions * * * during the first 12 months." *Id.* § 798.17(c).

20. In 1989, the City enacted the Mobilehome Rent Stabilization Ordinance, San Rafael Municipal Code Chapter 20.04 (the 1989 Ordinance). The 1989

Ordinance limited annual rent increases that mobilehome park owners could charge pad lessees to a graduated percentage of the California, All Urban Consumers, San Francisco-Oakland-San Jose index ("CPI-C"). *Id.* § 20.04.040(B). If the change in CPI-C was 5 percent or less, the park owner was entitled to increase pad rents by a percentage equal to the change in CPI-C. *Id.* If the CPI-C increased between 5 percent and 10 percent, the park owner could raise pad rents by a percentage equal to 75 percent of the overall change in CPI-C. *Id.* If the CPI-C increase was greater than 10 percent, the park owner could increase pad rents by a percentage equal to 66 percent of the overall change in CPI-C. *Id.* Under the 1989 Ordinance, park owners could seek a greater increase through a defined process. *Id.* § 20.10.180.

21. The purpose of the 1989 Ordinance was to "establish a speedy and efficient method of reviewing rent increases in mobilehome parks to protect homeowners [ie, pad lessees] from arbitrary, capricious or unreasonable rent increases while insuring owners and/or operators and investors a fair and reasonable return and encouraging competition in the provision of mobilehome lots." *Id.* § 20.04.010(J). The 1989 Ordinance contained a finding that mobilehomes "constitute an important source of housing for persons of low and moderate income." *Id.* § 20.04.010(B). The 1989 Ordinance described many pad lessees as "elderly, some of whom live on small fixed incomes" and who "may expend a substantial portion of their income on rent and may not be able to afford other housing within the city." *Id.* § 20.04.010.

22. The 1989 Ordinance did not contain "vacancy control" provisions. The park owner was thus able to raise the pad rent, irrespective of rent control, charged to a new pad lessee who took over the prior pad lessee's lease. See MHC Ex 104 (Quigley report) at 5 (explaining that under vacancy control, the right to rent the pad at the regulated price is transferred to a new lessee at the then current pad rental value).

23. In 1993, the City amended the 1989 Ordinance to include vacancy control provisions (1993 Amendments). In so doing, the City made additional findings, including the following:

> a. "Establishment of rent regulations on spaces where ownership of the mobilehome is transferred but the mobilehome remains, sometimes referred to as 'vacancy control,' is an important part of rent control policy as it protects mobilehome owners from excessive space rent increases and permits sales of mobilehomes without 'unconscionable' rent increases to the new owner";
>
> b. "Rent control regulations, including vacancy control, can assist in providing affordable housing in combination with city programs and actions to help provide a variety of housing types within a range of costs affordable to low and very low income households";
>
> c. "A significant number of residents have become residents following the effective date of [the 1989 Ordinance] and were required to pay a

rental rate substantially higher than comparable spaces"; and

d. "Many residents of such spaces are senior citizens on fixed incomes and have been forced to pay unnecessarily high rents and/or have been constrained in their ability to sell their mobilehomes."

24. Prior to enactment of the 1993 Amendments, when a tenant terminated tenancy at Contempo Marin and either sold his mobilehome to an incoming tenant or removed the mobilehome, MHC was able to negotiate a new rent with an incoming tenant. This allowed MHC to realize the fair market rental of the mobilehome pad.

25. Prior to enactment of the 1993 Amendments, the City did not conduct an investigation or other inquiry to determine any of the facts stated as grounds for enactment of the 1993 Amendments. The City did not have a factual basis to make any finding that MHC charged or attempted to charge "excessive" or "unconscionable" space rent increases upon in-place transfers of mobilehomes at Contempo Marin, Contempo Marin residents "were required to pay a rental rate substantially higher than comparable spaces" or Contempo Marin residents "have been forced to pay unnecessarily high rents and/or have been constrained in their ability to sell their mobilehomes." There was in fact no basis for any of the stated grounds for the enactment of the 1993 Amendments.

26. At the time the 1993 Amendments were enacted, Contempo Marin was owned by De Anza Assets, Inc ("De Anza").

27. On April 19, 1993, De Anza filed suit in Marin County superior court, *De Anza Assets, Inc v. City of San Rafael*, Case No AO63017.

28. There, De Anza alleged that the 1993 Amendments amounted to a regulatory taking in violation of the Takings Clause of the Fifth Amendment to the United States Constitution.

29. The superior court sustained a demurrer to the *De Anza* first amended complaint without leave to amend on the basis that De Anza had not stated and could not state a cause of action.

30. While an appeal of the superior court's demurrer was pending, in August 1994, MHC purchased Contempo Marin and has continued to operate the park to the present.

31. On October 6, 1994, the state court of appeal affirmed in part and reversed in part the superior court's grant of a demurrer and remanded the case to the superior court. While the court of appeal concluded that "the Amendments do not constitute a regulatory taking," it nonetheless reversed and remanded on other grounds. City Trial Ex BR at 15.

32. The parties in the *De Anza* litigation took no further action. On November 5, 2002, the superior court dismissed the *De Anza* litigation for failure to prosecute.

33. MHC is not affiliated with the plaintiffs in the *De Anza* litigation.

34. On November 1, 1999, the City further amended its mobilehome rent control ordinance by

enacting the regulation here at issue (the 1999 Amendments).[1] The City replaced the sliding scale formula of the 1993 Amendments that provided for graduated annual rent increases depending on the magnitude of inflation, with a single formula that limited increases to 75 percent of any increase in the CPI-C. City Trial Ex AI. In addition, the 1999 Amendments modified the manner in which the cost of capital improvements could be recovered by park owners. *Id.*

35. San Rafael's mobilehome rent regulation provides an administrative procedure by which park owners such as MHC may seek rent increases beyond that which the regulation's formula provides in order to obtain "a just and reasonable return." City Trial Ex AB § 20.12.050.

36. On October 13, 2000, MHC commenced the instant suit challenging the constitutionality of the City's regulations on the ground that they violate the Takings Clause of the Fifth Amendment as made applicable to the states by the Fourteenth Amendment. See Doc # 1.

Economic Impact of the Ordinance on MHC

37. Coupled with the earlier enactments, the 1999 Amendments changed the operation of San Rafael's mobilehome rent regulation to render it certain that

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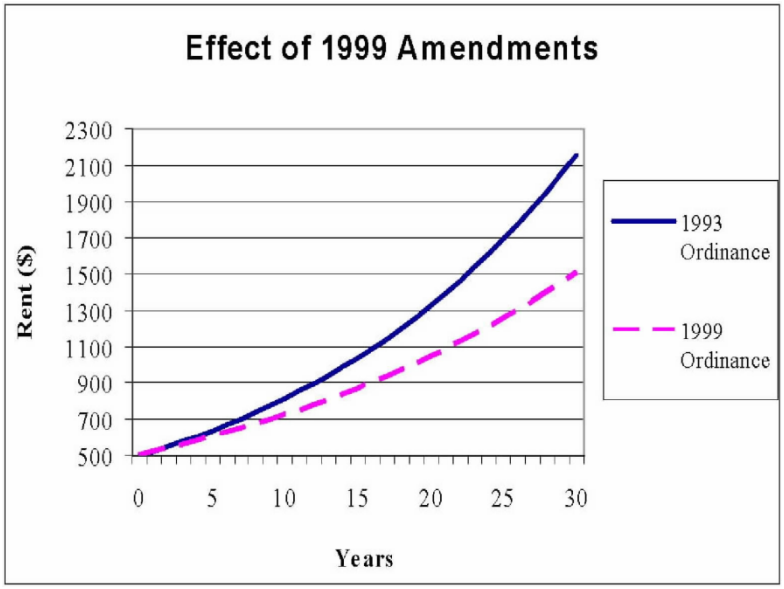
[1] The Ordinance as amended in 1999 is set out in the Appendix showing the deletions and additions made by the 1999 Amendments.

mobilehome pad rents would fall progressively further behind market rents.

38. Prior to the 1999 Amendments, the automatic rent increase formula provided that rent increases could essentially keep pace with the prevailing rates of inflation. Under the prior regime, park owners were automatically entitled to increase rents by 100 percent of the change in the CPI-C if the annual increase was 5 percent or less in a given year. In no year from 1993 to 1999 did the CPI-C increase at an annual rate greater than 5 percent. See Bureau of Labor Statistics, United States Dep't of Labor website, at http://data.bls.gov/PDQ/servlet/SurveyOutputServlet?data_tool = dropmap & series_ *Id.* =CUURA422SA0,CUUSA422SA0 ("change output options") (last visited January 26, 2008).

39. The 1999 Amendments, coupled with the vacancy control provision of the 1993 Amendments, impose a continually growing gap between the fair market rental value of a mobilehome pad leasehold and the rental rate MHC is permitted to charge at Contempo Marin. During its first year of operation, the formula limited the rent increase to 75 percent of the increase in the CPI-C. The following chart depicts this gap assuming a constant rate of inflation of 5 percent and a base rent of $500 per month.



40. After ten years, the increase in the fair market value of the leasehold would be approximately 30 percent greater than the increase in the amount paid by pad lessees under the 1999 Amendments. Because the formula prior to the 1999 Amendments provided for rent increases to rise at 100 percent of inflation if the local CPI-C increased by 5 percent or less, the increase in the amount paid by pad lessees under the previous formula would also be 30 percent greater than the cumulative increase allowed under the 1999 Amendments. After thirty years, the gap between the rent under the pre-1999 formula and the rent permitted under the 1999 Amendments rises to 40 percent. See also 11/6/02 Tr at 197:5-198:3.

41. The 1999 Amendments created a premium in the resale prices of mobilehomes located in Contempo Marin. This premium corresponds to and is equal to the

capitalized value of the difference between the fair market rental value of mobilehome pads at Contempo Marin and the rental permitted to be charged under the 1999 Amendments. MHC Trial Ex 104 (Quigley report) at 6-8; MHC Trial Ex 137 at 3.

42. Under operation of the 1999 Amendments, the economic value of the below fair market rent for the mobilehome pad is simply capitalized into the selling price of the mobile home in the event of an in-place transfer. Indeed, the amendments reduced MHC's revenue streams from Contempo Marin and the value of its property by $10,609,136. See MHC Trial Ex 103 (Fischel report) at 30; 11/6/02 Tr at 196:5-197:3.

43. In making in-place transfers of mobilehomes at Contempo Marin, purchasers and sellers negotiate one sales price. This sales price is composed of the replacement value of the mobilehome itself and the premium attributable to San Rafael's regulation of mobilehome pad rentals. Parties do not separately negotiate these two components of value. Estimates must be made to determine these components of value. The most reliable and widely used source of estimates of the replacement value of mobilehomes at Contempo Marin are found in the data compiled by the National Automobile Dealers Association (NADA). Estimates of replacement value in the NADA guides make adjustments for transportation and setup costs and tenant improvements such as carports, porches, awnings, additions and the like. Insurance rates for mobilehomes at Contempo Marin are based on replacement values.

44. The average replacement value of the mobilehomes sold at Contempo Marin between January 1999 and July 2002 was approximately $27,000. Most of these sales (fifty-nine out of sixty-nine) occurred after enactment of the 1999 Amendments.

45. Since the 1999 Amendments, including the several years that elapsed from the commencement of this action to the start of trial, San Rafael's scheme of mobilehome rent regulation created a premium in the price of mobilehomes sold in place at Contempo Marin. Purchasers of mobilehomes in Contempo Marin after the 1999 Amendments have paid a premium reflecting the present value of expected rent savings due to San Rafael rent regulation. This premium averages $67,000 for the right to enjoy the below market regulated rent.

46. The premium paid by new pad lessees in Contempo Marin who purchased existing mobilehomes following enactment of the 1999 Amendments reflected nearly full monetization of the expected rent benefits of the 1999 Amendments. See MHC Ex 137 (Quigley supp) at 3 (estimating the premium plus associated financing costs to represent nearly 100 percent of the economic benefits under the 1999 Amendments). Commencing in 2000, MHC provided a notice to all incoming pad lessees of the pendency of this lawsuit and the possibility that rent control and/or vacancy control for mobilehome pad rentals in San Rafael may be eliminated. On July 13, 2001, San Rafael through its city attorney's office notified Contempo Marin residents that it had entered into a settlement agreement with MHC to eliminate the City's mobilehome vacancy control regulations. The difference

between full capitalization of expected rent control benefits to existing pad lessees of the 1999 Amendments is the product of incoming tenants' uncertainty concerning the continued viability of rent and vacancy control at Contempo Marin. If the 1999 Amendments are determined to be constitutional, full capitalization (100 percent) of the below-market rentals produced by the 1999 Amendments will be realized by existing pad lessees at Contempo Marin. See 11/27/02 Tr at 70:12-19.

47. The evidence presented in 2007 corroborates the court's capitalization analysis. In 2007, MHC's expert, Dr Quigley, used a data source for real estate sale prices different from the NADA valuation he relied on in 2002. Quigley's findings and regression analysis nonetheless yield consistent results, namely, that the benefits that arise from the Ordinance were capitalized into higher selling prices of mobilehome coaches in Contempo Marin. 4/24/2007 Tr at 482:14-483:21; 502:11-19; MHC Trial Ex 392.

48. The level of capitalization would be even greater but for the uncertainty about the future of the rent regulation due to this litigation. 4/24/2007 Tr at 502:11-503:9, 502:22-503:9.

49. Since the 2002 trial, the average sales price for mobilehomes sold have risen to $119,606, City Trial Ex EV; Ex 392, yielding an average premium in excess of $98,000 and representing about 82 percent of the value of the transaction. 4/24/07 Tr at 612:25-613:3; MHC Trial Ex 392 at 9913. In 2007, 21 mobilehomes sold in Contempo Marin at a mean price of $154,000, MHC

Trial Ex 400. Most of these units were pre-HUD mobilehomes. 4/30/07 Tr at 782:13-20; 783:11-21.

50. According to the annual letters sent by MHC to the City for the purpose of calculating the annual automatic rent pursuant to the Ordinance, the average monthly space rents at Contempo Marin for 1999 through 2006 were as follows:

1999:	$613.73
2000:	$630.43
2001:	$654.24
2002:	$663.65
2003:	$652.81
2004:	$659.31
2005:	$664.85
2006:	$675.32

City Trial Ex AJ, CQ.

51. As a result of the capitalization of below market mobilehome pad rentals into the resale price of mobilehomes at Contempo Marin, the City's mobilehome rent control regulations do not contribute to the availability of low-cost (i e, below market rate) housing in San Rafael. Nor do the regulations foster the availability of housing to senior citizens as the value of the below market pad rentals available at Contempo Marin is greater, other factors being the same, to a prospective purchaser having a longer rather than shorter life expectancy.

52. For new or prospective mobilehome residents at Contempo Marin, their cost of housing includes both

cash outlays or finance payments for the mobilehome as well as the pad rental. The total economic cost of housing at Contempo Marin remains at market levels because of the increased cost of the mobilehome necessary to impound the capitalized value of below market pad rentals. The 1999 Amendments transfer the capitalized value of the difference between market pad rentals at Contempo Marin from plaintiffs to pad lessees in possession of Contempo Marin pads at the time of the effectiveness of the 1999 Amendments.

53. The City presented evidence purporting to show that the difference between the selling prices of mobilehomes after enactment of the 1999 Amendments and the "book values" for those homes, as published in the NADA Mobile/Manufacture Housing Appraisal Guide, were not the result of the Ordinance. The City introduced a study of mobilehome parks located in other cities that are not subject to rent control. See City Ex 106 (Brabant report) at 21-25. The study concluded that the recent sale prices of mobilehomes in those parks were comparable to recent sale prices in Contempo Marin, as measured on a per-square-foot basis. *Id.* at 25. This evidence is not credible due to the failure of this presentation to control for variation in the quality of the mobilehome parks used for comparison.

54. The City's expert also opined that the higher sales prices of mobilehomes in Contempo Marin, compared to their NADA book values, were attributable not to the capitalization of the benefits of below-market rent but rather the desirability of Contempo Marin's location. See Brabant Report (City

Ex 106), at 20. The locational value of a mobilehome in Contempo Marin is not the product of any investment of a Contempo Marin mobilehome owner, by situating a mobilehome on a pad at Contempo Marin and connecting utilities to the mobilehome or otherwise. 11/25/02 Tr at 141:4-142:6.

55. The premium by which Contempo Marin-located mobilehomes exceed their NADA book values is six to eight times larger than the location value claimed by the City. *Id.* at 132:10-133:2. The City's argument pertaining to location value simply does not account for the magnitude of the premium observed; nor does it undermine the evidence that the economic benefits of the Ordinance will be monetized and transferred to mobilehome owners who had leases in Contempo Marin at the time of its amendment.

56. Finally, the City also objects to MHC's expert report on the ground that its reliance on NADA book values is erroneous. While the City contends that MHC's experts lacked the necessary background and training to apply the information contained in the NADA book, the City fails to point to any logical or foundational deficiencies in those experts' testimony.

Impact on MHC's Fifth Amendment Rights

57. The Takings Clause of the Fifth Amendment of the United States Constitution states, in relevant part, "[N]or shall private property be taken for public use, without just compensation." US Const amend V. The Takings Clause applies to the states through the Fourteenth Amendment. See, eg, *Dolan v. City of*

Tigard, 512 U.S. 374, 383-84, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1984).

58. "[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S. Ct. 158, 67 L. Ed. 322 (1922).

59. The Takings Clause's proper role is to "[bar] government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 537, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005), quoting *Armstrong v. United States*, 364 U.S. 40, 49, 80 S. Ct. 1563, 4 L. Ed. 2d 1554 (1960) (internal quotations omitted). Nevertheless, states retain "broad power to regulate * * * the landlord-tenant relationship * * * without paying compensation for all economic injuries that such regulation entails." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982).

60. "[W]here the government merely regulates the use of property, compensation is required only if considerations such as the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole." *Yee v. City of Escondido*, 503 U.S. 519, 522-23, 112 S. Ct. 1522, 118 L. Ed. 2d 153 (1992).

61. "The *Penn Central* factors-though each has given rise to vexing subsidiary questions-have served as the principal guidelines for resolving regulatory takings claims * * *." *Lingle*, 544 U.S. at 538-39.

62. Regulatory takings jurisprudence "aims to identify regulatory actions that are functionally equivalent to the classic taking in which the government directly appropriates private property or ousts the owner from his domain. * * * [T]he *Penn Central* inquiry turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests." *Lingle*, 544 U.S. at 539-40, quoting *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978) (internal quotations omitted).

63. "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." *Id.* quoting *Penn Central*, 438 U.S. at 124 (internal quotations omitted). The court addresses each *Penn Central* factor in turn.

(1) Magnitude of the Ordinance's economic impact on MHC

64. The Supreme Court has measured economic impact in several different ways, including assessing the market value of the property, see *Hodel v. Irving*, 481 U.S. 704, 714, 107 S. Ct. 2076, 95 L. Ed. 2d 668

(1987), determining whether the regulation makes the property owner's business operation "commercially impracticable," *Keystone*, 480 U.S. at 493-96 (1987), and evaluating the possibility of other economic uses of the land besides sale, see *Andrus v. Allard*, 444 U.S. 51, 66, 100 S. Ct. 318, 62 L. Ed. 2d 210 (1979).

65. "The court should consider, along with other relevant matters, the relationship of the owner's basis or investment, and the fair market value before the alleged taking to the fair market value after the alleged taking. In determining the severity of the economic impact, the owner's opportunity to recoup its investment or better, subject to the regulation, cannot be ignored." *Florida Rock Indus. v. United States*, 18 F.3d 1560, 1566-67 (Fed.Cir. 1994) (*Florida Rock IV*), quoting *Florida Rock Indus. v. United States*, 791 F.2d 893, 905 (Fed. Cir. 1986) (*Florida Rock II*).

66. "Since loss of economic use and value is the issue in this regulatory taking case, it is not possible, absent a valid determination in the record of the ' after imposition' value of the land, to know if a taking occurred, much less what the Government must pay for it." *Florida Rock IV*, 18 F.3d at 1573.

67. The Ninth Circuit defined "economic impact" in the context of a regulatory takings claim in *Garneau v. City of Seattle*, holding that "plaintiffs must show that the value of their property diminished as a consequence of the [ordinance at issue]. Further, plaintiffs must show that the diminution in value is so severe that the [ordinance at issue] has essentially appropriated their property for public use." 147 F.3d 802, 808 (9th Cir. 1998).

68. As explained, absent the Ordinance, MHC could obtain average rents in 2006 of approximately $1700 (and $1800 in 2007). 4/11/07 Tr at 418:13-18; 409:14-411:4. This estimation reflects a compound annual increase in rents of approximately 6 percent from 2001 to 2006. 5/1/07 Tr at 972:4-13. Lending support to these figures, the compounded annual increase from 1998 to 2006 for neighboring Captains Cove property is approximately 13 percent per year. 4/30/07 Tr at 972:14-973:23.

69. Rents under the Ordinance, however, were limited to under $700, City Trial Ex EX, depriving MHC of approximately $5.2 million in annual net operating income ("NOI") ($1100 x 396 sites x 12 months). The Ordinance thus has the effect of eliminating at least 75 percent of the NOI that MHC would realize under market conditions. 5/1/07 Tr at 981:18-983:15; 4/30/07 Tr at 834:25-835:11 (City's expert, Dr Ken Baar, acknowledging that MHC is worth less than 25 percent of the value that it would have if MHC could collect market rents of $1800 a site). Consider *Florida Rock Indus. v. United States*, 45 Fed. Cl. 21, 33-38 (Fed. Cl. 1999) (*Florida Rock V*) (finding that the economic impact was severe because the property value diminished by 75 percent without offsetting benefits).

70. Compounding these losses, MHC remains responsible for maintaining and repairing an aging infrastructure and for incurring other capital expenditures without a reasonable means to recoup the capital, recover its costs of financing the same or obtaining a return on the same. 5/1/07 Tr 983:3-15;

4/11/07 Tr at 292:19-21. This state of affairs has led MHC to spend millions of dollars in legal fees simply to protect its property rights. 5/1/07 Tr at 979:20-980:20.

71. Based on the City's own expert analysis, MHC's net operating income has declined over the last seven years-even if legal expenses related to capital expenditures are not included as expenses. City Ex EO. Even if both legal expenses and expenses incurred by MHC's corporate office related to the park are excluded, its NOI has been completely frozen. *Id.* 4/30/07 Tr at 821:8-822:3.

72. Without the Ordinance, the park would be worth approximately $120 million. 5/1/07 Tr at 971:11-19. This valuation comports with the estimation of MHC's expert of the per parcel land value of $360,000, which amounts to a value of $140 million for the park. Further corroboration is found in the value of market rents for the park ($1800 a month in 2007), under which the NOI in 2007 would exceed $7 million. 4/11/07 Tr at 418:13-18; 409:14-411:4. Such an NOI level translates into a $118 million value for the park under a 6 percent capitalization rate, the rate suggested by the City's expert. See 4/30/07 Tr at 743:9-13.

73. The Ordinance, however, deprives MHC of most of the park's value. The City's expert valued the park at less than $23 million in 1999, MHC Trial Ex 13, and MHC's Chief Executive Officer asserts that the park is worth even less today. 5/1/07 Tr at 982:10-983:15.

74. The City's regulatory regime also prevents MHC from seeking investment alternatives for the

park. The City intends to retain Contempo Marin as a mobilehome community. MHC Trial Ex 300; 4/9/07 Tr at 167:13-24 and 169:17-24. In accordance with its "general plan," the City adopted a special zoning ordinance (no 1626), which designates Contempo Marin as a mobilehome park and proscribes any other use of the land. MHC Trial Ex 301.

75. Because the City is obligated to follow its general plan, 4/11/07 Tr at 421:6-8, if MHC seeks to change the use of the park, it must convince the City to modify or repeal ordinance 1626. MHC Trial Ex 301; 4/11/07 Tr at 435:22-436:6 and 295:8-24. Any change in zoning would require approval from the City council-the same council that adopted ordinance 1626 and has committed in its general plan to retain Contempo Marin as a mobilehome park. 4/11/07 Tr at 436:7-24.

76. To change the use of the park, MHC would need to obtain various permits, many of which would require approval by the City council. 4/11/07 Tr at 296:3-297:7 and 437:15-20. Even if MHC sought to subdivide the land, rather than change the use of each space, it would be required to obtain permits that require the City council's approval. 4/11/07 Tr at 296:3-12.

77. The City's aims with respect to Contempo Marin are further evidenced by its reversal concerning the settlement the parties agreed to in July 2001, see Doc # 23, Ex 1, § 2, under which the City agreed to "initiate" amendments to the ordinance that would eliminate vacancy control. The City reversed course in order to save the premiums obtained by Contempo

Marin residents through operation of the Ordinance. This establishes that the City will not accept a change of use that displaced those residents. 4/11/07 Tr at 297:8-298:4.

78. Owing to the political and litigation risks MHC would face in seeking a change of use and the costs, as demonstrated by MHC's efforts to obtain a discretionary rent increase, it would be commercially impracticable and wholly futile for MHC to seek a change of use. 4/11/07 Tr at 297:8-14.

79. Nor does the prospect of selling the park alleviate the burden imposed on MHC. 5/1/07 Tr at 982:10-16. Inasmuch as the City's conduct undermines MHC's investment it likewise diminishes the value of the park to prospective investors. MHC's ability to attract capital is similarly frustrated by the City's regulations. 5/1/07 Tr at 983:3-984:1.

80. Accordingly, the court concludes that the Ordinance imposed by the City is functionally equivalent to a physical taking of all or an overwhelming percentage of the value of MHC's land.

(2) Interference with MHC's reasonable investment-backed expectations

81. "Evaluation of the degree of interference with investment-backed expectations instead is *one* factor that points toward the answer to the question whether the application of a particular regulation to particular property 'goes too far.'" *Palazzolo v. Rhode Island*, 533 U.S. 606, 634, 121 S. Ct. 2448, 150 L. Ed. 2d 592 (2001) (O'Connor concurring) (emphasis in original).

82. "The *Penn Central* opinion suggested it is important whether or not the expected use of the property was the primary expectation for the property." *Florida Rock Indus. v. United States*, 45 Fed. Cl. 21, 38 (Fed. Cl. 1999) (*Florida Rock V*), citing *Penn Central*, 438 U.S. at 136 ("So the law does not interfere with what must be regarded as Penn Central's primary expectation concerning the use of the parcel.")

83. "Although there is no right to recoup one's investment, the inability to do so weighs in plaintiff's favor, since the regulation consequently places a greater burden on plaintiff." *Florida Rock V*, 45 Fed. Cl. at 39.

84. "Marketplace decisions should be made under the working assumption that the Government will neither prejudice private citizens, unfairly shifting the burden of a public good onto a few people, nor act arbitrarily or capriciously, that is, will not act to disappoint reasonable investment-backed expectations. The Government, in a word, must act fairly and reasonably, so that private parties can pursue their interests." *Florida Rock Indus. v. United States*, 18 F.3d 1560, 1571 (Fed. Cir. 1994) (*Florida Rock IV*).

85. A *Penn Central* claim is "not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction." *Palazzolo*, 533 U.S. at 630. Nonetheless, the timing of the regulation's enactment relative to the acquisition of title is not immaterial to the *Penn Central* analysis. "Indeed, it would be just as much error to expunge this consideration from the takings inquiry as it would be to

accord it exclusive significance." *Palazzolo*, 533 U.S. at 633 (O'Connor concurring).

86. Before purchasing the park, MHC's business objectives were to acquire manufactured housing community properties "that have strong cash flow growth potential" and "hold such properties for long-term investment and capital appreciation." 4/9/07 Tr at 20:15-24.

87. Pursuant to this business plan, MHC purchased the Contempo Marin park as part of a portfolio transaction in which the company acquired approximately eleven properties ("DeAnza Portfolio"), 4/11/07 Tr at 309:14-310:4, which included rent controlled and non-rent controlled properties. MHC's expectations in purchasing the park were to achieve market appreciation over time. 4/9/07 Tr at 23:6-12.

88. When MHC purchased the park in 1994, it had a reasonable expectation that it would be provided a reasonable return on its property value.

89. The City's amendments to the Ordinance in 1999 frustrated MHC s expectations by increasing dramatically the burden of the Ordinance on MHC. 4/11/07 Tr at 329:14-20; 5/1/07 Tr at 974:8-975:10 and 981:18-982:3. As set forth below, much of the economic injury suffered by MHC has been incurred after the enactment of the 1999 Ordinance, which MHC could not reasonably anticipate in 1994. According to the calculations of MHC's expert, the amendments immediately transferred $10 million from MHC to park tenants. *Id.*; MHC Trial Ex 103. 5/1/07 Tr at 976:8-977:8.

90. Absent the Ordinance, MHC could obtain average rents in 2006 of approximately $1700 (and $1800 in 2007), as opposed to the $700 it presently receives. 4/11/07 Tr at 418:13-18; 409:14-411:4. Starting from MHC's base rent from 1998, if MHC had been permitted to increase rent at a rate consistent with the rate of increase in housing costs in the immediate area, then MHC would have been able to increase its rents by approximately $900 a month during that period. Hence, approximately 90 percent ($900 out of $1000) of the economic impact of the Ordinance on MHC's rents is a function of the application of the Ordinance after 1999.

91. Not only did the 1999 Amendments reduce the rent increases, but they changed the "fair return" standard in a way that impedes MHC's ability to obtain a return on capital expenditures.

92. MHC had no reason to expect that the City would amend the Ordinance, transferring much of the park's value to third parties, 4/11/07 Tr at 329:19-20; 330:1-7, and denying MHC return on its capital in an escalating real estate market. 4/11/07 Tr at 292:19-21.

93. Accordingly, the City's enforcement of the Ordinance has interfered with MHC's reasonable and investor-backed expectations.

(3) Character of the City's Ordinance

94. The character of the government action being complained of is central to determining whether a regulatory taking has in fact occurred under *Penn Central*. To make this determination, courts look to "balance the liberty interest of the private property

owner against the Government's need to protect the public interest through imposition of the restraint." *Cienega Gardens v. United States*, 331 F.3d 1319, 1338 (Fed. Cir. 2003).

95. Courts must also assess whether the relevant regulation "forc[es] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49, 80 S. Ct. 1563, 4 L. Ed. 2d 1554 (1960); see also *Florida Rock Indus. Inc. v. United States*, 45 Fed. Cl. 21, 22 (Ct. Cl. 1999) (*Florida Rock V*) (stating that compensation is due under the Fifth Amendment where consideration of the *Penn Central* factors indicates that a plaintiff "was singled out to bear a burden which ought to be paid for by the society as a whole"); *Nollan v. California Coastal Commission*, 483 U.S. 825, 836, 107 S. Ct. 3141, 97 L. Ed. 2d 677 n.4 ("If the Nollans were being singled out to bear the burden of California's attempt to remedy these problems, although they had not contributed to it more than other coastal landowners, the state's action, even if otherwise valid, might violate * * * the Takings Clause.").

96. Through the Ordinance, the City has singled out MHC to bear a public burden that, in all fairness and justice, should be borne by the public as a whole. Contempo Marin and the RV Park are the only landowners in all of San Rafael that are unable to obtain market value for any part of their property.

97. Moreover, the RV Park has few, if any, mobilehomes-only recreational type vehicles, which may be moved in and out of the park easily. 11/5/02 at

67:16-24; 4/11/07 Tr at 391:18-392:17. The RV Park also provides many fewer amenities than those available at Contempo Marin. 4/11/07 Tr at 391:18-393:2. Consequently, MHC is uniquely affected by the City's Ordinance. No other landowner in San Rafael suffers a burden that is remotely comparable.

98. Nor has the City proffered a basis for singling out MHC to bear this burden. The affordability of housing is a market-wide problem; it is not attributable to Contempo Marin, the sole property made to bear the burden of law cost housing in San Rafael. Housing prices are set by market-wide forces, not the unilateral decisions of real estate providers. 4/24/07 Tr at 467:21-468:10. None of the City's affordable housing policies-other than the Ordinance here-imposes a similar burden on other San Rafael property owners. 4/24/2007 Tr at 520:19-521:24.

99. The City's expert Ken Baar conceded that Contempo Marin has not contributed disproportionately to the problem of affordable housing in San Rafael. 4/24/07 Tr at 516:19-517:3. To the contrary, absent rent regulations, mobilehomes constitute an affordable housing choice because they reduce the capital required to acquire a single family home. 4/24/07 Tr at 516:19-517:3. Mobilehomes are produced at roughly half the cost per square foot of stick built homes and do not require tenants to purchase the land upon which the mobilehome sits. City Trial Ex BC at 112; 11/21/02 Tr at 95:12-96:18.

100. The City has placed a disproportionate burden on MHC not only by imposing the Ordinance but also by enacting a special zoning ordinance that designates

Contempo Marin as a mobilehome park, rendering it commercially impracticable for MHC to change the use of its land. 4/11/07 Tr at 294:14-298:4.

101. The City's "General Plan 2000" established a specific goal of implementing the mobilehome rent control ordinance and developing a specialized zoning district "to ensure preservation of the Contempo Marin Mobilehome Park." 4/9/07 Tr at 169:14-170:5, 229:7-12.

102. It is immaterial that the Ordinance technically applies to two landowners. MHC has nonetheless been "singled out." "The relevant class for comparing treatment or allocation of any burden in a takings analysis is that of the class of persons disturbed by the lack of affordable housing-presumably all of society-and the group of people available to remedy that problem." *Cienega Gardens*, 331 F.3d at 1339.

103. MHCs operation within a regulated industry does not alter this fact. See *Wash Legal Foundation v. Legal Found. of Wash.*, 271 F.3d 835, 861 (9th Cir. 2001) (remarking that "the character of the government action is best viewed in the context of the industry it regulates" in concluding that statutes taking interest from lawyer client trust accounts was constitutional in part because lawyers constitute a heavily regulated industry). The Ordinance at issue here is atypical; it imposes a virtually unique burden on MHC.

104. The magnitude of the Ordinance's economic impact on MHC, the degree to which the Ordinance interferes with MHC's reasonable investment-backed expectations and the character of the City's conduct all support a finding that the Ordinance is functionally

equivalent to an unconstitutional taking that singles out MHC to bear a public burden that, in all fairness and justice, should be borne by the public as a whole. See *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978) (internal quotations omitted).

105. Accordingly, the application of the Ordinance to Contempo Marin gives rise to a regulatory taking under the standards set forth in *Penn Central.*

San Rafael's Private Taking

106. The Takings Clause of the Fifth Amendment of the United States Constitution states, in relevant part, "Nor shall private property be taken for public use, without just compensation." US Const Amend V. The Takings Clause applies to the states through the Fourteenth Amendment. See, for example, *Dolan v. City of Tigard*, 512 U.S. 374, 383-84, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1984).

107. "'[I]t is only the taking's purpose, and not its mechanics,' * * * that matters in determining public use." *Kelo v. City of New London*, 545 U.S. 469, 482, 125 S. Ct. 2655, 162 L. Ed. 2d 439 (2005), quoting *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 244, 104 S. Ct. 2321, 81 L. Ed. 2d 186 (1984).

108. "For more than a century, [Supreme Court] public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power." *Kelo*, 545 U.S. at 483.

109. "Without exception," the Supreme Court has "defined ['public purpose'] broadly" reflecting a "longstanding policy of deference to legislative judgments in this field." *Kelo*, 545 U.S. at 480.

110. "[I]f a legislature, state or federal, determines there are substantial reasons for an exercise of the taking power, courts must defer to its determination that the taking will serve a public use." *Midkiff*, 467 U.S. at 244.

111. "Viewed as a whole, [Supreme Court] jurisprudence has recognized that the needs of society have varied between different parts of the Nation, just as they have evolved over time in response to changed circumstances. Our earliest cases in particular embodied a strong theme of federalism, emphasizing the 'great respect' that we owe to state legislatures and state courts in discerning local public needs." *Kelo*, 545 U.S. at 482, citing *Hairston v. Danville & Western R Co.*, 208 U.S. 598, 606-07, 28 S. Ct. 331, 52 L. Ed. 637 (1908).

112. "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-no less than debates over the wisdom of other kinds of socioeconomic legislation-are not to be carried out in the federal courts." *Kelo*, 545 U.S. at 488, quoting *Midkiff*, 467 U.S. at 242 (internal quotations omitted).

113. The Ninth Circuit has held that mobile home rent control ordinances are legitimate if their stated legislative purposes are "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." *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 690 (9th Cir. 1993).

114. While the Supreme Court has "not elaborated on the standards for determining what constitutes a 'legitimate state interest[,]' * * * [it has] made clear * * * that a broad range of governmental purposes" are legitimate. *Nollan*, 483 U.S. at 834.

115. "An attempt to define [the police power's] reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation * * *. This principle admits of no exception merely because the power of eminent domain is involved." *Berman*, 348 U.S. at 32 (internal citations omitted).

116. A city, however, "would no doubt be forbidden from taking * * * land for the purpose of conferring a private benefit on a particular private party." *Kelo*, 545 U.S. at 477, citing *Midkiff*, 467 U.S. 229 at 245, 104 S. Ct. 2321, 81 L. Ed. 2d 186 ("A purely private taking could not withstand the scrutiny of the public use

requirement; it would serve no legitimate purpose of government and would thus be void.").

117. The Supreme Court has further explained that "it has long been accepted that the sovereign may not take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation. On the other hand, it is equally clear that a State may transfer property from one private party to another if future 'use by the public' is the purpose of the taking * * *." *Kelo*, 545 U.S. at 477.

118. Nor may a city "be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit." *Kelo*, 545 U.S. at 477.

119. The Supreme Court, however, has "rejected the contention that the mere fact that the State immediately transferred the properties to private individuals upon condemnation somehow diminished the public character of the taking." *Kelo*, 545 U.S. at 482.

120. Justice Kennedy, who joined the *Kelo* majority opinion in its entirety, issued a concurrence in which he wrote that "[a] court applying rational-basis review under the Public Use Clause should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits." *Id.* at 491. Justice Kennedy derived this rule from two Equal Protection cases in which the Court proclaimed that "[a] legitimate state interest must encompass the interests of members of the disadvantaged class and the communitY at large, as

well as the direct interests of the members of the favored class. It must have a purpose or goal independent of the direct effect of the legislation * * *." *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 452, 105 S. Ct. 3249, 87 L. Ed. 2d 313 n4 (1985) (Stevens concurring).

121. "A court confronted with a plausible accusation of impermissible favoritism to private parties should treat the objection as a serious one and review the record to see if it has merit, though with the presumption that the government's actions were reasonable and intended to serve a public purpose." *Kelo*, 545 U.S. at 491 (Kennedy concurring).

122. The *Kelo* court found that the taking at issue in the case satisfied the public use requirement because it involved a "carefully considered" development plan that lacked evidence of an illegitimate purpose (such as a purpose to benefit Pfizer or another private entity). *Id.* at 478 & n.6. Indeed, the majority noted, the identities of the private entities who would benefit were not known when the plan was adopted. "It is, of course, difficult to accuse the government of having taken A's property to benefit the private interests of B when the identity of B was unknown." *Id.* at 478 n.6.

123. Justice Kennedy noted approvingly that the trial court's conclusion was based on extensive fact-finding:

> The trial court considered testimony from government officials and corporate officers; documentary evidence of communications between these parties; respondents' awareness

> of New London's depressed economic condition and evidence corroborating the validity of this concern; the substantial commitment of public funds by the State to the development project before most of the private beneficiaries were known; evidence that respondents reviewed a variety of development plans and chose a private developer from a group of applicants rather than picking out a particular transferee beforehand; and the fact that the other private beneficiaries of the project are still unknown because the office space proposed to be built has not yet been rented.

Id at 491-92 (citations omitted).

124. To succeed on this claim, MHC must prove by a preponderance of the evidence that the circumstances surrounding the Ordinance's enactment make clear that the proffered public purposes asserted as justification for the Ordinance are palpably without reasonable foundation, see *Midkiff*, 467 U.S. at 240, or that the City imposed the Ordinance under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit, see *Kelo*, 545 U.S. at 478.

125. As explained, the court finds that the Ordinance creates a premium in subsequent sales of mobilehomes in parks subject to its regulation. This premium reflects the capitalized value of the expected privilege of paying increasingly below-market rents and the ability to sell that benefit to future buyers. See *Yee*, 503 U.S. at 526 (stating that due to the "unusual economic relationship between park owners and mobile home owners[,] * * * any reduction in the rent for a

mobile home pad causes a corresponding increase in the value of a mobile home, because the mobile home owner now owns, in addition to a mobile home, the right to occupy a pad at a rent below the value that would be set by the free market").

126. The payment of this premium is no different from the transfer of rental rights along with "key money" in regulation of apartment rents, as both are mechanisms by which current residents may capture the economic value of the regulation and thereby deprive the intended beneficiaries of any advantage. See MHC Trial Ex 103, 104, 341; 11/19/02 Tr at 33-35, 52-55; *Yee*, 503 U.S. at 530 (explaining that because apartment tenants "do not sell anything to their successors and are often prohibited from charging 'key money', * * * a typical rent control statute will transfer wealth from the landlord to the incumbent tenant and all future tenants").

127. The premium created by the Ordinance, on the other hand, allowing current mobilehome owners to capture the monetized value of below-market rent ultimately vitiates the connection between the Ordinance and the goals it was intended to further.

128. As part of its inquiry into whether the City imposed the Ordinance under the mere pretext of a public purpose, the court must examine whether there is any connection between the operative provisions and the asserted purposes of the Ordinance. *Nollan v. Calif. Coastal Comm'n*, 483 U.S. 825, 837, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987); *Yee*, 503 U.S. at 530.

129. In this case, 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. See *Yee*, 503 U.S. at 526, citing Hirsch & Hirsch, *Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol*, 35 UCLA L Rev 399, 430-31 (1988).

130. The City advances three purportedly legitimate governmental interests furthered by the Ordinance: (1) protection of mobilehome owner equity; (2) protection of fixed-income residents and (3) creation of more affordable housing. Assuming without deciding that all three interests, as a general matter, are legitimate state interests, see *City of Monterey*, 526 U.S. at 732 (Scalia concurring), the court discusses each in turn.

(1) Protection of existing mobilehome owners' equity

131. The City contends that without the Ordinance and in particular vacancy control mobilehome park owners like MHC would be able to extract a portion of the mobilehome owners' equity in their homes upon sale of the mobilehome. An increased rental rate upon transfer of ownership makes it more difficult for current owners to sell their homes combined with the general impracticality of moving mobilehomes and the scarcity of available pads in surrounding areas mean that "the park owner could force existing tenants to sell the coach-in-place at 'distress-sale prices.'" *Adamson*, 854 F. Supp. at 1493.

132. The City bases this argument on the reasoning in *Adamson*. The *Adamson* court noted that the price at which a mobilehome owner can sell her mobilehome is related to the lease that will be charged to a new owner. *Id.* ("From the standpoint of a prospective buyer with a set amount of money to pay for a coach, the lower the rent he must pay, the more money he will have left over to dedicate to the mortgage on the coach.").

133. The *Adamson* court then noted that the price a new owner would be willing to pay is based in part on the "placement value" of the mobilehome. *Id.* at 1488-89. The court then noted that even though mobilehomes depreciate, prices obtained by mobilehome owners upon sale of their mobilehomes have increased. *Id.* The court reasoned from this that the "placement value makes up a substantial, if not the dominant, element of the purchase price of a coach upon a change in tenancy." *Id.* This results in the mobilehome owners and the park owners "sharing" in the placement value upon a sale of the mobilehome. *Id.*

134. The *Adamson* court then concluded that the historical arrangement whereby mobilehome owners seemed to capture a portion of the placement value created an "expectation that they will be able to substantially recoup that investment upon the sale of the coach." *Id.* This expectation in turn created a property right to a portion of the placement value. *Id.*

135. Notwithstanding the district court's considered ruling in *Adamson*, this court concludes that the City's argument fails for two reasons. First, the mobilehome owners' equity in their mobilehomes is

limited to the salvage value of the mobilehome. There is simply no legal authority for the proposition that a tenant has any interest in the placement value of the mobilehome. It is axiomatic that "[t]he effect of [a] lease is to carve an estate for years out of [the lessor's ownership of an estate in fee simple in the premises] and to leave in the lessor a reversion in fee simple." Cornelius J Moynihan, *Introduction to the Law of Real Property* § 8 at 91 (2d ed 1988). While a lessee may possess an interest in the increased value of his leasehold as a result of an increase in the value of the estate *during his tenancy*, the court is unaware of any authority that permits a tenant to transform any part of the lessor's reversionary interests into his own upon the termination of the leasehold.

136. Given the nature of an interest in fee simple, the opposite is true. See Hirsch & Hirsch, 35 UCLA L Rev at 429 (emphasizing that "placement value is not equity" belonging to the tenant; "the mobile home coach owner's equity would be the value of the coach less encumbrances on the coach"). The coach is considered to be the tenant's personal property; as the City's own expert testified, the coach's attachment to the site does not constitute any "investment" in the location value of the lessor's reversionary fee simple interest. See 11/25/02 Tr at 141:4-142:6; 2 Nichols on Eminent Domain § 5.03 [5] [a] at 5-151 (rev 3d ed 2000).

137. Accordingly, the mobilehome owners' only equity in their mobilehomes is the salvage value of their units, which is the replacement value minus the pull-out costs. The mobilehome owners' leasehold interest is analogous to the leasehold interest of an

apartment dweller. An apartment dweller who confronts a raise in rent beyond his capability or willingness to pay can relocate apartments. Such relocation will involve the "pull-out costs" of moving his or her belongings. Likewise, a mobilehome owner seeking to sell the coach in-place but unable to do so because of the park owner's intent to increase the pad rental beyond any prospective mobilehome purchaser's willingness to pay confronts pull-out costs. The mobilehome owner may have significantly greater pull-out costs than apartment dwellers. But the magnitude of these costs does not alter the legal relationship created by the lease.

138. Because existing pad lessees do not have any legally recognized property interest in the location value of their mobilehomes, the Ordinance does not serve to protect an interest legitimately owned by a pad lessee in the location value of the pad.

139. Second, mobilehome park owners have no mechanism nor any incentive to extract equity from the mobilehome owners. The City contends that the existence of pull-out costs gives MHC (and other mobilehome park owners) leverage that can be used to appropriate the equity that mobilehome owners possess in their mobilehomes. As described above, the mobilehome owners' only equity is the salvage value of their mobilehomes, which is the replacement value less the pull-out cost. The City envisions a situation in which a park owner attempts to charge such a high rent that a mobilehome owner would be required to sell his mobilehome at below its salvage value. In such a situation, the mobilehome owner would merely refuse

to sell the mobilehome at that price. The mobilehome owner could move from the park and recover from MHC the salvage value, thus avoiding the pull-out costs. Because the mobilehome owners' equity interest does not include any locational value in the pad except as a pad lease provides, that interest needs no protection and the Ordinance cannot find constitutional rescue on this purported public interest.

140. In fact, as evidenced by the analysis in *Adamson*, park owners have an incentive to provide a benefit to outgoing mobilehome owners rather than extract equity from them. Without vacancy control, the park owner may charge a new tenant more than the previous tenant. Discounting transactional costs associated with setting up a new lease, a park owner would, therefore, prefer new tenants to old tenants because new tenants will pay more. Additionally, a new tenant who must provide a mobilehome will have to pay transportation costs. These costs take away money that could otherwise be used to pay a higher pad rent. Accordingly, in order to induce old tenants to move and to leave their mobilehomes in place, a park owner may choose to share some of the placement value with the outgoing tenant.

(2) Creation of more affordable housing

141. The Ordinance fails to create more affordable housing for incoming tenants. The court has found that the Ordinance creates a premium representing the capitalized value of transferable below-market rent. This means that incoming tenants will not receive any benefit from the rent control provisions. The benefit of a lower rent will be entirely offset by the need to pay a

higher capital outlay upfront. Rather than create more affordable housing, the Ordinance creates *less* affordable housing.

142. Vacancy control also fails to create more affordable housing for incumbent tenants. The vacancy control ordinance of 1989 does not influence the current rent that a tenant must pay. This rate is regulated by the 1999 Amendments, which set the rent at a base rate plus 75 percent of the CPI-C. Accordingly, vacancy control does not influence the rent that the current tenant must pay.

143. As explained, vacancy control provides a one-time wealth transfer from the park owners to the mobilehome owners. This transfer occurs upon the enactment of the vacancy control provision, but the cash value of the transfer is usually not realized until the mobilehome is sold to a new tenant.

144. To be sure, the premium transfer makes housing more affordable for the incumbent mobilehome owner, but only when he sells his mobilehome, not during his ownership. The Ordinance fails to fulfill the City's broader objective of making housing more affordable. The incumbent mobilehome owner is under no obligation to reinvest any part of the wealth transfer into housing; rather, the vacancy control provision has merely given the incumbent tenant a corpus of money that can be used for any purpose. The City made no showing whatsoever that the premium realized by the mobilehome owner is re-invested to create new housing in San Rafael.

145. Vacancy control tends to make housing less affordable for another reason. Adding vacancy control to the existing rent control provisions makes creating mobilehome parks less profitable. All other things remaining equal, fewer investors will create mobilehome parks. This will increase scarcity and drive up the cost of existing plots, a conclusion borne out by the evidence here. See 4/24/07 Tr at 506:6-507:5; MHC Trial Ex 392, 393.

146. Vacancy control also reduces the benefits and increases the costs of mobilehome ownership. The distinctive advantage of mobilehome ownership is that the pad lessee avoids the initial capital outlay required to own the ground upon which the mobilehome sits, notwithstanding the higher interest rates required for mobilehome financing as compared to "stick built" housing. See MHC Trial Ex 105 at 15-17 (finding that interest rates range from 10.44 percent to 15.24 percent). Vacancy control nullifies this advantage. A new mobilehome owner under vacancy control pays a much more substantial initial capital outlay (in return for lower lease payments), and must do so at a high interest rate. 4/24/07 Tr at 468:11-469:17. As described above, the premium obtained by the incumbent mobilehome owner exactly cancels out the value of the future decreased rent payments. It does, however, change the risks and investment associated with mobilehome ownership, requiring a greater capital investment, with its attendant risks of default to the incoming tenant.

(3) Protection of fixed-income residents

147. The Ordinance fails to protect fixed-income residents, including senior citizens. As noted above, the court finds that the Ordinance does not make housing more affordable. The creation of a premium cancels out the expected pecuniary benefits of below-market rent that incoming tenants would receive. To the extent that housing is not made more affordable, low and fixed-income individuals cannot be benefitted.

148. As noted above, by requiring incoming tenants to make a much more substantial capital outlay, vacancy control erases the benefits and increases the costs of mobilehome ownership. This problem is particularly pronounced for fixed-income individuals. Mobilehome ownership is attractive to fixed-income individuals because it only requires a lower initial cash outlay. Because vacancy control requires incoming tenants to trade a larger initial capital outlay for reduced rents later, it reduces this benefit. Accordingly, vacancy control frustrates rather than furthers the interests of fixed-income individuals.

(4) Other justifications by the City

149. The City puts forward numerous cases that purportedly compel the conclusion that the Ordinance passes constitutional muster. The City argues that because its Ordinance "serves the same policies as many similar ordinances that have been found constitutional," the Ordinance must be upheld. But a 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.

150. The City further argues that because the Ordinance's administrative petition process allows for actual rent increases to be any amount greater than the increase automatically provided for under the base formula, the existence of a premium would depend on how the Ordinance is applied. According to the City, the Ordinance's administrative petition process creates the possibility that actual rent increases will keep up with inflation so that no premium in fact is created.

151. Although the Ordinance at issue here provides a mechanism, on its face, through which park owners may petition for rent increases beyond the base formula, the pertinent question is not whether rent increases under the Ordinance may theoretically keep pace with inflation by way of the administrative petition process. Rather the question is whether the mere enactment of the Ordinance has created a premium that effects a transfer of wealth to existing mobilehome owners at the time of amendment for which MHC has not been compensated and which fails to serve a public purpose. The court finds that the Ordinance does so.

152. The court finds that the proffered public purposes asserted as justifications for the Ordinance are palpably without reasonable foundation, in spite of the "longstanding policy of deference to legislative judgments in this field." *Kelo*, 545 U.S. at 480. MHC's collection of economic evidence raises a strong inference that the City imposed the Ordinance under the mere pretext of a public purpose. This inference is

confirmed by the evidence with respect to Contempo Marin.

153. The City has persistently supported the tenants' desire to convert the Contempo Marin to a tenant-owned community. In 1991, City of San Rafael Mayor Al Boro sent a letter to the tenants of Contempo Marin in which he sought the tenants' support in an upcoming election and specifically promised the tenants that he would "continue working with [the residents] in [their] efforts to acquire ownership of the park." A Boro Dep Tr at 31:8-32:18.

154. Soon after, on March 18, 1991, the City passed a resolution "[s]upporting preservation of the Contempo Marin Mobile Home Park and supporting purchase of the Park by residents," in which the City specifically resolved that it "strongly supports the preservation of the Contempo Marin Mobile Home Park as a low and moderate income housing project and supports its purchase by Park tenants * * *." A Boro Dep Tr at 33:11-34:9.

155. To assess the feasibility of these plans, the City requested a study to determine whether or not it would be financially feasible to purchase the park or to use the City's powers of eminent domain to acquire the park. 4/9/07 Tr at 185:14-186:8; 11/1/02 Tr at 15:22-16:21; 4/9/07 Tr at 192:18-24 (concerning appraisal of Richard Brabant); 4/9/07 Tr at 195:21-197:4 (City council members urge the pursuit of purchase for residents).

156. More significantly, the very idea of reducing the CPI-C and modifying the capital expenditure recoupment provisions in 1999 originated with the

tenants, not the City or City staff. 4/9/07 Tr at 193:16-194:3.

157. The City's revocation of the settlement agreement in this case at the behest of the tenants, 4/11/07 Tr at 297:8-298:4, is yet another instance of the City's blatant efforts to confer a private benefit to "particular, favored private entities," *Kelo*, 545 U.S. at 490, namely the Contempo Marin tenants.

158. Because the assertion of a public purpose is pretextual and without reasonable basis and because the Ordinance has been amended and enforced for the singular purpose of transferring the value of land from one private party to another, the City's enforcement of the Ordinance constitutes a taking not for public use and, therefore, constitutes a "private taking."

Impact on MHC's Substantive Due Process Rights

159. The Due Process Clause of the Fourteenth Amendment provides that no state shall deprive "any person of life, liberty, or property, without due process of law." US Const Amend XIV. Substantive due process protects individuals from arbitrary and unreasonable government action that deprives any person of life, liberty or property. *Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1234 (9th Cir. 1994).

160. To establish a substantive due process violation, the government's action must have been "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Sinaloa Lake Owners v. City of Simi Valley*, 882 F.2d 1398, 1407 (9th Cir. 1989),

quoting *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395, 47 S. Ct. 114, 71 L. Ed. 303 (1926).

161. "The challengers' burden to show that a statute is arbitrary and irrational is extremely high." Kawaoka, 17 F.3d at 1234, citing *Del Monte Dunes v. Monterey*, 920 F.2d 1496, 1508 (9th Cir. 1990).

162. "In a substantive due process challenge, [courts] do not require that the City's legislative acts actually advance its stated purposes, but instead look to whether the governmental body could have had no legitimate reason for its decision." *Kawaoka*, 17 F.3d at 1234 (9th Cir. 1994), quoting *Levald*, 998 F.2d at 690 (internal quotations omitted).

163. Before *Lingle*, 544 U.S. at 548, the Ninth Circuit concluded that a deprivation of property cannot be challenged via substantive due process. *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996); *Ventura*, 371 F.3d at 1054; see also *Crown Point Development v. City of Sun Valley*, 2006 WL 288392 at *2 (D. Idaho Feb 6, 2006), revd, 506 F.3d 851 (9th Cir. 2007) ("[T]his Court applies the current Ninth Circuit law and finds the complaint should be dismissed as the law of this circuit does not allow substantive due process claims * * * when the interest at stake is real property.").

164. Yet *Lingle* plainly suggests the availability of a substantive due process challenge to a regulatory taking. See *Lingle*, 544 U.S. at 540 ("We conclude that [the substantially advances] formula prescribes an inquiry in the nature of a due process, not a takings, test * * *."). See also *Id.* (noting that "prob[ing] the

regulation's underlying validity" 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").

165. More significantly, *Lingle* undercuts the Ninth Circuit's basis for barring substantive due process challenges to deprivations of property. The rationale for this bar was that claims should rely on the explicit textual sources of constitutional protection, if available, such as the takings clause, rather than "the more generalized notion of substantive due process." *Armendariz*, 75 F.3d at 1324. But *Lingle* held that challenges concerning the means-ends relationship of a statute do not implicate the Takings Clause. 544 U.S. at 542. Hence, after *Lingle*, there is no explicit text for assessing whether a regulation is effective in achieving a legitimate public purpose; only the Due Process Clause remains. See also Blaesser & Weinstein, *Federal Land Use Law & Litigation* § 2:11 (noting that, after *Lingle*, "[i]f a land use regulation furthers no public purpose whatsoever then, although just compensation is no longer available under the Fifth Amendment, the failure of the regulation to substantially advance any legitimate public purpose in violation of due process * * * would give rise to a cause of action for damages under 42 USC § 1983").

166. Accordingly, the court concludes that after *Lingle*, *Armendariz* and its progeny no longer preclude a substantive due process challenge to deprivations of property. This reading of the law has been confirmed by a panel of the Ninth Circuit subsequent to the trial

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

167. For judicial scrutiny of price-control regulation under the Due Process Clause, the "standard * * * is well established: 'Price control is unconstitutional * * * if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt * * *.'" *Pennell v. San Jose*, 485 U.S. 1, 11, 108 S. Ct. 849, 99 L. Ed. 2d 1 (1988), citing *Permian Basin Area Rate Cases*, 390 U.S. 747, 769-70, 88 S. Ct. 1344, 20 L. Ed. 2d 312 (1968), quoting *Nebbia v. New York*, 291 U.S. 502, 539, 54 S. Ct. 505, 78 L. Ed. 940 (1934).

168. In *Pennell v. San Jose*, plaintiffs challenged a rent control statute that required a hearing in the event that a tenant challenged a raise in rent in excess of 8 percent per year. 485 U.S. 1, 5, 108 S. Ct. 849, 99 L. Ed. 2d 1 (1988). The statute required the hearing officer to take into account the hardship that the proposed rental increase would impose on the tenant. *Id.* The Court rejected a substantive due process challenge, finding that "a legitimate and rational goal of price or rate regulation is the protection of consumer welfare." *Id.* at 13, citing *Permian Basin*, 390 U.S. at 770; *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 610-12, 64 S. Ct. 281, 88 L. Ed. 333 (1944). Because the rent control statute in *Pennell* provided a hearing that "balanced" a number of factors, including the history of the premises, the landlord's costs and the market for comparable housing, the Court concluded that the scheme represented "a rational attempt to accommodate the conflicting interests of protecting tenants from burdensome rent increases while at the

same time ensuring that landlords are guaranteed a fair return on their investment." *Id.*

169. The Ninth Circuit in *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680 (9th Cir. 1993), held that "[o]rdinances survive a substantive due process challenge if they [are] *designed* to accomplish an objective within the government's police power, and if a rational relationship exist[s] between the provisions and purpose of the ordinances." 998 F.2d at 690, citing *Boone v. Redevelopment Agency of City of San Jose*, 841 F.2d 886, 892 (9th Cir. 1988) (emphasis in original). The plaintiff in *Levald*, a mobilehome landowner, challenged the constitutionality of a vacancy and rent control ordinance similar to the one at issue here. The *Levald* court rejected the owner's substantive due process challenge, concluding that "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." *Id.* at 690. The *Levald* court specifically rejected the owner's argument that the ordinance failed rational basis review because it transferred rent premiums from landlords to tenants:

> It may be true that in operation the ordinance does nothing more than take "money from the landlord and put[ ] it into the pocket of a tenant who no longer resides at the park." However, while one might believe that the ordinance is an ineffective-and indeed draconian-means by which to effect its goals, "how 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.

Id. (citation omitted) (alterations in original).

170. The Ninth Circuit reached a similar conclusion in *Richardson v. City and County of Honolulu*, 124 F.3d 1150, 1164 (9th Cir. 1997), which did not involve mobilehomes, but otherwise deals with the same economic "premium" theory advanced by MHC here. "In a substantive due process challenge, we do not require that the City's legislative acts actually advance its stated purposes, but instead look to whether 'the governmental body *could* have had no legitimate reason for its decision.' * * * [W]e hold that the landowners cannot meet the burden of showing irrationality." *Richardson*, 124 F.3d at 1162 (internal citation omitted) (emphasis in original).

171. The evidence adduced by MHC offers no grounds for distinguishing the Ninth Circuit's decision in *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 690 (9th Cir. 1993).

172. The Supreme Court's decision in *Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005), appears to counsel against the deferential review mandated by *Levald*. The Court observed that "prob[ing] the regulation's underlying validity" 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." *Lingle*, 544 U.S. at 543. The Court further emphasized that "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." *Id* at 542. See also Steven J Eagle, *Property Tests, Due*

Process Tests and Regulatory Takings Jurisprudence, 2007 BYU L Rev 899, 957 ("In *Lingle v. Chevron USA*, the Court did not repudiate its pronouncement * * * that a regulation does not pass muster if it does not substantially advance legitimate state interests. To the contrary, it ratified that formulation-not as a takings test-but rather as a test to determine if landowners have been accorded due process.") (quotation marks and footnotes omitted).

173. Justice Kennedy, who joined the *Lingle* opinion in its entirety, issued a concurrence in which he noted "that [the *Lingle*] decision does not foreclose the possibility that a regulation might be so arbitrary or irrational as to violate due process. The failure of a regulation to accomplish a stated or obvious objective would be relevant to that inquiry." *Lingle*, 544 U.S. at 548 (Kennedy concurring) (citations omitted).

174. The discussion in *Lingle* of due process scrutiny remains dicta, however, because the Court had no occasion to assess plaintiff's due process claim as it had voluntarily dismissed the claim prior to the Court's review of the case. Furthermore, a recent panel decision of the Ninth Circuit appears to indicate that the court of appeals is reluctant to depart from the line of authority, albeit on a different set of facts from this case. See *Equity Lifestyle Properties v. San Luis Obispo*, 505 F.3d 860 (9th Cir. 2007). As such, it would be inappropriate to construe the foregoing language in *Lingle* as overturning long-standing Ninth Circuit precedent sub silentio.

175. Accordingly, the court concludes that the challenged Ordinance does not violate the Due Process Clause of the United States Constitution.

FINAL FINDING OF FACT: To the extent that any of these findings of fact should more properly be characterized as conclusions of law, they shall be deemed as such.

CLAIMED DEFENSES

Ripeness Defense

1. Under *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 186-87, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985), a takings claim is ripe when: (1) "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue," and (2) the plaintiff "seek[s] compensation through the procedures the State has provided," unless doing so would be futile. See also *Ventura Mobilehome Communities Owners Ass'n v. City of San Buenaventura*, 371 F.3d 1046, 1053 (9th Cir. 2004) (request for capital improvement pass-through may suffice for exhaustion purposes).

2. The first prong of the *Williamson* ripeness analysis only pertains to as-applied takings claims. Facial claims, by definition, "derive from the ordinance's enactment, not any implementing action on the part of the government authorities," and therefore do not require a final decision. *Ventura*, 371 F.3d at 1052. The exhaustion requirement applies to both facial and as-applied takings claims.

3. A premium-based takings claim is a challenge to the regulation on its face, not as it is applied. Richardson, 124 F.3d at 1165, citing Carson Harbor, 37 F.3d at 474 n.5; Levald, 998 F.2d at 686 (existence of premium "is relevant only to a facial, not an as-applied, regulatory challenge" because "[i]t is not the particular application of the statute that gives rise to the premium; the premium arises solely from the existence of the statute itself").

4. With respect to MHC's substantive due process and private takings claims, only the final decision requirement applies. The Supreme Court has stated that "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." Lingle, 544 U.S. at 543; see also Armendariz, 75 F.3d at 1321 n.5 ("Because a 'private' taking cannot be constitutional even if compensated, a plaintiff alleging such a taking would not need to seek compensation in state proceedings before filing a federal takings claim.").

5. The final decision requirement ensures that a concrete case or controversy exists, as "[a] court cannot determine whether a regulation goes 'too far' unless it knows how far the regulation goes." Palazzolo, 533 U.S. at 621-22, quoting MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 348, 106 S. Ct. 2561, 91 L. Ed. 2d 285 (1986). See also Palazzolo, 533 U.S. at 620 (remarking that the final decision prong of Williamson embodies "the important principle that a landowner may not establish a taking before a land-use authority

has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation").

6. "[R]esort beyond the 'initial decision-maker' is not necessary to fulfill the final decision prong of the ripeness analysis." Hacienda Valley Mobile Estates v. City of Morgan Hill, 353 F.3d 651, 657 (9th Cir. 2003).

7. "Once it becomes clear that the * * * permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened." Palazzolo, 533 U.S. at 620; see also Carson Harbor Village, Ltd. v. City of Carson, 353 F.3d 824, 826-27 (9th Cir. 2004) (final decision prong requires giving the government the "opportunity to grant any variances or waivers allowed by the law").

8. The final decision requirement does not oblige MHC to file for a discretionary rent increase because of the settlement reached by the parties. Under the settlement agreement, the City agreed to "initiate" amendments to the Ordinance that would eliminate vacancy control, Doc # 23, Ex 1, § 2, but then the City reversed course and formally declined to eliminate vacancy control. Through these events, MHC obtained a final decision from the City notwithstanding MHC's failure to request a discretionary rent increase after 1999. The City's conduct throughout the dispute makes plain its intention to subject MHC to the Ordinance, a fact underscored by City's unwillingness to eliminate vacancy control pursuant to the parties' settlement agreement in 2002.

9. MHC's Penn Central claim must also satisfy the exhaustion requirement of Williamson County unless doing so would be futile. Under the Just Compensation Clause of the Fifth Amendment, a landowner whose land is taken by the government is entitled to the "market value of the property at the time of the taking contemporaneously paid in money." Olsen v. United States, 292 U.S. 246, 255, 54 S. Ct. 704, 78 L. Ed. 1236 (1934); Palazzolo, 533 U.S. at 625 ("When a taking has occurred, under accepted condemnation principles the owner's damages will be based upon the property's fair market value.").

10. As this court found in its December 5, 2006 order, see Doc # 486, MHC has exhausted remedies in seeking an inverse condemnation remedy in 1996.

11. In 1996, MHC filed a rent increase petition related to capital expenditures it made for the park lagoon transfer station. MHC Trial Ex 346. After an initial dispute regarding the appropriate amount of the rent increase, MHC reached a settlement with residents for the first phase of the capital expenditure. Yet a dispute arose concerning the second phase rent increase, which was resolved informally by an arbitrator the parties had dealt with previously. The arbitrator sided with the tenants and declined to recommend that MHC receive the full amount of the rent increase it requested.

12. MHC appealed the opinion to the City council. MHC Trial Ex 312. But the City refused to accept the appeal on the ground that the arbitrator in the second dispute had been acting as a mediator, not an arbitrator. MHC Trial Ex 314; 4/9/07 Tr at 236:6-237:2.

13. Next, the tenants sued MHC for attempting to collect the capital expenditure increase permitted under the second phase of its settlement agreement. MHC cross-claimed and asserted inverse condemnation against the City. In connection with that cross-claim, the City demurred and held that MHC had waived any right to be heard on the merit's because it did not take a writ of mandate from the City's refusal to hear its appeal of the non-binding decision from the mediator. The state courts agreed with the City in a final opinion issued on July 15, 2005. MHC Trial Ex 332; 4/11/07 Tr at 284:14-287:7.

14. In the end, MHC spent almost ten years in litigation only to recoup about one third of the capital expenditures it was seeking to recover, 4/11/07 Tr at 276:5-288:4; there is no further recourse on the merit's of its fair return petition and state inverse condemnation petition. MHC Trial Ex 314; 4/9/07 Tr at 237:3-238:4.

15. These events demonstrate that the City's tactics deprive MHC of the ability to obtain judicial review of administrative decisions. The City does so by refusing to issue an administrative decision from which MHC may appeal and then citing MHC's failure to seek mandamus relief as a means of precluding further judicial review of the merit's of MHC's claims.

16. The record makes clear that the City's discretionary rent increase process does not provide a remedy to cure an impermissibly low rental increase.

17. In Kavanau v. Santa Monica Rent Control Board, 16 Cal. 4th 761, 782, 66 Cal. Rptr. 2d 672, 941

P.2d 85 (1997), the California Supreme Court held that "a remedy for the due process violation [of an unconstitutional rent control ordinance], if available and adequate, obviates a finding of a taking [under the Fifth Amendment]." See also Galland v. City of Clovis, 24 Cal. 4th 1003, 1025 103 Cal. Rptr. 2d 711, 16 P.3d 130 (2001) ("[W]hen landlords seek section 1983 damages from allegedly confiscatory rent regulation, we hold that they must show (1) that a confiscatory rent ceiling or other rent regulation was imposed and (2) that relief via a writ of mandate and a Kavanau adjustment is inadequate."). The only alternative to the City's procedures is a future rent increase or Kavanau adjustment under state law, which, for reasons discussed below, is likewise inadequate. 4/9/07 Tr at 239:24-240:12; 4/9/07 Tr at 182:18-21.

18. California recognizes a constitutional right to receive a "fair rate of return one's property." Hillsboro Properties v. City of Rohnert Park, 138 Cal. App. 4th 379, 391, 41 Cal. Rptr. 3d 441 (Cal. Ct. App. 2006), for which the exclusive remedy is a Kavanau adjustment. Hillsboro, 138 Cal. App. 4th at 392, 41 Cal. Rptr. 3d 441. A Kavanau adjustment is a prospective rent increase to enable a park owner to recoup lost rents (from tenants) sufficient to provide a "fair return."

19. To satisfy Williamson County, the Kavanau adjustment must serve as a "reasonable, certain and adequate provision for obtaining compensation." Williamson, 473 U.S. at 194.

20. To seek a Kavanau adjustment, a landowner must first petition for a rent adjustment before an administrative agency. If unsuccessful, the landowner

may appeal to the city council and, if that appeal is unsuccessful, the landowner may seek review in state court through a writ of administrative mandamus. Then, if the state courts agree that the city council should have granted the petition, the landowner must return to the original administrative agency and file another petition requesting the agency to remedy its prior decision. 4/30/07 Tr at 868:8-870:8. The entire process takes seven years on average. 4/30/07 Tr at 870:21-871:21. In the meantime, landowners such as MHC have no way to recoup any losses stemming from the difference between the rents to which they are entitled and those being collected during the entire time this process takes place. 4/30/07 Tr at 871:22-873:22.

21. As MHC's expert testified, only one landowner has succeeded in having a Kavanau adjustment granted, and that required the owner to wait nine years and yielded about half of what the owner sought in his original petition. 4/30/07 Tr at 876:3-21.

22. Requiring a Kavanau remedy would be futile here, as it would remand MHC to the very administrative body-the City council-that has squarely rejected a resolution of this claim. The ripeness doctrine does not require a landowner "to submit applications for their own sake"; rather, it imposes obligations because "[a] court cannot determine whether a regulation goes 'too far' unless it knows how far the regulation goes." Palazzolo, 533 U.S. at 620; MacDonald, 477 U.S. at 348.

23. Moreover, the Kavanau remedy does not pass muster under Williamson County, as it fails to provide either a fair return or adequate remedy. 4/30/07 Tr at 874:9-875:2. Carson Harbor Village, Ltd. v. City of

Carson, 353 F.3d 824, 830 (9th Cir. 2004) (O'Scannlain concurring) (noting "serious concerns about the adequacy of the * * * compensation procedures established in Kavanau"). As has been pointed out, a Kavanau adjustment would entail increased future pad rentals. To the extent that lessees paying these higher rentals had not received the benefit of the impermissibly depressed rentals, such lessees would be required to pay the just compensation that the City is required to pay. Carson Harbor Village, 353 F.3d at 831 (O'Scannlain concurring). In this case, that result would be doubly injurious to lessees who moved into Contempo Marin after the effective date of the 1999 Amendments; such lessees would not only have paid the premium the Ordinance creates but they would be obligated to pay the compensation which the City is constitutionally obligated to pay. A Kavanau adjustment affords no remedy at all in these circumstances.

24. Accordingly, MHC has fully exhausted state remedies with respect to its as-applied taking claims by litigating unsuccessfully its 1996 fair return petition and by negotiating a settlement agreement with the City. Additionally, further pursuit of administrative remedies would be futile and unavailing.

Statute of Limitations Defense

25. The City and CMHA argue that the statute of limitations bars MHC's constitutional challenge.

26. The "statute of limitations is an affirmative defense, which the claimant bears the burden of proving." United States v. Real Property, Titled in the Names of Godfrey Soon Bong Kang and Darrell Lee,

120 F.3d 947, 949 (9th Cir. 1997), citing California Sansome Co. v. United States Gypsum, 55 F.3d 1402, 1406 (9th Cir. 1995).

27. All parties agree that the applicable statute of limitations in this case is one year (for § 1983 suits in California). De Anza Properties X, Ltd. v. County of Santa Cruz, 936 F.2d 1084, 1085 (9th Cir. 1991). The parties disagree, however, whether the 1999 Amendments effected a new injury so that a new limitations period began on enactment of the 1999 Amendments.

28. In general, the statute of limitations begins to run when a potential plaintiff knows or has reason to know of the asserted injury. Norco Constr., Inc. v. King County, 801 F.2d 1143, 1146 (9th Cir. 1986).

29. A facial takings claim accrues upon passage of the legislative action at issue. Levald, Inc. v. City of Palm Desert, 998 F.2d 680, 687 (9th Cir. 1993).

30. An amendment to an ordinance does not constitute a different injury, creating a new limitations period, if "the effect of the ordinance upon the plaintiffs has not been altered" and the plaintiffs experienced "substantially the same injury [under the previous ordinance] that they experienced [under the amended ordinance]." De Anza Properties X, 936 F.2d at 1086.

31. As explained, the 1999 Amendments altered the formula used to calculate the rent increase that could automatically be charged by a park owner.

32. This modification to the City's Ordinance deprived MHC, which purchased the park in 1994 under a substantially different regulatory regime, of its in-

vestment-backed expectations by effecting a reduction in the parks' value and assuring that regulated rents remain and over time fall progressively further below fair market rents.

33. The court concludes that the City and CMHA have failed to meet their burden of proving by a preponderance of the evidence that the 1999 Amendments effected substantially the same injury. Instead, the court finds the opposite to be true. As noted above, the value of Contempo Marin decreased by slightly more than $10 million as a result of the 1999 Amendments. See 11/6/02 Trial at 196:5-198:3. This reduction in land value was due to the anticipated effect of the reduced revenues caused by the modification in the automatic rent adjustment formula. Id; see also 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, 424 (1988) (explaining that because the "reduced future income flow is capitalized into the value of the park", "the immediate effect of rent control is that the value of [the park] has been reduced"). Moreover, from the enactment of vacancy control in 1993 until the 1999 Amendments, the CPI-C did not increase by more than 5 percent in any year. As a result, plaintiffs did not suffer the injury that resulted from the 1999 Amendments.

34. MHC's expert testified convincingly that the 1999 Amendments materially altered the dynamic between the automatically allowed increase and the vacancy control provisions. Insofar as the alleged premium occurs because new mobilehome owners are willing to pay current tenants for the privilege of pay-

ing pad rents artificially kept below market rate, the shift away from a regime under which the rental rate increases largely keep up with inflation to one under which cumulative rent increases fall progressively further behind the overall rate of inflation means that the change in the formula enacted in 1999 constituted more than a "minor amendment" in the operation of the Ordinance. Rather, the Ordinance, as amended in 1999, represented a fresh injury subject to facial challenge. See also Adamson Companies v. City of Malibu, 854 F. Supp. 1476, 1484 (C.D. Cal. 1994) ("[E]ven if each element standing alone would be constitutional, the [regulatory] scheme must fall if, taken as a whole, it exceeds constitutional bounds.").

35. De Anza Properties X, 936 F.2d at 1086, is inapposite precisely because the operation of the ordinance at issue in that case did not change; only the sunset provision was modified.

36. By contrast, in the case at bar, the court finds that the operation of the Ordinance was substantially altered in 1999. As a result, MHC and CMHA's statute of limitations defense fails.

37. The court hastens to add that MHC may bring a timely claim based on the totality of the amended Ordinance. Provisions that were found in the predecessor Ordinance are not immunized from judicial scrutiny. The constitutionality of an ordinance can only be determined by evaluating the totality of its provisions and effects, and there is no precedent suggesting that only limited parts of an integrated regulatory scheme should be evaluated in isolation. Richards v. United States, 369 U.S. 1, 11, 82 S. Ct. 585, 7 L. Ed. 2d 492 (1962).

Res Judicata Defense

38. The City argues that based on the De Anza litigation, MHC's takings claims must fail because they have already been adjudicated in a prior judicial proceeding.

39. "The doctrine of res judicata provides that 'a final judgment on the merit's bars further claims by parties or their privies based on the same cause of action.' The application of this doctrine is 'central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdiction.' Moreover, a rule precluding parties from the contestation of matters already fully and fairly litigated 'conserves judicial resources' and 'fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.'" In re Schimmels, 127 F.3d 8875, 881 (9th Cir1997), quoting Montana v. United States, 440 U.S. 147, 153-54, 99 S. Ct. 970, 59 L. Ed. 2d 210 (1979).

40. 28 USC § 1738 requires federal courts to give the same preclusive effect to state court judgments as they would be given by another court of that state. See San Remo Hotel, LP v. City & County of San Francisco, 545 U.S. 323, 338, 125 S. Ct. 2491, 162 L. Ed. 2d 315 (2005).

41. Once there is a final judgment on the merit's in an action, res judicata generally precludes a party or their privies from relitigating issues that were or could have been raised in the previous action. Allen v. McCurry, 449 U.S. 90, 94, 101 S. Ct. 411, 66 L. Ed. 2d 308 (1980). To determine the preclusive effect of a state court judgment, federal courts look to state law. Palo-

mar Mobilehome Park Ass'n v. City of San Marcos, 989 F.3d 362, 364 (9th Cir. 1993).

42. California law differs from both federal law and that of a majority of states in that its "same cause of action" aspect of the res judicata doctrine is based not on a transactional analysis but upon a primary rights theory. Manufactured Home Communites, Inc. v. City of San Jose, 420 F.3d 1022, 1031 (9th Cir. 2005).

43. Under the primary rights theory, a cause of action consists of (1) a primary right possessed by the plaintiff; (2) a corresponding primary duty on the defendant and (3) a wrongful act done by the defendant constituting a breach of that duty. Aqarwal v. Johnson, 25 Cal. 3d 932, 954-55, 160 Cal. Rptr. 141, 603 P.2d 58 (1979). The primary right is the plaintiff's right to be free of the injury suffered. Alpha Mech, Heating & Air Conditioning, Inc., v. Traveler Cas. & Sur. Co. of Am., 133 Cal. App. 4th 1319, 1327, 35 Cal. Rptr. 3d 496 (2005). This right is distinguished from both the theory of liability on which the injury is premised and the remedy sought. If an action involves "the same injury to the plaintiff and the same wrong by the defendant then the same primary right is at stake even if in the second suit the plaintiff pleads different theories of recovery, seeks different forms of relief and/or adds new facts supporting recovery." Eichman v. Fotomat Corp., 147 Cal. App. 3d 1170, 1174, 197 Cal. Rptr. 612 (1983). See also Mycogen Corp. v. Monsanto Co., 28 Cal. 4th 888, 897, 123 Cal. Rptr. 2d 432, 51 P.3d 297 (2002) (concluding that different theories of recovery are not separate primary rights);

44. The City's res judicata argument fails because the De Anza litigation does not concern the same primary rights.

45. Here, the relevant primary rights involve the operation of the 1999 Amendments and their application to MHC's property. While the Ordinance's vacancy control provision has not been altered since the De Anza litigation, the operation of the City's mobilehome rent regulation was altered in 1999 when the automatic rent increase adjustment formula was modified to impose a flat 75 percent of the change in the CPI-C.

46. The absence of a textual change in the vacancy control provisions themselves does not alter this conclusion. MHC challenges the City's entire regulatory regime as of 1999. That scheme of regulation may not escape constitutional scrutiny through piecemeal legislation effected by carefully timed amendments as a means of avoiding such scrutiny.

47. This is not a case in which the Ordinance's "relevant and legal factual components were fixed" in 1993 "and were not modified after that date." Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 322 F.3d 1064, 1079 (9th Cir. 2003). Because the claims presently before the court could not "have been asserted in the previous lawsuit," id. at 1078, the City's res judicata argument must fail.

CONCLUSIONS OF LAW

Relief

1. Injunctive relief is appropriate when an ordinance is deemed unconstitutional under the Takings

Clause. *Carson Harbor Village, Ltd. v. City of Carson*, 37 F.3d 468, 473 n.4 (9th Cir. 1994); see also *Golden Gate Hotel Ass'n v. City and County of San Francisco*, 836 F. Supp. 707, 709 (N.D. Cal. 1993), vacated on other grounds, 18 F.3d 1482 (9th Cir. 1994) (permanent injunction against enforcement of an ordinance was justified when the ordinance failed substantially to advance legitimate state interests).

2. Under *Penn Central*, if the government has had an opportunity to provide just compensation in response to a taking and fails to do so, the City may be enjoined from continuing to take the property unless or until it provides just compensation. See *Penn Central*, 438 U.S. at 124. In *Eastern Enters. v. Apfel*, 524 U.S. 498, 118 S. Ct. 2131, 141 L. Ed. 2d 451 (1998), a four-justice plurality recognized that a federal court may issue an injunction or declaratory judgment concerning whether the government's conduct constituted a "taking," even though the plaintiff had not yet sought compensation. See also, for example, *Student Loan Marketing Ass'n v. Riley*, 104 F.3d 397, 402 (D.C. Cir. 1997) (entertaining declaratory relief request despite the availability of compensatory remedy under the Tucker Act; such availability "does not wipe out equitable jurisdiction"); *In re Chateaugay Corp.*, 53 F.3d 478, 491-93 (2nd Cir. 1995) ("Because the plaintiff sought only declaratory relief on its takings claim, the plaintiff was not required to go to Claims Court first."). See also *Armendariz*, 75 F.3d at 1321 n.5 ("Because a 'private' taking cannot be constitutional even if compensated, a plaintiff alleging such a taking would not

need to seek compensation in state proceedings before filing a federal takings claim.").

FINAL CONCLUSION OF LAW: To the extent that any of the foregoing conclusions of law should more properly be considered findings of fact, they shall be deemed as such.

Severability

The severability of a statute held to be unconstitutional under the Fifth and Fourteenth Amendments is a matter of state law. *National Broiler Council v. Voss*, 44 F.3d 740, 748 n.l2 (9th Cir. 1994). Under California law, the unconstitutional provision in a law can be severed only if the defective provision is gramatically, functionally and volitionally severable:

> It is "grammatically" separable if it is "distinct" and "separate" and, hence, "can be removed as a whole without affecting the wording of any" of the measure's "other provisions." It is "functionally" separable if it is not necessary to the measure's operation and purpose. And it is "volitionally" separable if it was not of critical importance to the measure's enactment.

Hotel Employees and Restaurant Employees Int'l Union v. Davis, 21 Cal. 4th 585, 88 Cal. Rptr. 2d 56, 77, 981 P.2d 990 (Cal. 1999) (internal citations omitted).

Even if a law contains a severability clause, severability is not guaranteed: "[t]he final determination depends on whether 'the remainder * * * is complete in itself and would have been adopted by the legislative body had the latter foreseen the partial

invalidation of the statute' or 'constitutes a completely operative expression of the legislative intent * * * [and] are [not] so connected with the rest of the statute as to be inseparable.'" *Santa Barbara Sch. Dist. v. Superior Court*, 13 Cal. 3d 315, 118 Cal. Rptr. 637, 530 P.2d 605, 618 (Cal. 1975) (internal citation omitted). The lack of a severability clause is evidence that the provision is not volitionally severable: the legislating body intended that one part of the law would not persist if another part was invalid. Consider *Matter of Reyes*, 910 F.2d 611, 613 (9th Cir. 1990) (applying principles of severability to Executive Order).

The Mobilehome Rent Stabilization law as codified in the San Rafael Municipal Code lacks a severability clause although one appears in Ordinance 1743, the legislation that contains the provisions enacted in 1999. The court assumes, therefore, that the City would seek to retain in effect such portions of its mobilehome rent regulations that are not invalidated.

The City contends that elimination of the 75 percent limitation on permissive rent increases and the sentence excluding capital replacements and improvement assessments in the base rent and eligible for permissive CPI-C increases would return mobilehome rent regulation to that provided for in the code as it existed in 1993. Because the 1993 version of the Ordinance survived an attack by MHC's predecessor, the City asserts that the 1993 regulatory scheme is beyond attack. Therefore, the City argues that the court should simply strike the 1999 enacted provisions which the City contends would restore the status quo that existed in 1993.

The City's approach is not supported legally or practically and is inconsistent with California law on severability. First, invalidation of an enactment does not restore the law as it existed prior to the enactment. Consider Cal Gov't Code § 9607(a) (repeal of repealing statutes). Second, assuming arguendo that only the provisions of Ordinance 1743, the 1999 Ordinance, unconstitutionally take MHC's property under *Penn Central* principles, the court may remove or excise these provisions from the law but only if they are grammatically, functionally and volitionally severable. See *Jevne v. Superior Court*, 35 Cal. 4th 935, 960-62, 28 Cal. Rptr. 3d 685, 111 P.3d 954 (2005); *Calfarm Ins. Co. v. Deukmejian*, 48 Cal. 3d 805, 821-22, 258 Cal. Rptr. 161, 771 P.2d 1247 (1989). The 1999 provisions fail this test for several reasons.

The Appendix sets out the entire San Rafael mobilehome rent stabilization law showing the law as it existed in 1993 and the changes enacted in 1999 with Ordinance 1743. Although the provisions of the 1999 Ordinance dealing with capital improvements are grammatically severable, see Appendix § 20.04.020 M and § 20.08.010 B 1 (last sentence), elimination of those provisions alone does not cure the difficulty the court has found. The heart of the 1999 Amendments is the reduction of the permissive rent increases from the sliding scale increases allowed under the 1993 version of the Ordinance to the flat 75 percent CPI-C adjustment permitted by the 1999 Amendments. Excision of the 75 percent language renders the Ordinance as a whole essentially meaningless. For although the 1999 Amendments added and deleted

relatively few words to the law, those words are central to the operation of the mobilehome rent regulatory scheme the City sought to put into place.

First, the permissive rent increase is referred to in the Ordinance as "automatic." See App § 20.08.010 (last sentence). Without the 1999 provisions, the Ordinance lacks any permissive or automatic rent adjustment, a feature that has been included in all formulations of the City's mobilehome rent regulations dating back to their origination in 1989.

Second, numerous other provisions of the mobilehome rent Ordinance are keyed to the permissive or automatic rent increases. For example, the vacancy control provision limits any increase in rent upon transfer of a pad lease to a new tenant to that increase "otherwise exempted under the provisions of subsections (B)(2) and (3) of [section 20.08.010]." App § 20.08.010 C. There is a similar relationship between the automatic or permissive rent increase and the freeze provisions of the Ordinance. App § 20.08.010 E.

Third, much of the language of the Ordinance becomes surplusage in the event of elimination of the 75 percent CPI-C adjustment. For example, references to the CPI-C are spread throughout the Ordinance, see e g, App § 20.08.010 B, § 20.08.030, § 20.12.030, yet these references become essentially meaningless without a permissive or automatic rent increase linked to the CPI-C.

Fourth, excision of the 75 percent permissive or automatic increase renders all rent increases subject to the fairly elaborate regulatory mechanisms of the

Ordinance. For example, MHC is required to furnish the city manager and the affected lease pad holder a notice ninety days in advance of any rent increase, App § 20.08.010. In the event of excision of the automatic rent increase provision, each pad lessee's rent increase is subject to the elaborate rental dispute resolution mechanism of the Ordinance. App § 20.12.010 et seq. As a base rent is established for each of the 396 lots in Contempo Marin, any increase in any single pad rent would trigger the possibility of a hearing, arbitration and appeal provided for in the Ordinance. See App § 20.12.090. As each one of these increases could be appealed to and reviewed by the City council, with an ensuing possible court challenge pursuant to section 1094.5 of the California Code of Civil Procedure to follow, it is quite possible that the City council could be called upon to hear and decide a virtually endless string of disputes arising from Contempo Marin.

It is plain from the structure of the Ordinance and the exemption for any rent increase less than or equal to the 75 percent CPI-C adjustment that the City council sought to avoid this elaborate dispute process except for rent increases greater than the 75 percent threshold. The Ordinance simply cannot perform the functions that the City council plainly envisioned when it enacted the 1999 Amendments once they have been excised. Under such circumstances, it cannot be argued that the City council would have adopted the Ordinance denuded of the 1999 provisions and these provisions cannot be deemed volitionally severable. Moreover, of course, and although its approach was constitutionally flawed, the City council attempted to adjust what it

deemed to be the competing interests of Contempo Marin residents and MHC's interest in a "fair and reasonable return," as well as "encouraging competition in the provision of mobilehome lots," App § 20.04.010 J. A permissive or automatic rent increase equivalent to 75 percent of the CPI-C adjustment was integral to that legislative balancing. Because it is not clear that had it foreseen the invalidation of the 1999 Amendments the City council would have adopted the Ordinance without those provisions, they cannot simply be excised from the law. It is not the court's task, nor its prerogative, to re-write legislation that the City may enact. Indeed, the City council may now wish to refashion its regulation of mobilehome rent in a manner that is constitutionally permissible and adopting the City position in this litigation that the court "restore" the 1993 law would be inconsistent with the City's ability to make that change.

MHC shall submit a proposed form of judgment consistent with the foregoing.

IT IS SO ORDERED.

APPENDIX

The portions of the Ordinance deleted by the 1999 Amendments appear in strikethrough font. The portions of the Ordinance inserted by the 1999 Amendments appear in underlined and italicized font.

Chapter 20.04 GENERAL PROVISIONS

20.04.010 Findings.

20.04.020 Definitions.

20.04.030 Applicability.

20.04.040 Notice requirements.

20.04.050 Purchaser's rights.

20.04.060 Administration.

20.04.010 Findings.

The city council finds as follows:

A. There is presently within the city and the surrounding areas, a shortage of lots for the placement of mobilehomes.

B. Mobilehomes presently constitute an important source of housing for persons of low and moderate income.

C. A large number of persons living in mobilehomes are elderly, some of whom live on small fixed incomes. These persons may expend a substantial portion of their income on rent and may not be able to afford other housing within the city.

D. There is an extremely low vacancy rate in mobilehome parks within the city, with no lots presently available in some or all of the mobilehome parks within the city.

E. Rents for lots within mobilehome parks have, in the few years preceding adoption of the Rent Stabilization Ordinance codified in this title by the city, increased substantially, in parks within the city and other areas of the state.

F. Homeowners residing in mobilehome parks have very limited mobility because it is difficult and costly to move mobilehomes; therefore, such homeowners are forced to accept and pay substantially increased rents.

G. There is a potential for damage while moving mobilehomes from one site to another and a considerable amount of cost for landscaping, awning installations, and site preparation after such a move.

H. The San Rafael general plan 2000 housing policy H-8 recommends maintaining the city's existing stock of lower cost units of which the Contempo Marin Mobilehome Park is an example.

I. Owners and/or operators of mobilehome parks provide an important housing source for residents of the city. Unduly restrictive rent review ordinances can operate to discourage the establishment of new and the expansion of existing mobilehome parks in the city; to encourage owners to convert their mobilehome parks to other uses; and adversely affect the maintenance and other services offered by mobilehome parks, thereby exacerbating the shortage of mobilehome lots and the quality of life in mobilehome parks.

J. It is the purpose of this title to establish a speedy and efficient method of reviewing rent increases in mobilehome parks to protect homeowners from arbitrary, capricious or unreasonable rent increases while insuring owners and/or operators and investors a fair and reasonable return and encouraging competition in the provision of mobilehome lots.

K. Vacancy Control. The initial Mobilehome Rent Stabilization Ordinance, No. 1564, contained vacancy control provisions at its first reading; and

Said ordinance was thereafter revised to exempt from coverage space rent or space rent increases upon the transfer of ownership of a mobilehome where the

mobilehome remains in the park, sometimes referred to as "vacancy decontrol"; and

Said revisions were made in response to the decision of the United States Court of Appeal for the Ninth Circuit in *Hall v. City of Santa Barbara;* and

The decision of the United States Supreme Court in *Yee v. Escondido* effectively overruled *Hall v. City of Santa Barbara,* and the Yee opinion found that vacancy control of rents on in-place transfers of mobilehomes does not constitute a physical taking of property without just compensation; and

The council finds that the city's policy to continue rent control protection for all mobilehome parks in the city, has proven useful in stabilizing rent in mobilehome parks; and

Establishment of rent regulations on spaces where ownership of the mobilehome is transferred but the mobilehome remains, sometimes referred to as "vacancy control," is an important part of rent control policy as it protects mobilehome owners from excessive space rent increases and permits sales of mobilehomes without "unconscionable" rent increases to the new owner; and

Rent control regulations, including vacancy control can assist in protecting affordable housing in combination with city programs and actions to help provide a variety of housing types within a range of costs affordable to the low and very low income households; and

A significant number of residents have become residents following the effective date of Ordinance No. 1564 on October 16, 1989, and were required to pay a rental rate substantially higher than comparable spaces; and

Many residents of such spaces are senior citizens on fixed incomes and have been forced to pay unnecessarily high rents and/or have been constrained in their ability to sell their mobilehomes.

This city council desires to enact a measure that would regulate rent increases upon in-place transfers of mobilehomes.

L. The city council has reviewed the findings above set forth in subsections A through K of this section and finds them to be still true and correct and continues to find a profound need for continued mobilehome rent stabilization. (Ord. 1654 (20.01.010), 1993).

20.04.020 Definitions.

A. "Arbitration" is a process much like a trial where arbitrator listens to both sides and makes a decision (called an award) for the disputing parties.

B. "Capital improvements" means those new improvements which directly and primarily benefit and serve the existing mobilehome park homeowners by materially adding to the value of the mobilehome park, appreciably prolonging its useful life, or adapting it to new uses, and which are required to be amortized over the useful life of the improvements pursuant to the provisions of the Internal Revenue Code and the regulations issued pursuant thereto. "Capital

improvements costs" means all costs reasonably and necessarily related to the planning, engineering and construction of capital improvements and shall include debt service costs, if any, incurred as a direct result of the capital improvement.

C. "Capital replacement" means the substitution, replacement or reconstruction of a piece of equipment, machinery, streets, sidewalks, utility lines, landscaping, structures or part thereof of a value of five thousand dollars ($5,000.00) or more which materially benefits and adds value to the mobilehome park. "Capital replacement costs" means all costs reasonably and necessarily related to the planning, engineering and construction of capital replacement and shall include debt service costs, if any, incurred as a direct result of the capital replacement.

D. "Debt service costs" means the periodic payment or payments due under any security or financing device which is applicable to the mobilehome park including any fees, commissions, or other charges incurred in obtaining such financing.

E. "Representative" means a person appointed in writing by an owner, an operator, a homeowner, or a group of homeowners and authorized to represent the interest of, negotiate on behalf of, and bind the appointing party.

F. "Filing" means actual receipt of the item being filed by the person designated in this chapter to receive the item, or by his or her designee.

G. "Maintenance and operation costs" means all expenses, exclusive of costs of debt service, costs of

capital improvements, and costs of capital replacement, incurred in the operation and maintenance of the mobilehome park, including but not limited to: real estate taxes, business taxes and fees (including fees payable by landlords under this chapter), insurance, sewer service charges, utilities, janitorial services, professional property management fees, pool maintenance, exterior building and grounds maintenance, supplies, equipment, refuse removal, and security services or systems.

H. "Mobilehome" means a structure as defined in Section 798.3 of the Civil Code as follows:

"Mobilehome" is a structure designed for human habitation and for being moved on a street or highway under permit pursuant to Section 35790 of the Vehicle Code. Mobilehome includes a manufactured home, as defined in Section 18007 of the Health and Safety Code, and a mobilehome, as defined in Section 18008 of the Health and Safety Code, but does not include a recreational vehicle, as defined in Section 799.24 of this code and Section 18010 of the Health and Safety Code or a commercial coach as defined in Section 18001.8 of the Health and Safety Code.

I. "Mobilehome owner" or "homeowner" means any person legally occupying a mobilehome dwelling unit pursuant to ownership thereof within a mobilehome park and holding a rental or lease agreement with the park owner.

J. "Operator" means the owner, operator, or property manager of a mobilehome park within the city.

K. "Owner" means the owner or lessor of real property used for a mobilehome park within the city.

L. "Rent" means the consideration, including any bonus, benefits or gratuity, demanded or received in connection with the use and occupancy of a mobilehome lot in a mobilehome park, including services and amenities, and for the use of real property used for the operation of a mobilehome park, but exclusive of any amounts paid for the use of the mobilehome dwelling unit.

M. "Rent increase" means any additional rent demanded of or paid by a homeowner for a rental lot and related amenities, including any reduction or elimination of amenities without a corresponding reduction in the moneys demanded or paid for rent, and any additional rent demanded of or paid by an operator for rental of real property used for the operation of a mobilehome park. *Any portion of a rent increase assessed for capital replacements or capital improvements shall be separately identified and shall not be included in the base rent.*

N. "Rental lot" means a lot rented in a mobilehome park or offered for rent in the city for the purpose of occupancy by a mobilehome with all services connected with the use of occupancy thereof.

O. "Services" means those facilities which enhance the use of the rental lot, including, but not limited to, repairs, replacement, maintenance, painting, heat, hot and cold water, utilities, security devices, laundry facilities and privileges, janitorial service, refuse removal, telephone service, and meeting, recreational,

and other facilities in common areas of the mobilehome park in which the lots are located. (Ord. 1743 1999; Ord. 1654 (20.02.020), 1993).

20.04.030 Applicability.

The provisions of this title apply only to mobilehome parks which contain mobilehomes as defined in this title and to the mobilehomes within such parks. (Ord. 1654 (20.03.030), 1993).

20.04.040 Notice requirements.

Any owner/operator wishing to claim an exemption from this title based upon Civil Code Section 798.17 shall provide the following notice to any person and in the manner specified in this section.

A notice which conforms to the following language and printed in bold capital letters of the same type size as the largest type size used in the rental agreement shall be presented to any prospective purchaser at the time of presentation of a rental agreement creating a tenancy with a term greater than twelve (12) months:

> IMPORTANT NOTICE TO PROSPECTIVE PURCHASER REGARDING THE PROPOSED RENTAL AGREEMENT FOR _____ MOBILEHOME PARK. PLEASE TAKE NOTICE THAT THIS RENTAL AGREEMENT CREATES A TENANCY WITH A TERM IN EXCESS OF TWELVE MONTHS. BY SIGNING THIS RENTAL AGREEMENT, YOU ARE EXEMPTING THIS MOBILEHOME SITE FROM THE PROVISIONS OF THE CITY OF

SAN RAFAEL MOBILEHOME RENT STABILIZATION ORDINANCE FOR THE TERM OF THIS RENTAL AGREEMENT. THE CITY OF SAN RAFAEL MOBILEHOME RENT STABILIZATION ORDINANCE AND THE STATE MOBILEHOME RESIDENCY LAW (CALIFORNIA CIVIL CODE SECTION 798 et seq.) GIVE YOU CERTAIN RIGHTS. BEFORE SIGNING THIS RENTAL AGREEMENT YOU MAY CHOOSE TO SEE A LAWYER. UNDER THE PROVISIONS OF THE MOBILEHOME RENT STABILIZATION ORDINANCE, YOU HAVE A RIGHT TO BE OFFERED A RENTAL AGREEMENT FOR (1) A TERM OF TWELVE MONTHS, OR (2) A LESSER PERIOD AS YOU MAY REQUEST, OR (3) A LONGER PERIOD AS YOU AND THE MOBILEHOME PARK MANAGEMENT MAY AGREE. YOU HAVE A RIGHT TO REVIEW THIS AGREEMENT FOR AT LEAST 30 DAYS BEFORE ACCEPTING OR REJECTING IT. IF YOU SIGN THE AGREEMENT, YOU MAY CANCEL THE AGREEMENT BY NOTIFYING THE PARK MANAGEMENT IN WRITING WITHIN 72 HOURS OF YOUR EXECUTION OF THE AGREEMENT. IT IS UNLAWFUL FOR A MOBILEHOME PARK OWNER OR ANY AGENT OR REPRESENTATIVE OF THE OWNER TO DISCRIMINATE AGAINST YOU BECAUSE OF THE EXERCISE OF

ANY RIGHTS YOU MAY HAVE UNDER THE CITY OF SAN RAFAEL MOBILEHOME RENT STABILIZATION ORDINANCE, OR BECAUSE OF YOUR CHOICE TO ENTER INTO A RENTAL AGREEMENT WHICH IS SUBJECT TO THE PROVISIONS OF THAT LAW.

The notice shall contain a place for the prospective purchaser to acknowledge receipt of the notice and shall also contain an acknowledgment signed by owner/operator that the notice has been given to the prospective purchaser according to this section. A copy of the notice executed by owner/operator shall be provided to the prospective purchaser. (Ord. 1654 (20.03.040), 1993).

20.04.050 Purchaser's rights.

A prospective purchaser of a mobilehome which is subject to an in-place transfer shall have all the same rights as a homeowner, as defined in Civil Code Section 798.18 including:

A. The right to be offered a rental agreement for (1) a term of twelve (12) months, or (2) a lesser period as the homeowner may request or (3) a longer period as mutually agreed upon by both the homeowner and management.

B. The right to reject the offer of a rental agreement in excess of twelve (12) months and instead accept a rental agreement for a term of twelve (12) months or less from the date the offered rental agreement begins.

C. The owner/operator of any park shall file a standard multiyear residency agreement in the office of the city clerk. A standard form of written rejection approved by the city attorney's office shall also be filed in the office of the city clerk. A prospective purchaser may elect to reject a rental agreement in excess of twelve (12) months by executing the standard form of written rejection which incorporates applicable terms and conditions of the owner's standard multiyear residency agreement on file in the office of the city clerk. The execution of said written rejection shall be deemed to be a rental agreement between the purchaser and the owner with a month-to-month tenancy and with the rent limitations as set forth in this chapter sufficient for compliance with Civil Code Section 798.75(a). (Ord. 1654 (20.03.050), 1993).

20.04.060 Administration.

The city manager shall establish administrative procedures for the implementation of this title. (Ord. 1654 (20.10.260), 1993).

Chapter 20.08 RENT INCREASES

20.08.010 Increases subject to review-Exceptions.

A. Except as provided in subsection B of this section, any rent increase including rent on change of ownership as hereinafter defined under subsection C of this section, Vacancy Control, proposed to take effect

on or after February 1, 1993, shall be subject to this title.

B. The following rent increases shall be exempt from review under this title.

1. Except as provided in subsections (B)(2) and (3) of this section any rent increase for any mobilehome lot in any twelve (12) month period which is equal to or less than the rent charged on the date twelve (12) months prior to the date the increase is to take effect, multiplied by a cost of living factor and rounded off to the nearest dollar. ~~(The cost of living factor shall be as follows:~~

~~"CPI/C"~~ *The cost of living factor shall be seventy-five percent (75%) of the CPI/C*, where the CPI/C shall mean the percentage change in the consumer price index *("CPI")* for California, All Urban Consumers, San Francisco-Oakland-San Jose areas, as published by the Bureau of Labor Statistics, San Francisco, over the most recent twelve month period for which figures are available through the month before the month preceding the date notice of the rent increase is given. The most recently published CPI figure available at the time the rent increase notice is given shall be used for the calculation. The city of San Rafael will supply each owner and/or operator the

published CPI figure to be used in any rent increase. Each owner and/or operator shall post such document in a conspicuous place in the park office or office area, where it can easily be seen by the park homeowners. *Capital replacement and/or capital improvement assessment(s) shall not be included in the base rent nor eligible for automatic CPI increases under this section.*

2. Mobilehome spaces where the homeowner and the mobilehome owner/operator have entered into a negotiated lease agreement that exempts the space in accordance with subdivision (b) of Civil Code Section 798.17.

3. Mobilehome spaces that are "new construction" as defined in Civil Code Section 798.7 and as exempted in accordance with Civil Code Section 798.45.

C. Vacancy Control. When a mobilehome is transferred by the homeowner to another with the mobilehome remaining on the space, it is sometimes referred to as an "in-place transfer." No increase in rent shall be imposed upon an in-place transfer of a mobilehome.

When a mobilehome space becomes vacant and the mobilehome which is located thereon is removed from the space, the space rental shall not be increased upon re-rental of the space unless otherwise exempted under the provisions of subsections (B)(2) and (3) of this section.

D. Base Rent Provisions. In the event a mobilehome space is exempted from the provisions of this title by

reason of the existence of a space rent agreement that meets the requirements of Civil Code Section 798.17, and that agreement expires, the base space rent for that space shall be the space rent in effect for that space immediately preceding the expiration of the agreement.

In the event a mobilehome space was subject to the space rent restrictions of this title and between October 16, 1989 and February 1, 1993, was subject to an in-place transfer, the space rent that was demanded by the park owner immediately preceding February 1, 1993, shall be the base space rent for the space.

E. Freeze. Notwithstanding the provision for annual adjustment of space rents as provided in subsection (B)(1) of this section, a freeze in space rent shall be effected as set forth below for spaces where a mobilehome space was exempted from the space rental provisions of this title by reason of the existence of a space rent agreement in accordance with Civil Code Section 798.17 and that agreement expires or where there has been an in-place transfer of a mobilehome between October 16, 1989 and February 1, 1993.

The base space rent for said spaces shall remain frozen until such time as the base rent is less than or equal to the rent said space would have been under the Rent Stabilization Ordinance. Upon attainment of the level set forth in the preceding sentence, the space rent freeze provided for in this paragraph shall be lifted and the rent limitations of subsection B of this section shall then apply.

In the event the rent that a particular space would be if the space had been subject to the provisions of this title under rent stabilization cannot be determined for any reason, the base rent for said space shall remain frozen until such time that the lowest rent for a comparable space in a park on February 1, 1993, where no space rent agreement that was exempt from the provisions of this title expired or where no in-place transfer took place between October 16, 1989 and February 1, 1993 attains the same level as the base rent determined in accordance with subsection D of this section for said space. Thereafter the provisions of subsection (B)(1) of this section shall then apply.

The owners shall not have any obligation to return any rents heretofore collected under exempt rental agreements or under rent control ordinances numbers 1564, 1584 and 1644. Ordinance number 1644 was not intended to impose on owners any obligation to roll-back rents at mobilehome parks in San Rafael.

The freeze provisions of this subsection are to only have prospective application from the effective date of Ordinance No. 1644. (Ord. 1743 § 2, 1999; Ord. 1654 (20.04.040), 1993).

20.08.020 Notices.

The owner/operator is required to furnish to the city manager or an authorized designee at least ninety (90) days before the effective date of any rent increase, a complete list of the existing rent for each space within the park together with a copy of any rental agreement or lease applicable to all spaces within the park. The lease or rental agreement is required to show the

commencement and expiration date as well as the initial rent applicable under the agreement.

Ninety (90) days prior to any increase in rents, the operator shall provide each homeowner and the owner shall provide each operator with written notice setting the amount of the proposed increase, the then current rent and whether or not in the owner's and/or operator's opinion such increase is exempt from review under the provisions of this title. (Ord. 1654 (20.05.050), 1993).

20.08.030 Limitations on rent increases.

Each park operator shall, by November 1, 1989, establish an anniversary date for all rent increases, and such yearly increases, if any, except as specified below, shall be enacted only on the anniversary date of that park, which date shall also be posted in the park office or office area where it can easily be seen by the homeowners. The increases allowed by the terms of this title shall be applied equally on such annual basis to all lots subject to an increase as provided herein. The operator shall notify the city manager's office in writing of such anniversary date on or before November 1, 1989.

The operator, in calculating the amount of increase allowed, shall use the average rent per lot subject to the terms of this title. This figure shall be determined by dividing the number of lots subject to the terms of this title into the total gross rent receipts received from those lots. The CPI increase shall then be applied to that average lot rent, to determine the actual dollar increase.

The owner, in calculating the amount of increase allowed, shall apply increases as allowed in Section 20.08.010(B) to the current yearly rent to determine the actual dollar increase.

After the calculations showing the amount of anticipated increase and how the increase was determined has been approved and reviewed by the city manager or his or her designee, said calculations and method determining the increase shall both be posted in the park office or office area where it can easily be seen by the homeowners and a declaration of posting shall be forwarded to the city manager's office within five (5) days thereafter.

Failure to timely comply with the provisions of Sections 20.08.020 and 20.08.030 shall defer the effective date of any proposed annual increase until ninety (90) days after compliance. (Ord. 1654 (20.06.060), 1993).

Chapter 20.12 RENTAL DISPUTE HEARING PROCESS

20.12.010 Petition filing.

Within forty-five (45) days after the notice provided in 20.08.020, upon the written petition of more than twenty-five percent (25%) of the homeowners of any mobilehome park without rental agreements exempt in accordance with Civil Code Section 798.17 filed with the city clerk as set forth in this title, the rental dispute hearing process may be invoked. A copy of the petition shall be provided to the operator or representatives at the same time. The petition shall include the names, addresses, and telephone numbers of the authorized homeowner representatives. The petition shall also include such supporting materials as the city manager shall prescribe including, but not limited to, a copy of the owner's notice of space rent increase. The petition shall be verified. (Ord. 1654 (20.07.070(A)), 1993).

20.12.020 Filing fees.

The fee for filing a petition shall be two (2) times the then current daily rate for American Arbitration Association services. Upon receipt of the petition and filing fee from homeowners, the city manager shall notify the owner/operator of the receipt of the petition and shall require from the owner/operator a like fee. The filing fees may be adjusted by resolution of the city council from time to time to cover administrative costs

and the cost of arbitration services. (Ord. 1654 (20.07.070(B)), 1993).

20.12.030 Consultant services.

The city manager may, from time-to-time, employ the services of an accountant to supply information to the arbitrator such as the past twelve (12) months' CPI, a profit income to revenue statement, a profit income to investment statement, or such other financial data as may be independently required for or requested by the arbitrator. The fees for the consultant services may be paid from the filing fees or by the city from redevelopment low and moderate income set aside funds. (Ord. 1654 (20.07.070(C)), 1993).

20.12.040 Supporting information.

Within thirty (30) days after the filing of a petition, the homeowners and the owner/operator shall file with the city clerk all information reasonably available in support of or opposition to any proposed increase of rent. Copies of said supporting information shall be provided to the opposing party and the arbitrator. (Ord. 1654 (20.07.070(D)), 1993).

20.12.050 Submission of petition by owner or operator.

Any Operator or owner whose mobilehome park is subject to the provisions of this title and who seeks to increase rent in excess of the provisions of this title, or contends that the freeze of rents as provided by Section 20.08.010(E) does not result in a just and reasonable return shall be required to invoke the hearing process by a petition filed with the city clerk which shall be

heard and processed in the same manner as provided in this title for homeowner applications; provided, that the owner/operator shall notify, in writing, all homeowners or operators subject to such rental increase with proof of service of such notification listing the names and addresses of each affected homeowner and/or operator. (Ord. 1654 (20.07.070(E)), 1993).

20.12.060 Appointment of arbitrator.

The city manager shall appoint the arbitrator. The parties may submit to the city manager a list of three nominees who are members of the American Arbitration Association. The city manager may also consider retired judges of courts of record, or additional members of the American Arbitration Association or other experienced professional arbitrators. The city manager will give deference to any nominee agreed to by the parties. The arbitrator shall not own any interest in a mobilehome park, or be the operator of a mobilehome park or be a resident of a mobilehome park. (Ord. 1654 (20.07.070(F)), 1993).

20.12.070 Arbitration hearing.

The arbitrator shall set a hearing within thirty (30) days after the date the arbitrator was selected.

Any party or their counsel may appear and offer such documents, testimony, written declarations or other evidence as may be pertinent to the proceedings. The hearing may be continued at the request of each party for not to exceed ten (10) days. The arbitrator may continue the hearing for a reasonable time upon a showing of good cause. The burden of proving the amount of a rent increase is reasonable shall be on the

owner by a preponderance of the evidence. The hearing need not be conducted according to technical rules of evidence.

The arbitrator shall render within fifteen (15) days of the hearing a written decision together with the reasons for said decision determining the amount of allowable rent increase, if any, in accordance with the standards of Section 20.12.110. (Ord. 1654 (20.07.070(G)), 1993).

20.12.080 Recording.

The party requesting arbitration shall arrange to have a court reporter present to record the proceeding before the arbitrator, (Ord. 1654 (20.07.070(H)), 1993).

20.12.090 Appeal.

Upon the written request of any party within fifteen (15) days of the arbitrator's decision, the decision of the arbitrator can be appealed and reviewed by the city council. The appeal shall consist of a review of the record of the proceedings before the arbitrator and upon a showing of good cause in accordance with the provisions of the Code of Civil Procedure Section 1094.5(e), the city council may permit additional evidence at the hearing on the appeal. The appealing party shall cause a transcript to be prepared by the certified court reporter. Within fifteen (15) days after the original transcript is filed with the city clerk the appeal will be set for hearing. The city council may affirm, modify or reverse the decision of the arbitrator. The decision of the city council is final. The decision of the city council will be subject to the provision of

California Code of Civil Procedure Section 1094.5. (Ord. 1654 (20.07.070(1)), 1993).

20.12.100 Arbitration-Paying all costs.

The party requesting arbitration shall be responsible for paying all costs associated with the selection and retention of the arbitrator; provided, that if the arbitration is requested by the owner/operator, and the final arbitration award is eighty percent (80%) or more of the increase requested by the owner/operator, not previously granted by an arbitrator, the owner/operator shall be allowed to pass the costs through to the homeowners, spread over a one (1) year period in addition to any increase allowed. If the arbitration is requested by the homeowners and the final arbitration award is eighty percent (80%) or more of the reduction requested by the homeowners, not previously granted by an arbitrator, the operator shall refund such cost in a lump sum to the homeowners within thirty (30) days to be distributed to the contributing homeowners in accordance with their contributions. (Ord. 1654 (20.10.130), 1993).

20.12.110 Standards of reasonableness to be applied to rent increases.

A. Standards of reasonableness applicable to rent increases in order to assure owner and/or operator a fair and reasonable return to be considered by the arbitrator are:

1. The rental history of the mobilehome park, including:

a. The presence or absence of past increases,

b. The frequency of past rent increases and the amounts,

c. The owner and/or operator's response to any tax-reduction measure,

d. The occupancy rate of the mobilehome park in comparison to comparable units in the same general area;

2. The physical condition of the mobilehome park, including the quantity and quality of maintenance and repairs performed during the last twelve (12) months;

3. Any increases or reductions in services during the twelve (12) months prior to the effective date of the proposed increase;

4. Other financial information which the owner and/or operator are willing to provide;

5. Existing market value of rents for mobilehome spaces in communities with housing comparable to San Rafael;

6. Cost to replace the park;

7. Changes in the Consumer Price Index for All Urban Consumers, San Francisco-Oakland-San Jose areas published by the Bureau of Labor Statistics;

8. Any costs incurred as a result of a natural disaster and only to the extent such costs have not been reimbursed to the owner by insurance or other sources;

9. The arbitrator shall not consider changes in operating or other expenses caused by the park owner's refinancing of the park.

B. In determining an owner and/or operator's fair and reasonable return, the arbitrator shall consider all relevant factors, such as the owner's and/or operator's investment in the mobilehome park and the owner's net operating income; provided, that the determination may include a review of the replacement cost of the park.

In any determination of what constitutes a reasonable rent increase under the circumstances, the arbitrator shall consider and weigh evidence establishing the nature and extent of any violations by either the owner, the operator, or homeowners of the city building and housing codes. Any rent increase may be disallowed, reduced, or made subject to reasonable conditions, depending on the severity of such violations. (Ord. 1654 (20.10.180), 1993).

Chapter 20.16 REMEDIES-VIOLATIONS-PENALTIES

20.16.010 Services.

During the term of operation of this title, no operator shall reduce or eliminate any service to any

rental lot unless a proportionate share of the cost savings, due to such reduction or elimination, is simultaneously passed on to the homeowner in the form of a decrease in existing rent or a decrease in the amount of a rent increase otherwise proposed and permitted by this chapter. (Ord. 1654 (20.10.190), 1993).

20.16.020 Fair return hearing.

In the event an owner invokes the rental dispute process by reason of the freeze provisions contained in Section 20.08.010(E) the owner shall include in the petition the following additional information:

1. The name and address of the mobilehome park owner;

2. The name of the mobilehome park;

3. For each mobilehome space subject to a freeze by reason of an in-place transfer or expiration of a rental agreement in excess of twelve (12) months:

a. The number of the lot or space on which the mobilehome is located together with an executed copy of the most recent rental agreement for said space,

b. The name and address of the transferor of the mobilehome,

c. The name and address of the transferee of the mobilehome,

d. The date of transfer,

e. The rent charged prior to transfer,

f. The rent charged following the transfer,

g. The rent proposed as a fair and reasonable return,

h. All previous transfers of the mobilehome located in the affected mobilehome space since October 16, 1989, together with the information requested in subdivisions (a) through (g) for each such transfer;

4. The name and address of the person who signed the notice;

5. The park owner shall mail a copy of the petition to all mobilehome owners whose rents are the subject of the petition. The petition shall contain a proof of service that a copy of the petition was mailed to all such mobilehome owners;

6. The park owner shall bear the burden of proving by a preponderance of the evidence at the hearing that because of the rent freeze, the park owner is unable to obtain a fair and reasonable return;

7. The fair and reasonable return hearing shall be in accordance with the arbitration proceedings of Chapter 20.12. (Ord. 1654 (20.10.205), 1993).

20.16.030 Retaliation.

A. No operator shall in any way retaliate against any homeowner for the homeowner's assertion or exercise of any right under this title. Such retaliation shall be subject to suit for actual and punitive damages, injunctive relief and attorney's fees and costs. Such retaliation shall also be an available defense in an unlawful detainer action.

No owner shall in any way retaliate against any operator for the operator's assertion or exercise of any right under this title. Such retaliation shall be subject to suit for actual and punitive damages, injunctive relief and attorney's fees and costs. Such retaliation shall also be an available defense in an unlawful detainer action.

B. No homeowner shall in any way retaliate against any operator for the operator's assertion or exercise of any right under this title. Such retaliation shall be subject to suit for actual and punitive damages, injunctive relief and attorney's fees and costs.

No homeowner shall in any way retaliate against any owner for the owner's assertion or exercise of any right under this title. Such retaliation shall be subject to suit for actual and punitive damages, injunctive relief and attorney's fees and costs. (Ord. 1654 (20.10.210), 1993).

20.16.040 Civil remedies.

If any owner or operator demands, accepts, receives, or retains any payment of rent in excess of the maximum lawful lot rent, as determined under this title, the homeowners of such park affected by such violation, individually or by class action, may seek relief in a court of appropriate jurisdiction for injunctive relief and/or damages. In any such court proceeding, the prevailing party shall be awarded his reasonable attorney's fees and the court, in its discretion and in addition to any other relief granted or damages awarded, shall be empowered to award to each affected homeowner civil damages in the sum of not more than

three (3) times the total monthly lot rent demanded by the operator from each such homeowner.

If any owner demands, accepts, receives or retains any payment of rent in excess of the maximum lawful lot rent, as determined under this title, the operators of such park affected by such violation, individually or by class action, may seek relief in a court of appropriate jurisdiction for injunctive relief and/or damages. In any such court proceeding, the prevailing party shall be awarded his reasonable attorney's fees and the court, in its discretion and in addition to any other relief granted or damages awarded, shall be empowered to award to each affected operator civil damages in the sum of not more than three (3) times the total monthly lot rent demanded by the owner from each such operator. (Ord. 1654 (20.10.220), 1993).

20.16.050 Penalties.

Any person, firm, or corporation violating any of the provisions of this title shall be deemed guilty of a misdemeanor and such person shall be deemed guilty of a separate offense for each and every day or portion thereof during which any violation of the provisions of this title is committed, continued or permitted, and upon conviction of any such violation, such person shall be punishable by a fine of not more than five hundred dollars ($500.00), or by imprisonment for not more than six (6) months, or both such fine and imprisonment. (Ord. 1654 (20.10.230), 1993).

APPENDIX C

United States District Court

N.D. California

MHC FINANCING LTD PARTNERSHIP, et al.,
Plaintiffs,
v.
CITY OF SAN RAFAEL, et al.,
Defendants.

CONTEMPO MARIN
HOMEOWNERS ASSOCIATION,
Defendant-Intervenor

No. C 00-3785 VRW.
April 17, 2009.

ORDER FOR ENTRY OF JUDGMENT

In the eight or so years this litigation has been pending, the takings jurisprudence of the United States Supreme Court and the Ninth Circuit has transformed. The market for housing now differs dramatically from that at the inception of this litigation. Before these changes, the extremely able lawyers at bar and the involvement of a renowned mediator were unable to find a resolution. Emotional and political obstacles to a resolution on one side and weighty constitutional issues on the other then worked against a resolution. Current conditions may afford a new opportunity for the parties to achieve a fair and practical outcome consistent with constitutional standards. This order seeks to encourage those efforts.

More than a year ago, on January 29, 2008, the court issued its findings of fact and conclusions of law on claims by MHC Financing ("MHC") that the City of San Rafael' s mobilehome rent and vacancy control ordinance ("Ordinance") effected an unconstitutional taking. Doc #554 ("Findings"). MHC owns the Contempo Marin Mobilehome Park ("Contempo Marin") in San Rafael, California. The Contempo Marin Homeowners Association ("Homeowners Association") defended the Ordinance along with the City of San Rafael ("City"). The court found that the Ordinance effected a regulatory taking and a private taking. Findings at 34, 51. The Homeowners Association and the City now bring separate motions to stay enforcement pending appeal of any judgment (so far none has been entered) based on the court's findings and legal conclusions. Doc ##561, 576.

Although the case presents unsettled issues of takings law, the violation of MHC's constitutional rights seems no less plain to the court now than when it entered its findings and conclusions of law. A stay of relief pending appeal would, therefore, continue in effect a constitutionally infirm ordinance. But invalidating the ordinance as to all affected residents of Contempo Marin may impose a hardship for which they are not directly responsible. It is, after all, the City, not the Contempo Marin residents, that enacted the Ordinance. Rather than enter a judgment that immediately invalidates the Ordinance and then stay enforcement pending appeal to avoid an immediate hardship to Contempo Marin residents, the court will deny a stay but frame the injunctive relief in a manner

that provides for an orderly remedy for the constitutional violation found here. Under terms of the judgment the court frames, the constitutional infirmity of the Ordinance will dissolve gradually, minimizing possible hardships to Contempo Marin residents while still vindicating the constitutional interests at stake.

The judgment to be entered here will gradually phase out the pad rent regulation scheme that the court has found unconstitutional. Existing residents of Contempo Marin will be able to continue to pay pad rentals as if the Ordinance were to remain in effect for a period of ten years. Enforcement of the Ordinance will be immediately enjoined with respect to new residents of Contempo Marin and expire entirely ten years from the date of judgment. During this ten year period, the only "hardship" current residents of Contempo Marin will suffer is the inability to capture the artificial premium in the resale price of their mobilehomes that the Ordinance creates. As this premium represents the unconstitutional taking of MHC's property interest, its denial to Contempo Marin residents deserves little weight in the balance of equities employed to frame the injunctive relief afforded here. The court's reasoning for this result follows.

I

At Contempo Marin, MHC leases plots of land, called "pads" for the purpose of installing a mobilehome on each plot. MHC furnishes and maintains private roads and other community facilities within the park. Findings at 4-5 ¶7. MHC holds legal title to the pads, and pad lessees pay monthly rent to MHC for use of

their respective pads and the facilities and services that MHC provides. Id at 5 ¶9. Pad lessees at Contempo Marin who wish to relocate usually sell their mobilehomes in place to the new resident, and the purchaser — in addition to acquiring the mobilehome — takes over the pad leasehold. Id at 5 ¶8, 8-9 ¶18. The mobilehomes at Contempo Marin are not, in fact, very mobile.

In 1989, the City enacted the Mobilehome Rent Stabilization Ordinance. The 1989 Ordinance imposed rent control for the pad rents and provided that rents could increase only according to a sliding scale tied to an inflation index prescribed in the Ordinance. The mobilehome resale prices were left unregulated. If the change in inflation was five percent or less, the park owner was entitled to increase pad rents by a percentage equal to the change in inflation. But if the change in inflation was greater than five or ten percent, rents could increase only at 75 or 66 percent, respectively, of the change in inflation. Id at 9-10 ¶20. In no year from 1993 to 1999 did the inflation index rise at an annual rate greater than 5 percent. Accordingly, rent increases could essentially keep pace with the inflation benchmark used in the Ordinance. Id at 14 ¶38.

In 1993, the City amended the Ordinance to add "vacancy control." Under vacancy control, any new resident taking over a mobilehome pad lease in Contempo Marin had the right to rent the pad at the same rate as the previous tenant. Thus, after the vacancy control amendment, the park owner could no

longer raise the pad rent charged to a new pad lessee who took over the prior lease. Findings at 10 ¶22.

After the City imposed vacancy control, the then-owner of Contempo Marin sued in state court, alleging that the combination of pad rent control and vacancy control in the amended Ordinance was an unconstitutional taking. The superior court upheld the Ordinance. While on appeal, MHC purchased Contempo Marin. The court of appeal later reversed the superior court judgment on other grounds. Id at 12-13 ¶¶26-33.

In 1999, the City amended the Ordinance yet again. The City replaced the sliding scale formula that provided for graduated pad rent increases depending on the magnitude of inflation with a single formula that limited increases to 75 percent of any change in the inflation index. For that reason, the 1999 amendments imposed an ever-growing gap between the fair market rental value of a mobilehome pad lease and the rent MHC could charge. Id at 14-15 ¶39. The 1999 amendments alone reduced MHC's revenue streams from Contempo Marin and the value of its property by a present value at the time of trial of $10,609,136. Id at 16 ¶42. Prior to the 1999 amendments, it was at least theoretically possible for pad rents to keep up with inflation. The 1999 amendments eliminated that possibility.

The market did not ignore the significant change that the 1999 amendments wrought. Future pad rents at Contempo Marin were depressed because pad rents could not under any circumstance keep up with the general level of inflation as represented by the index used in the Ordinance. Accordingly, in order to obtain

the benefit of lower future rent payments, prospective buyers were able to — and did — pay a higher price to purchase the mobilehome itself from the existing tenant than the value of the mobilehome divorced from the below-market-value pad rental. In this manner, the reduction in rents was "capitalized" into the value of the mobilehome. Thus, the 1999 amendments created an inevitable premium in the resale prices of mobilehomes in Contempo Marin. Findings at 15-16 ¶41.

The only beneficiaries of that premium were the residents of Contempo Marin at the time the 1999 amendments went into effect. Id at 19 ¶52. These residents benefitted from the Ordinance if they continued to reside in Contempo Marin or if they sold their mobilehome plus pad leasehold to a new resident. Because the 1999 amendments did not change the total amount that future tenants would pay to live at Contempo Marin (mobilehome price plus pad rent), the 1999 amendments themselves did not contribute to the availability of low-cost housing in the City, which was a stated objective of the Ordinance. Id at 19 ¶51. Meanwhile, the whole Ordinance reduced MHC's net operating income by 75 percent and reduced the value of the park from $120 million to $23 million. Id at 24-26 ¶¶69-73.

Based on the foregoing findings of fact, the court concluded that the Ordinance as amended in 1999 effected a regulatory taking under the *Penn Central* test (id at 21-34) as well as a private taking under the Public Use Clause of the Fifth Amendment (id at 34-51). The court concluded as a matter of law that the

1999 amendments were not severable from the previous version of the Ordinance. Id at 74-79. Accordingly, the court held that the Ordinance was invalid in its entirety.

After the court issued its order, MHC submitted a proposed form of judgment requesting that the court enjoin the Ordinance effective immediately. The City and the Homeowners Association filed objections (Doc ##555, 556), and the court took the matter under submission. On February 12, 2008, the court requested further briefing by March 14 on the question whether to stay its judgment pending appeal. Doc #558.

On February 20, 2008, before the court entered judgment or issued an injunction, MHC sent the Contempo Marin residents a letter regarding their leases. Doc #564, Exh A. The letter stated that monthly rents would increase to $1,925.00 beginning in March 2008. Id. The letter stated that "Chief Judge Walker's January 29, 2008 Order" is a "binding federal court Order" and thus "the City has no legal authority to enforce the Ordinance." Id.

At the City' s request, the court held a telephone conference on February 22, 2008, to discuss MHC's letter. The court clarified that its order did not invalidate the Ordinance immediately. MHC agreed to refrain from raising its rents until the court ruled on the motion for a stay. The Homeowners Association contends that even after that conference call, MHC persisted in charging its residents $1,925.00 in rent but only demanded payment of current rent amounts, with rent invoices categorizing the difference between the two as "amount in dispute." Doc #569, Exh B. MHC has

thus appeared to communicate to Contempo Marin residents that they are racking up debt by remaining at the park and will be liable for the "amounts in dispute" if MHC wins a final judgment. Id. Pad lessees have reacted predictably.

After the conference call, the parties submitted their memoranda addressing whether enforcement of the court's order should be stayed. Doc ##561, 577, 581. In those memoranda, the City and the Homeowners Association (in the following discussion, the court refers the City and the Homeowners Association individually when appropriate or together as "defendants") challenge the court's findings of fact and conclusions of law. Doc ##561, 577. Defendants claim that because most Contempo Marin residents live on low or fixed incomes, the proposed rent is so high that most residents "will be forced to relocate or be evicted nearly immediately * * * ." Doc ##561 at 3, 577 at 25-27. MHC, on the other hand, is anxious to get out from under an ordinance found to be unconstitutional.

II

The Ninth Circuit reaffirmed recently the standard for granting a stay pending appeal. *See Golden Gate Restaurant Ass'n v City and County of San Francisco*, 512 F3d 1112, 1115-16 (9th Cir 2008). The party requesting a stay must show either (1) "a probability of success on the merits and the possibility of irreparable injury" or (2) that "serious legal questions are raised and that the balance of hardships tips sharply in its favor." *Lopez v Heckler*, 713 F2d 1432, 1435 (9th Cir 1983). These are "two interrelated legal tests" that "represent the outer reaches of a single continuum."

Lopez, 713 F2d at 1435. "[T] he required degree of irreparable harm increases as the probability of success decreases." *NRDC v Winter*, 502 F3d 859, 862 (9th Cir 2007). Lastly, the court should "consider where the public interest lies" as a factor independent of the parties' interests. *Golden Gate Restaurant Ass' n*, 512 F3d at 1116. "The relative hardship to the parties is the critical element in deciding at which point along the continuum a stay is justified." *Lopez*, 713 F2d at 1435.

Defendants' better argument for a stay is not that they have a *strong* likelihood of success on appeal, but that the relative hardships tip in their favor. Defendants argue that Contempo Marin residents may suffer irreparable injuries if the court does not grant a stay because an injunction against enforcement of the Ordinance will cause MHC to increase pad rents, forcing some Contempo Marin residents to move. Doc ##561 at 12-12, 577 at 25-27. The court will, therefore, analyze defendants' motions under the "serious legal questions" test.

As the following demonstrates, there are serious hardships on both sides. While Contempo Marin residents face the prospect of a sudden increase in their pad rents, MHC has long been deprived of its significant property interests, and a stay will prolong the taking MHC has suffered. The appropriateness of a stay turns on the weight of these hardships. Central to consideration of the balance of hardships here is that the party primarily responsible for creating MHC's hardship — namely, the City — will not immediately suffer any hardship.

The party seeking a stay "must demonstrate that serious legal questions are raised and that the balance of hardships tips sharply in its favor." *Lopez*, 713 F2d at 1435. Defendants can demonstrate a "serious legal question" by showing that they have a "fair chance of success" on appeal. *National Wildlife Federation v Coston*, 773 F2d 1513, 1517 (9th Cir 1985). Serious questions are "substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation." *Republic of Philippines v Marcos*, 862 F2d 1355, 1362 (9th Cir 1988). "For purposes of injunctive relief, 'serious questions' refers to questions which cannot be resolved one way or the other at the hearing on the injunction and as to which the court perceives a need to preserve the status quo lest one side prevent resolution of the questions or execution of any judgment by altering the status quo." *Gilder v PGA Tour, Inc*, 936 F2d 417, 422 (9th Cir 1991) (quotation marks omitted).

A

Defendants challenge the court's finding of a private taking. Doc ##561 at 10-11, 577 at 22-23. In its findings of fact and conclusions of law, the court determined that the "public purposes" the City asserted for the Ordinance — protecting homeowner equity, creating affordable housing and protecting fixed-income residents — were "palpably without reasonable foundation" and were mere "pretext[s]" that masked a private taking intended to enrich the Contempo Marin residents. Findings at 49-51 ¶¶152-57; *see Kelo v City of New London*, 545 US 469, 478 (2005).

In their motions for a stay, defendants argue the court's finding of a private taking is in tension with its conclusion that the Ordinance survives rationality review under the Due Process Clause. Doc ##561 at 11, 577 at 22-23. Although the court found the Ordinance operated so far afield from its stated purposes as to be pretextual, the court also found that the Ordinance was rationally related to its stated purposes. The court held that the Ordinance was permissible under the Due Process Clause because "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." Findings at 54 ¶169, 56 ¶171, quoting *Levald, Inc v City of Palm Desert*, 998 F2d 680, 690 (9th Cir 1993). Defendants argue that if the Ordinance is rationally related to its stated public welfare goals as required by due process, then those same public welfare goals cannot be pretextual . Doc ##561 at 10-11, 577 at 22-23; *see also Kelo*, 545 US at 490-92 (Kennedy, J, concurring), citing *Cleburne v Cleburne Living Center, Inc*, 473 US 432, 446-47, 450 (1985). Defendants misapprehend the court's findings and the governing test for a stay.

In the context of a private taking claim, neither the Supreme Court nor the Ninth Circuit has addressed a rent control ordinance that purports to reduce rents but creates instead an unavoidable one-time premium. Other cases raising taking and due process claims are distinguishable. Mobilehomes at parks like Contempo Marin are highly unusual because new buyers obtain a unitary ownership interest in a divided asset. Buyers obtain ownership of the mobilehome unit and a pad

leasehold interest, but negotiate one price with the mobilehome owner and pad lessee. Buyers do not negotiate with or arrive at a pad rental price with MHC, the pad lessor. The price paid to the mobilehome owner incorporates the market value of the mobilehome unit and the value of any premium inherent in the depressed pad rents resulting from the Ordinance. Even though MHC is not a party to these negotiations, its interests are nonetheless affected. Price regulation in this context is rare and, although there have been a number of cases involving mobilehome pad rent regulation or somewhat analogous regulation, no definitive guidance has emerged.

Previous judicial attempts to address the problem have failed, leaving the question unsettled. The Supreme Court encountered the "premium" issue in *Yee v City of Escondido*, 503 US 519 (1992), but that ruling is not helpful here because plaintiffs in that case had raised a *physical* taking claim. *Yee* stated specifically that the case might have turned out differently had the court granted certiorari on the regulatory taking claim. 503 US at 530, 533.

In *Richardson v City and County of Honolulu*, 124 F3d 1150 (9th Cir 1997), the Ninth Circuit picked up where *Yee* left off. The court found that a rent control ordinance that created a premium caused an unconstitutional regulatory taking. *Richardson*, 124 F3d at 1165-66. That ruling does not apply here because the court relied on the now-defunct "substantially advances" test, which the Supreme Court spurned in *Lingle v Chevron USA, Inc*, 544 US 528 (2005).

Lingle addressed yet another rent control ordinance that did not reduce rents but instead created a premium. 544 US at 534-36. The plaintiff in *Lingle* — like the plaintiff in *Richardson* — claimed that the ordinance did not "substantially advance" a legitimate public interest and therefore effected a regulatory taking. The Court held that the "substantially advances" test could not apply to a regulatory taking claim, and the Court reversed the district court's judgment that the ordinance was unconstitutional. 544 US at 548. Instead, the Court held that the "substantially advances" theory is "an inquiry in the nature of a due process" test. 544 US at 540, 542. Justice Kennedy's concurrence emphasized that even though plaintiff had not made out a regulatory taking claim, the ordinance might "be so arbitrary or irrational as to violate due process" if it "fail[s] * * * to accomplish a stated or obvious objective * * *." 544 US at 548-49 (Kennedy concurring). *See also Kelo*, 545 US at 490-92 (Kennedy concurring) (arguing the same point in the context of public use).

Each of these cases tried to address the type of ordinance encountered here. But each court never made it past the preliminary step of clarifying the applicable legal test. None of the cases determined whether a rent control ordinance like the one at bar effects a private taking. The Ordinance creates an inevitable premium attributable to one property interest and transfers that premium to someone else. In doing so, the Ordinance shuts out from participation in the transaction the owner who loses the premium — in this case, MHC. The validity of such an Ordinance

remains unsettled and presents a serious legal question on appeal. The fact that a city council may rationally have thought the Ordinance advanced its stated objectives should not rescue an enactment that does no such thing. The rational basis test does not insulate unsound public policy from attack. The rational basis test is, instead, a principle of judicial restraint — courts' authority cannot and should not be invoked every time elected officials enact or enforce some unwise or perverse statute, ordinance or regulation. *Williamson v Lee Optical of Oklahoma, Inc*, 348 US 483, 488 ("The day is gone when this Court uses the Due Process Clause * * * to strike down state laws * * * because they may be unwise, improvident, or out of harmony with a particular school of thought."). But the judicial restraint embodied in the rational basis test does not warrant judicial indifference to the violation of important constitutional limitations.

B

Defendants also challenge the court's finding of a *Penn Central* regulatory taking. Doc ##561 at 7, 577 at 23. After *Lingle*, the Homeowners Association contends, a court reviewing a regulatory taking claim may not substitute its own findings about the reasonableness of an ordinance for the findings of a legislative body. Doc #589 at 6. Rather than consider the Ordinance's reasonableness, according to the Homeowners Association, a regulatory taking claim focuses on "the *magnitude or character of the burden* a particular regulation imposes upon private property rights." 544 US at 542 (emphasis in original). Accordingly, so this argument goes, the dearth of authority on "premium" rent control ordinances does not affect the court's regulatory taking analysis because the crucial inquiry — the magnutide of MHC's harm — is more economic and algebraic than legal. Only the amount of damage is important. All the considerations undergirding the private taking analysis — the effectiveness of the Ordinance, the motivations of the City Council, the peculiar unitary market for housing at Contempo Marin — are irrelevant under this view.

The court's finding that the Ordinance effects a *Penn Central* regulatory taking included findings of fact as well as conclusions of law. The court found that the 1999 amendments alone reduced MHC's revenue streams from Contempo Marin and the value of its property by $10,609,136. Findings at 16 ¶42. The Ordinance as a whole reduced the value of MHC's land from approximately $120 million to $23 million. Id at

25-26 ¶¶72-73. Based on those factual findings, the court concluded that the Ordinance was functionally equivalent to a physical taking of all or an overwhelming percentage of the value of MHC's land. Id at 27 ¶80.

"Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous." FRCP 52(a). The court of appeals should "accept [this] court's findings of fact unless upon review [it is] left with the definite and firm conviction that a mistake has been committed." *United States v Doe*, 155 F3d 1070, 1074 (9th Cir 1998). Under clearly erroneous review, this court's findings of fact will likely be upheld.

This court's conclusion that the above facts constitute a regulatory taking is a mixed finding of law and fact because it involves a determination whether the reduction in value of MHC's land satisfies an undisputed rule of law. Mixed questions of law and fact are generally reviewed de novo. *Diamond v City of Taft*, 215 F3d 1052, 1055 (9th Cir 2000). This is even more true when the mixed question involves constitutional rights. *United States v City of Spokane*, 918 F2d 84, 86 (9th Cir 1990).

The City argues that the court misapplied the *Penn Central* "economic impact analysis." Doc #577 at 23. The City asserts that the court erred by considering the reduction in value caused by the *entire* Ordinance, instead of solely the reduction caused by the 1999 amendments. Only the 1999 amendments, according to the City, not the Ordinance as a whole, failed to advance the City's asserted public purposes. In

essence, the City argues that prior to the 1999 amendments, the Ordinance was constitutional and therefore any harm to MHC's constitutional rights did not accrue until 1999. Doc #577 at 23.

If the court looks to the entire Ordinance in assessing the reduction in value, the argument goes, MHC realizes a windfall, benefitting from the invalidation of those portions of the Ordinance that were well within the City's regulatory powers and well within MHC's reasonable expectations at the time it purchased the park. See Doc #561 at 9. Had the court calculated the reduction in value caused by the 1999 amendments only, the City contends the court would not have found a regulatory taking because the reduction in value would have been approximately $10 million rather than $97 million. Doc #577 at 23.

MHC responds that the court was correct to calculate the effect of the Ordinance as a whole rather than only the effect of the 1999 amendments. Doc #596 at 11. MHC asserts that calculating the effect of the entire Ordinance "is especially appropriate where, as here, the 1999 amendments are not severable from the rest of the regulation. Under the City's theory, governments could immunize a law from a *Penn Central* claim by repeatedly amending the law so that the incremental economic impact of any one amendment, standing alone, is insufficient to give rise to a taking * * * ." Id.

The only mentions in the Findings of any legally significant distinction between the entire Ordinance and the 1999 amendments were in the court's analysis of the statute of limitations (Findings at 66-69) and the

court's analysis of severability (Findings at 74-79). Neither of those analyses is relevant to the economic impact test the City posits.

The court's statute of limitations discussion is only indirectly relevant to the economic impact test, and even if it were directly relevant, it would not provide a clear answer. For the purposes of the statute of limitations, the court found that the 1999 amendments "substantially altered" "the operation of the Ordinance" by causing "a fresh injury" to MHC's property rights. Findings at 68-69. At most, the court's conclusion would support the City only to the extent that it suggests the 1999 amendments caused a distinct injury which may have pushed the preexisting Ordinance from constitutional into unconstitutional terrain, and thus MHC's harm equals the amount of the incremental injury only.

The court, however, further stated in the context of the statute of limitations that MHC could still challenge the entire Ordinance (not just the 1999 amendments) because "[t]he constitutionality of an ordinance can only be determined by evaluating the totality of its provisions and effects" and because the 1999 amendments could not be "evaluated in isolation." Id at 69 ¶37, citing *Richards v United States*, 369 US 1, 11 (1962). MHC reads that statement beyond the statute of limitations context, arguing that the same principle must hold true for the purposes of the economic impact test. Doc #596 at 11. This reading stretches the court's statement too far. The court's holding implies only that the 1999 amendments changed "the totality" of the Ordinance and that the new "totality of the amended

Ordinance" fell within the limitations period and did not bar MHC's suit. Findings at 69.

The court's severability analysis does not settle the *Penn Central* question. See id at 74-79. For the purposes of severability, the court concluded that the 1999 amendments were not severable from the rest of the Ordinance because "[e]xcision of the 75 percent language (introduced by the amendments) renders the Ordinance as a whole essentially meaningless." Findings at 76. MHC argues that holding supports applying the economic impact test to the reduction in value caused by the Ordinance as a whole. Doc #596 at 21-22. The court made its severability finding months after it had determined that the Ordinance effected a regulatory taking. Moreover, severability might present its own serious legal question.

But more fundamentally, California state law on severability has no relation to the *Penn Central* analysis. First, a finding that the unconstitutional 1999 amendments are not severable means that the full Ordinance *may not be enforced*; it does not imply that the Ordinance is otherwise constitutional or not. Second, merely because the severability analysis and the economic impact analysis both might mention carving up a statute does not mean that one rule of law controls the other. The court's conclusion whether the 1999 amendments are grammatically, functionally and volitionally severable from the predecessor Ordinance says nothing about whether the City exceeded its authority to provide for its residents' general welfare.

Overall, the court's conclusions on the statute of limitations and severability do not address a quite

different question: how to measure whether a property regulation "goes too far" under the Fifth Amendment. *Pennsylvania Coal Co v Mahon*, 260 US 393, 415 (1922). There would be no logical inconsistency in holding that the amendments are not severable, or that the statute of limitations has not run, yet the economic impact on MHC's land should be calculated in terms of the difference between the unconstitutional Ordinance and the milder predecessor in force when MHC purchased the park. Accordingly, the *Penn Central* issue here — whether to apply the economic impact test to the entire Ordinance or to the amendments that eliminated the sliding scale adjustments tied to inflation — is difficult and unsettled, and the court concedes fair grounds for disagreement. The court's regulatory taking holding presents a serious legal question, but this is a consideration that can more properly be considered in framing the terms of the injunction and declaratory relief awarded MHC than in whether any such relief should be stayed or held in abeyance pending appeal.

C

The City has filed a notice of the Ninth Circuit' s Nov 25, 2008 decision in *Equity Lifestyle Property, Inc v County of San Luis Obispo, et al*, 548 F3d 1184 (Doc #605), upholding the district court's dismissal of a mobilehome park owner's taking challenge to a local rent control ordinance as unripe. Id at *4-7. The Ninth Circuit held that California's administrative procedure, known as a *Kavanau* adjustment, providing for adjustment of future rents to compensate parties injured by a government taking is not futile per se for

failure to provide adequate compensation and that the claim at issue was therefore unripe under *Williamson County Regional Planning Commission v Hamilton Bank of Johnson City*, 473 US 172 (1984), because the mobilehome park owner had failed to pursue a *Kavanau* adjustment. *Equity Lifestyle Property* does not affect the court's determination that MHC's claims here do not fail for unripeness. See Findings at 58-66. Here, unlike in *Equity Lifestyle Property*, the court has determined, based on the long and tortured relationship between MHC and the City, that requiring a *Kavanau* adjustment *in this case* would be futile.

III

Given the novel questions presented in the context of unsettled principles of law, the court turns to the balance of hardships that immediate invalidation of the Ordinance would create.

The City, of course, is the party whose improvident decisions created this unfortunate situation. Any claim of hardship to the City itself would likely not move the court. But on this motion to stay enjoinment of the Ordinance and modify the relief awarded, the City seeks to piggyback on the interests claimed by the Contempo Marin residents, most of whom are embroiled in this litigation through no fault of their own. In crafting an equitable remedy, the court must consider the hardship to them.

Defendants contend that if the court does not stay its order pending appeal, then MHC will raise rents to two or three times the current amounts, the Contempo Marin residents will not be able to "pay the higher rent

while they await the outcome of the appellate process" and "there will be a mass exodus from the park and it will be impossible to restore the status quo ante in the event of a reversal." Doc #561 at 3-4. The City and the Homeowners Association have submitted 233 declarations from park residents claiming that effect. Doc #562. These form declarations include many handwritten comments from the declarants, including: "[The proposed rent of $1,925.00] is *more* than my monthly income" (Doc #562, Exh A (Candace Clark Decl)); "I am a 73 -year-old widow living on limited fixed income" (Doc #562, Exh A (Ann Plant Decl)); "I am on fixed income, I am unable to work" (Doc #562, Exh A (Paula Paganini Decl)); and "We will not be able to pay this large amount of lot rent along with our mortgage. Our home is all we have! We also care for our elderly parent who also lives in Contempo" (Doc #562, Exh A (Jayne & Brian Johnson Decl)). The Homeowners Association emphasizes that the residents' harm is irreversible and includes many non-commensurable harms such as children changing schools. Doc #592 at 5. These declarations have the earmarks of an orchestrated and rather maudlin appeal to sympathy. But the court does not doubt that a substantial pad rent increase could work a palpable hardship on Contempo Marin residents.

MHC rejects the defendants' concerns as "speculative," "hearsay" and "self-serving." Doc #596 at 19. MHC redescribes the residents' harm as merely the "elimination" of a "subsid[y] in the form of below market rents." Doc ##596 at 17, 583 at 5. MHC,

understandably, also points to its own constitutional injury as irreparable harm. Doc #596 at 18.

Although the court concludes that the regulation goes too far in this case, the situation of the Contempo Marin residents nonetheless calls for fashioning a phased remedy. Not all of the current Contempo Marin residents have benefitted from the premium that the 1999 amendments created. The premium benefitted only those pad lessees living in Contempo Marin when the amendments became effective. New lessees have in effect already paid for the privilege of paying below-market rent. Because these post-1999 Contempo Marin buyers presumably relied on the continued validity of the Ordinance, to subject them immediately to higher rents would be unjust in that they would be required to pay twice the premium created by the Ordinance — once at the time of buying a Contempo Marin mobilehome and then again through higher monthly pad rentals. It is simply impossible as a practical matter to claw back from pre-1999 residents any premium that they captured through sales of their mobilehomes.

In this case, the balance of hardships tips in favor of a remedy that accommodates the interests of the mobilehome residents as well as MHC. As the court adverted at the outset, present conditions in the housing market may very well mean that an immediate and total striking down of the Ordinance would not affect Contempo Marin residents as much as they fear and as much as defendants would have the court believe. But the court's remedy is designed to buffer

Contempo Marin residents from the large, sudden rent increases they fear.

As discussed above, at the time of trial, the operation of the whole Ordinance reduced MHC's net operating income by 75 percent and has reduced the value of the park from $120 million to $23 million. Every month that the Ordinance is in effect means substantial lost revenue for MHC unless the economics of the situation have changed very dramatically.

In crafting an appropriate remedy, the court must consider "where the public interest lies." *Golden Gate Restaurant Ass'n*, 512 F3d at 1116. It is difficult to assess the public interest without assuming the soundness of the court's Findings. If the Ordinance is unconstitutional, then enforcing an unconstitutional law does not serve the public interest. And if the Ordinance is constitutional, then enjoining it serves no public purpose. Because the public interest does not tip the scale discernibly in either side's favor, consideration of the public interest does not affect the court's analysis.

In this situation, there is no perfect remedy. But the most equitable remedy is to fashion an injunction that allows current residents to continue for a time their leases at pad rents regulated by the Ordinance. These are, of course, the below-market rents that the post-1999 residents paid for in the form of a premium on the price of their mobilehomes if they moved in after the effectiveness of the Ordinance. Allowing continued enforcement of the Ordinance as to current residents will avoid the plight that defendants so dramatically script. When a current Contempo Marin resident transfers his leasehold to a new resident upon the sale

of his mobilehome or by some other means, however, the balance of hardships tips sharply in favor of MHC and enjoining the Ordinance. Hence, the Ordinance shall be enjoined as to the next resident and any future resident, and those residents shall pay rates set by MHC (in the absence of any new and constitutional regulations enacted by the City).

The court realizes, of course, that enjoining the Ordinance as to future residents will significantly reduce the premium current residents will collect from new residents for the ability to pay below-market pad rents. But collecting that premium was never a legal right of the current residents. Moreover, the premium represents the net present value of expected future pad rent discounts. Consequently, the adjustment to the premium based on the remedy the court fashions here will not be the first change to the premium — the premium has likely been changing during all stages of this litigation. For example, when the court issued its findings of fact and conclusions of law on January 29, 2008 that the Ordinance was unconstitutional, the expected value of future discounts likely dropped significantly because the chances that Contempo Marin mobilehome owners would be able to collect that premium in the future plunged. But most importantly, the purpose of the relief awarded by the court is to remedy the constitutional violation in a manner that does not impose undue hardships on Contempo Marin residents and is not unwarrantedly disruptive of the parties' expectations. Given the unusual factual context and the changed law, an invalidation of the Ordinance as to new residents of Contempo Marin while

maintaining a lengthy status quo for current residents allows for an orderly transition.

One potential pitfall of a remedy that allows MHC to charge one price to current Contempo Marin residents and a different price to future residents is that the difference in the prices could produce inefficiencies by causing the residents to prolong their residency at Contempo Marin. Diminished turnover, of course, would further impose on MHC the hardship inherent in the Ordinance. An end date to effectiveness of the Ordinance is, therefore, appropriate. To mitigate the unintended consequences of price differentials between current and future residents, the court will delay complete invalidation of the Ordinance to a date ten years from entry of judgment. Ten years is an appropriate period for the Ordinance to sunset because Contempo Marin lots are turned over, on average, every ten years. Doc ## 607, 608 (parties' submissions pointing to multiple sources in the record indicating that annual turnover is approximately ten percent and average tenancy is approximately ten years). Because ten years from now the average current resident would have sold his or her unit if there were no pad rent price differential between current and future residents, invalidating the Ordinance as to all residents at that time reduces incentives for strategic behavior by current residents.

An alternative might be to enjoin enforcement of the Ordinance only as to Contempo Marin residents who bought their mobilehomes after enactment of the 1999 amendments and who, therefore, paid the premium created by those amendments. As, however,

those current residents who resided at Contempo Marin before the 1999 amendments are, in all likelihood, among the older residents of Contempo Marin, setting a definitive sunset date for the Ordinance would appear to be both more practical and more equitable.

IV

The court is well aware of the potential hardships that the Contempo Marin tenants will face if the Ordinance is immediately enjoined in full. The court emphasizes that it has considerable discretion in crafting a final injunction and has attempted to do so in a manner that vindicates MHC's constitutional interests without undue hardship to current Contempo Marin residents.

Accordingly, the court DENIES the Homeowners Association's and the city's motions for a stay of the January 29, 2008 order (Doc ##561, 576) and will enter judgment accordingly. MHC is DIRECTED to submit a proposed form of judgment whereby enforcement of the Ordinance is enjoined as to pad lessees of Contempo Marin who come into possession after the date of judgment so that all current Contempo Marin pad lessees shall be allowed to continue their leases at rents regulated by the Ordinance. When a current Contempo Marin pad lessee transfers his leasehold to a new resident upon the sale of the accompanying mobilehome, the Ordinance shall be enjoined as to the next resident and any future residents. The Ordinance shall be enjoined as to all residents ten years from entry of judgment. No bond shall be required.

IT IS SO ORDERED.

/s/
VAUGHN R WALKER
United States District Chief Judge

APPENDIX D

United States District Court,

N.D. California.

MHC FINANCING LTD PARTNERSHIP, et al.,
Plaintiff,
v.
CITY OF SAN RAFAEL, et al.,
Defendant.

CONTEMPO MARIN
HOMEOWNERS ASSOCIATION,
Defendant-Intervenor

No. C 00-3785 VRW.
June 30, 2009.

JUDGMENT IN A CIVIL CASE

This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED, ADJUDGED AND DECREED that:

1. Judgment is entered in favor of Plaintiffs and against Defendants on Plaintiff's first cause of action. The Court permanently enjoins Defendant from enforcing or applying Title 20 of the San Rafael Municipal Code (SRMC), the Mobilehome Rent Stabilization law or any part thereof (collectively the Ordinance), as set forth herein. This judgment will gradually phase out the pad rent regulation scheme that the court has found

unconstitutional. Existing residents of Contempo Marin will be able to continue to pay rentals if the Ordinance were to remain in effect for a period of ten years. Enforcement of the Ordinance is immediately enjoined with respect to new residents of Contempo Marin and will expire entirely ten years from the date of this Judgment. Enforcement of the Ordinance is enjoined as to pad lessees of Contempo Marin who come into possession after the date of judgment so that all current Contempo Marin pad lessees shall be allowed to continue their leases at rents regulated by the Ordinance. When a current Contempo Marin pad lessee transfers his leasehold to a new resident upon the sale of the accompanying mobilehome, the Ordinance shall be enjoined as to the next resident and any future resident. The Ordinance shall be enjoined as to all residents ten years from entry of judgment. No bond shall be required.

2. Judgment is entered in favor of Plaintiffs and against Defendant on MHC's second cause of action. Pursuant to the Declaratory Judgments Act, 28 U.S.C. § 2201, et seq., the Ordinance is hereby declared (a) unconstitutional and invalid as a private taking both on its face and as applied to Plaintiffs or any of their affiliates and/or to the Contempo Marin Mobilehome Park (the Park) in San Rafael, and (b) unconstitutional and invalid as applied to Plaintiffs or any of their affiliates and/or to the Park in San Rafael as an uncompensated regulatory taking under the standards set forth in *Penn Central Transportation Co. v. New York*, 438 U.S. 104 (1979), all in violation of the Takings Clause of the Fifth Amendment to the United States Constitu-

tion as applied to the states through the Fourteenth Amendment and in violation of 42 U.S.C. § 1983. The remedy for the Second Cause of Action is set forth in paragraph one of this Final Judgment.

3. Judgment is entered in favor of Defendant and against Plaintiffs on MHC's fourth and seventh causes of action. Plaintiffs shall recover nothing on Plaintiffs' third, fourth and seventh causes of action.

4. Pursuant to its January 27, 2006 Order, which shall be incorporated herein by reference, the Court dismisses Plaintiffs' fifth and sixth causes of action.

5. This Court reserves jurisdiction to enter a further judgment or Order with respect to attorneys fees and costs in conformity with its Order of April 17, 2009.

6. Without affecting the finality of this Final Judgment in any way, the Court hereby retains continuing jurisdiction over enforcement of this Final Judgment and over all parties for the sole purpose of construing and enforcing this Final Judgment.

Dated: June 30, 2009 Richard W. Wieking, Clerk

By: Cora Klein
Deputy Clerk

APPENDIX E

United States Court of Appeals

Ninth Circuit

MHC FINANCING LIMITED PARTNERSHIP, an Illinois limited partnership; Grapeland Vistas, Inc., a California corporation, Plaintiffs-Appellants,

v.

CITY OF SAN RAFAEL, a municipal corporation; Contempo Marin Homeowners Association, a California corporation, Defendants-Appellees.

MHC Financing Limited Partnership, an Illinois limited partnership; Grapeland Vista, Inc., an Illinois corporation, Plaintiffs-Appellees,

v.

City of San Rafael, Defendant-Appellant,

and

Contempo Marin Homeowners Association, Defendant-Intervenor.

MHC Financing Limited Partnership, an Illinois limited partnership; Grapeland Vista, Inc., an Illinois corporation, Plaintiffs-Appellees,

v.

City of San Rafael, Defendant-Appellant,

Contempo Marin Homeowners Association, Defendant-Intervenor-Appellee.

MHC Financing Limited Partnership, an Illinois limited partnership; Grapeland Vista, Inc., an Illinois corporation, Plaintiffs-Appellees,

v.

City of San Rafael, Defendant,

and

Contempo Marin Homeowners Association,
Defendant-Intervenor-Appellant.
MHC Financing Limited Partnership, an Illinois limited partnership; Grapeland Vista, 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.

Nos. 07-15982, 09-16447, 09-16451, 09-16612, 09-16613.

Filed June 3, 2013.

Before: FARRIS, THOMAS, and N.R. SMITH, Circuit Judges.

ORDER

Plaintiffs-Appellees' petition for panel rehearing is DENIED. The full court has been advised of the petition for rehearing en banc and no judge of the court requested a vote on whether to rehear the mater. Plaintiff-Appellees' pectin for rehearing en banc is DENIED.

Defendant-Appellant's petition for panel rehearing is DENIED.

Defendants-Appellants' emergency motion for stay of injunction or immediate issuance of mandate is DENIED as moot.

APPENDIX F

ORDINANCE NO. 1644

AN ORDINANCE OF THE CITY OF SAN RAFAEL AMENDING ORDINANCE NO. 1584 ENTITLED "MOBILEHOME RENT STABILIZATION ORDINANCE" TO ADD NOTICE REQUIREMENTS, REVISE §20.04.040 TO INCLUDE VACANCY CONTROL AND FREEZE PROVISIONS, ADD BUYERS RIGHTS AND PROHIBIT PASS-THROUGH CHARGES

THE COUNCIL OF THE CITY Of SAN RAFAEL DOES ORDAIN AS FOLLOWS:

20.01.010. Findings.

The City Council of the City of San Rafael hereby finds as follows:

A. There is presently within the city of San Rafael and the surrounding areas, a shortage of lots for the placement of mobilehomes.

B. Mobilehomes presently constitute an important source of housing for persons of low and moderate income.

C. A large number of persons living in mobilehomes are elderly, some of whom live on small fixed incomes. These persons may expend a substantial portion of their income on rent and may not be able to afford other housing within the City of San Rafael.

D. There is an extremely low vacancy rate in mobilehome parks within the City, with no lots presently

available in some or all of the mobilehome parks within the City.

E. Rents for lots within mobilehome parks have, in the few years preceding adoption of this ordinance by the City, increased substantially, in parks within the City and other areas of the State.

F. Homeowners residing in mobilehome parks have very limited mobility because it is difficult and costly to move mobilehomes; therefore, such Homeowners are forced to accept and pay substantially increased rents.

G. There is a potential for damage while moving mobilehomes from one site to another and a considerable amount of cost for landscaping, awning installations, and site preparation after such a move.

H. The San Rafael General Plan 2000 Housing Policy H-8 recommends maintaining the City's existing stock of lower cost units of which the Contempo Marin Mobilehome Park is an example.

I. Owners and/or Operators of mobilehome parks provide an important housing source for residents of the City of San Rafael. Unduly restrictive rent review ordinances can operate to discourage the establishment of new and the expansion of existing mobilehome parks in the City; to encourage owners to convert their mobilehome parks to other uses; and adversely affect the maintenance and other services offered by mobilehome parks, thereby exacerbating the shortage of mobilehome lots and the quality of life in mobilehome parks.

J. It is the purpose of this ordinance to establish a speedy and efficient method of reviewing rent increases

in mobilehome parks to protect Homeowners from arbitrary, capricious, or unreasonable rent increases while insuring Owners and/or Operators and investors a fair and reasonable return and encouraging competition in the provision of mobilehome lots.

K. Vacancy Control.

WHEREAS, the initial Mobilehome Rent Stabilization Ordinance, No. 1564, contained vacancy control provisions at its first reading, and

WHEREAS, said ordinance was thereafter revised to exempt from coverage space rent or space rent increases upon the transfer of ownership of a mobilehome where the mobilehome remains in the park, sometimes referred to as "Vacancy Decontrol", and

WHEREAS, said revisions were made in response to the decision of the United States Court of Appeal for the Ninth Circuit in *Hall v. City of Barbara*, and

WHEREAS, the decision of the United States Supreme Court in *Yee v. Escondido* effectively overruled *Hall v. City of Santa Barbara*, and the *Yee* opinion found that vacancy control of rents on in-place transfers of mobilehomes does not constitute a physical taking of property without just compensation, and

WHEREAS, the Council finds that the City's policy to continue rent control protection for all mobilehome parks in the City, has proven useful in stabilizing rent in mobilehome parks; and

WHEREAS, establishment of rent regulations on spaces where ownership of the mobilehome is

transferred but the mobilehome remains, sometimes referred to as "vacancy control", is an important part of rent control policy as it protects mobilehome owners from excessive space rent increases and permits sales of mobilehomes without "unconscionable" rent increases to the new owner; and

WHEREAS, rent control regulations, including vacancy control can assist in protecting affordable housing in combination with City programs and actions to help provide a variety of housing types within a range of costs affordable to the low and very low income households; and

WHEREAS, a significant number of residents have become residents following the effective date of Ordinance No. 1564 on October 16, 1989, and were required to pay a rental rate substantially higher than comparable spaces, and

WHEREAS, many residents of such spaces are senior citizens on fixed incomes and have been forced to pay unnecessarily high rents and/or have been constrained in their ability to sell their mobilehomes.

WHEREAS, this City Council desires to enact a measure that would regulate rent increases upon in-place transfers of mobilehomes.

20.01.020. Chapter 20 of the San Rafael Municipal Code is hereby enacted to read as follows:

CHAPTER 20

MOBILEHOME RENT
STABILIZATION ORDINANE

20.02.020. Definitions.

A. "Arbitration" is a process much like a trial where the arbitrator listens to both sides and makes a decision (called an award) for the disputing parties.

B. "Capital improvements" means those new improvements which directly and primarily benefit and serve the existing mobilehome park Homeowners by materially adding to the value of the mobilehome park, appreciably prolonging its useful life, or adapting it to new uses, and which are required to be amortized over the useful life of the improvements pursuant to the provisions of the Internal Revenue Code and the regulations issued pursuant thereto. "Capital improvements costs" shall mean all costs reasonably and necessarily relaxed to the planning, engineering and construction of capital improvements and shall include debt service costs, if any, incurred as a direct result of the capital improvement.

C. "Capital replacement" means the substitution, replacement or reconstruction of a piece of equipment, machinery, streets, sidewalks, utility lines, landscaping, structures or part thereof of a value of five thousand dollars ($5,000.00) or more which materially benefits and adds value to the mobilehome park. Capital replacement costs shall mean all costs reasonably and necessarily related to the planning, engineering and construction of capital replacement and shall include debt service costs, if any, incurred as a direct result of the capital replacement.

D. "Debt service costs" means the periodic payment or payments due under any security or financing device which is applicable to the mobilehome park including any fees, commissions, or other charges incurred in obtaining such financing.

E. "Representative" means a person appointed in writing by an Owner, an Operator, a Homeowner, or a group of Homeowners and authorized to represent the interest of, negotiate on behalf of, and bind the appointing party.

F. "Filing" means actual receipt of the item being filed by the person designated in this chapter to receive the item, or by his or her designee.

G. "Maintenance and operation costs" means all expenses, exclusive of costs of debt service, costs of capital improvements, and costs of capital replacement, incurred in the operation and maintenance of the mobilehome park, including but not limited to: real estate taxes, business taxes and fees (including fees payable by landlords under this chapter), insurance, sewer service charges, utilities, janitorial services, professional property management fees, pool maintenance, exterior building and grounds maintenance, supplies, equipment, refuse removal, and security services or systems.

H. "Mediation" is a voluntary process by which disputing parties come together with a professionally trained mediator who helps them clarify their differences and design their own agreement.

I. "Mobilehome" means a structure as defined in Section 789.3 of the Civil Code as follows:

"Mobilehome" is a structure designed for human habitation and for being moved on a street or highway under permit pursuant to Section 35790 of the Vehicle Code. Mobilehome *includes a manufactured home, as defined in Section 18007 of the Health and Safety Code, and a mobilehome, as defined in Section 18008 of the*

Health and Safety Code, but does not include a recreational vehicle, as defined in Section 799.24 of this code and Section 18010 of the Health and Safety Code or a commercial coach as defined in Section 18001.8 of the Health and Safety Code.

J. "Mobilehome Owner" or "Homeowner" means any person legally occupying a mobilehome dwelling unit pursuant to ownership thereof within a mobilehome park and holding a rental or lease agreement with the park owner.

K. "Operator" means the Owner, Operator, or property manager or a mobilehome park within the City of San Rafael.

L. "Owner" means the Owner or lessor of real property used for a mobilehome park within the City of San Rafael.

M. "Rent" means the consideration, including any bonus, benefits or gratuity, demanded or received in connection with the use and occupancy of a mobilehome lot in a mobilehome park, including services and amenities, and for the use of Real Property used for the operation of a mobilehome park, but exclusive of any amounts paid for the use of the mobilehome dwelling unit.

N. "Rent increase" means any additional rent demanded of or paid by a Homeowner for a rental lot and related amenities, including any reduction or elimination of amenities without a corresponding reduction in the monies demanded or paid for rent, and any additional rent demanded of or paid by an Operator for rental of real property used for the operation of a mobilehome park.

O. "Rental lot" means a lot rented in a mobilehome park or offered for rent in the City of San Rafael for the purpose of occupancy by a mobilehome with all services connected with the use of occupancy thereof.

P. "Services" means those facilities which enhance the use of the rental lot, including, but not limited to, repairs, replacement, maintenance, painting, heat, hot and cold water, utilities, security devices, laundry facilities and privileges, janitorial service, refuse removal, telephone service, and meeting, recreational, and other facilities in common areas of the mobilehome park in which the lots are located.

20.03.030. Applicability.

The provisions of this chapter apply only to mobilehome parks which contain mobilehomes as defined in this ordinance and to the mobilehomes within such parks.

20.03.040. Notice Requirements.

A park owner claiming an exemption from this ordinance based upon Civil Code section 798.17 shall provide the following notice to the person and in the manner specified in this section.

A notice which conforms to the following language and printed in bold capital letters of the same type size as the largest type size used in the rental agreement shall be presented to the resident or prospective resident at the time of presentation of a rental agreement creating a tenancy with a term greater than twelve (12) months:

IMPORTAMT NOTICE TO HOMEOWNER REGARDING THE PROPOSED RENTAL

AGREEMENT FOR _____ MOBILEHOME PARK. PLEASE TAKE NOTICE THAT THIS RENTAL AGREEMENT CREATES A TENANCY WITH A TERM IN EXCESS OF TWELVE MONTHS. BY SIGNING THIS RENTAL AGREEMENT, YOU ARE EXEMPTING THIS MOBILEHOME SITE FROM THE PROVISIONS OF THE CITY OF SAN RAFAEL MOBILEHOME RENT STABILIZATION ORDINANCE FOR THE TERM OF THIS RENTAL AGREEMENT. THE CITY OF SAN RAFAEL MOBILEHOME RENT STABILIZATION ORDINANCE AND THE STATE MOBILEHOME RESIDENCY LAW (CALIFORNIA CIVIL CODE SECTION 798 et seq.) GIVE YOU CERTAIN RIGHTS. BEFORE SIGNING THIS RENTAL AGREEMENT YOU MAY CHOOSE TO SEE A LAWYER. UNDER THE PROVISIONS OF STATE LAW, YOU HAVE A RIGHT TO BE OFFERED A RENTAL AGREEMENT FOR (1) A TERM OF TWELVE MONTHS, OR (2) A LESSER PERIOD AS YOU MAY REQUEST, OR (3) A LONGER PERIOD AS YOU AND THE MOBILEHOME PARK MANAGEMENT MAY AGREE. YOU HAVE A RIGHT TO REVIEW THIS AGREEMENT FOR AT LEAST 30 DAYS BEFORE ACCEPTING OR REJECTING IT. IF YOU SIGN THE AGREEMENT, YOU MAY CANCEL THE AGREEMENT BY NOTIFYING THE PAKK

MANAGEMENT IN WRITING WITHIN 72 HOURS OF YOUR EXECUTION OF THE AGREEMENT. IT IS UNLAWFUL FOR A MOBILEHOME PARK OWNER OR ANY AGENT OR REPRESENTATIVE OF THE OWNER TO DISCRIMINATE AGAINST YOU BECAUSE OF THE EXERCISE OF ANY RIGHTS YOU MAY HAVE UNDER THE CITY OF SAN RAFAEL MOBILEHOME RENT STABILIZATION ORDINANCE, OR BECAUSE OF YOUR CHOICE TO ENTER INTO A RENTAL AGREEMENT WHICH IS SUBJECT TO THE PROVISIONS OF THAT LAW.

The notice shall contain a place for the resident to acknowledge receipt of the notice and shall also contain an acknowledgment signed by park management that the notice has been given to the tenant according to this section. A copy of the notice executed by park management shall be provided to the tenant.

20.03.050. Buyer's Sights.

A new buyer of a mobilehome which is subject to an in-place transfer shall have all the same rights as a homeowner, as defined in Civil Code section 798.18 including:

(a) The right to be offered a rental agreement for (1) a term of 12 months, or (2) a lesser period as the homeowner may request or (3) a longer period as mutually agreed upon by both the homeowner and management.

(b) The right to reject the offer of a rental agreement in excess of 12 months and instead accept a rental agreement for a term of 12 months or less from the date the offered rental agreement begins.

(c) The written election of the new buyer to reject a rental agreement in excess of 12 months, shall be deemed to be a rental agreement between the new buyer and the park owner to a month-to-month tenancy with the rent limitations as set forth in this chapter sufficient for compliance with Civil Code section 798.75(a).

20.04.040. Increases Subject to Review; Exceptions.

A. Except as provided in B., below, any rent increase including rent on change of ownership as hereinafter defined under Vacancy Control, proposed to take effect on or after February 1, 1993, shall be subject to this chapter.

B. The following rent increases shall be exempt from review under this chapter.

1. Except as provided in section 20.04.040(2) and (3) an increase in rent for any mobilehome lot in any 12 month period which is equal to or less than the rent charged on the date 12 months prior to date the increase is to take effect, multiplied by a cost of living factor and rounded off to the nearest dollar. The cost of living factor shall be as follows:

One Hundred Percent	1.00 (CPI/C)	where CPI/C is equal to or less than five percent

		(5%); but in no event, less than (3%) per year.
Seventh-five Percent	.75 (CPI/C)	or five percent (5%), whichever is greater, where CPI/C is greater than five percent (5%) and equal to or less than 10 percent (10%).
Sixty-six Percent	.66 (CPI/C)	or seven and a half percent (7.5%), whichever is greater, where CPI/C is greater than 10 percent (10%).

"CPI/C" shall mean the percentage change in the consumer price index for California, All Urban Consumers, San Francisco-Oakland-San Jose areas, as published by Bureau of Labor Statistics, San Francisco, over the most recent twelve month period for which figures are available through the month before the month preceding the date notice of the rent increase is given. The most recently published CP1 figure available at the time the rent increase notice is given shall be used for the calculation. The City of San Rafael will supply to each Owner and/or Operator the published CPI figure to be used in any rent increase. Each Owner and/or Operator shall post such document in a conspicuous place in the park office or

office area, where it can easily be seen by the park Homeowners.

2. Mobilehome spaces where the mobilehome owner and the mobilehome park owner have entered into a negotiated lease agreement meeting the criteria of subdivision (b) of Civil Code section 798.17.

3. Mobilehome spaces that are "new construction" as defined in Civil Code section 798.7 and as exempted in accordance with Civil Code section 798.45.

C. **Vacancy Control.**

When a mobilehome is transferred by the homeowner to another with the mobilehome remaining on the space, it is sometimes referred to as an "in-place transfer". No increase in rent shall be imposed upon an in-place transfer of a mobilehome.

When a mobilehome space becomes vacant and the mobilehome which is located thereon is removed from the space, the space rental shall not be increased upon re-rental of the space unless otherwise exempted under the provisions of section 20.04.040 subparagraph B. (2) and (3) .

D. **Base Rent Provisions.**

In the event a mobilehome space is exempted from the provisions of this chapter by reason of the existence of a space rent agreement that meets the requirements of Civil Code section 798.17, and that agreement expires, the space rent for that space shall be the space rent in effect for that space before the agreement expired until the next annual adjustment.

In the event a mobilehome space was subject to the space rent restrictions of this chapter and between October 16, 1989 and February 1, 1993, was subject to an in-place transfer, the space rent that was demanded by the park owner immediately preceding the in-place transfer shall be the space rent for the space until the next annual adjustment.

E. **Freeze.**

A freeze in space rent shall be affected as set forth below for spaces where a mobilehome space was exempted from the apace rental provisions of the chapter by reason of the existence of a space rent agreement that met the requirements of Civil Code section 798.17 and that agreement expires or where there has been an in-place transfer of a mobilehome between October 16, 1989 and February l, 1993. Such space rents shall remain frozen until such time that the lowest rent for a comparable space in a park on the effective date of this ordinance, where no space rent agreement that was exempt from the provisions of this chapter expired or where no in-place transfer took place between October 16, 1989, and February 1, 1993 attains the same level as the base rent determined in accordance with

section D. above. Upon attainment of the level set forth in the preceding sentence, the space rent freeze provided for in this paragraph shall be lifted and the rent limitations of subsection B. above shall then apply.

20.05.050. Notices

Sixty (60) days prior to any increase in rents, the Operator shall provide each Homeowner and the Owner shall provide each Operator with written notice setting the amount of the proposed increase, the then current rent and whether or not in the Owners and/or Operators opinion such increase is exempt from review under the provisions of this chapter. A copy of the notice together with a detail as to which lots within the park will be affected, shall be provided to the city Manager at the same time.

20.06.060. Limitations on Rent Increases

Each park Operator shall, by November 1, 1989, establish an anniversary date for all Rent Increases, and such yearly increases, if any, except as specified below, shall be enacted only on the anniversary date of that park, which date shall also be posted in the park office or office area where it can easily be seen by the Homeowners. The increases allowed by the terms of this ordinance shall be applied equally on such annual basis to all lots subject to an increase as provided herein. The Homeowners of those lots having a different anniversary date than that established by the Operators shall pay only a CPI adjustment on his/her rent until the next anniversary date, at which time the formula set forth below shall be used for future increases. The Operator shall notify the city

Manager's office of the City of San Rafael in writing of such anniversary date on or before November 1, 1989.

Any Homeowner in any park, who has become a resident Homeowner within the three months preceding the anniversary date for an anticipated rent increase, shall be excluded from such rent increase, as may occur on the anniversary date of the park until such time as three months shall have elapsed, at which time any rent increase imposed against them shall not exceed the amount imposed against all other lots in the park.

The Operator, in calculating the amount of increase allowed, shall use the average rent per lot subject to the terms of this ordinance. This figure shall be determined by dividing the number of lots subject to the terms of this ordinance into the total gross rent receipts received from those lots. The CPI increase shall then be applied to that average lot rent, to determine the actual dollar increase.

The Owner, in calculating the amount of increase allowed, shall apply increases as allowed in Section 20.04.040 (B) to the current yearly rent to determine the actual dollar increase.

The calculations showing the amount of anticipated increase and how the increase was determined shall both be posted in the office or office area where it can easily be seen by the Homeowners and a copy forwarded to the City Manager's office of the City of San Rafael.

20.07.070. Petition Filing

Any Homeowners who will be or have been subjected to a proposed rental or service charge increase, not exempted by the provisions of section 20.04.040 may initiate a rent review hearing process by filing a petition, within forty-five (45) days of the date of notice, signed by Homeowners representing more than fifty percent (50%) of the lots subject to the increase, with the San Rafael City Manager. The Homeowners shall provide the Operator or Representatives with a copy of such petition at the same time that it is filed with the City Manager. Such petition shall include the names, addresses, and telephone numbers of the authorized Homeowner Representatives.

Any Operators who will be or have been subjected to a proposed rental or service charge increase, not exempted by the provisions of section 20.04.040, may initiate a rent review hearing process by filing a petition, within forty-five (45) days of the date of notice, with the San Rafael City Manager. The operator shall provide the Owner Representatives with a copy of such petition at the same time that it is filed with the City Manager. Such petition shall include the name, address, and telephone number of authorized Operator Representatives.

20.08.080. Petition-Form

A petition for mediation or arbitration must be filed with the City Manager on the form prescribed by the City and must be accompanied by such supporting material as is necessary to clearly support the request. The petition shall contain the following certification: "I

certify under penalty of perjury that the foregoing is true and correct." The petition shall be dated and subscribed by the petitioners and the place of execution shall be specified.

20.09.090. Cost of Filing

The filing of a petition shall be accompanied by a cash deposit in the amount of four times the then current hourly rate charged by the Marin County Mediation Services. Upon receipt of the petition and filing fee from the Homeowners, or Operator, the City Manager shall notify the owner and/or Operator of the receipt of the petition and shall require from the Owner and/or Operator a like cash deposit. All or part of said cash deposits shall be used to pay for the City's administration costs and the mediation services established hereunder. The filing fees may be adjusted by City Council resolution from time to time to reflect cost increases.

20.10.100. Petition-Effect of Timely Filing

Upon filing of a timely and completed petition, that portion of the requested and noticed rental increase (and only that portion) which exceeds the amount exempted under Section 20.04.040 shall not take effect unless and until such time as there is a mediation agreement or an arbitrator allows such increase or portion thereof pursuant to the provisions of this chapter. That portion equal to the amount exempted under Section 20.04.040 shall be allowed to take effect as noticed.

20.10.110. Mediation

A. Upon receipt of a timely filed and completed petition for mediation, the City Manager shall refer the petition to the Marin County Mediation Services.

In addition, the City Manager may from time to time employ the services of an accountant to supply information to the mediator or arbitrator such as the past twelve months CPI, a profit income to revenue statement, a profit income to investment statement, or such other financial data as may be independently required for or requested by the mediator or arbitrator. In such event, the cost of such accountant may be paid from the filing fees or by the City from redevelopment low and moderate income set aside funds.

B. Any Homeowner(s) believing that any of the provisions of this ordinance are being violated, shall give written notice of such alleged violation (s) to the Operator/Representative and the Operator/ Representative shall respond in writing within thirty days, denying such allegations or agreeing to correct such violation(s) within the following thirty days. In the event that the Operator/Representative shall deny any or all of the allegations and refuse to take corrective action within the following thirty days, the Homeowner(s) shall have the right to have the matter arbitrated pursuant to Section 20.10.130 herein.

Any Operator believing that any of the provisions of this ordinance are being violated, shall give written notice of such alleged violation(s) to the Owner/Representative and the Owner/Representative shall respond in writing within thirty days, denying such

allegations or agreeing to correct such violation(s) within the following thirty days. In the event that the Owner/Representative shall deny any or all of the allegations and refuse to take corrective action within the following thirty days, the tenant(s) shall have the right to have the matter arbitrated pursuant to Section 20.10.130 herein.

The party seeking mediation, if successful, may recover all actual costs including but not limited to filing fees, attorneys fees, accounting fees, expert witness fees, plus an amount to be decided by the mediator not to exceed the sum of five hundred dollars ($500.00) as and for expenses related to travel, meals and nonexpert witness time for preparation and/or testimony.

C. Within thirty (30) days of the date that the City Manager notifies the Owner and/or Operator of the filing of petition under 20.09.090, the parties shall provide all information that is reasonably available that the mediator deems necessary to resolve the dispute. Failure to provide the requested information may be deemed a refusal to mediate in good faith. All information submitted shall be in writing and shall be certified in the same manner as set forth in Section 20.08.080.

D. In the event that the parties agree to a specific rental increase, the mediator shall prepare a mediation agreement so specifying between the Owner and/or Operator and the affected Operator and/or Homeowners. The mediation agreement shall be executed by the affected parties, or designated representatives. A copy of the agreement shall be sent to the City. If the mediation process fails to establish a

mutually agreed amount of rental increase within (30) days, or sooner as hereinafter provided, or if at any time during the mediation process, the mediator may determine that there is an impasse, or that further mediation is impractical or not likely to be of further value, the mediator shall recommend the matter for arbitration and shall so notify the City in writing.

20.10.120. Request for Arbitration

A request for arbitration may be made either by the Owner, the Operator, or by the affected Homeowners in the affected mobilehome park. A request for arbitration shall be made by filing the request in writing with the City Manager no later than seven (7) working days after the postmarked date that the mediator's recommendation is mailed to the parties under Section 20.10.100. Requests for arbitration by Homeowners shall include the name and signature and rental lot number(s) of Homeowner's designated representative in the request for arbitration.

20.10.130. Arbitration-Paying All Costs

The party requesting such arbitration shall be responsible for paying all costs associated with the selection and retention of the arbitrator, provided, that if the arbitration is requested by the Operator, and the final arbitration award is eighty percent (80%) or more of the increase requested by the Operator, not previously granted by an arbitrator, the Operator shall be allowed to pass the costs through to the Homeowners, spread over a one-year period in addition to any increase allowed. If the arbitration is requested by the Homeowners and the final arbitration award is eighty percent (80%) or more

of the reduction requested by the Homeowners, not previously granted by an arbitrator, the Operator shall refund such cost in a lump sum to the Homeowners within thirty (30) days to be distributed to the contributing Homeowners in accordance with their contributions.

The party requesting such arbitration shall be responsible for paying all costs associated with the selection and retention of the arbitrator, provided, that if the arbitration is requested by the Owner, and the final arbitration award is eighty percent (80%) or more of the increase requested by the Owner, not previously granted by an arbitrator, the Owner shall be allowed to pass the cost through to the Operator, spread over a one-year period in addition to any increase allowed. If the arbitration is requested by the Operator and the final arbitration award is eighty percent or more of the reduction requested by the Operator, not previously granted by an arbitrator, the Owner shall refund such cost in a lump sum to the Operator within thirty (30) days to be distributed to the contributing Operator.

20.10.140. Arbitration Without Mediation

Upon the mutual request of the parties to a rent increase dispute, a petition may be referred directly to arbitration without mediation. Such a request must be in writing, signed by all parties, or their representatives, and filed with the City Manager prior to selection of an arbitrator. In this event only, the fee of the arbitration shall be divided equally between the Homeowners and the Operator and not awarded in accordance with the provisions of Section 20.10.130.

20.10.150. Arbitration-Process

A. Upon receipt of a timely and completed request for arbitration, the City Manager shall refer the petition to arbitration.

B. An arbitrator shall be appointed in the following manner:

Either interested party may submit to the City Manager a list of three nominees who are members of the American Arbitration Association. The nominees shall be experienced professional arbitrators with particular expertise in rental disputes arbitration or with experience or training showing the capabilities to deal with the issues found in the rental dispute. The lists of nominees shall include the resumes of each detailing their qualifications. To be eligible for nomination, the arbitrator shall not own an interest in a mobilehome park, shall not be a resident of a mobilehome park, and shall not be an employee, officer, member or otherwise affiliated with any group or organization which has or is viewed by a significant number of Owners, Operators or Homeowners as having taken advocacy positions in rent control matters. The City Manager shall review the lists, conduct such investigation and/or interviews as he deems necessary, and consult with both parties in an attempt to select an arbitrator acceptable to both. In the event of a disagreement by either party or both of the parties, the City Manager's selection shall be final.

C. The arbitrator shall conduct a hearing with the parties, and/or their representatives, within thirty (30) days of the date the arbitrator was selected. At the option of the arbitrator, the arbitrator may choose to

meet only with the representatives of one of the parties at a time. During this hearing process, the concerns of each party shall be discussed, and the arbitrator shall indicate the amount and nature of further information he will need from any party in order to reach a determination. All information submitted shall be in writing and shall be certified in the same manner as set forth in Section 20.08.080. The burden of proof regarding the reasonableness or unreasonableness of the rent increase shall be on the party requesting arbitration. Each party shall comply with the arbitrator's request for information within ten (10) working days of the request. The arbitrator may proceed under this part regardless of whether any party defaults in providing any of the requested information.

20.10.160. Arbitration-Determination

After reviewing the record and any additional evidence requested of the parties which has been provided, the arbitrator shall determine the amount of allowable rental increase, if any, in accordance with the standards of Section 20.06.060, if applicable, and Section 20.10.180, and the increase, if any, shall be effective as of the date for which it was originally noticed.

20.10.170. Arbitration-Determination Final-Conditions

The determination of the arbitrator shall be final, and shall be delivered to the City Manager and the parties in writing, together with the written findings of fact supporting such determination within fifteen (15) working days of the hearing provided in Section 20.10.150. The arbitrator's allowance or disallowance of

any rent increase or portion thereof may be reasonably conditioned in any manner necessary to effectuate the purposes of this chapter.

20.10.180. Standards of Reasonableness to be Applied to Rent Increases

A. Standards of reasonableness applicable to rent increases in order to assure Owner and/or Operator a fair and reasonable return to be considered by the Arbitrator are:

1. The rental history of the mobilehome park, including:

(a) The presence or absence of past increases;

(b) The frequency of past rent increases and the amounts;

(c) The Owner and/or Operator's response to any tax-reduction measure;

(d) The occupancy rate of the mobilehome park in comparison to comparable units in the same general area.

2. The physical condition of the mobilehome park, including the quantity and quality of maintenance and repairs performed during the last twelve (12) months.

3. Any increases or reductions in services during the twelve (12) months prior to the effective date of the proposed increase.

4. Other financial information which the Owner and/or Operator are willing to provide.

5. Existing market value of rents for mobilehome spaces in communities with housing comparable to San Rafael.

6. Cost to replace the park.

7. Changes in the consumer Price Index for all urban consumers, San Francisco-Oakland, San Jose areas published by the Bureau of Labor Statistics.

8. Any costs incurred as a result of a natural disaster and only to the extent such costs have not been reimbursed to the Owner by insurance or other sources.

9. The arbitrator shall not consider changes in operating or other expenses caused by the park Owner's refinancing of the park.

B. In determining an Owner and/or Operator's fair and reasonable return, the arbitrator shall consider all relevant factors, such as the Owner's and/or Operator's investment in the mobilehome park and the Owner's net operating income; provided, that the determination may include a review of the replacement cost of the park.

In any determination of what constitutes a reasonable rent increase under the circumstances, the arbitrator shall consider and weigh evidence establishing the nature and extent of any violations by either the Owner, the Operator, or Homeowners of the City of San Rafael building and housing codes. Any rent increase may be disallowed, reduced, or made subject to reasonable conditions, depending on the severity of such violations.

20.10.190. Services

During the term of operation of this chapter, no Operator shall reduce or eliminate any service to any rental lot unless a proportionate share of the cost savings, due to such reduction or elimination, is simultaneously passed on to the Homeowner in the form of a decrease in existing rent or a decrease in the amount of a rent increase otherwise proposed and permitted by this chapter.

20.10.200. Homeowner and or Operator Remedies

A. If notice required by Section 20.05.050 is not provided, the Homeowner and/or Operator may withhold the rent increase until such notice is provided.

B. In any action for recovery of rent or for unlawful detainer based on nonpayment of rent, the Homeowner and/or Operator may defend the action on the ground that the amount of rent claimed is in excess of the rent allowed by this chapter.

C. Any Homeowner(s) believing that any of the provisions of this ordinance are being violated, shall give written notice of such alleged violation(s) to the Operator/Representative and Operator/ Representative shall respond in writing within thirty days, denying such allegations or agreeing to correct such violation(s) within the following thirty days. In the event that the Operator/Representative shall deny any or all of the allegations and refuse to take corrective action within the following thirty days, the Homeowner(s) shall have the right to have the matter arbitrated pursuant to Section 20.10.140 herein. The party seeking arbitration, if successful, may recover all actual costs including but not limited to filing fees, attorneys fees, accounting fees, expert

witness fees, plus an amount to be decided by the arbitrator not to exceed the sum of five hundred dollars ($500.00) as and for expenses related to travel, meals and nonexpert witness time for preparation and/or testimony.

Any Operator believing that any of the provisions of this ordinance are being violated, shall give written notice of such alleged violation(s) to the Owner/Representative and the Owner/Representative shall respond in writing within thirty days, denying such allegations or agreeing to correct such violation(s) within the following thirty days. In the event that the Owner/Representative shall deny any or all of the allegations and refuse to take corrective action within the following thirty days, the Operator(s) shall have the right to have the matter arbitrated pursuant to Section 20.10.140 herein. The party seeking arbitration, if successful, may recover all actual costs including but not limited to filing fees, attorneys fees, accounting fees, expert witness fees, plus an amount to be decided by the arbitrator not to exceed that sum of five hundred dollars ($500.00) as and for expenses related to travel, meals and nonexpert witness time for preparation and/or testimony.

D. Nothing in this section is intended to limit or preclude any other lawful defense, cause of action or claim of the Homeowner or Park Owner and/or Operator in a Court of competent jurisdiction.

20.10.205. Owner's Remedies - Fair Return Hearing

A. In the event a park owner contends that the freeze of rents as provided by section 20.04.040 subparagraph E., does not result in a just and reasonable return to the park owner for that particular mobilehome space, the park owner may file a special petition within thirty (30) days for a hearing to determine a fair and reasonable return.

B. **Fair Return Hearing.** A petition for a determination of a fair and reasonable return shall be filed in writing in the format provided by the City Manager, at the City Manager's office, not less than thirty (30) days after the establishment of rent under the provisions of section 20.04.040 D. The petition shall contain the facts upon which the park owner relies to claim that a fair and reasonable return will not be received and shall contain the following additional information:

1. The name and address of the mobilehome park owner.

2. The name of the mobilehome park.

3. For each mobilehome space subject to a freeze by reason of an in-place transfer or expiration of a rental agreement in excess of twelve (12) months:

a. The number of the lot or space on which the mobilehome is located.

b. The name and address of the transferor of the mobilehome.

c. The name and address of the transferee of the mobilehome.

d. The date of transfer.

e. The rent charged prior to transfer.

f. The rent charged following the transfer.

g. The rent proposed as a fair and reasonable return.

h. All previous transfers of the mobilehome located in the affected mobilehome space since October 16, 1989, together with the information requested in (a) - (g) for each such transfer.

4. The name and address of the person who signed the Notice.

5. The park owner shall mail a copy of the petition to all mobilehome owners whose rents are the subject of the petition. The petition shall contain a proof of service that a copy of the petition was mailed to all such mobilehome owners.

6. The park owner shall bear the burden of proving by a preponderance of the evidence at the hearing that because of the rent freeze, the park owner is unable to obtain a fair and reasonable return.

7. The fair and reasonable return hearing shall be in accordance with the binding arbitration proceedings of this chapter. The City Manager shall deem the filing of the petition to be a request for arbitration by the park owner. Thereafter, the provisions of section 20.10.120 through section 20.10.180 shall be applicable.

20.10.210. Retaliation

A. No Operator shall in any way retaliate against any Homeowner for the Homeowner's assertion or exercise of any right under this chapter. Such retaliation shall be subject to suit for actual and punitive damages, injunctive relief and attorney's fees and costs. Such retaliation shall also be an available defense in an unlawful detainer action.

No Owner shall in any way retaliate against any Operator for the Operator's assertion or exercise of any right under this chapter. Such retaliation shall be subject to suit for actual and punitive damages, injunctive relief and attorney's fees and costs. Such retaliation shall also be an available defense in an unlawful detainer action.

B. No Homeowner shall in any way retaliate against any Operator for the Operator's assertion or exercise of any right under this chapter. Such retaliation shall be subject to suit for actual and punitive damages, injunctive relief and attorney's fees and costs.

No Homeowner shall in any way retaliate against any Owner for the Owner's assertion or exercise of any right under this chapter. Such retaliation shall be subject to suit for actual and punitive damages, injunctive relief and attorney's fees and costs.

20.10.220. Civil Remedies

If any Operator demands, accepts, receives, or retains any payment of rent in excess of the maximum lawful lot rent, as determined under this Ordinance, the Homeowners of such park affected by such violation, individually or by class action, may seek relief in a court of appropriate jurisdiction for injunctive relief and/or damages. In any such court proceeding, the prevailing

party shall be awarded his reasonable attorney's fees and the court, in its discretion and in addition to any other relief granted or damages awarded, shall be empowered to award to each affected Homeowner civil damages in the sum of not more than three times the total monthly lot rent demanded by the Operator from each such Homeowner.

If any Owner demands, accepts, receives, or retains any payment of rent in excess of the maximum lawful lot rent, as determined under this Ordinance, the Operators of such park affected by such violation, individually or by class action, may seek relief in a court of appropriate jurisdiction for injunctive relief and/or damages. In any such court proceeding, the prevailing party shall be awarded his reasonable attorney's fees and the Court, in its discretion and in addition to any other relief granted or damages awarded, shall be empowered to award to each affected Operator civil damages in the sum of not more than three times the total monthly lot rent demanded by the Owner from each such Operator.

20.10.230. Penalties

Any person, firm, or corporation violating any of the provisions of this ordinance shall be deemed guilty of a misdemeanor and such person shall be deemed guilty of a separate offense for each and every day or portion thereof during which any violation of the provisions of this Ordinance is committed, continued, or permitted, and upon conviction of any such violation, such person shall be punishable by a fine of not more than $500.00 (five hundred dollars), or by imprisonment for not more than six (6) months, or both such fine and imprisonment.

20.10.240. Validity

If any section, subsection, sentence, clause of phrase of this ordinance is for any reason held to be invalid, such decision shall not affect the validity of the remaining portion of this ordinance. The City Council of the City of San Rafael hereby declares that it would have adopted the ordinance and each section, subsection, sentence, clause of phrase thereof, irrespective of the fact that any one or more sections, subsections, sentences, clauses or phrases shall be declared invalid.

20.10.250. Publication

This ordinance shall be published once in full before its final passage in a newspaper of general circulation, published and circulated in the City of San Rafael, and shall be in full force and effect thirty (30) days after its final passage.

20.10.260. Administration

The City Manager shall establish administrative procedures for the implementation of this ordinance.

/s/
ALBERT J. BORO, Mayor

Attest:

/s/
JEANNE M. LEONCINI, City Clerk

The foregoing Ordinance No. 1644 was read and introduced at a regular meeting of the City Council of the City of San Rafael, held on the 1st day of February, 1993, and ordered passed to print by the following vote, to wit:

AYES:	Councilmembers:	Breiner, Cohen, Shippey, Thayer, & Mayor Boro
NOES:	Councilmembers:	None
ABSENT:	Councilmembers:	None

and will come up for adoption as an Ordinance of the City of San Rafael at a regular meeting of the Council to be held on the 16th day of February, 1993.

/s/
JEANNE M. LEONCINI, City Clerk

APPENDIX G

ORDINANCE NO. 1743

AN ORDINANCE OF THE CITY OF SAN RAFAEL AMENDING SECTIONS 20.04.020(M) AND 20.08.010(B) OF THE SAN RAFAEL MUNICIPAL CODE CONCERNING MOBILEHOME RENT INCREASES.

WHEREAS, in 1989, the City Council adopted the City's mobilehome rent stabilization ordinance, codified as Chapter 20 of the San Rafael Municipal Code, as amended in 1993, in order to implement provisions in the Housing Element of the City's General Plan, requiring the preservation of affordable housing in the City of San Rafael; and,

WHEREAS, mobilehomes continue to be an important source of affordable housing in San Rafael for persons of very low, low and moderate income; and

WHEREAS, San Rafael Municipal Code section 20.08.010(B)(1) currently permits mobilehome space rents to be increased annually in certain graduated amounts based upon increases in the Consumer Price Index, without review under the rent control provisions of Chapter 20; and

WHEREAS, mobilehome rent increases permitted over the past ten years without review pursuant to section 20.08.010(B)(1) of the Ordinance, have resulted in rents which are not considered affordable for very low or low income park tenants, thus effectively negating the purpose

of the rent control ordinance to preserve affordable housing; and,

WHEREAS, the City Council desires to ensure that the goals and objectives of its policy to preserve affordable housing within the City of San Rafael, as detailed in the Housing Element of the City's General Plan, are maintained, and, in order to do so, the City Council finds that it must adjust the provisions of Chapter 20 to more effectively ensure the affordability of housing for mobilehome park tenants, while continuing to provide the mobilehome park owners with a fair return on their investments; and

WHEREAS, the rent hearing procedure will continue to provide the park owner an efficient, inexpensive and prompt method to increase rent in excess of the exempted amount should the evidence justify such an increase to ensure the park owner's fair return on investment;

NOW, THEREFORE, the City Council does ordain as follows:

DIVISION 1:

San Rafael Municipal Code Sections 20.04.020(M) is hereby amended to read as follows:

Section 20.04.020(M) **— Rent Increase.**

M. "Rent increase" means any additional rent demanded of or paid by a Homeowner for a rental lot and related amenities, including any reduction or elimination of amenities without a corresponding reduction in the monies demanded or paid for rent, and any additional rent demanded of or paid by an operator for rental of real property used for the operation of a mobile home

park. ***Any portion of a rent increase assessed for capital replacements or capital improvements shall be separately identified and shall not be included in the base rent.***

DIVISION 2:

San Rafael Municipal Code Sections 20.08.010(B)(1) is hereby amended to read as follows:

Section 20.08.010(B)(1)

Except as provided in section 20.08.010(B)(2) and (B)(3) any rent increase for any mobilehome lot in any 12 month period which is equal to or less than the rent charged on the date 12 months prior to the date the increase is to take effect, multiplied by a cost of living factor and rounded off to the nearest dollar. The cost of living factor shall be seventy-five percent (75%) of the CPI/C, where the CPI/C shall mean the percentage change in the consumer price index ("CPI") for California, All Urban Consumers, San Francisco-Oakland-San Jose areas, as published by the Bureau of Labor Statistics, San Francisco, over the most recent twelve month period for which figures are available through the month before the month preceding the date notice of the rent increase is given. The most recently published CPI figure available at the time the rent increase notice is given shall be used for the calculation. The City of San Rafael will supply each Owner and/or Operator the published CPI figure to be used in any rent increase. Each Owner and/or Operator shall post such document in a conspicuous place in the park office or office area, where it can easily be seen by the park Homeowners. Capital replacement and/or capital improvement assessment(s) shall not be included

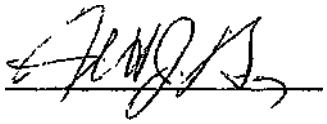
in the base rent nor eligible for automatic CPI increases under this section.

DIVISION 3:

If any section, subsection, sentence, clause or phrase of this Ordinance is for any reason held to be invalid, such decision shall not affect the validity of the remaining portions of this Ordinance. The Council hereby declares that it would have adopted the Ordinance and each section, subsection, sentence, clause or phrase thereof, irrespective of the fact that any one or more sections, subsections, sentences, clauses or phrases be declared invalid.

DIVISION 4:

This Ordinance shall be published once in full before its final passage in a newspaper of general circulation, published, and circulated in the City of San Rafael, and shall be in full force and effect thirty (30) days after its final passage.



ALBERT J. BORO, Mayor

ATTEST:

/s/

JEANNE M. LEONCINI, City Clerk

The foregoing Ordinance No. 1743 was read and introduced at a Regular Meeting of the City Council of the City of San Rafael, held on the 18th day of OCTOBER, 1999 and ordered passed to print by the following vote, to wit:

AYES:	Councilmembers: Cohen, Heller, Miller, Phillips & Mayor Boro
NOES:	Councilmembers: None
ABSENT:	Councilmembers: None

and will come up for adoption as an Ordinance of the City of San Rafael at a Regular Meeting of the Council to be held on the 1st day of NOVEMBER, 1999.

/s/
JEANNE M. LEONCINI, City Clerk