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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiff,

v.

CITY OF SAN RAFAEL, a municipal corporation, and CONTEMPO MARIN HOMEOWNER'S ASSOCIATION, a California corporation,

Defendants.

Case No. C 00-03785 VRW

CONTEMPO MARIN HOMEOWNERS ASSOCIATION'S REQUEST FOR STAY OF INJUNCTION; MEMORANDUM OF POINTS AND AUTHORITIES

Hon. Vaughn R. Walker

REQUEST FOR STAY OF INJUNCTION

Pursuant to this Court's request that the parties submit briefs regarding whether it should stay its injunction in this action, Defendant Contempo Marin Homeowners Association ("CMHOA") respectfully requests that this Court stay the injunction set forth in its forthcoming judgment during the pendency of Defendants' appeal of its ruling, for the reasons set forth below, and for the additional reasons set forth in the brief filed by co-defendant the City of San Rafael ("City"), which CMHOA joins.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Court's anticipated permanent injunction ("Injunction") against enforcement of the San Rafael Rent Control Ordinance (the "Ordinance") should be stayed pending appeals by CMHOA and the City. If the Injunction is not stayed, Plaintiff MHC Financing Limited Partnership ("MHC"), owner of the Contempo Marin Mobilehome Park in San Rafael (the "Park"), will immediately put into place a rent increase which will force many, if not most, of the Park's residents out of their homes before the resolution of the appeal and threatens to render their properties unsaleable. By contrast, there will be no irreparable harm to MHC if the Injunction is stayed. CMHOA's appeal will raise substantial legal questions favoring a stay, many of which present a substantial probability of success on appeal. Because the harm that the residents will suffer from MHC's planned actions cannot be undone in the event Defendants prevail on appeal, CMHOA respectfully requests that this Court stay its Injunction pending the outcome of appellate review, or at minimum for a 90-day period in order that CMHOA may seek a stay pending appeal from the Ninth Circuit.

II. FACTS

On January 29, 2008, this Court issued its Findings of Fact, Conclusions of Law, and Order Thereon ("Order") in this action. In its Order, the Court ruled, *inter alia*, that the City of San Rafael's mobilehome rent and vacancy control ordinance ("the Ordinance") was a regulatory taking under *Penn Central Transp. Co. v City of New York*, 438 U.S. 104 (1978) ("*Penn*

Central"), and an unconstitutional "private taking" under *Kelo v City of New London*, 545 U.S. 469, 480 (2005), and that injunctive relief against enforcement of the Ordinance was appropriate.

On February 1, 2008, MHC submitted a proposed form of judgment to the Court, which included an injunction against enforcement of the Ordinance, to be effective immediately. On February 5, 2008, the City filed objections to MHC's proposed form of judgment, and stated that it intended to seek a stay of injunction pending appeal. CMHOA filed its objections to MHC's proposed form of judgment on February 6, 2008, and stated that it also intended to seek a stay pending appeal. However, before this Court issued *either* a judgment or an injunction, on or about February 20, 2008, MHC informed residents of the Park in writing that it considered the Ordinance to be void already and that as of March 1, 2008, it was raising all pad rents within the Park to a base amount (i.e., not inclusive of fees or assessments) of $1,925 monthly. (*See, e.g.*, Decl. of Candace Clark Exh. A; Decl. of Khadija Gallagher Exh. A.) This figure is well over double (and for some residents, nearly triple) their current *total* pad rents. (Decl. of Candace Clark ¶ 4; Decl. of Khadija Gallagher ¶ 4; Decl. of Ben Ludin ¶ 5; Decl. of Tracy Newman ¶ 4; Decl. of Patricia Passiz ¶ 4; Decl. of Charlean Pohl ¶ 4; Decl. of Katty Samoun ¶ 4; Decl. of Bette Whitt Ellett ¶ 4.)

MHC's attempt immediately to raise rents on all Park residents contradicts representations that it made to purchasers in January 2008 that if MHC prevailed in overturning the Ordinance, only new residents would be affected and not existing residents. (Decl. of Ben Ludin ¶¶ 3, 8.) MHC's attempt to raise rents also cannot be reconciled with its approval, as recently as January 2008, of leases to new residents whom it knew did not have enough income to pay $1,925 monthly pad rent. (*Id.* ¶¶ 3-7.) Some of these purchasers relied on MHC's representation that they would not be affected by this lawsuit in securing mortgages on their mobilehomes. (*Id.* ¶ 9.)

After CMHOA informed the Court of MHC's attempt to raise rents, a telephone conference was held on February 22, 2008, in which the Court informed the parties' counsel that the January 29 Order was *not* intended immediately to invalidate the Ordinance, and that the *status quo* should remain in place pending briefing on the issues of attorneys' fees and a stay of injunction. However, even following the February 22, 2008 telephone conference, MHC is still

proceeding as though the Ordinance were already vacated. Revised rent invoices sent to Park residents after February 22, 2008 show the base rent as $1,925, and the difference between that amount and the residents' current base rent as a "disputed" amount (*See* Decl. of Ben Ludin ¶ 11 & Exh. B.)

In addition, MHC's on-site manager at the Park is currently representing to prospective purchasers and sellers of mobilehomes that upon sale of mobilehomes within the Park, any new lease will be set at $1,925 monthly. (Decl. of Barbara Annis ¶ 10; Decl. of Thomas Davis ¶ 5; Decl. of Marlene Hanson ¶ 6.) These representations have already caused at least one mobilehome sale within the Park to fail to close, and are currently threatening all Park residents' ability to sell their homes. (Decl. of Barbara Annis ¶¶ 3, 7, 9-10, 13-16.)

The residents of the Park would for the most part be entirely unable to pay a pad rent of $1,925 per month during the pendency of an appeal, as demonstrated by the detailed declarations of a sampling of them. (Decl. of Candace Clark ¶¶ 5, 7-8; Decl. of Khadija Gallagher ¶¶ 5-6, 8-9; Decl. of Ben Ludin ¶¶ 4-6, 12-13; Decl. of Tracy Newman ¶¶ 5-8, 10; Decl. of Patricia Passiz ¶¶ 5, 8-9; Decl. of Charlean Pohl ¶¶ 5-6, 8-9; Decl. of Katty Samoun ¶¶ 6-7, 9-10; Decl. of Bette Whitt Ellett ¶¶ 5-6, 8-9; *see also* Decl. of Alex C. Sears, Exh. A.) The demographic and census analysis conducted by CMHOA's expert witness, Darin Buchalter, and presented at trial, shows that Park residents are overall older and poorer than residents of either San Rafael or Marin County as a whole. (Trial Exhs. 1004-1017.) Further, they are less likely to have earnings income or interest, dividend or rental income than the residents of San Rafael and Marin County as a whole, and are more likely to support themselves with retirement income, social security income or supplemental social security income. (Trial Exs. 1018-1022.) These residents already expend a substantial portion of their limited resources on pad rent, and may not be able to afford other housing within the City of San Rafael. If pad rent is increased to $1,925, most of these residents will not be able to pay the new amount and will be forced to relocate or be evicted nearly immediately, because they cannot pay the higher rent while they await the outcome of the appellate process. (Decl. of Candace Clark ¶¶ 5, 7-8; Decl. of Khadija Gallagher ¶¶ 5-6, 8-9; Decl. of Ben Ludin ¶¶ 4-6, 12-13; Decl. of Tracy Newman ¶¶ 5-8, 10; Decl. of Patricia Passiz

¶¶ 5, 8-9; Decl. of Charlean Pohl ¶¶ 5-6, 8-9; Decl. of Katty Samoun ¶¶ 6-7, 9-10; Decl. of Bette Whitt Ellett ¶¶ 5-6, 8-9; *see also* Decl. of Alex C. Sears, Exh. A.)

III. DISCUSSION

MHC's conduct since this Court's January 29, 2008 Order establishes conclusively that it intends immediately to raise rents to $1,925 for all current and new Park residents—indeed, that it could not even wait for this Court's final judgment to do so. If MHC is allowed to enact its desired rent increases and to oust residents who cannot afford the new rent before the Court of Appeals has had the opportunity to review this Court's order, 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. A stay is thus necessary to preserve the *status quo* and prevent irreparable harm pending the outcome of appellate review.

A. Standard For Granting a Stay Pending Appeal

Under Rule 62(c) of the Federal Rules of Civil Procedure, this Court may stay an injunction pending appeal. Courts consider four factors in determining whether to stay an injunction pending appeal: (1) the stay applicant's likelihood of succeeding on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether the other parties interested in the proceeding will be substantially injured by issuance of the stay; and (4) whether the public interest favors a stay. *Hilton v. Braunskill*, 481 U.S. 770, 776, 107 S. Ct. 2113, 95 L. Ed. 2d 724 (1987). The Ninth Circuit considers these factors as on a continuum, such that the moving party may establish that a stay is justified based on either "a probability of success on the merits and the possibility of irreparable injury" or that "serious legal questions are raised and that the balance of hardships tips sharply in its favor." *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983). *See also* Natural Resources Defense Council, Inc. v. U.S. Dept. of Interior, 13 Fed.Appx. 612, 620 n.10 (9th Cir. 2001) ("To obtain a stay pending appeal, the moving party must demonstrate at least a fair chance of success on the merits and that the balance of hardships tips in its favor." (*citations omitted*)). By either statement of the test, CMHOA is entitled to a stay pending appeal.

B. CMHOA's Appeal Has a Substantial Probability of Prevailing on the Merits and Raises Serious Legal Questions

In order to warrant a stay, CMHOA does not need to show that reversal is certain or even highly probable. Because CMHOA's requested injunctive relief consists of a stay pending appeal, CMHOA only needs to establish a substantial case on the merits, not a strong likelihood of success. *See Hilton v. Braunskill*, 481 U.S. at 778 (a stay may be granted if movant presents a substantial case on the merits and the public interest and irreparable harm factors favor a stay); *Hirschfeld v. Board of Elections in New York*, 984 F.2d 35, 39 (2nd Cir. 1993) (explaining that in connection with a stay order the issue is "whether the movant has demonstrated 'a substantial possibility, although less than a likelihood, of success' on appeal"); *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844-45 (D.C. Cir. 1977) (success on merits factor is interpreted loosely at the district court level).

Under this standard, a stay is favored here. A district court's legal findings, including the application of law, are reviewed under a *de novo* standard. *Torres-Lopez v. May*, 111 F.3d 633, 638 (9th Cir. 1997). Under *de novo* review, "the court must consider the matter anew, the same as if it had not been heard before and as if no decision previously had been rendered." *Stotts v. Stalas*, 938 F. Supp. 663, 666 (D. Hawaii 1996) (*citing Ness v. Commissioner*, 954 F.2d 1495, 1497 (9th Cir. 1992)). The possibility that a reviewing court could reach a different result than this Court under *de novo* review of its legal findings is substantial enough to warrant preserving the *status quo* to prevent the forced relocation of residents during the pendency of appeal.

Even where success on the merits is less than certain, a stay is warranted where the appeal presents a serious legal question. *Lopez v. Heckler*, 713 F.2d at 1435. A "serious legal question" is one "which cannot be resolved one way or the other at the hearing . . . 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*. Serious questions are 'substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative

investigation.'" *See Gilder v. PGA Tour, Inc.*, 936 F.2d 417, 422 (9th Cir. 1991) (discussing this factor in context of request for preliminary injunction)[1] (citations, internal quotes omitted).

CMHOA will not repeat the extensive legal briefing that has already taken place in this action, nor will it present a full appellate brief here. However, CMHOA has a substantial possibility of success, justifying a stay, with regard to the Court's rulings that the Ordinance constituted both a regulatory taking and an improper private taking, and also that the controversy was ripe for adjudication. Further, the unprecedented nature of this Court's legal findings and the still-unsettled state of takings law as applied to mobilehome park rent control ordinances renders the questions presented on appeal "serious" enough to warrant a stay pending appellate review.

1. The Court's Determination That the Ordinance Constituted a Regulatory Taking

CMHOA will argue on appeal that in finding that the Ordinance effected a regulatory taking, the Court incorrectly applied the test set forth in *Penn Central Transp. Co. v City of New York*, 438 U.S. 104 (1978). Cases finding a *Penn Central* taking are exceedingly rare, *see U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985), and the Court's finding that the Ordinance constitutes such a taking is unprecedented. Under *Penn Central*, three primary factors determine whether a regulation has effected a taking: (1) the economic impact of the regulation on the plaintiff; (2) the extent to which the regulation has interfered with the plaintiff's investment-backed expectations; and (3) the character of the governmental action, including whether there has been a physical invasion or merely an adjustment of the benefits and burdens of economic life to promote the common good. *Id.* at 124. There is a substantial probability that the Court of Appeals will find on *de novo* review that these three factors weigh against a finding that the Ordinance is a taking.

a. Economic Impact

First, in applying the economic impact factor, this Court found that the Ordinance had caused a diminution in the Park's value "functionally equivalent to a physical

[1] Whether a stay is appropriate is governed by the rules applicable to injunctive relief generally. *See Tribal Village of Akutan v. Hodel*, 859 F.2d 662, 663 (9th Cir. 1988).

taking of all or an overwhelming percentage of the value of MHC's land" (Order ¶ 80). In reaching that conclusion, the Court seemingly disregarded evidence that the Park was currently worth significantly more than MHC paid for the Park (Trial Exh. 392 Table 4; Trial Transcript (TT) 4/24/2007 pp. 509:6–510:7, 609: 8–22, 610:5–14 [Quigley]), and instead focused on estimates of the Park's *potential* Net Operating Income (NOI) and value, in the hypothetical absence of *any* rent control. (Order ¶¶ 64-80.) CMHOA will argue that this was an incorrect basis for calculating economic impact of the 1999 amendments to the Ordinance, since MHC purchased the Park subject to a rent control ordinance that has been found to be permissible. (*See* Order ¶¶ 26-32.) Analysis of the economic impact factor is not concerned with whether a regulation prevents a property from achieving the full value it would reach absent *any* regulation: even a substantial decrease in value does not constitute a taking so long as there remains an economically viable use for the property. *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 645 (1993); *see also Penn Central*, 438 U.S. at 131 ("[Our decisions] uniformly reject the proposition that diminution in property value alone, can establish a 'taking[.]'"); *William C. Haas & Co., Inc. v. City and County of San Francisco*, 605 F.2d 1117, 1120-1121 (9th Cir. 1979). The proper calculation is therefore whether there has been a net diminution in value of the Park attributable *solely* to the 1999 amendment to the Ordinance: the evidence in the record was insufficient for the Court to make such a conclusion.

Further, the Court's calculations of economic impact did not take into account that the Ordinance provides a mechanism for MHC to petition the City for a rent increase.[2] However, in the rent control context, the "economic impact" factor looks to whether procedures are available to allow the landlord to obtain a fair return on its investment, *see MHC Operating Limited Partnership v. City of San Jose*, 106 Cal. App. 4th 204, 220 (2003). Finally, the Court found that the economic impact was "compound[ed]" by lack of a "reasonable means [for MHC] to recoup" its investments in capital improvement and maintenance of the Park (Order ¶ 70). However, in so

[2] MHC has not availed itself of the increase petition mechanism since the 1999 amendments to the Ordinance. (TT 11/5/2002 p. 147:6-19 [Kelleher]; Depo. of J. Renner p. 160:6 – 161:16, 162:5 – 163:3; TT 4/9/2007 p. 156:9-11 [Guinan]; TT 4/11/2007 pp. 359:5-12, 359:25-360:5, 360:24-361:15 [Kelleher].)

concluding, the Court disregarded, without explanation, the Ordinance's capital pass-through provision, which provided just such a mechanism (though it has been used only in a limited manner by MHC (Stipulation on Park Lagoon Transfer Litigation ¶¶ 1, 4 & Exhs. 1-2; TT 4/9/2007 pp. 156:25-157:9 [Guinan].)).

b. Investment-Backed Expectations

In applying the investment-backed expectations factor, the Court found that MHC's reasonable expectations of cash flow growth and capital appreciation were frustrated because the 1999 amendments to the Ordinance increased the burden of the Ordinance on MHC beyond the previous version of the Ordinance. (Order ¶ 89.) However, the Court's conclusion was contrary to case law establishing that in a highly regulated business such as mobilehome parks, reasonable investor expectations must account for the possibility of future changes in the regulatory scheme. *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 645 (1993). The Court further disregarded evidence establishing that the 1999 amendment was specifically foreseeable, because MHC was aware when it purchased the Park that it was subject to rent control and MHC owns numerous other mobilehome properties in California, many of which are subject to rent restrictions similar to the Ordinance. (Trial Exhs. EK, EA, DS p. 19; TT 4/9/2007 pp. 43:23–48:20 [Berman]; Contra Costa County Code Ch. 540-2.404; Fresno Municipal Code §§ 8-1208, 8-1212.2; San Luis Obispo County Code §§ 25.06.010(b), 25.06.011; San Jose Municipal Code §§ 17.22.570, 17.22.600; Santee Municipal Code § 2.44.100(c)(1); Rialto Municipal Code §§ 4.01.065, 4.01.100.) Also, as explained above in Part III.B.1.b, the Court disregarded the rent increase petition and capital improvement pass-through procedures provided under the Ordinance, and additionally disregarded evidence presented by MHC's own experts showing that the value of the Park has significantly increased since MHC purchased it in 1994.

c. Character of Government Action

Case law to date provides little guidance in how the "character" factor should be analyzed under facts such as those presented here. However, this Court's 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," (Order ¶ 104), is unprecedented. This case is the first that CMHOA is aware of where a rent or vacancy control ordinance that provided a mechanism for the landowner to obtain a fair return rent increase has been found to violate *Penn Central*. As an initial matter, the Court found that MHC was "uniquely affected" because it was only one of two landowners in San Rafael that was subject to the Ordinance, and the other landowner was subject to different practical facts that changed the impact of the Ordinance on it. (Order ¶¶ 96-97, 103.) However, this Court acknowledges that a premium-based takings claim is a *facial* analysis (*see* Order, "Claimed Defenses" ¶ 3 and cases cited therein)), and the Ordinance on its face applies to *all* mobilehome park landowners, not just to MHC: the "unique" impact this Court found here is solely a function of the Ordinance *as applied* to MHC. Further, there is no indication that the Court considered the rent increase request provision or the capital improvement pass-through provision in reaching its conclusion regarding the character of the Ordinance. On *de novo* review, when those two provisions are taken into account, along with the additional facts discussed above in relation to the other two factors in the *Penn Central* analysis, there is a significant possibility that the Court of Appeal will find that the Ordinance is merely a "public program adjusting the benefits and burdens of economic life to promote the common good." 438 U.S. at 124.

2. The Court's Determination That the Ordinance Effected an Improper Private Taking

The Court found that the Ordinance, on its face, constituted an impermissible "private taking" and was not connected to a legitimate public interest. (Order ¶ 158.) This finding was based on dicta from *Kelo v City of New London*, 545 U.S. at 480 ("Nor 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"), which has not yet been applied to a rent-control case at the appellate level.[3]

[3] Only the Second and Fifth Circuits have interpreted the "pretextual" dictum from *Kelo* to date, both in eminent domain cases. *See Goldstein v. Pataki*, ___ F.3d ___, 2008 WL 269100 at *5-6 (2nd Cir. 2008); *Western Seafood Co. v. U.S.*, 202 Fed.Appx. 670, 675 (5th Cir. 2006).

The Court's finding was based on the economic theory advanced by MHC's expert witnesses, i.e., that the Ordinance created a "premium" in subsequent mobilehome sales, which vitiated the purposes (which the Court accepted were legitimate for purposes of analysis) that the Ordinance was enacted to advance. Findings ¶ 127. In *Lingle v. Chevron U.S.A., Inc.*, the Supreme Court rejected use of this "premium" theory in determining that rent control legislation does not "substantially advance" its intended purpose. 544 U.S. 528, 545 (2005). CMHOA is aware of no appellate court opinion providing guidance on whether the "premium" theory can support a private takings claim after *Lingle* and *Kelo*. However, previous decisions in this Circuit have upheld mobilehome rent control ordinances as legitimate in the face of challenges brought under other legal theories. *See Cashman v. City of Cotati*, 415 F.3d 1027, 1028 (9th Cir. 2005) ("substantially advances" theory rejected in *Lingle*); *Ventura Mobilehome Communities Owners Ass'n v. City of San Buenaventura*, 371 F.3d 1046, 1054 (9th Cir. 2004) (rejecting pre-*Lingle* challenge to a factually-analogous statute based on "substantially advances" theory; finding that plaintiff had not shown lack of reasonable relationship between the statute and the public purpose it was meant to serve); *Carson Harbor Village Ltd. v. City of Carson*, 37 F.3d 468, 472 (9th Cir. 1994)). CMHOA believes that this Court's ruling that a mobilehome rent and vacancy control law can lack a reasonable relationship to its goals for purposes of the "public use" clause of the Fifth Amendment will be difficult to consistently reconcile with previous authority—which this Court acknowledged elsewhere in its Order—finding that such laws are rationally related to a legitimate government purpose for the purpose of equal protection and due process. This reconciliation presents a serious and difficult question, which strongly favors a stay pending appellate review.

3. Ripeness

This Court ruled that the discretionary rent increase provisions of the Ordinance did not render the controversy unripe for adjudication, on grounds that CMHOA believes present serious questions favoring a stay pending appeal.

The Court found that the City repudiated a settlement with MHC, and on that basis that "MHC obtained a final decision from the City notwithstanding MHC's failure to request a

discretionary rent increase after 1999." (Order, "Claimed Defenses" ¶ 8.) However, the Court's finding that a settlement was reached contradicted a jury finding that the agreement was not to amend the Ordinance but to initiate, or explore, amendment. Where the parties do not dispute the relevant facts, a district court's ruling on whether these facts establish formation of a contract is a question of law reviewed *de novo*. *See Warehousemen's Union Local No. 206 v. Cont'l Can Co.*, 821 F.2d 1348, 1350 (9th Cir. 1987); *Kaylor v. Crown Zellerbach, Inc.*, 643 F.2d 1362, 1366 (9th Cir. 1981) (where the only controversy was the legal effect of undisputed communications, question of contract formation was a matter of law). A district court's interpretation of such a contract also presents a question of law, which is reviewed *de novo*. *See Shaw v. City of Sacramento*, 250 F.3d 1289, 1293 (9th Cir. 2001). Finally, whether contract terms are sufficiently certain to be enforceable is a question of law reviewed *de novo*. *Ladas v. California State Auto. Ass'n*, 19 Cal. App. 4th 761, 770 n.2 (1993) (citation omitted). *De novo* review of the Court's finding that a settlement was reached presents a serious legal question favoring a stay.

Further, because there was no settlement agreement reached, MHC was obligated to seek a discretionary increase, the denial of which would have been a final decision making rendering the controversy ripe for adjudication. If the City had granted an increase that prevented 100% capitalization, then even under the Court's reasoning, the public purpose of lower housing cost would be served and no private taking would have occurred. The possibility that a reviewing court may find that no binding settlement was reached gives rise to the additional likelihood that MHC's failure to seek a discretionary rent increase will be found to render the controversy unripe for adjudication.

C. Park Residents Will Suffer Irreparable Harm if a Stay is Denied.

That Park residents stand to suffer irreparable harm unless a stay is granted is incontrovertible. Following this Court's January 29, 2008 Order, MHC expressed the intent immediately to raise the monthly pad rent within the Park to $1,925, even before judgment was entered. (Decl. of Candace Clark ¶ 6 & Exh. A; Decl. of Khadija Gallagher ¶ 7 & Exh. A; Decl. of Ben Ludin ¶ 10 & Exh. A; Decl. of Tracy Newman ¶ 9; Decl. of Patricia Passiz ¶ 7 & Exh. A; Decl. of Charlean Pohl ¶ 7 & Exh. A; Decl. of Katty Samoun ¶ 8 & Exh. A; Decl. of Bette Whitt

Ellett ¶ 7 & Exh. A.) Several of the residents, especially those on low or fixed incomes, will be unable to pay the new rent amount (nearly triple their current monthly rent) during the pendency of an appeal, and will have no other option but to relocate. (Decl. of Candace Clark ¶¶ 5, 7-8; Decl. of Khadija Gallagher ¶¶ 5-6, 8-9; Decl. of Ben Ludin ¶¶ 4-6, 12-13; Decl. of Tracy Newman ¶¶ 5-8, 10; Decl. of Patricia Passiz ¶¶ 5, 8-9; Decl. of Charlean Pohl ¶¶ 5-6, 8-9; Decl. of Katty Samoun ¶¶ 6-7, 9-10; Decl. of Bette Whitt Ellett ¶¶ 5-6, 8-9; *see also* Decl. of Alex C. Sears, Exh. A.) This is the epitome of irreparable injury: in the event CMHOA ultimately prevails on its appeal, it will be impossible to restore residents who have sold or walked away from their homes or been evicted to the *status quo ante*, and the harm of forced relocation cannot be measured by damages. *See Gilder v. PGA Tour, Inc.*, 936 F.2d at 423 ("[w]here the threat of injury is imminent and the measure of that injury defies calculation, damages will not provide a remedy at law.") Granting a stay will enable these residents to remain in their homes pending the ultimate resolution of the questions presented in their appeal.

CMHOA faces an additional threat of immediate irreparable injury. MHC has already—prior to this Court entering judgment—represented to the real estate agent for a contracted sale of a mobilehome, and to other prospective buyers and sellers, that any new rental agreement following sale of a mobilehome in the Park will be at the rate of $1,925 per month. (Decl. of Barbara Annis ¶ 10; Decl. of Thomas Davis ¶ 5; Decl. of Marlene Hanson ¶ 6.) This representation has already caused the failure to close of at least one home sale within the Park. (Decl. of Barbara Annis ¶¶ 3, 7, 9-14.) MHC's representation is not only inaccurate—in that it wrongly presumes MHC's right to declare a rent increase in advance of entry of judgment and disregards CMHOA's right and intent to appeal the District Court's ruling—but also jeopardizes residents' ability to sell their homes. There are currently nine additional properties in the Park offered for sale; MHC's actions currently jeopardize the potential sales of all of these. (*Id.* ¶¶ 15-16.) A stay is necessary to prevent MHC from taking any further actions that would be irreversibly harmful to residents' interests pending appellate review.

D. MHC Will Not Suffer Substantial Harm if a Stay Is Granted

On the other hand, preservation of the *status quo* will not substantially or irreparably injure MHC. The Ordinance has been in effect since the commencement of this litigation so far, and MHC has never sought a temporary restraining order or otherwise argued that it would suffer irreparable harm during the pendency of this litigation. Further, according to the Court's findings, MHC stands to gain millions of dollars in equity in the park if the Court's ruling is upheld and rent control is abolished (*see* Order ¶¶ 72-73)—which would far oustrip any rent revenues MHC might forego during the pendency of an appeal. The only harm MHC may suffer if a stay is granted would be a relatively short delay in ultimately resolving the question of the Ordinance's validity and in its ability to raise rents in the Park.

E. The Public Interest Will Be Served by Granting the Stay.

This Court is obligated to consider the effect on its injunction on the public interest. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982); *Hilton*, 481 U.S. at 776 (identifying "where the public interest lies" as a factor guiding the court's discretion on issuance of a stay). In determining whether to grant a stay, the "concerns of the movants must be weighed against the societal interests which will be adversely affected by granting the relief requested." *Warm Springs Dam Task Force v. Gribble*, 565 F.2d 549, 551 (9th Cir. 1977).

Here, the public interest favors granting a stay to preserve the *status quo* pending resolution of the legal questions raised by CMHOA's appeal. While there is no societal interest that will be harmed by granting of a stay, if the Injunction is not stayed pending appeal, the immediate displacement of many Park residents will frustrate the City's and the public's interest in promoting affordable housing. In addition, MHC's actions since the Order suggest that unless a stay is granted, it may exploit this Court's ruling and make an example of the Park residents as a negotiating tool in its disputes with mobilehome park residents elsewhere in California. The potential statewide disruption in the mobilehome market resulting from a rent increase in San Rafael that may ultimately be reversed on appeal favors granting a stay.

F. At Minimum, the Court Should Impose a Temporary Stay

Should the Court deny CMHOA's motion for a stay, CMHOA will ask the Ninth Circuit to stay any injunction pending appeal. The facts above demonstrate that, at minimum, the Court should impose a temporary stay while the Ninth Circuit considers CMHOA's stay request.

IV. CONCLUSION

For the reasons previously stated, CMHOA respectfully requests the Court to stay the Injunction pending CMHOA's appeal to the Ninth Circuit. Alternatively, if the District Court declines to stay the Injunction pending appeal, CMHOA requests a 90-day stay of the Injunction in order that it may seek a stay pending appeal from the Ninth Circuit.

Dated: March 14, 2008

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CONTEMPO MARIN HOMEOWNER'S ASSOCIATION