JAMES M. WAGSTAFFE (95535)
MICHAEL VON LOEWENFELDT (178665)
MICHAEL NG (237915)
KERR & WAGSTAFFE LLP
100 Spear Street, Suite 1800
San Francisco, CA 94105–1528
Tel: (415) 371-8500
Fax: (415) 371-0500

GARY T. RAGGHIANTI (43049)
ROBERT F. EPSTEIN (154373)
RAGGHIANTI FREITAS LLP
874 Fourth Street, Suite D
San Rafael, CA 94901
Tel: (415)453-9433
Fax: (415) 453-8269

Attorneys for Defendant
CITY OF SAN RAFAEL

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

CITY OF SAN RAFAEL,

Defendant,

CONTEMPO MARIN HOMEOWNERS ASSOCIATION,

Defendant-Intervener.

Case No. C 00-3785 VRW

CITY OF SAN RAFAEL'S RESPONSE TO PLAINTIFFS' OPPOSITION TO THE CITY'S MOTION TO STAY INJUNCTION

HON. VAUGHN R. WALKER

*** Filed pursuant to briefing schedule ordered by this Court on February 12, 2008.**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I. INTRODUCTION

In its moving papers filed March 14, 2008, the City of San Rafael explained why the effect of this Court's order finding the San Rafael Mobilehome Rent Stabilization Ordinance ("the Ordinance") to be unconstitutional, and any resulting judgment and injunction, should be stayed pending appeal to the Ninth Circuit. A stay is necessary to preserve the status quo pending appeal; indeed, without a stay it appears inevitable that MHC would either evict the existing tenants, coerce them into long term leases exempt from rent control, or both, such that the current character of the Contempo Marin Mobilehome Park would be destroyed and any appellate victory by the City or the CMHOA rendered Pyrrhic.

MHC, of course, takes a different view in its March 14, 2008 submission. As directed by this Court's February 12, 2008 order, the City presents herein its response to MHC's arguments, incorporating by reference the broader arguments in favor of a stay already presented. As discussed below, MHC's arguments fail to rebut the essential point that, without a stay, the current residency and character of Contempo Marin will be irrevocably altered, rendering any reversal by the Ninth Circuit largely moot. As for MHC's request for a $10.5 million bond that it knows neither the City nor the residents can afford, that request is simply another way of asking the Court to deny a stay. Consistent with Ninth Circuit practice in similar cases, the Court should exercise its discretion *not* to require any bond, so that the status quo can be preserved while the difficult and important legal questions presented by this case are reviewed on appeal. Accordingly, the City respectfully requests that the Court grant its motion to stay pursuant to Federal Rule of Civil Procedure 62(c) without imposition of a bond.

II. RESPONSE TO MHC'S ARGUMENTS IN OPPOSITION TO A STAY

A. THERE ARE SERIOUS QUESTIONS FOR APPEAL FAVORING A STAY

MHC argues that the City cannot demonstrate likelihood of success on appeal by repeating arguments this Court has rejected. (MHC brief p. 4.) Of course *every* request for stay pending appeal will *necessarily* repeat arguments the trial court has rejected. As discussed in the City's moving papers, the City is *not* required to convince this Court that its judgment is erroneous, but merely that this case involves a "difficult legal issue." Protect Our Water v.

Flowers, 377 F. Supp. 2d 882, 884 (E.D. Cal. 2004). The City has plainly made that showing at pages 16-19 of its March 14, 2008 brief.

MHC also misstates the standard that will be applied on appeal. Whether the Ordinance constitutes a taking under Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978), or a private taking are *legal questions* that are reviewed *de novo*. Penn Central, 438 U.S. 104 (determining whether taking occurred as a matter of law); Kelo v. City of New London, 545 U.S. 469, 477-90 (2005) (determining question of public use as a *de novo* question of law consistent with the Court's "longstanding policy of deference to legislative judgments in this field"). Indeed, one of the principal issues on appeal will be this Court's conclusion that Lingle v. Chevron U.S.A., Inc., 544 U.S. 528 (2005), calls for some type of heightened scrutiny (see FF&CL # 172, Docket # 554), and the Court's substitution of its own findings for those of San Rafael's legislature with no apparent deference to the City. The Supreme Court emphasized the lack of heightened scrutiny and need for ordinary rational basis review in both Lingle and Kelo, and Lingle was directly critical of district courts' conduct of trials to determine the effect of an ordinance such as the two court trials that occurred here. Lingle, 544 U.S. at 545 ("We find the proceedings below remarkable, to say the least, given that we have long eschewed such heightened scrutiny when addressing substantive due process challenges to government regulation. The reasons for deference to legislative judgments about the need for, and likely effectiveness of, regulatory actions are by now well established, and we think they are no less applicable here.") (citations omitted); Kelo, 545 U.S. at 488 (rejecting heightened scrutiny for "public use" inquiry).

This Court's order is unprecedented, and in sharp contrast to all prior cases directly addressing similar laws.[1] It cannot seriously be refuted that, at a minimum, the appeal of this

---

[1] See Cashman v. City of Cotati, 415 F.3d 1027 (9th Cir. 2005) (affirming district court's judgment that Cotati's mobilehome rent and vacancy control ordinance is constitutional); Ventura Mobilehome Communities Owners Ass'n v. City of San Buenaventura, 371 F.3d 1046, 1055 (9th Cir. 2004); Carson Harbor Village Ltd. v. City of Carson, 37 F.3d 468, 472 (9th Cir. 1994); Levald, Inc. v. City of Palm Desert, 998 F.2d 680, 690 (9th Cir. 1993); Sierra Lake Reserve v. City of Rocklin, 938 F.2d 951, 958 (9th Cir. 1991), *vacated in other part* 987 F.2d 662 (9th Cir. 1993); Adamson Cos. v. City of Malibu, 854 F. Supp. 1476, 1492-93 (C.D. Cal.

case presents the type of difficult legal issue that warrants preservation of the status quo pending appeal.

B. THE BALANCE OF HARDSHIPS FAVORS A STAY

Most of MHC's hardship arguments are directed to the tenants, and the CMHOA's attorneys have thoroughly demonstrated in their briefs the extreme harm denial of a stay will cause the tenants. MHC also argues that "the City will suffer no harm whatsoever from invalidation of the Ordinance." (MHC brief at 6.) That is simply incorrect. Although the City will suffer no direct monetary harm, as explained in the City's prior briefing, the City will suffer the loss of the Contempo Marin park as a source of what the City considers to be affordable housing. Replacing the current tenants with new tenants who have practically no investment in their homes and who pay nearly $2,000 per month in rent will fundamentally change the character of the Contempo Marin park. Similarly, coercing existing tenants with the threat of eviction into signing long term leases that are exempt from rent control will also change the character of the Park. Either of these actions – which are the only reasonably likely consequences of denying a stay – will render an appellate victory by the City largely moot by eliminating the type of housing the City's ordinance seeks to protect and/or by stripping the City of the ability to regulate most spaces at the Park. This fundamental alteration in the status quo is a hardship to the City that can only be addressed by preserving the status quo pending appeal.

MHC's self-serving showing of counter-hardship amply illustrates why there are substantial issues on appeal. MHC continues to insist that the Ordinance eliminated 75% of the value of the Park, when the evidence at trial clearly showed – as this Court's own findings recognize – that the challenged *1999 amendments* caused a theoretical loss of only *$10 million out of $120 million* in *unregulated* value. (FF&CL #42, Docket #554.) It is the pre-existing ordinance – and most especially vacancy control enacted in 1993 – that "causes" the "loss" of the land's unregulated value. It is unclear why this is considered a "loss" at all – MHC acquired the

---

1994); Sandpiper Mobile Village v. City of Carpinteria, 10 Cal. App. 4th 542, 549-51 (1992); Westwinds Mobile Home Park v. Mobilehome Park Rental Review Board, 30 Cal. App. 4th 84, 95 (1994).

park subject to vacancy and rent control, and only paid $18.9 million because of that fact. (TT 11/5/2002 p. 83:15-17 [Kelleher].)

In addition, MHC's claimed $1,925 per month rents are entirely speculative; MHC has never actually charged such rents to anyone at Contempo Marin. These high levels of rent vastly exceed the rent MHC is able to collect at any other park in California except for the "unique" Santa Cruz park on a bluff overlooking the Pacific Ocean. There is no basis for concluding that MHC will "lose" more than $1,100 per space per month by maintaining the status quo; only that MHC will lose the ability to unilaterally demand that much rent (and thus evict tenants who cannot pay it).

Nor is there any fair comparison between the economic circumstances of MHC and the tenants. As discussed in the CMHOA briefs, the tenants are largely middle and lower income persons. MHC, on the other hand, is a wealthy company; according to the 2006 10-K introduced at trial, it has more than $2 *billion* in assets, and rental property income of more than $200 million per year. (Tr. Ex. 359 pp. MHCCM2 02152-53.) MHC is far more able to absorb the risk on appeal than the tenants or the City.

C. THE PUBLIC INTEREST FAVORS A STAY

MHC presents the cursory assertion that the public interest favors enforcement of the Constitution, which begs the point. The dicta from one inapposite district court case in Minnesota is not authority that a stay should not be granted where a constitutional challenge is brought. As discussed in the City's brief, the public interest favors maintenance of the current law pending appeal. See Lopez v. Heckler, 713 F.2d 1432, 1435-36 (9th Cir. 1983).

MHC also argues that "the Court held that 'the proffered public purposes asserted as justifications for the Ordinance are palpably without reasonable foundation.'" (MHC brief p. 7.) With all respect, that finding illustrates the inconsistency of this Court's ruling. In connection with the due process claim, the Court found – as required by Ninth Circuit law – that the Ordinance *is* rationally related to a legitimate government purpose. (FF&CL #s 168-175, Docket #554.) That same rational relationship should have governed, and defeated, the public takings claim here:

> This Court has declared that a taking should be upheld as consistent with the Public Use Clause, U.S. Const., Amdt. 5, as long as it is "rationally related to a conceivable public purpose." This deferential standard of review echoes the rational-basis test used to review economic regulation under the Due Process and Equal Protection Clauses…

Kelo, 545 U.S. at 490 (Kennedy, J., concurring) (citations omitted). The rational relationship mobilehome rent and vacancy control has to a legitimate government purpose, as recognized by prior Ninth Circuit due process and equal protection law, provides the public interest justifying a stay in this action. See also Cal. Civ. Code § 798 *et seq.*; Galland v. City of Clovis, 24 Cal. 4th 1003, 1010 (2001).

D. THE DECISION NOT TO SETTLE THIS CASE IS IRRELEVANT

MHC also argues that "equity" prohibits a stay because the City had the opportunity to settle this case but did not do so. No law is cited for this proposition. The City was under no obligation to settle this case, and has every right to defend this law which more than 100 other California jurisdictions have adopted. The jury correctly determined that the City complied with the Settlement Agreement, and the City's decision not to cave to the pressure of MHC's suit is simply not relevant to this or any other issue still before the Court.

E. NO BOND SHOULD BE REQUIRED

Finally, in a transparent attempt to render any stay meaningless, MHC requests that the Court impose a bond requirement of "no less than $10.5 million" as a condition of a stay. (MHC Brief p. 8.) MHC admits that a bond is not required to stay an injunction, but is merely discretionary. Fed. R. Civ. Proc. 62(c); Stone v. City and County of San Francisco, 145 F.R.D. 553, 560 (N.D. Cal. 1993) ("there is no requirement that a party appealing a grant of injunctive relief post a supersedeas bond in order to obtain a stay."); See Goelz & Watts, CAL. PRACTICE GUIDE: FEDERAL NINTH CIRCUIT CIVIL APPELLATE PRACTICE § 6:315, p. 6-53 (The Rutter Group 2007) ("As a practical matter, the Ninth Circuit seldom requires a bond as a condition of a stay or injunction issue pursuant to FRAP 8. Rather, the court usually evaluates such motions with the assumption no security will be posted.").

No bond should be awarded here for two reasons. First, any "loss" by MHC is entirely speculative, as MHC has never actually collected any of the rents it claims it is losing. There is no factual basis for the Court to conclude that MHC will successfully collect its unilaterally demanded rent from anyone, let alone on all 396 spaces, if MHC is allowed to raise rent during the appeal of this Court's judgment. Second, and as importantly, the City cannot afford the demanded bond. The City's annual budget is based on a beginning general fund balance of approximately $6.7 million, and then $94 million in revenues and $94 million in expenses. (Request for Judicial Notice of City Budget.) Paying MHC $10 million would wipe out the City's entire cash reserve, and place it millions of dollars in debt. Moreover, MHC *waived* its right to damages in this action, and should not be able to threaten the City with a $10.5 million liability as a condition of effectively appealing this Court's judgment. Nor can the City assume such a liability; setting a bond as MHC requests would thus be the same as denying the pending motion.

The bond requirement should not be used as a device for denying a stay. Because there are significant questions that should be presented on appeal, and the balance of private hardships and public interest favors preserving the status quo pending appeal, this Court should exercise its discretion to stay its judgment and injunction without a bond.

III. CONCLUSION

For the foregoing reasons and those set forth in the City's March 14, 2008 papers, the City respectfully requests the Court to stay the effect of its judgment pending appeal.

Respectfully submitted,

DATED: March 31, 2008

KERR & WAGSTAFFE LLP

By _____

JAMES M. WAGSTAFFE
MICHAEL VON LOEWENFELDT

Attorneys for Defendant
City of San Rafael