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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,

Plaintiffs,

v.

CITY OF SAN RAFAEL,

Defendant,

CONTEMPO MARIN HOMEOWNERS ASSOCIATION,

Defendant-Intervener.

Case No. C 00-3785 VRW

CITY OF SAN RAFAEL'S MEMORANDUM OF POINTS AND AUTHORITIES RE: SEVERABILITY OF THE 1999 AMENDMENTS

HON. VAUGHN R. WALKER

Filed per Court Order dated July 26, 2007 – no hearing date has been set in connection with this issue

I. INTRODUCTION

On July 26, 2007, the Court issued its Preliminary Findings of Fact and Legal Standards, Preliminary Conclusions of Law And Request For Further Briefing (hereinafter "7/26/07 Order"). In its 7/26/07 Order, the Court concluded that City of San Rafael's 1999 amendment to its Mobilehome Rent Stabilization Ordinance (hereinafter the "Ordinance") constitutes an unconstitutional taking under the private takings and Penn Central tests because limiting annual rent increases to 75% of the Consumer Price Index ("CPI") caused rents to fall progressively behind market rents and inflation. The Court directed the parties to serve and file supplemental memoranda "addressing whether the Ordinance may be rendered constitutional by severing the 1999 Amendments or whether enforcement of the ordinance as a whole should be enjoined…"

The City is cognizant of the limits of what it has been asked to brief, and will not herein address the Court's underlying conclusions, but only the severability issue.[1] The City submits that the severability of the 1999 amendments is clear – both changes made to the Ordinance in 1999 can be grammatically and functionally severed from the remainder of the statute, and the City Council indicated its intent for them to be severable by including an express severance clause in both the codified law and the enacting Ordinance. Indeed, California law is clear that the remedy where a statutory amendment is found unconstitutional is to strike the amendment and restore the law to its status quo ante. That is the most the Court should do here.

The City also anticipates that MHC will argue that, despite being unchanged since 1993, vacancy control should also be enjoined. Again, the City has not been asked to reargue this point, and believes that the prior briefing and the Court's statute of limitations and res judicata rulings prohibit a challenge to the pre-existing vacancy law. However, if the Court determines that it will enjoin vacancy control, that provision of the law is also plainly grammatically and functionally severable, and the City's desire to have rent control, even without vacancy control if necessary, is well proven by the existing record and the 1993 Ordinance itself. Accordingly,

[1] By presenting the ordered briefing, the City of San Rafael does not in any way agree that the 1999 amendments or any other portion of the Ordinance is constitutional, and reserves its right to appeal the Court's decision on all grounds.

under any circumstances the rent control provisions protecting existing in-place tenants from unreasonable rent increases should not be enjoined by the Court.

II. FACTS

The facts necessary to determine this question of statutory construction and legislative intent are already in the record. The City Council first voted to enact mobilehome rent control on July 17, 1989. (Ex. CG at CSR 004155.) The version of the statute originally passed to print contained a vacancy control provision. (Ex. CF p. CSR2-04710 at § 20.04.040(B)(2).) However, due to the Ninth Circuit's decision in Hall v. City of Santa Barbara, 833 F.2d 1270 (9th Cir. 1986) that vacancy control was a physical taking, that version never became law. Instead, later in 1989, a version without vacancy control was enacted. (Ex. CK; Ex. CL.) The enacted Ordinance limited the automatic annual rent increases to a graduated percentage of the Consumer Price Index. (Ex. CL p. 5 at § 20.04.040(B)(1).) The first version of the Ordinance (like every subsequent version) contained the following express severance clause:

> Validity. [¶] 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 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 or phrase thereof, irrespective of the fact that any one or more sections, subsections, sentences, clauses or phrases shall be declared invalid.

(Ex. CL at § 20.10.240.)

In 1992, the United States Supreme Court overturned Hall in Yee v. City of Escondido, 503 U.S. 519 (1992). The City Council then amended the Ordinance to include vacancy control. (TT 4/9/2007 p. 131: 8–18; Ex. AF; Ex. CN.) The Ordinance as amended in February 1993 retained the express severance clause first enacted in 1989. (Ex. CN p. 24 § 20.10.240.)

After the City enacted vacancy control, MHC's predecessor, De Anza, filed an action challenging the constitutionality of the Ordinance. De Anza alleged, as MHC does here, that the ordinance as a whole (including vacancy control) was a "regulatory taking." De Anza Assets,

Inc. v. City of San Rafael, Case No. AO63017. (Ex. ED.)[2] The state court sustained a demurrer to De Anza's complaint. That ruling was affirmed by the Court of Appeal, which upheld the constitutionality of the Ordinance and found that "the Amendments do not constitute a regulatory taking." (Ex. ED p. 15.) This Court has held that the De Anza decision was a final judgment, and the MHC was in privity with De Anza, for purposes of res judicata. (12/5/2006 Order p. 7:12-8:10.)

In 1999, the City again amended the Ordinance to make the changes at issue in this case. That 1999 amendment (Ordinance No. 1743) did not restate or reenact the entire ordinance, but rather only modified specific subsections within the existing Ordinance. (Ex. AI pp. 2-4 Div. 1-2.) The amendment did not alter section 20.10.240, the express severance clause enacted in every version of the Ordinance since 1989. (Ex. AI.) The 1999 amending ordinance (1743) also contained an additional severance clause referring to the 1999 amendments themselves:

> 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 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 or phrase thereof, irrespective of the fact that any one or more sections, subsections, sentences, clauses or phrases shall be declared invalid.

(Id. p. 4 Div. 3.)

The City Council has thus unequivocally and repeatedly demonstrated its legislative intention to have mobilehome rent control without vacancy control if vacancy control is unconstitutional, and further that each of its amendments to the Ordinance be severable to the greatest extent permissible by law.

III. LEGAL ARGUMENT

A. AN AMENDMENT TO AN ORDINANCE DOES NOT "RE-ENACT" THE UNCHANGED PROVISIONS OF THE ORDINANCE

Before specifically addressing severability, it is important to rebut MHC's assertion that the entire Ordinance was "reenacted" in 1999. As a matter of law, that is incorrect. Under the

[2] After a lawsuit was filed by the then-owner of Contempo Marin, De Anza, amendments were made to the Ordinance to clarify points not relevant in this case. (Ex. AC.) Again, the enactment contained an express severance clause. (Ex. AC p. 20 § 20.10.240.)

California Government Code, the amendment of a statute is *not* considered to be a repeal and re-enactment of the entire statute, but *only* an enactment of the new provisions:

> Where a section or part of a statute is amended, it is not to be considered as having been repealed and reenacted in the amended form. The provisions which are not altered are to be considered as having been the law from the time when they were enacted; the new provisions are to be considered as having been enacted at the time of the amendment . . .

Cal. Gov't Code § 9605.

As the evidence plainly shows, and the Court's 7/26/07 Order recognizes, the 1999 Amendment to the Ordinance made two changes to that ordinance: it replaced the sliding scale CPI formula with a fixed 75% scale, and it modified the treatment of capital improvement pass throughs. (Ex. AI; 7/26/07 Order p. 13 #34.) None of the other relevant rent control provisions, including the vacancy control provisions, were altered in 1999. (Ex. AI.) The 1999 amendment does not restate the entire text of the Ordinance, but rather sets out the linguistic modifications to be made to two subsections (sections 20.04.020(M) and 20.08.010(B)(1)). Thus, the plain language of the 1999 amendment itself makes clear that the modifications were not a repeal and reenactment of the preexisting Ordinance, but a modification of particular subsections of the otherwise-unchanged law as provided by California Government Code section 9605. Accordingly, *only* the changes made in 1999 can be considered as effective starting in 1999 (and thus, under this Court's rulings, not subject to either the statute of limitations or res judicata defenses). As discussed below, those 1999 amendments, if deemed invalid, should be judicially eliminated on their own, restoring the pre-1999 state of the law.

B. WHERE AN AMENDMENT RENDERS A STATUTE UNCONSTITUTIONAL, THE PRE-EXISTING LAW IS RESTORED

It has long been the law that when an amendment to an existing statute is found to be unconstitutional, the amendment is stricken and the preexisting law restored:

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

Miller v. Union Bank & Trust Co., 7 Cal. 2d 31, 36 (1936), citing Frost v. Corporation Commission, 278 U.S. 515, 526 (1929), see also Skyline Materials, Inc. v. City of Belmont, 198 Cal. App. 2d 449, 459 (1962) ("When a valid act is amended by an unconstitutional provision, the usual rule is that only the amendment is invalid."); Ex parte Mascolo, 25 Cal. App. 92, 96 (1914) ("We hold the act of 1913 to be void. … Being void, it was inoperative for any purpose and effected no change whatsoever in the act of 1911."); Danskin v. San Diego Unified School Dist., 28 Cal. 2d 536, 555 (1946) ("When an act that has stood valid over the years is amended by an unconstitutional provision, ordinarily the amendment alone is invalid."); Bess v. Park, 144 Cal. App. 2d 798, 806 (1956) (invalidating amendment but holding that statute "as it was before the amendment of 1953, remains in full force.").

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

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

MHC's suit challenges the 1999 amendment to the Ordinance, as the Court has already recognized. (7/26/07 Order at ¶ 45, "Here, the relevant primary rights involve the operation of the 1999 Amendments and its application to MHC's property."). Thus, if the Court maintains its

preliminary ruling that the 1999 amendment is unconstitutional, the appropriate remedy would be to invalidate the *amendment* while leaving the prior enactments intact.

C. THE TWO CHANGES MADE IN 1999 ARE SEVERABLE FROM THE REMAINDER OF THE ORDINANCE

If, contrary to the rule discussed above, the 1999 amendments are not simply removed with the restoration of the status quo ante, the changes made in 1999 can still be severed from the statute under the rules for severability when one part of an enactment is unconstitutional. Two changes were made in 1999: the automatic CPI adjustment was leveled at 75%, and capital pass throughs were required to be excluded from the calculation of base rent for purposes of determining the automatic adjustment.

With respect to the CPI adjustment, the Court's findings conclude that "the 1999 Amendments changed the operation of San Rafael's mobilehome rent regulation to render it certain that mobilehome pad rents would fall progressively further behind market rents" and that under the prior regime "rent increases could essentially keep pace with the prevailing rates of inflation." (7/26/07 Order at ¶¶ 38 & 39.) The City understands the Court to be concluding that the constitutional problem is that automatic adjustments are less than 100% of CPI. With respect to the treatment of pass throughs, the Court does not specify why that change is unconstitutional, but in any event its removal is relatively straightforward. As discussed below, each of these two changes from 1999 meet the requirements for severability under California law.

1. Standard for Severability

A portion of a California statute can be severed if it is "grammatically, functionally and volitionally separable." Calfarm Ins. Co. v. Deukmejian, 48 Cal. 3d 805, 821-22 (1989).

> 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 & Restaurant Employees Internat. Union v. Davis, 21 Cal.4th 585, 613 (1999), quoting and citing Calfarm Ins. Co. at 48 Cal. 3d at 821, 822. A severability clause indicates the

legislative body's preference, and the inclusion of such a clause weighs strongly in favor of allowing severance. "Although not conclusive, a severability clause normally calls for sustaining the valid part of the enactment, especially when the invalid part is mechanically severable." Calfarm Ins. Co., 48 Cal. 3d at 821, quoting Santa Barbara Sch. Dist. v. Superior Court, 13 Cal.3d 315 (1975), see also McElroy v. United States ex rel. Guagliardo, 361 U.S. 281 (1960).[3]

MHC Financing Ltd. Partnership Two v. City of Santee, 125 Cal. App. 4th 1372 (2005) ("MHC v. City of Santee"), another mobilehome rent control case involving MHC, sets out the rule and illustrates its application. There, the court stated, "When the ordinance contains a severability clause, an invalid provision is severable if it is grammatically, functionally, and volitionally separable." Id. at 1393. After invalidating particular sections of the city's rent control ordinance, the Court nevertheless left intact the remaining, non-offending provisions of the ordinance in place, stating: "If an invalid provision of an initiative or ordinance is severable, it is stricken from the ordinance and the remaining provisions are given effect." Id., citing Pala Band of Mission Indians v. Board of Supervisors, 54 Cal. App. 4th 565, 585 (1997); In re Portnoy, 21 Cal.2d 237, 242 (1942).

2. Grammatical Severability

Grammatical severability means that it is possible to remove the words containing the invalidated sections of the statute without affecting the wording of the remaining sections. "An enactment passes the grammatical test where the language of the statute is mechanically severable, that is, where the valid and invalid parts can be separated by paragraph, sentence, clause, phrase, or even single words." People v. Library One, Inc., 229 Cal. App. 3d 973, 988 (1991). The 1999 amendments are grammatically separate from the remainder of the Ordinance because they are located in distinct subsections (Ex. AB §§ 20.04.020(M) and 20.08.010(B)(1)) which can be removed without affecting the wording of any of the Ordinance's other provisions.

Specifically, with respect to the CPI adjustment, the 75% rule can be eliminated, and a 100% of CPI rule established, by simply deleting the words "seventy five percent (75%) of"

[3] Federal courts look to state law to determine the severability of a state statute. Leavitt v. Jane L., 518 U.S. 137, 139 (1996) ("Severability is of course a mater of state law.").

from San Rafael Municipal Code section 20.08.010(B)(1), leaving the Ordinance with a 100% of CPI standard. The capital pass through provision enacted in 1999 is contained in the same paragraph, and can similarly be struck. The severed ordinance provision would thus read as follows:

> 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 ~~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.~~

The single corresponding sentence added by the 1999 amendments to the definition section (section 20.04.020(M)) can also be struck without any effect on the remaining text. The pertinent definition section would read:

> 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 owner 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 base rent.~~

Grammatical severability is thus clearly met in this case.

3. Functional Severability

"A provision is functionally severable if it is 'capable of independent application. In order to pass this test '[t]he remaining provisions must stand on their own, unaided by the invalid provisions nor rendered vague by their absence nor inextricably connected to them by policy

considerations.'" MHC v. City of Santee, 125 Cal. App. 4th at 1393, quoting Library One, Inc., 229 Cal. App. 3d at 989, citing Barlow v. Davis, 72 Cal.App.4th 1258, 1265 (1999). The 1999 amendments are functionally severable from the Ordinance as a whole because they are not necessary to the Ordinance's operation and purpose. This is best illustrated by the fact that the Ordinance operated for ten years without them. There is simply no functional difficulty in enjoining enforcement of the 1999 amendments and ordering the City to calculate automatic rent increases according to the former sliding scale, or even at 100% CPI.

4. Volitional Severability

The 1999 amendments are also volitionally separable. There can be no reasonable argument that the City would not have adopted the Ordinance without a flat 75% adjustment because it did so in 1989 and operated under that system for ten years. As the California Court of Appeal has held, statutory amendments pose no functional or volitional severability problem:

> [T]he invalid provisions are functionally severable as their exclusion will simply return the rule to the status quo ante . . . . Moreover, there is no reason to believe that, with the invalid provisions eliminated, the Judicial Council would not choose to have the rule operate as it had before the amendments, rather than have [the rule] abrogated in its entirety.

Maribel M. v. Superior Court, 61 Cal. App. 4th 1469, 1477 (1998).

In addition, the express severance clause, both in the Ordinance itself and in the amending ordinance passed in 1999, make absolutely clear that the San Rafael City Council intended that if any part of the Ordinance was found unconstitutional, the remaining provisions should remain in place. (Ex. AI p. 4 Div. 3; Ex. AB § 20.10.240.) San Rafael's legislature has thus expressly stated 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 shall be declared invalid." (Id.)

5. As Severed, the Pre-1999 Ordinance Would Be Constitutional

Severance would return the Ordinance to its status prior to the 1999 amendments, which was the statute the De Anza court found to be constitutional. (Ex. ED.) This Court has already held that the De Anza court's holding that San Rafael's pre-1999 rent and vacancy control

ordinance was constitutional was a final judgment for purposes of res judicata. "Here, the trial court determined, and the appellate court affirmed, that De Anza failed to state a claim that the ordinance was unconstitutional. Under California law, this determination is a final judgment for purposes of res judicata." (12/5/2006 Order p. 7:21-25.)

This Court has also already held that MHC was in privity with De Anza for purposes of res judicata. "Accordingly, as purchaser of the property affected by the judgment, MHC is a privy to De Anza under California res judicata law." (12/5/2006 Order p. 8:8-10.)

The only reason this Court found MHC's challenge *not* barred by res judicata was this Court's conclusion that the 1999 amendments implicated a different primary right than the ordinance as it existed before 1999. (12/5/2006 Order pp. 10:22-11:17.) Though the City disagrees with the Court's conclusion that the 1999 amendments "materially altered" the preexisting Ordinance (7/26/07 Order p. 66 at ¶ 35), there can be no question that once the 1999 changes are eliminated, the resulting regulatory regime would be the same as that already adjudicated to be constitutional.[4] Following the Court's reasoning that De Anza involved a different "primary right" because "the City's mobilehome rent regulation was altered in 1999 when the automatic rent increase adjustment formula was modified to impose a flat 75% of the change in the San Francisco Bay area composite CPI," restoring the 75% CPI adjustment to a full 100% would eliminate the primary right distinction. Accordingly, as MHC has already been found to be in privity with De Anza, and a final judgment was made that the pre-1999 law was not unconstitutional, MHC is barred by res judicata from asserting that the pre-1999 state of the law is unconstitutional.

Even aside from the res judicata effect of the De Anza litigation, full CPI adjustments would eliminate the basis on which *this Court* founded its conclusion that the 1999 amendments are unconstitutional. Viewed from anther angle, MHC would be left with *exactly* what it bargained for when it purchased the park in 1994. Because severance of the provisions leveling

[4] To the extent severing the provisions would do away with the sliding scale CPI adjustments and leave rent increases at 100% of CPI (which was the actual adjustment for every year prior to the 1999 amendments), the result would be more favorable to MHC than the regime construed in De Anza.

CPI at 75% and modifying the treatment of pass-throughs would cure the constitutional problem found by this Court, it should defer to the City Council's express legislative intent to retain all remaining sections of the Ordinance.

D. VACANCY CONTROL IS SEVERABLE FROM THE REMAINDER OF THE ORDINANCE

As the Court has found, the vacancy control provisions of the Ordinance were enacted in 1993, and have not been amended since that time. Vacancy control is not part of the 1999 amendment, but instead part of the primary right already challenged unsuccessfully by MHC's predecessor De Anza. (7/26/07 Order pp. 69-70 at ¶ 45.) Accordingly, there is no legal basis for severing vacancy control from this Ordinance.

If, however, the Court determines to enjoin the vacancy control provisions of the Ordinance, they also can be easily severed from the basic rent control provisions of the Ordinance. The operative vacancy control provisions are contained in San Rafael Municipal Code section 20.08.010(A) and (C), and can be removed without affecting the rest of the ordinance's grammar or function.

Nothing in the Court's preliminary findings suggest that rent control in the absence of vacancy control is unconstitutional. The cardinal principle that a statute must be read to avoid potential unconstitutionality (see, e.g., Lewis v. United States, 445 U.S. 55, 71 (1980)), compels preservation of the indisputably constitutional basic rent control provisions of the Ordinance. Moreover, elimination of basic rent control for existing tenants would result in a gross inequity, undermining the protections for which the existing tenants bargained and the investments they have made in their homes. Basic control of rents is clearly constitutional, and no matter what the Court's conclusions with respect to the 1999 amendments, there is no valid reason to strip the clearly-severable protections for existing tenants.

1. Grammatical Severability

Grammatical severance of vacancy control is quite simple. The Court need only sever the words controlling change of rent on vacancy, so that section 20.08.010 would read as follows:

> 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.
>
> * * *
>
> ~~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.~~

2. Functional Severability

Functional severability is also easily met – without vacancy control the Ordinance would continue to control rent increases for existing tenants, but would not apply to the initial rent set for incoming tenants.

3. Volitional Severability

Volitional severability is also met here. It is clear that the City's preference is for vacancy control, as the City believes the evidence clearly shows that without vacancy control tenants have no ability to gain equity in their homes without having that equity lost when they move out by rent increases that reduce their homes to near salvage value.[5] The City understands that this brief is not the place to reargue those matters, which the Court has addressed in its recent order. If the choice, however, is between rent control without vacancy control and no rent control at all, the record evidence is clear that the City prefers rent control.

No speculation is required here because the City has already faced this question. In 1989, the original rent control ordinance contained vacancy control. (Ex. CF p. CSR2-04710 at §

[5] As the Court itself explained during trial, and notwithstanding whether vacancy control was originally a good idea, the tenants who purchased under the pre-1999 regime upheld in the De Anza litigation certainly will suffer an unexpected loss in the resale value of their homes if vacancy control is rendered unconstitutional. (TT 4/9/07 p. 111:17-112:24.) The situation is even worse, however, if all rent control is eliminated as existing tenants would have no protection against MHC doubling or tripling rents to existing tenants and then evicting them when, inevitably, they cannot pay those new rents.

20.04.040(B)(2).) Before that ordinance was effective, the Ninth Circuit held that vacancy control was a physical taking in Hall v. Santa Barbara, 833 F.2d 1270 (9th Cir. 1986). Given this ruling that vacancy control was unconstitutional, the City revised the ordinance to enact rent control without vacancy control. (Ex. CL.) That remained the law in San Rafael until 1993 after the Supreme Court overruled Hall in Yee v. City of Escondido, 503 U.S. 519 (1992). (Ex. AF.)

When it enacted vacancy control in 1993, the City also expressly stated its intent that any invalid provisions be severable from the rest of the Ordinance:

> Validity. [¶] 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 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 or phrase thereof, irrespective of the fact that any one or more sections, subsections, sentences, clauses or phrases shall be declared invalid.

(Ex. AF at § 20.10.240.) Thus evidence of both the City's conduct and its express statements demonstrates that vacancy control is volitionally severable from the remainder of the Mobilehome Rent Stabilization Ordinance.

4. As Severed, the Rent Control Provisions of the Ordinance Would Be Constitutional

Unambiguous precedent allows government restriction of rents for existing tenants without compensation. "States have 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 (1982); Pennell v. City of San Jose, 485 U.S. 1, 12 (1988). "When a landowner decides to rent his land to tenants, the government may place ceilings on the rents the landowner may charge." Chevron USA, Inc. v. Cayetano, 224 F.3d 1030, 1033 (9th Cir. 2000). In the absence of vacancy control, the remaining provisions of the Ordinance would be indistinguishable from ordinary rent control ordinances that have universally been held to be constitutional.

IV. CONCLUSION

The City believes that its 1999 amendments were entirely constitutional, and that its ordinance, including vacancy control, is lawful. However, as the Court has reached the opposite conclusion, the City urges the Court, in accordance with existing law, to draw its injunction narrowly, and to sever the 1999 amendments from the ordinance, returning the law to the status quo ante – the 1993 version of the law that was already in effect when MHC purchased the Contempo Marin park for less than $20 million.

Respectfully submitted,

DATED: August ___, 2007

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CITY OF SAN RAFAEL

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