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THE COMMUNITY OWNERS' ADVOCATE

U.S. Supreme Court Denies Review of the Guggenheim Case

By Robert S. Coldren, Esq. & Mark D. Alpert, Esq.

In *Guggenheim v. City of Goleta*, a split 11 ("en banc") panel of the Ninth Circuit decided that the City of Goleta's adoption of a rent control ordinance did not cause a "taking" under the Fifth Amendment of the U.S. Constitution that must be compensated. The key fact in deciding the case, according to the eight judge majority opinion, was that the property owner had purchased the property already subject to rent control. In essence, the court concluded that the park owner "got what he paid for" - a property subject to a confiscatory rent control regulation.

The decision is wrong because *Palazzolo* (a prior U.S. Supreme Court decision) affirms that property owners who purchase property subject to confiscatory regulations can bring a Fifth Amendment taking claim.

The *Guggenheim* decision effectively approves of the confiscation of the property owner's private property for a public purpose, without compensating the property owner. This is the sort of harm the Fifth Amendment was designed to prevent. A petition for review was submitted to the U.S. Supreme Court. The Industry felt the effort merited the putting together of a top-notch team to pursue the petition. Dan Guggenheim received a great deal of financial support, most notably a very generous contribution from the WMA Committee to Save Property Rights. Many other park owners made generous contributions. With their help, Dan was able to hire Theodore Olson (former U.S. Solicitor General) and his team at Gibson Dunn to lead the effort with HK&C's assistance.

The odds of getting a review by the Supreme Court are always difficult and, unfortunately, review was not granted. The Ninth Circuit's decision in *Guggenheim* will be the "law of the land" for the foreseeable future, at least in the Ninth Circuit, which covers most of Western United States, Hawaii and Alaska.

Fortunately, the technical legal holding of the Ninth Circuit's decision in *Guggenheim* is narrow. It held that a property owner, under these circumstances and with this record, who purchases a property subject to rent control, may not bring a "facial challenge" to the ordinance. The decision is narrow because "facial challenges" are lawsuits aimed at the ordinance as drafted, as opposed to a lawsuit based on how the ordinance has been administratively applied to a particular property owner. That means the property owner could theoretically file a new lawsuit claiming its property was "taken" after seeking an administrative application to increase rents. It also means, for the time being, that park owners in Dan's position should go through the Administrative Rent Hearing process before filing suit.

Despite the narrow holding, however, the decision may not be interpreted so narrowly by local governments and even courts, both of which will have plenty of ammunition to support them from broad language used in the decision. Local government may be emboldened to adopt new rent controls and other land use regulations that will substantially impair the value of property over time. California state courts have never been particularly protective of property rights, and those courts which wish to deny such claims may claim the ammunition they need.

continued on Page 2

"Guggenheim" continued from page 1

On the other hand, the decision does help open the door to federal litigation of takings claims. The federal courts (particularly the U.S. Supreme Court), have typically been the source of the important decisions affirming property rights. This is extremely important as we look for other opportunities to raise takings challenges that will reach the Supreme Court. Indeed *Guggenheim* has already provided park owners many benefits which include:

- It establishes that a facial *Penn Central* taking claim can be brought. (Rent control advocates have asserted there is no such thing!)
- It prevented many cities from amending their ordinances for the many years it was pending.
- It "opens the door" to the Federal Courts where taking claims have a better chance. No decision upholding a *Penn Central* takings claim, in this context, has ever emerged from the State Court system, and practitioners agree this is perhaps *Guggenheim's* greatest achievement.
- It precipitated the repeal or easing of rent control in a number of cities.
- It is a building block for the ultimate success that park owners will achieve in the U.S. Supreme Court.

Even though a review was not granted, the decision may sow the seeds for the eventual successful challenge of rent control and other property regulations which confiscate private property for public use - without compensating the owner.

Rob Coldren is a founding partner of the law firm Hart, King & Coldren in Santa Ana, California. For over a quarter of a century, Mr. Coldren's practice has emphasized representation of mobilehome parks and recreational vehicle parks, as well as park owners, throughout the State of California. Mark D. Alpert is a partner with Hart, King & Coldren. Mr. Alpert's practice focuses on rent control, land use and property rights. He edits a property rights blog for the firm - www.capropertyrights.com. Both may be reached at 714-432-8700 or email at rcoldren@hkclaw.com or malpert@hkclaw.com.

Join the NCC

If you are not a member of MHI and the National Communities Council (NCC), now is the time to join!

The NCC is a national organization that represents the interests of manufactured home community owners, operators, managers, developers, lenders and suppliers. Since its inception in 1996, the NCC has continued to be a strong and effective voice for the industry as it tackles a host of legislative and regulatory issues.

The NCC also serves as a clearinghouse for information and provides its member with educational seminars and webinars, newsletters, informative updates and numerous networking opportunities including the upcoming MHI Annual Meeting in October in Arizona.

To learn how to become a member of NCC and work together to improve today's business climate and positively impact the future of the manufactured housing industry, call Thayer Long at (703) 558-0678 or visit www.mhcommunities.org.

Obtaining Rent Increase in Chula Vista

Hard Fought Victory for Park Owners and the City

By Robert S. Coldren, Esq. & C. William Dahlin, Esq.

The conventional political wisdom of municipalities is that rent control is adopted to preserve "affordable housing" and to make sure that residents do not get "gouged" for rent. Frequently, the political reality is much different.

In early 2007, the remaining term of the ground lease for Brentwood Mobilehome Park, in Chula Vista, was sold. The new park owner took over and began investing millions of dollars to improve the park. An entirely new electrical utility system was installed, a new fire hydrant system was created, streets were repaved, the club house was improved, and repairs were made to the common areas including the pool. After spending just over $3.0 million, the park owner went to the city requesting reimbursement of the capital expenditures. Seeking to be exceptionally fair and not create an undue burden on the residents, the park owner requested an increase that would be phased in over three years and would capitalize all of the new expenditures over an exceptionally long period of time (40 years).

City staff, to its credit, reviewed the application and recommended that it be granted in its entirety. Unfortunately, the city's Rent Review Commission decided to disregard the recommendations of the staff, including the city attorney, and

continued on page 3

Time to Evict a Tenant?

By Darrell P. White, Esq.

A tenant fails to pay rent and now it's time to move forward with an eviction. Every owner and manager, at some point in time, will have to deal with this unfortunate situation. At HK&C, we are frequently asked to walk through the Unlawful Detainer ("UD") process with those owners and managers having little or no experience with evictions. The following is a short outline of the UD process with a few common issues.

Notices

The cornerstone of a UD is the notice. Whether the notice is a Three (3) Day Notice to Pay Rent of Quit or another notice under Civil Code section 798.56, it is extremely important that the notice be addressed to the correct party, state the monthly rent amount as well as the rent owing and due for the correct rental period. Courts tend to examine notices with a high level of scrutiny and can throw out an entire UD if the underlying notice contains incorrect information.

Service

After you have prepared an error free notice, the next step is to serve the notice on the tenant. Service must be conducted by personal service, substitute service, or, if neither personal or substitute service can be achieved, by posting and mail. Although some parks choose to go straight to posting and mailing the notice, some courts require three "good faith" attempts at personal or substitute service prior to posting and mailing a notice. HK&C recommends this practice to save money downstream.

Trial

Trial issues are numerous and varied. Experienced trial counsel can be essential to success. A popular tactic that tenants use to fight this type of case is to argue improper service of the Three (3) Day Notice to Pay Rent. That is why it is a good idea to have the person who served the notice present for trial.

What Happens Next?

Once a park obtains a judgment for possession, the eviction process is over, right? Not yet, unfortunately. A park will still have to go through the Sheriff's "lockout" process; change the locks on the home and create inventories of remaining personal property. Then comes the Warehouseman's Lien – which is the legal method by which many parks collect on their UD judgment. Even if the tenant is a "turnip", often a Warehouseman's Lien post-judgment is the cheapest, quickest way to get title to the home for resale or pulling from the park.

To avoid the many pitfalls owners and managers face when evicting a tenant, it is imperative that the eviction process be done correctly. For more information on how to legally evict tenants, please give your UD professionals at HK&C a call at 714-432-8700.

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"Chula Vista" continued from page 2

grant a rent increase that was literally less than half of what was requested. In response to the irrational decision of the city's Rent Review Commission, the park owner, with HK&C, filed a Writ Petition. In late May 2011, the San Diego Superior Court granted the Writ Petition and handed the matter back to the Rent Review Commission for reconsideration. A new hearing has not yet been scheduled but should be completed sometime during the summer of 2011.

The park owner, in choosing to contest the decision of the Rent Review Commission must be commended. Such challenges are time consuming, expensive, and difficult to win.

It is gratifying that the Superior Court has granted the Writ Petition of the park owner, essentially granting a much larger rent increase. The uncontroverted dollars and cents aspects of the rent increase application made it abundantly clear that the park owner was seeking to obtain reimbursement of literally millions of dollars of investment with a reasonable return. The City of Chula Vista may well be considering following the lead of Oceanside and adopt full vacancy decontrol in the near future. HK&C is proud to have helped in achieving this progress.

Bill Dahlin is a partner with Hart, King & Coldren and has practiced law for over two decades. His practice focuses on property rights. Both Rob Coldren and Bill Dahlin may be reached at (714) 432-8700 or email at rcoldren@hkclaw.com or bdahlin@hkclaw.com

Thank you!

I've been reading your blog postings and articles in the *WMA Reporter* for a while now. I wanted to say "congratulations" on the progress you made on your case for the Reeds. Your focus on land use and property rights issues is so important to me as an American, I have to say "thank you, thank you, thank you!"

– Don & Jackie Fenaroli

LinkedIn Follow Us...

Follow our new group "**California Mobile Home Park Owner Industry Members**" on LinkedIn! The group was created to provide important legal updates and other information that affects the manufactured housing industry. You will not only connect with other members, but will be able to share your valuable insight, experience and challenges with this dynamic industry.

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