RESIDENT RELATIONS

Recent Decisions Creates an Important "Downside" for Local Governments Under Rent Control.

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Very few economists would argue that rent control makes economic sense. Economist Assar Lindbeck described rent control as the best way to destroy a city, other than being bombed. The decision of local governments to adopt and aggressively apply mobilehome rent control is purely a political calculation. You don't need calculus to do the political equation: supporting rent control = large block of votes. The result is not only rent control, but typically rent control applied in a manner that is extremely unfair to park owners and which makes no sense for the community at large.

Local governments have been able to make this political calculation because, for the most part, unsympathetic state courts have protected local governments from takings or inverse condemnation claims that would create a major financial downside to consider in their calculation. This problem is compounded by the fact that federal courts have largely refused to step in, denying park owners access to those courts to adjudicate takings claims. However, that may be changing, with two recent Ninth Circuit decisions, *Guggenheim v. City of Goleta* and *Los Altos El Granada Investors v. City of Capitola.*

Much has already been said and written about the *Guggenheim* decision, which held that the City of Goleta's rent control ordinance caused a taking. Of course, *Guggenheim* is an extremely important decision for manufactured home community owners under rent control. Its ultimate impact may depend on a petition for en banc rehearing currently pending or potentially a U.S. Supreme Court review of the decision. In all the excitement over the *Guggenheim* decision, the importance of the *Los Altos* decision, issued a few weeks later, may be somewhat overlooked.

Los Altos affirms the right of plaintiffs to reserve the right to litigate federal constitutional claims in federal court, particularly where the state courts have declined to allow a decision on the merits of takings and other constitutional claims. The federal court reversed the efforts of the state court to strike the park owner's reservation of federal claims for federal court. The decision included strong language signaling the need for federal courts to step in to protect property rights where state courts have failed to do so. This is very significant because some state courts (notably California) have effectively eliminated takings claims in litigation over rent control. The risk of takings litigation brings with it the very real risk to local governments of damage awards and attorney fee awards.

In fact, on January 6, 2010, the Ninth Circuit Panel which decided the *Los Altos* case granted the Plaintiff park owner an award of attorneys' fees for prevailing in the litigation. The Panel award in this case was particularly notable because the appeal involved a procedural question, not the ultimate determination of whether rent control had caused a

taking. The actual award of attorneys' fees makes the real downside for local governments applying rent control, all the more palpable. It may be, as they say, a "game changer." Prior to the *Guggenheim* and *Los Altos* decisions, a park owner under rent control could seek rent increases and when those rent increases were denied, had the right to challenge those decisions. Much of our expertise at Hart, King & Coldren is in advising our clients when and whether to seek administrative rent increases and, where appropriate, recommend that those administrative decisions be challenged. For practical and legal reasons, however, most park owners have been limited to narrow legal challenges to rent control decisions, known as administrative mandamus litigation. If successful, this litigation requires the local agency to reconsider the requested increase, correcting for any errors that were made. Administrative mandamus litigation resembles an appeal more than a trial. There is a hearing rather than a true trial and the judge generally reviews the administrative decision for "substantial evidence."

We can attest to the fact that many park owners have obtained substantial rent increases pursuing administrative rent increase applications and as a result of administrative mandamus challenges. However, because this litigation does not have any real significant downside for local governments (i.e. the potential for damages), there is little incentive for rent boards or local governments to apply rent control more fairly. In addition, under the deferential standard of review and law that has been developed under this standard, park owners have not been able to successfully argue rents should be raised to reasonable fair market levels.

If local governments must face takings trials, it fundamentally changes the nature of the litigation. The park owner would be entitled to a true trial, with discovery and the ability to call witnesses. The trial would be decided under the preponderance of evidence standard (i.e. 'more likely than not' standard) rather then under "substantial evidence" standard. Most importantly, there is a potential for damages based on the confiscation of the value of the property by rent control.

The potential large downside of a damage judgment against local governments may fundamentally change the way in which rent control is applied. The *Guggenheim* and *Los Altos* decisions are a painful example to local governments of the potential consequences of a federal trial on takings claims. ■

Hart, King & Coldren attorneys, Rob Coldren and Mark Alpert, were counsel for the park owners in the Los Altos and Guggenheim cases.