PARK WATCH ® A LEGAL DEVELOPMENTS NEWSLETTER

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SOUTHERN CALIFORNIA: 284 NORTH GLASSELL STREET, FIRST FLOOR, ORANGE, CALIFORNIA 92866 (714) 532.2222, FAX 532.3238, 532.5381
NORTHERN CALIFORNIA: 980 NINTH STREET, 16TH FLOOR, SACRAMENTO, CALIFORNIA 95814, (916) 444.0777, FAX 444.2983

A COURTESY FOR OUR FRIENDS AND CLIENTS **E-MAIL**: trd@dowdalllaw.net

High Court Unanimously Slaps Down EPA Brutality Against Property Owner

We recommend:
LEASING DOCUMENTS SHOULD NOW INCLUDE BROAD FACILITIES RELEASES AND FED ARBITRATION CLAUSES

A Strike Against Belligerent Bureaucratic Bullying

By: Terry R. Dowdall, Esq.

Mike and Chantell wanted to build a house. They purchased a .63-acre parcel in Idaho for $23,000. The parcel is 500 feet west of Priest Lake, separated from the lake by a house and a road. Sackett imported fill (dirt and rock) upon the parcel.

EPA issued a "compliance" order, demanding a stop to further construction, and removal of the gravel. The order alleged that the parcel is a wetland subject to the Clean Water Act (CWA), violated by importing the fill without a permit. Moving the gravel would cost $27,000 — more than what the Sacketts paid for the land.

The Sacketts unsuccessfully sought a hearing to challenge the assertion of jurisdiction (that the lot was a wetland). The EPA refused a hearing and continued to assert CWA jurisdiction. The National Resources Defense Council accessed documents which show additional some additional facts, which apparently were not included in the record before the Court.

It appears that the Sacketts knew, well before issuance of the compliance order, that the parcel was a wetland. Their expert opined as much in 2007, after EPA first inspected but months before the compliance order. In May 23, 2007, the Army Corps gave the Sacketts a permit application, requesting completion and return. Mrs. Sackett's notes further suggest she recognized the land was a wetland, even if she contested EPA's authority to regulate it.

In any event, the EPA declared the parcel a wetland and threatened assessment of a penalty of $37,500 per day, *doubled* if an enforcement action were needed. The Sacketts had no ability to challenge that sanction. And our Ninth Circuit affirmed.

Supreme Court Ruling

The Supreme Court unanimously (!) condemned the EPA, based on the bar against any hearing to review its actions. This case has significant ramifications for every

Chelu Travieso

(1950 - 2012)

By: Diane W Medina, Esq.

My dear friend and colleague, Chelu Travieso, passed away in the early morning hours on March 30, 2012. The manufactured housing industry has lost another icon.

Chelu introduced me to the manufactured housing industry in 1995, when I was hired as in-house general counsel at Mobile Community Management Co. ("MCM"). Chelu was my boss and my early mentor in this industry, and we worked together until 2006. Along the way we became friends.

Chelu, Cont'd to page 2

property owner whipsawed at the whim of an audacious governmental bureaucracy.

For decades, the EPA has squelched development –*i.e.*, lawful use of one's own property. The EPA has seized on the vagueness of the term "waters of the United States"—never defined and not clear (Congress' fault as Justice Alito writes) –as to morph it into any meaning EPA pleases.

Appeals by the property owners may take years and small fortunes to navigate the bureaucratic labyrinth before a dispute is finalized so it may be judicially challenged. As one editorial states, "[T]he EPA, of course, has all the time in the world and unlimited funds from taxpayers."

● *It Helps to Have A Sympathetic Plaintiff*

Just three weeks before the Court granted review, the High Court rejected an appeal by General Electric. G.E. claimed to be afflicted with the same grievance against the EPA *(G.E. v. Jackson)*. G.E. alleged that the EPA orders would affect value of its stock and its credit rating without chance for judicial review.

> *"Bullying – that's what the EPA does. They came into our lives, took our property, put us in limbo, told us we can't do anything with it, and then threatened us with fines."* -- Chantell Sackett, The Washington Times

Whatever the impact on GE, the Court had sympathy for the "little guy." The opening page of the Sacketts' petition, stating that they owned ". . . a small lot in a built-out residential subdivision that they graded to build a home," and then faced an EPA order claiming that their property was a "wetland without a federal permit." The order mandated that they "remove all fill, replace any lost vegetation, and monitor the fenced-off site for three years," or else face "great cost" and a "threat of civil fines of tens of thousands of dollars per day, as well as possible criminal penalties."

After failing to secure a hearing from the EPA, the Sacketts filed suit, challenging the compliance order to remove the fill they imported and to comply with the full panoply of regulations required to procure a permit for the development of their residential lot. The EPA issued a compliance order, which first claimed that the Sacketts were in violation of the Clean Water Act and subject to fines of up to $37,500 a day.

● *The Courts*

The Court held that the Sacketts could pursue their suit based on the compliance order. They did not need to await judicial enforcement and the accumulation of fortunes in fines. Essentially, the EPA has gone far enough, when issuing a compliance order, to be challenged in its exercise of jurisdiction.

According to Professor Eastman of Chapman University School of Law (a couple of doors down the street from our office), the EPA strategy was to draw matters out for many years, costing property owners hundreds of thousands of dollars, until the property owners dropped their cases or went broke. "Now, the Supreme Court's decision provides an early trigger. As soon as the EPA gives you that letter" – demanding that development be halted – "you can challenge that letter in court."

The majority decision is very neutral in tenor, as would be expected in a unanimous decision from *this* Court. To understand the extraordinary repugnancy of the EPA practice (and other dictatorial agencies of like ilk), the concurring opinion of Justice Alito is illuminating:

Said Justice Alito: "*The EPA may issue a compliance order demanding that the owners cease construction, engage in expensive remedial measures, and abandon any use of the property. [They] may be fined up to $75,000 per day ($37,500 for violating the Act and another $37,500 for . . . order). And if the owners want their day in court to show that their lot does not include covered wetlands, well, as a practical matter, that is just too bad. Until the EPA sues them, they are blocked from access to the courts, and the EPA may wait as long as it wants before deciding to sue. By that time, the potential fines may easily have reached the millions. In a nation that values due process, not to mention private property, such treatment is unthinkable.*"

Chelu, Cont'd from page 1

In addition to her responsibilities as President of MCM, Chelu was very active in several industry organizations, including the WMA, CMPA, MHET, CMHI and MHI. She was also honored by these organizations over the years.

She received the Busch, Carr, McAdoo Award in 2008, WMA's highest honor for those who dedicated themselves to the manufactured housing industry. She served on the Executive Board of the CMPA and organized its annual Symposium in Las Vegas. She was twice a recipient (1990 and 2008) of CMPA's Freedom Fighter Award for her dedication to protecting property rights. Chelu was a member of the MHET Board of Directors from 1990 to 2012, served as its President in 1997 and 1998, created and chaired the MHET Awards Dinner from its inception in 1996, and was honored with the MHET Above and Beyond Award in 2005.

Chelu loved the manufactured housing industry. Her devotion showed in everything she did. Whatever the cause or occasion, if it was for the betterment of the industry, or if it was fun and entertaining, Chelu was right in the middle of it (or leading the way). From spearheading rent control initiatives and organizing industry events to playing the castanets and putting on stage shows during those events, you could count on Chelu.

Chelu led a fascinating life. Born in Cuba, her family escaped the Castro regime when she was a child and eventually relocated to the United States. She began her career in property management in 1971, first in apartments and later commercial and industrial properties. Chelu entered the manufactured housing industry in 1983 when she joined the Newport Pacific Family of Companies. She took the helm at MCM in 1990, managing a portfolio of close to 5,000 spaces in California. She had recently been transitioning to join her husband, Don Earhart, in retirement.

Chelu had an incredible sense of humor. Fun and full of life, she loved meeting new people and was a great story teller. She was spirited and feisty, she was witty, charming, and she was an entertainer. She was a caring person, and she was a friend to many. Chelu was the strongest woman I knew. I loved her dearly, and along with everyone else she touched in life, will miss her deeply.

–DWM

Conclusion

The dark and ostensibly sinister dealings of the EPA, and perhaps many other agencies whose regulatory schemes are predicated upon procedural iterations similar to EPA's, can be brought into the light and examined before impartial tribunals. It is the beginning of real judicial intervention to check the manifest abuses of a tyrannical system running untethered to any notion of fairness. This is not "activism" as some now conveniently say (in condemning the Court's actions)—rather, it is an affirmance of the fundamental notion that our courts are, by design, to check the abuses of a majoritarian will against minority interests, even when the minorities just happen to be property owners.

A "Loan Workout Plan" Is Not an Agreement to Modify a Loan

By: Terry R. Dowdall, Esq.

Upshot

As park owners finance more home sales, the issues not resolved by the CFPB (regulations for servicing of mortgage loans) have yet to be promulgated and remain of great concern. However, what if a park owner makes a loan for a mobilehome sale, using the attorney exemption to negotiate, structure and originate the loan? Will the loan modifications of the future regulate the park owner in the event that help is needed to assist the tenant in staying in the home? This new case offers an interesting approach to creatively circumventing such regulations.

Background

In *Nungaray v. Litton Loan Servicing*, the Court of Appeal held that: (1) a Loan Workout Plan is not an enforceable agreement to modify a loan; and, (2) a bank does not violate the "one-form-of-action" rule by accepting payments under such a Plan, then proceeding with foreclosure.

Plaintiffs refinanced but then defaulted on their loan. The bank initiated non-judicial foreclosure proceedings. In response, Plaintiffs negotiated a "Loan Workout Plan" pending decision for a permanent modification. The Plan required them to pay monthly and also called for financial information required for a loan modification. Plaintiffs failed to provide the financial information. The bank denied their request for modification and foreclosed.

Plaintiffs filed suit arguing that the workout plan was an enforceable loan modification among other challenges. The trial court granted summary judgment for the lender. The appellate court affirmed.

Ruling

The Court held that there was no enforceable modification agreement because the workout plan expressly stated that it was "not a modification" and that a modification would not be granted unless the debtors met all conditions required, which they failed to do. The Court also held that banks can negotiate and enter into workout plans, and then receive payments, without forfeiting the right to foreclose.

The standard advice–*"don't take any payments after the 60 day notice is served"*; or *"after the 3 day period has expired"*—is not necessarily applicable. This case reinforces the notion that park owners utilizing workout plans to preserve tenancies which have the reasonable prospect of successful reinstatement after default can do so with reasonable security. Properly drafted, park owners can and do receive payments while, pursuant to the work out plan, they have preserved their rights under previously served notice to terminate tenancy. With a workout plan, a park owner may receive monies otherwise lost if straightforward termination of tenancy proceedings are brought. In this time of economic downturn and stagnation, seeking to help tenants reinstate does not have to be with prejudice to enforcement of the management's rights if, indeed, the resident cannot perform according to the work out plan.

Crawford v. BNSF Railway Company: Workplace Policy Trumps Sex Harassment Claim

The Importance of Employment Policies, Contracts, Manuals

Employers may wish to re-evaluate the value of implementing written workplace policies against improper conduct and procedural remedies to stop and control future misconduct. For example, employers may wish to take advantage of instituting written rules for receiving and processing harassment in the workplace. *It can be the difference between winning a lawsuit and avoiding trial, as against the possibility*

of facing a jury based on the actions of subordinates. In the recent *Crawford v. BNSF Railway Company* (8th Circuit case) an employer with an *effective preventive harassment policy* was granted a summary judgment *(prevailing without a trial and as a matter of law)* from liability for an employee's harassment of others.

● *Facts*

Several employees "allegedly" suffered sexual and racial harassment at the hands of a supervisor. But the plaintiffs failed to report the offensive conduct to the employer. Additionally, the plaintiffs did not exercise the prerogative of the employer's "zero tolerance" harassment policy with its procedures.

Once the employer found out about the alleged offensive conduct, remedial measures *were* taken, including a termination of the bad-actor-supervisor. Plaintiffs sued anyway. In response, the employer stated that the employees did not report the conduct—which prevented the employer from taking action, and moreover, that exercise of reasonable care to stop offensive conduct and any harassing behavior had been taken.

● *Ruling*

The court refused to hold the employer liable for the supervisor's harassment. Having in place a policy that effectively responds to harassment in the workplace can help limit an employer's potential exposure. Several important aspects for an employer's harassment policy are:

- ▲ A policy prohibiting harassment;
- ▲ Channels open to employees to report this type of behavior;
- ▲ Guidelines explaining the ranges of discipline that the employer might apply to employees who harassed others;
- ▲ Training employees on the harassment policy;
- ▲ Actually enforcing the harassment policy.

The Eighth Circuit panel concluded that the employer had a comprehensive anti-harassment policy and that it investigated and terminated the allegedly offending supervisor within two weeks of notice of the alleged conduct. Summary judgment in favor of the employer was therefore appropriate.

Management of mobilehome parks is a people business in which interpersonal contact is a frequent daily occurrence. A written policy to deal with the friction between employees which may develop may well exculpate the employer from liability. And incidentally, an employee exhibiting bad conduct toward others, employees and residents alike, must be firmly and promptly disciplined. In most cases, if the employee is not a part of the "key" personnel of a management team and the offense is serious or continuing, the only proper response is termination. In respect to "key" personnel, some additional leeway is acceptable depending on the nature of the discipline and avoidance of any further recurrence.

Santa Monica Rent Board Errs in Rent Reduction Order

A Rent Reduction Not Applicable to Amenities and Requires Particularization of Loss of Value.

● *Facts*

Two women tenants in Santa Monica really liked their sauna and jacuzzi (supplied by their landlord).

The tenants were paying $1214.25 and $1440.23 per month, respectively, for very large two-bedroom, two-bath apartments. The apartments include shared access to a Jacuzzi and a sauna. They complained that the landlord had turned down the daytime temperatures on the Jacuzzi and had shortened the (repeatable) toasting time on the sauna's control knob from an hour to 25 minutes. They were complaining that they had to turn on the switch more often.

In a not-surprising ruling from the Santa Monica Rent Board, this egregious action by the landlord was punished with a reduction in the rent of each of the tenants. The Board found, in a 99-page decision (!) that set forth 58 separate "Findings of Fact and Conclusions of Law," the Board hearing examiner ordered a $48 and a $25 decrease. Thankfully, that reckless, irresponsible agency decision could be immediately challenged in court.

● *Ruling*

The landlord sued. The relief sought was a reversal of the rent decrease and an order to compel the Board to adopt regulations relating to administrative remedies. The trial court ruled against the landlord.

On appeal, the Court held that "substantial" deterioration or violations of housing, health or safety codes can warrant rent decreases. However, in this case the reduction of services was minimal – a minimal reduction of adult recreational services of a type commonly found only in luxury housing did not justify decreasing rents unless the tenant could present evidence establishing that as a result of the change

the current rental amount became excessive or the landlord would realize an unjust or unreasonable investment return. This essentially reverses the daunting task of proving rate of return, and puts a tenant in the unenviable position of proving an excessive rate of return. And in Santa Monica, that is likely not possible.

The opinion interprets the Santa Monica ordinance to find that "A reduction in recreational services may be considered on a rent decrease petition, but where, as here, the reduction is a minor adjustment in the hours of luxury spa services, no rent decrease may be ordered without evidence that it resulted in excessive rent or an unjust return on the landlord's property." This opinion helps all park owners who are faced with the threats or reality of a rent or service reduction petition, or opposition to a rent application, due to park conditions.

● *Comment: You Must be Kidding!*

But look at the uncompensated cost to vindicate the landlord's rights! And the taxpayer burden for hearings culminating in 99 page decisions. And what of the eventual impact on the other 32 residents in the building? Trying to economize, and be environmentally responsible, is a laudable action.

Lessons to Consider: the cost of this exercise for the property owner, from beginning to end, is not soon to be reimbursed with higher rents or the savings from the change in the facilities. In the long run, is it better to keep services at existing levels so as to not expose a possible risk of an expensive and long-running agency battle? Or consider the proactive strategy of providing a voluntary reduction to the affected residents, with a release of claims against such a reduction claim?

Consumer Financial Protection Bureau Enforcement Activity to Launch - "Non-Banks" Included

● *Upshot*

According to recent reports, the Consumer Financial Protection Bureau has opened investigations, starting with the practices of some large banks.

"We do have open matters we're looking at involving a range of institutions, large banks, smaller banks and non-banks," Richard Cordray said in an interview taped for C-SPAN's "Newsmakers."

Cordray would not give any details of the investigations, but in the interview with reporters from The Times and Dow Jones Newswires, he said the agency was "active on all fronts."

The bureau, which began operations in July, has its own examiners at banks and at some financial companies outside the banking industry. The examiners are aggressively looking for violations of consumer protection laws.

All the more reason to, as urged previously, determine how park owners will comply with the SAFE Act.

If You Have an Arbitration Clause, Pay the Fees

(Or Watch Out for A Guy Named "Christopher")

● *Upshot*

If you seek to arbitrate, you cannot win by frustrating the process with nonpayment of the arbitration fees, and then seek to enforce a favorable judgment based on the abandonment of the arbitration process.

● *Facts*

In one of the more audacious, and obviously groundless, challenges involving arbitration law in recent memory, various investors sued a founding member of an investment group (Christopher) who induced plaintiffs to purchase, for securities fraud. There was an arbitration clause involved and accordingly, Christopher sought arbitration of the dispute. However, after he refused to pay the arbitration fees, the proceedings were suspended and eventually terminated.

At this point, just what the defendants were thinking is not clear. The matter returned to the trial court. Defendant Christopher moved for confirmation of the arbitration "award," which quite apart from an "award," was merely a failure of the proceeding to move forward.

Ruling

The trial court found that there was but a "termination order" and denied Christopher's effort to confirm that the termination order included no liability. Christopher argued that the trial court could not review the merits of an arbitrator's award in determining that it did not constitute an "award."

Not content with this outcome, Christopher appealed. The appellate Court affirmed. The Court held that an arbitration award shall determine all the questions which must be decided in order to adequately decide the dispute. But the arbiter's order did not address any substantive issues related to the dispute. The order refused to commence the proceedings for failure to pay fees. So the Court ruled that Christopher's petition to confirm was properly denied.

Comment: You Must be Kidding!

If a park owner is sued and there is an available arbitration clause, it would probably be unthinkable to believe that the proceedings could be subverted by thwarting the process. May a defendant park owner may emerge unscathed with no finding of liability whatsoever, by merely not paying the arbitration fees? A strategy *(if you can call it that)* to prevent the arbitration from taking place will therefore not allow for a default judgment in favor of the non-participant. In other words, you cannot win by preventing the arbitration from even taking place. But just in case this thought had ever crossed your mind, *ah, no,* it will not work.

With cost-sharing arbitration clauses, *what is outcome if a tenant fails to contribute his or her share of costs?* The case may proceed as a default if the clause is self-executing and the clause provides as much. If the clause is not self-executing, then an order compelling arbitration is safest to cement the validity of the clause. Again, arbitration is a relinquishment of a fundamental due process right and must therefore consent must be compellingly established to enforce it. In state courts, cost-sharing is likely invalid, as arbitration costs generally exceed the costs of court litigation. Hence, clauses need to comply with the *AT&T* requisites to have reasonable assurance of enforcement.

As per the case that follows, the courts are buzzing with new arbitration cases ever since last year's *AT&T v. Concepcion* case, and the Ninth Circuit has now sustained an arbitration clause which contravened California law, which should make all of us recommending FAA arbitration clauses broadly smile.

Ninth Circuit Preempts Cal. Arbitration Law

(Or, Another Step Closer to Annulling MRL Restrictions on Arbitration Clauses)

Upshot

I have previously written that the Supremacy Clause of the U.S. Constitution means that California law (including the Mobilehome Residency Law "MRL") which adds to, modifies, or takes away the rights vested in the Federal Arbitration Act ("FAA") will likely be deemed unenforceable. In other words, the special terms and provisions for dealing with arbitration cannot withstand constitutional muster in light of a paramount federal law. A new case (*Kilgore v. KeyBank*, March 7, 2012) is more evidence that, indeed, the MRL restrictions on arbitration clauses will be adjudged enforceable just as soon as a challenge ascends to the courts.

Facts

Following *AT&T Mobility LLC v. Concepcion*, the Ninth Circuit Court has held that California's rule against compulsory arbitration of claims for public injunctive relief was preempted by the FAA. The plaintiffs were students at a failing vocational school, and filed a class action against the school's tuition lender. They alleged that the lender knew of the school's impending failure, but continued making loans anyway. Plaintiffs desired only injunctive relief, and an order which barred enforcement of the student loan agreements. The agreements contained an arbitration clause. The filing was in state court, but the lender removed the case to federal court and moved to compel arbitration.

Ruling

The trial court denied the motion. The court held that California's state law rule prohibiting arbitration of injunctive relief claims rendered the arbitration clause unenforceable. But that decision was prior to the *AT&T* precedent handed down in April, of 2011.

The Ninth Circuit reversed! In doing so, it recognized that the District Court decision was predicated on pre-*AT&T* law, which was that California could avoid FAA preemption if it did not intend the type of injunctive relief provided for in the legislation to be arbitrated. But state intention and purpose notwithstanding, *the Supreme Court held in AT&T that the FAA policy of promoting arbitration does not allow for any state interference.*

The Ninth Circuit stated that California's rule cannot withstand muster due to *AT&T.* California law "prohibits outright the arbitration of a particular type of claim." This violates *AT&T.* The Court also referred to a Supreme Court opinion holding that the FAA preempted a state law prohibiting arbitration of patient/ nursing home disputes on public policy grounds ("states cannot require a procedure that is

inconsistent with the FAA, even if it desirable for unrelated reasons").

● *Comment*

This decision is at odds with a state court ruling in *Brown v. Ralph's Grocery Co.*, in which the state court would *not enforce* an arbitration agreement that provided for a waiver of the state Private Attorneys General Act ("PAGA"). That state court held that *AT&T* does not affect PAGA actions, because PAGA actions are to enforce public policy. The obvious reaction to this decision is to *ignore* it, and file the motion to compel in *federal court* once the state action is *removed.* It is likely that the FAA will receive the welcome to which it is entitled in that forum. And it is likely a waste of time and money to seek enforcement in California's hostile courts.

Using Volunteers: What Policies Do You Have in Place?

● *Upshot*

Many owners utilize resident volunteers to perform work within the community. In the current economic climate, this practice has become even more prevalent as a cost saving measure. The use of volunteer labor, while reducing maintenance costs, presents certain legal exposure and liability to the association.

● *Discussion*

All owners should be aware of the legal consequences and exposure when enlisting volunteers for work in a park. There are two general areas of potential liabilities:

▲ Some utilize volunteers to perform routine maintenance and repair services. Owners may be liable for injuries suffered by volunteers while performing such services.

▲ In addition, owners may be liable for injuries to third parties if the services are not performed properly.

Therefore, owners should impose strict guidelines and exercise oversight when utilizing volunteers. In this regard, volunteers should not be utilized for hazardous activities such as climbing ladders, using power equipment or performing strenuous labor. What of security patrols? Some gentlemen enjoy gathering together in the night time hours to patrol the park, drink coffee, and keep an eye on the common areas. As we see from recent events in the news, this conduct is potentially dangerous. It is dangerous to the participants and to third parties. While a park owner cannot stop a group of residents from "being where they have a right to be," providing aid, comfort or support is an encouragement which, as an endorsement and permission to do what they intend, can expose the owner to claims of liability. Innocent actions such as petty cash for coffee and donuts or flashlight batteries each constitute affirmative manifestations of aid and support. Worse, by allowing such patrols, there may also be an implicit admission on the part of the owner that such patrols are needed due to dangerous conditions in the park. All in all, the management should not participate in the support of volunteer patrols. If such activities do exist, it is recommended that, at least, the owner procure a written understanding the owner is not in any manner supporting or complicit in the activity, and that the limit of action is to notify the proper authorities when a crime is being committed. The volunteers should not attempt to apprehend any suspects or directly intervene during a crime. And the owner may wish to check with the insurer to determine if any coverage issues will be present if a problem does later arise.

In other volunteer activities, Owners should supervise all volunteer work carefully to avoid exposure to liability not only to the volunteer, but also to others for breach of its duty to maintain the common areas.

In addition, volunteers should not perform tasks which require a licensed professional or building permit such as electrical or plumbing work since this may not only impose liability but also void insurance coverage.

By limiting the scope of the volunteers' duties, management will reduce the likelihood of injury to third parties or to the volunteer himself. Again, owners should confirm with the insurer that volunteers are covered by insurance while performing volunteer work. While the pride in ownership of the volunteer is commendable, relationships change. A decision to use volunteers is a business judgment to be made by the owner only, not managers or others. Where risk of liability to volunteers or third parties, or both, outweighs the benefits incurred, then volunteers should not be used. And where the decision to utilize volunteers is made, a waiver releasing the owner from all liability should be procured.

HCD Agency Annuls Development Fee for Mobilehome Installation

(Or, Why Does Desert Hot Springs So Dislike Mobilehome Dwellings?)

● *Upshot*

Desert Hot Springs lost its appeal in a ruling written by state hearing officer, Ronald Javor, in Riverside. As part of a legal battle that began in October, HCD contended the city has overstepped its legal authority by overcharging mobile home park owners for mobilehome

installations. HCD had ordered the city to repeal an ordinance that charges parks development impact fees. The city refused.

The City Attorney contended the city fairly charged the parks to set up new mobile home units because the fees pay for the additional burden the new residents place on city services, like police and street work.

● *Facts*

The owners of Palm View Estates fought the city over an ordinance that charged new mobile home owners up to $7,000 in development impact fees. Residents and management had asked the city to waive the development impact fees because incoming residents — who pay $425 monthly rent — could not afford the high fee.

On October 18, 2011, HCD sent a letter to the City, objecting to the City fees based on preemption by the Mobilehome Parks Act. There is no authority for such a development fee. Indeed, one may speculate that all the municipal fees to which the City was entitled were extracted as part of the permitting process for the original construction of the mobilehome park. All the state further authorizes are school impact fees. HCD maintained that installation permit fees violate the City's obligations as a local enforcement agency, because they exceeded state law limits.

On November 17, 2001, the City responded, disagreeing with HCD. The city claimed it had the right to require the draconian permits pursuant to the City's police powers. The city stated that it was common practice for other cities to require the payment of the fee because the commencement of construction creates the "strain" on public facilities.

On January 3, 2012, the Department issued a formal notice of intent to revoke the City's local enforcement agency authority effective February 15, 2012. After hearing, Hearing Officer Javor upheld the position of the HCD.

● *Ruling*

In a 31 page ruling, the fee was a pernicious interference with the state policy of promotion of affordable housing. Javor found that a fee "not expressly contemplated" by state law may have a significant impact on both the general welfare of homeowners and renters, as well as on their investment in their homes.

"Such a fee-particularly if significant-must be paid or amortized in a loan, increasing the cost of a home, or may be passed on as part of rent by a non-owner-occupant. It may discourage new homes from being added to a park, thus increasing vacant spaces and impacting the investment value of those homes already there. A significant number of vacant spaces also impacts the financial ability to operate the park by the owner, or will cause increased rents to homeowners in order to offset the lack of rent from empty spaces. The Legislature's focus on limiting fees charged by the enforcement agency for general administrative costs bears witness to the impact of excessive fees placed on owners of no-longer mobile manufactured homes."

Based on a thorough analysis of applicable state law, the City's Appeal was denied. HCD's Notice of Revocation was sustained "with respect to the City's continuing violation mandating payment of a development impact fee as a condition for approval of an installation permit for a manufactured home in a mobilehome park."

This decision now has the effect of taking away local enforcement jurisdiction of the City and returning it to HCD. In many cases, local enforcement jurisdiction runs amok in light of lack of expertise, knowledge and shared goals of promoting affordable housing. Much like the EPA decision above, too many mini-bureaucrats attempt to bludgeon park owners with either imprecise or outright incorrect application of Title 25. Some it may be observed, do so with the intention of securing a fair enforcement practice, but others appear to harbor the intention to persecute owners not to their liking. This decision stands as a useful enlightenment of the scope, and limits of the exercise of local enforcement jurisdiction, of the Mobilehome Parks Act for use by park owners across the state.

Please feel free to request a copy of the order. *A copy will be posted soon at www.dowdalllaw.com.*

Please feel free to contact Terry R. Dowdall, Esq. for further information and questions.

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