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IN REPLY REFER TO:

October 28, 2010

VIA FEDERAL EXPRESS

Honorable Ronald M. George, Chief Justice
and the Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Re: Colony Cove Properties, LLC v. City of Carson, et al.
Supreme Court Case No. S187500;
Court of Appeal Case No. B219352
Request for Depublication (Cal. Rules of Court, rule 8.1125(a))

Dear Chief Justice George and Associate Justices of the California Supreme Court:

These offices represent the California Mobilehome Parkowners Alliance ("CMPA"), a non-profit corporation and California's second largest association of park owners.[1] On behalf of CMPA, I request depublication of *Colony Cove Properties, L.L.C. v. City of Carson*, 187 Cal.App.4th 1487 (2010), filed on August 31, 2010 ("*Colony Cove*" or "the Opinion").

The Opinion correctly rules that the City of Carson's ordinance is preempted (requiring a specific threshold level of resident support for a mobilehome park conversion to resident ownership, thus impermissibly adding to *Govt. Code* §66427.5). However, it improperly sanctions discretionary consideration of the "result" of the resident survey. In effect, this is a license to probe the state of mind of the sub-divider and the popularity of the subdivision application. Worse, that agency foray is contemplated devoid of any standard or safeguard, swallowing whole the express admonition of the statute: to judge compliance with

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[1] CMPA was incorporated on March 10, 1988 and provides educational information and publications concerning the operation and ownership of mobilehome park communities. CMPA further speaks on behalf of owners of mobilehome parks and service and industry members throughout California. CMPA keeps apace of developments which affect the manufactured housing industry in California. These developments include legislation, litigation and advocacy for the preservation of property rights. CMPA seeks to participate as amicus curiae in actions in which the issues have a direct bearing upon the rights of property owners, and which affect the continuing vitality of manufactured housing as an important source of housing in California.

the requirements of *Govt. Code* section 66427.5.[2] The legislature avoided conferring any such discretionary power to local agencies.

Specifically, the Opinion states that "by adding the provisions requiring the subdivider to obtain and submit a survey of resident support, the Legislature expressly expanded the statutory factors to be considered at the subdivision map hearing to include the *results of the survey*" (*Colony Cove*, 187 Cal.App.4th at 1506, emphasis added).

The contention that a local agency may make a finding sustaining denial of a subdivision application based on the "results" of the survey of resident support ("Resident Survey" or "Survey"), *per se*, is unsupported by the text, intent or any conceivably legitimate operation of the statute. Such is directly contrary to every decision that has addressed this issue and is inconsistent with all decisions that have examined Section 66427.5 (all of which hold that the legislative intent behind the statute is to strictly truncate agency deliberation to scrutinizing compliance with Section 665427.5 only). By contrast, the Opinion will be (and already has been) relied upon by local agencies to exercise unfettered discretion to deny approval of subdivisions, simply, by citing as grounds, the results of the Survey as a *per se* litmus paper test, eclipsing and rendering nugatory the requirements of Section 66427.5.

Even worse, *Colony Cove* admits that its untethered holding has set the parties adrift without direction regarding what may or may not be required for approval:

> We recognize that our conclusion – that section 66427.5 permits consideration of the results of the survey of support but not the promulgation of an ordinance requiring specific levels of resident support – does not resolve the manner in which the City and other local agencies are to approach conversion applications.

Colony Cove, 187 Cal.App.4th at 1508, fn. 18.

The Court then goes on to plead for assistance of the legislature:

> It is our hope that the Legislature will recognize the dilemma faced by local agencies illustrated by this case . . . and act to clarify the scope of their authority and responsibilities.

However, this is a dilemma of the Court's own making where there was none before. Accordingly, CMPA respectfully requests that this Court order that the Opinion be depublished for the following reasons:

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[2] All statutory citations are to the *Government Code* unless otherwise noted.

1. The Court has failed to consider the fact that interested parties, such as residents with demonstrable financial interests, cannot be delegated the responsibility to approve or annul applications for subdivision processing: this is a municipal function regulated and controlled by state law. The statute is fatally flawed as applied and interpreted, if the result of a resident survey can be used to sustain a finding (and thereby constitute substantial evidence invulnerable to appeal) disapproving a subdivision application. The Court's construction would erroneously, by mere *fiat*, add a new substantive basis for rejection of the subdivision application. The legislature has withheld such authority. And the legislature could not do otherwise were it of such a mind. Such power may not be delegated to private persons under California law. *Cal. Const., Art.* XI, § 11(a):

> The Legislature may not delegate to a private person or body power to make, control, appropriate, supervise, or interfere with county or municipal corporation improvements, money, or property, or to levy taxes or assessments, or perform municipal functions. . .

See, 8 McQuillin Mun. Corp. § 25.151 (3rd ed.) ("[I]n many cases, such legislation is void as an unconstitutional delegation of legislative power, making rights to use property subject to the whim and caprice of other property owners or residents"). In the seminal case of *Washington ex rel. Seattle Trust Co. v. Roberge*, 278 U.S. 116 (1928), the U.S. Supreme Court struck down a law allowing location of a home only with consent of neighbors (violation of due process). The Court said that the neighbors were "not bound by any official duty, but [we]re free to withhold consent for selfish reasons or arbitrarily and [could] subject [a neighboring landowner] to their will or caprice."

In this specific context, state law does not admit of any right of delegation of power of land use into the hands of a majority of tenants who may be antagonistic to the owner's rights. The coincidental proximity of hostile lessees to the sub-divider's property serves as no constitutionally permissible basis on which to empower them with City land use and subdivision powers. If this construction be the rule, occupants with no interest or concern in the property, or for fulfilling municipal priorities or objectives, would control the destiny of all local development throughout California by sheer idiosyncratic whim. And it would render the Constitutional mandate nugatory. This cannot be right.

> . . . where the issuance or denial of special use permits is an exercise of a city council's adjudicatory power, as distinguished from the council's legislative power, an initiative prohibiting a particular use except upon approval of the electorate is not permissible.

8 McQuillin Mun. Corp. § 25.151 (3rd ed.), citing *Wiltshire v. Superior Court*, 172 Cal. App. 3d 296, 218 Cal. Rptr. 199 (1985).

The statute calls for a resident petition to be filed. But only the statute is to be

"considered" in the determination of *compliance with the requirements of the code.*

> (e) The subdivider shall be subject to a hearing by a legislative body or advisory agency, which is authorized by local ordinance to approve, conditionally approve, or disapprove the map. The scope of the hearing shall be limited to the issue of compliance with this section.

Section 66427.5.

The only possible construction of the code is that the local agency must consider whether the petition was properly undertaken and filed. Nowhere does the code provide that resident sentiment, pro or con, may constitute a finding sufficient to determine that the sub-divider did not comply with the terms of Section 66427.5. The legislature must be presumed to have stopped short of opening the door to consideration of resident support, specifically because of *Cal. Const., Art.* XI, § 11(a) and the careful restraint in passing Section 66427.5 (as now provided and allowed to stand *unmolested* since 2002).

The Court goes too far when it imposes a statutory interpretation that the required fact of the filing of a survey is intended to confer expanded discretion and jurisdiction on the part of the local agency. The statute reveals no such textual mandate or jurisdiction. The call of the statute goes only so far as to require the local agency to decide whether the sub-divider has complied with the requirements of the statute. *Was the petition proper and was it filed?* This is the limit of action the legislature was willing to take. But now, the Court adds to the statute's carefully circumscribed limitations by holding that not just procedural compliance, but resident approval or dislike be substantively considered. The Court invites complicity as well. Expressly focusing on the legislature to approve the folly and legitimize it with interstitial detail, the Court seems to ignore the silence of the legislature since the 2002 amendments to Section 66427.5 and subsequent case law (*e.g.*, *Sequoia*). Plainly, the lament springs from a predicament of the court's own making.

The plain reality is that the Legislature rebuffed the invitation to recognize any need to provide interstitial refinement of the statute. It did not do so because resident sentiment cannot matter. It recognized, *sub silencio*, that any such guidelines would violate the constitutional bar against delegating local power to biased residents, or others, who could undermine the control over local affairs.

> The need is usually not for standards but for safeguards. ... When statutes delegate power with inadequate protection against unfairness or favoritism, and when such protection can easily be provided, the reviewing courts may well either insist upon such protection or invalidate the legislation.

1 Davis, Administrative Law Treatise (1958) § 2.15; see *Kugler v. Yocum*, 69 Cal.2d at 381; *Birkenfeld v Berkeley* (1976) 17 Cal.3d at 169.

The opinion states:

> "It is our hope that the Legislature will recognize the dilemma faced by local agencies illustrated by this case . . . and act to clarify the scope of their authority and responsibilities."

But if the statute contains no safeguards buttressing the Court's construction--adding deliberative discretion of the local agency to make a finding based on resident sentiment--that discretion cannot be added in the first instance. The Court's new and strained construction adds discretion without any standards or safeguards, as it admits. For the local planner, this interpretation is plainly unintelligible. Given the Opinion, it is anyone's mere guess how a resident survey is to be interpreted in a fact-finding hearing.

The Court, understandably, pleads for further legislative action to clarify the powers it now bestowed on the local agency. In doing so, the Court assumes the legislature meant to do what the Court decided. But the legislature never did that; the Court erred by failing to read the legislature's actions and restraint for just what it was: an unwillingness to delegate local discretion to make findings about the results of the survey. The Court erred when it assumed the legislature meant to do something other than it actually and intentionally did—limit the survey to its undertaking and filing. The Court must of course then prevail on the legislature to fill in the blanks the Court itself has created by opening up a new fact-finding inquiry beyond the articulated restrictions of Section 66427.5.

If constitutional validation of the Court's construction requires further legislative action, it cannot be right. It merely shows the Court went too far, supplying substantive content *via* judicial *fiat* the legislature declined to promulgate. Rather, the statute is flawed as interpreted as it requires further requested substantive refinements (inclusive of "safeguards") the legislature never included. Simply, the legislature never went that far. And prudently so.

2. The Opinion conflicts with controlling precedent, *Sequoia Park Associates v. County of Sonoma*, 76 Cal.App.4th 1270, 1293-1300 (2009) ("Sequoia"). *Sequoia* contained a comprehensive analysis of the legislative history of section 66427.5. *Sequoia* was issued after extensive briefing and argument by parties and by *amici curiae* for both parties. In *Colony Cove*, there was little or no briefing on the tangential issue addressed by the Court because the issue was not necessary to resolution of the case. CMPA believed the matter was settled by *Sequoia*.

3. The Opinion's language suggesting that local agencies may deny subdivision approval based on the result of a resident survey, without more, is directly contrary to at least two unpublished appellate opinions (and several trial court opinions) that have ruled upon the same issue in very similar factual contexts.

4. The Opinion's objectionable language is completely unnecessary to the court's resolution of the case. The *ratio decidendi* is invalidation of the City's local ordinance because it expressly conflicts with state law. Yet, the *dicta* will be interpreted in a patch-work quilt-like pattern across the entire state. This *ad hoc* predicament for local agencies will result in the proliferation of litigation in every case when either side is dissatisfied. In these usually emotionally-charged matters, someone is always unhappy. The likelihood of continued, costly and time-consuming litigation is greatly exacerbated due to the Opinion.

5. The "survey of support" issues were already decided in *Sequoia*. There, the County of Sonoma adopted an ordinance imposing illegal conditions on mobilehome park subdivisions, including the requirement that a subdivision be "*bona fide*," as measured by the percentage of resident support. *Sequoia*, 176 Cal.App.4th at 1288-92. *Sequoia* held that the Sonoma Ordinance was preempted by Section 66427.5.

After a thorough survey of state legislation and the legislative history of section 66427.5, *Sequoia* held that (1) "the state has taken for itself the commanding voice in mobilehome regulation" (*id.* at 1293), (2) "the Legislature viewed the subject [of mobilehome park subdivisions] as one where the state concern would not be advanced if parochial interests were allowed to intrude" (*id.* at 1298), and (3) "[S]ection 66427.5 strictly prohibits localities from deviating from the state-mandated criteria for approving a mobilehome park conversion application" (*id.* at 1299).

Citing *Sequoia*, *Colony Cove* invalidated Carson's ordinance because the ordinance "impose[d] additional requirements in connection with obtaining tentative map approval not expressly authorized by Section 66427.5 and prohibited by subdivision (e) of that section" (*Colony Cove*, 187 Cal.App.4th at 1497), *i.e.*, it required that the survey evidence a certain level of resident support which Section 66427.5 does not require.

The Court further noted that "this provision [in Carson's ordinance] cannot be reconciled" with the legislative history of the 2002 amendment to Section 66427.5 that added the requirement that prospective park sub-dividers conduct and submit a resident survey ("2002 Amendment" or "AB 930") as the 2002 Amendment "specifically stated that '[t]he fact that a majority of the residents do not support the conversion is not ... an appropriate means for determining the legitimacy of a conversion,' and that '[t]he law is not intended to allow park residents to block a request to subdivide.'"1 (*Id.* at 1507 (citing Sen. Amends. to Assem. Bill 930 (2001-2002 Reg. Sess.), August 30, 2002, p. 5).)

Yet, *Colony Cove* noted "[w]here we part ways with the opinion in Sequoia and the ruling in the trial court is in their conclusions that all local regulation . . . is preempted ..." *Id.* But without any explanation. And *Colony Cove*'s departure from a well-reasoned *Sequoia* is not just unsupported and conclusory but superfluous.

Even worse, *Colony Cove* suggests it is without means to safeguard the interests of the unpopular sub-divider when exercising discretion over a "survey of support." This interpretation of Section 66427.5, subd. (d) would be contrary to *Sequoia*, and throw all local agencies into an *ad hoc* standardless morass. The call of the statute is to approve the subdivision if the sub-divider has complied with Section 66427.5. Is it permissible to deny the application despite proof of all requirements of state law, because the sub-divider is unpopular?

Such folly would eviscerate any semblance of statewide uniformity, throw the fate of the sub-divider into the whim and caprice of a loud unruly public hearing, and slant the playing field toward those with the loudest voices and most votes. This is the *antithesis* of fair play. *Sequoia*, 176 Cal.App.4th at 1298) ("[T]he Legislature viewed the subject [of mobilehome park subdivisions] as one where the state concern would not be advanced if parochial interests were allowed to intrude").

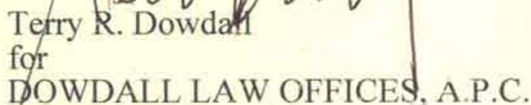
> "The legislative intent to encourage conversion of mobilehome parks to resident ownership would not be served by a requirement that a conversion could only be made with resident consent."

El Dorado v City of Palm Springs, 96 Cal.App.4th at 1182 (1997).

Nothing in the 2002 Amendment overturns El Dorado's reading of Section 66427.5. In fact, as the Sequoia court noted, "the El Dorado construction of section 66427.5 has stood the test of time and received the tacit approval of the Legislature." *Sequoia*, 176 Cal.App.4th at 1297.

Colony Cove should be depublished as it conflicts with published appellate precedent in *Sequoia.* The construction of the Court opens the door to the mischief of local discretion operating without standards or safeguards of any sort, with an *ultra vires* delegation beyond the scope of the California Constitution.

Very Truly Yours,



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cc: CMPA