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PARK WATCH™ LEGAL DEVELOPMENTS NEWSLETTER

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U.S. Supreme Court Refuses to Hear N.Y.C. Rent Control Appeal

Big Disappointment to Property Rights Advocates

By: Terry R. Dowdall, Esq.

● *Upshot*

All property rights litigation is high risk at high expense. Long shots may be justified by the prospect of vindicating confiscated constitutional rights. Many still believe that, fundamentally, the judiciary protects minorities against a dominating majoritarian will. But, some minorities are more equal than others. Still, one may fairly lament the court's refusal to tackle a case so clearly replete with demonstrable confiscation as that of the Harmons. There is probably no case as clear as this; to live in *one's own property* has been confiscated. And $55 rent for a $2500 per month apartment? There is virtually no judicial scrutiny at all when it comes to rent controls.

● *Facts*

James and Jeanne Harmon reside in their own property, a brownstone in Manhattan. The building has been family owned since 1949. The same tenants have rented three of the six apartments that are rent controlled.

In this jurisdiction, most tenants can renew their leases, similar to the Mobilehome Residency Law (*Civil Code* §§798, *et seq*.) in California. Tenants can also bequeath their apartments to their children, or to a friend who lives with them for two years. Review of this New York case might provide inroads into resurrecting the rights taken by the MRL and rent controls.

The tenants in the rent-controlled units were paying 59% less than market rates. The Harmons would like to reclaim one apartment for a grandchild, but because occupants of two of the units are over 62, the Harmons would have to find the displaced tenant a comparable apartment, at the same or lower rent, in the same neighborhood.[1] They cannot even use the apartment for their own family. The Circuit Court of Appeals for the Second Circuit dismissed on erroneous grounds. As pointed out by the Pacific Legal Foundation, the appellate court upheld dismissal of the *substantive due process claim*, not because it was supposedly unripe (trial court's view), but because the Second Circuit believed the due process claim was *subsumed by the takings claim.* ("[w]here a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, . . . must be the guide for analyzing these claims.'" Pet. App. 6a.)The high court has refused review. But one must wonder. *If not this ground, some other?* Despite glorious platitudes to the contrary, the plain fact in reality is that the federalist notion of "protection of the powerless minority" from the majoritarian hoard is gone and abandoned.

One may lament the realization of this judicial self-inflicted impotence, or rejoice at the *clarity* of the rules in play. Judges will *not* provide relief in the appellate courts. Do not rely on the courts. *Let's get over it and move on.* Focus on achievable goals.

[1] Pat Moynihan called it "iatrogenic government" (an illness is induced inadvertently by a physician's treatment).

We recommend: FEDERAL ARBITRATION CLAUSES; LEASING DOCUMENTS SHOULD INCLUDE BROAD 'FACILITIES

In this Issue:

● *Conclusion*

Again I will say: *rent control is here to stay.* For more than 20 years, I have suggested that owners seek success by working within the system of local rent controls, pursuing alternative strategies (without investing a dime for litigation), and controlling the lots, lot-by-lot. This remains the best course of action for owners subject to rent control. Spend precious resources on *pro-active plans and strategies* to exorcise rent controls from your parks. *Other than closure, alternative creative strategy is the only answer to draconian rent regulations.*

Best Rental Deal: *Luxury Apartment for $55.00.* In related news, a search of the best rental deal was conducted. The winner: The Gothamist website identified a one-bedroom apartment at 5 Spring Street in Manhattan's SoHo district renting for $55 a month even though, according to a real estate agent, it should be drawing $2,500. The tenant's parents moved in upon immigrating from Italy in the 1940's, and since the tenant, now in his 70's, has a much younger wife, the apartment could remain under rent control for decades.

Res Ipsa Loquitur.

Fido and Marijuana Lose out as Reasonable Accommodations

Two New Cases Make Owners Smile

By: Terry R. Dowdall, Esq.

● *Upshot*

We know that Park owners are required to provide "reasonable accommodations" to the disabled resident on request. This means policies, standards, and rules and regulations must be relaxed to reasonably accommodate a disabled resident. While the variations on reasonable accommodation are seemingly endless, there are two recent cases focusing on the limits of that park owner's duty.

(1) We have a resident who failed to proceed in a cooperative, honest manner to obtain a reasonable accommodation.

(2) We have a holding from the 9th Circuit Court of Appeals which bars marijuana as a reasonable accommodation under the ADA.

The same logic should apply to requests for reasonable accommodation under the FHAA as well. Since state laws for fair housing must be substantially equivalent to federal law (else risk loss of federal funding), the same rules should apply under applicable similar state law. But what of the state initiatives which provide for medical marijuana?

● *James v City of Costa Mesa*

▲ The Law: In federal law, marijuana is illegal. Period. "[T]he term 'drug' means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act." 42 U.S.C. § 12210(d)(2). Marijuana is classified as a drug. In 1970, Congress listed marijuana as a Schedule I drug, designating it as a substance having "a high potential for abuse," "no currently accepted medical use in treatment in the United States" and "a lack of accepted safety [standards] for use . . . under medical supervision."[2] In 1989, the Administrator of the Drug Enforcement Agency (DEA) rejected an administrative law judge's recommendation that marijuana be relisted from Schedule I to Schedule II because of its therapeutic advantages. The Administrator said that "marijuana has not been demonstrated as suitable for use as a medicine."[3] The DEA once again rejected rescheduling in 1992, reaffirming the absence of accepted medical use of marijuana.[4] It did so again in 2001.[5]

▲ Facts: The plaintiffs are severely disabled, claiming that conventional medicine failed to alleviate the pain caused by their impairments. Each obtained a recommendation from a medical doctor to use marijuana to treat their pain. Plaintiffs obtained medical marijuana through collectives located in Costa Mesa and Lake Forest, California. These cities, however, have taken steps to close marijuana dispensing facilities operating within their boundaries. Plaintiffs sued under the Americans with Disabilities Act (ADA) for relief.

▲ Holding: Marijuana Is Not a Reasonable Accommodation: The Court held that Congress has made clear that the ADA defined "illegal drug use" by reference to federal, rather than state law, and federal law did not authorize plaintiffs medical marijuana use. Therefore, the court concluded that plaintiffs' medical marijuana use was not protected by the ADA. The court stated:

> We recognize that the plaintiffs are gravely ill, and that their request for ADA relief implicates not only their right to live comfortably, but also their basic human dignity. We also acknowledge that California has embraced marijuana as an effective treatment . . .Congress has made clear, however, that the ADA defines "illegal drug use" by reference to federal, rather than state, law, and federal law does not authorize the plaintiffs' medical marijuana use. We therefore necessarily conclude that the plaintiffs' medical marijuana use is not protected by the ADA.

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[2] Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91- 513 (see 21 U.S.C. § 812(b)(1)).

[3] 54 Fed. Reg. 53,767, 53,768 (Dec. 29, 1989)

[4] 57 Fed. Reg. 10,499 (Mar. 26, 1992).

[5] 66 Fed. Reg. 20,038 (Apr. 18, 2001)

But what of California Law? Under state law, the approach law enforcement agencies take is to require the user to show a registration card. If the card is issued properly, the local law enforcement agency is not likely to interfere. This is the approach taken by users of marijuana as a practical matter. Since state law allows for use of marijuana, park owners are not likely to receive requests for a reasonable accommodation. Owners seeking to literally apply the federal law may face costly litigation, often supported by organized and well financed groups of defenders of marijuana use, an unsympathetic trier of fact, and possible loss of face with a defeat.

▲ What Can We Learn: Owners may wish to acknowledge the use of marijuana and add reasonable controls. A sample rule might start with this approach. First, outlaw illegal drug-related criminal activity with a rule which clearly bars such conduct: For example:

"¶ Drug-Related Activity: *"'Drug-related criminal activity' means the illegal manufacture, sale, distribution, use or possession with intent to manufacture, sell, distribute, or use of a controlled substance (as defined in Section 102 of the Controlled Substance Act (21 U.S.C. 802) and all comparable provisions of state and local law as set forth in the Penal and Health and Safety Codes and local ordinance. Resident and all other occupants shall not engage in any act to facilitate, promote or acquiesce in any drug-related criminal activity."*

Next, a policy can be developed to cope with marijuana use with reasonable restrictions. For example: *"¶ Marijuana: Mobilehome park living requires special restrictions for the safety of tenants who invest hard-earned savings to qualify to reside in this park. Under federal law, marijuana is illegal. Whatever the provisions of other law, the use, possession, sale, distribution or cultivation of controlled substances raises the likelihood of dangerous, violent, and injurious conditions from inside and outside the park. Moreover, tenants may not impose their predilection for controlled substances upon the senses of others. Therefore, as per federal law: ¶(1) marijuana use is prohibited in any common area; (2) cultivation outside the mobilehome is prohibited (including screened or other patios, under awnings, driveways, inside sheds); (3) any use of marijuana in the vicinity of a minor shall be deemed contributing to the delinquency of a minor and reported to police. Any sale, gift, distribution of marijuana is prohibited. Any possession or use of marijuana without proper medical supervision and licensing is prohibited. Any complaints of odors or second hand smoke due to marijuana may result in the termination of tenancy, because it may impair the senses of others in close and inescapable proximity to the space, resulting in dangers and risks posed to health and safety. ANY VIOLATION OF THE ABOVE PROVISIONS MAY RESULT IN TERMINATION OF TENANCY."*

● *Meadowland Apartments v. Schumacher*[6]

The Federal Fair Housing Amendments Act of 1988 (FFHA) protects the disabled from discrimination. One aspect of the federal (equivalent provisions also in California law) is that the for a reasonable accommodation to be granted, there must first be a proper request. There must be proof of a disability; and then the accommodation must be a reasonable one. A common accommodation is a "companion dog" ("companion dog" is not recognized for an ADA accommodation, but is for the FFHA's provisions). The law assumes the tenant is not perpetrating a fraud, but telling the truth. Ms. Schumacher did neither. This case reflects that park owners should not simply abdicate the right to properly enforce the FHAA.

▲ Facts: Schumacher suffered from a mental illness entitling her to protection under the FHAA. After obtaining the dog, Schumacher left a copy of a doctor's note and other unspecified paperwork in the rent payment drop-box. The doctor's note stated that she "would benefit from a pet companion on a physical and emotional basis." The manager requested further paperwork (vaccination records and proof that it was licensed). Schumacher testified that instead of providing the paperwork requested, she placed the dog with friends. But then, she brought the dog back to the apartment. She never told landlord she brought it back.

The landlord served a notice to quit, alleging breach: disturbing or harassing other residents; unauthorized business on premises; conducting illegal activities; damage/waste; having a pet of any type without written consent; washing pet items in washer; failure to provide proper veterinarian documentation of health of animal; failure to register animal with the city; failure to fill out required service animal agreement; failure to maintain apartment or common areas in a clean and sanitary condition; and excessive noise from [Schumacher's] apartment.

▲ Trial: After Schumacher failed to surrender the apartment, Meadowland sued for eviction. At trial, Schumacher said she obtained a dog upon her doctor's recommendation. An inspection of the apartment was conducted. Here we have indicators of unacceptable conduct warranting eviction; even with the presence of a service animal:

Smell: The smell of pet urine and feces was overwhelming. A tenant noticed an overpowering urine smell coming from Schumacher's apartment; another that the smell was overwhelming.

Damage: There were several carpet stains. There was damage to the bedroom wall and scratches on the woodwork.

Noise: The dog barked constantly during the inspection. The dog's barking was reported to be extremely disruptive. Testimony from tenants n a nearby building to the same effect.

Tenant Complaints: Management received nine written complaints from tenants regarding Schumacher.

Conduct of Animal: Several tenants testified that Schumacher let her dog run loose in the hallway of the apartment complex. The dog jumped on another tenant repeatedly; Schumacher did not attempt to restrain the dog.

[¶14.] At the conclusion of the trial, Schumacher argued that Meadowland failed to make a "reasonable accommodation" for her disability as required under the FHAA. 42 USC § 3604(f)(3)(B).

Absence of Waiver: Despite a long presence of the dog, it was not discovered until actual inspection.

1. During the court trial, VanBockern testified as follows: Q: Did there come a point in time in which you did learn for sure or for certain that

[6] *Supreme Court of South Dakota, 2012.*

she did have a dog? A: Yes. Q: When did you learn that? A: For sure when we saw it, when we went in to the unit inspections . . ..

▲ Court Ruling: Tenant never requested a reasonable accommodation. Management never refused to make a requested accommodation. *The courts have consistently interpreted the FHAA to require a prior request.* The claimant failed to show that he or she requested an accommodation that was reasonable on its face. The evidence indicated that the management made contact with the tenant on at least two separate occasions and attempted to obtain information so that reasonable accommodations could be made. The tenant refused to cooperate and denied that she even owned a dog.

▲ What Can We Learn: When a resident claims management failed to make a reasonable accommodation, what is the essential test?[7] To establish a claim for failure to accommodate, a plaintiff must show that:
(1) tenant is disabled or handicapped within the meaning of the FHAA;
(2) tenant requested a reasonable accommodation;
(3) such accommodation was necessary to afford an opportunity to use and enjoy the residence; and,
(4) management refused to make the requested accommodation.

▲ Conclusion: It is important to have a "fair housing policy" in your park. That policy will include the procedure for the request, consideration and granting or refusal of a requested accommodation. The procedure ensures that management can verify a disability, that the accommodation is relevant to meeting and responding to the need posed by the disability; that the request is reasonable and alternatives suggested, if more reasonable, were available and refused by the resident. These fair housing policies and procedures are more frequently being written as part of the rules and regulations to prevent claims that the policy was not actually in existence, known or utilized.

"SYG" Laws: Lessons for Owner and Park Managers, Volunteer Resident Patrols

Perpetuating Peace and Safety in Mobilehome Parks

By: Terry R. Dowdall, Esq.

● *Upshot*

George Zimmerman, a volunteer canvassing a residential property for criminal activity, was arrested on charges of second-degree murder in the death of Trayvon Martin. Initially, the police decided not to arrest Mr. Zimmerman, rationalizing their reticence based on the "Stand Your Ground" law ("SYG" laws). California's law is similar (espousing the "castle" doctrine, though it is anyone's doubtful guess if he would not have been arrested had the incident occurred here).

Should a manager patrol the parks and engage unknown persons? Should owners buy donuts and coffee for the residents who volunteer to group together and patrol the park in the late evening hours?

▲ Conclusion: No employee should be asked to encounter a dangerous condition or person, nor engage in an activity that would likely result in injury. It is not the manager's job to stop a crime in progress, or intervene to prevent incipient wrongdoing. Tolerating a resident group's activities is part of the right of a mobilehome resident to the use and access common facilities. Encouraging that conduct is another matter. When the purpose of the resident activity may lead to intervention resulting in injury, the owner may be painted with the brush of liability. Owner may be claimed to have tacitly encouraged the residents. In other words, it is not advisable to organize, cooperate with, encourage or support resident patrols.

● *California Law is the "SYG" form*

If your manager injures or kills another, including a mistakenly-believed perpetrator of crime, it is possible the district attorney would prosecute for any number of possible crimes depending on the circumstances. In California in a case of home intrusion, your manager would be subject to the defense jury instruction which states that:

"The defendant is not guilty of (e.g., manslaughter) if he killed/attempted to kill to defend himself/herself [or another resident] in the defendant's home. Such killing is justified, if: he reasonably believed that he was defending a home against the deceased, who intended to or tried to commit: forcible and atrocious crime or violently tried to enter that home intending to commit an act of violence against someone inside; and defendant reasonably believed that the danger was imminent; and defendant reasonably believed that the use of deadly force was necessary to defend against the danger; and defendant used no more force than was reasonably necessary to defend against the danger."

[7] The FHAA makes it illegal "[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of . . . that person . . . ." 42 U.S.C. § 3604(f)(2)(A). Under 42 U.S.C. § 3604(f)(3)(B), discrimination includes "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling . . . ."

"The defendant must have believed there was imminent danger of violence to (himself/herself/ [or] someone else). Defendant's belief must have been reasonable and (he/she) must have acted only because of that belief. The defendant is only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation. Consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed."
"A defendant is not required to retreat. He or she is entitled to stand his or her ground and defend himself or herself and, if reasonably necessary, to pursue an assailant until the danger of (death/bodily injury) has passed. This is so even if safety could have been achieved by retreating."

Penal Code §197, subd. 2 provides that "defense of habitation" may be used to resist someone who "intends or endeavors, by violence or surprise, to commit a felony . . . ." (Pen. Code, § 197, subd. 2.) However, a case interpreting this section also states that the felony feared must be "some atrocious crime attempted to be committed by force." Forcible and atrocious crimes are those crimes whose character and manner reasonably create a fear of death or serious bodily harm.[8]

The following crimes have been deemed forcible and atrocious as a matter of law: murder, mayhem, rape, and robbery. The courts specifically hold that burglaries which "do not reasonably create a fear of great bodily harm" are not sufficient "cause for exaction of human life." Thus, although the statute refers to "defense of habitation," the cases require that a person be at risk of great bodily harm or an atrocious felony in order to justify homicide.

▲Common areas: SYG laws extend the castle doctrine more broadly and hold, for instance, that if anyone poses a threat of imminent death, substantial bodily harm, kidnapping, or rape against another, the threatened party may use deadly force to defend herself without needing to consider retreat, so long as she (the threatened party) is lawfully present in the location at issue. This is true no matter how easy and safe retreat might have been. It operates to protect an individual's liberty to occupy a place lawfully, notwithstanding the demands of a thug who has threatened her and demanded that she either leave or die.

Florida law states that "A person who is not engaged in an unlawful activity and who is attacked in any other place where he or she has a right to be has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself or another or to prevent the commission of a forcible felony." *California does not have such a provision.*

● *Discussion*

The main purpose of owning and operating mobilehome parks is to promote availability of housing, which requires that a fair profit be earned, which incidentally pays employees, vendors, utility companies and the bank. The secondary purpose is to avoid needless expense and loss.

A corollary of these two precepts is to avoid needless injury to employees and liability created by legal actions claiming a King's ransom for settlement. Sure, SYG laws are attractive because they are right. But as a business practice, there is *no sense* to implementing them as official policy for the management or any other group of tenants.

▲ Managers: Your managers are valued employees. It is difficult to find good, honest and competent employees. Managers with experience are cared for by prudent owners. *Why in the world would an owner instruct, direct or even tolerate the actions of a resident manager to engage in actively preventing crime?*

Lack of Knowledge, Fitness: The manager is not trained (certainly not hired) to be a crime fighter. If the owner knows that the manager is actively and personally patrolling to stop crime, it is with an ignorance of the manager's skills, abilities, and likely emotional response to stressful, heated or threatening situations. The owner does not know if the manager is carrying any weapon, including possibly tear gas, club, stun gun, or firearm. In Mr. Zimmerman's case, he was armed only with a handgun. Simply, the owner has no control over the rule of engagement for unidentified occupants, the nature of the contact and the outcome of a physical altercation. Injury to employees is an insured event, covered by compensation laws. Willful exposure to dangerous conditions may exceed insurance coverage and lead to direct claims against the owner.

Liability: The person who is "contacted" by the manager on the other hand, if injured, will pursue criminal prosecution. Such prosecution if successful, leads to a civil claim in which liability is already established. The general rule is that an employer is required to defend an employee for actions within the course and scope of the employment. If the manager is knowingly patrolling the park and forseeably injures someone as a result, it may be the legal duty of the employer to pay for a defense. If a manager is found guilty of a crime which was based on conduct within the course and scope of employment, the ensuing civil claim will name the owner and seek punitive damages. If either the manager or the victim were injured, each may have claims against the owner. If the owner has reason to know the employee is acting in a way which intentionally violates the rights of others, the owner is also exposed to punitive damages. Punitive damages are not covered by any insurance policy. An award of punitive damages is not tax deductible. Punitive damages are not discharged in a bankruptcy proceeding. Simply, physical apprehension, confrontation or involvement lead to injury and expense for the park owner even when the manager did nothing wrong and everything right.

▲ Employment Practices 101: The course and scope of management duties should be made crystal clear.
*Never engage physically with a resident. Do not stand your ground. Retreat and call the police. There will be time for a restraining

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[8] The following crimes have been deemed forcible and atrocious as a matter of law: murder, mayhem, rape, and robbery. The courts specifically hold that burglaries which "do not reasonably create a fear of great bodily harm" are not sufficient "cause for exaction of human life." Thus, although the statute refers to "defense of habitation," the cases require that a person be at risk of great bodily harm or an atrocious felony in order to justify homicide.

order and termination of tenancy is appropriate. If in the park office, order the resident out, call the police.

* If there is trouble inside a resident's mobilehome, do not enter, except possibly behind the paramedic or police officer summoned to the scene of the event.

*Do not intervene in any domestic disturbance, not even when asked. Call the police.

* If a crime is reported, call the police. Do not attempt to stop a crime in progress. Call the police.

* When making rounds in the park, unidentified guests can be reminded that they must be accompanied by a resident (assuming the park rules and regulations say so). Do not confront suspicious persons. Call the police.

We should want our managers to stay safe at all times. Exposing the manager to risk of injury, or, exposing others to risk of injury from the manager's conduct, is liability generating with no possibility of increasing profit. Proposing that they intervene in risky and dangerous activity for which they were not hired, not trained, and not truly liable (owner is), is antithetical to prudent park operation and management.

▲ Resident Patrolling: Park management may not forbid the use of the park streets and facilities to the residents. The streets are always accessible; the facilities are accessible during posted hours. A group of residents who choose to walk or drive the park late at night for sake of camaraderie is welcomed by the MRL. State law protects the rights of residents to socialize. Management need not support such conduct; management can issue admonitions to such residents that they should under no circumstances confront or challenge persons on the streets of the park at any time. The admonition should also state that the management cannot prevent the use of the streets and other facilities but owner in no way condones or approves of any such activities and shall hold the residents responsible for any wrongful activity.

The case is made worse by support of such groups. Endorsements, encouragement, monetary support, all go to implicating the owner in the outcome of any wrongdoing, injury or death to others. The situation is one step worse than pursuit of such activities by the manager. The owner cannot know the abilities or predilections of the residents. One may assume that to engage in such activity is to seek out the excitement of a confrontation and possible overreaction. But older residents will be more likely to resort to deadly means of defense to substitute for a dwindling physical prowess. Eyesight is less accurate and sharp; hearing, sight and physical agility make for higher likelihood of regrettable accidents, overreactions and liability. Think twice before offering petty cash for coffee and donuts. The example of George Zimmerman should be a lesson to all park owners. Whatever the outcome of that spectacle (and it is believed he will be found not guilty even by the giants of liberalism such as Alan Dershowitz), the cost, potential expense, civil case to follow and loss of management services can never be offset by any increases in revenues.

▲ What Can We Learn: If a community is experiencing an unacceptable frequency of criminal conduct, the means to deal with it must not include any form of participation by the manager or other residents which may lead to injury to any persons. The scope of employment should clearly exclude and discipline any conduct in violation of the policy. No support of any resident group should be offered when they express the intention to walk or drive the park in the evening hours.

An Analysis of the Fiscal Impacts of Rent Control in the City of Oceanside

Wow. It Is Expensive to Administer a Rent Control Law

By: Terry R. Dowdall, Esq.

● *Upshot*

The City of Oceanside enacted rent control in the late 1970's. After three rounds of successful litigation against the ordinance, the appellate court finally sustained it by decision in 1984. Your author worked hard on those cases, wrote the briefs and introduced the then-novel idea that that vacancy control effected a taking due to the buildup of a premium caused by under-market rents. By then, several other cases had set the stones in place for the approval of rent control in California mobilehome parks. The administration of rent control in Oceanside has been remarkably expensive. The beneficiaries are a small subsidized group of residents, to the extraordinary cost of all the hard working taxpayers in the City.

● *Facts*

There are 17 mobile home parks with over 2500 units. This author assisted with closure of one, which could no longer afford to do business under the harsh and punitive regime. Catalina Estates has disappeared. No further parks have been built. The housing stock is declining due to the ordinance.

According to city Rent Control Fund, since 1999 the Oceanside has collected $1.7 million in rent control fees, while spending $2.4 million in staff and other costs. However, it is estimated that an additional $1.9 million in unreported personnel costs were expended as well, bringing full staff rent control costs to $4.3 million. Additional rent-control related staff and legal expenditures are unknown.

As a result of rent control, the reports are that the citizens of Oceanside lost approximately $7.5 million since 1999. The city has collected approximately $1.7 million over that period in mobile home park registration fees. So the estimated NET cost and lost tax revenue to the taxpayers since 1999 is $5.8 million.

However, this is not a full accounting of outside legal and litigation costs, nor does it include all staff costs which have not been allocated to rent control programs. Basically, the findings reveal that there is a $7.5 million cost and loss to taxpayers for 1999-2011. $2.4 million in expenditures

from the rent control fund; $1.9 million in estimated additional management staff costs; $3.2 million in lost property taxes

City of Oceanside Reported Rent Control Administration and Staff Cost 1999-2011

Total Labor costs $1.1 million, including $840,700 for Permanent Employees; City reports staff-related rent control expenditures of only about $110,000 a year; Consultant fees $279,000 (including probably expert witnesses to rescue tenants with testimony at hearings, with junk science reports designed to defeat court challenges, such that the tenants are mollycoddled with litigation support when an owner seeks a just and fair increase in rents); Maintenance and Operations $504,600; General administration allocation $110,900; Inspections $184,000; Redevelopment and housing admin costs $122,000; Rent to city $257,800; Management info services to city $120,000; Between 2006 and 2011 the City transferred over $556,000 from general fund to cover rent control expenses

While the city appears to obscure the full internal staff costs of rent control, these are the two primary departments which are involved in rent control activities, Housing & Neighborhood Services and City Attorney. The Neighborhood Services Director, the Housing Program Manager and the Assistant City Attorney spend significant amount of their time on mobile home related activities. In addition these activities would require administrative support and additional overhead costs.

The current annual costs of these three significant management positions who work on rent control issues is $550,000. For the purpose of this study, we are assuming that these positions spend only 45% of their time on rent control related activities, or $250,000. It is very likely these actual costs plus other unreported staffing costs are significantly higher. In order to estimate the costs to date (1999-2011) of just these three positions, we calculated an estimated annual cost of $150,000 a year over 13 years. So the additional cost to the city since 1999 is estimated at $1.9 million.

▲ Ongoing annual staff costs are estimated at over $360,000 per year (2012 dollars). This includes an "unreported" amount of approximately $250,000 and a "reported" amount of $110,000 per year.

▲ The study reflects a $4 million loss in property taxes. Because rent control depresses property and resale values, the average estimated annual TOTAL property tax paid by each mobilehome park is only $13,500. The City of Oceanside receives back approximately $2,646 annually from each park, or about $45,000 a year. For the purpose of the study, an increased assessed valuation of "10 x" current value is used. Therefore, it is assumed that in the absence of rent control these past 20 years, the 17 mobile home parks would currently be paying a total of $450,000 in property taxes to the city, a net increase of over $400,000 a year.

▲ Oceanside taxpayers have spent and lost $7.5 million as a result of rent control: From 1999 through 2011, Oceanside taxpayers have spent and lost $7.5 million as a result of rent control. If rent control is maintained in its current form, Oceanside will spend and lose another $8 million over next decade. In addition, it is clear that hundreds of thousands of dollars in additional staff and outside legal costs have been incurred, but the city has not kept track of these detailed expenditures. While citizens debate the merits and demerits of rent control, one thing is clear: rent control is a costly proposition to Oceanside's taxpayers.

Sargent Shriver Civil Counsel Act

(AB 590) (Feuer)

By: Terry R. Dowdall, Esq.

Sargent Shriver

● *Upshot*

Pursuant to the Sargent Shriver Civil Counsel Act ("SSCCA"), seven pilot projects selected by the Judicial Council of California through a competitive RFP process have been funded, commencing October 1, 2011, to provide representation to low-income Californians on critical legal issues affecting basic human needs. The pilot projects will be available in a few geographic regions of the state, operated by legal services nonprofit corporations working in collaboration with local courts.

The pilot projects aim to address the substantial inequities in timely and effective access to justice that often arise because of the nature and complexity of the law and a particular proceeding or because of disparities between the parties in education, sophistication, language proficiency, legal representation, and access to self-help and alternative dispute resolution services.

● *Background*

The modern movement to offer legal services to low-income people was spearheaded by Sargent Shriver in 1966, aided by the American Bar Association, which at the time was headed by future United States Supreme Court Justice Lewis Powell. The movement has been driven by the great disparity that exists between the small number of lawyers available for low-income Americans compared with the abundant availability of legal services for others.

Over the past few decades, a number of studies have demonstrated that "just outcomes" are more likely to be reached in civil cases when litigants have legal representation

● *Discussion*

The Judicial Council has chosen seven pilot projects with $9.5 million per year now in effect. These pilot projects are each in a different area of the state. They target cases involving "critical legal issues" that affect "basic human needs" such as "housing," custody, conservatorship, and

guardianship. In these kinds of disputes they have determined, low-income litigants are, for the most part, unrepresented—and often unaware of the various options open to them. The pilots target cases in which one side is represented by a lawyer and the other is not.

Each project is a partnership of a lead legal services nonprofit corporation, the court, and other legal services providers in the community. The projects will provide legal representation to low-income Californians at or below 200 percent of the federal poverty level. They will also review how serious the case is and *whether the client has a good chance of prevailing.* In addition, the agencies will look at whether providing assistance might save money in the long run by reducing the costs of social services such as homeless and domestic violence shelters.

Since the need for services is expected to outpace the available funding, it will not be possible to provide all eligible low-income parties with attorneys. Thus, the court partners will also receive funding to change procedures and practices to ensure that those parties who still lack attorneys have meaningful access to the courts, have their cases heard on the merits, and do not unintentionally give up their rights. These new court services will include expanded mediation assistance, language interpreters, a probate facilitator, a housing inspector, special parenting workshops, and other creative methods to address these important and challenging cases.

Only some of the funds are earmarked for unlawful detainer defenses. Where this is the case, such as in San Diego (Legal Aid), the objective appears to be to find weak cases, defend them vigorously and prevail. The attorney fee award may then be a sizeable amount for the unlucky landlord.

▲ What Can We Learn: It is recommended that cases filed be without defects; cases with known issues which may lead to a defense verdict will be a costly exercise for the park owner.

It is recommended, without regard to the SSCCA, that attorney's fees clauses in rental agreement be deleted, or conditioned on a pre-filing mediation requirement. While Civil Code §798.85 cannot be waived or released by either side, many cases do not arise under the MRL.

Pilot projects The selected pilot projects include the following:

Bar Association of San Francisco
Voluntary Legal Services Program
Superior Court of San Francisco County
Child Custody Pilot Project

Greater Bakersfield Legal Assistance
Superior Court of Kern County
Housing Pilot Project

Legal Aid Society of San Diego
Superior Court of San Diego County
Housing Pilot Project
Child Custody Pilot Project

Legal Aid Society of Santa Barbara County
Superior Court of Santa Barbara County
Housing Pilot Project
Probate Guardianship Pilot Project

Legal Services of Northern California
Superior Court of Sacramento, Yolo County
Housing Pilot Project

Los Angeles Center for Law and Justice
Superior Court of Los Angeles County
Child Custody/Domestic Violence Project

Neighborhood Legal Services of L.A. County
Superior Court of Los Angeles County
Housing Pilot Project

California Supreme Court Rules on Employer Meal and Rest Break Obligations

Court Decides Employers Need Not Ensure Employees Take Rest Breaks

By: Terry R. Dowdall, Esq.

● *Upshot*

The California Supreme Court has ruled that an employer's obligation is to relieve its employees of all duty during meal periods, leaving the employees thereafter at liberty to use the period for whatever purpose they desire, but that an employer need not ensure no work is done.

● *Facts*

These questions arose in *Brinker Restaurant Corporation v. Superior Court.* A class of employees filed suit claiming that the employer had failed to provide meal and rest periods in the number and at the times required by state law. While the break periods were recognized and offered, the employees were not taking them, but continuing to work.

● *Ruling*

In a unanimous opinion, the California Supreme Court explained that neither state statutes nor the orders of the Industrial Welfare Commission (IWC) compel an employer to ensure employees cease all work during meal periods.

Instead, under state law an employer must provide its employees an uninterrupted 30-minute duty-free period during which the employee is at liberty to come and go as he or she pleases. Absent a statutorily permissible waiver, a meal break must be afforded after no more than five hours of work, and a second meal period provided after no more than 10 hours of work. The court concluded a first meal break generally must fall no

later than five hours into an employee's shift, but an employer need not schedule meal breaks at five hour intervals throughout the shift.

On the question of rest periods, the court explained that under the IWC's orders, employees are entitled to 10 minutes of rest for shifts from three and one-half to six hours in length, and to another 10 minutes rest for shifts from six hours to 10 hours in length. Rest periods need not be timed to fall specifically before or after any meal period.

More Fair Housing Regulators on the Way: Fair Housing Month 2012 Kickoff

DFEH Awarded $475,000 to Launch Fair Housing Clinics

By: Terry R. Dowdall, Esq.

● *Upshot*

The California Department of Fair Employment and Housing (DFEH) has announced the establishment of a Fair Housing Clinic with Rio Hondo College in Whittier and the National Fair Housing Training Academy.

The new clinic will educate students about fair housing laws and instruct them in the enforcement and understanding sufficient to enter public service and seek careers in civil rights. DFEH secured $475,000 from the Department of Housing and Urban Development (HUD).

The DFEH Director applauded the Grant, stating: "The Department. . . is delighted to partner with HUD to encourage students at Rio Hondo College to pursue careers that would ensure equal housing opportunities for people in our state. These students will be the fair housing leaders of the future." Park owners and management may wish to tune in and pick up pointers as well. After all, the program is funded with your federal tax dollars. The grant allows DFEH to host the Washington D.C. based National Fair Housing Training Academy (NFHTA) on campus at Rio Hondo College. In addition to webcasting, short segments of NFHTA's presentations will be posted on the DFEH's Web site as well as the Department's YouTube, Facebook, and LinkedIn pages.

C.F.P.B. (SAFE ACT Enforcers) to ABA: "Turn Over Attorney-Client Documents"; ABA: "Think Again"

By: Terry R. Dowdall, Esq.

● *Upshot*

The Consumer Financial Protection Bureau says it has the right to see information that is protected by the attorney-client privilege or the work product doctrine. ABA: *No you don't.* This appears to be one of the first show downs challenging the totalitarian-like C.F.P.B. *Why do park owners care?* Because attorneys providing advice to owners in respect to strategies to comply with the S.A.F.E. Act would lose their privilege to keep communications confidential. *What kind of advice can be given if to be read by a CFPB investigator?* Nothing worth paying for, in all candor.

To the rescue of all American lawyers comes the American Bar Association—supported in this endeavor with an assembly of former general counsel and top financial lawyers. The ABA sent a comment letter to the CFPB objecting to a proposed rule that gives the agency the right to demand that all banks and other supervised financial entities submit privileged information to the bureau during examinations.

● *Objections Expressed*

The ABA expressed "serious concerns" about the "unfounded assertion of the bureau's authority to compel production of privileged materials." In a press release last month, bureau director Richard Cordray (one of the president's infamous midnight appointments) called it "a common sense rule." The release also said the Dodd-Frank Act of 2010 gave the agency the authority to issue rules to enable it to fulfill its mission.

● *The ABA Must Win This Battle*

Never has the attorney-client privilege been subject to such a frontal assault. The ABA bombarded the CFPB with authority reminding it of the absolute and historical adherence to recognition of the privilege. The attorney-client privilege is "the oldest of the privileges for confidential communications known to the common law."[9]. The purpose of the privilege is to "encourage full and frank communication between attorneys

[9] Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (citing 8 J. Wigmore, Evidence § 2290)

and their clients and thereby promote broader public interests in the observance of law and administration of justice." Id. at 389. This strong rationale for the privilege has been recognized by the U.S. Supreme Court for well over a century and "is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure."

Unfortunately, the Bureau's efforts to obtain privileged materials will undermine these fundamental principles in several important respects. First, even if the Bureau cannot require supervised entities to produce privileged and work product protected information and materials, its policy of seeking such information on a regular basis during examinations and other regulatory processes is contrary to the important public policy purposes that the privilege and the work product doctrine serve and could lead to the routine waiver of these protections as to the Bureau.

From a practical standpoint, a supervised entity often will have no choice but to waive when requested or instructed to do so, as the prospect of the Bureau labeling the entity as "uncooperative" if it exercises its legal rights and declines to produce the privileged materials could have a profound effect not just on the Bureau's subsequent supervisory and enforcement actions, but also on the entity's public image, stock price, and perceived creditworthiness. Such a policy of routine coerced waiver could seriously undermine and weaken the privilege, because as the U.S. Supreme Court has noted, "an uncertain privilege…is little better than no privilege at all."

Second, the Bureau's policy of requiring the submission of privileged and work product protected information may significantly undermine both the confidential lawyer-client relationship and the supervised entities' fundamental right to counsel. Lawyers play an essential role in helping to comply with applicable law.

By pressuring supervised entities to submit privileged and work product protected materials to the Bureau in connection with its supervisory and regulatory processes, the Bureau's policy risks chilling and seriously undermining the confidential lawyer-client relationship.

The sweeping and audacious usurpation of attorney client privilege is an assault by the federal government on a very fundamental aspect of privacy as well. Peering into privileged materials also runs counter to the clear trend among other leading enforcement and regulatory agencies. The Department of Justice directs prosecutors not to require—or even ask—companies and other organizations to produce information or materials protected by the attorney-client privilege or the work product doctrine during investigations.

Finally the ABA warned the CFPB: "The bureau lacks legal authority to compel supervised entities to submit information and materials protected by the attorney-client privilege and the work product doctrine." This is a clear shot across the bow threatening legal action to curb the insidiously over-intrusive power mongers of the CFPB.

Tenant Can't Just Cancel His Decision to Move Out

Can a Renter gave written notice to vacate, then change his mind?

● *Upshot*

A tenant serves the landlord with a notice to terminate the tenancy and vacate. Immediately, the landlord springs into action, incurs costs to advertise and actively seek a new tenant, procures, screens and enters a new rental agreement slated to commence on expiration of the terminated tenancy. Now the terminating tenant changes heart and cancels the notice. Is the cancellation effective?

● *The Notice to Vacate is Binding*

When a tenant serves a written notice of termination, that notice is binding on the tenant. The tenant does not have a right to unilaterally revoke the termination. A tenant who gives notice and remains in the property beyond the time frame of the 60-day notice is no longer a lawful tenant and can be named in an unlawful detainer eviction case on the 61st day as a holdover tenant. The actions in reliance are not necessary to this conclusion. However, the evidence that the park owner relied on the notice and acted to secure a new tenant will also be used to estop the claim of the resident that the termination notice can be revoked.

The owner *can agree to cancel the termination notice*. The park owner is not required to do so. If the park owner decides to allow the tenant to stay, it may be subject to an updated tenancy agreement; because you are commencing a new tenancy after termination of the old.

Parents Sue Park after Oregon Toddlers' Deaths

Park Rentals Need to Conform to Code for A Reason. This is one of them

From the Associated Press

When you rent out park owned mobilehomes, the homes must comply with all applicable codes. *A working smoke detector is required.* A fire that killed two toddlers is the subject of a Umatilla County lawsuit that alleges negligence on the parts of the Seattle-based management company and the trailer park manager. The suit names the toddlers' parents as beneficiaries of their estates. The suit seeks $2.4 million.

The fire killed 16-month-old Olivia Wilson and 4-month-old Eva Wilson in February 2011. A state fire marshal determined the fire was caused by combustibles too close to a space heater.

In the suit, the children's parents claim the park manager and ownership company failed to install working smoke alarms or provide heat, forcing the family to buy space heaters and use a stove for heat.

City of Carson "Shocks" Court with "Bad Faith" --Denial of Conversion Reversed!

A Slap of the City Council, Again, for Bludgeoning a Single Park Owner with the Bigotry and Bias of Run-Away Majoritarian Will


Council Member
Mike A. Gipson


Mayor Pro Tempore
Julie Ruiz-Raber


Council Member
Lula Davis-Holmes


Council Member
Elito M. Santarina


Mayor
Jim Dear

By: Terry R. Dowdall, Esq.

Upshot

In a virtually unprecedented condemnation of the ethics of the City Council, Judge Chalfant says the City's actions are "shocking" and "smack of bad faith." He means *(sub rosa)*, that the City Council (pictured right) has betrayed the public trust in recognizing the rights of its people. A flagrant, malignant dereliction of sworn duty. These are not words that come easily to the a highly reputed and erudite writs and receivers judge. But amid the "death march" to which a *single* property owner has been subjected, the plainly accurate description is rightly aimed.

In sum, the City is owned by mobilehome residents. There is no reason to deny Mr. Goldstein's application to subdivide; instead, the City continues to myopically pile up damning evidence which may eventually bankrupt it. *Why?* For sake of a very small middle-class tenant group? This unseemly embarrassment must be haunting veteran City attorney William (Bill) Wynder, who happens to be a very nice and amiable guy (I have always found). *Why?* Because the Council either: refuses to listen to Bill's advice (meaning he has no client control); or, he is providing bad counsel and misguiding them to illicit conduct. But the latter is not possible. Bill's daunting task is to defend elected officials shirking their sworn duties and running amok. But the moorings to sensible thought broke loose long ago.

The involvement of Carson Council-members with the criminal justice system is some indicator of level of respect for legal duty. Not that long ago (2007), a vicious fight for City control was afoot, while still reeling from an FBI sting in the first half of the decade that unveiled a corrupt City Hall; and led to indictments of two former mayors and most of the City Council. *It's Chinatown, Jake....*

Discussion

Jim Goldstein, the owner of Carson Harbor Village on Avalon Boulevard in Carson, has sought conversion of the 400 space community to condominiums since 2002. The city has repeatedly denied his applications - even after he won conversion at his other nearby park, Colony Cove Mobile Estates in 2009 - arguing that he only wants to exact unfair profits from residents.

The mobile home parks also make up a significant voting bloc, and the City Council has loyally backed residents who oppose conversion. Chalfant criticized the council Tuesday for being unlawful, when he issued a tentative decision on Goldstein's latest appeal of the city's denial of his conversion application.

Chalfant said the City Council has unfairly denied Goldstein's conversion applications because it has been too biased by mobile home park residents who oppose conversion.

"The court has real doubt about the city's ability to be fair, . . . Instead, the city's paramount concern has been whether park residents are satisfied . . . the ...Council will seek any and all means of avoiding approval so long as a majority of park residents do not support conversion."

Goldstein has offered numerous concessions to residents to entice them to support conversion. But residents, and the City Council, have steadfastly opposed subdividing the lots into individual owners.

"The city's actions in this case are shocking and smack of bad faith," said the judge. "The City Council is performing a quasi-adjudicative, not a political, function. It must act objectively and fairly to both sides."

Chalfant ordered the council to again consider the issue and have attorneys return to court on the matter in 60 days. Attorney Richard Close said that Tuesday's decision could be good for his separate case against the city, in which Goldstein is seeking more than $70 million in damages for denying his conversion applications for years.

Conclusion

At some point soon, look for the judge to pull jurisdiction away from the tone-deaf Council into the courtroom, and ordering approval from the bench.

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