MAY, 2013

PARK WATCH ™ LEGAL DEVELOPMENTS NEWSLETTER

DOWDALL LAW OFFICES, A.P.C., Attorneys at Law

SOUTHERN CALIFORNIA: 284 NORTH GLASSELL STREET, FIRST FLOOR, ORANGE 92866 PH. 714.532.2222, FAX 532.3238, 532.5381
NORTHERN CALIFORNIA: 980 NINTH STREET, 16TH FLOOR, SACRAMENTO 95814 PH. 916.444.0777, FAX 444.2983

Are Conversions a "Bona Fide" Exit Strategy? – Yes, if Not to Avoid Rent Controls, According to the Residents!

- Court of Appeal Approves Subdivision Conversion, Slams Tenant Counsel, and Clips the Wings of a Sham Definition in Monarch Country v Goleta (March 7, 2013)

By Terry R. Dowdall, Esq.

Upshot

Asleep at the Switch: The Court of Appeal rules that a sleepy population of non-responsive tenants is not opposed to conversion and approves the application. "Sham" is in the eye of the beholder, and the beholder is the tenant. The "sham" test lacks virtually any safeguard against the unfairness, prejudice and caprice of a disgruntled majority in economic competition with the park owner. It comes down to the variability of community organizing: the level of organization, door-knocking, owner popularity, volunteer efforts, and other social dynamics having no bearing on the merits of a subdivision. In essence, subdivisions are subject to a well organized resident veto. Arguably, closure or conversion remain the only viable options to rent control.

How the Park Owner's "State of Mind" Became Relevant to a Subdivision Processing Application.

- *Government Code §*66427.5: state law "limits the power of the City Council to a determination of whether the subdivider has complied with the provisions of the section . . . ." The code was amended to state that "[T]he subdivider shall obtain a survey of support of residents of the mobilehome park for the proposed conversion. [¶] (2) The survey of support shall be conducted in accordance with an agreement between the subdivider and a resident homeowners' association, if any, that is independent of the subdivider or mobilehome park owner. [¶] (3) The survey shall be obtained pursuant to a written ballot. [¶] (4) The survey shall be conducted so that each occupied mobilehome space has one vote. [¶] (5) The results of the survey shall be submitted to the local agency upon the filing of the tentative or parcel map, to be considered as part of the subdivision map hearing prescribed by subdivision (e)." (Italics added.)

In an uncodified section of the amendatory act in 2002, the Legislature stated: "It is the intent of the Legislature to address the conversion of a mobilehome park to resident ownership that is not a bona fide resident conversion, . . .' The Legislature desired to ensure that conversions pursuant to *Government Code* §66427.5 are "bona fide" resident conversions."

There is a short line of cases that brings us to the state of the law today. Now, a resident survey can be considered by the City or County in determining whether a subdivision is a "sham" or conversely "bona fide." Few would have predicted that this finding is determined by resident vote. The intent of the owner in seeking a conversion is determined by tenants. The court has painted itself into an unintelligible and unworkable standard that cannot stand the light of day.

- Carson Harbor v City of Carson. It started on March 30, 2010, in the Second District Court of Appeal. The court reversed a trial court approval of a mobilehome subdivision proposal in Carson. The 3 justice panel issued a split decision which opened the door to allowing a trial court to consider whether residents favored subdividing and the motive of the park owner.

> *"Whether the conversion is or is not bona fide turns on the state of mind of the park owners," the opinion states. "A bona fide conversion is one that the park owner expects to in fact produce a change in the estate interest of a significant percentage of the mobilehome lots from tenancy to ownership."*

The city and residents assert that subdividing is a means by which to circumvent the enforcement of rent controls (when in fact, the poor

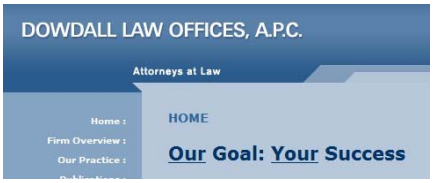
Creative Solutions, Efficient, Practical Representation, Profitable Parks

Dowdall Law Offices A.P.C.

In this Issue:

Proudly Representing Mobilehome Park Owners since 1978

We recommend:
FEDERAL ARBITRATION CLAUSES;
MANDATORY MEDIATION;
BROAD 'FACILITIES RELEASES'



Please visit: www.dowdalllaw.com; for

Current News, Updates, Alerts
Courtesy MRL, TITLE 25, TITLE 24

continue to enjoy its benefits). Those residents also objected to the owner's profit. They ignored the chance to own their homes and lots as single family residence with all attendant benefits of home ownership (from favorable financing to tax benefits to relinquishment of management control), ostensibly desiring to remain shackled as landless tenants. Essentially, the park owner is held hostage to the use and enjoyment of his or her own property, until such time as the whim and caprice of resident appetite is sated. Oddly, the main protestants against subdividing remain those who benefit the most: residents. The opportunity to take control and ownership of a rental mobilehome park is the embodiment of the American dream of home ownership and ultimate tenant objective espoused for decades, initially by GSMOL president Marie Malone thirty years ago.

● ***The 2002 Amendments to the Subdivision Law***. The basis for the Carson ruling lies in legislative history. In 2002, the Legislature acknowledged the asserted "deficiency" in the existing Government Code identified by the court in *El Dorado* that precluded local agencies from preventing "non bona fide conversions," and added the section which required the applicant to "obtain a survey of support of residents of the mobilehome park."

> *"This bill seeks to provide a measure of that support for local agencies to determine whether the conversion is truly intended for resident ownership, or if it is an attempt to preempt a local rent control ordinance. The results of the survey would not affect the duty of the local agency to consider the request to subdivide pursuant to Section 66427.5 but merely provide additional information."*

The *Carson* Court held that this language allows for consideration of the bona fides of the conversion (*". . . the Legislature did not intend the survey to be an idle exercise but rather meaningful input . . . those agencies, with their wide experience in land use matters . . . may determine bona fides in the first instance").* The Court stated that "Whether the conversion is or is not bona fide turns on the state of mind of the park owners."

● ***"Bona Fide" Subdivision Defined***. The Court held that a finding of a "bona fide" subdivision application is part of the process of approving an application.

> *"A bona fide conversion is one that the park owner expects to in fact produce a change in the estate interest of a significant percentage of the mobilehome lots from tenancy to ownership . . . whether the conversion is truly intended for resident ownership, or if it is an attempt to preempt a local rent control ordinance." To make this determination, "[A]n inquiry ... must, therefore, focus on the state of mind of the mobile park owner."*

● ***Resident Support NOT Required***. The court has held that the level of resident support may be relevant to the determination of *bona fides*, but it is not dispositive ("The level of tenant support, or lack thereof, may be circumstantial evidence of the presence or absence of bona fides but it is not dispositive"). But, the Court was careful to emphasize that the law is not intended to allow park residents to block a request to subdivide. Still, as we will see, a unified voice against conversion from residents is equivalent to a sham conversion: they decide.

● ***How the Legal Test for a "Bona Fide" Subdivision is Applied***. The court pronounces this test for determining a bona fide subdivision: "The owner's intent to truly provide for tenant ownership and the absence of intent to avoid rent control. The city must decide that question in approving or denying the application."

According to the dissent, the city has a duty only to determine whether the owner has complied with the requirements for the processing of the subdivision. Motive or intent is not a part of the state law requirements (". . . it is hard to imagine a clearer statement to indicate that the Legislature did not intend to modify *El Dorado's* holding that a city's review of a mobilehome park conversion . . . is limited to confirming whether the park owner complied with the requirements of . . . [the statute]"). The dissent further stated that the majority was in error in holding that a city may deny a conversion that is not bona fide based upon a determination of "the state of mind of a park owner." Justice Bigelow contends that decision is from "whole cloth." Oh well. The decision does remain unpublished.

● ***Sequoia Park Associates*****:** In the case that followed the 2002 amendment, *Sequoia Park Associates v. County of Sonoma,* 176 Cal.App.4th 1270 (2009), the court struck down an ordinance imposing conditions, *i.e.*, *percentage requirements* of approval by residents in the survey of resident support, additional to those required by state law.

● ***Colony Cove Properties v. City of Carson:*** The City enacted an ordinance similar to the one in *Sequoia Park* and hence the court held that the ordinance was invalid because it imposed requirements in addition "to the exclusive statutory requirements of state law." The *Colony Cove* court emphasized the importance of the results of the survey of resident support. It concluded "that the contents of the survey, as opposed to its mere existence, are relevant to the approval process."

● ***Goldstone*****:** And then we come to *Goldstone v. County of Santa Cruz*, 207 Cal.App.4th 1038 (2012). The County denied a conversion because " '[t]he results of the survey [of resident support], testimony and other evidence submitted by park residents establish unanimous opposition' to the conversion." (*Id.*, at p. 1045.) The court held that the County was authorized to take the results of the resident survey into account when making its decision. The import of this opinion is that a City or County may properly reject conversion if the financially-interested tenant, with a significant and direct conflict of interest of unspeakable dimension, is voting on a future land use they do not like for economic reasons. The state cannot delegate such power to private parties in economic competition with the property owner. *It should not matter that 119 residents opposed the conversion, while only 2 supported it.*

● ***Chino MHC*****:** The latest case to consider conversion law is *Chino MHC, LP v. City of Chino,* 210 Cal.App.4th 1049 (2012). In Chino the mobilehome park had 260 residents. Only **36 residents (14 percent)** returned the survey, and 33 residents (13 percent) responded to the questions asked in the survey. Of these 33 respondents, 14 (42 percent) supported the conversion, and **19 (58 percent)** opposed it. The Chino court decided that, based on these results, the local agency had abused its discretion in denying the application for conversion to resident ownership. The court reasoned: "For purposes of this case . . . it suffices to hold that a majority of 58 to 42 percent is precisely the kind of bare majority that the Legislature did not intend to be able to block a conversion." The *Chino* court concluded that, even if only 10 residents had supported the conversion and 23 had opposed it, the "level of support would be 30 percent," which would "still show[] the conversion

was not a sham." The court declared: "[A]ll the survey showed was that the majority of residents did not care enough to return the survey . . . . This is affirmative evidence that the conversion was not a sham."

■ Monarch Country Mobilehome Owners Association , Plaintiff v. City of Goleta: This Conversion Deemed Not a Sham.

In *Monarch Country Mobilehome Owners Association v. City of Goleta,* handed down March 7, 2013, Rancho Mobilehome Park had sought to subdivide in the City of Goleta. The City Council approved Owner's application, but the residents complained. They filed suit to overturn the City Council's approval of the project.

● ***Survey; Conversion Approved; Tenants Sue****:* The Owner conducted a survey of resident support for the conversion. Thereafter, the City held a public hearing. Numerous residents opposed. Still, the City approved the project, and had been advised that their role was to merely determine whether the Owner had complied with the law in respect to the subdivision processing statutes. Some council members were reluctant, supporting the project as they had no choice (some made comments such as ". . . the State really and truly does not give us any alternatives. . .There's nothing more that I can say, nothing more that I can do; . . . I have reluctantly come to the conclusion that what we're doing is the best we can do to protect your interests. . . "). The tenants filed suit.

● ***Trial Court Granted the Tenant Petition****:* The trial court concluded that, contrary to *Government Code* §66427.5, the survey had not been conducted in accordance with an "agreement" between the Owner and the residents. The court also concluded that the Council had failed to consider the results of the survey. The Owner presented the results of a survey of "resident support." Owner represented that a "ballot form was prepared in conjunction with [Association] and was distributed to all residents in the mobilehome park." But responses were received from only 33 residents. Nine residents supported the conversion, seventeen opposed it, and seven did not say whether they supported or opposed it.

● ***Contentions on Appeal***. The Owner and the City appealed. Owner and City argued there was sufficient evidence supporting the Council's implied finding that the survey of resident support was conducted in accordance with an agreement between Owner and Association. City conceded that there is no "direct evidence" of an agreement but under the particular circumstances, the agreement requirement was a mere technicality.

● ***Conclusions:*** The appellate Court reversed the trial court and held that: (1) sufficient evidence supported the Council's implied finding that the survey was conducted in accordance with an agreement between Park Owner and Association, (2) the Council was required to consider, and did consider, the results of the survey, (3) Council review was limited to ruling on whether the conversion was a "sham transaction," *i.e*., intended merely to preempt a local rent control ordinance and (4) there was no evidence that the proposed conversion was a sham.

■ Was There an "Agreement" for the Survey Language? Tenant Counsel's Misleading the Court Assured It.

The state law calls for a survey. *What if the parties cannot agree on language? Can the conversion be stultified by reason of the refusal of the residents to participate? What if there is no resident association? Is the requirement of agreement vitiated based on the inability to do the impossible?*

In this case, good common sense prevails. The City Council impliedly found that the survey had been "conducted in accordance with an agreement" between Owner and Association. The City acknowledged that the Owner submitted the results of a survey of support. The trial court erred in this respect, the appellate court noting that the error was invited by the Association. This means that the lawyer for the tenant association was found to have intentionally misled the trial court into making a mistake. The Association was reportedly represented by attorney James P. Ballantine of Santa Barbara. According to the appellate court, counsel conceded that the court could grant the motion to augment the administrative record to include an instrumental email and, in addition, could consider the new evidence: "We've responded [to the motion to augment] . . . by basically conceding the Court can put it [the email] as part of its record and consider it and give it the weight that it deems appropriate." The appellate court stated that:

> "We recognize that, after conceding that the trial court could grant the motion to augment, Association's counsel "suggest[ed]" that the trial court could not rely upon the email "in reviewing the sufficiency of the city's action" because the email "was not in the city's record when they acted on this thing." Counsel was contradicting himself. If a party concedes that the administrative record may be augmented . . . the party will not be heard to complain that the evidence cannot be relied upon because it is not properly part of the administrative record."

In view of the augmentation of the administrative record to include the email, substantial evidence supports the City Council's implied finding that the 2006 second survey was conducted in accordance with an agreement between Park Owner and Association. Calling out an attorney in an appellate opinion is unusual. If the evidence had not been considered, it is possible the trial court's ruling which denied the conversion would have been affirmed. But by misleading the court, the finding of compliance was assured.

■ The Results of the Survey. "Sham" or "Bona Fide"? IT IS UP TO THE TENANTS!

The statutory language requires a local agency to consider the results of the survey, but it provides no guidance on the permissible scope of this consideration, said the court. Still, in review of the legislative concern for harm to residents occurring from exposure to market conditions resulting from a subdivision and the need to continue to mollycoddle the resident community to muster more support for secure political careers, it was deemed appropriate to provide the means by which the residents could collectively hold a property owner hostage to the whim and sensibilities of the residents, already depriving the property owner of general market rents. The court so construed the 2002 legislation when it determined that the law provided support for local agencies to determine whether a conversion is truly intended for resident ownership, or if it is an attempt to preempt a local rental control ordinance. Though the relevant Assembly Floor Analysis emphasized

that a conversion is not a "sham" *merely because it lacks majority support*: *"The fact that a majority of the residents do not support the conversion is not . . . an appropriate means for determining the legitimacy of a conversion. The law is not intended to allow park residents to block a request to subdivide. Instead, the law is intended to provide some measure of fiscal protection to non-purchasing residents."*

● ***What is "bona fide"***? Well, first one must consider the fact that almost no conversions are undertaken outside of rent control areas. Conversions are pursued because, plainly, local government has failed to protect an unpopular citizen, a true minority against whom local government has turned its back. The diminution of value leaves owners in rent controlled areas with little choice but to consider subdivision. By the same token, it turns tenants into property owners. But in rent-controlled areas, since the tenants already own the property, it seems that subdividing is superfluous in their view.

●***Definitions****:* The Court noted that the legislative history of laws in the conversion area address *"bona fide resident conversions."* This occurs when the subdivider *truly intends that the spaces in the mobilehome park be converted to resident ownership*. A *"sham transaction"* occurs when the subdivider's purpose in seeking conversion is merely "an attempt to preempt a local rent control ordinance."

● ***The Tenants Decide.*** It is not about the Park Owner's state of mind at all. It is what the tenants believe the state of mind is, and whether the resident opinion of the project is that it is a sham. *Chino* concluded that the survey was the only means available to prove that the survey was a sham:

> ". . . a local agency can consider only 'compliance with this section,' and under subdivision (d), the subdivider need only obtain and submit a survey showing that the conversion is not a sham. Section 66427.5 simply leaves no room for opponents of the conversion to show that a conversion is a sham, other than by way of the survey."

● ***No "Sham" in this Case****.* The Court held that the City *could not make a legal finding of "sham*." The park has 150 residents. Only 33 residents **(22 percent)** returned the survey, and **26 residents (17 percent)** responded to the questions asked in the survey. Of these **26 respondents, 17 (65 percent) opposed** the conversion and **9 (35 percent) supported it.** 65% *con* to 35% *pro* was *insufficient* to show that the conversion was a sham. *Moreover, 78% "did not care enough to return the survey," which was "affirmative evidence" that the conversion was not a sham.*

In addition, the approval rating here (**9 out of 150** residents, or **6 percent**) was almost identical to the approval rating in *Chino* **(14 out of 260 residents, or 5.4 percent**). Since the local agency in *Chino* abused its discretion in denying the conversion application, it follows that City would abuse its discretion if, on remand, it denied the Owner's application. Accordingly, the court would not remand to the Council even though it did not consider the sham transaction issue.

■ Conclusion

All told, the "sham" transaction measurement is no test at all. The courts may grapple with this moving target as best they can, but if tenant vote is the test in purest essence, it is no judicially cognizable and defensible standard or safeguard against unfairness. It is contingent on the variability of level of organization, door-knocking, volunteer efforts, and other dynamics of social organization having virtually nothing to do with the merits of a subdivision. Subdividing simply gives tenants a chance at the "American dream" of home ownership. Resisting subdivisions perpetuates economic repression of residents and deprives them of ownership. Home ownership would, after all, dilute the voting bloc of landless tenants who feel dependant on the city for a perceived need for protection against landlords. The diminution of rental housing, as lots are deeded to the residents, creates wealth and reduces dependency. By insidiously suppressing resident empowerment through ownership of property, development and accumulation of wealth, the GSMOL may unwittingly be worsening a situation they seek to remedy, or, is it the manifestation of a purposefully-minded sub-agenda to squelch a dwindling membership? As for the average resident, inexplicably supporting barriers to economic advancement is baffling: dampening the hopes of a chance at home ownership seems a patently myopic response to a golden opportunity. *The reality?* Conversion is very, very expensive if the residents oppose and likely impossible if they are well-organized and oppose.

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

Legal Disclaimers: No Attorney/Client Relationship: PARKWATCH™ is for informational purposes only and is not to be construed as legal advice. The information provided does not create an attorney/client relationship. Readers should not act on information without seeking professional counsel. Our client intake process must be completed by written statement advising that we represent you. Generally, this statement is sent to you pursuant to an engagement letter from one of our attorneys. When you receive an engagement letter from one of our attorneys, assuming that the terms of the engagement are acceptable to you, you will be our client.

Disclaimer Regarding Materials: PARKWATCH™ is prepared by this office to provide information of general interest. This information is not legal advice or a substitute for specific advice and information that you obtain from your own counsel. Some information may contain information that is dated or obsolete. The legal advice appropriate to you, will also be dependent upon the particular facts and circumstances. Therefore, the information is not to be construed as legal advice to be relied upon by you in any capacity.

Terry

If you have any questions regarding the materials on our Website or any of the information contained therein, we encourage you to contact one of our lawyers in order to assist you in interpreting or clarifying any statement that you read in our PARKWATCH™. Thank you!