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PARK WATCH

LEGAL DEVELOPMENTS NEWSLETTER

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THE LETTER EVERY PARK OWNER WANTS FROM A TENANT ATTORNEY

By: Terry R. Dowdall, Esq.

▲ ***Synopsis:*** *The "failure to maintain" (FTM) lawsuit plaguing park owners for a generation remains cause for utmost concern. The ill will engendered, the schism in promotion in good will, the damage to park reputation, the hampering of park operations, vandalism, community scorn, political repercussions, cost, insurance premium hikes, ability to procure insurance at all, demands which are claimed to be excluded from coverage, stops and limits on defense costs, persons qualifying as insureds, all these issues, and more, emerge in the face of such resident discontent. Good maintenance, of course, is important to avoiding such a risk. EVERY failure to maintain lawsuit carries and underpinning of ill will:* ***that*** *factor is the only common denominator present in every such case.* ***Positive resident and community relations*** *is the real key to preventing such a calamity, whatever the condition of the park.*

The FTM case can be triggered by any number of causes. Poor maintenance, failure to attend to a utility interruption, rent adjustments, space integrity (subsidence), common area conditions, etc. But the factor which is **determinative**? *The collective tenant perception of the management and the job being done*. Almost thirty years of experience leads to this *invariably* correct conclusion. Positive feelings for management forgive many shortcomings.

Example? Tenants in a three-star park with dirt roads, moderate rents, no facilities, and occasional sewer spills, but who like their manager/owner, are far less likely to sue management because of the positive feelings for them. Yet, a five-star park filled with idle seniors, at market rent, and a healthy ill will for management, will readily form their social club into an action committee and sue when the slightest issue is not to their liking. Hence many FTM cases are settled with agreement to replace the park manager.

Unquestionably, FTM lawsuits will continue to detrimentally affect the ability to buy liability insurance at a reasonable price. Carriers have left the market in California with some regularity. Others are selective about who they will insure.

But with a carefully strategy, even the risk of the FTM case can be neutralized. This is the experience, very recently, in a case in which this office coordinated with management in a *pro-active effort* to sway the reasonable resident to the negative aspects of maintaining a FTM action against the owners. After long consideration, the tenant lawyers who were consulted wrote the following letter; the letter ***every*** park owner would like to receive and frame in the office.

IN THIS ISSUE

[redacted]

7, 2006

Re: Problems at [redacted]

Dear Park Resident:

We were contacted by a few residents in your park regarding maintenance problems. At this point in time, we have decided that we are unable to represent you or other residents in [redacted] regarding a failure-to-maintain case. Enclosed are your original documents and/or photographs.

If you wish to pursue your claims against the park with another attorney, you should contact one immediately as California Law places a time limitation upon which you may file a lawsuit.

If you or other residents would like us to consider a failure-to-maintain lawsuit in the future, please do not hesitate to contact us again.

If you have any questions, please feel free to call my paralegal, [redacted] at [redacted]

TENANT RELATIONS. How are your tenant relations? Do you have a monthly newsletter or other ways of regularly communicating with your tenants in a positive way? Are your employees in the park, being seen doing work, available to the residents, meeting individual needs, responding appropriately, professionally, and timely? I once defended a discrimination claim; when I called the office to martial some facts for the first time, the phone rang eight times, and was abrasively answered with a loud gruff "yeah?" I was hoping for a prompt answer, followed by a pleasant "Good Morning, Rancho Loco Mobilehome Estates, Mary speaking, may I help you?" If this characterized the management mood, I would be concerned that feelings for others, that intangible factor that separates good management from bad, would not be a management priority. Yet, the intangible "good will factor" is the key to avoiding FTM lawsuits.

The key factors to FTM cases are poor resident relations, a healthy dislike, hatred, resentment against the owners. This needs to be evaluated and addressed in every park: this goal, however accomplished, is, I believe, more important than the issue of maintenance standing alone in and of itself. Insurers, too, are concerned about how parks are operated and tenant relations.

In some cases, rent policies trigger tenant lawsuits. The lawsuit is not about a rent increase, but because of the collateral disputes rents engender. A tenant thinks, well, higher rent, yet the park looks exactly the same. This is not fair. The result, 120 rent control laws in the state, and FTM cases often in areas without rent controls. Some questions owners already wisely consider: How high are rents compared to market? How often are rents raised and by how much? Are rent increases staggered so all tenants aren't increased on the same date?

IS THE PARK OPERATED BY AN INDEPENDENT MANAGEMENT COMPANY? Experience shows that parks operated by professional management companies are sued less. This doesn't mean you have to hire a management company. Certainly being prepared to show you are doing a good, professional job in managing will be beneficial.

IS THE PARK INVOLVED IN SELLING MOBILEHOMES? Some carriers believe that if the park owner or manager is involved in selling mobilehomes, there may be a greater risk of tenant unhappiness and lawsuits. Dealing exclusively with a dealer may be a very unwise, indeed unlawful practice. Consider the SC Homes case below.

DOES THE PARK PLAN TO REDUCE SERVICES OR GO OUT OF BUSINESS? Major reductions in services or going out of business to convert to another use is another common cause of tenant lawsuits.

MAINTENANCE AND REPAIR. Doing a good job maintaining and repairing your park is essential. Some carriers ask about two common causes for lawsuits: Do you have sewer back-ups or spills? Are your trash bin areas clean or is trash scattered about?

HAVE YOU BEEN SUED BY YOUR TENANTS? Although frankly our experience is that once you're sued you're usually not sued again in the near future, this is a question you'll see more and more.

THE FIVE G'S: Good maintenance; Good management; Good tenant relations; Good lease and rental agreements; and some say (not necessarily me) a Good experienced legal advisor, meaning, someone attuned to preventing problems before they start, someone thoughtful and creative. All these are your cheapest and best insurance. Put differently, belligerence, confrontation, pugnacity? An advisor with these approaches is not providing prudent guidance, quite simply.

So, it's no longer "just enough" to do a good job maintaining our parks. Even the best maintained park may be sued if mediocre management practices result in poor tenant relations. Well-written leases and rental agreements do more than anything else to let you charge reasonable rents and have reasonable increases in the future. They can also contain provisions fair to both you and your tenants which help solve problems and prevent lawsuits.

But the first and most important job your attorney has is to advise you about why these lawsuits occur and how best to succeed in receiving that coveted "no action" letter from a tenant attorney.

Legal Developments:

SC MANUFACTURED HOMES, INC. v. TREVILLYAN

Or, Why a Closed Park, Exclusive Deals with Dealers, Kick-backs and Foreclosing Competition in Mobilehome Sales Is Not Just Risky, it Is Illegal

Charles W. Redick, Jr., owns and operates SC Manufactured Homes, Inc., a dealership. In April 2006 an important decision was handed down which every owner should watch carefully. Redick filed a complaint for violation of the Cartwright Act (Bus. & Prof.Code, §§16720, et seq), intentional interference with prospective economic advantage, and unfair competition. All three causes of action were alleged against all 70 named defendants, including park owner attorney Trevillyan.

The amended complaint described the alleged conspiracy to restrain trade between mobilehome park owners and dealers in Santa Clarita. Namely, park owners in Santa Clarita refused "to allow buyers of new homes to locate in the park unless they bought particular homes from [a specific dealer] who provided kickbacks of up to $30,000 to the [park owners and operators] for the exclusive right to place and sell their homes on spaces within the park." This scheme increased mobilehome prices, limited buyers' choices, and prevented competition among mobilehome dealers. The scheme also resulted in "closed parks," *i.e.*, parks that " 'reserve[ ]' all (or virtually all) of the available spaces in the park to one or more specific dealers for the placement of new model homes until they are sold, leaving none for a potential tenant to lease and place on it a new [mobilehome] purchased from a dealer of his own choice."

Redick refused to participate in the scheme, and therefore was prevented from competing equally. *Example:* Redick asked one owner about placing new homes on five vacant spaces. Redick was told that new homes were not being allowed into the park, although Redick later found out that another defendant dealer was allowed to place and sell new mobilehomes on the vacant spaces (which had become available through a series of tenant evictions Trevillyan instituted). *Another example*: some park managers requested

almost $5,000 from the sale of a pull-out, when judgment was only $1,713.40 in back rent, $350 in attorney fees, and $399.30 in costs. The story was that the additional amount was for Trevillyan's fees, even though the court had set his fees at $350 and had rejected his request for $1,200. Trevillyan is claimed to have, therefore, "engaged in a pattern and practice of conspiring with all of the defendant [mobilehome] parks to conduct . . .lien sales in a fraudulent and illegal manner in order to illegally misappropriate the tenants' equity and to obtain their homes to sell to defendant dealers as 'pull-outs' so that new model homes can be placed and sold on those spaces."

Trevillyan is alleged to have stated to Redick that an employee of a particular mobilehome park "accepts graft" and that Redick and a particular owner "should put your differences behind you--you've been in this business long enough to know that what he is looking for is some green."

Aside from the dubious wisdom and cavalier bravado of such an alleged statement, if true such would constitute an admission of a violation of the Mobilehome Residency Law. Management is not lawfully permitted to receive monies for "selling a space."

Another few owners allegedly stated that a dealer could have spaces at $50,000 ($20,000 for "improvements" and a $30,000 "space fee") each in advance of the new home being moved into a particular park. The claim is that management would open up spaces by dreaming up an excuse to evict someone, e.g., not trimming the lawn. He would then hire Trevillyan to evict them; Trevillyan would " 'buy the tenant out,' meaning buy their mobilehome, and force them to sell their units to him;" Trevillyan threatened tenants and browbeat them into selling their homes to him. Trevillyan allegedly bragged he could always get another two or three thousand dollars out of every eviction above what the court awarded him.

Another dealer was allegedly told that "he had an agreement with a [park owner defendant] to buy four spaces at $5,000 each. This fee was in addition to the space rental fee. Whenever possible, these fees would be passed onto the mobilehome buyer."

A prospective mobilehome buyer was allegedly told that a particular dealer paid $30,000 for the exclusive right to sell its mobilehomes at a specific park in Santa Clarita. A manager at another mobilehome park told an assistant manager, he could get kickbacks from dealers.

The court is allowing the case to proceed against all defendants. Every park owner should pay careful heed to the statements of the Court:

> *At its core, the complaint alleges, under the Cartwright Act, a conspiracy between certain mobilehome parks and mobilehome dealers to restrain trade. The elements of a civil conspiracy action are (1) the formation and operation of the conspiracy and (2) damage resulting to plaintiff (3) from a wrongful act done in furtherance of the common design. . . Under the conspiracy alleged here, mobilehome dealers pay a "kickback" to mobilehome parks for the exclusive right to sell their mobilehomes on available park spaces. (See, e.g., Suburban Mobile Homes, Inc. v. AMFAC Communities, Inc. [plaintiff established a prima facie case of an illegal tying arrangement under which mobilehome parks entered into agreements with four dealers who paid the park for the exclusive right to display their mobilehomes in the park].) Parks become "closed," i.e., the owner has reserved all or virtually all of the park's available spaces to one or more specific dealers. These exclusive arrangements have the effect of restraining trade because other dealers, such as Redick, are prohibited from selling homes at the park. The arrangement impacts consumers because only tenants who buy from the exclusive dealer are allowed in the park.*
>
> *In addition, the fee that dealers pay to parks to "reserve" the space is often passed onto the consumer by virtue of inflation of the mobilehome price. Thus, according to Redick, this "reservation fee" is also a de facto entry fee that is prohibited under the Mobilehome Residency Law. (See, e.g., Civ.Code, § 798.37.)*

If these allegations are proven at trial, the damages, penalties, punitive damages, attorneys fees and costs will be considerable. There are, after all, 70 some defendants named in this action.

This is *not* a reported case for all tenant lawyers to rely on, but constitutes a fertile source of ideas nonetheless. Of course, the scope and breadth of the action could affect many owners and others in the mobilehome industry. It is a wise thing to consider the management practice in your community to determine whether or not revision to business policies needs to be considered. And whether there are disgruntled dealers and brokers in your area who perceive they are foreclosed from selling and brokering homes in your park. *It is not just your confidence level in the propriety of your business practices, it is your assessment of the perceptions of others, looking through their eyes, which determines whether legal disputes will emerge.*

Please note: Due to the complicated nature of the issues in these cases, it is strongly advised that you seek the advise of your legal counsel to plan a business strategy which complies with law and avoids the pitfalls of these many management personnel and owners in the Santa Clarita area.

BAKER v. TRAMUTOLA:

Or, Why Defined Lot Lines and Limiting Expectations of Purpose and Meaning Are Prudent; Or, How to Pay about $50,000 in Attorney's Fees for a 6 Inch Error in Lot Lines

▲ ***Synopsis:*** *As mobilehome parks age and change, landscaping matures, lot line markers age and disappear and encroachments inadvertently take place, the chances of lot line disputes increase. These changes occur slowly and sometimes imperceptibly over time, only to become a focus of dispute when a new home is installed, or as a result of some other controversy. Both tenants may then demand intervention of the management, to rule on the exact location of the lot line. If the lot line is absent or mis-marked, or if management does not take action to correct an encroachment, the legal dispute between the neighbors may entangle management as a targeted wrongdoer. Limiting liability with leasing provisions is a prudent measure to avoid involvement in potentially expensive litigation concerning lot line placement. In the following case, a non-WMA mobilehome park attorney in the San Diego area sued an adjacent tenant over lot lines, in the face of a survey which reflected his client was encroaching; two appeals later, his client faces a significant liability for attorney's fees and costs.* ***The lesson here? Lot line litigation is expensive, risky, and should be avoided wherever possible, by carefully crafted rental agreements and rules and regulations.***

In 1976 the Bakers purchased a mobilehome in Carlsbad. The common interest mobilehome development had

a survey conducted and recorded a plat map depicting the lot lines. Then, the Bakers built a fence between lots 21 and 22, with their existing adjacent asphalt driveway extending several feet beyond the fence to the street. In 2002 the Tramutolas moved onto the adjacent lot. They retained a surveyor to locate the property line between lots 21 and 22, because the Bakers claimed they owned the property up to the Tramutolas' porch in the front and up to their coach in the back. Contrary to the Bakers' position, the surveyor reported that his survey (the 2002 survey) comported with the 1988 survey and plat map, and the Bakers' fence and driveway encroached on the Tramutolas' property "in the front ... approximately a foot ... and in the back ... about 6 inches."

The Tramutolas insisted that the Bakers remove their fence. The Bakers refused on the ground the fence was inside their property line according to the 1988 survey. In April 2003, when the Bakers were out of town, the Tramutolas removed the fence, a portion of the Bakers' driveway and other property such as exterior lights, irrigation and plants.

Bakers retained the San Diego attorney to sue the Tramutolas for injunctive relief, property damage, trespass and intentional and negligent infliction of emotional distress. The Tramutolas cross-complained against the Bakers to quiet title. At trial, the Tramutolas presented evidence that the 2002 survey conformed to the 1988 survey and the Bakers' fence and a portion of their driveway encroached on the Tramutolas' property. The Bakers argued that surveys were immaterial, because the encroachment was "minor."

The jury found that the Bakers' fence and driveway encroached and that the encroachments were not "minor"; the Tramutolas did not trespass on the Bakers' property.

The Tramutolas moved for costs of $2,783, and attorney fees of $76,135.99. The court awarded costs of $2,454.79 and attorney fees of $43,952. The Bakers' attorney contended the $300 hourly rates of the Tramutolas' attorney were "excessive." They ". . .however, submitted no evidence establishing that $300 per hour is not within the range charged by other attorneys in the community with similar experience" said the Court. Further, the Court notes that the Bakers' attorney claimed: "'Neither [the Tramutolas] nor their counsel should be permitted to reap a windfall of unearned fees.'" Replied the Court: "The Bakers, however, cite no supporting authority for that proposition, and thus we may treat it as waived or meritless."

Making matters, worse, the Bakers are required to pay attorney's fees and costs on appeal. "" '[I]t is established that fees ... are available for services at trial and on appeal.' ... The Tramutolas are the prevailing parties in both appeals, and thus they are entitled to contractual and statutory fees.

COMMENT: Assertion of a lot line claim, in the face of an unassailable survey conflicting with your argument, is of dubious wisdom. Defending a claim which is unsupported by a survey is an equally needless exercise in futility. *And where management is confronted by competing tenants with adverse lot line claims, it is clear that determination of the accurate location of the lot line is* ***management's responsibility*** *which should be resolved as soon as possible.* I strongly advise that where management may be in any respect **at fault** for lot line defects of *any* kind, accommodations be proposed for early resolution of that claim. That accommodation may mean a reduction in rent, a boundary improvement (new fence or landscaping for example), a cash payment, etc. However, to avoid the cost liability of litigation, it is imperative that an early satisfactory resolution be fashioned before the dispute spins out of control and into the hands of attorneys catering to the unbridled emotional fury of their tenant-clients.

Additionally, as mobilehomes age, they are often replaced. Sometimes a tenant (or dealer) seeks to replace a mobilehome with a new home, to the maximum size allowed by the lot lines. This indeed may be a requirement of the rules and regulations. However, the largest possible home may not be allowable if there are underground easements or utilities over which a mobilehome may not be placed. If the largest expected mobilehome cannot be sited due to easements or encroachments, there may be a direct impact on profitability: a larger home is more valuable than a smaller one.

To avoid claims based on an implied covenant that the lot lines (which may be inaccurate) define a tenant's expectations of use and occupation, or define the largest possible home that can be sited, appropriate disclaimers and disclosures should be included in residency documents. This possibility should be described in the disclosure statement given to each prospective purchaser. Further, if there are separate architectural guidelines, such a disclosure should also be included.

Additionally, sometimes lot lines are not properly marked. To avoid the thorny problem of lot line mis-markings and resulting impact on use, occupancy and the size of a new mobilehome that can be sited on a space, a provision which sets forth that the "apparent and actual use" defines the expectation of use and occupancy to be enjoyed, not the lot lines themselves which are present for just 'health and safety' reasons. These provisions may assist in minimizing liability when the actual lot lines encompassed by the mobilehome space are not, in reality, as it may appear.

HILLSBORO PROPERTIES v. MARTIN

Or, Why Injunctions for Rule Violations May Be a Better Approach than a Termination of Tenancy.

▲ ***Synopsis:*** *Rule violations are perhaps the most difficult basis on which to seek a termination of tenancy and eviction. Due to the fact that a judge or jury may not perceive the rule violation with the same seriousness as the management, a tenant may prevail against the management even where the evidence of the rule violation is very clear cut. The rule violation based on conduct is even more difficult that the rule violation based on conditions. The precedent 7 day notice for a conduct violation, say, for disturbances, is cured the very instant that the residents are quiet. The stakes are high in either case: the tenant may lose his home, be forced to relocate it, there may be an elderly family member evoking sympathy, and number of mitigating factors which make this form of eviction difficult.*

Compare the injunction action: no waiting periods (no 60 day notice), no jury, no loss of home or equity. Just a "oh do behave" type order. Plus an attorney's fees award. All the pressure imposed from the potential loss of the mobilehome is removed from the equation. Especially in the currently heightened atmosphere of awareness of management duties to resolve neighbor v. neighbor disputes, the injunction may be a more viable remedy than termination of tenancy for dealing with resident disturbances and rule violations.

In a lawsuit between two feuding tenants, who blamed the park owner for not taking action to stop the interrelated harassment of one another, the court said the park owner could be held liable to the tenant claiming to have been victimized if the interference with quiet possession was substantial. That action can be a warning, or a suit for injunction to stop the feuding if sufficiently serious, or in even more serious cases, an

eviction for substantial annoyance. In the worst case of violent confrontation or criminal conduct, a call to the authorities to stop criminal activity between the tenants is also expected.

Specifically, the Court mentions the management's ability to obtain injunctive relief. The opinion talks about injunctions for "violation of a reasonable rule or regulation," and an established rule is therefore necessary as a predicate for relief by injunction in this situation. "Peace and quiet" rules may not be enough depending on the nature of the harassment.

Other problems remain with these "Hatfield and McCoy" situations - which tenant to evict? Both? This should be unnecessary because elimination of one tenant might solve the problem. If both tenants are sued, the park owner probably loses one case once the "chicken and egg" causation issue is adjudicated by the jury as an issue of fact ---with resultant attorney's fees and costs awards, plus maybe malicious prosecution from the prevailing tenant; also now management must deal in the future with a tenant feeling empowered and invulnerable to rule enforcement measures.

I think the opinion makes it clear that breach of quiet enjoyment constitutes a "substantial annoyance." This is very nice. I believe it lowers the bar as to burden of proof for eviction on this ground. However, we would need the cooperation of the victimized tenant. Tenants do not always cooperate as we all know. If management sues both tenants for eviction, the owner will get cooperation from neither of them. That is a roller coaster ride no practical attorney would wish to risk.

For these reasons, park owners should more often consider injunctions as a way to separate the feuding parties. The advantages are patently clear: no jury; no pressure on the part of the judge as to the "loss of the home" issue; rather, all management would be seeking is an "Oh Do Behave!" order (quoting *Austin Powers*); there is little or no time for discovery; and, the law allows for the recovery of attorney's fees and costs.

Injunctive relief is therefore the fastest, most economical and low risk remedy available to the park owner. The real issue is when the feuding and disruption or interference with the right to a reasonably quiet and uninterrupted tenancy becomes “substantial.” And indeed, once an award of attorney’s fees and costs is granted, the tenant sometimes decides to move on and sell.

In the *Hillsboro* case, management filed for an injunction against tenant Martin's continuing violations of the rules and regulations. Martin was in violation of the rules requiring him to keep the exterior of his mobile home, as well as all appurtenant structures, well maintained and painted, and prohibiting (1) the storage of non-patio furniture or debris on his deck; and (2) the presence of vehicles which are inoperable or unsightly, in his assigned space. The petition alleged Martin had been given numerous warnings about the problems, but failed to correct them. A seven-day notice was served demanding compliance with requests to: (1) "wash house"; (2) "remove all debris"; (3) "remove old furniture from deck"; (4) 'trim all shrubs (evergreens, etc.); and (5) "remove any vehicle from driveway which cannot be parked without protruding into street." Another seven day notice was served as well. This notice requested that he: "1. Remove old furniture from deck, including but not limited to daybed, miscellaneous shelves and racks, rotten rattan plant stand, empty black metal plant stand, white rocking chair, gold lounge chair, old table and chairs, blue bike, wood chest, three old (empty) plant stands. 'Only patio furnishings, barbecue equipment and decorative plants are allowed on the decks or patios.' 2. Remove derelict yellow Buick license No. 1KSB317 and gold Mustang license No. NOM652 from driveway. 3. Paint house. Be sure to bring us paint samples first so color can be approved per rules and regulations. 4. Replace rotting deck, stairs and handrails." Martin failed to take further action to rectify the problems outlined in that notice.

After numerous court hearings, proceedings, and machinations of court process, the management was awarded the amount of $12,396.39.

The Court found that: *“[t]he record is replete with evidence both the Park, and the court, did everything that could be reasonably expected to cajole, coax and induce Martin to fulfill his obligations pursuant to the court's order. Despite the court's warnings, he simply failed to take the matter seriously, and appeared to believe that no serious consequences would be inflicted on a nice man with no lawyer. He was wrong, and his intransigence caused the expense of this proceeding to spiral. Under these circumstances, we certainly cannot conclude the trial court erred in determining the Park was entitled to recover all the fees it incurred and requested.”*

This case is an excellent example of why an injunction action, heard by a court and not a jury, may provide the management with the relief requested, at full reimbursement of cost, and with compliance with the rules and regulations. Would an eviction have succeeded? Due to compliance, a previously served 60 day termination notice was cancelled, and the court lauded the management for making every effort to seek compliance and not terminate tenancy: *“[W]e note the Park's attorney assured this court at oral argument that the Park had no present intent to evict Martin . . . We commend the Park for its attitude, especially in the face of Martin's repeated accusations that it is acting in bad faith . . .”* The result? Full compliance with the rules and full reimbursement of attorney’s fee and costs: the prudent approach to handle a dispute in a close case in my judgment.

HILLSBORO PROPERTIES v. ROHNERT PARK

Or, Why Banking on the Courts for Relief from Unconstitutional Rent Controls Is a Risky, Uncertain Business

▲ ***SYNOPSIS*** *Seeking relief from the Courts in any rent control matter is a risky uncertain business. Here, the Court refuses to allow collection of rents deprived formerly, by operation of an admittedly unconstitutional rent control law. The case is indicative of the hostility of the Courts, generally, in California, to property rights.*

From 1988 through 1995, Hillsboro gave notice to its tenants of higher rents that it sought to impose, but could not because of the ordinance. In 1995, the city amended the ordinance to allow a landlord to raise rents above the rent control ceiling in order to recoup the cost of capital improvements, which the original measure did not permit. In 1996, a federal court determined that the ordinance as originally written was unconstitutional because it did not provide a fair return on capital improvements. In December 2002, the federal court held that the amended ordinance satisfied constitutional requirements. Beginning in August 2003, Hillsboro unsuccessfully attempted to apply to the rent board with its “Application for a rent increase to compensate it for the City of Rohnert Park's unlawful 1988 rent roll back and the enforcement of unlawful rent control rents from January 16, 1988 through January 24, 1995.” The city attorney

refused to submit the application to the board. In September 2004, Hillsboro filed suit in the Superior Court for, among other things, inverse condemnation; a declaration that the ordinance had effected an unconstitutional taking; and a writ of mandate ordering the rent board to consider the application. The court refused relief.

Said the Court: *"Hillsboro's failure to allege that the Rohnert Park ordinance deprived it of a fair rate of return on its investment thus defeats any possible right to recovery. If despite the invalidity of the ordinance the landlord received a fair return, there is no basis for [an adjustment to remedy past confiscation]. The correspondence attached to the complaint indicates that Hillsboro persistently rejected the advice of the city attorney that in order to obtain a rental increase to compensate for rental income lost while the invalid measure was in effect, Hillsboro should apply for either an 'NOI increase' or for an adjustment to provide a fair return on capital improvements. As indicated above, an 'NOI increase' is available if gross income on the property less operating expenses does not provide a fair return. A capital improvement pass-through is available to provide a fair return on additional investments in the property. Implicit in the city's rejection of Hillsboro's application is the assumption that the amended Rohnert Park ordinance permits upward rental adjustments in all circumstances in which a property owner potentially could be deprived of a fair rate of return. This assumption may be true by definition, but in all events we are unable to conceive of any circumstance in which an owner would not receive a fair return that does not come within the scope of the NOI increase or capital improvement provisions. We need not speculate as to whether there could be such a circumstance; it is sufficient to observe that the present complaint does not allege that any such circumstance exists here."*

This regrettable determination of the Court, once again steeped in the notion that some presumptive bare return on investment is sufficient to placate observance and adherence to basic notions of substantive due process, fails to comport with fairness. If a regulation is unlawful, no other standard not then applicable to reasons for rent adjustments can be used to supplant what the City Council did not itself provide or intend.

Yet this treatment is emblematic of many California Courts. This hostility of the Courts to property rights is well documented and continuing. It does point up the high risk and cost of property rights and rent control litigation: and why no single park owner should shoulder the burden of the risk and cost to advance the interests of all park owners.

The individual park owner's self-interest is best advanced by the individual rent application, coupled with aggressive leasing campaigns to eventually move toward exemption from local rent controls. For example, the use of signing bonuses, cash payment for rental adjustments, home improvement allowances, and other concessions to achieve voluntary agreement to long-term leases may be very cost effective, when compared to the cost of attorneys, experts, and psychological costs imposed on a community from rent hearings, court battles, and the ill will engendered by such actions.

Let us consider the notion of a signing bonus for a lease rent increase: if each dollar of rent roughly means a $200.00 increase in the value of a space, then a $3,000 signing bonus investment, in return for a $100.00 voluntary rent increase, would equal capital appreciation of about $20,000. This is an instant return of $20,000 capital value for a $3,000 cash investment. *Carefully considered, such a leasing program could succeed in many areas where stultified rents subsidizing middle class incumbent tenants can be increased voluntarily for cash payment, and still reap significant increases in capitalized value.*

Such litigation generally, as laudable and commendable as it always is, remains the domain of the collective efforts of park owners, the Committee to Save Property Rights, the Pacific Legal Foundation, and other groups dedicated to the preservation and advancement of property rights in California.

But a permanent solution to get to market, just once, space-by-space (whether on attrition, default, in turnover opportunities, acquisition opportunities), in the form of leases and marketing of programs that serve both management and tenant interests, is not found in litigation or rent hearings.

The permanent solution remains the investment in your own property, not in lawyers and experts. At little risk and cost, when considering litigation alternatives, the marketing of leases is the only certain, state-mandated, exemption that has proven reliable for avoidance of rent controls. One manner is to provide lease incentives which, while costly now, pale in significance to the capital return immediately achieved. The way to do this is to make an expenditure in your own property, in a cash bonus arrangement for consensual vacancy decontrol, immediate rent increases, long term lease protection for pass-throughs, and keeping apace with market change; a certain investment.

PLEASE FEEL FREE TO CALL TERRY R. DOWDALL FOR QUESTIONS OR COMMENTS ABOUT THE FOREGOING ISSUES.