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PARK WATCH

A Legal Developments E-Bulletin

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A COURTESY FOR FRIENDS AND CLIENTS

COURT OF APPEAL REVERSES RULING FOR PARK OWNER IN CARSON SUBDIVISION CASE!

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By Terry R. Dowdall, Esq.

● ***Upshot:***

The Second District Court of Appeal reversed a trial court approval of a mobilehome subdivision proposal in Carson yesterday. The 3 justice panel issued a split and unpublished opinion (2-1 with a strong dissent) which opens the door to allowing a trial court to consider whether residents favored subdividing and the motive of the park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 state controls the rents for the 4 years following conversion); further, they objected to the owner's expectancy of profit on lot sales. But, the owner can, instead, sell the entire park as on ongoing operation. Subdividing, however, gives residents a chance to own their homes and lots as single family residences with all the attendant benefits of home ownership, from favorable financing to tax benefits to management control.

Basically, the March 30th opinion, if left standing, will allow Carson to again seek to thwart a park subdivision. Some may describe the opinion as a delay to eventual conversion; and others may trumpet the decision as the first defeat and focus of future attacks against park subdivisions.

Oddly, the main protestants against subdividing are those who benefit the most: residents seemingly undermining their own opportunity at home ownership and the final end to space rent. This is substantively no different than self-inflicting a wound. 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.

> "Whether the conversion is or is not bona fide turns on the state of mind of the park owners."
> —Majority Opinion

● **Facts:**

The owner of Carson Harbor Village Mobile Home Park submitted an application to subdivide the park into individual lots. The Government Code, *inter alia*, requires a survey of the residents' level of support. The owner conducted a resident survey of support. In 2005, the (first) resident survey showed 11 percent voting in favor (the rest were against it or did not vote). Subsequently, the city later deemed the application to be complete.

Upon completion of the application, the planning commission held a series of public hearings. The hearings addressed statutory requirements for the subdivision, such as the preparation of a "tenant impact report" ("TIR") and whether the conversion was a "subterfuge" to escape local rent control. The hearings also covered matters such as purported claims of deteriorating physical condition and whether the subdivision furthered the city's general development plan of preserving open space and low and moderate income housing.

The city disapproved the application on several grounds:

■ First, the planning commission found the conversion was inconsistent with provisions in the city's general plan to preserve affordable housing and open space.

■ Second, the city decided the tenant impact report lacked sufficient information about the conversion's effects on the park's residents and wetlands.

■ The city also denied the conversion because the first survey of resident support did not comply with Government Code requirements ("[T]here is no evidence ... that the survey of support was conducted in accordance with an agreement ...[with]...a resident homeowners association ...").

Owner appealed from the planning commission to the City Council. Meanwhile, the court states, the owner devised newly-offered "incentives" and "enticements" to the residents in order to curry greater favor toward subdividing. A second survey showed that 65 percent still remained opposed. Still, the council denied the subdivision application, finding that the survey failed to comply with legal standards; failed to include a sufficient TIR; and, was inconsistent with the city's general plan.

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>
> *—Majority opinion*

<u>Trial Court Appeal</u>

<u>*The trial court ruled in owner's favor.*</u> The Court held:

■ The city may not impose any conditions on approval of the subdivision beyond ensuring that the application complied with state law.

■ The city erred in disapproving the application on the grounds the subdivision conflicted with the city's general plan for affordable housing and open space.

■ The city was time-barred from seeking additional information in the TIR about the conversion's effect on tenant displacement and nearby wetlands.

■ While the evidence of the first survey was "flimsy" (in terms of the requirement of an agreement with a resident association), the second survey was improperly rejected (city wrongly concluded that the second survey was not pursuant to such agreement and staff assisted in processing of it).

<u>City Appeals</u>

<u>*The City Asserts:*</u>

■ The survey may be used to consider the *"bona fides"* of the conversion, and it was legally inadequate.

■ City properly denied the subdivision for its inconsistency with the city's general plan for maintaining affordable housing and open space.

■ The TIR failed to include adequate information about the effect on nearby wetlands and tenant displacement.

<u>The Court of Appeal Reverses the Trial Court</u>

<u>*"Bona Fide" Conversion?*</u>

<u>For the first time in California history</u>, a court held that an agency is <u>not</u> prohibited by state law from determining whether a conversion is *bona fide*. The Court held that despite the early *El Dorado* decision which held that review of a conversion was limited to confirming that the owner had complied with the statutes (and could not consider the good faith or motive for a conversion), a local agency may determine the *bona fides* of the subdivision proposed (this conflicts with earlier precedent and constitutes grounds for review by the Supreme Court).

The basis for this ruling lies in the legislative history of the statutes. 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 "nonbona 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 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 <u>*"Whether the conversion is or is not bona fide turns on the state of mind of the park owners."*</u>

<u>*"Bona Fide" Subdivision Defined:*</u>

The Court holds 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:

Also for the first time in California history, an appellate 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."

The legal test for a "bona fide" subdivision

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."*

Is Consistency with the General Plan Relevant?

No. The Government Code preempts local authorities from adding additional factors besides those the statute identifies, when considering a subdivision application. The city improperly rejected the application for subdivision based on concerns with the general plan. This holding is one of the few positive aspects of this case for owners.

Tenant Impact Report

Every subdivision application requires a TIR describing the impact of subdividing on park residents. The TIR did not deal with local wetlands (that were a substantial part of the city's open space [1]) and the city claimed that it failed to adequately address "economic displacement [2] of tenants from the conversion."

The trial court opined that requiring information concerning the effect of subdivision on wetlands issues and tenant displacement was *reasonable* in helping the city assess the impact of the conversion on the park's residents, but found that demands for additional information were improper after the city deemed the application complete.

The law allows a city to request the applicant to "clarify, amplify, correct, or otherwise supplement" information in the application. So, the city is not barred from requesting more information once the application is "complete." The reversal requires determination of the adequacy of the TIR.

Limit of City Purview re the TIR

The city's review of the TIR is, however, limited to confirming whether the report complies with the Government Code; *i.e.,* determining whether the information sought is prohibited "new or additional" information, or information properly sought to "clarify, amplify, correct, or otherwise supplement" the application. The city may not add new conditions.

Conclusion of Majority

The summary of the ruling is this:

■ The city must determine whether the 2007 survey complies with the statute.

■ If the city council finds the survey is adequate, the city council must consider the survey and may do so in determining whether the conversion is bona fide.

■ In analyzing whether the conversion is *bona fide*, the city council may not, however, impose a minimum threshold of tenant support for the conversion.

■ The city may not disapprove the application on the ground that it conflicts with the city's general plan.

■ The city must, in the first instance, determine whether the tenant impact report complies with the requirements for such a report as stated in the Government Code (section 66427.5, subdivision (b)).

■ If the city council concludes the conversion is *bona fide* and the tenant impact report complies with statutory requirements, the city council must approve the application.

A Strong and Persuasive Dissent

The dissenting justice (Honorable Justice Bigelow) parted company with the majority on all decisive issues. He would have ruled that the second survey *was* conducted in accordance with an agreement with the resident association and that there is no evidence to support a finding of a noncompliance.

According to the dissent, the city has a duty only to determine

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[1] As for the wetlands, the city found the tenant impact report did not include information concerning (1) the "extraordinary measures needed to meet the requirements of the California Department of Fish and Game . . . [and] the unreasonable liability and maintenance responsibilities that will be borne by the resident owners following the date of conversion" and (2) "the significant remediation costs should the park be determined responsible for contamination within the wetlands."

[2] As for tenant displacement, the city found the report did not include information about: (1) "the impact of the conversion upon displaced residents;" (2) "the availability of adequate replacement space in mobilehome parks;" (3) "the impact of rent increases on the continued financial viability of non-low income non-purchasing residents remaining as park renters;" (4) "the likely increase in rental rates on non-low income non-purchasing residents [and] the impact of such rental adjustments on available disposable income [and whether] . . . such rent increases . . . could or will result in short- or long-term resident displacement;" (5) whether "the economic impact of annual rent increases may result in resident displacement;" and (6) the "availability of adequate replacement space in mobilehome parks."

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]").

He further states that the majority is wrong 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."

And any defect in the TIR was waived when the city's staff deemed the application complete.

State of Mind? How Proven? What Evidence? An Affirmative Showing or A Defense?

The Court holds that the owner's "state of mind" is the key to determining the *bona fides* of the subdivision application. There is no indication whether that is an affirmative showing the owner must make as part of the burden of proof, whether it is a defense raised by the residents, what standards apply and what findings must, if any, be discerned from the evidence. Is a park owner to be subjected to cross-examination to determine state of mind? Psycho-analyzed? In this respect, the court has invited *some form* of additional scope which is as stated, unintelligible.

A "state of mind" is basically, *what is in your head.* One cannot see that. So, state of mind is distilled from what is said and done. Usually, evidence of state of mind is what is in the mind of the person who makes utterances or engages in conduct that manifests the claimed state of mind: not in the mind, thinking or attitudes of others. Where an utterance is a direct assertion of state of mind, such as a statement, it is, at best, hearsay under the rules of evidence. There is no direction given as to how to prove or defend state of mind evidence.

● ***Conclusion:***

This valiant fight will continue.

It is difficult to believe that subdivision approval is contingent on a probing of the mental state of the park owner. The court seems to be inviting an untethered foray into surrounding circumstances to make a record from which it can be determined whether the subdivision application is legitimate or not. But that excursion is incomplete by nature. For example, the price of lots cannot be considered in the map approval process: no one can ascertain pricing information, which may be key to discerning some inference of claimed abuse of the statute! And what is the measure of evidence in a non-rent controlled area? Such an evidentiary inquiry is inherently truncated and ultimately standardless. This decision cannot be right.

This opinion is not published and may not be cited or relied on. But make no mistake: it will be used against owners in every agency proceeding considering a subdivision proposal not supported by the residents.

I imagine the City will seek to have the case published as a binding precedent in other localities throughout the state. The owner may seek reconsideration and petition for review to the California Supreme Court.

Subdividing simply gives tenants a chance at the American dream of home ownership. The city's position, on the other hand, perpetuates economic repression of residents, makes them pay rent, 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 suppressing resident empowerment, the GSMOL may more effectively curry favor for enlistment of new members; and, the politicians can instill fear to garner votes while using parks and tenants to meet housing element and general plan goals. As for the average resident, inexplicably supporting barriers to economic advancement is baffling: squelching a chance at home ownership seems a patently myopic response to a golden opportunity.

Please fee free to contact Terry R. Dowdall, Esq., with any questions or comments.