

PARK WATCH

LEGAL DEVELOPMENTS NEWSLETTER

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

SOUTHERN CALIFORNIA: 284 NORTH GLASSELL STREET, FIRST FLOOR, ORANGE, CALIFORNIA 92866 (714) 532.2222, FAX 532.3238, 532.5381

NORTHERN CALIFORNIA: 980 NINTH STREET, 16TH FLOOR, SACRAMENTO, CALIFORNIA 95814, (916) 444.0777, FAX 444.2983

A COURTESY FOR OUR FRIENDS AND CLIENTS**E-MAIL: DOWDALL@PACBELL.NET****THIS NEWSLETTER CONVEYS GENERAL INFORMATION, NOT LEGAL ADVICE: CONSULT AN ATTORNEY BEFORE RELYING HEREON**

LINGLE v. CHEVRON - TAKINGS CLAIMS DEFEATED - OR - DON'T 'BANC' ON THE 9TH CIRCUIT

Finding the actions of the 9th Circuit "remarkable, to say the least," the unanimous High Court continues to eschew heightened scrutiny when addressing substantive due process challenges to government regulation.

By: Terry R. Dowdall, Esq.

▲ SYNOPSIS:

The *Chevron* case. The sun may have set on our "great bright hope." Proving a silver bullet can misfire, the Supreme Court has squelched the claim, seen as similar to the takings challenges against mobilehome park vacancy controls, that controlling only wholesale price without regulating retail price is unconstitutional because it creates a valuable premium leasehold for an incumbent lessee at the cost of the landowner and prospective tenant. The phrase "substantial advancement" (and the argument that without controlling retail prices a leasehold would become a valuable commodity to a lessee which does nothing to assist in stopping runaway gas prices) is a dead letter for purposes of independent saber attack against vacancy controls.

The remaining issue is whether this tsunami will also engulf the fledgling *Cotati-Cashman* holding that vacancy controls, indeed, an entire rent control scheme, is *per se* unconstitutional, because it creates a leasehold premium which can be sold at profit to a mobilehome purchaser who, in reality, pays full price for the total value of the housing, thusly failing to provide affordable housing to anyone but incumbent tenants. One thing for sure: if *Cotati-Cashman* can survive, it will NOT be based on the substantial advancement theory.

▲ COTATI-CASHMAN

Cotati-Cashman still lies in the 9th Circuit on request for further review (*en banc*). Why is *Chevron*

important? Well, first a brief review of the *Cashman* case, holding that vacancy controls are unconstitutional.

Cashman owns a park subject to Cotati rent control which has no vacancy decontrol (the right to increase rents on tenant sale of a mobilehome). *Cashman* sued, claiming the law was unconstitutional because it failed to advance the City's interests in protecting affordable housing-- the law allows a tenant to capture a "premium" upon the sale of a mobilehome that corresponds to its increased value as a result of the low rents restricted by rent control. Thus, the incoming tenant pays full market value for the housing because of the premium commanded for the under-market leasehold. That value is reflected in an inflated price for the mobilehome. This market reality totally frustrates continued affordable housing. The effect of the law is to therefore transfer a valuable property interest of the park to departing tenants.

The Court of Appeal agreed with Plaintiffs, without the necessity of providing empirical evidence of the actual taking, stating that there is no dispute that the law fails to prevent tenants from capturing a premium. "There is separate ownership of the mobilehome coaches and the underlying land, controlled rent, and the ability of incumbent tenants to sell their mobilehomes subject to this controlled rent. This creates the possibility of a premium, which undermines the City's interest in creating or maintaining affordable housing" said the court. No evidence was needed for this holding. It was plain as a matter of indisputable reality. The only result substantially advanced by the law was to enable a one time wealth-transfer from park owners to the incumbent tenants of their rent-controlled mobile home parks. The parallels to the *Chevron* case are many.

▲ **THE CHEVRON CASE:** In *Chevron*, Plaintiff alleged the facial unconstitutionality of state restrictions on the rent gasoline companies could charge lessee dealers of retail service stations. The purpose was to curb spiraling retail prices for gasoline. The restrictions limited the amount of lease rent payable to service station lessees. *But the law did not prevent a lessee from selling his service station lease or the retail price of gasoline.*

The trial court agreed that the rent cap provision of the law allowed incumbent dealers to capture the value of the decreased rent in the form of a premium. The court explained that the existence of the rent cap makes a leasehold interest more valuable, and this added value can be captured by the selling lessee on sale. The rent cap provision enables these dealers to sell their stations at a premium. But a trial was needed respecting two

issues: whether the statute enabled incumbent dealers to capture a premium, and whether oil companies will raise fuel prices. There was evidence of mechanisms which not only might permit Chevron to prevent its lessee-dealers from capturing a premium on the sale of their dealership, but could enable Chevron itself to capture this premium.

For example, Chevron might capture the premium by increasing the wholesale price of fuel, and dealers would then be forced to raise the retail price charged to the public, which price increase would offset the effect of rent control and thereby defeat the purpose of the Act to lower gasoline prices. *This is one of the differences between vacancy control and the Chevron case.* There is another equally important difference between Cashman and Chevron. In Cashman case all that is needed to prevent Cotati's ordinance from substantially advancing its objectives is the likelihood of capitalization and sale of the benefits of living under the Ordinance by incumbent mobile home coach owners. Whether the Ordinance will facilitate such transfers can be logically inferred from examining the face of the ordinance itself.

▲ THE U.S. SUPREME COURT:

The Supreme Court rejected the claims of the Chevron Plaintiff, and did so in near summary fashion. Essentially, the Court held that the "substantial advancement" test is an invalid method of identifying compensable regulatory takings. *Specifically:*

- "Substantial advancement" prescribes an inquiry in the nature of a due process test, which has no proper place in the Court's takings jurisprudence.

- The formula unquestionably was derived from due process precedents and although reliance on those precedents is understandable when viewed in historical context, the language the Court selected was imprecise. It suggests a "means-ends" test, asking, in essence, whether a regulation of private property is effective in achieving some legitimate public purpose. Such an inquiry is not a valid method of discerning whether private property has been "taken" for Fifth Amendment purposes.

- In stark contrast to the regulatory takings tests, the "substantial advancement" inquiry reveals nothing about the magnitude or character of the burden a particular regulation imposes upon private property rights or how any regulatory burden is distributed among property owners. Thus, this test does not help to identify those regulations whose effects are functionally comparable to government appropriation or invasion of private property; it is tethered neither to the text of the Takings Clause nor to the basic justification for allowing regulatory actions to be challenged under the Clause.

- The formula's application as a "takings test" would present serious practical difficulties. Reading it to demand heightened means-ends review of virtually all regulation of private property would require courts to scrutinize the efficacy of a vast array of state and federal regulations--a task for which they are not well suited.

- Such a claim would also empower--and might often require--courts to substitute their predictive judgments for those of elected legislatures and expert agencies.

The Court concluded: **"In short, Chevron has not clearly argued--let alone established--that it has been singled out to bear any particularly severe regulatory burden. Rather, the gravamen of Chevron's claim is simply that Hawaii's rent cap will not actually serve the State's legitimate interest in protecting consumers**

against high gasoline prices. Whatever the merits of that claim, it does not sound under the Takings Clause."

And in yet another slap against the 9th Circuit, the unanimous Court stated: **"We find the proceedings below remarkable, to say the least, given that we have long eschewed such heightened scrutiny when addressing substantive due process challenges to government regulation. "**

▲ **COTATI-CASHMAN:** The issue for mobilehome park owners seems predestined as well. While arguable factual distinctions may exist; while due process challenges are paid deference by a concurring opinion; while, well, we may well find a "pony" in all this, the "substantial advancement" test, in the end, is only a claim deemed to have exalted select precedential text over constitutional substance.

However, the highest compliments must go to all who advanced this fight, and who go on doing so until *Cotati-Cashman* is concluded. The noble challenge was well and hard fought. It must be remembered that the judicial arena is a risky and uncertain place, and that the very best of resources was drawn into the fray.

DE-CONTROLS, LEASES:

THE END GAME

I believe that for most owners under rent controls, the administrative level, dealing with the local rent board, is where the money must be spent: the individual pursuit of fair rents within the system. This is accomplished with retention of competent experts, preparation, and a comprehensive presentation that closes the doors to any result except success for the owner. I have advocated this position since 1992 when the Yee case was adversely decided. I advocate it today. I think the bulk of activity will continue to be in rent decision challenges, in the context of well-settled mandamus law and the individual effort of the single park owner to obtain relief.

My own belief? That rent controls are here to stay, and that there are no *silver bullets* in the courts. Innovative ideas for achieving fair return are many and within the existing structure of current law. Success for the individual owner requires resort to exploiting these resources within our immediate grasp before the legislature or the courts take them away.

I continue to believe, for example, that Civil Code section 798.17 is the single most important advancement in the MRL since its inception. A long term lease can be offered which sets a fixed turnover rent adjustment. It can be more attractive to a new tenant than rent controls. It may for example require less than the adjustment allowed if the new tenant stays under rent controls. The long term lease establishes annual adjustments which are reasonable and realistic for the park owner as well; that eliminates some pressure to go to market in one step. And if leases are in place, there is no need for special rent adjustment applications, hearings and the considerable expense for attorneys, accountants, appraisers, economists.

It has been some time now that existing avenues for advancement of property rights be seriously explored. **PLEASE FEEL FREE TO CALL TERRY R. DOWDALL FOR QUESTIONS OR COMMENTS ABOUT THE FOREGOING ISSUES.**