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Court of Appeal, Fourth District, Division 2, California.
WESTMINSTER MOBILE HOME PARK OWNERS' ASSOCIATION, etc.; et al., Plaintiffs and Appellants,
v.
CITY OF WESTMINSTER, et al., Defendants and Respondents,
Doris M. Ruse, et al., Interveners and Respondents.
Civ. 30081, E000538.

April 30, 1985.
As Modified May 14, 1985.
Review Denied July 30, 1985. [FN*]

FN* In denying review, the Supreme Court ordered that the opinion be not officially published.

Mobile home park owners' sued to have city's mobile home rent control program declared unconstitutional. The Superior Court, Orange County, Thomas F. Crosby, Jr., J., gave judgment on the pleadings dismissing the action for failure to exhaust administrative remedies. Park owners appealed. The Court of Appeal, Kaufman, J., held that: (1) passage of ordinance purportedly repealing challenged program did not render appeal moot; (2) alleged failure to exhaust administrative remedies did not bar the court action, particularly where, inter alia, major claim was that the very administrative procedure prescribed was unconstitutional; (3) challenged ordinances were constitutionally adequate so far as "fair return" standard was concerned; (4) adjustment mechanism provided in the program failed to meet constitutional muster, in that it would necessarily result in needless and unreasonable delay and city would retain no control over time required to process and determine request for increase in rent; and (5) program effected an unlawful delegation of municipal power exercised by general law cities.

Reversed and remanded with directions.

***641** Lazof & Swanson, Swanson & Casello, C. Brent Swanson, Terry R. Dowdall, and Maureen A. Hatchell, Santa Ana, for plaintiffs and appellants.

Pacific Legal Foundation, Ronald A. Zumbrun, Mark A. Wasser, and Steven G. Churchwell, Sacramento, as amicus curiae on behalf of plaintiffs and appellants.

Paul H. Morgan, Newport Beach, for defendants and respondents.

Legal Aid Soc. of Orange County and Crystal C. Sims, Santa Ana, for interveners and respondents Doris M. Ruse, Clemma Hawkins and Marvel Grimm.

R. Richard Farnell, Newport Beach, for intervener and respondent Los Alisos Mobile Home Owners' Ass'n.

Robert M. Myers, City Atty., Karl M. Manheim, Deputy City Atty., Santa Monica, Michael Heumann, Sr. Atty., Stephen P. Wiman, Staff Atty., Santa Monica Rent Control Bd., Ira Reiner, City Atty., Claudia McGee, Asst. City Atty., Michael S. Woodward, Deputy City Atty., Los Angeles, K.D. Lyders, City Atty., Oxnard, Steven F. Nord, City Atty., Merced, Robert G. Koch, Jr., City Atty., Rialto, Jeffrey A. Walter, City Atty., Cotati, Marc G. Hynes, City Atty., Morgan Hill, Alice C. Graff, City Atty., Hayward, William J. Adams, City Atty., Palm Springs, Richard M. Manning, City Atty., Capitola, Sabina D. Gilbert, City ***642** Atty., Rocklin, Marvin E. Helon, City Atty., Clovis, E.A. Demchuk, City Atty., Montclair, Albert E. Polonsky, City Atty., Daly City, S.L. Kabot, City Atty., Visalia, as amici curiae on behalf of defendants and respondents and interveners and respondents.

OPINION

KAUFMAN, Associate Justice.

The Westminster Mobile Home Park Owners' Association (plaintiffs or park owners) appeal from an adverse judgment on the pleadings in their suit to have the City of Westminster's mobile home rent control program declared unconstitutional on its face.

The City of Westminster and the City Council of Westminster (collectively Westminster or city) were named as defendants. However, in the trial court Los Alisos Mobile Home Owners' Association (home owners' association) and three individuals, Doris M. Ruse, Clemma Hawkins and Marvel Grimm, were permitted to intervene. On appeal Pacific Legal Foundation has filed an amicus curiae brief in support of the position of the park owners, and the City of Los Angeles and the City of Santa Monica together with the Santa Monica Rent Control Board have filed amici briefs in support of the position of city and the interveners. Numerous other cities have filed appearances as

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amici, adopting the appellate brief of the City of Los Angeles.

The trial court gave judgment on the pleadings dismissing the action on the ground that plaintiffs failed to seek an adjudication of the program's constitutionality in the first instance through the administrative process and thus failed to exhaust their administrative remedies. On appeal, park owners contend they were not required to seek an adjudication of the constitutionality of the rent control program through the administrative process as a prerequisite to seeking redress in the courts and advance myriad grounds on which they claim the rent control program is facially unconstitutional.

We conclude park owners are correct on the exhaustion question and, further, that their claim of facial unconstitutionality of the program is correct on two separate but related grounds. Except for one we therefore have no need to consider the numerous other grounds of unconstitutionality advanced.

Introduction

The Westminster mobile home rent control program is somewhat unique. Although the program exists by virtue of municipal ordinances, there is no rent control commission [FN1] or agency [FN2] appointed and controlled by the city to administer the program. Indeed, apart from utilizing its police powers to establish the program the city is to play no part in its application, administration or enforcement.

> FN1. Although section 2:B of Westminster Ordinance No. 1928 (see fn. 2, *infra*) mentions a "Commission," it is given no authority over or with respect to "rental rate adjustments."
>
> FN2. It is the city's position that the arbitrator selected by the parties or appointed to conduct the "arbitration" proceeding called for by the program is, in effect, an ad hoc administrator or agency of the city. As we shall point out, however, the city plays no part in the selection of the arbitrator or the "arbitration proceeding" nor has it the power to control or review the decision of the arbitrator.

Very much simplified, the program may be briefly described as follows. In cases to which it applies, any increase in rents is made dependent on the consent of at least 51 percent of the homeowners residing in the park. In the absence of agreement between a majority of the residents and the park owner a compulsory and binding "arbitration" proceeding is specified, subject to judicial review by petition of any party for administrative mandate pursuant to Code of Civil Procedure section 1094.5. The arbitrator is to be selected "on a case by case basis from a list furnished by the Judicial Arbitration and Mediation Service, Inc. of Orange County, or by the American Arbitration Association." During the "arbitration" and any judicial review thereof ***643** the park residents are required to pay a portion of the rent increase noticed by the park owner, but not to the park owner. The portion of the disputed rent increase to be paid is to be placed in an interest-bearing trust account where it is to remain until all proceedings, including judicial review, are concluded.

The program was enacted over a period of several years in several ordinances made a part of the Westminster Municipal Code. (All references and citations to the Municipal Code will refer to the Westminster Municipal Code.) Several of the amendatory or supplementary ordinances were enacted after this lawsuit was filed and indeed one of the important ordinances was adopted during the pendency of this appeal. [FN3] Several of the amendatory ordinances were apparently enacted in efforts to remedy problems or deficiencies pointed out by plaintiffs in their pleadings and arguments in the lawsuit.

> FN3. Although other related Westminster ordinances such as the "conversion ordinances" found in chapter 17.59 of the Westminster Municipal Code could conceivably be peripherally involved, the principal ordinances at issue are Ordinance No. 1928 enacted June 9, 1981, to be effective July 1981; Ordinance No. 1941 amending Ordinance 1928 enacted March 23, 1982; Ordinance No. 1950 amending Ordinance 1928 enacted August 24, 1982; and Ordinance No. 1965, which we shall interpret as supplementing Ordinance 1928, enacted March 9, 1983. Ordinance 1928 as amended is codified as Chapter 2.63 of the Westminster Municipal Code and Ordinance 1965 constitutes Chapter 2.63.5 of the Westminster Municipal Code.

Nor has the ongoing enactment of municipal legislation ceased. The court was recently informed that on March 26, 1985, the Westminster City Council adopted Ordinance No. 2022 (hereafter the repealer) purporting to repeal the mobile home rent control program in its entirety. Section 2 of Ordinance 2022 reads: "All funds, including interest earned, held in trust pursuant to said ordinances shall be disbursed forthwith by the trustees to the park owners without reference to past arbitration proceedings. Any rent increases suspended pursuant to said ordinances, may be enforced as though any ordinance repealed by this ordinance had not occurred."

The court is informed the effective date of the repealer was April 25, 1985, and its adoption raises the question whether the appeal is moot. As we shall explain, we do not believe it is; however, in order to discuss that question intelligibly it is necessary to mention another complexity affecting the appeal.

Following the judgment in the trial court in this action but before the enactment of Ordinance 1965 (see fn. 3, *ante*), rent adjustment "arbitration" proceedings pursuant to the ordinances then in effect commenced between the owner of Los Alisos Mobile Home Park and the residents of the park represented by the Los Alisos Mobile Home Owners'

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Association, Inc. In what is referred to as the first phase of those proceedings the rent control arbitrator set the standards and criteria to be employed in determining the amount of rent the park would be permitted to charge. Assertedly, the arbitrator determined all evidence of general market conditions would be excluded and the matter would be determined exclusively on the basis of a "Net Operating Income Maintenance" (NOIM) formula. Shortly thereafter, Ordinance 1965 was enacted by the city. Assertedly it embodies the NOIM formula adopted by the arbitrator in the Los Alisos proceedings.

In June 1983, the arbitrator issued an "award" allowing Los Alisos Mobile Home Park only a small fraction of the rent increases it was seeking for the several years in issue. Pursuant to the rent control ordinances, however, the tenants were required to deposit in a trust fund a portion of the rent increases requested by Los Alisos Mobile Home Park. The court is informed that some $700,000 was thus being held in trust as of July 1983, and at oral argument the court was informed that, either in the Los Alisos case alone or in that case and others, the moneys being held in trust by then amounted to in excess of $4 million.

On June 27, 1983, the owner of the Los Alisos Mobile Home Park, the Westminster Mobile Home Park Owners' Association ***644** and others filed action No. 401919 in the Orange County Superior Court seeking a writ of mandate to set aside the Los Alisos rent control "arbitration" proceedings and the resulting "award" on grounds the Westminster mobile home rent control program was unconstitutional both on its face and as applied. Proceedings in that action have been stayed by the trial court pending the determination of the instant appeal, and we are informed the sizable sum of money deposited as disputed rents remains in trust.

Threshold Issues

Mootness

[1] Upon learning of the enactment of the repealer, we invited the parties to submit letter briefs on the question of whether the appeal would be thereby rendered moot. City responded that upon the repealer becoming effective the appeal would in its view be moot. Park owners agreed, indicating a "settlement" had been reached and that a stipulation for dismissal of the appeal would be filed when the repealer became effective and the stipulation was duly executed. However, interveners Ruse, Hawkins and Grimm and intervener Los Alisos Mobile Home Owners' Association (hereafter collectively interveners) have informed the court in substance that they do not believe the appeal is moot because the disputed rents are still held in trust and interveners intend to institute a lawsuit to establish the invalidity of the repealer and, we gather, especially section 2 thereof.

Under these circumstances we are compelled to conclude the appeal is not moot. While the validity of the repealer, either in whole or in part, is not presently before us and while the disputed rents are held in trust not in the action giving rise to this appeal but in another separate action, our determination on this appeal that the Westminster mobile home rent control program is facially unconstitutional will effectively resolve the other action and permit the early disbursement of the substantial amount of money held in trust in connection with it. If we should dismiss this appeal as moot, the inevitable result would be further litigation and in all probability the retention of the disputed rents in the trust for a further protracted period of time. It is appropriate therefore that we proceed to determine the appeal.

Exhaustion of Administrative Remedies

[2] The trial court's conclusion that park owners were foreclosed from testing the facial constitutionality of the ordinance by their failure to exhaust administrative remedies was erroneous for two reasons. First, a claim of facial unconstitutionality may be addressed directly to the court without the necessity of first going through the administrative process. (See, e.g., *Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 165, 130 Cal.Rptr. 465, 550 P.2d 1001; *Oceanside Mobilehome Park Owners' Assn. v. City of Oceanside* (1984) 157 Cal.App.3d 887, 898, fn. 3., 204 Cal.Rptr. 239; *Cotati Alliance for Better Housing v. City of Cotati* (1983) 148 Cal.App.3d 280, 285, fn. 5, 195 Cal.Rptr. 825; *Palos Verdes Shores Mobile Estates, Ltd. v. City of Los Angeles* (1983) 142 Cal.App.3d 362, 368, 190 Cal.Rptr. 866; *Gregory v. City of San Juan Capistrano* (1983) 142 Cal.App.3d 72, 78, 191 Cal.Rptr. 47; *Ebel v. City of Garden Grove* (1981) 120 Cal.App.3d 399, 409, 176 Cal.Rptr. 312; see also *Carson Mobilehome Park Owners' Assn. v. City of Carson* (1983) 35 Cal.3d 184, 197 Cal.Rptr. 284, 672 P.2d 1297; *City of Santa Barbara v. Adamson* (1980) 27 Cal.3d 123, 135, 137, 164 Cal.Rptr. 539, 610 P.2d 436.) The rule finds particular application here where one major claim is that the administrative procedure prescribed by the legislation is itself unconstitutional.

[3] Secondly, " ' "[t]he rule that a party must exhaust his administrative remedies prior to seeking relief in the courts 'has no application in a situation where an administrative remedy is unavailable or inadequate.' (*Martino v. Concord Community Hospital Dist.* (1965) 233 Cal.App.2d 51, 56 [43 Cal.Rptr. 255]....)" (*Diaz v. Quitoriano*, 268 Cal.App.2d 807, 812 [74 Cal.Rptr. 358]....)' (***645***Ramos v. County of Madera* (1971) 4 Cal.3d 685, 691 [94 Cal.Rptr. 421, 484 P.2d 93], fn. omitted [4 Cal.3d 685, 94 Cal.Rptr. 421, 484 P.2d 93].)" (*Anton v. San Antonio Community Hosp.* (1977) 19 Cal.3d 802, 829, 140 Cal.Rptr. 442, 567 P.2d 1162.) And here there was no adequate administrative remedy because the arbitrator would not have had the authority to declare the ordinance unconstitutional.

In response to the constitutional problems that would be presented if the decision of the "arbitrator" were subject only to the limited review prescribed in Code of Civil Procedure, section 1286.2, city argues, and we agree, that the ordinances have the effect of making the "arbitrator" the city's mobile home rent adjustment administrator, an ad hoc administrative agency of the city. Whether or not that procedure is lawful is a serious question we shall later discuss; however, for this purpose we shall assume it is.

[4] Section 3.5 of article 3 of the California Constitution, added in 1978, bars administrative agencies from declaring a statute unconstitutional without prior appellate court adjudication of the issue. [FN4] (See *Regents of University of California v. Public Employment Relations Bd.* (1983) 139 Cal.App.3d 1037, 1041-1042, 189 Cal.Rptr. 298; *Fenske v. Board of Administration* (1980) 103 Cal.App.3d 590, 595, 163 Cal.Rptr. 182.) While an ordinance is not a statute in every sense, it is a legislative enactment by the city's duly authorized legislative body. The purpose of article 3, section 3.5, is to deny administrators the power to refuse to enforce measures duly enacted by the authorized legislative body on the basis of the administrator's own assessment of the measure's constitutionality and in the absence of a final judicial determination of unconstitutionality. (*Regents of University of California v. Public Employment Relations Bd., supra; Fenske v. Board of Administration, supra.*) That purpose suggests the rule's applicability a fortiori to an "arbitrator" acting as an ad hoc administrative agency pursuant to municipal legislation.

> FN4. The constitutional provision reads:
> "An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:
> "(a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;
> "(b) To declare a statute unconstitutional;
> "(c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations."

Thus, in respect to the question of facial constitutionality there was no administrative remedy to exhaust.

The authorities cited by city are inapposite. In neither *Pan Pacific Properties, Inc. v. County of Santa Cruz* (1978) 81 Cal.App.3d 244, 251, 146 Cal.Rptr. 428, nor *Mountain View Chamber of Commerce v. City of Mountain View* (1978) 77 Cal.App.3d 82, 143 Cal.Rptr. 441, both zoning cases, was the challenge directed at the administrative process itself. In both cases a zoning variance could have given the plaintiffs perfectly adequate relief. Likewise, in *Roth v. City of Los Angeles* (1975) 53 Cal.App.3d 679, 126 Cal.Rptr. 163, the attack was directed at the *outcome* of the administrative process, not the process itself. And *Morton v. Superior Court* (1970) 9 Cal.App.3d 977, 88 Cal.Rptr. 533, while it contained, in dicta, a statement to the effect that exhaustion is required even when constitutional or jurisdictional issues are raised (see 9 Cal.App.3d at pages 984-985, 88 Cal.Rptr. 533) does not govern this case because in *Morton* the administrative apparatus was clearly empowered to grant adequate relief, [FN5] even though the action was primarily concerned with questions of law. (See 9 Cal.App.3d at pp. 983-984, 88 Cal.Rptr. 533.)

> FN5. In *Morton*, the foregone "administrative remedy" was a city grievance procedure, and the dispute involved a labor relations matter, fully susceptible to being resolved by the procedure.

****646** Facial Constitutionality: Remand or Decision on Appeal*

[5] Having concluded the basis on which the trial court granted judgment was unsound, the question arises whether we should simply reverse the judgment and remand the case for a determination on the merits or whether we should proceed to resolve on this appeal the facial constitutionality of the program. For reasons not unlike those controlling our decision on the mootness issue, we have concluded we should resolve the issue on this appeal.

As the city points out, a number of the questions now presented were not raised in the trial court. However, many of them could not have been, because neither Ordinance 1950 nor Ordinance 1965 (see fn. 3, *ante*) had been enacted at the time judgment was rendered in the trial court. And it is the ordinance as finally amended and supplemented that must be considered. Absent due process considerations or problems of unfairness, when there has been a change in the law after rendition of judgment in the trial court, the law to be considered and applied on appeal is the law extant at the time of the appellate court judgment. (*Gregory v. City of San Juan Capistrano, supra,* 142 Cal.App.3d 72, 78, 191 Cal.Rptr. 47, and cases there cited; see also *Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 654, including fn. 3, 209 Cal.Rptr. 682, 693 P.2d 261.)

[6] Our review is limited on this appeal to the rent control program's facial constitutionality, which presents only questions of law. (See *Fisher v. City of Berkeley, supra,* 37 Cal.3d 644, 654, fn. 2, 209 Cal.Rptr. 682, 693 P.2d 261; *Birkenfeld v. City of Berkeley, supra,* 17 Cal.3d 129, 165, 130 Cal.Rptr. 465, 550 P.2d 1001; *Palos Verdes Shores Mobile Estates, Ltd. v. City of Los Angeles, supra,* 142 Cal.App.3d 362, 368, 190 Cal.Rptr. 866; *Gregory v. City of San Juan Capistrano, supra,* 142 Cal.App.3d 72, 78, 191 Cal.Rptr. 47.) While an appellate court is, of course, aided by the trial court's consideration and resolution even of questions of law, to expedite the matter and avoid

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further litigation at the trial court level with the probability of yet another appeal, all as a prelude to a petition for a hearing in the California Supreme Court, we conclude it is in the best interests of the parties and the sound administration of justice that we resolve the facial constitutionality of the mobile home rent control program on this appeal.

The Merits

"Just and Reasonable Return on the Property": the Constitutional Standard and the Net Operating Income Maintenance (NOIM) Formula

[7] The parties and amici debate at some length and considerable effort whether the expressions "a just and reasonable return" or "a just and reasonable return on the property" found in all the precedent cases (e.g., *Carson Mobilehome Park Owners' Assn. v. City of Carson, supra*, 35 Cal.3d 184, 191, 197 Cal.Rptr. 284, 672 P.2d 1297; *Birkenfeld v. City of Berkeley, supra*, 17 Cal.3d 129, 165, 168, 130 Cal.Rptr. 465, 550 P.2d 1001; *Oceanside Mobilehome Park Owners' Assn. v. City of Oceanside, supra*, 157 Cal.App.3d 887, 900-901, 204 Cal.Rptr. 239; *Cotati Alliance for Better Housing v. City of Cotati, supra*, 148 Cal.App.3d 280, 285-286, 195 Cal.Rptr. 825; *Palos Verdes Shores Mobile Estates, Ltd. v. City of Los Angeles, supra*, 142 Cal.App.3d 362, 368, 190 Cal.Rptr. 866; *Gregory v. City of San Juan Capistrano, supra*, 142 Cal.App.3d 72, 85, 191 Cal.Rptr. 47) mean a just and reasonable return on the *value* of the property or whether a just and reasonable return measured in some other way will be sufficient as against an attack on facial constitutionality. Although the question has been largely resolved pending appeal by the decision of the California Supreme Court in *Fisher v. City of Berkeley, supra*, 37 Cal.3d 644, 679-686, 209 Cal.Rptr. 682, 693 P.2d 261, we think it pertinent to address briefly park owners' contention the "fair return" standard embodied in the Westminster ordinance is constitutionally insufficient.

***647** In *Gregory v. City of San Juan Capistrano, supra*, 142 Cal.App.3d 72, 85, 191 Cal.Rptr. 47, citing *Birkenfeld v. City of Berkeley, supra*, 17 Cal.3d 129, 165, 130 Cal.Rptr. 465, 550 P.2d 1001, and *Helmsley v. Borough of Fort Lee* (1978) 78 N.J. 200, 394 A.2d 65, 70, 79, we stated in a dictum: "Plaintiffs are correct that to accord with due process of law a rent control ordinance must permit rents that will allow an efficient owner a fair return on the value of his property." Our conclusion that that is the constitutional standard and our citation of the *Birkenfeld* and *Helmsley* decisions for it have been rather severely criticized in several recent decisions of sister Courts of Appeal upholding the constitutionality of ordinances employing "a fair and reasonable return on investment" standard (*Cotati Alliance for Better Housing v. City of Cotati, supra*, 148 Cal.App.3d 280, 288-289, 195 Cal.Rptr. 825) and a NOIM standard at least in part (*Oceanside Mobilehome Park Owners' Assn. v. City of Oceanside, supra*, 157 Cal.App.3d 887, 900, 902- 903, 204 Cal.Rptr. 239).

In retrospect and in light of *Fisher*, our dictum in the *San Juan Capistrano* case and particularly our citation of the *Helmsley* decision were admittedly justly subject to criticism. However, it should be pointed out that our dictum was directed at attempting to describe the constitutional due process standard, not the formulae or criteria that may lawfully be employed in the administration of a rent control ordinance as a measure of "fair and reasonable return." While no doubt correct in result, the *Cotati Alliance* and *Oceanside* decisions as well as the principal precedents upon which they rested (e.g., *Helmsley v. Borough of Fort Lee, supra*, 78 N.J. 200, 394 A.2d 65), fail to distinguish between and appear to confuse the substantive content of the required constitutional due process standard and the formulae and criteria that may lawfully be employed administratively as a standard for granting or denying rent increases. (See Comment, *Rent Control and Landlords' Property Rights: The Reasonable Return Doctrine Revived* (1980) 33 Rutgers L.Rev. 165, 188-190.) The *Fisher* decision properly made the distinction (37 Cal.3d at p. 681, fn. 35, 209 Cal.Rptr. 682, 693 P.2d 261) and, indeed, the court declined to delineate the required constitutional standard in that case in which only facial constitutionality was in issue (37 Cal.3d at p. 686, 209 Cal.Rptr. 682, 693 P.2d 261).

It is uniformly acknowledged that both in utility rate making cases and in rent control decisions the rate setting or rent fixing agency is not limited to the use of any particular formula or mechanism. (See *Fisher v. City of Berkeley, supra*, 37 Cal.3d 644, 679-680, 209 Cal.Rptr. 682, 693 P.2d 261; *Carson Mobilehome Park Owners' Assn. v. City of Carson, supra*, 35 Cal.3d 184, 191, 197 Cal.Rptr. 284, 672 P.2d 1297, and cases there cited; *Oceanside Mobilehome Park Owners' Assn. v. City of Oceanside, supra*, 157 Cal.App.3d 887, 899, 204 Cal.Rptr. 239.) However, it is unthinkable that the substantive content of the constitutional due process standard should vary with each case and with each individual rent control ordinance or statute.

Happily, however, in the case at bench we need not explore the substantive content of the constitutional standard further because even if the substantive content of that standard includes a consideration of the value of the property, properly construed the Westminster ordinances permit consideration of all relevant factors and as so interpreted are constitutionally adequate so far as "fair return" is concerned. (Cf. *Fisher v. City of Berkeley, supra*, 37 Cal.3d 644, 679-684, 209 Cal.Rptr. 682, 693 P.2d 261; *Gregory v. City of San Juan Capistrano, supra*, 142 Cal.App.3d 72, 86, 191 Cal.Rptr. 47.)

Finding 4 of the City Council set forth in Ordinance 1928 reads: "The City Council finds and declares that it is necessary to establish a means to provide protection to owners and occupiers of mobile homes from unreasonable rent increases while at the same time recognizing the need of mobile home park owners to receive a just and reasonable return on their property and rent increases sufficient to cover increased ***648** cost of repairs, maintenance, service, insurance, upkeep and other amenities."

Municipal Code section 2.63.110 enacted in Ordinance 1928 provides in pertinent part: "The arbitrator shall determine the rights of the parties in accordance with law including this chapter." Municipal Code section 2.63.130 also enacted in Ordinance 1928 is entitled "Standards For Arbitration" and reads: "The arbitrator shall give due consideration to the purposes and intent of this chapter in reaching a decision. In evaluating the rent increase proposed by the owner, the arbitrator shall also consider increased costs to the owner attributable to increases in utility rates and property taxes, insurance, advertising, governmental assessments, increases attributable to incidental services, normal repair and maintenance, capital improvements, upgrading and addition of amenities or services, *as well as a fair and just rate of return on the property.*" (Emphasis added.)

Standing alone, these provisions, just as were the provisions of the ordinance we examined in *Gregory v. City of San Juan Capistrano, supra*, 142 Cal.App.3d 72, 85-86, 191 Cal.Rptr. 47, are fully susceptible to the interpretation that all factors relevant to determining "a just and reasonable return on the property" are proper considerations. (Cf. *Gregory v. City of San Juan Capistrano, supra.*)

It was only the enactment of Ordinance 1965 that injected doubt into the matter. The park owners contend, and until the time of oral argument we understood the city and interveners to contend as well, that Ordinance 1965 enacting chapter 2.63.5 of the Municipal Code established a rather rigid NOIM formula based upon specified factors, not permitting deviation except in narrowly circumscribed circumstances therein described. Municipal Code section 2.63.5.070 enacted in Ordinance 1965 provides: "The arbitrator may permit rent increases, unless otherwise proscribed by law, such that the park owner's net operating income will be increased at the rate of sixty percent (60%) of the increase in the Consumer Price Index (CPI) over the base year." Park owners contended in their briefs that the quoted provision established an absolute and arbitrary maximum on rent increases such as that invalidated in *Helmsley v. Borough of Fort Lee, supra*, 78 N.J. 200, 394 A.2d 65, 76-77.

[8] At oral argument, however, counsel for the city argued, contrary to our earlier understanding of its position, that Ordinance 1965 should not be construed as having the effects argued for by park owners but, rather, that Municipal Code chapters 2.63 and 2.63.5 should be construed together and both given effect. We agree. Though enacted at different times, the several ordinances together constitute the Westminster mobile home rent control program and must be construed together and harmonized. (*Merrill v. Department of Motor Vehicles* (1969) 71 Cal.2d 907, 918, 80 Cal.Rptr. 89, 458 P.2d 33.)

[9] While the provisions of Municipal Code chapter 2.63.5, one of which has been quoted above, do contain some language suggesting an absolute administrative standard, they must be read in light of section 2.63.5.010 entitled "Fair Return" which states: "It is the intent of this regulation to establish rents at a level which will provide park owners with a fair return on their property, consistent with the Mobile Home Mutual Fair Rental Accord ordinance of the City (Chapter 2.63)." Thus, the language of the several provisions found in chapter 2.63.5 must be read in light of the more general and flexible standard set forth in Municipal Code chapter 2.63 previously quoted.

Construing the various provisions together and harmonizing them, it is our interpretation that Municipal Code chapter 2.63.5 was intended to establish a formula to be utilized in the first instance as a presumptive tool but that under the provisions of chapter 2.63 park owners are permitted to produce evidence and the arbitrator is permitted to consider any and all evidence relevant to the determination of a fair and reasonable return on the property.

***649** Absence of Mechanism for Rent Adjustments without Unnecessary Delay

[10] One of the two reasons articulated by the court in *Birkenfeld v. City of Berkeley, supra*, 17 Cal.3d 129, 130 Cal.Rptr. 465, 550 P.2d 1001 for holding the Berkeley rent control charter amendment unconstitutional was that the administrative mechanism for adjusting rents was so cumbersome and so inherently and unnecessarily preclusive of reasonably prompt action that it violated the due process rights of rental property owners. (17 Cal.3d at pp. 169-173, 130 Cal.Rptr. 465, 550 P.2d 1001; see also *Fisher v. City of Berkeley, supra*, 37 Cal.3d 644, 687, 209 Cal.Rptr. 682, 693 P.2d 261.) The court stated: "For ... rent ceilings of indefinite duration an adjustment mechanism is constitutionally necessary to provide for ... situations in which the base rent cannot reasonably be deemed to reflect general market conditions. The mechanism is sufficient for the required purpose *only if* it is capable of providing adjustments in maximum rents *without a substantially greater incidence and degree of delay than is practically necessary*. 'Property may be as effectively taken by long-continued and unreasonable delay in putting an end to confiscatory rates as by an express affirmance of them....' (*Smith v. Illinois Bell Tel. Co.* (1926) 270 U.S. 587, 591, [70 L.Ed. 747, 749, 46 S.Ct. 408, 410]....)" (*Birkenfeld v. City of Berkeley, supra*, 17 Cal.3d at p. 169, 130 Cal.Rptr. 465, 550 P.2d 1001, emphasis added.)

The quoted mandate was only recently reiterated in *Carson Mobilehome Park Owners Assn. v. City of Carson, supra*, 35 Cal.3d 184, 191-192, 197 Cal.Rptr. 284, 672 P.2d 1297, and again in *Fisher v. City of Berkeley, supra*, 37 Cal.3d 644, 687, 209 Cal.Rptr. 682, 693 P.2d 261. Both *Carson* and *Fisher* also observed that some delay is inherent in all rent control procedures and that "only those delays which are longer than practically necessary to achieve the legitimate purposes of the legislation are constitutionally proscribed." (*Carson, supra*, 35 Cal.3d at p. 192, 197 Cal.Rptr. 284, 672 P.2d 1297; *Fisher, supra*, 37 Cal.3d at p. 687, 209 Cal.Rptr. 682, 693 P.2d 261.)

In *Helmsley v. Borough of Fort Lee, supra*, 78 N.J. 200, 394 A.2d 65, 76-77, the New Jersey Supreme Court quoting and relying on the portion of the *Birkenfeld* decision just quoted, invalidated a rent control program because

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it withheld from the rent control board " 'powers by which [it] could adjust maximum rents without unreasonable delays and instead requires the Board to follow an adjustment procedure which would make such delays inevitable.' " (*Helmsley, supra*, 78 N.J. 200, 394 A.2d at p. 77.)

We are cognizant of the limited inquiry into the timeliness and efficacy of the rent adjustment mechanism that a court may properly make in considering the facial constitutionality of a rent control ordinance. (See *Fisher v. City of Berkeley, supra*, 37 Cal.3d 644, 687, 209 Cal.Rptr. 682, 693 P.2d 261 ["We will declare the adjustment procedures invalid only if the ordinance on its face will not permit the Board to avoid confiscatory results."].) Nevertheless, we conclude the adjustment mechanism provided in the Westminster program fails to meet constitutional muster because (1) it will necessarily result in needless and unreasonable delay and (2) because under the program the city retains no control whatever over the time required to process and determine a request for an increase in rents.

Somewhat simplified, the process for seeking a rent increase may be summarized as follows. A park owner first must give 60 days' written notice to the park residents of any proposed rent increase. (Mun.Code, § 2.63.050.) Within 10 days after the notice the residents must be polled on the increase by the mobile home owners association. (Mun.Code, § 2.63.060.) If a majority of residents affirmatively accept the proposed rent increase it goes into effect as proposed. Otherwise, the proposed rent ***650** increase is referred to the Park Committee [FN6] to "negotiate" the matter.

> FN6. The establishment of a park committee is governed by Municipal Code section 2.63.040 enacted in Ordinance No. 1928 and amended in Ordinance No. 1941. The provision requires each mobile home park in the city to establish a park committee consisting of five members. Two of the members are to be appointed by the park owner, two are to be representatives of the residents. The fifth member is to be appointed "by the unanimous vote of the other four members." If unanimous agreement on the fifth member cannot be had within 10 days after written notice of a rent increase, "either party to the negotiation may declare an impasse and refer the matter to Arbitration...." (§ 2.63.040.)

If the Park Committee reaches an agreement, the agreement is submitted to a secret ballot vote of the residents. If a majority of residents affirmatively approve the agreement it goes into effect; if not, the matter is submitted to arbitration. If, after 10 days, the committee fails to produce an agreement, or, for that matter, at any time during the process, either party may declare an impasse and submit the matter to arbitration. (Mun.Code, § § 2.63.080, 2.63.101.) Upon referral to arbitration, the Park Committee must meet to select an arbitrator. If, within 14 days from the referral, the Park Committee cannot agree on an arbitrator, either party then may submit the matter to either the Judicial Arbitration and Mediation Service, Inc. of Orange County or the American Arbitration Association for the selection of an arbitrator pursuant to the rules of either of those organizations.

The ordinance does not specify a deadline by which the arbitrator must hold a hearing, but does state that within 10 days after the hearing the arbitrator shall render his decision. (Mun.Code, § 2.63.140.) Municipal Code section 2.63.010 as amended in Ordinance No. 1950 provides: " 'Arbitration' means the mandatory submission of a disputed rental rate adjustment for hearing and decision to an arbitrator.... The process conducted shall be in accordance with the California Arbitration provisions contained in § 1280 et seq. of the Code of Civil Procedure, save and except where such provisions are inconsistent with this chapter [ch. 2.63]."

Municipal Code section 2.63.110 provides that each party shall be entitled to written findings of fact and conclusions of law as to all issues determined by the arbitrator's decision. It further provides that the "decision of the arbitrator shall be subject to review by a court of competent jurisdiction upon the application of either party." Ordinance No. 1941 added the sentence: "The review by the court shall be pursuant to Code of Civil Procedure § 1094.5 [administrative mandate]."

Originally, the ordinances provided the arbitrator's fees were to be evenly divided between the park owners and the home owners with all other costs to be borne by the party incurring it. However, as amended it is now provided that the arbitrator's fee is to be paid by city "in accordance with the fee schedule of the Judicial Arbitration and Mediation Service, Inc. or the American Arbitration Association" unless a party refuses to submit the matter to arbitration in which case the other party "may proceed to arbitration as a default matter after due notice ... in which event all costs of arbitration including attorney's fees shall be assessed against the party refusing to proceed to arbitration." (Mun.Code, § § 2.63.100, 2.63.150.) Also, "[i]n the event the arbitrator finds that there has been a failure or refusal by the park owner or the park residents to bargain in good faith, the arbitrator may assess all costs of negotiation and arbitration, including attorney's fees, against the party failing or refusing to bargain in good faith." (Mun.Code, § 2.63.165.)

Municipal Code section 2.63.190 provides in part: "The procedures of this chapter are intended to result in a final resolution of a dispute prior to the effective date of a rent increase [60 days after the original notice]. If negotiations or arbitration do not result in a final decision by the effective date, the noticed rent shall be paid provided the amount of the increase shall be placed in an interest bearing trust account. Any negotiated agreement or arbitrator's ***651** decision shall be retroactive to the noticed effective date and shall provide for the disbursement of any trust account as a part of any such agreement or decision."

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However, Municipal Code section 2.63.5.080 provides in part: "Notwithstanding any other provision of this ordinance, no increase in space rents in a mobile home park shall be valid during the time that any arbitration proceeding is being conducted pursuant to the Mutual Fair Rental Accord ordinance Chapter 2.63 (Ordinance 1928 as amended) nor shall such increase be valid during the period in which an arbitrator's decision for that park is being reviewed by a court of competent jurisdiction, except that the resident shall be required to pay a maximum of sixty percent (60%) of the CPI over the base year of that resident's space rental. Any such increase *shall be held in trust* pursuant to the provisions of Chapter 2.63 of this Code, *pending final confirmation of the arbitrator's decision.*" (Emphasis added.)

Finally, Municipal Code section 2.63.167 provides in part: "Any rent increase imposed while an earlier rental rate adjustment is being considered through negotiation, arbitration, or administrative mandamus, shall be null and void unless one year has expired since the last rental rate adjustment."

Thus, Westminster's program permits no automatic periodic rent adjustments of any sort. Unless 51 percent of the home owners residing in the park affirmatively agree to a requested increase, any such increase must first be "negotiated" and then "arbitrated" unless negotiation is successful in producing an agreement. No time is fixed in which the arbitrator is required to render a decision but whenever the decision is made it is subject to appeal by either party by a petition for administrative mandate and, of course, a judgment of the superior court either granting or denying a writ of administrative mandate is appealable to the Court of Appeal as a matter of right (Code Civ.Proc., § 904.1) and any decision of the Court of Appeal is, of course, subject to a petition for hearing in the California Supreme Court. (See Cal.Rules of Court, rule 28.)

Manifestly, the mechanism provided for obtaining adjustments in rent is so cumbersome and pregnant with unnecessary delay that it will necessarily be confiscatory in many cases. In the first place, all requests for a rent increase must go through the process unless affirmatively consented to by 51 percent of the resident home owners, even if the request fully comports in every respect with the standards and guidelines in the ordinances. Secondly, if a requested rent increase is contested throughout the process, [FN7] it would appear to take a minimum of six to twelve months and could take literally years before an owner would receive any spendable rent increase. While the home owners would be required to deposit a part of the requested rent increase in trust pending the proceedings, Municipal Code section 2.63.5.080 provides the deposited money must remain in trust "pending final confirmation of the arbitrator's decision." Exacerbating the problem, a park owner may not notice or seek a second rent increase "unless one year has expired since the last rental rate adjustment." (Mun.Code, § 2.63.167.)

> FN7. The program appears to provide no incentive for park residents not to contest a requested rent increase except possibly the "bad faith" provisions under which the individual home owners would appear to have no personal liability.

Moreover, the city has no control whatever over the time the process will take. Whether the process shall be invoked in the first instance is given, in effect, to decision by the residents of the park. Once they decide the process is to take place, the city is virtually powerless to affect the process. The city has nothing to do with the selection or appointment of the arbitrator, the time in which the matter is to be heard, the progress of the proceedings, the time for issuance of a decision nor the time at which the decision becomes final. The city has no power to exempt any requested rent increase from the process nor to shorten the ***652** process even if the request fully comports with the criteria set forth in the ordinances.

Although the mechanism provided for adjusting rents here may not be quite as inadequate as that considered in *Birkenfeld*, it will in many cases necessarily result in unnecessary and unreasonable delay which the city is powerless to avoid and is therefore constitutionally deficient. (*Birkenfeld v. City of Berkeley, supra*, 17 Cal.3d 129, 169, 130 Cal.Rptr. 465, 550 P.2d 1001; *Helmsley v. Borough of Fort Lee, supra*, 78 N.J. 200, 394 A.2d 65, 76- 77; see also *Fisher v. City of Berkeley, supra*, 37 Cal.3d 644, 687-690, 209 Cal.Rptr. 682, 693 P.2d 261; *Carson Mobilehome Park Owners Assn. v. City of Carson, supra*, 35 Cal.3d 184, 191-192, 197 Cal.Rptr. 284, 672 P.2d 1297.)

Unlawful Delegation of Municipal Authority without Reservation of Control

[11] Raising a related problem, park owners and amicus Pacific Legal Foundation contend the Westminster mobile home rent control program effects an unlawful delegation of municipal power, either legislative, administrative or the police power exercised by general law cities, of which Westminster is one. We are persuaded they are right.

The usual formulation for resolving claims of unlawful delegation is typified by the statement in *Carson Mobilehome Park Owners' Assn. v. City of Carson, supra*, 35 Cal.3d 184, 190, 197 Cal.Rptr. 284, 672 P.2d 1297: "An unconstitutional delegation of authority occurs only when a legislative body (1) leaves the resolution of fundamental policy issues to others or (2) fails to provide adequate direction for the implementation of that policy." (Accord *Birkenfeld v. City of Berkeley, supra*, 17 Cal.3d 129, 167, 130 Cal.Rptr. 465, 550 P.2d 1001; *Kugler v. Yocum* (1968) 69 Cal.2d 371, 375-377, 71 Cal.Rptr. 687, 445 P.2d 303.) Here, there is no question but that the ordinances prescribe adequate standards for the guidance of the arbitrator (see *Carson Mobilehome Park Owners' Assn. v. City of Carson, supra*, 35 Cal.3d 184, 190-191, 197 Cal.Rptr. 284, 672 P.2d 1297; *Birkenfeld v. City of Berkeley, supra*, 17 Cal.3d 129, 167-168, 130 Cal.Rptr. 465, 550 P.2d 1001.) Nor, in view of the prescribed

standards do we believe it can fairly be said the ordinances leave fundamental policy decisions to the arbitrator.

However, in *Birkenfeld* another requirement in respect to a municipality's delegation of authority was noted, found wanting and relied on as a second basis for invalidating the Berkeley rent control charter amendment. Said the court: "However, legislative guidance by way of policy and primary standards is not enough if the Legislature 'fail[s] to establish an effective mechanism to assure the proper implementation of its policy decisions.' (*Kugler v. Yocum, supra*, 69 Cal.2d 371, 376-377 [71 Cal.Rptr. 687, 445 P.2d 303].) 'The need is usually not for standards but for safeguards.... When statutes delegate power with inadequate protection against unfairness or favoritism, and when such protection can easily be provided, the reviewing courts may well either insist upon such protection or invalidate the legislation.' ... (1 Davis, Administrative Law Treatise (1958) § 2.15; see *Kugler v. Yocum, supra*, 69 Cal.2d at p. 381 [71 Cal.Rptr. 687, 445 P.2d 303].)" (*Birkenfeld v. City of Berkeley, supra*, 17 Cal.3d 129, 169, 130 Cal.Rptr. 465, 550 P.2d 1001.)

Under the Westminster program the city has retained no means, either practical or legal, of assuring that the policies and standards contained in the several ordinances are carried out and reserved. As already indicated, it plays no part in the selection of the arbitrator; it takes no part in the arbitration proceedings or decision; and it has no authority to review, alter or amend the decision of the arbitrator even if it should determine the arbitrator's decision is wholly at odds with its prescribed policies and standards.

Although the *Birkenfeld* court did not cite them, there are a number of cases dealing with delegation of governmental authority or power without the reservation ***653** by the governmental body or agency of sufficient control to insure that its policies and standards are carried out and observed. In *Irwin v. City of Manhattan Beach* (1966) 65 Cal.2d 13, 23-24, 51 Cal.Rptr. 881, 415 P.2d 769, the court, quoting from *County of Los Angeles v. Nesvig* (1965) 231 Cal.App.2d 603, 617, 41 Cal.Rptr. 918, stated: " '[T]he issue in each case of delegation is whether ultimate control over matters involving the exercise of judgment and discretion has been retained by the public entity.' "

The *Nesvig* court's discussion of the problem is illuminating: "The general rule is that while a public body may not delegate its power of control over public affairs to a private group, it may delegate the performance of administrative functions to such groups if it retains ultimate control over administration so that it may safeguard the public interest. (*Sacramento Chamber of Commerce v. Stephens*, 212 Cal. 607 [299 P. 728].) ... [¶] ... As succinctly put by Sloss, J. in the *Egan* case, 'If the management of an opera house constitutes a public use, the public character of the use can exist only so long as the control is retained in the hands of some public agency.' Powers which require the exercise of judgment and discretion, said Justice Sloss, must necessarily remain with the public agency and cannot be delegated. Thus the issue in each case of delegation is whether ultimate control over matters involving the exercise of judgment and discretion has been retained by the public entity. (*Egan v. City & County of San Francisco*, 165 Cal. 576 [133 P. 294, Ann.Cas. 1915A 754]; *City & County of San Francisco v. Ross*, 44 Cal.2d 52 [279 P.2d 529]; *Haggerty v. City of Oakland*, 161 Cal.App.2d 407 [326 P.2d 957].)" (*County of Los Angeles v. Nesvig, supra*, 231 Cal.App.2d 603, 616-617, 41 Cal.Rptr. 918.)

The Westminster mobile home rent control program clearly violates these principles. The city contends, and we agree, that what it has attempted to do is to constitute the arbitrator in each case as an ad hoc rent control administrator of the city. Thus, the ordinances provide that the arbitrator's decision is reviewable by administrative mandate (Code Civ.Proc., § 1094.5). The problem is, as already indicated, that the city plays no part in selecting the arbitrator out of the corps of arbitrators available or in determining the arbitrator's qualifications and, even more fundamentally, has no control or power of review over the arbitrator's conduct of the proceedings or his or her decision even if the city should determine they are arbitrary, unfair and contrary to the policies and standards set forth in the city's ordinances. Moreover, it is likely there will be a different arbitrator in each case and the city is in no position to assure reasonably uniform administration and application of its program.

The reasoning of the court in *Egan v. San Francisco* (1913) 165 Cal. 576, 585, 133 P. 294, seems apposite: "The objection now under discussion is not met by the consideration that the city is given a representation on the board of trustees which is, under the contract, to have the possession and management of the opera house. A majority of the board is to be appointed by the Musical Association, and the city is given no voice in the selection of such majority, or of its successors. It goes without saying that the association, naming nine members of a board of fifteen, exercises a power which cannot be effectively disputed by the city and county, having a direct representation of not over four members. Whatever might be said of an arrangement under which the representation was equal (see *Laird v. Pittsburg*, 205 Pa.St. 1, [61 L.R.A. 332, 54 Atl. 324]), it cannot be disputed that the purpose and effect of the contract before us *was to vest the management and direction* of the opera house *in a board that should be essentially beyond the control of the municipality or its officers*." (Emphasis added.)

So it is in the case at bench. The city has used its police power to enact ordinances establishing a mobile home rent control program but at the same time it has attempted to disassociate itself from the program in every other respect, leaving its administration to a corps of arbitrators to ***654** be selected by the park owners and the home owners and reserving to itself no authority to insure that its policies are carried out and its standards adhered to. A municipality may not exercise its police power in that fashion. (*Birkenfeld v. City of Berkeley, supra*, 17 Cal.3d 129, 169, 130 Cal.Rptr. 465, 550 P.2d 1001; *Egan v. San Francisco, supra*, 165 Cal. 576, 583-585, 133 P. 294; see *County of Los*

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Angeles v. Nesvig, *supra*, 231 Cal.App.2d 603, 616-617, 41 Cal.Rptr. 918; cf. *City & County of San Francisco v. Ross* (1955) 44 Cal.2d 52, 57-59, 279 P.2d 529.)

Disposition

The judgment is reversed and remanded with directions to enter judgement in favor of plaintiffs and appellants.

MORRIS, P.J., and RICKLES, J., concur.

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